COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

IN RE: SHELLEY M. RICHMOND JOSEPH

SUFFOLK, SS. SJC NO. OE-157

STIPULATION

The Commission on Judicial Conduct ("the Commission") and Judge Shelley M. Richmond Joseph ("Judge Joseph") stipulate as follows:

1. The attached blacklined transcripts for Days 1 through 6 of the hearing in this matter shall be exhibits admitted for identification and numbered Exhibits 7 through 12, respectively.

2. The attached revised transcripts for Days 1 through 6 of the hearing in this matter shall be exhibits admitted for identification and numbered Exhibits 13 through 18, respectively.

3. The revised transcripts (Exhibits 13 through 18) reflect edits that the parties agreed should be made to the stenographer's final certified transcripts, dated August 27, 2025, as approved by the hearing officer. The blacklined transcripts (Exhibits 7 through 12) reflect the differences between the stenographer's final certified transcripts and the revised transcripts.

For the Commission on Judicial Conduct,

By: Judith Fabricant
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For Judge Shelley M. Richmond Joseph,

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Dated: 10/30/2025

EXHIBIT 7

COMMONWEALTH OF MASSACHUSETTS

COMMISSION ON JUDICIAL CONDUCT

COMPLAINT NUMBER 2019-22

VOLUME I

HEARING

~ BEFORE ~

HEARING OFFICER

DENIS J. McINERNEY, ESQ.

JUNE 9, 2025

9:00 A.M.

Boston, Massachusetts

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

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(NO EXHIBITS)

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

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

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

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

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

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

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

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

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

HEARING OFFICER: Thank you

very much.

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

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

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

proving the charges by clear and convincing evidence.

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

JUDGE FABRICANT: Thank you, Mr. McInerney.

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

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

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

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

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

HEARING OFFICER: That is all fine with me.

JUDGE FABRICANT: Thank you.

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

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

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

JUDGE FABRICANT: Thank you.

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

I want to ~~the~~ start with what's undisputed.~~,~~

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

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

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

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

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

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

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

One of the cases that came before Judge Joseph on that date was Commonwealth versus Medina Perez, and there are various names for him in various documents. I'm using the name that appeared in the District Court docket at the time. Mr. Medina Perez faced three charges, a charge of being a fugitive from justice based on a warrant from Pennsylvania and two misdemeanor drug charges.

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

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

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

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

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

He spoke with Assistant

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

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

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

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

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

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

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

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

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

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

The conversation at side bar, the part of it that was on the record, is set

forth in a transcript that the parties have stipulated is accurate. The transcript is Appendix G, and I direct your attention to Page 40 to 41. Again, these are the red numbers up in the right-hand corner of each page.

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

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

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

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

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

From the discussion on the record, Attorney Jellinek had reason to think that Judge Joseph was open to helping him with the problem he was trying to solve for his client. Like everything else, that impression factored into what he said off the record. He told the judge that if his client could go back

downstairs, he thought he could get him released through the back. The judge said something to the effect of, yes, that's what we'll do. Based on that exchange, Attorney Jellinek believed that he had Judge Joseph's blessing to proceed as he had discussed with Court Officer MacGregor. The defendant would go back downstairs, and Officer MacGregor would release him out the back of the courthouse.

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

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

have it under control.

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

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

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

difference and no purpose for going off the record.

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

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

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

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

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

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

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

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

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

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

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

With Judge Heffernan, she did

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

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

With Chief Justice Dawley, in her sworn interview with me on behalf of the Commission, Judge Joseph acknowledged going off the record, but denied having anything to do with the defendant's release out the back.

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

I thank you for your attention.

HEARING OFFICER: Thank you, Special Counsel.

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

MS. MULVEY: Thank you.

Do you mind if I move around a little?

HEARING OFFICER: No. Of course.

MS. MULVEY: Kind of crowded back there.

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

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

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

HEARING OFFICER: If I can interrupt for one second. Mr. Neff, ~~A~~are you able to --

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

(PAUSE)

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

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

MS. MULVEY: Sure. Thank you.

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

basis for all of the media reports.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

complied. And that's sometimes something that happens in the District Court.

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

Because that's how she figured he could avoid ICE. If you can convince him he's not the guy, they'd go away, and David Jellinek has done his job. That's what she thought he was looking to do, and that's why she said, if you need more time, why don't we hold him overnight. She wasn't going to put him on bail. She was going to bring him right back in the morning, ICE could come back in the morning, and if David Jellinek hadn't worked his magic to convince ICE that this wasn't the guy, she'd release him and ICE would take him. She was, again, trying to respect the rights of the defendant and of ICE. But after the 52 seconds,

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

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

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

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

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

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

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

She handled two more matters

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

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

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

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

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

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

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

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

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

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

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

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

yes, that's what we'll do.

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

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

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

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

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

on what happened at side bar.

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

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

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

Thank you.

HEARING OFFICER: Thank you very much, Counsel.

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

JUDGE FABRICANT: All right. David Jellinek,

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

DAVID JELLINEK, SWORN

HEARING OFFICER: Special counsel.

DIRECT EXAMINATION

BY JUDGE FABRICANT:

Q. Please state your name.

A. David Jellinek.

HEARING OFFICER: Just one second. Sorry.

(PAUSE)

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

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

HEARING OFFICER: Ok.

(PAUSE)

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

for the moment.

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

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

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

HEARING OFFICER: Okay. Great.

JUDGE FABRICANT: Can you hear now?

HEARING OFFICER: Yes.

JUDGE FABRICANT: Ok. Great.

HEARING OFFICER: Thank you.

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

A. Yes. Mild.

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

A. Yes.

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

A. Thank you.

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

A. Thank you very much.

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

professional background.
A. I'm a lawyer. I --
HEARING OFFICER: I'm sorry. I'm not sure that I'm hearing Mr. Jellinek the same as I'm hearing everybody else.
JUDGE FABRICANT: Let's make sure that that's --
A. I'm a lawyer.
HEARING OFFICER: Yes. just stay close to the mic.
THE WITNESS: Sure.
HEARING OFFICER: That would be great. Thank you.
THE WITNESS: Trying to avoid the feedback from before.
A. I'm a lawyer. I've been practicing since 2000. I went to BC Law school. I did a one year clerkship in Arizona, state court of appeals, and I started with CPCS in 2001, worked in the Worcester office and Cambridge office in '06, and I went to the Boston Police Department working in the legal affairs division until '08, and then I left for the Obama campaign for a month, and then I went out on my own.

Q. And the CPCS, Committee for Public Counsel --
A. Yes.
Q. The state and public --
A. The state and public defender. Correct.
Q. Okay. And in your private practice, did you also serve as a bar advocate?
A. Yes. I continued to do bar advocate work, probably half to 75 percent of my practice.
Q. And are you still in private practice?
A. Yes.
Q. And still doing some bar advocate work?
A. Yes.
Q. Okay. And I want you to take your mind back to April of 2018. And I know that that's a little more than seven years ago, so it's a bit of a challenge. But I'm going to ask you a series of questions that relate to how things were in April of 2018.

As of that time, what was your experience in the Newton District Court as to how often you were there, what kind of work you did there?
A. Sure. I was a bar advocate there, which meant that I picked up duty days, which are days when you're assigned and you help out anyone who

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

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

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

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

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

better.
Q. Did you feel that you got to know the judge a little bit than --
A Yes. Absolutely.
Q. Okay. Were you familiar with the courthouse staff?
A. Excuse me?
Q. Were you familiar with the courthouse staff?
A. Yes.
Q. And were you friendly with the courthouse staff?
A. Not to the extent that we would go out on our own. But friendly in the courthouse, sure.
Q. A professional friend.
A. Yes.
Q. Did you sometimes bring them coffee or other things?
A. Yes. Particularly on a Tuesday, I made it a point, because everyone had to stay and work longer for drug court, and usually on a first break or lunch I'd have coffee and some lunches, because oftentimes clients in the afternoon, they hadn't eaten or they had to travel for an hour or two to get there.
Q. And so the clients in the drug court, just so we're clear, these are people who had been

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

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

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

A. Yes.

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

A. Sure. There's an entryway that's somewhat modern. You walk through that. And there's a metal detector. Clerk's office is off to the right. The main courtroom is ahead of you a little bit to the left. There's a bathroom to the left and elevator to the left as well. There's stairs to go down to probation, all the way to the left, and stairs to go up to the second ~~or third~~floor courtroom for the trial session.

Q. And those stairs that you just referred to, are those publicly accessible.~~—~~

A. Yes. Those are the public stairs.
Q. On the screen is Page 509 of the appendix, Appendix U, Page 509. You also have in front of you, you have a binder that has all the appendices, and they are -- the pages are sequentially numbered in the upper right-hand corner.
THE WITNESS: Thank you, sir.
A. Yes.
Q. So let me ask you to look at that photograph and tell us what it is.
A. That's the main session of the courtroom. The judge would sit up front. The clerk would be at the next level down. The DA just sat on the left and defense would sit on the right. That glass box to the left was the dock where defendants would be brought up if they were in custody.
Q. And let's look at the photograph at Page 511.
A. Okay. I can pull up the rest.
JUDGE FABRICANT: Does that have a number?
MR. NEFF: Here.
Q. Okay. What do you see in that photograph?
A. That is essentially taken from what would be

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

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

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

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

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

Q. And there's a door --

A. Yes.

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

A. Yes.

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

A. Yes.
Q. And what is the orientation of that door in relation to where the judge's bench is and where the exit to the courtroom is?
A. If you were standing looking at that, the judge's bench would be slightly to your right and the exit to the courtroom would be behind you.
Q. Okay. Do those three photographs fairly and accurately represent what you've been -- what you've described?
A. Yes, they do.
JUDGE FABRICANT: All right. And I offer those three in evidence, please.
HEARING OFFICER: No objection?
MR. HOOPES: No objection.
HEARING OFFICER: They're admitted.
Q. If your client is going into or out of the dock, is it that door that your client goes into or out of?
A. Depends where they're coming from. If they're in the audience, if they are in custody, then, yes, they would go through that door. If they're leaving the dock, and they're released,

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

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

A. Yes.

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

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

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

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

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

A. Yes.
Q. If the person is leaving, how does the person go out?
A. Well, usually they remove the restraints in the dock. And when the person would be released, they would walk out through that little gap there, ~~behind which is the overhang~~at the bottom which leads to the public area, and then out the back door, which would --
Q. And were there exceptions to that?
A. Yes.
Q. On April 2nd of 2018, were you in the Newton District Court?
A. Yes.
Q. And do you remember the reason that you went there that day?
A. No, I don't remember the reason I was there initially that day.
Q. And over the course of this proceeding and the series of discussions that we've had, have you made some effort to refresh your memory on that point as to what brought you there that day?
A. Yes. We checked the court docket from that day and we checked my diary, and I think my computer cuts off the calendar after five years

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

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

A. No.

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

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

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

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

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

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

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

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

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

A. Yes.

Q. And did they pay you?

A. Yes.

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

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

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

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

Q. Okay. Did you get some paperwork?

A. Yes.

Q. And what did you learn as to what he faced?
A. Well, he was charged, if I remember correctly, with being a fugitive from justice and with possession of an illegal substance. I believe it was Class B or C. I don't remember clearly. In Newton.
Q. And did he have another problem that you were aware of?
A. Well, the fugitive from justice charge was from Pennsylvania, and it was apparently a warrant for operating under the influence of drunk driving in Pennsylvania.
Q. And was there another problem that he had?
A. There was another problem that I heard or learned, that ICE, Immigration, was in the area and apparently he had an immigration detainer as well.
Q. And did you make some effort to investigate his identity with respect to the Pennsylvania warrant and the ICE detainer?
A. Yes. And what began to become clear was that the Pennsylvania warrant was not the same gentleman that was in the lockup. I don't -- I'm not going to refer to him by name because I don't know who was who. But the Pennsylvania

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

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

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

Q. Did he persuade you?

A. No.

Q. Did you persuade him?
A. No.
Q. And after your conversation with him, what did you understand he was going to do?
A. My understanding, that he would be detaining Mr. Medina Perez when he was released.
Q. Did you have a discussion with the assistant district attorney regarding the Pennsylvania warrant?
A. Yes. At some point the ADA determined that it was not right gentleman in custody. In other words, the gentleman in custody was not the same person under the Pennsylvania warrant.
Q. And did she tell you what she intended to do regarding the fugitive from justice charge?
A. She told me that that would be dismissed.
Q. So if the fugitive from justice charge was dismissed, that leaves, as state charges, the drug charges.
A. Correct.
Q. Did she tell you what she intended to do regarding the drug charges?
A. Yeah. She said, because he had no state record and because it was a minimal charge, that she would not request bail.

Q. So what did that mean? She was going to dismiss the fugitive charge. She wasn't asking for bail on the drug charges. What did that mean as to what would happen regarding state custody?
A. It would mean there would be no state custody and you can walk out.
Q. Okay. And you had this conversation with the ICE officer. So what was your concern at that point?
A. My concern was they had the wrong guy, that ICE was there for the wrong person. And that was essentially because the Pennsylvania warrant was apparently backed by fingerprint data. But again, it wasn't the right person. So I asked for the opportunity to review the Triple I, which is the interstate FBI record, and at that point we're only allowed to look at them in the courtroom. I believe Mr. Bostwick had already gotten it. So it was provided. It was at counsel table. And I reviewed that to try to figure out what was going on.
Q. And did you have some discussion with Ms. Bostwick?
A. Very little at that point. I believe she handed me the materials.

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

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

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

A. Yeah. It helped solidify them and crystallize that it wasn't the right person, because there were, by my count, 12 or 13 individuals tied to the FBI number. The Triple I has an FBI number and apparently ties to fingerprint data, and there were 12 or 13 identities connected to that, all with different physical descriptions. One gentleman didn't have an arm, one had a huge tattoo on his face, that kind of thing. Where you could clearly see that wasn't

Mr. Medina Perez. So I was very concerned that somehow they had the wrong person.

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

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

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

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

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

Q. So does this show where you were?

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

Q. So let go back to Page 509.
A. I would have been sitting to the right.
Q. Okay. The counsel table chair to the right.
A. Yes. Or against the bar to the right, where I usually left my bag.
Q. Okay. And so you had this conversation with Officer MacGregor in the courtroom. Was anybody else there?
A. No.
Q. And tell us about the conversation that you had with Mr. MacGregor.
A. To the best of my memory, I said something like I think they have the wrong guy and I'm concerned. He said, you know, is there anything I can do. And I said, I think if he goes out the front, they're going to detain him, and there's nothing we can do about that. He said I'm allowed to let him out the basement if I have permission, basically. I said can we do that. He said if you can get him downstairs with a legitimate reason, I can let him out the back door if it's cleared.
Q. So after your conversation -- Is that the whole conversation, that you recall?
A. Essentially, yes.

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

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

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

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

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

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

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

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

A. I was hopeful.

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

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

Q. And did he need to go downstairs?

A. Yes.

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

So was the case called at that point?

A. 2:48 p.m.?

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

A. Yes.

Q. Two hours and 48 minutes and 13 seconds.

A. Yes, that's when the case was called.
Q. Okay. So let's play the recording, and I'll ask you to follow along in the transcript.
(RECORDING PLAYING)
Q. We'll stop there. And I'm just going to read the transcript. And I'll let you know that the transcript has been stipulated as accurate.
So what we've heard so far is, Clerk Okstein says to the court officer can you bring up the next, Mr. Perez. And Officer MacGregor, all right. Clerk Okstein, judge, the next case is Commonwealth versus Jose Medina Perez, Attorney David Jellinek has filed an appearance on behalf of Mr. Perez. Judge Joseph, good afternoon. Attorney David Jellinek, good afternoon, David Jellinek on behalf of Mr. Perez, may we approach briefly. Judge Joseph, yes, please. Attorney Jellinek, thank you. Clerk Okstein, do you want to wait for your client? Or do it? Attorney Jellinek, no, side bar. Judge Joseph, we're just going to side bar.
Is that what you see there at Page 40 of the transcript?
A. Yes.

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

A. Yes.

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

A. Yes.

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

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

Q. Okay. Let’s resume the recording.

(RECORDING PLAYING)

Q. Let's pause there.

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

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

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

Attorney Jellinek, something inaudible.

Judge Joseph, then it's a different --

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

Attorney Jellinek, something inaudible.

Judge Joseph, what if we detain him.

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

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

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

(RECORDING PLAYING)

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

Judge Joseph --

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

Did I read that correctly?

A. Yes.

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

A. Yes, I did.

MR. HOOPES: Objection.

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

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

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

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

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

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

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

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

A. Yes, I did.

Q. And what was your impression?

A. My impression was 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.

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

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

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

A. Yes.

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

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

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

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

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

somebody?
A. Well, I was trying to protect essentially everybody, but myself and the judge, most primarily, because if we had -- if she had said, no, you can't do that, fine, I never said this, she never said it off the record. If she wanted to help me, it was better that that's off the record than on the record for her protection as well. So it wouldn't have changed how I spoke.
Q. And so my question, if she had said, no, we're staying on the record, what would you have done?
A. I would have said exactly the same thing.
Q. Okay. And when the judge told the clerk to go off the record, to turn off the record, did that affect your thinking?
A. Yeah. Yes. It made me feel like she might be more sympathetic to hearing what I had to say.
Q. And what did you say off the record?
A. I said that I was very concerned that ICE, as I said on the record, ICE had the wrong individual, because this was supposedly biometric data that didn't match up, and that I 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 I knew that ICE was out front, so that might be a way for him to avoid getting into ICE custody.

Q. And what did she say?

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

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

A. Not to my memory.

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

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

Q. And how did you know that?

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

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

A. I believe she ordered them out at some point

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

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

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

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

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

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

A. Yes.

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

A. I would not have gone downstairs with him and he would not have been let out the back. ~~H~~We might have gone downstairs to ~~not~~ collect~~ed~~ his personal property or to speak more to him with the interpreter to say here's my card, give me a call, we'll meet. That would be the extent of it.

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

A. Yes.

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

A. Yes.

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

(RECORDING PLAYING)

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

(RECORDING PLAYING)

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

At one point, and this is about

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

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

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

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

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

Q. And then further down on Page 43 Judge Joseph

says -- After Court Officer MacGregor says he's released, Clerk Okstein says he is. You said yup. Judge Joseph says he is. And then Judge Joseph, Mr. Jellinek asked if the interpreter can accompany him downstairs to further interview him. Did you intend to further interview him?

A. I wanted to speak to him for a moment, yes, but not an extensive interview.

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

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

Q. And what happened next?

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

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

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

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

A. I went back upstairs.
Q. And were you done for the day then?
A. I believe, yeah, I was done for the day. If my memory is correct, court was pretty much done at that time.
Q. And did you leave the courthouse?
A. I did.
Q. On your way out of the courthouse, did you see Assistant District Attorney Shannon Jurgens McDermott?
A. I actually saw her in the courtroom on my way back upstairs. I looked upstairs. I saw her in that main area of the courtroom.
Q. Okay. Did you have any conversation with her?
A. Very briefly.
Q. Okay. And do you remember that conversation?
A. To the best of my memory, I said what's wrong, she said ICE is pissed at me, said are you pissed at me, she said something like yes or...
Q. Okay. And when you went out to get to your car, did you see Attorney Bostwick?
A. I did. We were both walking out at the same time.
Q. Did you have a conversation with her?

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

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

A. Yes.

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

A. Yes.

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

A. I did.

Q. Tell us first how that came about.

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

Q. And how did the conversation end?

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

problem, something to that effect.
Q. Was anyone else present for that conversation?
A. No.
Q. And why did you have that conversation with her?
A. Because she's the presiding judge, and I wanted her to know that something had occurred in the courthouse the day before and that at least some people didn't think it was proper and that ICE had been angry with the district attorney.
Q. Did you say anything about going off the record?
A. No, not to my memory.
Q. Why not?
A. It didn't seem relevant at that point. In the earlier part of my practice, in the early 2000's, that was not uncommon.
Q. This was 2018. Was it common or uncommon at that point?
A. I hadn't been off the record in a while at that point. But in the earlier 2000's, with CPCS, we would go off the record frequently or even meet in the judge's lobby, in the chambers for lobby conferences to discuss cases.
Q. What's a lobby conference?
A. Lobby conference would be, usually the

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

Q. What was the purpose of that?

A. Often to work out a plea.

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

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

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

A. Yes.

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

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

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

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

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

A. Not to my memory, no.

Q. Never?

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

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

A. Not to my memory, no.

Q. And why not?

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

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

A. Not to my knowledge, no.

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

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

Q. Meaning a dismissal of the fugitive --
A. Yes. Correct.
Q. Okay.
A. Correct.
Q. At some point did you learn that you would be subpoenaed to the grand jury?
A. Yes.
Q. And how did you learn that?
A. I learned it from a lawyer who called me one afternoon and said he was representing Mr. Okstein, who had been subpoenaed.
Q. The clerk.
A. Yes. And that he thought I would be as well and that I should come speak to him.
Q. And did you hire a lawyer to represent you?
A. I did, yes.
Q. And who was that?
A. Bob Peabody.
Q. And is he present?
A. He's -- Yes.
Q. Did you believe that you would have a Fifth Amendment right to refuse to speak with the U.S. attorney or to refuse to testify to the grand jury?
A. That is a difficult question. I don't think

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

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

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

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

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

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

JUDGE FABRICANT: Okay. Thank you.

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

A. Yes.

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

A. Yes.

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

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

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

A. I believe that was the date, yes.

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

A. Yes.

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

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

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

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

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

A. Absolutely.

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

A. Yes.

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

A. Yes.

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

A. Yes.

Q. At the time of the interviews, were you given an opportunity to review the notes to see if they accurately reflected your statement?
A. No.
Q. Have you since recently in connection with this case had a chance to review those notes and reports?
A. Yes.
Q. And did you find some things that --

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

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

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

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

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

JUDGE FABRICANT: Okay.

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

MR. HOOPES: Same objection.

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

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

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

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

Q. What did you mean?

A. I meant that she was --

MR. HOOPES: Objection. Sorry.

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

JUDGE FABRICANT: Allow him to answer or...

HEARING OFFICER: Yes.

Q. What did you mean?

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

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

A. I believe that was the date, yes.

Q. And was your testimony truthful?

A. Yes.

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

A. Yes.

Q. What was your view at the time?

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

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

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

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

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

A. Absolutely.

Q. Is that something you have said --

A. I have said it in the past. Yes. Absolutely. It's on the edge of ethical and it's on the edge of legal. And that's one of the reasons that we went off the record and it's one of the reasons that I think this came up. It is. It's a little bit in the gray area.

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

A. Yes.

Q. And do you still to this day?

A. Yes.

Q. And for as long as he~~you~~ continued to work, do you continue to be friendly with Court Officer MacGregor?

A. Yes.

Q. Did he retire at some point?

A. To my knowledge, yes.

JUDGE FABRICANT: I have

nothing further at this time. Thank you.

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

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

MR. HOOPES: Yes. Thank you.

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

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

HEARING OFFICER: We're back on the record.

Mr. Hoopes.

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

CROSS-EXAMINATION

BY MR. HOOPES:

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

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

that right?
A. Yes.
Q. And you're the one who asked to go to side bar; correct?
A. Correct.
Q. And nothing unusual about that; correct?
A. Not in my opinion, no.
Q. And when you got to side bar, it was a side bar; right? It was at the side of her bench; correct?
A. Correct.
MR. HOOPES: And so with the hearing officer's permission.
Q. There's a photo of the courtroom right to your left there.
A. Yes.
Q. And the judge was on the bench.
A. Yes.
Q. And you and Ms. Jurgens were right at the side; correct?
A. Yes. Right around where the stairs are.
Q. So right maybe here; is that correct?
A. Yes.
Q. And you wanted to go to side bar because you wanted it not out in public; correct?

A. Correct.
Q. And you wanted to speak reasonably softly; is that right? So the public wouldn't be hearing what you had to say exactly; right?
A. Well, there's also white noise that goes on so the public can't hear.
Q. Okay. But be that as it may, you were keeping your voice down; correct?
A. Yes. Correct.
Q. And I assume that you wanted the judge to be able to hear what you were saying; correct?
A. Correct.
Q. Because that's what you were doing, you were there to try to ask for something; correct?
A. Yes.
Q. And so when you were speaking, you spoke directly to her so she could see your face; right?
A. Correct.
Q. And Ms. Jurgens was there because she was the assistant district attorney; right?
A. Correct.
Q. She had an important role in whatever was going to be said in side bar; correct?
A. Yes.

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

A. Yes.

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

A. Yes.

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

A. Yes.

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

A. Probably about there.

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

A. Yeah.

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

A. She responded at certain points. Correct.

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

A. Depends on your point of view.

Q. Yeah. Well, I mean, you never had a sense that she was hard of hearing; right?
A. No, no.
Q. You talked to her before.
A. Yup.
Q. And she understood every word you had to say.
A. Yes.
Q. She was watching you and watching the judge and keeping track of the whole situation; right?
A. Can't speak for her.
Q. Yeah. But she was paying attention; correct?
A. I can't speak for her.
Q. Okay. Did you respond when special counsel asked you about the comment from Ms. Jurgens saying that it wasn't -- ICE wasn't her issue?
A. Yes.
Q. And you heard her say that; correct?
A. Correct.
Q. So the transcript is accurate; right?
A. Transcript's accurate.
Q. So she was listening and hearing certain things; right?
A. At least those things, yes.
Q. Now, at some point your client was sent downstairs, right, to the lockup?

A. Yes.
Q. And you went with him.
A. Yes.
Q. The interpreter went with you.
A. Yes.
Q. When you left, everybody else was in the courtroom, remained in the courtroom. Nobody came down with you. Correct?
A. Correct.
Q. And when you were down there, you talked to your client, you said for a short period of time.
A. Yes.
Q. And one of the reasons you wanted to talk to him was to exchange phone numbers; is that right?
A. To my memory, yes.
Q. Okay. So that you could prepare for the next time he came back; right?
A. Yes.
Q. Let me see if I understand this correctly. You have told us and you've told many people involved with the Federal Government and this prosecutor, special prosecutor, that your intention was that he would escape ICE; right?
A. That he would avoid being arrested by ICE, yes.

Q. Okay. And so you thought he needed your phone number to be in touch with you to come back again if he's avoiding ICE, escaping ICE?
A. Yes. Just because someone is avoiding ICE doesn't mean they won't return to court. I expected him to come back on the next date. I give all my clients my phone number.
Q. So you and he talked briefly.
A. Yes.
Q. The interpreter was there.
A. Yes.
Q. Officer MacGregor did something at that point; right?
A. Yes.
Q. Opened the door?
A. Yes.
Q. Released him?
A. Yes.
Q. Did you peer out to see if ICE was out back?
A. Not to my memory.
Q. So if the doors for that day show that you were downstairs for about six minutes, what you did you do to fill the time?
A. I believe that I went downstairs, I spoke to my client for a little while, he had to be

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

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

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

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

A. Yes.

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

A. I believed he had property downstairs, yes.

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

A. Yes.

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

A. To my memory, yes.

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

A. Yes.

Q. And where did you meet with them?

A. In the courtroom.

Q. They were waiting in the courtroom.

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

Q. And you had a conversation with them.

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

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

A. To my memory, yes.

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

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

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

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

Q. Had you been paid by that point?

A. Yes.

Q. And where was the ADA?

A. Probably near her desk or leaving the room.

Q. In the same main courtroom.

A. Probably.
Q. Now, you told us that the ADA was angry at you, pissed off at you; right?
A. Seemed that way, yes.
Q. And she said something to you like, I know what you did and that was not the right thing to do; right?
A. I don't remember if that's what she said or not.
Q. Well, you just testified that it was -- I didn't like what you did, that wasn't the right thing. Correct?
A. I think she said something along the lines of, ICE is mad at me.
Q. She said ICE is mad at me.
A. Something like that, yes.
Q. And was ICE in the courtroom at the time?
A. Not to my knowledge. I don't know.
Q. ICE was out in the hallway?
A. I don't know where they were.
Q. And when you saw the ADA, and she said that, did you say, what are you upset for, you were there when we had the conversation at side bar?
A. I don't remember if I said that or not.
Q. You didn't say, what are you upset for, I didn't

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

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

Q. Well --

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

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

A. Not sure I agree with the question.

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

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

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

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

Q. Sometime in the morning before noon.

A. Yes. Probably.

Q. And the discussion was about Pennsylvania having

the wrong guy; right?
A. That was probably the initial conversation, yes.
Q. You wanted him released; right?
A. Yes.
Q. You wanted to address the bail issue; correct?
A. Yes.
Q. And ICE was looking for him; right?
A. Yes.
Q. And so what time was it of the day on April 2nd, 2018, that you and Wesley MacGregor spoke and agreed that MacGregor was going to let him out the back once he came downstairs? What time was that conversation?
A. Again, that's not the conversation we had. He and I spoke over the lunch break, but he -- That was not an agreement that was made.
Q. Oh. Well, over the lunch break, between 12:00 and 1:00, between 1:00 and 2:00?
A. Between 1:00 and 2:00.
Q. And you were in the courtroom?
A. Yes.
Q. And he said -- You expressed to him that you were upset about the fact that your client was potentially going to ICE custody?

A. I was upset that, yes, that ICE might get the wrong guy.
Q. And you suggested that they had the wrong guy; correct? You just said that; right?
A. I don't believe --
Q. And he said, you get him downstairs, I can get him out the back; right?
A. He said, if I remember right, if you get him downstairs, I'm allowed to let him out the back.
Q. And I'm sure at that point you said no way; right?
A. No.
Q. Okay. You didn't say you can't do that, did you?
A. No. Because I've seen other people released out the back. I knew it was possible.
Q. Okay. You had seen other people go out the back with ICE in the courthouse?
A. No.
Q. Okay. So you told us several times now that you knew that ICE was there; right?
A. Yes.
Q. And ICE was waiting for him; correct?
A. I assume they were waiting for him. I didn't know if they were doing anything else there.

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

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

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

A. That was the goal.

Q. Thank you. That was the goal.

A. Uh-huh.

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

A. It wasn't that linear.

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

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

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

to go down and talk to his client; right?

A. That's true.

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

A. Correct.

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

A. That's not quite what I said.

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

A. It was not quite that simple.

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

A. No.

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

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

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

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

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

Q. Well, --

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

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

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

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

A. No.

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

A. No.

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

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

A. No.

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

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

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

A. Sounds like it, yes.

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

A. No, it's not what I'm saying.
Q. Well --
A. I'm saying that, after she had dealt with the matters that related to her, I'm not sure if she was as focused on the conversation about the Federal issues of ICE. And she said -- and I don't remember the exact language -- that's not my business.
Q. Oh, because sometimes people are focused on what's important to them and what they're thinking; right?
A. Sure. Yeah.
Q. But you agree that she's right there when you were continuing talking; right? All about ICE; right?
A. Yes.
Q. And in fact, she said not my business; right?
A. Yes.
Q. Now, I think you've also said very recently that you thought she maybe didn't get it because she was inexperienced. Or newish, was the word you used. Right?
A. She was a relatively new ADA, yes.
Q. So you hadn't met her and talked to her during your two or three months often; right?

A. Yes.
Q. And you knew that she had been in the district attorney's office now for almost three years; right?
A. Yes.
Q. And that she had supervised in other courts, up to 10 or 11, ADA's; right?
A. I didn't know her ~~report~~ work history.
Q. And she handled thousands of cases.
A. Probably. Most DA's have.
Q. Maybe thousands more than you.
A. I don't know.
Q. Well, that's not newish and inexperienced, is it?
A. She was not a Superior Court ADA. She was a supervisor, alone in the Newton District Court. And she said, basically, it's not him, so the Pennsylvania warrant is dismissed and we're not asking for bail. And at that point, I'm not sure she was paying too much attention after that.
Q. So your claim today and prior to today is that, if you said something, she might not have got it. She might have not have. It might have been subtle, she might have been inexperienced,

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

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

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

A. Probably.

Q. Well --

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

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

A. Yes.

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

A. That's my memory, yes.

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

A. I don't know.

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

A. Yes.

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

notes. Have you seen those notes?
A. I believe I have, yes.
Q. Oh, so then you know that, when asked, Page 5, when asked whether you had any further interaction with ADA Jurgens after coming upstairs from the lockup following Medina Perez's release, Mr. Jellinek responded that ADA Jurgens was in the lobby with the ICE agents, not in the courtroom. Do you remember saying that?
A. I believe she was -- had been in the lobby with the ICE agents. She was in the courtroom when I spoke with her~~.~~ to the ~~B~~best of my memory.
Q. That's not what you said to Special Counsel. And she's a lawyer. You're supposed to be truthful with her; right?
A. Did the best I could.
Q. And so -- let's see -- today is June the 9th; right?
A. Yes.
Q. So six months ago, you put the ADA in the courtroom -- excuse me -- the ADA out of the courtroom and in the hallway with the ICE agents, and today you put the conversation inside the courtroom; right?

A. That's my memory.
Q. And you said they were all angry with each other.
A. Appeared that way.
Q. Meaning, somebody was angry with -- the ICE agents were angry with Ms. Jurgens; right?
A. What she said to me, yes.
Q. And when you saw Ms. Jurgens talking to the ICE agents, did you see any court officer? Did you see Scott Noe? You know who he is; right?
A. There's multiple questions there. I do know who he is. I believe he's retired.
Q. No. My question is, did you see Scott Noe outside?
A. I don't remember.
Q. Okay. So when you came out, your memory is that you just saw the ICE guys and Ms. Jurgens; right? And they were angry at her.
A. Seemed that way.
Q. And you just walked away; right?
A. Yes.
Q. You didn't say -- walk over to them and say it's not her fault, did you?
A. No, not to my memory.
Q. You let her just be on it, ICE guys, herself, right?

A. To my memory, yes.
Q. You didn't walk over to the ICE agents and say, guys, he went out the back, I arranged for him to go out the back. You didn't do that, did you?
A. Not to my memory, no.
Q. You worked with law enforcement for a couple of years, didn’t you? You've been on the Boston PD?
A. Yes.
Q. Did you think that you owed any duty to any police officer in the Commonwealth of Massachusetts to be open and honest with them? Like the ICE agents there that day? Did that go off in your head? To explain to them that it wasn't the DA who caused this problem, it was you?
A. I'm sorry.
Q. Let me back it up. You've been in law enforcement before; correct?
A. Yes.
Q. You've helped law enforcement enforce laws; right?
A. Yes.
Q. Your feeling here was, not this time, I'm not

going to tell ICE anything; right?
A. Wasn't my job to tell ICE anything.
Q. Well, --
A. That's a different role.
Q. -- whose job was it? She didn't know that you had planned this with MacGregor; right?
A. She was, as you said, standing next to me. If she had been paying attention, she would have heard it.
Q. Well, would I be over the top by saying you left her hanging out to dry?
A. I don't know how she felt about it. She said she was angry with me. And the next time we met, it was okay.
Q. So there's a lot of people who work in the Newton District Court; right?
A. Yes.
Q. And you take great pride in knowing these people; right? The clerk, Mr. Okstein, other people in the clerk's office?
A. Again, it's a multiple part question. I take pride in knowing people who work in the court, yes.
Q. Including the clerk's office?
A. Yes.

Q. Including the probation department?
A. Yes.
Q. You never walked up to any one of those people prior to the afternoon call list and said, ICE is here, you know ICE is here, and I'm going to arrange for my client to go out the back door. You didn't do that, did you?
A. Nope.
Q. So afterwards you never said to any of those people, I had the blessing of Judge Joseph; right?
A. I didn't speak to any of them after that, no, not that day.
Q. Well, before that day in court ended, you saw Ms. Bostwick; correct?
A. Yes.
Q. Now, Ms. Bostwick was the lawyer who was the bar advocate who was there in the morning; right?
A. Yes.
Q. And she's the lawyer that you replaced.
A. Yes.
Q. And you knew that she was in the back of the courtroom in the afternoon; correct?
A. Yes.
Q. What time did you first notice her?

A. I don't remember.
Q. But she was certainly there until you walked out.
A. We walked out at the same time. I don't know where she was before that. But it was her job to be there that day.
Q. And as you walked out with Ms. Bostwick, you weren't shy about the attorney/client privilege. You told her I just got him released out the back; right?
A. I said the guy just got released out the back.
Q. Oh.
A. I might have said I did. I might have said --
Q. You don't remember whether you were even truthful with her; right?
A. (No response).
Q. So tell us, where was this conversation?
A. That was in the parking lot off to the side of the building.
MR. HOOPES: So if the hearing officer can allow me.
Q. So this is a, this is a little bit of a blowup. So this is the back of the courthouse.

A. Would you like me to point it out?
Q. That'd be great.
A. If I'm right --
JUDGE FABRICANT: If the witness steps away from the microphone, he won't be amplified.
THE WITNESS: I understand.
HEARING OFFICER: Mr. Hoopes. If you could. Thank you.
A. Looks to me like that is the Newton District Court and that is the police station.
Q. And where was your conversation with Ms. Bostwick?
A. In this area here.
Q. So facing the courthouse, to the right.
A. Correct. From Washington Street.
Q. And she said to you, you've obstructed justice.
A. I don't think it was that clear~~. More direct.~~ or direct.
Q. Well, you may have obstructed justice.
A. Something along those lines, yes.
Q. And if you may have obstructed justice, then you may have engaged in a criminal act; right?
A. If you obstruct justice, that's a crime, yes.

Q. Now, this discussion with Ms. Bostwick in the parking lot right after court -- which would have been at roughly what time?

A. 3:00 or ~~2~~3:30 probably.

Q. That's a conversation that you never shared with Federal investigators, did you?

A. I honestly don't remember. I thought I did, but I don't remember.

Q. Well, as a matter of fact, did Federal investigators, to your knowledge, ever interview Ms. Bostwick?

A. I have no idea.

Q. Did Federal investigators ever confront you or ask you about anything with regard to conversations they had with Ms. Bostwick?

A. Not to my memory.

Q. Now, when Ms. Bostwick said that you may have obstructed justice, what did you say?

A. I said -- Again, this was a long time ago. I don't remember my specific language. But I think I said I don't believe I did.

Q. Well, did you say to her, I made a deal with MacGregor to let him out the back?

A. No.

Q. Did you say to her, I didn't obstruct justice,

Judge Joseph gave her blessing? That was the time to tell her; right?

A. I don't know what you're --

Q. Well, did you say that to Ms. Bostwick?

A. Not to my memory.

Q. So you got in your car; correct?

A. I would have, yes, most likely.

Q. You drove home. Went back to your office. Which was it?

A. Probably home.

Q. You walked in the door, right, of your house?

A. Yes.

Q. Did you talk to your wife about what happened that day? Not what was said. Not what was said. Did you speak to your wife about it?

A. I don't believe she was home at that time. Probably later that evening.

Q. Speak to your parents that evening?

A. No, probably not.

Q. Well, that night, thinking about it, did you have any fear whatsoever about what might have happened next, to you, being prosecuted?

A. No. I didn't think I'd be prosecuted. I was a little -- I was concerned by what Ms. Bostwick said, and I thought about what I had done, and I

didn't think it was obstruction.

Q. Now, you've been in the Newton District Court now for a number of years; right?

A. Yes.

Q. And normally you've been there as a bar advocate; correct?

A. As a what?

Q. As a bar advocate?

A. Yes.

Q. And some private cases.

A. Yes.

Q. And it's a smaller courtroom; right?

A. Yes.

Q. And smaller court generally; right?

A. Yes.

Q. Fewer cases there than say Waltham; --

A. Yes.

Q. -- correct? Or even Lowell District Court; right?

A. Yes.

Q. And a number of people share the bar advocate assignments; correct?

A. Correct.

Q. But you're one of a very few people who handles the drug court; correct?

A. I was back then. I'm not anymore.
Q. Okay. But back then, on April 2nd of 2018, it was you and maybe one other person?
A. I believe so, yes.
Q. And being on the list or being one of the two people who would do the drug court gave you extra cases, extra assignments; right?
A. It wasn't necessarily extra assignments. It was to continue the case into the drug court and you took whatever was there.
Q. Now, the bar advocate's pay back then was $53 an hour?
A. Sounds about right.
Q. And you had a case load typically of 50 to 60 cases?
A. Sounds about right.
Q. But this -- Newton District Court was what you would consider to be a home court for you; right?
A. It's one of two courts ~~on~~I was the bar advocate in routinely.
Q. The other one was Waltham; correct?
A. Correct.
Q. And so the person who's the presiding justice at the Newton District Court would be of some

importance to you; correct?
A. Yes.
Q. And that was Judge Heffernan; correct?
A. Correct.
Q. And Judge Heffernan had seen you working as a bar advocate now for, by that time, four, five years?
A. Probably, yes.
Q. Experience with you in regular cases?
A. Yes.
Q. Experience with you in the drug court?
A. Yes.
Q. And you were concerned about what she might hear about what happened on April 2nd, so you wanted go see her; correct?
A. Loosely, yes.
Q. Okay. And you wanted to talk to her; correct?
A. Yes.
Q. And you went to see her in the morning, I think you've said in the past?
A. I believe it was in the morning, yes.
Q. And you believe the conversation took place in her first floor chambers?
A. If my memory's correct, yes.
Q. And there was nobody else at the time in the

chambers?
A. That's my memory.
Q. And the conversation took place around 8:45 before she got on the bench.
A. That's my memory, yes.
Q. And you wanted to tell her that -- Because you knew the ADA and the ICE officer were upset, you thought it would be prudent to talk to Judge Heffernan; right?
A. I thought she should know what had happened in her courtroom because there might have been something she should know about, particularly with regards to the ADA.
Q. So when you're walking into a judge's lobby, ex parte, by the way; right? Nobody else is there.
A. (No response).
Q. She's somebody you see every day that you're in Newton District Court; right?
A. Whenever she's on the bench.
Q. Yup. Which is a lot; correct?
A. Not necessarily. Just a couple of days a week.
Q. Well, you're in that courtroom twice a week?
A. Once or twice a week, yes.

Q. Okay. Which can be a lot for most people; right?
A. I don't know what other people do.
Q. Yeah. So I mean, she's the presiding justice. Did you think for a minute that you owed her the duty to tell her the whole truth, nothing but the truth, so help you God, as to what happened the day before?
A. I would have answered any questions she asked me truthfully. Absolutely.
Q. No. You're the one who knocked on the door.
A. I asked the clerk to ask her if I could come by.
Q. But you're the one who made the approach.
A. Yes.
Q. You said to her -- Quoting your comments to the Special Counsel. Mr. Jellinek stated that he advised Judge Heffernan there was an issue with Medina Perez's identity and he was let out the back door. He added he didn't recall saying anything to her about going off the record. He also added that he didn't recall saying anything about going back downstairs with the defendant. Mr. Jellinek stated he didn't recall saying anything to Heffernan, Judge Heffernan about

going back downstairs with him to probation. Judge Heffernan told him she already knew about the incident and not to worry.

That was what you remembered in sum; right?

A. Yes. That sounds right.

Q. So I mean, we're beyond attorney/client privilege. This is being honest with a member of the judiciary. Do you think that you owed it to her to tell her that you had had this conversation with her court officer about letting him out the back? Yes or no?

A. She said she already knew about it.

Q. No. She said she knew about the incident. Are you telling us -- Oh. Are you telling the hearing officer that you interpreted that to mean that she already knew that MacGregor had made this deal with you?

A. I don't know what she knew. I -- She said I know about it, basically just go away, and I didn't respond.

Q. Well, I would assume that you valued her opinion of you.

A. I do, yes.

Q. And you valued whether or not she had confidence

in your honesty and integrity; correct?
A. Yes.
Q. And you know under the Board of Bar Overseers ethical rules that you're supposed to be honest and forthright with members of the judiciary at all times; correct?
A. Yes.
Q. Did you say one word to her about your conversation with MacGregor?
A. Not to my memory.
Q. So when you left that lobby, she may have known that MacGregor let him out; right?
A. She may have.
Q. But she didn't know that you were the mastermind of the whole thing; right?
A. I don't follow the question. She knew what she knew. I don't know what else she knew.
Q. You didn't tell her I had the conversation with MacGregor, we agreed my client was going out the back. You didn't tell her that.
A. I don't remember. I don't believe I did.
Q. I mean, you wouldn't quarrel with me about mastermind; right? That's -- I mean, it's easy to look it up online, that it's somebody that controlled it, planned it, directed it. That was you; right?

A. It was my idea.
Q. Yeah.
A. And I argued for my client.
Q. And you got a BA and a JD. And you'd never say that MacGregor was the mastermind, would you?
A. No, probably not.
Q. Okay. I mean, certainly, you certainly didn't say, you certainly didn't say to Judge Heffernan, oh, by the way, Judge Joseph blessed it. You never said that; right?
A. Not to my memory, no.
Q. And in fact, you came back to that same courthouse on May the 29th, right, for the next date on Medina Perez, correct?
A. Yeah. Probably had a few other cases on that day, too.
Q. And Judge Heffernan was in the courtroom?
A. I don't remember.
Q. But you never told any judge who was sitting that day, when Medina Perez didn't show up, that you knew everything that had happened, you knew why he wasn't there, you were involved in it. Anything. Right?
A. Again, it's a bit of a compound question. But no. I assumed he was either going to return

for court or wasn't, and I don't know whether he was in ICE custody or whether he was simply not coming to court ~~in the fall~~in default.

Q. So you had conversations I assume on that same day when you back in court on April 3rd, the next day after April 2nd, with other people because you were in court on other cases; right?

A. I believe I did, yes.

Q. So you would have talked to people in the clerk's office probably?

A. Probably spoke to the clerk of the courtroom, yes.

Q. Yeah. Spoke to the people in probation probably; right?

A. Probably, yes.

Q. Nobody talked about this, this disappearance out the back door with your client.

A. No.

Q. And you didn't initiate it; correct?

A. Not to my memory, no.

Q. Now, tell us, from the time you left the courthouse on April 2nd until Wesley MacGregor -- the courthouse -- got a grand jury subpoena, did you have conversations with Mr. MacGregor about this incident?

A. Potentially brief ones, yes. I might have thanked him or asked if that was -- if he was okay.

Q. Well, you knew he had a court appearance for - grand jury appearance; correct?

A. It was before I found out about the grand jury subpoena, yes.

Q. No. I said between. Yeah. Well -- And you knew he got a subpoena; right?

A. At some point I found out, yes.

Q. And how long before the subpoena was returnable?

A. I have no idea.

Q. So if you were to answer how many times you talked to Wesley MacGregor between April 2nd, when you left and when you found out that there was a grand jury subpoena for him, how many times did you talk to him?

A. In general or about this?

Q. About this.

A. Maybe twice.

Q. And what was your conversation?

A. What I just said, I probably thanked him at one point. And then when I found out that ICE was upset or there might be things happening, I asked him if he was okay in his job.

Q. Now, I assume you were sort of tracking this grand jury; right? I mean, you knew MacGregor had gone in.

A. I didn't know when he went in.

Q. But you knew somebody hit him with a subpoena.

A. Yes.

Q. And it couldn't have been a mystery to you as to what the subpoena was for.

A. I was told it was for this case.

Q. So if they're going to subpoena MacGregor, then it's very possible somebody's going to subpoena you.

A. Yes.

Q. So were you tracking other people in the courthouse who got subpoenaed before you did?

A. I had no access to any grand jury. I don't what you mean by "tracking."

Q. Did you know that Scott Noe got a grand jury subpoena?

A. No.

Q. Did you know that Mike Walsh got a grand jury subpoena?

A. No.

Q. Did you know that Clerk Okstein got a grand jury subpoena?

A. Yes.
Q. When was that?
A. I don't remember.
Q. Before his attorney had called you.
A. No.
Q. When his attorney called you.
A. When . . .
Q. So you go in to see, you go in to see Federal authorities on or about November 8th, 2018; correct?
A. Yes. That sounds right.
Q. And so if this event happened on April 2nd, and if MacGregor was in testifying in the middle of July --
A. I don't know when he testified.
Q. But you knew he got a subpoena to go testify.
A. I was told he did, but I don't know when it was for or when he testified.
Q. How'd it make you feel?
A. When he got a subpoena?
Q. Yeah.
A. I was upset. I didn't like the idea. I liked the guy. Didn't think it was fair.
Q. Well, as we said, you must have been thinking they were coming for you, too; right?

A. I didn't have a fear for my own subpoena until I spoke to the attorney who called me, after he had spoken with Mr. Okstein.

Q. And that was maybe two weeks before November 8th; correct?

A. I don't remember the timeline, but probably two weeks to a month before, yeah.

Q. And when the attorneys spoke to you, he was calling to tell you that they were looking -- the Federal authorities were looking to subpoena you; right?

A. He mentioned that I might be a target and I should get a lawyer.

Q. And I assume at that point you began to be concerned; right?

A. Yes. Sure.

Q. And in fact, you called the lawyer; right?

A. Yes.

Q. Mr. Peabody, right?

A. Correct.

Q. Who was a friend; right?

A. He was a~~Good~~ mentor of mine. Yes.

Q. And based on what you heard from Mr. Okstein's lawyer, you were afraid of potential jail time; right?

A. Not in that moment, no.
Q. Well, would it be fair to say that you talked to some people in town? Right? Lawyers who are friends?
A. I spoke to Mr. Peabody.
Q. You talked to nobody else.
A. Not to my memory, no. I did speak to one other lawyer who I knew and I gave a brief rundown of the situation. I didn't talk about my role in it. She quoted me her price. And I called Mr. Peabody. I was closer with him.
Q. So you talked to Mr. Peabody. As far as you know, Mr. Peabody contacted Federal authorities; correct?
A. That's my understanding.
Q. And then arranged for you to go have a conversation with them; correct?
A. Correct.
Q. And you went in to speak with them pursuant to what's called a proffer letter; right?
A. Yes.
Q. Or sometimes a queen for a day letter; right? Which is you typically --
A. Never heard it referred to as that.
MR. HOOPES: So pop that up.

So can we go to the second page? Yeah.

Q. So it's a two-page letter; right?

A. One page of substance. Yes.

Q. Two-page letter. And your signature's on the second page; right?

A. Yeah.

Q. And that's your signature?

A. Yes.

Q. That's Mr. Peabody's signature?

A. Yes.

Q. And I'm sure that the Federal prosecutors ran through the letter with you before they started talking; right?

A. To my memory, yeah.

Q. So they said that you needed to give an accurate and complete proffer; right?

A. They -- Yeah. That's the goal. As complete as I could.

Q. And then you spoke to them.

A. Yes.

Q. And then you went back and you spoke to them a second time; is that right?

A. I believe so, yes.

Q. And that would have been January 15th, I think special counsel referenced, correct?

A. 14th or the 15th. Yes.
Q. And that is pursuant to the proffer letter. The same terms; right?
A. I believe so, yes.
Q. Have to be accurate, detailed, and complete.
A. I'm not sure that it says that in the proffer letter, but that was the intent.
Q. And then your grand jury testimony was nine days later, on January the 24th; right?
A. Sounds right.
Q. And before you went in for the grand jury testimony, you got what we call a letter of immunity; correct?
A. Say that again.
Q. You got what's called a letter of immunity; right?
A. Yeah. I received an immunity letter. Yes.
Q. An immunity letter. And that letter is a little more detailed. Again, you have to give complete, truthful information.
A. I believe it's to be honest to the best of your ability.
Q. Well, let's go to Paragraph 1. See that? Second sentence. You must provide complete and truthful information --
A. Yes.

Q. -- to all law enforcement personnel. If his testimony is requested, he must testify truthfully and completely before any grand jury. Correct?

A. Yes.

Q. The next sentence. You can't withhold any information; correct?

A. That's what it says in the letter, yes. That's what I signed.

Q. And you must not attempt to protect any person or entity through false information or admission. Correct?

A. Correct.

Q. Including yourself.

A. That's the idea of the immunity letter, yes.

Q. So is it fair to say, sir, that before you went in to speak to them on November 8th, you were afraid of doing jail time?

A. No. It really hadn't -- Jail hadn't occurred to me at that point. I was more worried about the subpoena and career issues.

Q. Career issues. Meaning, losing your livelihood.

A. Possibly. That was my biggest worry at that point, yes.

Q. Not being able to support your family.

A. Correct.
Q. But I'm sure you knew that at some point before you were immunized that they were investigating Federal crimes; right?
A. Yes.
Q. Federal crimes that were punishable by incarceration in a Federal prison; right?
A. In the statute, yes, it's punishable by prison.
Q. Yeah. In fact, one of the indictment counts was punishable by 20 years; right?
A. To my memory, yes.
Q. Conspiracy, five years; right?
A. I'm not an expert in those statutes. But yes, I believe so.
Q. So for you to get this get out of jail free card, this immunity letter, you needed to have something to offer them; right?
A. Yes. I'd offer my truthful testimony.
Q. Okay. You were going to tell them that you were the mastermind; right?
A. I was going to tell them that it was my idea, yes.
Q. In return for something, they were going to give you a complete pass. When I say "complete

pass," you understand, before we finish that question, that there were all kinds of ways that they could have rewarded you but for your attorney's efforts, they could have done what's called a 5K, plea, and do a reduced sentence. You understand that; right?

A. We didn't discuss those things.

Q. Could have been placed on probation; correct?

A. I assume that's an option, yes.

Q. But you didn't get either of those.

A. No.

Q. You got complete immunity.

A. Yes.

Q. Did anybody explain to you how rare it is for the mastermind of any crime Federally to ever be immunized, --

A. No.

Q. -- as in testify against somebody else?

JUDGE FABRICANT: Can we have one person speaking at a time, please.

Q. Go ahead. What were you going to say?

A. I was going to say no, I never had that conversation.

Q. So the only thing that you needed to give them really was the judge blessing it in those

52 seconds; right?
A. Not sure I follow the question.
Q. Well, they had a tape that had before the 52 seconds, they had a tape that had the after the 52 seconds. The only piece of evidence that you could provide them that they didn't have on tape was your version of what happened in those 52 seconds; right?
A. There were other things we discussed. But yes. That was the core --
Q. That's the core. Correct. And so they traded immunity for you for the core, which was those 52 seconds; right? Yes?
A. If you'd like to phrase it as a trade, sure.
Q. Did you tell them or did they tell you that Ms. Jurgens was up there and didn't know anything about that this guy was going to go out the back?
A. Not to my memory, no. We didn't discuss that.
Q. I mean, she's the only other witness to the 52 seconds; right?
A. Not the only other witness, no.
Q. Oh. Well, clerk Okstein?
A. Correct. And Judge Joseph.

Q. And Judge Joseph.
Now, you sort of quickly discussed with us this morning that fee arrangement which you had with the boss of Mr. Medina Perez. Do you remember that? Right? You made a fee arrangement with him; right?
A. With his employer, yes.
Q. Yeah. And in that fee arrangement, you said that you were going to be paid a thousand dollars; right?
A. Correct.
Q. And you said this morning and you said previously that the employer paid you by check; right?
A. That's my memory of it, yes.
Q. Now, did the U.S. attorney's office ever ask you for your checks to confirm that?
A. Not to my memory, no.
Q. Did they ever say what's my bank account -- what's your bank account?
A. Not to my memory, no.
Q. And you told them about that information pretty early on. I mean, you talked to them about that in January before you went into the grand jury; right? You said the employer paid you by check;

right?
A. Again, that's my memory of it and that's my memory of what I told them.
Q. And then, in fact, you went in to the grand jury and testified a few days later; right?
A. That's my memory, yes.
Q. And so when you go in front of a grand jury, 13 to 23 people in a room; right?
A. It was -- Yeah. There were a lot of people in the room.
Q. And it's you along with the prosecutors; right?
A. Yes.
Q. Mr. Chow was with you; correct?
A. Yes.
Q. And you raised your right hand and you swore to tell the truth, the whole truth, and nothing but the truth, just like you did today; right?
A. Yes.
Q. And you told them that the boss paid you right there by check.
A. That was my memory of it, yes.
Q. Now, on December the 20th of 2024, just six months ago, you went and spoke in person with Attorney Fabricant, did you not?
A. No. The judge and I spoke via Zoom.

Q. Oh, by Zoom. Okay. And was Mr. Neff there?
A. I believe so, yes.
Q. And whether or not it was by Zoom or in person, you understood that she was asking you questions and expecting that you were going to tell her the truth.
A. Yes.
Q. The whole truth and nothing but the truth.
A. To the best of my recollection, yes.
Q. So on Page 2 of the report, it says Mr. Jellinek stated that they gave him a thousand dollars in cash for his work that day and that he planned to work out the details of his ongoing representation later. In fact, they followed up and they said, when asked whether he went before the Federal grand jury, he testified that the people who hired him wanted him to get Medina Perez out of custody, and they paid him a thousand dollars, and he said yes. When asked whether they said person paid by check, he responded yes.

So six months ago you told the former chief justice of the Massachusetts Trial Court that it was by check.
A. Well, I was -- Yeah.

Q. And then cash; right?
A. My memory six months ago was not as clear as it was in the grand jury. When she refreshed my memory as to what I said in the grand jury, that made sense.
Q. Well, when she refreshed your memory. You said cash. And in fact, you promised to go back to your bank records to confirm whether the payment you received was check or cash, and you said I'm waiting on the bank for the 4/20/18 statement.
A. Correct.
Q. And so that would have been two months ago.
A. Yes.
Q. And I take it, you hadn't gotten that statement; right?
A. No, I have not.
Q. That's the same statement that the Federal authorities didn't ask you for back then seven years ago; right?
A. They didn't ask me for anything about my banking, no.
Q. And you're not denying that you said it was cash when you talked to the special prosecutor.
A. When I spoke to special prosecutor, I did~~n't~~ say cash at first, yes.

Q. So your attorney's here in the courtroom today.
A. Yes.
Q. You know with him or without him that you have an obligation in front of this hearing officer to tell the truth, the whole truth, and nothing but the truth; right?
A. That's the oath I took, yes.
Q. And if you got cash, that's not what you told the grand jury.
A. No. I told the grand jury I got a check.
Q. Because if it was cash, then you would have committed perjury.
A. I don't believe so, no.
Q. Well, if it was cash, and you told them it was a check, that's not perjury?
A. I believe that would have been a mistake. And I believe it was by check. My memory was not as clear seven years after the fact when I first spoke to Judge Fabricant.
Q. So I mean, it's kind of an important thing; right? You kind of want to be able to say I got paid X amount of money, that's all it was worth, and you should believe me. Right? I mean, I'm assuming you had that check, if you actually had one, back in November of 2018 when you first

talked to Federal authorities; right?
A. When you say I had the check, what do you mean?
Q. You would have gotten it back from the bank.
A. No. I --
Q. You would have bank statements that had the deposit on it; right?
A. If they asked for it, I'm sure I could have found it.
Q. So did you deposit the check?
A. Yes.
Q. Did you declare the check?
A. Yes.
Q. Did the Federal authorities ask you to account for that particular check in any documents that you had reporting your income?
A. No.
Q. So without the check, we have no way of knowing if it was a thousand dollars or $10,000; right?
A. No, you do not.
Q. We don't know whether you took all the money or you split the money, some of it to somebody else; right?
A. I, I -- You don't -- I don't know what you know or don't know. I know what I testified to.

Q. Well --

MR. HOOPES: Want me to keep going?

HEARING OFFICER: I think we're to the point where we could take a lunch break, if now's a good point from your perspective?

MR. HOOPES: I think, at the risk of holding everybody up, I'd say yes. Thank you. Yeah.

HEARING OFFICER: It would be best to take a break now?

MR. HOOPES: I think so.

HEARING OFFICER: Okay. Is that okay from your perspective, Special Counsel?

Okay. So we're going to take our lunch break. I'd ask the witness, Mr. Jellinek, not to speak to anybody about your testimony or about this hearing in general during this break.

THE WITNESS: Yes.

HEARING OFFICER: And we're going to resume again at 2:00. Thank you All.

(Luncheon recess taken at 1:03 p.m.

Proceedings resumed at
2:00 p.m.)
HEARING OFFICER: So we're back on the record.
Back to you, Mr. Hoopes.
MR. HOOPES: Thank you very much, Mr. Hearing Officer.

Q. So at the end of the morning, just before lunch, you told us that it wasn't cash but it was a check; right?

A. I told you that was my memory, and that's what I told the grand jury, and that's the best of my recollection, yes.

Q. Well – But as we've been over, you spoke to special counsel on December 20th of 2024, just six months ago; correct?

A. Yes.

Q. Okay. And you said to the special counsel that, in the first interview meeting with Federal authorities, you didn't have immunity, that it was a proffer session, you explained you did not feel entirely comfortable, and was concerned at the time of the November 28th proffer meeting that you'd be indicted. You said that to them; correct?

A. That was a long question. But I believe you're asking if I said I was worried at the proffer meeting that I could be indicted.

Q. Yes.

A. And that is correct. Yes. Of course. I didn't have immunity. I had no proffer letter.

Q. Well, you went on to add that you weren't comfortable and that the only reason you could have hedged on your answers to the prosecutor during that meeting about cash versus check was because you didn't have immunity.

A. I don't believe that I said I hedged on that particular point. I may have not remembered exactly what I said to the special counsel.

Q. Well, you used the word "hedge"; right?

A. I just said I don't remember my exact language to special counsel.

Q. But you wouldn't have used the word "hedging" with Federal prosecutors unless you had something specific in your mind; correct?

A. No.

Q. Well, would you share with us what you thought you hedged on?

A. I honestly don't know exactly what you're talking about at this point.

Q. Well, on Page 5 of your interview with special counsel, you said the only reason you could think that you would have hedged on your answers to the prosecutor during that meeting, that first meeting, was that you didn't have immunity.

A. Yes. The only reason that I could think that I might have hedged about anything. That doesn't mean I did or that I didn't. The only thing I can think of in speaking to the judge when she asked for the first time, said I might have hedged when I didn't have a proffer letter, but I don't believe I did.

Q. Just to make it clear. So you want to go back from having received cash and making, today in front of the hearing officer, you want to make it, it was a check; right?

A. To the best of my recollection, that's what I said at the grand jury, which was nearer in time. So yes, I believe it was a check.

Q. So what was it that you saw ~~de~~in the notes ~~to~~of the prosecutor that Judge Fabricant referred to this morning that you didn't agree with? She asked you a question. She said, ~~de~~the notes and you didn't agree with them.

A. I honestly don't remember what she was referring to. There may have been a moment when the FBI agent wrote something down that was different than what I said. I don't remember.

Q. So now going back to the afternoon session of April 2nd, 2018. That was the first time that you had contact that day with Judge Joseph; correct?

A. I don't remember. I may have had -- I may have appeared before her in the morning. I don't remember.

Q. And so you had known Judge Joseph a little bit when you both were in private practice, --

A. Yes.

Q. -- as much?

A. A little bit.

Q. You had been out to coffee with her once to get some advice on something?

A. Correct.

Q. And you had seen her around a handful of times prior as when she was the judge.

A. That's correct. And the coffee was a follow-up to an MCLE that she and I went to.

Q. And so she was somebody that, you know, would smile at you and say hello when she saw you?

A. As much as I remember, yes.
Q. Okay. Now, you told us that, this morning that the point of release for people in custody, who are released ~~in~~from custody would be out the front, except if they had property; right?
A. Not necessarily only if they had property.
Q. Yes. Only if they had property.
A. No. There might be other reasons --
Q. So going down the stairs was not that unusual; right?
A. No.
Q. And you were familiar with the Lunn policy at that point, were you not?
A. No, I wasn't.
Q. Okay. So --
MR. HOOPES: Can we call up...
Q. Okay. So what you're looking at is the Lunn policy. And it's from the stipulations here by counsel. And it's stipulation -- It's Appendix B. And I'm assuming it's been moved into evidence.
And so you know that there was a case called Lunn back in July of 2017.
A. Yes.
Q. And the Trial Court made efforts to put that

case into effect by developing standards.
A. I -- No, I didn't know. I'm nNot a judge.
Q. So looking at this, this is the first time that you've seen this thing called the Lunn policy.
A. I may have seen it once or twice before, but I don't -- I haven't memorized it, no.
Q. So if we go to APP007, at B, and we go down to Subsection A where it says, individuals over whom the Trial Court has custody, and then it says, consistent with Chapter 2, Section XIV and XV of the Court Officer Manual, when an individual who wais brought into court in custody is subject to release after his or her court proceeding, court security personnel shall process that individual out of lockup in the normal course regardless of whether the individual is the subject of a civil immigration detainer or warrant. Did you read that?
A. That's what it says, yes.
Q. So that means that regardless of whatever deviant practice or practice deviating from this was going on in Newton District Court, that under the Lunn policy, your client was supposed to go downstairs no matter what. Did you realize that?

A. I'm not sure I follow your question.
Q. So your client was brought in to the Newton District Court from the Newton Police Department; correct?
A. To my knowledge, yes.
Q. And since he was on a -- being detained at least on a warrant, among other things, he would have been brought in in custody; correct?
A. Yes.
Q. And he would have been brought in the back door through the sallyport area; correct?
A. Yup.
Q. And placed in lockup.
A. Yup.
Q. So technically, he was brought into court in custody; right?
A. Yes.
Q. Okay. Well -- So this policy, which is the Lunn policy, which governs all the courts in Massachusetts as of November 2017, required that defendants who came in—to custody -- came into the courtroom and courthouse in custody, go out again the way they came in, through the lockup.
A. Again, I'm not a judge (inaudible) to know about what it i~~t~~s (inaudible).

Q. Okay. But if I'm correct, then there was no magic in Judge Joseph sending him downstairs; correct? That's where he was supposed to go.

A. Not necessarily. That's not where a lot of the releases happened.

Q. Well, if he was -- Not where they happen. Where he was supposed to go, would have been downstairs; right?

A. What I'm telling you is I don't know where he was supposed ~~going~~ to go. I'm not a court officer or a judge.

Q. Okay. But in your head, you thought you had to do something, like ask in order for him to go downstairs. Is that right?

A. Because I had seen a lot of individuals released directly out of that glass portion in the courtroom. Yes, upstairs. Released out of the glass portion upstairs. And so I felt I needed to arrange for him to be back downstairs.

Q. Well, but not when ICE was involved; right? I mean, the Lunn policy is specifically addressing people who come in in ICE.

A. Again, I don't know the policy. I had nothing to do with it.

Q. And you told us this morning that you didn't

think it was unusual for you to be able to go downstairs and to speak to your client before being released; correct?

A. No, no. That happens sometimes.

Q. As a matter of fact, he'd been given these drug rights; right? Those hadn't been explained to him.

A. Correct.

Q. As well as the fact that ICE was looking for him; correct?

A. Correct.

Q. So you asked to go to side bar, you went to side bar, and there’s the recording pieces that we heard this morning.

MR. HOOPES: Will you pull that up, please.

Q. And on Page 33 --

A. Could you tell me --

Q. APP033. Page 4.

A. Of which tab?

Q. Tab G.

A. You're on 33?

Q. Yes. At the bottom, it says recording starting at 2:48.

A. Sure.

MR. HOOPES: Okay. If I could just have one moment.

HEARING OFFICER: Do you want APP33 or APP40? I want just to make sure that we're all –

MR. HOOPES: Yup. That's a good point by special counsel. I see. They're double-sided.

HEARING OFFICER: Yup.

MR. HOOPES: Yup. Okay. Thank you.

Q. So in Number 40. Page 40. APP040. Page 40.

A. Okay. Yes.

Q. So they ask you whether or not you want your client up and you said no. You said you're going to side bar.

A. Yes.

Q. You say ICE is convinced that this guy and you say again that you've been through this and you think that there's 13 FBI numbers connected to the Social, something's bad with inaudible, my client denies that it's him. ICE is going to pick him up if he walks out the door, I think the best thing for us to do is to clear the fugitive issue, release him on personal, and hope that he can avoid ICE.

The ADA says I don't think arguing ICE is really my -- you say right, the ADA says my, my, and the Judge Joseph says the other alternative is, if you need more time to figure this out, hold until tomorrow. Right?

A. That's what the transcript says, yes.

Q. Okay. So this comment by you about releasing him on personal met with the response or the alternative is to hold him until tomorrow. Correct?

A. I don't know if it met that response. There are few overlapping conversations. That's what the transcript reads as.

Q. Okay. So you don't doubt the transcript; correct?

A. No. The ~~T~~transcript I don't doubt. Not at all.

HEARING OFFICER: Could I ask that you speak a little bit closer to the microphone.

THE WITNESS: Oh, I apologize.

HEARING OFFICER: Thank you.

A. I agree, the transcript is as it reads.

Q. And then it goes on. ADA Jurgens says there's a detainer attached to my paperwork but I feel like that's separate and apart from what my role

is. Attorney Jellinek says there's an ICE detainer so if he's bailed out from Billerica, ICE will pick him up. And Judge Joseph says ICE is going to get him. You say something. And she says what if we detain him. Right? So she's not responding to any suggestion by you that anything other than detaining him is what she's offering; right?

A. I don't know what was in her mind. I'll tell you that I didn't hear it that way.

Q. Okay. But you, again, you don't know what was in her mind. But that's what's in the transcript; right?

A. That is one way to read the transcript, yes.

Q. But you didn't want that; correct? You didn't want him detained overnight.

A. No. I was advocating for my client.

Q. No. That's not what I asked you. I said you didn't want him detained overnight; right?

A. No. I was advocating for my client. He wanted to be released. That's what I was arguing for.

Q. And so if he had been detained and held overnight, then you would have come back the next day; correct?

A. Possibly.
Q. ICE would have come back the next day; right?
A. Or ICE would have removed him from Billerica that night.
Q. Well, if ICE didn't have him at that point, right, if ICE didn't have him, then they're coming back to court the next day?
A. Right.
Q. Because the fugitive warrant then would be dismissed; right?
A. As far as I understand, yes.
Q. Okay. She could have held him on the fugitive warrant, he could have been there on the warrant, and then come back the next day; right?
A. Yes. Unless ICE picked him up in Billerica that night.
Q. Well, they can't pick him up if he's on a fugitive warrant; right?
A. I don't know.
Q. You don't know the law. Okay.
Now, at that point you say can we go off the record.
A. I believe I asked, as the transcript's stipulated to, are we on the record.
Q. Are we on the record. And from there, you

wanted to go off the record; right?
A. Actually, it was judge Joseph who said can we go off the record.
Q. Well, you said are we on the record.
A. Correct.
Q. And she said can we go off the record. Right?
A. Correct.
Q. Now --
HEARING OFFICER: I'm sorry. But you also said can we go off the record; correct?
A. Later on, yes.
HEARING OFFICER: Later on.
A. Yes. Absolutely.
HEARING OFFICER: Okay.
Q. So you just said now that you didn't understand what it was that she was thinking when she said that; correct?
A. Which part?
Q. The part about let's detain him.
A. No. I did have an inkling as to what she was meaning.
Q. Well, I think that your comment was is that -- And when I asked you, was she agreeing with you, you said you didn't know what she was thinking;

right?
A. I don't know what was in her head. All I know is how I heard what she was saying. I said this is one reading of this transcript and I had a different one in the moment.
Q. So then we have the off the record conversation; correct?
A. Yes.
Q. And two things get raised on the off the record conversation. Right? The first is, you're, again, advocating for him to be released; is that right?
A. Yes.
Q. And you also raised issue of you going downstairs to see your client; right?
A. Yes.
Q. Now, as to the part that has to do with what you said when the tape recording was shut off, that you asked that he be able to go downstairs and be released to the lockup area; correct?
A. That was essentially what I was arguing for, yes.
Q. And under the Lunn policy, that's what was going to happen anyway; correct?
A. I don't know. I was unaware of the policy.

Q. Now, when you spoke to Federal prosecutor the first time on November 1st -- November 8th, 2018, you said that you requested Judge Joseph release him through the lockup area because you thought it was okay for the defendant to be released from the lockup area; correct?

A. Yes.

Q. Okay. Now, you gave a number of different statements over time; correct? You gave -- You were back for three more interviews and one grand jury appearance; correct?

A. Yes, I did. I spoke to them at those times.

Q. And then you spoke to special counsel again in December of 2024; correct?

A. I believe so, yes.

Q. And you told special counsel that there was -- your recollection is that essentially that -- you said to her that -- said to Judge Joseph, that if ICE was waiting out front, you thought it would be best to be released out the back door. Is that correct?

A. Yes. Yes. That is ~~E~~essentially what we were discussing.

Q. Okay. So in other words, you were asking for essentially what was in the ICE policy; correct?

A. Again, I don't -- I didn't know the policy. In my reading of that the way you described it just now is released in the normal course. And I would say the majority of releases in Newton occurred through the courtroom and out of that glass lockup.

Q. Now, just a little bit ago you said that you weren't sure what was in Judge Joseph's mind when you were -- during your conversation with her, with Ms. Jurgens present at side bar; correct?

A. I don't believe you could ever know completely what's in someone else's mind, but I certainly knew or it ~~what~~ felt like it was she was agreeing to.

Q. So when you were interviewed in February of 2012, you said as much as that to Federal authorities -- 2019. I'm sorry. February 12, 2019, Jellinek stated that he had no idea what was in Joseph's mind during and after the side bar conversation in the courtroom. That'd be accurate; right?

A. Yes.

Q. You spoke to special counsel on December 20th, 2024. And when you were asked whether you believed that Judge Joseph understood what was

being said during the side bar, you responded yes. When asked what Judge Joseph did or said that caused him to say that she understood the side bar discussion, you responded, yeah, she said that's what we'll do.

A. Essentially, yes.

Q. And yeah, that's what we'll do is that he'll go down the stairs and be released from downstairs; right?

A. Correct.

Q. Which is exactly conforming with the Lunn policy; correct?

A. Again, I don't know the policy. I don't know how it conforms or doesn't.

Q. Now, at some point right after that, because the matter was only 52 seconds, you went back on the record; correct?

A. Yes.

Q. And when you were on the record, you asked for certain things to be read into the record. She read certain things into the record. Correct?

A. What are you saying I asked to be read into the record?

Q. Well, did you -- You asked her ~~to~~that it be put on the record, sir, that you be allowed to go

downstairs to speak to your client?
A. Yes.
Q. When you were on side bar. Yeah. Okay. So we have this back on the recording at 2:57 p.m. The clerk says, judge, we're back on the record. There's a recitation of everything that's going to happen; right?
A. Yes. That's what the transcript says.
Q. And then at the end there's a section where, a little bit farther down, where the clerk says to her, essentially, ICE is here and would like to take custody. And he says that to her. And she responds, he's released on this, that's okay, but they're not coming in here, essentially; right?
A. Yes. According to the transcript, yes.
Q. And you of anybody is familiar with Newton District Court; right? You know the places that can be accessed to the lockup; right? You can go down the step, come into the main courtroom, and go down the stairs; right?
A. Yes, you can.
Q. You can go around the back and come in through the sallyport; right?
A. I've never gone in that way, but you could.

That's the way prisoners come in.
Q. You can go through probation and go in that way; right?
A. No. There's keycards. I can't. But you could.
Q. But an officer, an officer could.
A. Yes. Sure.
Q. Now, you've told us that you came to the Newton District Court that morning, but you don't know why you were there.
A. I don't remember, no.
Q. At one point you told the grand jury that you believed you had other cases there that day.
A. I believed I do -- I believed I did, yes.
Q. At another point you said that you were there for your own case that day?
A. I thought so, yeah. I believe I was.
Q. And at another point you said that you were there and Medina Perez's friends, the boss, had seen you perform and liked what they saw; correct?
A. Yes.
Q. But the fact is that you didn't perform anything that day. Right? You never were heard in the morning. On any transcript or any audio.

Right?
A. I was shown a transcript that doesn't include anything from me, but I believe I was there and did argue.
Q. So are you saying you think that the transcript is wrong?
A. It could be. My memory is that I was in the court that morning.
Q. Well, at one point you said that you thought that you were there perhaps on the Pamela Hodgkin case, which was on the list that day.
A. Could have been. My understanding is that I didn't inherit that case until a little bit later. And because the way Masscourts work, my name is attached to it now as opposed to then.
Q. Well, were you shown the docket entries for the case that day, for the Hodgkin case, that you filed your appearance the next month?
A. Yes.
Q. Okay. So that you couldn't have been representing her on that day; right?
A. I don't believe so, no.
Q. Now, Ms. Bostwick was there as the bar advocate; correct?

A. That's my understanding, yes.
Q. Well, did you see her there in the morning?
A. I believe I did, yeah.
Q. And where did you have contact with her?
A. I don't believe we had any substantive contact.
Q. Well, where would you have been sitting in the Newton District Court on that day?
A. Typically, if you go through the middle bar area, I sit off to the right, and she was probably sitting over there as well. That's where the defense lawyers tend to sit.
Q. So you would have been somewhere over here.
A. Correct.
Q. And --
A. Usually, I think. Don't remember that date specifically. But yes, that's usually where I sit.
Q. And you would have recognized her and she would have recognized you?
A. Most likely, yes.
Q. And did you talk about this client Medina Perez?
A. Not much, to my memory, no.
Q. And -- Not much. What did you talk about with her?

A. I probably said good morning.
Q. About Medina Perez.
A. I probably didn't even ask her about it until I was approached by his friends.
Q. Well, you told us this morning that you thought you were approached by his friends about 10:30?
A. Yeah, 10:30-11:00 o'clock probably, yeah.
Q. And so when you talked to them, where did you talk to them? Is that inside the courtroom or outside the courtroom?
A. The bBest recollection I have is it was in the back of the courtroom during a break.
Q. And the conversation was that we want you as the lawyer and we'll make some financial arrangements with you.
A. That was to my memory, yes.
Q. And so you would have completed that discussion by what time?
A. I really don't remember. 11:00, 11:15.
Q. And did you tell Ms. Bostwick that you had been retained at 11:00, 11:15?
A. Yes.
Q. You did.
A. I did.
Q. And where did you tell her that you had been

retained at 11:00, 11:15?
A. I don't remember. Probably in the courtroom.
Q. And after you told her that you had been retained at 11:00, 11:15, why did she keep on working on the case?
A. Maybe it was later. I don't remember the exact time.
Q. So maybe 11:00 isn't correct. Maybe it was later than 11:00.
A. Might have been closer to 12:00. I don't remember her last appearance when she stood up last on the case.
Q. If she was still working on the case after 12:00, and you had been retained, why would she do that?
A. She wouldn't. I don't remember the exact time I was retained.
Q. So are you sure you were there in the morning, sir?
A. To the best of my memory, I was there in the morning, yes.
Q. Okay. Well, to the best of your memory. So you're saying that it's possible that you weren't there in the morning.
A. I know I was there before the lunch break,

which qualifies to me as the morning. I don't remember if I got in at 9:00, 9:30, but it was in the morning.

Q. Well -- So the lunch break was about 12:45 or so.

A. Correct.

Q. And so you're saying you were there before 12:45.

A. Yes.

Q. And you spoke with Ms. Bostwick before 12:45.

A. It's entirely possible at the break I'm remembering when they hired me was the beginning of lunch break and I talked to her during the lunch break. Like I said, I don't remember the specific timing. They approached me during a break in the session.

Q. So Ms. Bostwick left and went to a doctor's appointment at 12:45, and they set the case down for her to come back a little bit late. So at 12:45 she couldn't have known that you were on the case; right?

A. If that's what you say the order of events was, sure.

Q. So in fact, you weren't there before let's say 12:30; right?

A. Again, I think I was there, and I think that's why his friends approached me, because I made an argument. To the best of my memory, I was there making argument that morning.

Q. So if there's nothing on the transcript that says you were there in the morning, and Ms. Bostwick has no memory of you being there in the morning, why do you remember you were there in the morning?

A. That's my memory.

Q. Well, if you didn't get to represent Medina Perez because they saw your work because you're nowhere on the transcript and you don't have any cases for that day, how is it that these people got to you of all people?

A. You'd have to ask them. I don't know.

Q. Well, no. You've already told us that -- you say they liked the way I dealt with ~~thc~~a prior case. There was no prior case for you.

A. My memory is there was.

Q. But again, why you, sir? Meaning, you weren't the only lawyer who was standing up on cases that day; right?

A. Probably not.

Q. There were other lawyers, good lawyers.

Arthur Kelly was there; correct?
A. I don't remember if he was there or not, but he's a good lawyer.
Q. And so if they had asked around and said who's a good lawyer, we don't like this bar advocate, why you?
A. I don't know. I would have told them to hire Arthur Kelly.
Q. Well, they came to you, and you didn't tell them to hire Arthur Kelly, did you?
A. ~~They~~He had gone by that point, if I remember right. And they asked for me, so I said sure, I'll represent him. Said I think you've got a really good lawyer, I wouldn't do anything about it, can't change the situation, but if you want to, you can hire me.
Q. Well, you certainly could have given Arthur Kelly's number and ~~they~~he could have come back; right?
A. Sure.
Q. But you're firm with the hearing officer, that they approached you; right?
A. Yes.
Q. And are you firm that nobody pointed him in your direction?

A. Not to my knowledge, no.
Q. Do you think Mr. MacGregor pointed him in your direction?
A. I don't believe so, no.
Q. So tell us, your office is about seven- to nine-minute drive --
A. Yes.
Q. -- from the courthouse; right?
A. Yes.
Q. It's right there in Newton; --
A. Yes.
Q. -- right? Somebody picks up the phone, you're in your office, you're in court seven minutes later.
A. Yeah. Depending on whether I have to put a tie on or not. Absolutely.
Q. And so you want to leave it with the hearing officer in the hearing that they picked you for some reason that you don't know, because you weren't working that day, you didn't have any cases on that day, you weren't on any transcript for that day, it's just random that they got to you.
A. No. That's not -- everything I said is accurate.
Q. So what's not accurate?

A. It was multiple things you said there. And I was working that morning. I just don't remember exactly what case I was on.

Q. Well -- So you told Federal authorities you carry an iPad; correct?

A. Yes.

Q. And you have a habit of writing on it or doodling on it when you're in court; correct?

A. I don't doodle on it, but I write on it, yeah.

Q. And they knew that you had an iPad, right, because you told them?

A. Yes.

Q. And did any Federal authority ask~~ed~~ to see your iPad?

A. Not that I remember, no.

Q. To check whether or not you're telling the truth about whether you were there in the morning or not?

A. They did not ask, no.

Q. To tell us whether -- To help tell whether you're telling the truth about how you got the case?

A. I didn't hear -- Is -- What's the question?

Q. The question is, you didn't offer to show your

iPad to anybody, nobody checked on it; correct?
A. Nobody checked on it, no.
Q. So when the boss, when the boss of -- How did you know he was the boss of Mr. Medina?
A. He told me he was his employer.
Q. He was his employer. Did he tell you what company that was?
A. I don't remember.
Q. But when he said he was going to hire you, you demanded that there be some sort of fee arrangement; correct?
A. Well, ethically you have to have some agreement before you represent someone. He had all the documents for Mr. Medina Perez, so I said, yeah, I'll represent him, but we're going to need some kind of agreement going forward.
Q. Yup. And as a matter of fact, you wouldn't -- you said you wouldn't represent this individual unless you got paid; right?
A. Generally, that's how private counsel works, yes.
Q. Yeah. Well, you weren't doing it because you were in service of some cause; right? You were doing it because you were going to get paid.
A. Yes.

Q. And of all the people who were representing Mr. Medina Perez that day, which is only two of you, Ms. Bostwick was court-appointed, and so she was going to get $53 an hour, but you were the guy that got a thousand dollars for three hours work. Right?

A. I don't remember if it was three. Could have been four.

Q. You're the one that got the thousand dollars; right?

A. Yes.

Q. Now, you told special counsel you couldn't remember if you signed a fee agreement with them at the time or left that until another day.

A. Correct.

Q. That's kind of ridiculous, isn't it? I mean, were you carrying fee agreements with you in your pocket?

A. Generally don't carry them. But I sometimes I have one available on my iPad that I could have shown them. But I didn't that day.

Q. Well, if it's available on your iPad, then it's always on your iPad; right?

A. No. Sometimes I have blank ones that I leave like in a desktop location I could get to

easily, but I didn't have one with me that day that they could sign.

Q. Now, if you arrived there at whatever time you arrived, you were hired, you got the documents, you reviewed them, and you spoke again with his employer, did you ever, did you ever meet with Medina Perez that morning?

A. Yes.

Q. What time?

A. I don't remember.

Q. Well --

A. Probably just before the lunch break or during the lunch break.

Q. And that would have been -- You don't speak Spanish; right?

A. No.

Q. And that would have been you and the interpreter; right?

A. To the best of my recollection, yes.

Q. So you would have met Medina Perez with the interpreter by going downstairs; correct?

A. It's possible we had a brief conversation in the lockup upstairs. I don't remember the details of my first conversation with Mr. Medina Perez.

Q. But you would have had the interpreter there with you.

A. To my memory, yes. It's possible he knew enough English to say minor things to me. It's possible that I understood most of it from his friends at that point and what the assignment was.

Q. Now, you've told various people at various times that you got the paperwork related to Medina Perez from different people. From the ADA.

A. Yes.

Q. From the court clerk.

A. Yes.

Q. And from the probation officer.

A. Yes. Probably with Gloria.

Q. And also, you got material from Ms. Bostwick.

A. Yes.

Q. Now, you knew ICE was in the building.

A. Yes.

Q. And you had heard -- You would have heard Judge Joseph say no ICE in the courtroom during the morning session; right?

A. I believe so, yes.

Q. So would it surprise you to note that the whole

transcript has been reviewed and never a word from Judge Joseph about that in the morning?

A. As I said, it was my memory. It might have been the clerk. It might have been someone else that told me.

Q. Instead of putting it on the record, somebody told you.

A. Again, I said I don't remember exactly how I found that out that morning.

Q. Now, when you spoke to MacGregor, that was just before -- it was during the lunch break; right?

A. When I spoke to him substantively about this, yes, that was during the lunch break.

Q. And was ICE in the courtroom when that happened?

A. No, they were not.

Q. Now, you know that the ICE agent says he didn't see you there in the morning at all.

A. I don't know that, no.

Q. Well, either you're correct or the ICE agent is incorrect. Either you were there or you just told us a half a dozen stories. Which is it?

A. I don't think I follow your question. I don't believe it's answerable.

JUDGE FABRICANT: The witness said he didn't know what the ICE agent said

about this, so I have to object to the question.

HEARING OFFICER: If you could rephrase the question, please.

Q. You're saying to us that – So, let me phrase it a different way. You've recounted a story about what happened between you and MacGregor that nobody witnessed, just the two of you; right?

A. Yes.

Q. And you're recounted a story about what happened on the off the record conversation for those 52 seconds; correct?

A. Yes.

Q. So are you as sure about the fact that you were there in the morning as you are about those other two things, what MacGregor said?

A. Well, let me answer it this way. I believe I was there in the morning. I know the transcript doesn't show that. So I don't know what you're getting at and what your theory is as to how or why I got there. But I know that day I was there, for some reason, whether I was advancing a case or arguing something, and they approached me during a break. That's all I remember.

Q. Well, no. The point is, is that -- I guess my question is, are you making up the fact that you

were there in the morning or not?
A. As I said, to the best of my recollection, I was there in the morning.
Q. So it's possible your recollection is not correct.
A. Of course.
Q. Of course.
A. Yeah, of course. It's eight years ago.
Q. Well, it's been -- It's eight years ago when you first spoke to Federal authorities. And memories tend to disintegrate quickly. We know that from the most recent research; correct?
A. I don't know what we know as a community. I know that the defense bar knows what memories tend to do and become unreliable over time.
Q. And that may have happened to you.
A. Can happen to anybody. Of course.
Q. But that may have happened to you.
A. As I just said, it could happen to anybody. Of course.
Q. That may have happened to you, too.
A. Could happen to anyone. Of course. It could happen to ~~you~~me. It could happen to you.
MR. HOOPES: Can I just have a moment, Your Honor?

(PAUSE)

Q. So Mr. Jellinek, you said I think on questions from special counsel that you were trying to protect the judge; is that right?

A. That was part of my motivation to go off the record or to attempt to go off the record, yes.

Q. But the DA was there to protect the judge; correct?

A. I don't know -- No. The DA's there to prosecute.

Q. Well, but the DA was hearing everything that was being said; right?

A. Again, I don't know what the DA heard..

Q. And when you went down to talk to Judge Heffernan the next morning, it was the same issue, which is, you weren't trying to protect anybody when you went to see her except yourself. You weren't trying to protect the judge. Correct?

A. No, that's not my motivation. That wasn't my motivation to talk to Judge Heffernan. It was to tell her what happened.

Q. But you didn't tell her everything that happened; correct?

A. No. I didn't spend 20 minutes talking to

her, no.
Q. So let's go back to your first interview with Federal authorities on November 8th. You say that you requested that the judge release Medina Perez through the lockup area because you thought it was okay for a defendant to be released from the lockup area; correct?
A. I thought it had happened and it was okay for it to happen, yes.
Q. And you didn't give them anything that she said back at that point. She made no statement back to you; correct?
A. I'm sorry. I don't follow the question.
Q. She didn't make any statement one way or another.
A. Who would --
Q. Judge Joseph.
A. At what time?
Q. At that time. Right? So you're talking to Federal authorities.
A. Yes.
Q. And you said to them, I asked her -- specifically, you requested that Judge Joseph release Medina Perez through the lockup area because you thought it was okay for defendant to

be released from the lockup area. That's what you said; right?

A. I believe so, yes.

Q. Yeah. And you gave no response from Judge Joseph; correct?

A. If it's not in my notes, I probably didn't. But I might have said something. I don't know.

Q. If it's not in the notes, then you didn't say it.

A. Well, no, that's not quite what I said. I may have said something but it's not in their notes. That's a different statement.

Q. Oh, so if you said something -- You may have said something but they didn't put it in their notes.

A. Correct.

Q. Well, they would be interested, would they not, in whatever Judge Joseph had to say in response? Correct?

A. I don't know what they were interested in at that point.

Q. So if you had said to them that she responded in some affirmative way that signaled that she was fine with him going out the back door, they would have put that in the notes, don't you

think?
A. They also would have probably asked me directly, and I don't remember that they asked me directly either. I don't think that's in the notes either. I think what is in the notes is parts of a full conversation.
MR. HOOPES: That's all I have at this time. Thank you.
HEARING OFFICER: Special Counsel, do you have follow up?
JUDGE FABRICANT: Yes, please.
REDIRECT EXAMINATION
BY JUDGE FABRICANT:
Q. Mr. Jellinek, I want to turn to the immunity letter.
JUDGE FABRICANT: And can you bring back up...
A. Which tab?
Q. It's not in the appendix, but Mr. Neff will post it on the monitor.
A. Sure.
JUDGE FABRICANT: And while he's setting that up, Mr. McInerney, I'm going to want to offer this in evidence. I don't have a clean copy of it right now. I will have a

clean copy of it tomorrow. So unless there's objection, I'd like to bring it in tomorrow and offer it in evidence.

HEARING OFFICER: That's fine. I see there's no objection.

MR. HOOPES: None.

JUDGE FABRICANT: And that would be both the immunity letter and the proffer letter.

HEARING OFFICER: That's fine.

Q. What we have on the screen now is the immunity letter. Mr. Jellinek, can you see it?

A. Yes.

Q. So I'd like to call your attention to numbered Paragraph 1. Mr. Hoopes read part of it. I'd like to read all of the sentence that begins: He must not attempt to. Do you see that? It starts around the middle of --

A. Yes.

Q. -- the line.

(Reading) He must not attempt to protect any person or entity through false information or omission or, -- and this is the part that Mr. Hoopes did not read -- or to implicate falsely a person or entity. Do you see that?

A. I do.
Q. Did you attempt to implicate falsely any person or entity?
A. No.
Q. Did you tell the truth to the grand jury?
A. Yes.
Q. And did you tell the truth to the U.S attorney in your interviews with them?
A. Yes.
Q. And when you spoke with me on December 20th, and Mr. Neff was there, did you talk a little bit about -- did you say that the only reason you could think of that you would have hedged on your answers to the prosecutor during that meeting was you did not have immunity?
A. Correct.
Q. And did you add that you did not remember ever having a different memory from what was in the transcript of your grand jury testimony?
A. Correct.
Q. And did that have anything to do with whether you were paid in cash or by check?
A. No.
Q. Did you go on to say -- Mr. Dunn explained that the immunity -- Did you go on to say that the

immunity made you more comfortable, but you do not think it changed anything about what you remember?

A. That's correct.

Q. Now, this event happened on April 2nd of 2018; correct?

A. Yes.

Q. So that's now a little more than seven years ago.

A. (Witness nods head).

Q. So in that time, have certain aspects of your memory faded?

A. Of course. Yes.

Q. The matters that were the focus of your grand jury testimony, that is what happened at side bar, what happened off the record, your conversation with Mr. MacGregor, and your client going out the back, has your memory changed about that?

A. No.

Q. And let's turn to your role in representing your client there that day. Tell us what you viewed as your role.

A. I viewed my role that day like I do all the time. It's to, as zealously as possible,

advocate for my client.

Q. And what in particular were you trying to accomplish?

A. On that day, he was adamant that it wasn't him, he was adamant that this person they were attempting to detain through immigration was not him, as I said, his boss or his friend were viably with a birth certificate that appeared authentic, and the ICE paperwork was not a judicial warrant, it was an administrative warrant directed to Newton, that had no biometric data that linked it to the gentleman in custody. So at that time my job was to try to get him out of custody and away from anything that might endanger him.

Q. So when the judge made suggestions about detaining him, did that, in your view, serve purposes you were trying to serve?

A. It implied that she understood the problem, but not fully, because that did not serve the purpose I was trying to achieve.

Q. Did you think that you had an obligation to tell anybody other than the judge what your approach was to in trying to achieve your purpose?

A. No. In fact, I think it's the opposite. I

think I shouldn't be telling anybody else, like the prosecutor, what my approach was going to be.

Q. And if you told the prosecutor before this side bar conference, before the off the record conference, what did you think might happen?

A. I imagine that ICE would put one person down by the lockup and one person up in front of the building.

Q. And if you talked around the courthouse about it, the clerk's office or in probation or anywhere else, what do you think would happen?

A. The same. That ICE would be more prepared to get him.

Q. As a lawyer representing clients, is it your practice to talk about your strategy in general?

A. No.

Q. Did you think that what you were doing that day was a crime?

A. No.

Q. Do you think so now?

A. No.

Q. You did say earlier, though, that you thought it was on the edge of ethical.

A. Yes. And, you know, Federal indictment makes

you think that some of the things you've done might be on the edge of ethical and legal.

Q. And do you still think it was on the edge of ethical?

A. Absolutely.

Q. You told us about a series of conversations with the ICE officer, the assistant district attorney, court officer MacGregor. Can you try to put those in sequence?

A. My initial conversation would have been with the district attorney to get the paperwork together, and at that point she probably said something like I'm investigating whether this is really him. I believe the transcript reflects that she did mention on the record she wasn't sure if she was investigating him. I believe I got the paperwork from Ms. Bostwick. So my conversation probably would have been with the ADA, then with Ms. Bostwick, and then I would have checked in with the ADA, I would have spoken to probation to get the Triple I, I believe I got permission from the ICE to do that, and review it in the courtroom, and then I would have spoken with Officer MacGregor during the lunch break after I reviewed the Triple I.

Q. So you think that was the sequence.
A. Yes.
Q. Assistant district attorney, Ms. Bostwick, the ICE officer, and Officer MacGregor.
A. Well, yeah. And probation in between to get the documents.
Q. To get the Triple I.
A. Yes.
Q. You made reference earlier to a CORI. What's a CORI?
A. A CORI is a Massachusetts, criminal record.
Q. A Massachusetts, criminal record.
A. Yes.
Q. And you get that from probation.
A. Yes.
Q. When you spoke with Judge Heffernan the next day, what did you think she already knew?
A. I don't know what she already knew and what she was thinking. I know that, when I went in, it was a very brief conversation, and the implication I got was that she understood everything that happened, I had given her a full briefing, and I was okay and to go away.
Q. Did she seem willing to spend more time with you that morning?

A. Not that morning, no.
Q. On May 29th, so that would have been the next date, the date for pretrial conference in the case, you told us earlier that Mr. Medina Perez didn't show up.
A. Correct.
Q. Did you know where he was?
A. No.
Q. Did you know whether he was or wasn't in ICE custody?
A. I did not.
Q. And I'm not asking you the substance of any communications you had with him, but had you had communication with him in the interim?
A. Not to my knowledge, no. And one of the Problems that I had to deal with that day was ICE doesn't always tell you where they are, how to get them back to court.
Q. When you go to lockup to talk with your client, if you have a client in custody, how do you get there?
A. Usually I would say 99 percent of the time you go to the court officer's station next to the glass box and then they open the door and let you go downstairs. Usually they radio down

and say attorney coming down.

Q. You said 99 percent of the time. So what would be the other percent?

A. I've had some major knee surgeries, and there were times I couldn't get down those stairs. So there is a way to get into the lockup through probation, and occasionally I had to take the elevator and ask to be let in through probation and escorted into lockup.

Q. And would that still require a court officer to let you in?

A. Absolutely. Yes. Someone -- The probation department has to let you in probation and the court officer would have to meet you at the back and unlock that door.

JUDGE FABRICANT: All right. That's all I have. Thank you.

HEARING OFFICER: Anything further, Mr. Hoopes?

MR. HOOPES: Just a little bit, if I may.

RE-CROSS EXAMINATION

BY MR. HOOPES:

Q. So three things, if I can. So go back, sir, and talk a little bit about what was in -- what you

thought was in Judge Joseph's mind. Right?
When you first spoke to the Federal authorities about that issue, it was the February 12th, 2019 interview. And you said, and I'm quoting you, Jellinek stated that he had no idea what was in Judge Joseph's mind during and after the side bar conversation in the courtroom.
A. Again, that's correct. I did not know what was in her mind. I only knew what my reading of statements ~~of~~[inaudible] the implications were. I had made inferences.
Q. So that was in February of 2019; right?
A. Yes.
Q. So if we advance from 2019 to 2020, '21, '22, '23, when you spoke to special counsel in December of 2024, you said, and I'm quoting, when asked whether he believed Judge Joseph understood what was being said at side bar, Mr. Jellinek responded yes.
A. That's correct.
Q. And you had no idea what was in --
JUDGE FABRICANT: Can he finish his answer, please?
A. I made an inference, yes, that I understood her intent.

Q. So when asked what Judge Joseph did or said that caused him to say that she understood the side bar discussion, Mr. Jellinek responded, she said, yeah, that's what we'll do. That's what you told…

A. That's correct.

Q. ~~Question by~~ special counsel; right?

A. Yes.

Q. Okay. And you were asked about that same topic in 2019, six years prior, you never said, yeah, that's what we'll do. You never quoted a single word from her in response; right?

A. I don't remember saying -- I don't remember the details of the meeting. If that's what the report from the FBI said, as I said earlier, I believe those are fragments of our conversations. The whole thing may have been slightly different. But if that's what it says there, then you can read that.

Q. Now, the second point is what you said to her. So in your very first interview, November 8th, 2018, with Federal authorities. You requested that Judge Joseph release Medina Perez through the lockup area because you thought it was okay to be released from the lockup area. Is that correct?

A. I got a little lost in your question. But yes, I believe it was okay to be released from the lockup area.

Q. And as we've discussed today, being released from the lockup area was the place that they were supposed to take him, into the lockup; right?

A. Again, I don't know that policy. My reading of the paragraph you put up is that he should be released in the normal course. In Newton, that would be up through the glass box on the first floor.

Q. But you testified in front of the grand jury on January 24th, 2019. You said that you thought that Medina Perez could be released out the back door if he was received from downstairs.

A. That's correct.

Q. You never said that in your first interview in November; correct?

A. I don't remember what I did or didn't say. I said that in that interview. I don't remember every detail of the interview, but they may not have written down every single word that I said.

Q. You didn't say anything in the second interview on January 14th; correct?

A. Again, same answer. I don't have a specific memory of everything, what was said every word for word. I do think I said it at some point. It may not be in their notes.

Q. You just think that the Federal authorities who were investigating the case missed something that you said that was reported.

A. They may have. I don't know.

Q. So you remain practicing in Newton District Court; correct?

A. Yes.

Q. And you knew that Mr. MacGregor had been called to the grand jury; correct?

A. I found that out at some point, yes.

Q. And that he continued working for some period of time.

A. Yes.

Q. And you'd see him almost every time you came over to Newton; correct?

A. I don't remember exactly when he left Newton, but I saw him a number of times after that day.

Q. Until he left.

A. Yes.

Q. And did you tell him that you were in talking to Federal authorities in November?

A. I don't believe I told him that, no.
Q. Did you tell him you were in talking with Federal authorities in January?
A. No, I don't believe I said that.
Q. Did you tell him you testified in front of the grand jury?
A. No, I don't believe I told him that.
Q. Did you tell him that you were interviewed again by Federal authorities in February?
A. Not to my memory, no.
Q. How about March; did you tell him you were in for the last time in March of 2019?
A. I don't believe I told him. I don't remember.
Q. But there was a retirement party for Mr. MacGregor in the spring, right after your last testimony; correct?
A. I don't know the timing of it. I know there was a retirement, yes.
Q. And you were there.
A. I believe I was.
Q. You were there, shook his hand. Do you remember that?
A. I might have been. Was it at the courthouse or was it at a different location?

Q. Courthouse.
A. I probably was in the courthouse, yes.
Q. And you didn't say anything to him then.
A. I don't remember, no.
MR. HOOPES: No other questions. Thank you.
JUDGE FABRICANT: Nothing further. Thank you.
HEARING OFFICER: If I may, I just have a couple clarifying questions.
Sir, if you -- I'll just read it to you. I'm sure you remember it. From the transcript. It APP043. This is after the off the record conversation that Clerk Okstein says, quote, there is a representative from ICE here in the court inaudible to, to visit the lockup. Judge Joseph, that's fine, I'm not going to allow them to come in here but he's been released on this.
I believe you testified that your understanding from that was that ICE would remain upstairs.
A. Yes.
HEARING OFFICER: What's -- Could you explain that to me.

A. By saying that I'm not going to allow them to come in here, I understood that to mean within the courtroom and within the lockup, because that's sort of one space, versus the lobby, which is another space.

HEARING OFFICER: But they were specifically being -- asking to visit the lockup, and she said that's fine.

A. I don't believe the "that's fine" refers to them visiting the lockup.

HEARING OFFICER: Okay. Just so I'm clear, the language, again, is Clerk Okstein saying that there's a representative from ICE here in the court inaudible to, to visit the lockup. Judge Joseph, that's fine, I'm not going to allow them to come in here, but he's been released on this.

A. If that's what the transcript says, that might be what she meant. That's not what I interpreted.

HEARING OFFICER: Okay. You interpreted it to mean that the ICE people should stay upstairs in the lobby --

A. Yes.

HEARING OFFICER: -- of the

courthouse.
A. Yes.
HEARING OFFICER: Okay. The other thing is, on April 3rd, when you were speaking to Judge Heffernan, I believe you said that you thought that she knew what had happened -- that you thought that she should know what happened, and I think you said something to the effect particularly with respect to the ADA.
A. Yes.
HEARING OFFICER: Could you explain that.
A. Sure. The ADA has to be in front of the judge every day in that court. And the ADA was upset by the way things had happened the day before, and I thought the judge should know that someone in her courtroom had been aggrieved and she'd have to see that person that day.
HEARING OFFICER: The ADA had been aggrieved?
A. Yes.
HEARING OFFICER: Did you explain how the ADA had been aggrieved?
A. Not in any great detail, no.

HEARING OFFICER: In any detail? There was no --

A. If my memory's right, I said ADA Jurgens was upset yesterday, ICE got mad at her, and she was upset, I thought you should know about it.

HEARING OFFICER: And she didn't ask what was she upset about?

A. No, not to my memory.

HEARING OFFICER: Okay. And by the way, Mr. Medina Perez, he had property in the lockup area.

A. Yes, he did. I believe he did.

HEARING OFFICER: Okay. And finally, were you aware of the special Rule 211 that said you should not be going off the record?

A. Not at that time, no, I wasn't aware that we were not allowed to go off the record.

HEARING OFFICER: Anything further, Counsel?

JUDGE FABRICANT: Nothing further. Thank you.

MR. HOOPES: Nothing.

JUDGE FABRICANT: May this witness be excused?

HEARING OFFICER: Yes. Thank you.

JUDGE FABRICANT: And I'm sorry to say, we don't have our next witness present, because Mr. Hoopes was more efficient than we predicted.

So we will try very hard to have Ms. McDermott here at 10:00 tomorrow morning. As you know, we are scheduled to have Mr. Mendoza on Zoom at 11:00. We had asked Ms. McDermott to come at 2:00, but we'll try to get that moved up to 10:00.

HEARING OFFICER: Okay. That would be very good, if you could.

MR. KEATING: 9:00?

HEARING OFFICER: No. We're on for 10:00 tomorrow. Normally we'll be starting at 9:00, but tomorrow we're starting at 10:00.

So with that, we're adjourned. Thank you All.

(The proceedings adjourned at 3:07 p.m.)

Exhibit 8

COMMONWEALTH OF MASSACHUSETTS

COMMISSION ON JUDICIAL CONDUCT

COMPLAINT NUMBER 2019-22

VOLUME II

HEARING

~ BEFORE ~

HEARING OFFICER

DENIS J. McINERNEY, ESQ.

JUNE 10, 2025

10:00 A.M.

Boston, Massachusetts

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

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THE HEARING OFFICER: Good morning Everybody. We're on the record.

My name is Denis McInerney. I'm the hearing officer in this matter.

We're here in connection with the Commission on Judicial Conduct's Complaint Number 2019-22 against Judge Joseph.

Yesterday we had a viewing at the Newton District Courthouse first thing in the morning, and then we resumed here at the Suffolk County Courthouse for opening statements and testimony.

At the beginning, I would like to ask both parties, to have counsel identify themselves for the record, please.

JUDGE FABRICANT: Judith Fabricant, special counsel for the Commission on Judicial Conduct.

MS. MULVEY: Elizabeth Mulvey for Judge Joseph.

MR. HOOPES: Tom Hoopes for Judge Joseph.

MR. KEATING: Michael Keating for Judge Joseph.

MR. NEFF: And Howard Neff for

the Commission on Judicial Conduct.

HEARING OFFICER. Thank you.

So, with that, we concluded at 3:00 yesterday with the first witness, and I'll ask special counsel to call the next witness.

JUDGE FABRICANT: All right. And I'm about to do that.

I'd like to just offer the document that we referred to late in the day yesterday, the proffer letter and the immunity agreement, and I'd like to hand up -- So I have a copy ready for marking and a copy with holes punched in case you want to put it in your binder. And if you would like to have it in the electronic form, we can certainly send that.

HEARING OFFICER: Great. Thank you very much.

No objection?

MR. HOOPES: No.

HEARING OFFICER: Thank you.

You're good.

JUDGE FABRICANT~~MR. HOOPES~~: And with that, the Commission calls Shannon Jurgens.

JUDGE FABRICANT: And Mr. McInerney, I just want to again ask your

permission. We have the next witness ready on Zoom, which we expect to have ready on Zoom at 11:00. And if he's ready at 11:00, we'll want to interrupt this witness.

HEARING OFFICER: Yes.

MS. MULVEY: That's fine.

HEARING OFFICER: Yes.

JUDGE FABRICANT: Thank you.

DIRECT EXAMINATION

BY JUDGE FABRICANT:

Q. Good morning.

A. Morning.

Q. Please state your name.

A. Shannon McDermott.

Q. And Ms. McDermott, please tell us your professional background.

A. I started as an assistant district attorney in 2015 for the Middlesex County DA's office, where I worked for four years, then in September of 2019, I worked at Keney & Sams, a small office in Boston, until March of 2020, then I went to the Suffolk District Attorney's office, and then in May of 2021 I became an assistant clerk magistrate at Malden District Court, which I still am today.

Q. I'm going to ask you a lot of questions about April of 2018. And I know that that's nearly -- actually, it's a little more than seven years ago, so it's challenging to take your mind back to that time, but that's what I need to ask you to do.

As of April 2nd of 2018, what was your position?

A. I was the only district attorney at the Newton District Court.

Q. In that capacity, did you have a title of supervisor?

A. Yes.

Q. And what was your role? What did you do?

A. So as I said, I was the only assistant district attorney in Newton District Court, so I was assigned to prosecute all of the cases that came through that courthouse, supervise myself, and the victim witness advocate, and then there was one, you know, staff, support staff that helped as well. That was really our whole office there.

Q. So were you in the courtroom every day?

A. Yes.

Q. And every time a case was called before the

court, were you the person standing up?
A. Yes.
Q. Where was your office?
A. My office was in the Newton Police Station, which the building is connected to the Newton District Court. I was on the second floor, which is within the detective bureau.
Q. Was there another office in the courthouse associated with the district attorney's office?
A. Yes.
Q. Who used that office?
A. The victim witness advocate.
Q. Did you ever work in that office?
A. I did not.
Q. As of April 2nd of 2018, how long had you been in that role in the Newton District court?
A. I believe I went to Newton in March, so about a month, a few weeks.
Q. About how many arrests were there in the Newton District Court? Say, how many a week?
A. Not many. Not many at all. Five, maybe, would be average. I guess I could bring it up to 10, but I think that would have been rare. Just roughly. My best guess.
Q. When in court you worked in, not regular.

A. Exactly.
Q. Did you have occasion to deal with ICE detainers?
A. Yes.
Q. And what was the practice about ICE detainers, about the paperwork, who would get it, when, how?
A. There is a couple ways. Sometimes I would get it when I got the packet in the morning from the police department, the police prosecutor, with the new arrests for that day, sometimes it would be in it, sometimes I know it gets sent to the clerk's office, so sometimes I would get it from them. There was a couple of different ways that I could have obtained that paperwork.
Q. Would it be something that you would get?
A. Yes, yes, at that time.
Q. And were you aware of, in the course of the day, who else would get it, who else would have it?
A. I know that the clerk's office got it and that it was always something given to the security department, the court officer. I don't know who else got it.
Q. When you're in the courtroom in Newton, where do you sit or stand?

A. Well, the main courtroom, as you walk in, there's a left -- there's a table on the left, table on the right, and mine was on the left.

Q. And let's bring up the Photograph 509, which was received in evidence yesterday.

Okay. So you see the photograph on the monitor. And can you just indicate on the photograph where would be your place?

A. I think I was on the left.

Q. Okay. And what is -- If you're on the left, at that chair and table, what's immediately to your left?

A. With the glass?

Q. Yes.

A. That would be the dock, we call it, where a custody comes up from lockup.

Q. So a person in custody would be in that dock.

A. Correct. Now that I'm looking at this, I could have been in the left or right chair. I don't remember.

Q. Do you see in the glass in the dock something that looks like a metal circle?

A. Yes.

Q. What is that?

A. I don't know if it was a speaker or if it was

amplified it all. I can't remember. But it was just a way for the person in the dock to hear better in that area.

Q. And if an interpreter was helping a defendant in the dock, where would the interpreter stand?

A. They would be outside along, you know, that small alleyway on the left talking through that metal piece.

Q. So when you say "outside," you mean outside the dock?

A. Correct.

Q. And talking through that metal piece?

A. Correct.

Q. Again, taking your mind back to April of 2018. When a defendant was in custody and was then released from custody, how would that happen?

A. If they were going to be released, the court officer, who -- you can't see it, but there would be a little seat to the left outside the photo where there's a court officer seat, and they would just unlock the door to the dock and they would walk right out.

JUDGE FABRICANT: Let's bring up photo Number 513, Page 513.

Q. Does this show what you were just talking about?

A. Yes.
Q. And was what you can see, the piece of furniture that you can see on the left, is that the court officer's station that you're talking about?
A. Yes.
Q. And the door that you can see there that looks like it's slightly ajar in the photo, is that the door that you were talking about?
A. Yes.
Q. And, so you said the court officer would go in there and take off~~pick up~~ the restraints and ~~would~~ the person would just come out?
A. Yes.
Q. And then when the person's leaving the courtroom, how does the person leave the courtroom?
A. There is a door in the back of the courtroom.
JUDGE FABRICANT: And why don't we bring up -- We'll get to the photograph that shows that. There it is. And what number is this?
Q. All right. So this is numbered Page 512 of the appendix. Does this show the door that you're referring to?
A. Yes.

Q. And Photograph 509 was already received in evidence yesterday. Photograph 513 and 512, do those fairly and accurately depict what you described?

A. Yes.

JUDGE FABRICANT: And I offer those in evidence.

HEARING OFFICER: Any objection?

MS. MULVEY: No objection.

Q. What if a defendant had property downstairs? And what ~~W~~we're talking now about a defendant who doesn't have to go check in with probation, doesn't need the bail posted, is being released. What is the property -- How would the defendant get the property?

A. My best memory is one of the court officers would just run it up to them.

Q. On that date, April 2nd of 2018, I want to draw your attention to a case involving a Mr. Medina Perez. Do you remember the charges?

A. Yes.

Q. What were the charges?

A. There was a possession of a drug charge, I think it was B, but I don't remember, and a fugitive from justice charge.

Q. And what's a fugitive from justice charge?

A. It's a mechanism to kind of hold somebody when they have an out of state warrant, so the language of the charge is fugitive from justice from X state for Y charges.

Q. So it's a Massachusetts criminal charge for the purpose of effectuating a warrant from another state.

A. Correct.

Q. On that day, with respect to Mr. Medina Perez, you said he had a drug charge and a fugitive from justice charge. Were you also aware of an ICE detainer?

A. Yes.

Q. And was there an ICE officer in the courtroom for part of the day?

A. Yes. At some point they arrived.

Q. And did you speak with him?

A. Yes, at some point.

Q. And did he show you a photograph or a video or something to that effect?

A. I don't remember a video. He had paperwork that he showed me.

Q. Okay. Did you notify others of the presence of ICE and the detainer?

A. I'm sure I mentioned the detainer. I don't

know whether I told others about the ICE officer or not. There wasn't very many people there.

Q. Did you become aware at some point in the course of the day that the ICE officer left the courtroom?

A. Yes.

Q. And do you know what caused the ICE officer to leave the courtroom?

A. My understanding is he was asked to wait outside.

Q. Do you know who asked him to wait outside?

A. I think it was the judge asked someone to ask him. I don't remember exactly how it happened, I guess is my answer.

Q. Do you know where he went?

A. I think he just went right in the hallway.

Q. In the hallway, the main lobby of the courthouse?

A. Correct.

Q. Was the case called, the Medina Perez case called a number of times over the course of the day.--

A. Yes.

(INTERRUPTION)

HEARING OFFICER: Okay. It's not playing anymore; so... go ahead.

JUDGE FABRICANT: Okay.

Q. So the case was called a number of times over the course of the day?

A. Yes.

Q. And was it then put on for further call?

A. Several times, yes.

Q. And during the course of the morning, what information did you have about the Pennsylvania warrant?

A. I knew that it was not -- I guess Pennsylvania OUI/DUI charge. I'm sure I had a piece of paper reflecting that. I don't remember what other supporting documents I had for that.

Q. Did you at some point in the morning inform the court that you were going to ask to detain the defendant on the fugitive from justice charge?

A. Yes, at first I did.

Q. And why was that your position at that point?

A. So generally the practice that we were taught in the DA's office when there's a fugitive from justice charge, you reach out to the out of state body, sheriff's office, the police and see if it's something that they want to come extradite, come pick the person up for. Most

times they say yes. Sometimes they say no. When they say yes, we ask that they be held ~~we hold~~ without bail pending the out of state authorities coming to pick up the person to face the warrant in the other court -- in the other state.

Q. And in the course of the morning, when you were taking that position, had you yet been in touch with the Pennsylvania authorities?

A. I don't recall. I don't remember.

Q. At some point later on in the course of the day did you get more information? Did you get a photograph?

A. Yes.

Q. And did you review the photograph with the defendant's attorney?

A. I reviewed it with a couple of people. But it was the booking photo from Pennsylvania is what someone gave me and I can't remember who. That is what I reviewed with definitely a couple people.

Q. And in the course of the morning, did you take a position regarding bail on the Massachusetts charges?

A. Yes. I was not going to be asking for bail on the possession charge.

Q. And why was that?
A. At the time in my office, the mandate was on nonviolent misdemeanors. We were not to ask for bail.
Q. And I want to just call your attention to a transcript of the proceeding. This is Appendix G. I want to take a look at Page 39 at the bottom of the page and going into Page 40. And you have in front of you a book that has all of the appendices that have been received in evidence. So if it's easier to look at that, rather than refer to the monitor, that's fine.
So looking at Page 39, at the bottom and going over to the top of Page 40, so do you see where, five lines from the bottom, the judge asks Commonwealth with respect to the new charges, is there going to be a request? What did you understand, is there going to be a request?
A. A bail request.
Q. Okay. And what did you say?
A. I said no, Your Honor.
Q. And the judge says okay. And what did you say?
A. I said, well, not on the drug possession.
Q. And the judge says that the possession that --

and then what did you say?
A. If they're treated separately, I'm not going to ask that he's held without.
Q. And what did you mean by "if they're treated separately"?
A. The state charges are the Newton charges -- I don't remember if it was state police or Newton. The charge versus the fugitive from justice charge.
Q. And then the judge says, right on the fugitive. What did you say?
A. But if he's not, I would have a bail request.
Q. So if he's not what?
A. So sometimes you argue -- Sometimes a judge won't hold somebody without bail on a fugitive charge, in which case I would have asked for a number on the same.
Q. Bail on the fugitive charge.
A. Correct.
Q. But not bail on the misdemeanors.
A. No.
Q. All right. Now, in the afternoon, did Attorney Jellinek appear for the defendant?
A. Yes.
Q. And at the beginning of when he appeared, did you and he go to side bar?

A. At some point we went to side bar. I don't recall at what point that was.

Q. So we're going to bring up a transcript again, starting at Page 40, and we're going to go to 2:48:13 p.m. And we're going to play the recording. The initial part of the recording is pretty good, but you can see the transcript. So we're going to play the recording at 2:48:13 p.m. until the end of that first clip.

(RECORDING PLAYING)

Q. So does that refresh your memory that Mr. Jellinek asked to go to side bar and you went to side bar?

A. Yes.

Q. Did you have an understanding of why you were going to side bar?

A. No, not before.

JUDGE FABRICANT: Let's put up Photograph Number 511 if we could.

Q. Is this where -- This is Number 511 of Appendix U. This was admitted in evidence yesterday. Does this show where you would be at side bar?

A. Yes.

Q. And where would the judge be when you're at side

bar?
A. The judge would just stay in the chair and kind of shuffle over to the, closer to the right side of the photograph, and the attorneys would stand on the outside, on the right side.
Q. And is there a microphone for the recording system at that part of the bench?
A. Yes. I can't see it in the photo, but there's the little black microphone.
Q. Now, we're going to go back ~~to~~ and play the recording. Now that we're at side bar, it's much harder to hear. But again, we have the transcript starting with at the bottom of Page 40 and going over to page 41.
(RECORDING PLAYING)
Q. So looking at the transcript, at the beginning, Judge Joseph says something inaudible is dismissed. What was it that was being dismissed?
A. The fugitive from justice charge.
Q. And then she says, so it's my understanding that ICE is here.
A. Yes.
Q. Attorney Jellinek says, so there's the fugitive. Judge Joseph says, if there's no warrant. What

did you understand that to be referring to?
A. If I was going to dismiss the fugitive from justice charge, then there's no out of state Pennsylvania warrant.
Q. And you then said yes; is that right?
A. Yes.
Q. And then Attorney Jellinek says, there isn't something inaudible that we can tie this to him. What do you understand that to refer to?
A. I believe the Pennsylvania warrant.
Q. And then you said, I don't think it's him. Is that right?
A. Yes.
Q. And was that also in reference to the Pennsylvania warrant?
A. Correct.
Q. And Judge Joseph said, okay. And then Judge (verbatim) Jellinek says, ICE is convinced that this guy, and he goes on and talks about his discussion with the ICE agent and what he saw in the records. And he says, ICE is going to pick him up if he walks out the front door, but I think the best thing for us to do is to clear the fugitive issue, release him on a personal, and hope he can avoid ICE. You said,

I don't think ICE is really my -- Is that right?
Is that what you said?
A. Yes.
Q. What did you mean by that?
A. I think I finished it somehow in the transcript saying, ICE has nothing to do with my role as a prosecutor.
Q. And so what was your view about any discussion relating to this?
A. That I did not have an opinion or a standing, it's not my job, doesn't have anything to do with my job.
Q. Were you neutral about it?
A. Yes.
Q. So a little later the judge says, the other alternative is if you need more time to figure this out hold until tomorrow. Attorney Jellinek says something inaudible. Judge Joseph says, then it’s a different. ~~difference.~~And then you said, there's a detainer attached to my paperwork but I feel like that that's separate and apart from what my role is. Was that a reiteration of you're neutral about it?
A. Yeah. I think I was finishing my thought that ICE isn't my business.

Q. And then Attorney Jellinek says, there's an ICE detainer, so if he's bailed out from Billerica, ICE will pick ~~up~~ him up. Judge Joseph says, ICE is going to get him. Attorney Jellinek says something that is inaudible. ~~Judge Joseph says something inaudible.~~ Judge Joseph says, what if we detain him. What was your understanding of what was going on in that conversation between Attorney Jellinek and Judge Joseph?

A. Just --

MS. MULVEY: Objection.

Q. Well, did you have an impression of what Judge Joseph was conveying in that conversation?

MS. MULVEY: Objection.

HEARING OFFICER: I'm going to allow it. I'm going to allow it.

JUDGE FABRICANT: Allow the witness to answer.

HEARING OFFICER: Yes.

A. Just for both Judge Joseph and Attorney Jellinek, just options to have him not to leave with ICE, to be walked out into the hallway.

Q. Discussing options.

A. Yes.

Q. Then Attorney Jellinek says, are we on the

record. Judge Joseph says, Larry, can we go off the record for a minute. Larry is Clerk Okstein?

A. Correct.

Q. And Clerk Okstein says, what's that. Judge Joseph says, are we off the record. Clerk Okstein says, no, we're on the record. Attorney Jellinek says, can we go off the record for a minute.

Going off the record in the course of a matter on a case, was that something you had experienced before?

A. No.

Q. Do you have a feeling about that?

A. I had never experienced that before while a case is being discussed.

Q. Were you concerned about it?

A. Yes.

Q. And the conversation that had occurred with respect to the options to have him leave without encountering ICE, did you have a feeling about that, an impression about that?

A. I just -- It wasn't my role. I didn't think it was not really a proper conversation, but I stayed out of it.

Q. But you didn't think it was a proper conversation.
A. Correct.
Q. Did it make you uncomfortable?
A. Yes.
Q. When you went off the record, the three of you went off the record, tell us everything you can remember about the discussion off the record.
A. I don't remember a lot of what was on the record and what was off the record. The best I can say was it was sort of a continuation of the last few thoughts and pieces of conversation. You know, just ICE being there. Like I don't remember any quotes or any direct statements at all. It was just a continuation of the same type of conversation.
Q. So without quotes, do you have a general sense of the substance or do you have a general sense of the substance of the conversation?
A. Yes.
Q. What was your sense -- What is your sense of the substance of the conversation?
A. Just different options to have the individual not be taken by ICE.
Q. And what sort of options?
A. To the best of my memory, I think ~~like~~whether, if

there is a bail put on him. I, I can't be certain. I don't remember.

Q. Okay. Would looking at your grand jury testimony help you?

A. Yes.

Q. So let me ask you to look in particular -- There's copy of your grand jury testimony. I would ask you to look particularly at Pages 45 to 46.

HEARING OFFICER: Yes.

Q. And just to establish, did you testify before the Federal grand jury on January 10, 2019?

A. I did.

Q. And this is, as far as you can tell, an accurate representation of your testimony?

A. Yes, it is.

Q. So 45 to 46. And the bottom of 45 is where I think the most pertinent part starts, but look at however much you need to make sure you understand the contents.

(PAUSE)

A. My memory's refreshed.

Q. Okay. So what's the best you can remember now that your memory's refreshed of what you heard?

A. Now that I reviewed this, I remember also

saying at that time -- I didn't remember any direct quotes or statements -- but that was the gist was Attorney Jellinek saying I have a plan. I don't know if he used the word "plan." But that was the impression that I got.

Q. Okay. And do you remember --

HEARING OFFICER: If I can just interrupt one second. I'm hearing another person speaking, and I'm just not following what that could be.

JUDGE FABRICANT: I'm hearing the same thing.

HEARING OFFICER: If we could take a two-minute break so that we can try to solve this, that would be helpful. Sorry to interrupt.

JUDGE FABRICANT: Okay.

HEARING OFFICER: We're off the record for a minute while we try and solve this. Thank you.

(PAUSE)

HEARING OFFICER: We're back on the record.

And we think Mr. Neff has solved this particular riddle, so you may continue with your questioning. Sorry to interrupt.

Q. Ms. McDermott, I think what you had just told us

was that you remembered Mr. Jellinek saying something to the effect of, but not the exact words, I have a plan.

A. Yes.

Q. Is that your best memory of what he said off the record?

A. Yes.

Q. And did you hear Judge Joseph saying something off the record?

A. Just I think before he said that, it was something to the effect of, you know, what could we do and him saying, I have a plan, it's all set. [Inaudible.] ~~Logistic.~~

Q. And again, did you have concern about that?

A. Yeah. The conversation made me uncomfortable.

Q. And why did it make you uncomfortable?

A. Because my training was that ICE, that just didn't play a calculus in a criminal case.

Q. In the course of the discussion at side bar, whether on or off the record, was there discussion about where the ICE officer was waiting?

A. At some point in the day there was. I don't remember when.

Q. So you're not sure whether it was during that side bar.
A. I don't remember.
Q. Did you say anything -- Was there any reference to an immigration lawyer, that you recall?
A. Not that I recall.
Q. And now I want to turn back to the recording and back to the transcript, starting when everybody went back on the record and everybody went back to open court. So we're going to play the recording starting at 2:50:17 p.m., and this appears at Appendix G, Pages 41 ~~and~~to 43. It's 2:50:57. Pardon me.

(RECORDING PLAYING)

Q. So Ms. McDermott, at the beginning of that section Mr. Jellinek says, after extensive researcha ~~search~~ into the ~~of the~~ various FBI numbers, Social Security numbers, as well as obtaining a photo from Pennsylvania, we don't believe that this gentleman is the same gentleman as on the fugitive from justice warrant. And then you said, with the information I have, I don't think there's enough tying him to the Pennsylvania warrant but that there are other out of state records, I do believe that some of them belong to this individual, but

that's not what's at issue, and then shortly thereafter you said you were going to dismiss the fugitive from justice charge.

Was there something a little off sequence in his saying it and then you saying it?

A. I mean, yes. I am the only person that can move to dismiss it.

HEARING OFFICER: I'm sorry. Could you speak into the microphone.

THE WITNESS: Oh, sorry.

A. I just said that the ADA is the only person that can make a decision to dismiss it. I mean, obviously, an attorney can ask for something to be dismissed. But I moved to dismiss it, so usually I would be the one to say that.

Q. And then later on, a little bit further out on Page 42, Mr. Jellinek says, I would ask that he, I believe he has some property downstairs, I'd like to speak with him downstairs with the interpreter if I may.

In your experience, was it unusual at the Newton District Court, was it unusual for a defendant and the interpreter, after the defendant had been ordered released,

to go back downstairs?
A. Yes.
Q. Then over on the top of Page 43, the clerk says to the judge, there was a representative from ICE here in the court to, to visit the lockup. And the judge says, that's fine, I'm not going to allow them to come in here but he's been released on this. How did you understand that?
A. Just that the clerk was alerting that -- everyone that the ICE officer was there, and that the judge said that's fine, but he's not going to come into the courtroom or I guess the lockup, if that's what the clerk is referencing as well.
Q. So I want to make sure I understand what you just said. Did you understand the judge to be saying something about whether ICE could go into lockup?
A. I don't have a memory of that. In reading the transcript, it was just that the ICE officer wasn't going to be permitted to come into the courtroom.
Q. And then later on, about six bullet points from the end, the judge -- the court officer asks, he's released, the judge says he is,

Mr. Jellinek asked if the interpreter can accompany him downstairs to further interview him.

In your experience in the Newton District Court with a defendant who has been ordered released, was that unusual?

A. Yes.

Q. All right. Now, what happened next?

A. I don't know how long it took me, but I finished my business, and then I was going to walk back to my office, so I went out into the hallway, I thought I saw the ICE officer was still there. I don't recall how much later after this recording ended at 2:55. I just was, oh, you're still here. And that's when I learned that the individual hadn't come out -- come up out of lockup.

Q. So before that, did the court officer open the door to the dock and let Mr. Jellinek and the interpreter in and let everybody go downstairs?

A. Yes.

Q. And did you see that happen?

A. I'm sure I did. I can't remember.

Q. Okay. So when you went out into the hallway, you saw that the ICE officer was still there,

did you have some conversation with the ICE officer?

A. Yeah. I just, oh, you're still here, has he not come up yet, you know, they could still be talking, something like that.

Q. After what you had heard in the courtroom, did you have any -- what was your expectation as to where the defendant was going to come out?

A. Right up the back door of that main courtroom that you showed in one of the earlier exhibits.

Q. In accordance with ~~W~~what you had previously experienced in Newton.

A. Correct.

Q. Did you have any thought that there was another way he might be released?

A. No.

Q. Did you say anything to the ICE officer as to where he would come out?

A. I just said he has to come out this way. I just, you know, ~~K~~kind of didn't know what to tell him. This is the only way out.

Q. Were you aware of any other way out?

A. I mean, unless you're leaving in custody, no.

Q. And did you wait with him for some period of time?

A. I did.

Q. Did you become concerned?
A. Yeah. It ~~There~~ was just a really long time. So I decided, huh, I wonder what's going on.
Q. Did you do something to inquire?
A. At some point I -- The victim witness advocate's office is downstairs. He came, I think he came up. And I just said, I was like, Mike, is there another door that they can -- you know, down there. I think he just said I don't think so.
Q. And did he go to check?
A. He may have. I can't remember.
Q. Okay. Did you see Mr. Jellinek again that day?
A. Yes.
Q. Did you have some interaction with him?
A. Yes.
Q. Tell us about that, please.
A. At some point he came out the way I expected everyone to come out of the main courtroom, through~~e~~ the door, and he had a property bag in his hand. And then I can't remember if I said something to him before or after he went into one of the conference rooms in the hallway, and came back out and left. And at some point, I put it together what had happened. And I don't recall

if somebody else said something, too, or if I just figured it out and I -- At some point -- I can't remember if it was still inside the hallway or right outside the front door, but I said I know what you did and that was not the right thing to do.

Q. What did you figure out?

A. That he had somehow facilitated the individual leaving.

Q. After that happened, did you call your supervisor?

A. Yes.

Q. And why then?

A. Because it was a very unusual day, and the ICE officer wais very upset, it was not, you know -- An individual was let out the back door, and it was something that I felt I needed to report to my supervisor, because I was uncomfortable with what had happened.

Q. What was your overall impression of what had happened?

A. Just that it was wrong. He was -- Yeah.

Q. Did it affect -- Did the experience affect your view of the court?

A. Of the -- In general? No, not really.

Q. Did you have a view about Judge Joseph's role?
A. I mean, I think I've said it before. Misjudgment, misguided attempted to do what she thought was right.
JUDGE FABRICANT: All right. Thank you. I have nothing further for this witness.
What I'd like to do, if everyone is in agreement, is have her step down and take Mr. Mendoza on Zoom if he's here.
HEARING OFFICER: I assume that makes sense from your perspective as well.
MS. MULVEY: Yes, that’s fine.
HEARING OFFICER: So we'll take a two-minute break while you try to plug us in by Zoom.
JUDGE FABRICANT: Thank you.
HEARING OFFICER: I'd ask that the witness -- if I could ask the witness not to talk about your testimony to anybody or this hearing during this break for you. We'll see you back probably in an hour or so. Thank you.
(PAUSE)
HEARING OFFICER: We're back on the record.

JUDGE FABRICANT: We're back on the record?

HEARING OFFICER: Yes, we're Back on the record.

And I'll leave it to you to call the witness, and then I'll swear him in.

JUDGE FABRICANT: All right. So the Commission calls Eric Mendoza.

HEARING OFFICER: Thank you.

Mr. Mendoza, can you hear me? Mr. Mendoza, can you hear me? Hello?

MR. NEFF: The only microphone --

HEARING OFFICER: Is there only one microphone?

JUDGE FABRICANT: Mr. Mendoza, are you able to hear the hearing officer?

THE WITNESS: No. I can hear you.

HEARING OFFICER: I'll try one more time. Mr. Mendoza, can you hear me? Mr. Mendoza? Can you hear me?

MR. NEFF: The only microphone is on the laptop.

HEARING OFFICER: If you could

just bring the laptop up, that would be probably the best.

(PAUSE)

HEARING OFFICER: Can you hear me, Mr. Mendoza?

THE WITNESS: Yes, sir.

HEARING OFFICER: If it's okay, under these circumstances, just for this particular part of the proceeding.

Good morning, Mr. Mendoza. First, let me swear you in. If you would please raise your right hand.

ERIC MENDOZA, SWORN

HEARING OFFICER: All right. Thank you.

I just have -- Because this is the only Zoom testimony, I have a few additional questions just to make sure we've covered these things. And we do this, Mr. Mendoza, for any witness who is testifying remotely.

Could I ask, where are you physically located at this time?

A. I'm presently in Las Cruces, New Mexico.

HEARING OFFICER: Okay. Is anyone physically in the room with you at this

time?
A. No, Your Honor.
HEARING OFFICER: And what materials and devices do you have with you right now?
A. I think just my phone. I'm not too sure about my laptop because it's old.
HEARING OFFICER: Got it.
And please tell us, what is currently on your screen?
A. I see you and I believe I'm on the screen with my name on it.
HEARING OFFICER: Okay. And are you in communication with anyone other than the people who are conducting your examination and myself today right now?
A. No, no.
HEARING OFFICER: Okay. If anything changes in this regard during your testimony, please let us know.
A. Yes, Your Honor.
HEARING OFFICER: Thank you.
With that, I will return the laptop.

DIRECT EXAMINATION

BY JUDGE FABRICANT:

Q. Good morning, Mr. Mendoza.

A. Good morning.

JUDGE FABRICANT: We're going to pause for just a moment while Mr. Neff plugs in the computer in a different location.

(PAUSE)

Q. All right. Mr. Mendoza, you recall, we met on Zoom before. I'm Judith Fabricant. I'm serving as special counsel for the Commission in this case.

A. Yes.

Q. And now would you tell us what you see on your screen besides yourself.

A. Well, I'm in the top corner and you're in my main screen with -- I don't know -- maybe people in the background or a jury. I'm not sure.

Q. Okay. You see me and people in the background.

A. Yes, ma'am.

Q. All right. Thank you.

Mr. Mendoza, would you please tell us your professional background.

A. Well, I was a certified or a vetted interpreter for about, about 20 years.

Q. And in Massachusetts, with the Massachusetts court system, what was your role?
A. Pretty much a vetted interpreter where I was able to do certain cases, like moving violations, things that dealt with domestic issues. But major trials was -- although I may have been able to do them, I wasn't there in the process yet. So I was a vetted, like I was a vetted interpreter.
Q. So was vetted a credential that was not at the level of certified?
A. According -- Based on the courts. Correct. Yes.
Q. Okay.
A. But I was certified in other aspects of interpretation.
Q. And what is the role of an interpreter in a courtroom?
A. To basically give the information or interpret what is being said in and around the defendant or the client.
Q. And who are you interpreting for?
A. Usually -- I forget the, I forget the acronym that they use. But it's basically people who do not speak or have difficulty communicating in

English from Spanish.

Q. So the person who needs assistance with English, is that the person who you are interpreting for?

A. Yes. Yeah. If it has to do with Spanish, yes.

Q. And when that person speaks to the court, to the judge, to the lawyer, are you then interpreting what that person says?

A. Correct. Yes.

Q. Did you for some period of time serve as an interpreter in the Newton District Court?

A. In the Newton District Court?

Q. Yes.

A. Yes.

Q. Okay.

A. Yeah.

Q. And how long a period did you do that?

A. I don't know. Like maybe half a dozen to a dozen times I was in that courtroom.

Q. Okay. And I should put the question a little differently. How long a period did you serve as an interpreter for the Massachusetts court system?

A. Oh, I don't know. Anywhere between a year and a half, two years, maybe.

Q. Okay. And then you said you were in the Newton District Court, you said you thought half a dozen times?
A. Yeah. Newton. Maybe more. Yeah.
Q. In the Newton District Court, do you remember the physical arrangement of the courthouse?
A. Yeah. Yes.
Q. And I want to take you back to April of 2018.
A. All right.
Q. I know that's a little more than seven years ago.
A. Yeah.
Q. A lot has happened since.
A. Yeah.
Q. But I'm going to ask you to put your mind back into that time frame.
A. Okay.
Q. So in that time frame, if you were interpreting in the first session in the Newton District Court, the main courtroom on the first floor, --
A. Yes.
Q. -- if there was a defendant in custody, and if the defendant was in the dock, where would you be?
A. Before or while I'm interpreting?

Q. While you're interpreting, if the defendant is in the dock.

A. Okay. If the defendant's in the dock, it's like a concealed area, like some type of plexiglass or something like that, and then there's a little cutout area, and I would stand usually facing the courtroom and listening to the judge or listening to whoever is speaking or proceeding and letting the client know through the, through the little hole in the dock, the dock.

Q. If the defendant is not in the courtroom, is being brought up, you're waiting for him, but he's not yet in the courtroom, he's not yet in the dock, and there is something going on, where would you be?

A. Well, in Newton, it was, it was different. It was set up differently. Like there was a chair specifically set up for the interpreters. So that was usually -- you're facing the court, usually on the left side. There could have been one on the right side as well, but usually on the left side in that particular courtroom. Normally, in most courtrooms you're sitting behind the defendant -- the defense or the

prosecuting attorney, they have a section for you to sit at.

Q. And is that always where you were or did you at times move around?

A. Yeah. I was able to move around. And as the hearings went through the day, I might sit closer towards either the attorneys, just to be able to listen and approach the court quicker.

Q. I want to call your attention to April 2nd of 2018.

A. Okay.

Q. Were you serving as interpreter in Newton that day?

A. I believe so, yes.

Q. And do you remember a case involving a Mr. Medina Perez?

A. Yes.

Q. Do you remember that that case was called several times over the course of the day --

A. Yes.

Q. -- and then set for further call?

A. Yes.

Q. Were you aware that there was an ICE officer present?

A. Yes.

Q. Were you aware that there was a detainer for Mr. Medina Perez?
A. Only because it was shown to me, yes.
Q. It was shown to you.
A. Yes.
Q. Now, in the afternoon, the afternoon session, after a series of calls in the morning, I want to call your attention to the afternoon session, and do you recall that at one point in the afternoon session the lawyers went to side bar and spoke with the judge at side bar?
A. Yes.
Q. And at that point, when they started the side bar conversation, was the defendant, Mr. Medina Perez, was he in the dock or not in the dock?
A. I, I don't believe he was.
Q. Okay. And when they started, when he was not in the dock, where were you while you were waiting for the defendant?
A. Towards the left, close to the table of where the attorneys sit, kind of set away. Like you don't -- I don't have to listen to what's being said or what the judge is doing at side bar. Sometimes you can hear. Sometimes you can't.

But I was trying to set back -- I don't know -- just being respectful. I wasn't right there. Nobody had to say, hey, move away or anything.

Q. Were you able to hear some of what was being said at side bar?

A. A little bit.

Q. Who did you hear speaking?

A. I heard the judge speaking. And both attorneys were there, but the gentleman was speaking to her more. That's what I recall.

Q. The male attorney more than the female attorney?

A. Yes, ma'am.

Q. And what did you hear?

A. I mean, I -- It was a while ago. I know that the judge wasn't happy with ICE being there, wasn't happy with the fact that he might have to be released or let go or -- and that he was going to be detained. So yeah. That's pretty much what I heard.

Q. When you say "the judge wasn't happy," what was it that gave you the impression that the judge wasn't happy with that situation?

A. She didn't like the fact that ICE was around. I don't even think they were in the courtroom. But the fact that ICE was there, I don't think

she was like happy about that.

Q. Was there -- Were there words or tone that gave you that understanding?

A. Yeah. Yeah. I don't -- I can't say specifically what she said. But she didn't like the fact that, regardless of what she did, this person was going to be detained by ICE.

Q. And tell us -- I know you don't remember exact words. We all understand that it was a long time ago.

A. Yeah.

Q. The best you can, what was the substance of what you heard?

A. What was the what?

Q. The substance of what you heard. The gist of what you heard, the best --

A. Oh, the gist of what I heard was that she wasn't happy, and there was possibly an agreement to -- instead of the client -- You're usually released out the front. So if somebody leaves the courtroom, that's, that's -- twhose case has been heard. They usually leave the front of the court. Maybe go and sign some papers or something. But she was suggesting that this particular person be let go out the

back. Now, I -- that's like the gist of what I heard. But that he'd be let go out the back or a different way.

Q. After the proceeding came to its conclusion and the defendant was ordered released, what happened?

A. Well, I believe, I believe the defendant had to be brought ~~out~~up and then notified that something was going to happen or that he was going to be released. But I don't think he knew that he was going to be released out the back door. So when he came back up, there was that discussion, and then when he went back down, and that's when, that's when he was released.

Q. Who went back down?

A. I believe the court officer was in front, the defendant was in front of me, I was in back of the defendant, and the attorney was behind me.

Q. And had you previously had occasion to go down to the lockup after a defendant had been ordered released?

A. In Newton or --

Q. Yeah, in Newton.

A. -- in the court at all? No.

Q. In the Newton District Court.

A. No, no.
Q. And on the way downstairs, did you have any conversation with the attorney?
A. The attorney asked me if I was good with all this. And I just said to him, that's not for me to make a decision or judgment on what the judge decides, I'm just here to like interpret and be unbiased.
Q. When you went -- When you were downstairs, --
A. Yes.
Q. -- did you interpret something briefly? And I'm not asking for what. Did you interpret something briefly betweenfore the attorney and the defendant -- I'm not asking for what was said. But did you interpret something briefly?
A. Yes.
Q. And about how long did that take?
A. Couple minutes.
Q. Okay. And then what happened?
A. Are you asking me what I interpreted and what the reaction was when I interpreted or...
Q. No. I don't want to, I don't want you to tell us what you interpreted. But after you interpreted, what was the next thing that happened?

A. The defendant went down the hallway, took a right, the door was open for him, and he went out the back door.

Q. Did what happened there that day affect your view of the court?

A. Yes, ma'am.

Q. Tell us how.

A. You're doing your job for like justice and to do the right thing. And when a decision is made, especially coming from a judge, you kind of like wonder if everything you see or hear -- you kind of like lose faith in the system a little. You'd like to think that it's a certain -- it's just happening right there, but I've noticed that it's happening throughout the country.

JUDGE FABRICANT: All right. Thank you, Mr. Mendoza. I have nothing further. Mr. Hoopes will have some questions for you.

THE WITNESS: Okay.

CROSS-EXAMINATION

BY MR. HOOPES:

Q. Good morning, Mr. Mendoza.

A. Good morning.

Q. My name is Tom Hoopes, and I represent

Judge Joseph.

A. Okay.

Q. And sir, you said you were a vetted court reporter -- or court interpreter in the Massachusetts system for about a year and a half; right?

A. Yes, sir.

Q. And that would have been from when to when?

A. I'm not sure of the dates. It would have been about, about a year and, about a year and four months prior to this, prior to this case.

Q. And you were working at the time for a woman named Ms. Barrios; is that correct?

A. Correct.

Q. And --

A. Well, it's kind of -- That was -- It's kind of complicated. Because in the courts, I worked for her. But at the same time, when I wasn't in the courts, I was working for an agency that would allow or that was allowed to send in vetted interpreters. So I was kind of working for both the state and for a private agency.

Q. Okay. So you had two places that you were working, one private and one the state; is that right?

A. Correct.
Q. And your employment, I think you've told us or you made statements in the past, didn't work out with Ms. Barrios; right?
A. Right. Yes.
Q. And so you never followed through to become a certified interpreter.
A. I was basically not allowed to.
Q. Okay. And if I can, you spoke at some point to the -- to Ms. Fabricant or to special counsel; correct?
A. Yes.
Q. And the date of that I believe was February 24th of 2025. Does that sound about right?
A. I'm sorry. What was that for?
Q. So you spoke to the attorney who was just asking you questions in the past; right?
A. Yes.
Q. Yeah.
A. Yes, yes.
Q. And the date of that was after the beginning of this year; correct?
A. Yes.
Q. Now, that morning at the Newton District Court, what time did you arrive?
A. What time did I arrive to the court in

Newton?

Q. Yes.

A. I don't recall. But if the session started at 8:00 or 9:00, I was usually there about a half hour, 45 minutes before.

Q. Okay. And so were you interpreting that day just for one case, for Mr. Medina Perez, or were you interpreting for other cases?

A. I was interpreting for other cases.

Q. And on the Medina Perez case, do you have a memory as you are with us today as to what time you first interpreted on that case?

A. No. No. It was, it was definitely -- There was definitely -- He was definitely called first session, but that could have been between anywhere between 9:00 and 11:00.

Q. Okay. And so the case was called originally, and Mr. Medina Perez was brought up for you to do the interpreting; correct?

A. Yes.

Q. And there was an initial discussion, appearance in front of the judge, and you interpreted that; correct?

A. Yes.

Q. And there was a prosecutor, who is a woman, who

was present for that; correct?
A. I'm not sure, I'm not sure what you mean. There was a what?
Q. There was a -- So there's two sides. You know that.
A. Yes.
Q. There's a prosecutor --
A. Yeah.
Q. -- and a defense attorney; correct?
A. Yes.
Q. And the prosecutor that morning for Mr. Medina Perez's case was a woman; right?
A. I believe so. I'm not sure which attorney was which. I'm sorry.
Q. So in the morning, the attorney representing Mr. Medina Perez was also a woman, in the morning. You remember that.
A. I'd say so, yes.
Q. And that person was different than the person who appeared in court in the afternoon; correct?
A. Yeah. I believe, I believe, I believe one of the attorneys stepped in for her or something happened where another attorney came in.
Q. Okay. And so in the morning you were up in the first session courtroom in Newton; yes?

A. I was, yes.
Q. And Mr. Medina Perez was brought up; yes?
A. Yeah.
Q. And you did the interpreting. And then there was a recess after that; correct? Or they continued the matter to allow some time. You recall that.
A. Yes. Yes. Afterwards.
Q. Yeah. And so they brought Mr. Medina Perez back downstairs; right?
A. I believe so, yes.
Q. To the lockup.
A. Yeah.
Q. And the next time that you had contact with Mr. Medina Perez was in the morning or in the afternoon?
A. You tell me.
Q. You're the witness, sir.
A. Once again, ~~No. Because~~ you're talking in the morning or you're talking in the afternoon? Because if we're talking in the afternoon, I had one final, I had one final time with Mr. Medina upstairs and then I communicated or interpreted for him downstairs.
Q. And so let's -- Thank you. Let's go back to the

morning. Was that first time the only time in the morning that you had contact with Mr. Medina Perez, in the morning?

A. No. I believe he was brought up twice.

Q. And so both times that you had contact were there in the courtroom in the morning.

A. Was in the courtroom in the morning, yes.

Q. In the morning. So, it was in the courtroom with the judge on the bench and the attorneys right there in the courtroom; correct?

A. Yes.

Q. And that was the only contact that you had in the morning with Mr. Medina Perez; right?

A. I believe so. I think so, yeah.

Q. Okay. And it would be fair to say that you never saw him again until he was brought up in the afternoon; right?

A. Correct.

Q. So in the morning there was a discussion that you interpreted about whether they had the right individual that Pennsylvania wanted; right?

A. Yeah. They needed to compare --

Q. I'm sorry?

A. Yes. They needed to confirm because everybody was worried of the fact that ICE was

there. So they wanted to make sure who he was and what was going to be done.

Q. Well, so you say they were worried about ICE being there. Did you hear any discussion about ICE in the morning?

A. Yes. Well, we were kind of -- I'm kind of like a court employee. So we're somewhat notified just for safety sake that ICE may be present.

Q. Okay. So ICE was there. But what did you hear that there was some concern that ICE was there? And from whom?

A. I guess ~~our~~the concern was from the employees or people that were there that ICE was present.

Q. Okay. But you never heard anything said by the judge in the morning about ICE; correct?

A. I, I don't think so, no.

Q. And do you remember, was there an announcement that ICE was not allowed in the courtroom in the morning or not?

A. I don't remember that announcement.

Q. Okay. And so did you see anybody that was -- that you knew to be an ICE officer in the courtroom in the morning?

A. I would have to say I was guessing.

Q. Okay. And so what is your memory? Were there a few people in the audience in the morning or almost nobody or a lot of people?

A. You mean general population --

Q. Yeah.

A. -- in the audience?

Q. Yeah.

A. People in the audience?

Q. Yeah, number of people.

A. There was several.

Q. I'm sorry?

A. There was several people in the audience.

Q. Several people in there. Between one and five, between 1 and 10?

A. Maybe more. But I'll say 1 and 10, but more closer to 10.

Q. Okay. And over time in the morning, the number of people in the courtroom thinned out, diminished as cases were called, as cases were resolved; correct?

A. Yes.

Q. And so you, sitting where you ~~are~~ were sitting in the courtroom, you wouldn't have had any problem looking around to your right or behind you and actually seeing anybody who was in the

courtroom; right?
A. Correct.
Q. Because the distance from where you were sitting to the audience is only a matter of a few feet; correct?
A. Yes.
Q. Now, so can I ask you, had you ever heard at any time from 2017 until today about what's called a Lunn policy, L-u-n-n policy?
A. A what policy?
Q. I'm going to say Lunn or Lunn. Sounds like Lunar. But it's L-u-n-n in English and it's pronounced the Lunn or the Lunn policy. Have you ever heard of that before?
A. No.
Q. And so were you given any training as an interpreter as to policies and procedures and things in court just besides -- in addition to the language issues?
A. Yes.
Q. Okay. And in any of that training did anybody draw to your attention that there was a thing, a document, a policy in Massachusetts beginning in November of 2017 into 2018, that policy was called the Lunn policy?

A. A Lunn policy?
Q. Lunn, yes. L-u-n-n.
A. I'm not sure if that was presented to me.
But not, my supervisor,—— Ms. Barrios, was pretty thorough. And if I had to read something, I'm sure I would have gotten it.
Q. So this policy deals with how to handle people in custody when ICE is there to take custody.
So sounds like you never read that policy.
A. I -- Probably not.
Q. Okay. And so you wouldn't know that that policy requires that individuals who are in custody that ICE is waiting for or advises that they be taken into custody by ICE in the lockup.
JUDGE FABRICANT: Objection.
The witness says he doesn't know anything about the policy.
HEARING OFFICER: I'll allow it.
Q. Let me rephrase.
A. I had been, I had been present with authorities taking clients, taking clients in lockup, yeah. I've been, I've been exposed to that, yes.
Q. Okay. And had you ever seen ICE take custody in

the front lobby at the Newton District Court? Yes or no? If you remember, you remember. If you don't, you don't. If the answer's yes, it's yes. If it's no, it's no. That's okay.

A. No. The screen, the screen shut off. So you may want to go back approximately two minutes and let me know what you were saying.

Q. It didn't like my question.

A. Excuse me?

Q. So I'll ask the question again.

A. Yes.

Q. So you had interpreted at the Newton District Court a half a dozen or so times?

A. Yeah. Maybe a little more, yeah.

Q. Okay. And in any of those times were you interpreting when ICE was there to take custody of somebody?

A. I don't think so.

Q. So for you to say that a policy was that ICE takes custody out of the front lobby of the Newton District Court, you wouldn't have any basis for that because you've never seen it before; right?

A. What -- The procedures that ICE do is what ICE does, not -- I had nothing to do with the

policy.

Q. Okay.

A. And whether I know it or not, they're going to operate either way whether the judge lets it or not or whether ICE, ICE is going to do something or not.

Q. Okay. Now, in the afternoon session, you were there for the afternoon because Medina Perez was still an active case; correct?

A. In the afternoon session, I'm still there, whether there's -- until I'm dismissed by the judge.

Q. Understood. And in the afternoon, was Medina Perez the only case that you were there for?

A. Oh, yeah. That was, that was the only or last Spanish case.

Q. And so when the case was called, you told us earlier that you were sitting at the special desk or carrel that they had for interpreters?

A. I may have been sitting closer. That's what I mentioned, that there's a, there's a legal desk where the prosecutor or defender -- I'm not sure in Newton which one it is back there, but I may have been like leaning up against that table

or sitting right, right at that table.

Q. But you weren't over by the dock because there was nobody in the dock when the case was first called; correct?

A. Correct.

Q. And so do you remember whether or not, when the case was called, the parties stayed talking to the judge in the open court or do you remember if they went to side bar?

A. I'm not sure what you're asking.

Q. Do you have any memory of where the conversation between the two lawyers and the judge first took place in the afternoon about Medina Perez?

A. It started open and then it went to side bar.

Q. And so when it was open, you would have been next to the conversation or next to the lawyers; correct?

A. I was kind of behind the attorney, because the defendant wasn't ~~out~~up there yet.

Q. Yup. And there was no interpreting for you to do.

A. Excuse me?

Q. There was -- No defendant means there was no interpreting for you to do; correct?

A. Correct.

Q. And so when they moved the side bar, they moved away from you to your right and up next to the judge; right?

A. No. They moved closer.

Q. Closer to the judge? Or closer to you?

A. No. Closer to me.

Q. Oh. Because you were on the right side now or on the left side facing the judge?

A. Facing the judge, I'm on the left side.

Q. So in your memory, the side bar was on the left side, not the right side of the courtroom.

A. When you're looking at the court, on the left side.

Q. That's where you remember the side bar to be.

A. Yes.

Q. And so do you recall, was there -- when they moved to side bar, was there any white noise in the courtroom? Do you know what white noise is?

A. Yes, there was.

Q. And there was white noise in Newton at that time?

A. That's what I just said. Yes.

Q. And so when they moved the side bar, and they're talking, there's white noise in the courtroom. I just want to make sure I understand that.

That's a yes; correct?
A. I'm not sure if it's in the whole courtroom. I thought -- From what I recall, was right at The little system itself. But it could have been throughout the whole courtroom.
Q. And the purpose of the white noise is to make it harder for people in the audience to hear the conversation; correct?
A. I don't believe there was an audience.
Q. Oh, you think there was nobody else in the courtroom at that point.
A. I don't believe there was.
Q. Okay. But the white noise was on anyway; right?
A. Yes.
Q. And are you saying that the white noise had no impact on your ability to hear what was being said at side bar?
A. No, I'm not saying that.
Q. And --
A. I'm saying that's why I didn't hear everything that was being said, because there was white noise and it was side bar. It's not my position to be listening.
Q. Okay. So today do you have a memory as to whether or not the whole conversation at side

bar was being recorded or not being recorded?
A. I don't believe side bar is recorded, especially if there is white noise. I'm not sure, though.
Q. But you don't know.
A. If I was to make a - if I was a gambling man, I would say that it wasn't recorded.
Q. Now, you've said that you heard the judge say something about the defendant being sent downstairs; is that right?
A. I -- Being let go. Not being sent downstairs.
Q. About being let go.
A. Yes.
Q. So if the judge used words "he's released," that would be consistent with what you heard.
A. If the judge said what?
Q. He's being released, Medina Perez is released, that would be consistent with what you heard.
A. Yes.
Q. And if the judge said to the lawyers, why don't we detain him overnight, that would be consistent with what you thought the judge was saying about avoiding ICE; right?
A. No.
Q. So tell us, why did you think that the judge was

concerned about Medina Perez avoiding ICE?
A. It was -- I'm not hearing you well. But you mentioned something about having --something having to be overnight, and I don't know what that has to do with...
Q. Well, let's break it into two parts. I think you've told us that you couldn't hear the conversation very well; right?
A. Correct.
Q. You could hear bits and pieces; right?
A. Correct. Right.
Q. And from those bits and pieces, that's why you drew the inference that there was some effort on the judge's part to avoid ICE, from those bits and pieces; right?
A. To let the client out, to let the -- to release the client.
Q. To release the client. So you heard the judge say to release the client; is that right?
A. No. I heard a judge say let the client go.
Q. And that was still at side bar?
A. I believe she might have said it even before that, but I recall at side bar.
Q. And how about -- At some point the conversation moved back to the open court; right? Or do you

not remember?
A. Not -- I don't -- Yeah. Because they have to finish the session.
Q. And would it be fair to say that it's hard for you to remember what you heard from side bar and what you heard said at open court seven years ago? I'm sorry.
A. It may not be exactly the time frame that it occurred.
Q. Okay. So in the afternoon there were two lawyers speaking to the judge; correct?
A. Correct.
Q. One was a woman; right?
A. Yes.
Q. And one was a male; correct?
A. Correct.
Q. And you said previously that you thought that the male was the district attorney, the prosecutor, because he was doing all the talking; right?
A. Correct.
Q. So if you thought he was the prosecutor, it's pretty fair to say that you never talked to Medina Perez with him alone prior to going downstairs after court completed; right?

A. I believe I may have. I don't, I don't recall.
Q. You have no memory.
A. I said I don't recall. I said I believe I may have, but I'm not entirely sure during the first session.
Q. During the first session in the morning or in the afternoon?
A. In the morning.
Q. And so -- But it's fair to say you thought the man there in the afternoon was the prosecutor at the beginning; right?
A. Yes.
MR. HOOPES: May I just have a moment, Your Honor?
HEARING OFFICER: Sure.
JUDGE FABRICANT: Mr. Mendoza, we're just pausing just for a minute. Just stay with us, please.
(PAUSE)
MR. HOOPES: Mr. Mendoza, that's all I have. Thank you very much.
JUDGE FABRICANT: Mr. Mendoza, I'm going to be very brief.

REDIRECT EXAMINATION

BY JUDGE FABRICANT:

Q. You said that in the course of your time working as an interpreter in the Massachusetts court system that you had been exposed to situations in which ICE went to the lockup to take custody of someone. Did I understand that correctly?

A. Yes.

Q. Did that happen, --

A. Yes.

Q. -- did that happen in Newton or in other courthouses?

A. In other courthouses.

Q. Did you ever see that happen in Newton?

A. No.

JUDGE FABRICANT: That's all I have.

Perhaps Mr. Hoopes has more, perhaps the hearing officer has questions for you, so stay with us a little longer.

THE WITNESS: Okay.

MR. HOOPES: Yes. You're back with me again, Mr. Mendoza.

RECROSS-EXAMINATION

BY MR. HOOPES:

Q. So you told us, when I asked you questions earlier, that there were two lawyers in the morning dealing with the Mendoza -- Medina Perez case, -- I'm sorry -- the Medina Perez case, both of them were women; correct?

A. Both of them wea~~a~~re what?

Q. Women. Female lawyers.

A. There was always a man and a woman and one of the women was switched. One of the attorneys came in and there was another -- there was a different attorney.

Q. So the one --

A. That was a woman.

Q. So there was a woman initially and then there was a man; is that right?

A. That's not what I said.

Q. I'm not understanding you. In the morning, who was representing Mr. Medina Perez, a man or a woman?

A. I was under the assumption it was a man.

Q. Oh.

A. So it's irrelevant for me because I just need to do the interpreting. So whether it's a prosecutor or defendant, it's almost irrelevant.

I just have to interpret for the client.

Q. So would it be fair to say that today you don't remember in the morning whether Mr. Medina Perez was represented by a woman or a man or do you believe it was a man?

A. I believe it was a man.

MR. HOOPES: Thank you. No other questions.

JUDGE FABRICANT: Just stay with us a little longer just in case the hearing officer wants to ask you anything.

THE WITNESS: Okay.

HEARING OFFICER: Yes. It may easiest if I just go down there.

JUDGE FABRICANT: Mr. Mendoza, just stay with us a little longer. The hearing officer has some questions for you.

THE WITNESS: Okay.

HEARING OFFICER: Can you hear me, Mr. Mendoza?

A. Yes, sir.

HEARING OFFICER: So my only question relates to your location during the proceedings. And I don't know how easy it is for us to do this. But in Exhibit U -- And this

is -- We'll start with page APP 508. Are you able to see this?

A. Yes.

HEARING OFFICER: Okay.

A. Wait. Yes.

HEARING OFFICER: So can you describe, looking at this page, where you were located before Mr. Medina Perez came upstairs? So we're in the afternoon session. At the beginning of the session, before there is a side bar, I believe you said that you were behind where the attorneys were. Is that correct? Is that what you said?

A. On the -- So if -- I believe the little, the little hole where you speak to the client, that, that -- the major thing on that picture is the dock itself. So there's the desk right, right there, I believe -- Nope. Closer. Right around there. There's a sign in the picture. I can't see the picture. There you go. So I believe, I believe that's, that's the attorney's desk. I was like standing right on the corner of the dock.

HEARING OFFICER: Do you see where I'm pointing with my pen?

A. Yes, sir. Right around there. That's what I recall.

HEARING OFFICER: I see. And so -- And I'm pointing now to the area where, if somebody were inside the dock, you would be speaking through this hole right here? Is that right?

A. Is that, is that -- I can't see the hole. But if that's where the hole was, yes.

HEARING OFFICER: It's just to the right of the door to the dock.

A. Yes. And normally I'd be sitting, approximately diagonally towards the back there would be a chair.

HEARING OFFICER: Okay. I understand what you're saying.

Do you see where there's a place for the court officer, there's a location? Do you see where I'm pointing?

A. Okay.

HEARING OFFICER: Is that where the court officer often sits?

A. If you say so. I would be sitting around, right around him.

HEARING OFFICER: Okay. So my

understanding from what you're saying is you basically would have been located somewhere between that location where the court officer typically sits and that door to the dock.

A. Yes. But during the side, during the side bar, I was, I was closer, because it was the end of the day, they were making a decision as to what they were going to do with the client, so I was standing a little closer, but I wasn't able to hear everything. Either way, I had to notify the client of what was going to happen, and a decision was made for him to be let go out the back door. So whether I know who the prosecutor was or who the defendant was or what the decision was made, I had to tell the client what was going to happen, and the client had to decide whether he was going to go with what was agreed upon.

HEARING OFFICER: Okay. I was just asking you about your physical location, sir. But I understand you.

With that, I've got no further questions.

JUDGE FABRICANT: All right. I'm going to ask one more question, if I may.

REDIRECT EXAMINATION

BY JUDGE FABRICANT:

Q. Mr. Mendoza, I'm going to try and hold up the same photo. Can you see it again?

A. Yup. Yes. That's a little clearer.

Q. You can see that there's the door to the dock.

A. Yes.

Q. A little bit on the same side. The dock is a rectangle.

A. Yes.

Q. On that same glass wall of the dock, right next to the door, there's a little metal circle.

A. I don't remember where the stairs were inside the dock or outside. I think they're inside there.

Q. Okay. So what I want to direct your attention to is -- Again, the dock is a rectangle.

A. Yes.

Q. On the other wall of the dock.

A. Yes.

Q. The wall that is not where the court officer sits is not where the door is.

A. Correct.

Q. The other wall, there's another little metal circle. If the client is in the dock, which one

of those little metal circles do you speak through?

A. The one, the one around the corner, the one in the middle that you just mentioned.

Q. In the middle, meaning along the longer wall?

A. Yes.

Q. Not the one next to the door; is that right?

A. No.

Q. All right.

A. Correct.

JUDGE FABRICANT: Thank you. Stay with us a little longer just in case anybody else wants to --

HEARING OFFICER: That was a very helpful clarification. Thank you for that.

JUDGE FABRICANT: All right. I think we're all finished.

May this witness be excused?

HEARING OFFICER: Yes.

JUDGE FABRICANT: Thank you very much, Mr. Mendoza.

THE WITNESS: Thank you.

JUDGE FABRICANT: Thank you. ~~JUDGE FABRICANT:~~ You have completed your testimony. Thank you.

HEARING OFFICER: At this

point, we've been going for a couple hours. I think it probably makes sense to take a 10-minute break.

JUDGE FABRICANT: Yes.

Before we do that, may counsel approach side bar just very briefly?

HEARING OFFICER: Sure.

SIDE BAR CONFERENCE

HEARING OFFICER: Let me make sure. Do we have any white noise --

JUDGE FABRICANT: I think the hearing officer -- I mean the court reporter is hearing us directly, not through any device.

HEARING OFFICER: Fine.

JUDGE FABRICANT: We're having a little trouble remembering whether Shannon McDermott was sworn -- now, I am aware of SJC authority that it actually is not essential as long as they're aware of necessity to tell the truth.

HEARING OFFICER: I will swear her in as soon as she comes back.

~~JUDGE FABRICANT~~MS. MULVEY: I thought you did.

HEARING OFFICER: I will

confirm that everything she's already testified to is the truth.

JUDGE FABRICANT: Thank you. Maybe you did.

HEARING OFFICER: I'm not sure. I'll do it again. Thank you.

(SIDE BAR CONFERENCE ENDS)

(Recess taken at 12:05 p.m. Proceedings resumed at 12:20 p.m.)

JUDGE FABRICANT: Can we have Ms. McDermott come back, please.

(PAUSE)

HEARING OFFICER: Thank you, Ms. McDermott. Apologies for interrupting your testimony.

THE WITNESS: Okay.

HEARING OFFICER: It has been brought to my attention that I likely didn't swear you in at the beginning. So if I can ask you if you solemnly swear that the testimony you've already given and will be giving is the truth, the whole truth, and nothing but the truth?

THE WITNESS: yes.

HEARING OFFICER: Can you please raise your right hand and swear to that?

THE WITNESS: Yes, I do swear.

HEARING OFFICER: Okay. With that...

CROSS-EXAMINATION

BY MS. MULVEY:

Q. Good afternoon, Ms. McDermott.

A. Hi.

Q. My name is Liz Mulvey. We've never met before; is that right?

A. That's right.

Q. And can I apologize now to you for when I call you Jurgens?

A. Oh, that's fine, too.

Q. Okay. I'm going to do the best I can, but you've been Jurgens for six years. Okay.

You told the special counsel that, after kind of everything that was over, you saw David Jellinek in the front lobby of the courthouse; is that right?

A. Yes.

Q. And you said to him, I know what you did and it wasn't the right thing.

A. Yes.

Q. Did David Jellinek say to you, Shannon, what are you talking about, I told the judge the court officer was going to let him out the back door?
A. No.
Q. Did he say to you, Shannon, what you are talking about, Judge Joseph said this was okay?
A. No.
Q. Did he say, Shannon, come on, you knew what was going to happen?
A. No.
Q. Did you know what was going to happen?
A. No.
Q. What did David Jellinek do or say when you said I know what you did and it wasn't the right thing?
A. He smiled and he didn't say a word.
Q. Now, when you said to David Jellinek, I know what you did, what did you mean?
A. Helped facilitate Mr. Medina Perez leaving the courthouse.
Q. All right. And what did you mean when you said it wasn't the right thing?
A. Well, I think by that time I knew that it had been from the security door downstairs somehow and just -- that wasn't okay to do.

Q. All right. And I think you told us on direct that you had either figured it out or somebody had told you --

A. Yeah. I can't remember how I learned, but by that time, I had learned about it.

Q. All right. By the time you learned that he went out the back door, he was long gone and hard to find; right?

A. Correct.

Q. All right. You were present at side bar for both the on the record and off the record conversation; is that right?

A. Yes.

Q. And I think you told us that in your mind they kind of blend together?

A. Yes.

Q. You said off the record was kind of a continuation of the on the record?

A. Yes.

Q. And you had trouble kind of sorting out in your mind what was on the record and what was off the record?

A. That's fair, yes.

Q. And if you didn't have a transcript, you wouldn't be able to tell at all. Is that fair?

A. Yes.
Q. It all kind of blends in?
A. Yes.
Q. And one thing that you did remember that was new off the record was David Jellinek asking to go downstairs to speak with his client in the lockup; is that right?
A. Yes, he did ask that.
Q. That was the part you remembered as being new; is that true?
A. I don't know -- I always remembered him asking to go back downstairs. I don't think I could have told you it was on or off the record --
Q. Okay.
A. -- before seeing a transcript.
Q. Okay. So we know from the transcript that it wasn't before you went off the record, so it must have been while you were off the record; true?
A. Yes. Must have been. Yes.
Q. Now, you also told us that you don't have a real clear memory of what was actually said at side bar. Is that true?
A. True.

Q. And I'm going to ask you a little bit more in detail later. But is it fair to say that, whatever it was that David Jellinek said, you walked out the door thinking that Medina Perez was coming out the front door. Is that true?
A. I did, yes.
Q. And certainly, as an assistant district attorney, you weren't going to go out and lie to ICE, were you?
A. No.
Q. And you wouldn't be part of a plan to avoid ICE; right?
A. I would not.
Q. And so if there were a plan discussed at side bar on or off the record to help Medina Perez go out the back door and avoid ICE, you wouldn't then go out to the ICE agents and say he's coming out the courtroom door, would you?
A. I would not.
Q. You would have, if you heard anything like that, done something; right?
A. Probably.
Q. Now, if David Jellinek had said at side bar, the court officer -- if I take him downstairs, the court officer will let him out the back door, and the

judge said, yes, that's what we'll do, is there any way you would have gone out to the hall and told ICE he's coming out this door?

A. No.

Q. So is it fair to say that, without remembering exactly what was said, it wasn't that?

A. Correct.

Q. All right. And it wasn't anything that would have given you that impression; right?

A. Correct. I did not have that impression.

Q. And in fact, you have spoken with Special Counsel Fabricant, haven't you?

A. Yes.

Q. And she pretty much asked you that same question; right? Whatever was said, what did you think after it. Right?

A. Yes.

Q. And you said I thought he's coming out the front door.

A. Yes.

Q. And that's the truth, isn't it?

A. It is.

Q. Now, if somebody in that courtroom had said, either at side bar or out loud, we've made a decision that he's going to go out the back

door, that's the kind of thing you'd remember, isn't it?

A. Yes.

Q. Did that happen?

A. Not to my memory.

Q. Would you forget something like that?

A. I don't think I would have.

Q. Now, you said about Judge Joseph, in response to one of Special Counsel Fabricant's questions, you thought that she had made a misguided attempt to do what she thought was right?

A. I did say that.

Q. And you had no reason to believe, having been present at side bar, that she knew that David Jellinek was going to have him released out the back door, do you?

A. I do not.

Q. And when you say a misguided attempt to do what she thought was right, are you referring to the idea that maybe there was a way that ICE wouldn't get him?

A. Right.

Q. Okay. Now, at side bar David Jellinek was claiming very vociferously that his client was not the guy ICE was looking for; right?

A. Yes.
Q. And certainly, no one would want ICE to take the wrong guy, would they?
A. No.
Q. That's not a good thing, is it?
A. It is not.
Q. All right. And so what Judge Joseph was actually doing was offering David Jellinek time to try to convince ICE this wasn't the guy.
A. I don't know if that's what the offer was for or not.
Q. Well, you know that that's what she had been doing all morning, right, giving more time?
A. The more time, for me, I thought was to figure out the Pennsylvania warrant.
Q. All right. But,
~~A. But...~~
Q. But not just you, but Attorney Bostwick was asking for more time; right?
A. Correct. Yeah. Absolutely.
Q. And there was a second call and a third call --
A. Absolutely.
Q. -- and a fourth call?
A. Many, yes.
Q. All right. And all of those were with you and

Attorney Bostwick; is that right?
A. I don't remember at which point Attorney Bostwick withdrew because of the private appearance by Attorney Jellinek, but Attorney Bostwick was certainly there in the morning, and at some point, that I can't recall, Attorney Jellinek came in.
Q. Well, let's see if we can try to shed a little light on that. Do you have the book of exhibits there?
A. I do.
Q. And would you take a look at Exhibit H, please. And Exhibit H is a transcript of the full day. Can you take my word for that?
A. Yes. I am with you.
Q. All right. And if you could, would you look at Page 147.
A. I'm sorry. Are we talking about within the transcript?
Q. Yes.
HEARING OFFICER: Can you give us the --
Q. The transcript page, not physical page.
A. Okay. I'm here.
Q. All right. And if we look at Line 16, the clerk is saying, and that's just, Judge, that leaves

us with Mr. Perez and Attorney Bostwick, are you still, and Ms. Bostwick says I just sent a fax?

A. Yes, I see that.

Q. Do you remember that happening?

A. Not specifically but...

Q. All right. But we can tell from the transcript Ms. Bostwick was still there representing Medina Perez and she was trying to sort out the identity issue; --

A. Yes.

Q. -- is that right?

A. Yes.

Q. All right. And then Judge Joseph asked Mr. Harrington whether he needed more time. Right? Do you see that, the next line?

A. I do see the next line that says that as well.

Q. All right. And if we flip over to two pages later, 149, there's a period where Judge Joseph and the clerk are talking to Mr. Harrington; is that right?

A. Yes.

Q. And again, you would be there because you'd be representing the Commonwealth on that case, whatever it was?

A. Correct.
Q. All right. And then if we get to Page 149, and we look at Line 18, do you see that?
A. Yes.
Q. All right. Then Ms. Bostwick is speaking again?
A. Yes.
Q. And she says, I will, and then she says, I think, Your Honor, I have an appointment this afternoon and I wanted to ask if we could have a -- I understand that the interpreter has to be somewhere as well, if maybe we could have Mr. Medina's case called at 2:15 or so, so that would give me time and then we're not just waiting, and the clerk says, at 2:15.
A. Yes.
Q. Do you recall that happening?
A. Not specifically, but it sounds right.
Q. All right. And then if we flip to Page 150, Ms. Bostwick says, somewhere, and then the clerk interrupts and says, and the interpreter's okay with that, too, 2:15, and Ms. Bostwick says, I have a medical appointment at 1:30, Judge Joseph says, not a problem, Ms. Bostwick says, so I don't know if I'm going to be able to get back at 2:00, Judge Joseph says, not a problem, the

clerk says, that's fine, court says, we'll hold it, do you have to be somewhere else today. And now she's talking to Mr. Harrington?

A. Yes, I see that.

Q. And if we slide down to Line 18, all of that happened just before 12:40 in the afternoon; is that true?

A. Yes.

Q. Okay. So does that refresh your recollection that at least as of the lunch break Attorney Bostwick was actively representing Jose Medina Perez?

A. Yes.

Q. All right. And you don't have any recollection of interactions with David Jellinek before that, do you?

A. I don't.

Q. Now, Attorney Bostwick was doing things, like she said, sending a fax, and at one point do you recall she asked for something called a Triple I?

A. That makes sense that she would.

Q. Help us out. What's a Triple I?

A. It's an out of state record.

Q. All right. And is that something a defense

lawyer might want to see if they're trying to investigate identity?

A. Yes.

Q. And you understood Ms. Bostwick had some questions about her client's identity, who was he really; --

A. Yes.

Q. -- right? And appropriately she was trying to figure it out.

A. Correct.

Q. And appropriately Judge Joseph was giving her time, repeated calls, to try to figure it out.

A. Yes.

Q. And she gave her the lunch break to try to figure it out.

A. Yes.

Q. And there's nothing wrong with a judge giving a lawyer time to do his or her job; right?

A. No.

Q. Okay. Now, would you take a look at the transcript. And why don't we look at the typed version because I think it's a little cleaner. That's Exhibit G. And --

JUDGE FABRICANT: G?

MS. MULVEY: G. I'm sorry. G,

like girl.

Q. And it's App 34?

HEARING OFFICER: Are we using the A or the B transcript?

MS. MULVEY: It's A.

HEARING OFFICER: So don't you want to use the B or...

MS. MULVEY: Oh, I'm sorry. Sure. Let's go to 40. I didn't realize they were in here one after the other. I apologize.

HEARING OFFICER: Thank you.

Q. At 40.

A. 40, yes.

Q. And if we look, we see 2:48, and that's the beginning of the afternoon call for Mr. Medina Perez's case?

A. Yes.

Q. All right. And the clerk says, Attorney Jellinek filed an appearance. And everybody's in open court at that point; is that right?

A. Yes.

Q. And then Attorney Jellinek asks to go to side bar.

A. Yes.

Q. All right. And you all go up to side bar?
A. Yes.
Q. Okay. And if we look at the picture up here, is that where we all are?
A. Yes.
Q. All right. Now, you said that the judge would sort of scooch over, roll the chair over to here?
A. Yes, generally.
Q. And then you and David Jellinek would stand there?
A. Yes.
Q. All right. And there's some stairs here?
A. Yes.
Q. I don't know how tall you are. Do you climb up on the stairs?
A. I'm pretty tall. I don't remember if I stood on the stairs or not.
Q. Okay. But either way, you and David Jellinek are standing side by side at the side bar; --
A. Yes.
Q. -- is that right? And the clerk's over here somewhere?
A. Yes.
Q. All right. Now, at that point the first part of

this side bar was on the record; is that right?
A. Yes.
Q. And we see Judge Joseph, is dismissed, so it's my understanding that ICE is here. That's the part that starts at side bar; is that right?
A. Yes.
Q. Okay. And we know you're there because you say yes?
A. Right.
Q. And Attorney Jellinek, again, starts saying this is the wrong guy?
A. Right.
Q. And if we continue onto Page 49, he's pleading his case that this is the wrong guy?
A. Yes.
Q. Okay. And you said, and you pointed it out, I don't think arguing ICE is really my, and that means you're not getting involved in is he the guy ICE is looking for or not.
A. Correct.
Q. All right. And David Jellinek at the end says, I think the best thing for us to do is to clear the fugitive issue, release him on a personal, and hope that he can avoid ICE. Now, did you interpret that as meaning I'm going to let him

out the back door?
A. I did not.
Q. What did you think that meant?
A. That he was going to try to figure a way for him to avoid the ICE officer, but I didn't know how.
Q. And one way would be to convince the ICE officer this isn't the guy; right?
A. Sure.
Q. He's successfully done that with the Pennsylvania warrant, hadn't he?
A. He had.
Q. All right. So, if he's done it once, he could very well think he could do it again; true?
A. True.
Q. And if we look at what Judge Joseph says is, the other alternative is, if you need more time to figure it out, hold until tomorrow.
A. That is what it says, yes.
Q. And did you understand that Judge Joseph was once again offering this defendant's lawyer time to do whatever he could on the issue of identity?
A. Yeah.
Q. All right. And again, nothing wrong with that,

is there?
A. Not, not necessarily, no.
Q. All right. And she says, hold until tomorrow?
A. Yes.
Q. All right. And then they say, if he's bailed out from Billerica, ICE will pick him up, and she says, ICE will pick him up?
A. Right.
Q. And what all that means is, Billerica is the overnight pretrial place?
A. Yes.
Q. Is that where they send them?
A. Yes.
Q. All right. And if somebody goes to Billerica and posts bail, they walk out the door but ICE can take them right then; right?
A. Right.
Q. Whereas if they bail, et cetera, they don't make bail, they're held in custody and they're brought back for the next appearance.
A. Correct.
Q. And so if he were held at Billerica overnight and brought back in the morning, you'd be there; right?
A. Yes.

Q. David Jellinek could come back.
A. Yes.
Q. ICE could come back.
A. Yes.
Q. And we can pick up where we left off and see if David Jellinek had had any luck convincing ICE this wasn't the guy; right?
A. Yeah.
Q. All right. And there would be nothing wrong with that, would there?
A. Well, holding someone without bail on an ICE detainer I don't think is part of the bail consideration. So that's -- What I thought was, maybe we were still talking about the Pennsylvania warrant. I don't recall. It could have been both.
Q. Okay. But there's a couple of parts there. First, if his lawyer says, yes, I'd like you to hold him, there's no problem; right?
A. It depends what the reason is to hold someone. You need a reason.
Q. Well, one reason, if you're talking about bail, is to make sure he's going to show up for the next appearance.
A. Absolutely. Yes.

Q. And one of your roles as the district or assistant district attorney is to make a bail request?
A. Yes.
Q. But the judge isn't bound by your request, --
A. No.
Q. -- is she?
A. No.
Q. And if you say, Judge, I want bail, the judge can say, no, I'm going to release him on personal?
A. Absolutely.
Q. And vice-versa. You could say I'm not asking for bail and the judge can say I have concerns I'm going to set bail.
A. Sure.
Q. That's the judge's role.
A. Absolutely.
Q. And one of the things that might make a defendant likely not to show up is if he's not the guy everybody's talking about.
A. Sure.
Q. And so if you had concerns about or if a judge had concerns about a defendant's identity, it wouldn't be unreasonable to impose bail to make

sure he shows up, whoever he is.
A. Right.
Q. And that would have been a reasonable thing, again, for Judge Joseph to be thinking, wouldn't it?
A Yes. To set bail, yup.
Q. Now, she then says, what if we detain him; right?
A. Yes.
Q. And did you understand, again, that meant kind of hanging onto him while David Jellinek tried to sort things out?
A. Yes.
Q. All right. And then David Jellinek basically said, no, I don't want any of that to happen; right?
A. Yes.
Q. Okay. And he asked to go off the record.
A. Yes.
Q. He didn't say why?
A. No.
Q. You didn't know why?
A. No.
Q. And you don't anticipate Judge Joseph would have known why.

A. No. I can't speak to that. But I don't know why.

Q. All right. And there was an exchange and the clerk turned off the recording.

A. Yes.

Q. The clerk didn't say, Judge, what are you doing, there's a rule against this.

A. No.

Q. You told us you're a clerk magistrate now.

A. Yes.

Q. Could you tell us what that is in the Massachusetts system?

A. Sure. An assistant clerk magistrate, we have a number of roles. One of them is to assist in the courtroom session, facilitating calling cases on the record. That's one of many things. That would be what Mr. Okstein was doing on that date. We also order search warrants, do applications for criminal complaints, small claims, Many, many other things. But one of the roles is to assist in the courtroom, calling a list.

Q. Sort of half courtroom clerk and half type of judge?

A. Sure.

Q. All right. And when you're sitting as a clerk magistrate, one of the things you do, try to help the new judge?
A. Yes, sometimes.
Q. And do new judges sometimes say --
A. Sometimes.
Q. -- how do I handle this?
A. (Witness nods head).
Q. And you know that's something that happens between clerks and judges; right? Clerks who are experienced try to help new judges not to do something they shouldn't do.
A. Sure.
Q. And Clerk Okstein didn't say, no, you can't go off the record, did he?
A. No.
Q. Then there was this 52 seconds off the record; right?
A. Yes.
Q. And the only firm memory you have is David Jellinek asking to go speak with his client downstairs?
A. In terms of like a statement, yes.
Q. Okay. Now, you've been dragged into this and asked questions on a number of occasions; is

that right?
A. It is.
Q. All right. Now, the first time you were interviewed by somebody from the U.S. Attorney's office; is that right?
A. Yes.
Q. And if I suggested to you that was in October of 2018, does that sound about right?
A. Yes. That could be right.
Q. And that was a phone call?
A. I don't remember, but probably.
Q. Okay. And at that point did you know that David Jellinek was talking to the U.S. attorney's office?
A. I did not.
Q. Did you know that he -- Well, he hadn't yet. You didn't know anything about his interactions; is that right?
A. I did not.
Q. Did you know anything about Clerk Okstein's interactions with the U.S. attorney's office?
A. I did not.
Q. And do you recall telling the U.S. attorney in October of 2018 that you remembered the defendant's attorney asking at side bar to speak

to his client in the lockup and thinking that it was odd?

A. Yeah, that sounds, that sounds accurate.

Q. Do you remember at that point saying anything about a plan or anything like that?

A. I don't recall.

Q. Okay. And then you had another interview with the U.S. attorney's office; is that right?

A. At some point, yes.

Q. And this was January 9th of 2019. Does that sound about right?

A. Yes. Yes, it does.

Q. And you went there?

A. I did.

Q. And at this point you had counsel representing you?

A. I did.

Q. All right. And you were asked again some questions about the side bar?

A. Yes.

Q. And you said at this point that you found the side bar discussion weird or sketchy. Does that sound like something you would say?

A. Yeah, I guess so, yeah.

Q. Okay. And that Jellinek and Joseph discussed

options to avoid defendant being turned over to ICE?

A. Yes.

Q. And was that the bail and the detainer and the holding him overnight?

A. Right.

Q. Is that what you meant by that?

A. I believe so, yes.

Q. You weren't suggesting that you heard David Jellinek say, well, why don't we avoid ICE by taking him out the back door?

A. No.

Q. And the next day you testified to the grand jury; is that right?

A. Yes.

Q. All right. And is it fair to say that your memory of that side bar was probably better in January of 2019 than it is in June of 2025?

A. Yes.

Q. All right. And did you tell the grand jury at that point, so I don't have a memory of what was on and off the record, but having heard the recording now, what else was discussed at side bar was Attorney Jellinek's request to have Mr. Medina Perez brought back downstairs to

lockup, there was also a short discussion and, again, I remember zero direct quotes, but there was the continued discussion between Judge Joseph and Attorney Jellinek of sort of what can we do, and I just have a memory again, I can't remember any direct words of Attorney Jellinek, but saying something to the effect of, is he all set, I have a plan, I don't remember him saying I have a plan, but it was the gist and it was that -- that is what I got from their exchange was, you know, what should we do, and he is like I've got it under control, that sort of thing. Again, I don't remember any words, but that was the impression that I was getting at side bar, and after that is when he asked still at side bar if his client could be brought back downstairs to speak with him.

A. Yes.

Q. Does that sound like the most accurate you're going to do?

A. It's a lot of words. But yes, that is what I said.

Q. And certainly, nothing about any plan or I've got it, meaning I'm going to get him out the back door.

A. Right.
Q. Now, in terms of going back down to speak to his client -- Have you ever been a defense lawyer?
A. No.
Q. Okay.
A. Actually, one case, for about a week.
Q. Did you have trouble finding a place in the courthouse to have a private talk with your client?
A. No. Because I had been an ADA in that courthouse.
Q. Okay. Well, for the rank and file, there aren't a lot of private places to speak to a defendant, are there?
A. It depends on the courthouse, but that's fair.
Q. In Newton. I'm sorry.
A. There's actually conference rooms out in the hallway.
Q. There's a conference room?
A. Yeah. I think there might be one.
Q. But, for example, if you're in a courtroom, and you need an interpreter, there's not really a good place to huddle and have a private conversation.

A. In the courtroom, no. It's small.
Q. Okay. And everybody knew that ICE was in the front hall, --
A. Yes.
Q. -- is that right, --
A. Yes.
Q. -- waiting for Mr. Medina Perez?
A. Yes, I believe so.
Q. And would it be a legitimate concern that, if he walked out the doorway with his lawyer, they might not be quite as respectful of the attorney/client privilege and they might not give him a chance to talk to his counsel?
A. That's fair.
Q. And so there would be a legitimate reason to think, well, we don't want to walk out in the hall because he may get grabbed before I get a chance to talk to him.
A. Maybe.
Q. And that leaves the lockup, doesn't it?
A. It does, yeah.
Q. There wouldn't be really any other place he could go.
A. Well, there was no one else in the courtroom but...

Q. Well, there was one more matter, wasn't there?
A. Oh. I don't remember. I don't remember there being anything else, but there could have been.
Q. If you look at the transcript --
A. If the transcript says there was, then there may have been another one.
Q. All right. And his friends were there? Do you remember --
A. I believe there was one person there.
Q. Okay. And he had some property in the lockup?
A. Yes.
Q. All right. And so sometimes defendants would go down and get their own property?
A. Not in my memory but... That's just my memory.
Q. Not in youra month there?
A. Yeah. Exactly.
Q. Okay. Now, in the month that you were there or in the time that you were there, had you had ICE take into custody any other defendants?
A. I don't have a memory of, at Newton, that happening prior to this case.
Q. Okay. So fair to say you didn't have any experience with how or where ICE did that in

Newton?
A. Correct.
Q. Were you, as an assistant district attorney, familiar with something called a Lunn policy?
A. I am not.
Q. As a clerk magistrate, are you familiar with a policy about how defendants should be taken into ICE custody?
A. We just got a new one. I don't know what it's called. But I'm familiar with it.
Q. Okay. And did you know that there was a prior version?
A. I'm sure that there was.
Q. If you take a look at page -- I'm sorry -- Exhibit B in the book in front of you.
A. Okay.
Q. And this is a transmittal memo. Do you -- As a clerk magistrate now, are you on the receiving end of these sometimes?
A. Yes.
Q. All right. And it says to ~~chief~~ judges, clerks, registers, chief probation officers, and all staff?
A. Yes.
Q. From the chief justice of the Trial Court and court administrator?

A. Yes.
Q. And it says policy and procedures regarding interactions with the Department of Homeland Security?
A. Yes.
Q. Is that similar to the one that you said you just got a new one?
A. Yes.
Q. All right. And if we turn to App 7, which is the third page.
A. Okay.
Q. Do you see a Section 3, DHS? That's Department of Homeland Security?
A. Yes.
Q. Officials taking custody of individuals at a courthouse?
A. Yes.
Q. And Section A is individuals over whom the Trial Court has custody?
A. Yes.
Q. All right. And it says, consistent with Chapter 2, Sections --
A. Uh-huh.
Q -- 14 and 15 of the court officer manual --
A. Yes.

Q. I assume that's not something you had; --
A. I did not.
Q. -- is that right? Okay. When an individual who was brought into court in custody and subject to release after his or her court proceeding, that's Mr. Medina Perez; right?
A. Yes.
Q. All right. Court security personnel shall process that individual out of lockup in the normal course regardless of whether the individual is subject to a civil immigration detainer or warrant; right?
A. Yes.
Q. Okay. And then it says, if, during the process, processing of an individual subject to release out of the courthouse, -- Again, that's Mr. Medina Perez?
A. Yes.
Q. -- a DHS official is present in the courthouse and seeks admission to the courthouse's holding cell area in order to take custody of the individual. Now the holding cell area, is that what we've been calling the lockup?
A. Yes.
Q. Okay. Court officers shall permit DHS officials

to enter the holding cell area; right?
A. Yes.
Q. And what that means is, if the DHS officials, if ICE wants to go to the lockup, they may.
A. Yes.
Q. And that's exactly what Judge Joseph said.
A. I don't remember. I don't recall what --
Q. Do you recall special counsel reading you, when the clerk said ICE is here, they want to visit the lockup, and she said that's fine, but they can't come in here?
A. Oh, yes.
Q. All right. And so she was complying with that policy, wasn't she?
A. Yes, yes.
Q. And if we keep going there, it says they can enter once trial court personnel had finished processing that individual out of the court security personnel custody.
A. Yes.
Q. If a security department supervisor determines that the DHS official would otherwise take custody of the individual inside or immediately outside of the courthouse. And again, that's Mr. Medina Perez; right?

A. Yes.
Q. All right. And then the last paragraph there says, to the extent possible, court security personnel should require that DHS officials transport any individuals taken into custody through the prison or transport entrance and avoid taking the individual through the public areas of the courthouse. Right?
A. Yes.
Q. And the prisoner transport entrance is this sallyport that we've talked about?
A. Yes.
Q. And you knew that was there. There was a place where vans would pull up and they take the people in custody directly from the van 5 feet to the door?
A. Yes.
Q. And that would be called the sallyport? Does that sound --
A. Yes.
Q. And what this policy is saying is, if ICE is taking somebody, they should go out through that door; right?
A. Yeah, that is what this says.
Q. And that you understand is a security thing,

it's not great to have ICE try to take custody of people in public areas?

A. Right.

Q. Because you just don't know what's going to happen?

A. Sure.

Q. Okay. And so in terms of Mr. Medina Perez going down to the lockup, that's exactly where, per the policy, he was supposed to go, isn't it?

A. I think if he was still in custody, yes.

Q. Okay. They were supposed to process him for release down there?

A. Well, I'm just reading the section, any individual whom the Trial Court has custody.

Q. Right. And it says, people who are brought into court in custody and is subject to release.

A. Okay.

Q. Right. That's him; right?

A. Yes, yes.

Q. Okay. And ICE should have been permitted to go down there, should have been required to go down there and take him; right?

JUDGE FABRICANT: I think this calls for an interpretation of the policy.

A. I'm not -- I'm trying to read it quickly.

Q. All right. The last paragraph says, to the extent possible, court security personnel should require that DHS officials transport any officials taken into custody through the prisoner transport entrance?
A. That is what this says.
Q. All right. And so if ICE had been permitted to go down to the lockup, as they had asked, all of that would have happened; right?
A. I would assume so.
Q. And it wasn't Judge Joseph that prevented them from going to the lockup, was it?
A. From going to lockup.
Q. She said that's fine; right?
A. If that's what the transcript says. I don't remember this part at all; so...
Q. Okay. All right. Now, the rest of the appearance for Mr. Medina Perez was pretty routine; right? He was arraigned and he was given drug warnings?
A. Yes.
Q. And then he and David Jellinek and the interpreter went downstairs to the lockup?
A. Yes.
Q. And you gathered up your stuff and at some point

you went out to the lobby?
A. Yes.
Q. And you saw the ICE agent there.
A. Yes.
Q. And you told him he's coming out this door.
A. Yes.
Q. And you stood there and you waited with him.
A. Yes.
Q. And at some point you thought, gee, this is kind of taking a long time; --
A. Right.
Q. -- right? And at that point you asked somebody to go check.
A. Yeah. I don't remember if I asked him to check or I may have -- I just remember it was Michael Owens, the advocate, and I was just kind of asking any other doors.
Q. When you say "advocate," you mean the victim witness advocate?
A. Yes.
Q. Is that somebody who works with your office?
A. Correct.
Q. All right. Then you're standing there and David Jellinek comes out with his property bag?
A. Yes.

Q. And everything kind of gets disrupted. The ICE agents weren't happy?
A. Oh. Yes.
Q. Somebody goes running around to the back. Do you recall that?
A. That sounds like probably what happened. I don't specifically recall.
Q. And at some point, after you figured out what had happened, you called your supervisor; --
A. Yes.
Q. -- is that right? And the reason you called your supervisor was because of this escape; right?
A. Yes.
Q. Okay. And you were actually asked a question about that call at the grand jury.
A. Yes.
Q. Do you recall that?
A. Yes.
Q. And did you say -- You were asked, a member of the grand jury wants to inquire as to why it is at that time that you -- Where am I? With the context there. A member of the grand jury asked, getting back to the side bar conference when the recording was turned off and you had a

feeling of discomfort, a member of the grand jury wanted to inquire as to why it is at that time that you did not go and immediately contact the supervisor about the recording shut off and the discussion about this way to get Medina Perez out while avoiding ICE. And you said probably because I didn't think he was going to escape, I thought he was going to get released and go with ICE and then it would be just sort of another day, and that was weird but, well, you know, it happened. So once it didn't happen, I immediately called my boss.

A. Yes.

Q. Is that true?

A. Yes.

Q. All right. And so up until the time you learned he had gone out the back door, it was just, you know, kind of an odd day; right?

A. Yeah. It was something I didn't feel I had to immediately report.

Q. All right. And once he went out the back door, that changed everything, didn't it?

A. Yes.

MS. MULVEY: May I have one moment~~, Chair~~?

(PAUSE)

MS. MULVEY: I have nothing else. Thank you.

JUDGE FABRICANT: Very briefly. Very briefly, Ms. McDermott.

REDIRECT EXAMINATION

BY JUDGE FABRICANT:

Q. You said, in response to one of Ms. Mulvey's questions, that an ICE detainer was not part of bail conditions. What -- Take~~e~~ing your mind back to the spring of 2018. What were legitimate considerations for an ICE consideration, condition, what were legitimate considerations for setting bail ~~on~~under the law as it stood at that time in Massachusetts?

A. So I mean, what I would consider in asking for bail is default history, the sentence that they might be facing, so their motivation not to return to court, whether they had other open cases, whether they had a strong defense. There's a number of factors.

Q. So had there been a decision of the SJC a few months earlier regarding the issue of what was proper to consider in setting bail?

A. Yes. Commonwealth versus Brangan.

Q. Can you tell us the essence in your view what the teaching of that case was?

A. It was t~~o~~hat -- Bail is meant to ensure the Defendant's return to court. For instance, a DA can argue dangerousness associated with bail. One way it affected my job.

Q. And just to make sure we've got it here on the record. That's Commonwealth versus Brangan,

A. Brangan

Q. B-r-a-n-g-a-n?

A. ~~B r a n g a n, y~~Yes.

Q. And the essence of the holding was the legitimate purpose of bail is to ensure the defendant's return to court.

A. Correct.

Q. And not other things.

A. Yes.

Q. Now, if somebody has an ICE detainer, and ICE takes custody of the person, person -- ICE might bring the person back to court or might not.

A. Sure.

Q. Assuming it's the right person for ICE to take, ICE might bring the person back and might not. And if it's not the right person for ICE to take, ICE might bring the person back and might not; correct?

A. Correct.
Q. So on that issue of how ICE relates to whether the person is going to appear, it doesn't matter whether it's the right person or it isn't the right person, does it?
A. I guess not. What I'm -- It's not part of my calculus in requesting bail.
Q. So you as an assistant district attorney would not take into consideration whether there was or wasn't an ICE detainer, whether the person was or wasn't the right person for an ICE detainer. That wouldn't be part of your consideration as to whether you requested bail or not.
A. Correct.
Q. And in your view, again, back in the spring of 2018, was that a legitimate part of consideration with respect to bail?
A. I mean, the view on ICE and detainers in the courtroom has changed so many times. I mean, our office has always said it's not part of the district attorney's job to consider that, and what the judge's policies are, I don't know. I just know that, you know, for the criminal case, ~~is~~ what I consider when I'm asking for bail and other factors.

Q. The criminal cases that you prosecuted, criminal charges that you were prosecuting, were the focus of your attention; correct?

A. Correct.

JUDGE FABRICANT: Okay. Thank you.

I have nothing further.

MS. MULVEY: I have nothing else. Thank you.

JUDGE FABRICANT: May this witness be excused?

HEARING OFFICER. Yes. Yes.

Thank you very much.

HEARING OFFICER: Given the hour, does counsel agree this is a good time to break~~prepare~~ for lunch?

JUDGE FABRICANT: Yes.

HEARING OFFICER: So we'll resume at 2:00. Thank you.

(Luncheon recess taken at 1:03 p.m.

Proceedings resumed at 2:01 p.m.)

HEARING OFFICER: Good afternoon.

I'll defer to you, Special Counsel, to call your next witness.

JUDGE FABRICANT: Thank you.

And the Commission calls Lawrence Okstein.

(PAUSE)

JUDGE FABRICANT: While he's coming to the witness stand, Mr. McInerney, counsel have now agreed that the whole set of photographs that's in Appendix U should be received in evidence with your permission.

HEARING OFFICER: Absolutely. Got it, Judge.

JUDGE FABRICANT: Thank you.

And there's another photograph --

MR. HOOPES: Yes. And I will bring that in the morning to add. So that will be the collection of photographs.

HEARING OFFICER: That's fine.

JUDGE FABRICANT: Thank you.

MR. HOOPES: And they all come from one set of photos. This one was missing.

HEARING OFFICER: Understood.

Thank you very much.

Would you please raise your right hand.

LAWRENCE JOSEPH OKSTEIN, SWORN

HEARING OFFICER: Thank you. Please have a seat.

DIRECT EXAMINATION

BY JUDGE FABRICANT:

Q. Good afternoon.

A. Good afternoon.

Q. Tell us your name, please.

A. Lawrence Joseph Okstein.

Q. And what is your occupation?

A. I am the first assistant clerk magistrate at the Newton District Court.

Q. And going back through your career, can you give us a brief overview of your professional history?

A. Sure. From 1993 to 1995 I was an assistant district attorney in Norfolk County, with William Delahunt, from 1995 to 2014 I was in private practice, general law practice, and then from December 29th of 2014 to present I've been in the Newton District Court, first as an assistant clerk magistrate and now as the first assistant clerk magistrate.

Q. And what's your role as first assistant clerk magistrate?
A. So I conduct criminal show cause hearings, so when the police are seeking criminal complaints against individuals, I hold hearings to determine whether there is probable cause to issue a criminal complaint, I conduct small claims trials, I handle CMVI or civil motor vehicle infractions hearings, I process appeals to the various courts within the divisions of the district court~~,~~ ~~decisions of the court.,~~ I also issue search warrants upon finding probable cause, arrest warrants upon finding probable cause, and that's generally -- and I sit in the session to assist the judge when the session clerk is otherwise unavailable.
Q. And you said that before you became first assistant clerk, you were an assistant clerk. When you were an assistant clerk, were you more frequently sitting in the session?
A. I, again, we have a session clerk. So we are a small court. If the session clerk is unavailable due to sickness, vacation, or any other reason, I would sit in the session to assist.
Q. Okay. I'm going to ask you to give us a general description of the physical layout of the

building and the courtroom. We're going to put up some photographs to assist in this. So let's start with Photograph 509, Page 509, Appendix U.

And Mr. Okstein, in front of you on the witness stand is a binder that has a set of exhibits that have been received in evidence. The photographs are at Tab U. So you can look at them there or you can look at them on the screen, whatever is easier. And there are page numbers in the upper right-hand corner, and those are the page numbers that I'm going to refer to.

So what do you see here in Photograph Number Page 509?

A. So -- Page 509. Are they marked page numbers?

Q. In the upper right-hand corner, there's a red number. Actually, in the book --

A. I see the numbers. Okay.

So on Page 509 I see what appears to be the first session of the Newton District Court.

Q. And what are we looking at from the perspective of this photograph?

A. So you're looking at a shot of where the judge sits, which is the far back, with the

seat, what appears to be the false bookcase, if you will, in the back with two flags, and then in front of where the judge sits is where the session clerk or whoever's covering for the session clerk would sit, and then the litigants would be at the table that you see where -- with the two chairs, and then if there was a custody, the person in custody would be where you see the glass enclosure up close.

Q. Is that referred to as the dock?

A. The dock, yes.

Q. And let's pull up Photograph Page 506. And what do you see here?

A. So Page 506 is a picture, a photograph of the entranceway to the clerk magistrate's office, so the first floor of the Newton District Court.

Q. If you're coming out -- Looking at this photograph, if you're walking out the door of the courtroom, the public door of the courtroom, where are you in this photograph?

A. So you can just make out the bench that's on the left-hand side. The door to the first session is just past that bench, on the right-hand side.

Q. And so you'd be coming out and turning to your

left to go into the clerk magistrate's office if you're coming out of the courtroom?

A. Yes. Yes. If you walk out of the first session courtroom, you walk out and you turn to your left, that's what you would see. This is the view.

Q. If you're in the clerk's office, in your office, and you're going into the courtroom, is there another way to get there?

A. There is. So if you walk through the clerk's office, there is a back entranceway into the courtroom.

Q. And does that lead to a secure door on the side of the courtroom?

A. Yes. So the only people that are allowed back there are court personnel, court officers, clerks, judges. And so, yes, that was the secure area back there.

Q. And do you need a security pass to open that door?

A. Yes, you need a pass and you put it up to the little reader.

HEARING OFFICER: Could I ask that you speak a little closer to the microphone, sir.

THE WITNESS: Sorry. Yes.

HEARING OFFICER: Thank you.

JUDGE FABRICANT: It is partly probably because I'm having him turn to the photograph.

Q. Let's bring up Photograph 512, Page 512. So what do you see here?

A. So on Page 512 you have a photograph of the ~~exitway~~exit way of the first session. So if you were leaving the first session, you would walk through those double doors and into the main corridor where you just saw the clerk's office to your left.

Q. And what are those benches that you see back there behind the bar?

A. So the benches are for the public, it's where the public would sit, or if there are observers of the court, if you will.

Q. And let's just bring up Photograph 513. What's that?

A. So Page 513 is a photograph of the dock, if you will. So that's where people in custody would sit, where there's a little bench there, and stand before the judge, they approach the glass that faces the bench so the judge could

hear them.

Q. And let's bring up 512. Is this the same one we just looked at?

Do part of your responsibilities, if you're serving as the clerk in the courtroom, do part of your responsibilities include managing the recording system?

A. Yes.

Q. And back in the spring of 2018 -- And now everything else I'm going to ask you is going to relate to April of 2018, which I realize is seven years ago, but I'm going to ask you to put your mind back to that time frame.

A. Sure.

Q. In that time frame, what kind of recording system did you have?

A. It was called JAVS. I'm not sure what JAVS stood for. It's J-A-V-S. It was -- That was the recording system that we used.

Q. Has that since been replaced by something else?

A. It has. It has.

Q. And the new system, what's that called, For

A. I believe it's called FTR, For the Record.

Q. So focusing on JAVS. If you needed to get access to a recording after a proceeding, what

did you have to do?
A. So what I personally did was ask someone in our office who was well versed in the technology side to make a copy of a proceeding, they would come into the courtroom, they could pull up the proceeding through JAVS, make a recording on a CD or disc, if you will.
Q. So you'd get it in the form of a CD?
A. Yes.
Q. Nowadays, with the FTR system, what do you do?
A. Now it's all online. You request a copy online, pay for it online.
Q. And for you, if you want to listen to something --
A. I go on For the Record, I have a pass, and I can listen to the proceeding that was ~~detected~~requested.
Q. So turning to April 2nd of 2018. Before that day, had you had experience with ICE detainers?
A. I had seen them before, yes, so I'd seen both detainers and warrants.
Q. And how often?
A. I~~f~~t felt like they were coming fairly regularly around that time frame. So I'd see them a few times a week.
Q. And if you were serving as the clerk for the

session, would you get the detainer?
A. Yes. They would make their way to me.
Typically, I believe the court officer probably got them from the police. I'm not sure how it came to be in the court's possession. But someone would give it to me, I would then distribute a copy if I had it to the Commonwealth, defense attorney, and I would let the judge know that we have one.
Q. And up to that day, had you had experience with ICE taking custody of someone from Newton District Court?
A. I had seen individuals taken into custody outside of the courthouse by ICE.
Q. Outside the courthouse. Outside what part?
A. The front. Outside the front door, on the street.
Q. And prior to that day, and it was 2018, had you had -- had you seen ICE going to the lockup in the Newton District Court?
A. I personally had not seen that.
Q. Were you aware of that happening?
A. I was not aware if it happened or not. I -- Typically, I wasn't in the courtroom. But I had never heard of it happening. I've never seen it

happen.

Q. On that day, were you working as a clerk in the courtroom with Judge Joseph?

A. I was. The session clerk was unavailable, so I was covering.

Q. During the course of the day, were there times when things were active in the courtroom and then breaks?

A. Yes. We would call the list to start the day, find out who ~~i~~was~~s~~ present, who wasn't present, the judge would get a handle on how much business there was and how much time she or he needed to allot to the cases, so -- and then we would take a break so that the attorneys could talk to their clients or the DA's office or -- the judge would come back out when the session clerk, or in this case, myself would tell the judge that we had business for her~~, to the sidebar~~ to deal with.

Q. And were you in and out of the courtroom --

A. I was.

Q. -- during that time~~s~~?

A. I was.

Q. During the course of that morning, did you see an ICE officer in the courtroom?

A. I did. I did see an ICE officer in the

courtroom.

Q. And how did you become aware that that person was an ICE officer?

A. So I think I first saw the ICE officer in the hallway. I can't remember precisely how I knew it was him, he was an ICE officer. Typically, they had a tag on or they identified themselves, introduced themselves. But I don't recall on that day how I knew, but I knew that the gentleman, one of the gentleman sitting in the benches area that I pointed out in the courtroom was from ICE.

Q. Who was the first justice at Newton District Court at the time?

A. Judge Mary Heffernan.

Q. And was she the judge who would be sitting there most often?

A. Yes.

Q. Did she have a practice regarding ICE agents in the courtroom?

A. So it was her practice, my understanding of the practice, was that, if the ICE officer was present in the court indicating that he or she wanted to take custody of a litigant, that they would -- she would ask that they wait outside the courtroom so that they're not in the

courtroom, and that if they're going to take custody of the person, that they do it outside the courtroom, so it's not going to interfere with the business of the court.

Q. And would she speak to the ICE officer --

A. No.

Q. -- or would she have you do it?

A. No. She would let the session clerk know, or if I was in the session, she would tell me to let the ICE officer know that that was the preference of the court.

Q. And was that preference, that practice, ever put in writing anywhere?

A. No. Each judge that came in had their own way of doing things, so to speak. So it wasn't something that other judges had to follow, but some judges did follow it and some judges had their own idea of how things should go, and we would follow that judge and whatever that judge wanted.

Q. So, on April 2nd, 2018, --

A. Yes.

Q. -- you're serving as the session clerk, Judge Joseph is sitting in the first session courtroom. Was Judge Heffernan in the building

that afternoon?
A. No, Judge Heffernan was not present on April 2nd, 2018.
Q. Did you talk to Judge Joseph about ICE being there?
A. I did. We had a conversation about the ICE officer being present in the courtroom.
Q. And did you have a conversation with her about Judge Heffernan's practice?
A. I did. I did.
Q. Tell us that conversation as much as you can.
A. So I spoke to Judge Joseph, and I let her know that there was an ICE officer in the courtroom, and we talked a little bit about it. Judge Joseph -- I asked her how she wanted to handle the situation, and she in turn asked me what Judge Heffernan's custom was, that she wanted to follow whatever Judge Heffernan did typically, and I advised her what Judge Heffernan did typically, and she said that's what we want to do here today.
Q. Do you know when in the course of the day that conversation occurred?
A. I think it was probably a little past 10:00 a.m., maybe, or -- around that time, but

I'm not positive of the exact time.
Q. Did you have one conversation with her or more than one conversation about ICE and how to handle ICE being there?
A. I believe we had just that one conversation where I just wanted -- I knew that, you know, she was fairly new to the bench, and I wanted to inform her of the ICE officer, and I think she was trying to make a reasonable decision, so I think following the first justice was a way that...
Q. And did you at some point communicate with the ICE officer what you understood to be the preference of the court?
A. I did. After I left Judge Joseph, I walked to the ICE officer and let him know the preference of the court was that he, if he intended to take custody of the individual he was there for, that it was preferred to do so outside of the courtroom.
Q. And did you give him direction or make a request to him regarding where he would physically be?
A. He asked should he wait in the hallway. I said that's fine, you can wait in the hallway. I think he asked me about which door the person— would

come out of, and I just pointed to the front of the building, which is right in the hallway. And he said, okay, I'll wait out in the hallway.

Q. At some point later in the day did you have further conversation with the ICE officer?

A. Yes. I had -- So toward the very end of the day, so late, later in the afternoon, almost toward the ending time of court, he asked me if the defendant was going to be released and go to lockup to, or downstairs in the basement to where the cells are, to get, to get the person he was interested in taking custody of, and he asked me to ask the judge if he could do that.

Q. Did you tell ~~you~~him you would ask the judge?

A. I did tell him I would ask the judge.

Q. We're going to come back to that. At this point what I want to do is play the recording of the afternoon call of the Medina Perez case.

A. Okay.

Q. So we're going to play that recording. What you have in front of you, in the binder in front of you is a transcript, which is at Appendix G and starts at Page 40 in Appendix G. So you can turn to that. We'll also have the

transcript on screen. So you can refer to the screen or binder in front of you.

(RECORDING PLAYING)

Q. So in this first clip, counsel says he wants to go to side bar and not ~~yet~~ to wait for his client. Is that your understanding of what happened?

A. That's my understanding, yes.

Q. Is that your memory of what happened?

A. That is my memory.

Q. Do they at that point go to side bar?

A. They did.

Q. The two attorneys and the judge?

A. And I believe someone was present from probation as well.

Q. Okay. And would that often happen that -

A. Yeah. Someone from probation-- ~~of the people,~~ they often changed out who was there during the lobby -- during th~~is~~ese little conferences. So one person could be there and then leave and another probation officer~~—~~. But ~~—~~ usually probation is somewhere in that mix.

Q. When they were at side bar, what were you doing?

A. I was marking cases, ~~from~~ cases that we had already done, so I was filling out the docket sheets, next dates, what had happened in the court proceeding, attorneys were asking me for

dates or, you know, whispering to me about something, so I was really taking care of what I needed to do from a clerk's perspective.

Q. Were you paying attention to the conversation at side bar?

A. No.

Q. All right. We're going to play the next clip.

(RECORDING PLAYING)

Q. So that conversation that appears in the transcript and we heard on the recording, although it's a little difficult to hear, until we get to the point where the judge says, are we on the record, did you hear any of that conversation?

A. No.

Q. And then when she said, are we on the record, the first time she said that, did you hear her say it?

A. I think I wasn't paying attention, so I asked her to repeat herself, because I just wasn't paying attention.

Q. And then the transcript indicates you said, what's that. Is that your memory of --

A. Yes. That was my way of asking what happened, what she wanted me to do -- because I just

wasn't paying attention.

Q. And then, according to the transcripts, she says, are we off the record. You say, no, we're on the record. And then Mr. Jellinek says, can we go off the record for a minute.

A. Yes.

Q. Had you had previous experiences in District Court with going off the record?

A. Do you mean Newton District Court specifically or just in general?

Q. Well, let's start with Newton.

A. So I think that there were other judges that would go off the record to greet an old friend or to talk about something that was personal. So that happened on occasion. And from my experience in Newton, it didn't happen a tremendous amount, but it did happen. Different judges coming into the court.

Q. Did you have experience in Newton with judges having conferences off the record about the substance of a case or about the matters in a case?

A. No. Well, typically, it was to discuss something a little -- something personal, personal to the judge and whoever they were talking to.

Q. Meaning personal to the lawyers, or --
A. Yeah, personal to the lawyers. So if they had an old college roommate or a friend or somebody they hadn't seen in many, many years, and they were appearing in Newton and they wanted to say hello or asked about their family, they didn't want that to all be part of the tape recording ~~record~~, so ~~that~~ they said could you shut that off for a second, they say hello, and put it back, they ask that it be back on.
Q. Going back earlier in your career to when you were a new lawyer in your earlier years of your law practice.
A. Uh-huh.
Q. Had you had experience with conversations with judges off the record?
A. Yes. As a practitioner, I definitely had experiences with judges more often, because I practiced with my father who had been a practicing attorney for 50 years, so a lot of judges knew him or knew my mother and they wanted to say hello or asked how they were or something like that. So oftentimes it was much more common. It's not common now. But it was common that a judge would say, hey, let me ask you a

couple of questions and it would all be not taped.

Q. And back in those early years of your career, had you had experience with substantive conversations off the record?

A. Only in lobby conferences. So going back to the lobby conferences, which was earlier in my career, they were not tape recorded. It would be in a lobby of a judge, the judge, the prosecutor, usually a criminal ~~case~~defense, the defense attorney. And oftentimes, a judge would have somebody else just sit in the room to make sure that there was somebody else in the room other than the defense attorney and the prosecutor. But those weren't taped.~~--~~ And then at some point they started to recommend that those conferences be taped, so judges would have tape recorders and tape the lobby conference.

Q. And in the 2018 time frame, April 2nd of 2018 frame, in particular, were the judges doing lobby conferences off the record that you knew of?

A. No, not that I'm aware of.

Q. And were judges doing other kinds of conferences other than what you've described off the record that you knew of?

A. Not off the record. Sometimes they would

hold side bar -- ~~lobby~~ conferences but on the record in the courtroom.

Q. On the record.

A. On the record, right. But -- ~~they would conduct that.~~

Q. Were you aware of a rule about recording?

A. I wasn't at the time this all happened. I of course now am aware.

Q. And when the judge asked you to go off the record, what did you do?

A. I went off the record.

Q. And did you have any concern about that at that point?

A. Not at that point, no.

Q. When you went off the record, when you turned off the recording, and the judge and the lawyers were talking, what were you doing?

A. I was just marking my cases and dealing with the clerk -- clerical part of my job, of being in the courtroom, marking paperwork and --

Q. Were you listening to their conversation?

A. No.

Q. Did you hear any of their conversation?

A. No.

Q. And then at some point did you go back on the record?

A. I did.
Q. And let's play the back on the record part.
(RECORDING PLAYING)
Q. Mr. Okstein, if you look on Page 42 of the transcript, and you go about a third of the page, about a third of the way down the page, Mr. Jellinek says, I would ask that he, I believe he has some property downstairs, I'd like to speak with him downstairs if I may. Was that something that was usual in your experience in the first session in the District Court?
A. Well, I wasn't in the first session all that often. But I hadn't seen an interpreter go down into custody for -- with the defendant like that, but that doesn't mean it didn't happen. I just, I hadn't seen it.
Q. It wasn't in your experience.
A. In my experience, I hadn't seen it.
Q. Okay. Now, at the bottom of the page where we just stopped, and Judge Joseph says wait just a second, let's go -- let's play a little more.
(RECORDING PLAYING)
Q. Mr. Okstein, you said to the judge, there is representative from ICE here in the court to visit the lockup.

A. Yes.
Q. What did you intend to be asking her or conveying to her at that point?
A. So I was conveying the ICE officer's or agent's request to visit the lockup to take the individual he was interested in into custody.
Q. Was that the request you told us about a little while ago?
A. Yes.
Q. And her response, that's fine, I'm not going to allow them to come in here, but he's been released on this, how did you understand that response?
A. I understood that response to be following the practice of the court, th~~at~~e officer was an agent, wasn't coming into the courtroom, wasn't coming into the courtroom to go down into the lockup, but she was releasing the prisoner and he was free to leave, and whatever happened after that was between him and ICE.
Q. And did you have any understanding as to whether ICE could go to the lockup another way?
A. I think at that time there was a policy that indicated that ICE agents were permitted to go to lockup. I had never seen them in Newton go

to the lockup. I had never seen in Newton that occur, in my experiencethat. But I think under the policy that the court put out to all the clerks and judges, I think that a judge could allow it.

Q. And did you understand that Judge Joseph was allowing it?

A. No. As I understood it, Judge Joseph was saying the agent was not permitted to come into the courtroom down the stairs through the courtroom to lockup but that she was releasing him and he was, the individual was free to leave, and then she was just following the practice of the court, that this gentleman would leave and if the ICE agent wanted to take him into custody he would.

Q. And the practice of the court, are you referring to Judge Heffernan's practice?

A. Yes. Well, refer to Judge Heffernan's practice, but more specifically, that's what I believe that Judge Joseph was following.

Q. And what was the practice of the court as to how a defendant would leave the courtroom when the defendant was released from custody?

A. So my experience is that the defendant would leave through the front door. So they get their

possessions, and the court officer would walk with them up the stairs, and they literally would walk right out the front door.

JUDGE FABRICANT: Let's continue playing.

(RECORDING PLAYING)

Q. Now, when the judge says, Mr. Jellinek asked if the interpreter can accompany him downstairs to further interview him, was that something in your view consistent with the practice you had seen previously in that courtroom?

A. Well, in the limited time that I'd been serving as the session clerk in the courtroom covering for a clerk, I hadn't seen that.

Q. Hadn't seen that.

A. I had not.

Q. You told us earlier that the ICE agent asked you if he could go to the lockup and you said you would ask the judge. Did you convey back to him an answer?

A. I did. I let him know.

Q. So let's try to get as close as we can to when you conveyed that back to him.

A. So after we were done with, with my reading what happened in the case, and Attorney Jellinek

walked down the stairs to the lockup with the court officer and the interpreter and then a defendant, I -- the hearing was over, I went out of the courtroom, the ICE officer was waiting in the hallway, and I conveyed to him that the -- you know, what had happened, that he could not go down to the lockup, that the individual would be -- was released from custody and would be coming up and going out the front door.

Q. And what was the basis for your telling the ICE officer that he couldn't go to the lockup?

A. That's how I understood -- That's what I understood Judge Joseph's decision to be in that respect.

Q. At some point did the ICE officer express a concern to you?

A. He did. He didn't say anything specifically. He was more speaking of, there was another individual in the courtroom with the defendant, and he expressed that he was alone that day at the Newton District Court and he was going to call another agent to come assist him so he -- That's what he expressed initially.

Q. Did he express concern about being alone?

A. Yes. He expressed concern about being alone

and that the defendant had a friend, he wasn't sure who the friend was, but he was in the courtroom waiting for him; so...

Q. And did you do something about that?

A. So yeah. When he expressed his concern about that situation, I called the chief court officer, who was in his office downstairs, and expressed to him that I'd be more comfortable if he came upstairs and stayed with the ICE agent to make sure that there was no confrontation to occur, and he did, he came up.

Q. And at some point -- That conversation you just talked about, you have an officer who's expressed his concern~~ed~~ to you, so you called the chief court officer, can you place that in time?

A. So, that, again, that would have been after the hearing was conducted, that would have been while the defendant, the defense attorney, the interpreter, the court officer were downstairs. So that's -- When they were all downstairs, I was on the first floor by the front door in the hallway area, and that's where the ICE representative was. So it was sometime after the hearing concluded but before the court closed at 4:30.

Q. And the chief court officer --
A. He came right up, yeah.
Q. And did you or the chief court officer tell the ICE officer where you expected the defendant to come out?
A. So yeah. Definitely one of us did. I don't remember if it was me. I definitely, if I was asked, I would have said the front door. I just don't remember if it was the chief who said the front door or myself. But I would have said that if I was asked.
Q. And the front door of what?
A. The front door of the courthouse. So opposite the courtroom, when you walk out of the first session, you literally walk right out the courthouse right through the doors.
Q. When you're having this conversation, are you outside the building or inside the building?
A. I'm inside the building in the hallway with the ICE officer and at that point with the chief court officer.
Q. And where -- How were you expecting the defendant to come into that hallway, what we've been referring to as the main lobby of the courthouse?

A. I was expecting that the defendant would be -- I guess not -- "supervised" isn't the right word, but accompanied by a court officer, brought up the steps, and then they would walk out the front door.

Q. So is that the stairway that comes from the probation counter?

A. Yes. That's where the public would go down.

Q. At some point that day did you become aware that the defendant wasn't coming out into the main lobby?

A. So I stayed with the chief court officer and the ICE officer for probably about five or 10 minutes, and then I left to do other things that I needed to do to close up the court. But in that five or 10 minutes, the prosecutor had come out of the courtroom. I don't know what she had been doing prior. But she came out of the courtroom and she asked, you know, whatever they were still doing here. I asked the ICE officer what he was still doing here. I was somewhat surprised that he was still there. And he said that he was waiting for the defendant to come out through the door that we told him was going

to happen. So...

Q. And did you at some point learn what had happened?

A. Yes. So it became clear as we approached the 4:30 time frame, when the court's closing up, that the defendant wasn't coming out. We also saw the defense attorney came up and walked by the ICE agent and the prosecutor and the chief court officer and walked out the door for the day. So he was leaving. So I wasn't sure where his client was, but he was leaving.

Q. The next day, was Judge Heffernan back in Newton District Court?

A. I believe it was the next day. I don't -- I'm not a hundred percent sure. I believe it was the very next time I saw Judge Heffernan, I think it was the next day.

Q. So you're not sure which day the next time --

A. No. I think it was April 3rd, the next day, but it could have been April 4th. I just don't remember exactly.

Q. Did you have a conversation with her?

A. I did.

Q. Tell us about that conversation, please.

A. So typically, when Judge Heffernan is not in the court, when she comes back to the court,

she'll ask did everything go okay, is there anything I should know about or any problems, because she's just trying to monitor how the day went for everybody. And I let her know that there was an issue, I didn't quite understand at that time the magnitude fully, but I said there was an issue with this person leaving the court not through the front door and the ICE agent was waiting and wasn't able to take him into custody.

Q. And did you talk to her at all about the recording?

A. I did. I let her know that -- She asked me a little bit about the hearing and what had happened, and I was trying to remember what had happened and in my mind tell her. And I did, I did say at some point the tape was off, and that's it.

Q. Did you at some point listen to the recording?

A. I did. I listened to the recording. Because I was trying to figure out, I was trying to figure out if I had said anything or if the judge said -- I was trying to figure out why the defendant didn't come up through the front, and I thought if I listened to the tape maybe I

missed something that the judge said or I said or the defense attorney said, and so I listened to the tape and I didn't hear anything that addressed that issue.

Q. Sometime later, did Judge Joseph ask you for a copy of the recording?

A. Yes. I believe I bumped into Judge Joseph maybe a week or so after, could have been two weeks, sometime in that time frame, when she was visiting the court, and she asked me for a copy of the tape.

Q. And did you have someone make a copy for her?

A. I did. Well, I had had multiple copies made anyway, so I just gave her one that we had.

Q. And who else did you give a copy to at some point?

A. Judge -- Well, I took one to listen to, Judge Heffernan asked for one, I think the Trial Court asked for several. They wanted it several different ways, because it was a little choppy, start, stop, start, stop, and a couple times the tape captured some but not all. So we made sure that the whole day proceedings was captured on tape so whoever was listening could hear the whole day, not just a part of the day.

Q. That request that came from the Trial Court, can you place that in time at all?
A. I would say it was probably a couple of weeks after my seeing Judge Joseph maybe or a week after seeing Judge Joseph or somewhere -- It was sometime after that week that I saw Judge Joseph.
Q. And was that Dan Sullivan, general counsel for the Trial Court, who made that request?
A. My best recollection is, it might have been Joe Jackson from the administrative office, and sometime Dan Sullivan, general counsel, had made a request but requested not just the day, they wanted the day before, the day after. So they were changing up what they wanted from the clerk's office; so...
Q. And to the best of your memory, that request that was changing and asking for the day before, the day after, the whole day, did that come from Joe Jackson or from Dan Sullivan?
A. I don't recall. I think that the ultimate request came from Dan Sullivan, from the general counsel's office, but I don't know why he was requesting -- That's what he requested. That's my recollection.

Q. Was Joe Jackson in the administrative office of the District Court?

A. I think so. At the time, yes. I think he dealt with those like tape issues and stuff like that.

Q. So was he working for working for Chief Justice Paul Dawley?

A. I believe so. In the administrative office.

JUDGE FABRICANT: That's all I have for you at this time. Counsel may have some questions for you.

HEARING OFFICER: Mr. Hoopes?

MR. HOOPES: Thank you.

CROSS-EXAMINATION

BY MR. HOOPES:

Q. Good morning.

A. Good morning, sir.

Q. My name is Tom Hoopes, and I represent Judge Joseph. Nice to meet you.

A. Nice to meet you, too.

Q. Thank you for your testimony so far. But I'd like to go back a little bit --

A. Sure.

Q. -- and ask you some questions, if I might.

A. Sure.

Q. So let's go straight to April 2nd. Event happens on that day that you've described, some events happened after that day.
A. Right.
Q. That was some seven years ago?
A. Yes.
Q. And so, I think it would be fair to say that you remember some things, some things you don't remember; correct?
A. Yes.
Q. And at the time, it didn't seem like to you something you needed to take notes on, so you don't have any notes; correct?
A. Correct.
Q. And nobody asked you to make notes at that point?
A. No.
Q. So did you start out as the session clerk at the very beginning of the morning?
A. I'm trying to remember. Because when I looked at the transcripts that were from the hearings, it starts around 10:00. We usually start the day at 9:00. So I wasn't sure if I started out the day or when the -- The session clerk's mother had passed away, so I'm

not sure if she found that out and left or how I ended up going into the session. But the first that I had of going into the session here on the tape is 10:00.

Q. So you started when you heard it; right?

A. Yeah.

Q. But you were the session clerk for the entire day.

A. Yes. Yup.

Q. And so talking about it today, you seem to have some specific memories of this case, Medina Perez.

A. Yes.

Q. Okay. And do you remember today that initially, when the case was called, Medina Perez was represented by Ms. Bostwick?

A. Yes.

Q. And you I assume are familiar with Ms. Bostwick?

A. I am.

Q. She's a bar advocate?

A. Yes.

Q. She's been a bar advocate there for a number of years; --

A. Yes.

Q. -- right? She's there often, to say the least?

A. She was at that time, yes.
Q. Yup. And the ADA was Shannon Jurgens?
A. Yes.
Q. And she had been there just about a month or so at that point?
A. Yes. They change over fairly quickly. I think she had been there for a little while, yeah.
Q. Just so I have it in time. So this is 2018, April of 2018. How long had you been the clerk -- been a clerk there?
A. I started December 29th of 2014. So maybe four years, a little over.
Q. Okay. And you've been promoted. So you've been the first assistant clerk on that day for --
A. From 2015 -- November of 2015 I was promoted.
Q. Okay. And so Ms. Bostwick represented Mr. Perez for the morning essentially; correct?
A. Yeah. She was appointed in the morning by Judge Joseph, yes.
Q. And when you listen to the tape for the day, you don't hear any reference to ICE by you in the morning.
A. No. No. I don't think I reference ICE ever other than asking the judge about the lockup,

going downstairs. The conversation I had with Judge Joseph was in her lobby.

Q. And do you have a firm memory as to when that conversation took place? Could it have been in the morning, could it have been at the lunch break?

A. I don't have a firm recollection. I thought it was in the morning hour. When I say "morning," I mean around the 9:00, 10:00 area, but I don't -- I couldn't tell you the exact time.

Q. Okay. And the first time you noticed ICE in the courthouse was you thought sometime in the morning.

A. Yes. I saw him in the hallway.

Q. And later on that morning you saw him actually in the courtroom.

A. I did.

Q. And he was sitting in the courtroom.

A. He was.

Q. So if I showed you a blow-up, if I can, of the courtroom. Do you have a recollection -- So we've got two. We've got -- This is a blow-up from the bench view out the door to the left side and this is a blow-up of the other side.

A. Yes.

Q. And I'll just put this one here. Do you have a recollection today of where you saw ~~--~~him.

A. I do. He was sitting in the front row on the right-hand side.

Q. So right up here.

A. That's the left-hand side.

Q. I'm sorry. The left. Well, okay. So we're --

A. I think. If I'm looking at it correctly. So I'm looking at the one behind that.

Q. When you say "left-hand side," looking at the bench --

A. I'm sorry. You're correct. So if I'm looking at the bench walking into the courtroom, it would be on the left-hand side, front row.

Q. Okay. So it would be fair to say that he would have had a front row seat.

A. Yes.

Q. And do you have a recollection of how many people were in the courtroom that day, like spectators --

A. I don't, I don't recall how many. It wasn't the busiest day. There definitely were other people. I just don't remember how many.

Q. It was a Monday.

A. It was -- I don't, don't remember. But like

I said, it wasn't the busiest day, but there was definitely other court business.

Q. Yup. And it would be fair to say that oftentimes in District Courts Monday's an arraignment day for arrests over the weekend and some other --

A. Traditionally it's the busiest day.

Q. Now, do you have a memory of whether the ICE agent was there the entire time before you said something to him or not?

A. I think when I came out -- when I came into the courtroom to handle cases, I saw him sitting there, and I think that's what prompted me to have a conversation with Judge Joseph, just to make sure I knew what she expected and wanted.

Q. So was this a conversation during the course of the morning? Again, I'm asking the same question. Or could this have been a conversation that was over the lunch?

A. I believe it was in the morning hours.

Q. But you're not sure.

A. I'm not sure.

Q. Okay. And the conversation was about ICE being in the courtroom?

A. Yes. I let her know that there was a

representative from ICE present in the courtroom.

Q. And you also told her, as I understood it, that Judge Heffernan's policy was no ICE in the courtroom.

A. It was not -- I would say her practice.

Q. Her practice.

A. Yeah.

Q. Well --

A. Yeah. Because every judge is a little different. So it wasn't a policy you had to follow, but it was definitely Judge Heffernan's practice.

Q. And not everybody had to follow it because the judge is the judge of that particular court that particular day.

A. Yes. Yeah.

Q. But you knew that that was Judge Heffernan's preference.

A. I did know, yeah.

Q. And if you had known it was her preference, you would have said something to Judge Joseph.

A. Well, I said, I said something to Judge Joseph when I saw the ICE agent. I knew that Judge Joseph was a fairly new judge, so I

wanted to alert her ~~of~~to it and ask her what she wanted me to do, if anything. And she in turn asked me, well, what was Judge Heffernan's usual practice, what did Judge Heffernan usually do, so I told her, and she said let's just follow what Judge Heffernan usually does; so...

Q. And you knew that Judge Joseph was a fairly new judge because -- a rookie judge, so to speak; right? Because you had seen her practice in that court before as a lawyer; right?

A. I'd seen her a couple times, but I knew she was a lawyer for sure.

Q. And -- So you had that conversation. Do you recall her saying anything to you about she wanted to check on the policy by calling the administrative offices?

A. I do remember that, yes.

Q. And so in fact she did call; correct?

A. Yes. I think I left at the point she was starting to call, but she did indicate to me -- I think she asked me if I had a copy of the policy handy. I went to my office, I couldn't put my hands on the actual policy. So she said don't worry about it, I'm going to call anyway to make sure I understand the policy.

Q. So based on your experience, limited experience as a session clerk, but experience as the first assistant clerk, some judges follow that practice, but not all.

A. Correct.

Q. When they were at the Newton District Court.

A. Correct.

Q. Were you aware of that practice of asking ICE to step out of the courtroom being utilized or practiced in any other District Court?

A. I didn't know one way or another.

Q. Okay. Now, the policy that she was asking you about, that was called the Lunn policy; correct?

A. You mean Judge Joseph was asking?

Q. I'm sorry. Judge Joseph, yes.

A. Yes. It was a fair case.

Q. And you went to look for it?

A. Yes.

Q. And it would be fair to say that clerks have their own organization, right, where they transmit documents and policies and things like that, that keep you updated?

A. An Association of clerks and magistrates. Yes. Oftentimes we'll get transmittals of important cases or rules. But this was a policy that was

generated and transmitted by the Trial Court to all the clerks.

Q. To all the clerks.

A. All the clerks.

Q. So whatever you had, you were the first assistant.

A. Yup.

Q. And I suppose in some ways very responsible in that courthouse for running the daily sort of functions.

A. I try to, I try to do my best.

Q. And I'm sure -- The clerk himself is a little older; correct?

A. He's a little older, yes.

Q. And so he relied on you to sort of be at the mouth of the information coming in from both of those sources.

A. I would imagine that's true.

Q. Now, after, did she get back to you and tell you exactly what the results were, the communications?

A. Did Judge Joseph?

Q. Yes.

A. I think she said that she was able to get someone in town or she -- I knew she was calling

in town. I think she got to talk to somebody. I'm not sure who. But I think she said she was all set. Because I continued to look for the policy. She said don't worry about it, that she had -- I think she said she had spoken to someone, she now knew the answer to her question.

Q. So you've read the Lunn policy?

A. A while ago, but yes.

Q. Okay. And so it would be fair to say, with regard to that policy, that that policy doesn't say anything about whether ICE can be in the courtroom; correct? It has to do with ICE getting custody of individuals to whom they want to take custody; correct?

A. Correct. It was kind of differentiated between the detainers and the warrants and taking them into custody and when the judge should hold someone in custody and whatnot.

Q. And so without us reading through this, -- though we can -- it's, as you know it now, that Lunn policy mandates that District Court personnel allow, permit, and require ICE to go into a lockup in order to take custody of an individual in District Court; correct?

A. Yes. I think we received the transmittal to that effect. That's a -- if requested, they should have access. And I think there's a whole protocol, that the court officer should take them into, take them into the prison or cell block and transfer --

Q. So that was the policy that was in effect on April the 2nd, 2018; correct.

A. I believe so.

Q. Yeah. And so when you went in to see Judge Joseph, you went in to see her about this issue of whether ICE could be in the courtroom; correct?

A. Whether she wanted the ICE agent to be in the courtroom.

Q. And she answered yes, you could, after you pointed the administrative District Court that you could follow, we could follow, she could follow the practice of Judge Heffernan and ask ICE to stand out; correct?

A. Yeah. So that was -- She told me in her lobby, in her lobby. She said that she preferred to just follow what Judge Heffernan customarily did.

Q. And she said nothing, that you could recall,

about asking -- telling ICE that they couldn't take custody down into the lockup.

A. No. Because at that point there was no question -- like the ICE officer hadn't requested that and that wasn't part of our conversation at that point.

Q. Okay. Now, Ms. Bostwick stayed representing Medina Perez all the way up to the lunch break.

A. Yes.

Q. Like just before 1:00?

A. Yes. Lunch break was 1:00 to 2:00.

Q. And she was allowed to come back a little late because she had a medical appointment that day?

A. Yes.

Q. But at some point Jellinek showed up in court; correct?

A. My recollection is that he filed an appearance at the lunch break.

Q. Okay.

A. Sometime over the 1:00 to 2:00 mark.

Q. And -- So you would have seen him around there or you would have heard that he filed an appearance?

A. I don't recall if he was there earlier in the day, but he definitely was there right at 2:00 when we were starting after lunch. So I assume

he was in the courthouse doing something, whether it be he had court business or other filings or -- I don't recall specifically whether he came to the courtroom at all prior to the lunch break.

Q. And there were court officers there that day; correct?

A. I believe there were two court officers there that day, one who sat with the custodies~~y~~, one in the courtroom, and then at some point the chief came from another court, he kind of supervised three different courts, and he showed up, too.

Q. So we can talk about that for a minute. So Wesley MacGregor was there that day?

A. Yes.

Q. And he was handling the custod~~y~~ies?

A. Yes.

Q. And Michael Walsh was there that day as a --

A. Yes. I had met him a couple of times. He was retired.

Q. Retired. He was there as what we call a per diem?

A. Yes.

Q. And -- but the chief, his name is Scott Noe, --

A. Yes.

Q. -- Scott Noe, was not there until later; right?
A. I didn't see him until later. I think I -- My best recollection is that he came from some other court at some point during the day. I don't know when. But he was -- I was told he was in the building.
Q. And the Lunn policy requires that the chief court officer, which would have been Noe, would do at least two things, one would be to make sure that there's notice given to the presiding justice of the court that ICE was there; right?
A. Correct.
Q. But the presiding justice was out.
A. Correct.
Q. And to make sure that the Lunn policy was followed with regard to access to ICE in the lockup; correct?
A. Yes. I wasn't in the session too often, but that's my understanding.
Q. Okay. So if I'm understanding it correctly, your communication to the ICE agent, there was only one at that point.
A. Correct.
Q. It was two-fold. One is, they're being asked to step outside of the courtroom.

A. Yes.
Q. And second -- And that was directly from Judge Joseph; right?
A. Correct.
Q. But the second was, that, no, he couldn't take custody in the lockup. But that was your interpretation of what Judge Joseph was saying.
A. So the second communication with the ICE officer would have been after we concluded for the day. And the answer to your question is, yes, that's what I interpreted Judge Joseph's directive to be.
Q. So -- Okay. Thank you. So -- But sitting here today, you have no memory of having one more conversation with the ICE agent.
A. I don't recall having any other -- other than which door he'd be going out of initially, and then secondarily, the -- when he asked for permission to go to the lockup. I don't recall having other communications with him.
Q. So you indicated, when special counsel asked you some questions, your previous memory wa~~i~~s that ICE had taken custody out on the street in the front door area.
A. I had seen that once before.

Q. You had seen that before.
A. I actually saw it, yeah.
Q. Now, court ends; right? Before court ends -- Judge Fabricant, special counsel, ran you through the transcript of the end of that proceeding; right?
A. Yes.
Q. And we heard already that you said something to Judge Joseph about ICE being there, right, and wanting to take custody in ~~in to~~ the lockup.
A. Yes. I was just, I was just reminding her that the ICE officer was there, because he was waiting out in the hallway, and I conveyed his request to go down to lockup.
Q. And you actually put -- It's on the record that you conveyed that, and she said that's fine, they're not coming in here, in essence; correct?
A. Correct.
Q. So it would be fair to say that there were at least two or three other ways at the Newton District Court that they could have access to the lockup, correct. One is, to go around the back.
A. Yeah.
Q. They can come in the sallyport --
A. Yeah. They could have gone around the back of the

courthouse and knocked on the door and have the court officer provide access or they could have just walked down the public stairs -- well, they could have gone through the back way and there's the -- where the lockup is situated, they could have walked through the hall -- You're right. There's two different ways other than the way down the stairs.

Q. Or third, unless you're including the one you just relayed, go downstairs, have someone escort them through probation.

A. Correct.

Q. So there were several different ways.

A. Sure.

Q. And with the sallyport, were you aware that there was a van, pickup van inside the sallyport that afternoon?

A. No, I was not aware.

Q. So if there were no van there, then they could have just driven in.

A. Sure.

Q. With their unmarked vehicle, whatever it is.

A. Sure.

Q. And then take into custody.

A. Sure.

Q. Now, we talked about Ms. Bostwick. You knew David Jellinek, too; correct? You had seen him from time to time.

A. I think they were calling, because they were both ~~on~~ duty attorneys.

Q. Both bar advocates.

A. Both bar advocates.

Q. Got it. And you saw him there. He came in for the drug court on Tuesday afternoon?

A. Typically, he did. He did the drug court.

Q. And so he was there fairly frequently, at least once a week; right?

A. For sure.

Q. And I mean, he'd say hi to you, you'd say hi to him.

A. Typically. I try to say hi to everybody. But yes.

Q. Yup. And he was at least friendly, as far as you could see, with many of the court personnel.

A. He was familiar with all the court personnel, yes.

Q. And so were you present when the conversation between David Jellinek and Wesley MacGregor letting Medina Perez out the back?

A. No.
Q. And did David Jellinek approach you before the 2:00 session after he filed his appearance and tell you that he had a conversation with Wesley MacGregor?
A. No.
Q. When you saw him walk out, when you were with the ICE agents, did David Jellinek come over to you and say I had the judge's blessing to let him out, anything like that?
A. No. He just walked straight by us.
Q. Didn't say a word?
A. No.
Q. He was there the next morning?
A. Was he there the next morning? Is that what you just said?
Q. Yeah. David Jellinek.
A. I have no idea. I don't know.
Q. From that day, April 2, until today, has he ever said Wesley MacGregor and I together conspired to let him out?
A. No. I have not talked to him about it.
MR. HOOPES: Can I just have a moment?
(PAUSE)

MR. HOOPES: Thank you very much. No other questions.

JUDGE FABRICANT: I just want to clarify one point.

THE WITNESS: Sure.

REDIRECT EXAMINATION

BY JUDGE FABRICANT:

Q. The ways to get to the lockup, if not through the courtroom and into the dock and down the stairs, how many other ways are there?

A. So you could go through the -- where the clerk's office and the judge has her lobby, you go down the set of stairs, that's a secure area, you could come back through the [inaudible] and go down that back stairwell and that leads to the lockup. You could go, as counsel indicated, you could go around the building and knock on the door. They could open the sallyport door for you. And the other way you could do it, I suppose, is you could, -- just trying to think -- you could go through -- come down the front stairs. You'd have to go through probation, I believe; so...

Q. And once you went through probation, would you have to get through a secure door?

A. Yeah. There was a secure door. You would

have to ~~even~~ use your pass or you'd have to knock and they'd have to let you in the courthouse.

Q. So each of those ways that you've described, would you have to get through a secure door?

A. Yes.

Q. So you would need somebody with a pass --

A. Yes.

Q. -- to let you through.

A. Yes. You couldn't just walk through.

JUDGE FABRICANT: That's all I have.

MR. HOOPES: That's all I have.

HEARING OFFICER: So I just have one clarifying question for me.

When you spoke to the ICE agent after the proceeding, did you tell the ICE agent that they were not -- that he was not allowed to go to the lockup period or did you say you're not allowed to go to the lockup through the courtroom?

A. I think what I said was just what the judge said, which is, you're not allowed to come in here and go to the lockup.

HEARING OFFICER: I'm sorry.

Say that again.
A. I said you're not allowed to go in the way they had all gone down through the courtroom. I think I said to the ICE agent that he could not go in ~~any~~the courtroom down to the lockup.
HEARING OFFICER: Did you tell him there are other ways to get to the lockup?
A. I didn't discuss it with him, no.
HEARING OFFICER: You knew he wanted to go to the lockup.
A. I did overhear. He made it clear.
HEARING OFFICER: And were you clear with him? Do you believe that you told him you just can't go to the lockup through the court?
A. I didn't say just. I think I was under the impression he couldn't go to the lockup at all.
HEARING OFFICER: Based on what?
A. Based on, when I asked the judge, I said there was someone here to visit the lockup, I think is how I phrased it, to get the person intended to be taken. And she said something like, okay, but I'm not going to allow him in here but he's released. I took that to mean

that she was following Judge Heffernan's practice of releasing him, he'd walk out the court front door, and if they wanted to take him into custody, that's where they would take him into custody. So that's what I was under the impression.

HEARING OFFICER: Okay. And so your impression was that he was not going to be allowed to go to the lockup area from any direction.

A. Correct. I didn't go over with him the different ways. I didn't think he would be going to the lockup area.

HEARING OFFICER: But you did understand Judge Joseph to be saying he can't go to the lockup area through the court.

A. Yeah. I understood that just how she said it. Because I listened to the tape, too. That's how she said it. And that's how I took it. But I took her to mean I'm -- when she said I'm releasing him, what she meant was, he's going to walk out, and so if they want him, they can take him, but it's not my, not my issue.

HEARING OFFICER: Okay. I have no further questions.

Any follow-up?

JUDGE FABRICANT: May this witness be excused?

HEARING OFFICER: Yes.

JUDGE FABRICANT: Thank you, sir.

And again, Mr. Hoopes is much more efficient than predicted. And so we don't have a next witness ready. We will have Scott Noe at 9:00 in the morning, Judge Heffernan at 11:00, and Judge Fortes, Chief Justice now, Chief Justice Fortes at 2:00 tomorrow.

HEARING OFFICER: Okay. So with that, unless the parties have anything else to cover, we're recessed for the day.

(The proceedings adjourned at 3:16 p.m.)

EXHIBIT AA (DOCUMENT SUBSEQUENTLY MARKED AS EXHIBIT AA)

C E R T I F I C A T E

I, LISA L. CROMPTON, Registered Professional Reporter, hereby certify that the foregoing is a true and accurate transcript of my stenographic notes of the proceedings in this matter on the date and time specified in the caption hereof.

IN THIS WITNESS WHEREOF I have hereunto set my hand this 17th day of June, 2025.

<%33863,Signature%>

LISA L. CROMPTON

REGISTERED PROFESSIONAL REPORTER

MY COMMISSION EXPIRES 1/17/2031

EXHIBIT 9

COMMONWEALTH OF MASSACHUSETTS

COMMISSION ON JUDICIAL CONDUCT

COMPLAINT NUMBER 2019-22

VOLUME III

HEARING

~ BEFORE ~

HEARING OFFICER

DENIS J. McINERNEY, ESQ.

JUNE 11, 2025

9:00 A.M.

Boston, Massachusetts

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

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E X H I B I T S

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EXHIBIT 1	Court Officer Manual Page 2-9, 1 page	~~436~~426
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JUDGE FABRICANT: The Commission now calls Scott Noe, who, I take it, is in the hallway.

HEARING OFFICER: We're on the record. And if counsel could just introduce themselves for the record.

JUDGE FABRICANT: I'm sorry for jumping the gun here.

Judge Fabricant for the Commission on Judicial Conduct.

MR. NEFF: Howard Neff for the Commission on Judicial Conduct.

MR. HOOPES: Tom Hoopes for Judge Joseph.

MS. MULVEY: Elizabeth Mulvey for Judge Joseph.

MR. KEATING: Michael Keating for Judge Joseph.

HEARING OFFICER: Great. Thank you very much.

JUDGE FABRICANT: He'll be right with us, I'm told. Apparently the highway that comes up from the South Shore is problematic this morning.

HEARING OFFICER: Totally

relate to those issues. No issue whatsoever.

(PAUSE)

HEARING OFFICER: Good morning.

PAUL SCOTT NOE, SWORN

HEARING OFFICER. Thank you.

Please be seated.

DIRECT EXAMINATION

BY JUDGE FABRICANT:

Q. Good morning.

A. Good morning.

Q. Please tell us your name.

A. First name is Paul, middle name is Scott, last name is Noe, N-o-e.

Q. And do you go generally by Scott?

A. I do.

Q. Thank you.

And Mr. Noe, would you tell us briefly your professional background?

A. I began my career in law enforcement with the Norfolk County Sheriff's Department, and I became a court officer six years into that. Still stand at Norfolk County, worked nights, was a court officer until I retired between '15, in 2019, became chief court officer in Concord, Waltham, Newton courts in 2015.

Q. So I want to just make sure we've got the sequence there. So in 2015 you became the chief court officer for three courts, Newton, Waltham, and Concord?

A. Yes.

Q. And then in 2019 you retired from the court officers.

A. Correct. The start to the end of 2019.

Q. And what do you do now?

A. Retired from the courts and the sheriff's department and I work for NAGE, National Association of Government Employees. I'm a union rep for the court officers.

Q. So NAGE represents the court officers in Massachusetts.

A. Yes, court officers, probation officers.

Q. Court officers and probation officers.

A. Yup.

Q. I'm going to ask you to give us a general virtual tour of the Newton District Court, and we have some photographs that we're going to show assist in that process, and that binder in front of you has a set of exhibits that are appendices that have already been admitted in evidence. Appendix U is the photographs. So

look at them in the binder or look at them on the screen as is more convenient for you.

So let's start with what's right in front of you here, which is Page 526 of the appendix. What is this?

A. This is the front door of the Newton courthouse.

Q. And --

HEARING OFFICER: If you could just be a little closer to the mic. Much appreciate that. Thank you.

A. That's the front door to the Newton District Court.

Q. And what level is that when you enter the door?

A. Well, the picture is taken from the street level. You climb up those 10 steps and you're at first level of the courthouse.

Q. So once you're in the courthouse and go in those doors, how many levels does the courthouse have?

A. You have one down below, which is at ground level, when you go out in the back of the courthouse it's at ground level, it goes downhill from there. So you have the lower level, that first level, and then the second floor level.

Q. So three floors altogether.

A. Yes.
Q. One of which is below ground at the front and at ground level at the back.
A. Yes.
Q. When you enter from the front, through this door, where are you?
A. You're in the main lobby of the courthouse at the security entrance.
Q. And let's go to 523. And what do we see there?
A. So the right would be coming through those front doors to the courthouse, and that's the security station, security office to your right.
JUDGE FABRICANT: And, is his voice loud enough at this point?
HEARING OFFICER: It's pretty good. If you could get just a little closer to the mic for everybody in the court, I think that would be great. Thank you.
Q. So that's the security equipment you come through if you come through that main door.
A. Yes.
Q. And what else do you see in this main hallway?
A. That's the entry door from the main entrance off of the main road. That door to your right

is the security office, where a lot of administrative things are done.

Q. And let's go to the Number 506. What do you see there?

A. That's -- To your right would be that main door that you come in through and that door in front of you is the entrance to the clerk's office.

Q. Do we see here some of the security equipment?

A. Yes.

Q. So if you just come through the security equipment, you've got the clerk's office just to your right?

A. Correct.

Q. And you see that bench along the left wall there?

A. Yes.

Q. If you got to the end of the bench where the picture doesn't show, what would be there?

A. That would be the entrance to courtroom one of Newton District Court.

Q. And let's go to 525. What's that?

A. That is the entrance to courtroom one on the first floor.

Q. And the chair, the bench that we see there, is that the end of the bench that we saw in the

last picture?
A. Yes. Same bench.
Q. And then there's a chair next to it?
A. Yes.
Q. Was that chair usually there?
A. I believe it was.
Q. Let's go to 509. What do you see here?
A. That's courtroom one of Newton District Court, the judge's bench, clerk's seating area, DA's table, and defense attorney's table.
Q. And which side are the DA and the defense attorney usually?
A. Typically, the DA would be on the left side of that picture, and defense attorney would be on right, on the left side of the dock.
Q. So the DA, if there's a defendant in custody, the DA would be closer to the defendant than the defense lawyer is.
A. Yes. Typically.
Q. And do you see, along that glass wall of the dock, do you see a little, a little metal circle?
A. Oh, yes.
Q. What's that, what's that used for?
A. That's the opening so you could hear clearly

from the dock. It's not -- I don't think it's a microphone on it, but it would be for that.

Q. It's a space for hearing?

A. Yes.

Q. If there's an interpreter, would the interpreter use that to speak to the person in the dock?

A. Yes.

Q. Let's look at 510. What do we see here?

A. That's the right side of the same courtroom. That's the two exit doors.

Q. Those two exit doors there, are those for public or for other people?

A. Those are for employees. The one on the right is typically -- almost leads you directly into the clerk's office, along the left brings you to the employee elevator and entrance to the judge's lobby.

Q. And those two desks that we see there, who uses those?

A. Typically, probation would sit at one and the other one is used for administrative duties.

Q. If there's a witness in the courtroom, where would the witness be?

A. The witness stands back in the bar.

Q. Okay, Let's bring up 512 -- 511. What do you

see here?
A. That's the view from those same pictures you just looked at looking at from the judge's bench, on the side of the bench.
Q. If there's a side bar conference, is that where it would occur?
A. Yes. And there's a swinging door that brings -- gives access to the judge's bench.
Q. And is that how the judge goes in and out, through that swinging door?
A. Yes.
Q. And let's go to 512. What do you see here?
A. That's a view looking back from where we just were, looking back at the exit of courtroom one.
Q. So if you were standing at the judge's bench or at the clerk's bench, is this what you would see?
A. Yes. The defendant stands in the block box. There's a microphone there.
Q. So if the defendant is not in custody, is that where the defendant would stand, just behind the bar?
A. Correct.
Q. And are there seats for spectators on both sides of the entrance?

A. Yes.
Q. And if you look down, is that the audience section on the other side?
A. Correct.
JUDGE FABRICANT: I don't know that this has a number yet.
MR. HOOPES: Nope.
JUDGE FABRICANT: We'll get it in.
Q. Let's go to 513. And we're going to go through a series starting with 513. So what is this that you see here?
A. That's the custody dock and the second -- the first door brings you into the custody dock, the second door brings you into a stairwell and down to the lockup.
Q. So two doors.
A. Correct.
Q. Are those both doors that you need a keycard to open and close?
A. Neither door has a keycard. They're both key open.
Q. So help me understand the distinction there.
A. Manual keyed open.
Q. So an old-fashioned key.
A. Yes.

Q. Physical key.
A. Right.
Q. And are they -- You could see here that both of them look like they're a little bit ajar.
A. Yes.
Q. Would that be the normal condition for those doors?
A. Typically, they're kept ajar, to give access for us to come up and down or maintenance.
Q. If there's a person who's in custody who's in the dock, would they be ajar?
A. No. They'd be secure.
Q. And who's responsible for securing?
A. The court officers.
Q. And then let's go to 514. What do we see there?
A. That's a view from inside the dock.
Q. So if a person is inside the dock, is that -- would the person be standing or sitting in that location?
A. Correct. It looks to be looking at the judge's bench.
Q. Let's go to 515. What's that?
A. That's the stairwell bringing you down to the lockup, exiting the dock.
Q. So look to the left of that photograph, it looks

like there's an open door. Is that that second secure door?

A. Yes, it is.

Q. And let's go to 516. What's that?

A. That brings you down to the door that gives you access to the lockup area.

Q. And then 517. What's that?

A. That is from inside the lockup. Not sure which direction that's in. Oh, I believe, when you enter that door that we just saw, it would be straight in. And so it was typically used for storage. And one of the prisoner cells to the right.

Q. Then let's go to 527. Now, can you describe what that is generally?

A. Yes. That's the rear of the building. The building to the left is the Newton District Court. It's ground level from behind now. And the building to the right is the Newton Police Department.

Q. And can you see a sort of fenced area there between the two buildings?

A. Yes. That's the sallyport.

Q. And what is a sallyport?

A. Sallyport is where custodies are brought in,

transported in. And in this particular case, the arrest could be walked over from the Newton Police Department or, typically, brought in from the sheriff's department, in the back of the van and deliver the prisoner that way.

Q. So that fenced area, is that for the purpose of putting a van in --

A. Yes.

Q. -- for transporting people in custody?

A. Yes.

Q. And what characterizes a sallyport as opposed to any other kind of exit and --

A. A sallyport, typically they're secured to keep the public from gaining access to them or from somebody escaping while they're being transported in, if they're brought in to the courthouse. That particular sallyport had a door. It had fencing that was on an electronic runner that locked up, but there was a problem~~s~~ with the -- with that door. It would get jammed closed sometimes. So typically, when I was chief, that door was left open.

Q. Okay. Now, taking our virtual tour back inside. So we're now back in that -- in the lockup area. From there, if you wanted to go inside to a

public area, where would you be going?
A. Well, at the end of this first brick wall, there's an access door for employees, and electronically access to the back stairwell, which would bring you up to the judge's lobby and all the way to the second floor to the courtroom.
Q. So you're now talking on the outside of the building.
A. Yes. Prior to going into the sallyport, there's an employee entrance, only accessed electronically.
Q. And is there actually more than one in different locations along the back of the building?
A. On the back of the building, there's one there, yes, there's one behind the sallyport, where there's a parking area, and then on this side of the building there's a maintenance entrance you can electronically access.
Q. And each of those doors that would bring you into the secure area, do you need a security pass to get in and out of those?
A. Yes.
Q. So envisioning that we're back inside the building and you're in that secure hallway, if

you go down the secure hallway, and you've got those secure doors that are there, but you need a security pass to go in and out, so envisioning that we're going down that secure hallway, where do you eventually get?

A. Coming in through that employee entrance I just mentioned?

Q. Once you're inside.

A. Okay. Once you're inside of this first entrance, at the end of that brick wall, you'll enter a stairwell, and the stairwell you can take up to both floors or you can use your electronic access card to go in behind the probation department or another door that brings you into the lockup area.

Q. So that first stairwell that you just referred to, is that within the secure space?

A. It's not a lockup area but it's secured for employees only.

Q. So you can't get into that stairwell without a security pass.

A. Correct.

Q. If you walked down that secure hallway to eventually get to a place where, at that lower level, without going up or down, you could with

a security pass get out of the secure area into a public area?

A. You'd have to go through several doors to get -- you'd have to go through probation department or somehow go through the lockup area and back up to the courtroom.

Q. So -- if you go through the probation department, if you have -- if you're escorted by somebody who has a security pass, can you go through a secure door and end up in the public area of probation?

A. Yes, yes.

Q. And let's look at Photograph 519. What's that?

A. That's the lockup officer's office.

Q. Where is that?

A. Located in the lockup on the lower level.

Q. Is there also an office somewhere in the lower level for the chief court officer?

A. Yes.

Q. Where's that?

A. That's back out through probation, back out to the public area, and it's a locked office.

Q. So is that on the public side of that secure door in the downstairs --

A. Yes.

Q. -- location? Is there a phone in the chief

court officer's office?
A. Yes.
Q. Is there also a phone in this office in the lockup?
A. Yes.
Q. Now, if you went to where -- to the chief court officer's office, you went through that secure door, so you're now in the public space, you're at the location where the probation, the public probation desk is, is there a way to get upstairs from there?
A. Yes.
Q. Tell me about that.
A. It's a public hallway.
Q. Okay.
A. So if you came out of the chief court officer's office, to the right there's an entrance into the counter area for probation, and then there's a stairwell that brings you back up to the first floor or the second floor.
Q. Public stairway.
A. Yes, public stairway.
Q. Going back to the sallyport. How many vehicles fit there? Now I want you to -- Things of course could have changed. -- take your mind

back to be April of 2018. That's a long time ago. So that's what these questions are about, April of 2018.

A. Yes.

Q. How many vehicles would fit?

A. One vehicle.

Q. And the sheriff's vans, the vans that came from the sheriff's department that transported people in custody, how big were they?

A. They're long. They have extended bumpers on the back. I don't know the length of them. But very long. I think one in and secure the whole sallyport.

Q. Was the fence at the back of the sallyport usually kept opened or closed?

A. The gate itself was typically kept open.

Q. And why was that?

A. Because it had jammed -- I was told when I became chief it had a history of jamming and vans couldn't get out once they were in there, they'd secure the sallyport and the van couldn't get out. Manually.

Q. So it was usually kept open.

A. Yes.

Q. And you told us earlier that the police

department is next to the courthouse.
A. Yes.
Q. We saw that photograph with the police department back there.
A. Yes.
Q. Now, I'm going to ask you about some practices. Again, I'm asking about the way things were done in April 2018. So you became the chief court officer you said in 2015.
A. Yes.
Q. So you had been the chief court officer for about three years at that point?
A. Yes.
Q. So in that time frame, what was the standard practice if a defendant who had been in custody was being released from custody and didn't need to go check in with probation and didn't need to wait for somebody to post bail, was just being released? What was the standard practice?
A. Standard practice would be that he was released from the courtroom, from that dock.
Q. And how was that -- I'm sorry.
A. From the dock in the courtroom.
Q. How exactly would that work?
A. Typically, they'd bring the custody back up, bring

his property up with him, the lockup officer would stay in the dock with him, there would be a court officer in the courtroom, the case would be resolved, if it was determined that the custody was to be released, then the court officer would bring the custody out, and depending on what the property bag had in it, they could just hand him his property bag and tell him he was all set to go, or he would have to check in to probation from there, if he had something in there that was unacceptable inside the courthouse, then it would be brought to the front door security, the front door security would hold onto the bag until he did any business he had to do inside the courthouse, in the clerk's office and anything in probation, and when he exited, he received his property.

Q. When the person is in the dock, is the person usually in restraints?

A. Yes.

Q. When in that sequence of events would the restraints be removed?

A. He'd be seated inside the dock, the cuffs would be removed, and he'd be escorted out.

Q. Before April 2nd of 2018, in your experience,

was anybody ever released through the sallyport door?

A. Never.

Q. Why not?

A. Never when I was the chief. And I inquired with prior chiefs when I became chief and then I inquired after this incident occurred.

Q. Why would that not be the way that someone would be released?

A. Because you'd be releasing them into the police department's parking lot.

Q. And what would you want to prevent there?

A. Well, typically, there are weapons involved and the police are coming in and out of work. You don't want them to run into a police officer who arrested them early in the day, or the night before. Could be running -- could be dropped off by his wife. Could be a bad scene releasing him out to the police department's parking lot.

Q. Before April 2nd of 2018, was there in the Newton District Court any written policy or written instructions about how anybody was to be released?

A. No. There's a standard in the policy/procedures for Trial Court. It didn't --

Each building's different. I supervised in three buildings at the time, and they all release different.

Q. And was that because of the physical situation?

A. Correct.

Q. Before April 2nd, 2018, did you have experience with ICE coming to the Newton District Courthouse?

A. Yes.

Q. And how often did that happen in Newton?

A. Very rarely.

Q. Would you become -- When it did happen, would you be informed of a detainer?

A. Typically, the van arrives with the custody.

Q. So from the police station or from the sheriff's department?

A. Yes. And copies would be distributed. In the normal circumstance, from my experience and all of my years in the many different courts that I've worked in, typically, the detainer would arrive with the custody.

Q. On April 2nd of 2018, when did you arrive in Newton?

A. Sometime in the afternoon. I'm not certain of the time. If I was to guess, I'd say

2:00 p.m.

Q. Okay. So we don't want guesses. But your best estimate, if you can.

A. Yeah. Afternoon time. It was in the afternoon I arrived on that day.

Q. Okay. And when you arrived, what did you do?

A. I came in through that employee entrance in the back, went straight up to first session through the probation department, I believe I dropped off things in my office, then I went straight up to the first session and entered the first session courtroom.

Q. And when you went into the first session courtroom, was anything happening there?

A. No. They were waiting for the judge to take the bench.

Q. And was there any person present?

A. Court Officer Mike Walsh was seated in the courthouse.

Q. Did you have any conversation with him?

A. Yes. I said, hi, Mike, how's everything going. He said, good Chief, we have one case left, it should be done in a few minutes.

Q. Okay. And did he give you any more information?

A. He said the custody that's downstairs has the

ICE detainer, should be coming up, he's going to be released on our case.

Q. So he had that information at that point. He gave you that information.

A. Correct. Typically, in Newton Court, being such a small setup and not that many custody cases in particular, you would know before you even bring the custody up if he was going to be released.

Q. So if the court officers would know before the custody -- before bringing the person in custody up that the person was going or was likely to be released, would that have indications for how property would usually be handled?

A. Correct. If you know he's not being released, if he's -- the sheriff's department is not going to be returning to them, then you just -- there would be no property typically coming in from the sheriff's department unless he was going to be released. A new arrest has the property. But you find out in advance if they're asking for bail, and then that would dictate if you bring the property up to custody.

Q. How would you find that out if they're asking for bail?

A. Typically, the court officer that's assigned to the courtroom would know from speaking to the district attorney, the clerk, the defense attorney.

Q. After you spoke with Officer Walsh, what did you do?

A. He, he informed me of the case that was -- the one case that we had remaining in custody, what was going on, he said the ICE agent's outside for him, outside the courtroom.

Q. And then what did you do?

A. I went out to the public hallway. There was the associate court officer Tony Caruso at his station, and the ICE agent was leaning up against the wall next to what we saw, he would have been looking just like we're looking at this picture right now. Would be at the courtroom. His back was at the wall next to the security office looking at the courtroom.

Q. And did you have conversation with him?

A. Yes.

Q. Tell us about that conversation.

A. I introduced myself as the chief, told him the custody would be coming up soon, I believe the last name was Perez Medina, said he would be

coming up soon, said he's going to get released on the charges here, you can go to the sallyport, back in to the sallyport if you'd like to pick him up, or you can wait right here, he's going to be released from here. I informed him there was a van, when I caeme in, there was a van in the sallyport. So there's a van in the sallyport, you can go around there, if you'd like, or you can wait here, he'll be released from here.

Q. With the van in the sallyport, would ICE have been able to put a vehicle in the sallyport?

A. No.

Q. What would they have had to do with the vehicle?

A. They would either have had to walk to the sallyport, go to a regular parking space.

Q. And what was his response when you told him that?

A. He said, no, I'm fine, as long as he's coming out from there.

Q. And did you tell him anything about where you expected the person would come out?

A. I had already told him you could go around or --

Q. And would you normally be in uniform?

A. Yes. I was.

Q. And then after you had that conversation with the ICE officer, what did you do?
A. I spoke -- I believe I gave Tony Caruso a bathroom break, so he could use the restroom, just to the left of those doors.
Q. So did you cover the equipment while he was doing that?
A. Yes. And then I went back down to my office.
Q. And when you were down in your office, did you receive a phone call?
A. Yes. Approximately 10 minutes after getting back to my office, I got a call from Clerk Okstein.
Q. And what did Clerk Okstein say?
A. Clerk Okstein said, the custody with the ICE detainer is being released, has to sign papers with probation, but he has several friends in the building, there could be a problem, and any chance you could go out there. I'm literally 20 feet away from the probation counter. Hung up the phone.
Q. And what --
A. There was nobody in there at the counter. There was a young lady Ashley Medeiros working there. And I said, did the ICE custody come out

yet to sign papers, and she said he doesn't have to sign papers.

Q. And so then what did you do?

A. I said, okay, and I headed up to the first floor.

Q. And what --

A. Through the stairwell.

Q. And what did you do? The public stairwell?

A. Yes. The ICE agent was leaning against the wall where I had left him 15 minutes earlier. I said to him, where is, where is your custody. He said he hasn't come up yet. And I looked through the glass of the doors and saw that there was nobody on the bench. Called on my radio to the lockup court officer. He didn't respond. Called again. He didn't respond. I went over to the phone at the security desk, called lockup, Officer MacGregor answered the phone.

Q. And tell us about your conversation with Officer MacGregor.

A. I asked him where the ICE custody was.

Q. And what did he answer?

A. After a little delay, he said he was released. I think I had asked him twice. Where

is he, where is he. And he said I released him out the back.

Q. And how did you respond to that?

A. I was upset. I said, why would you do something like that. And I hung up the phone quickly, looked at the ICE agent, said he was released out the back.

Q. Over the next few days or weeks, did you have further conversation with Officer MacGregor?

A. Yes.

Q. Did you get varying answers to the question of why?

A. Yes.

Q. ~~And~~To what he did?

A. Yes.

Q. Can you tell us what the varying answers were?

A. The initial statement he made to me was, I didn't have the detainer in hand.

Q. And then did you get a different kind of answer?

A. I followed that up with, but you knew there was a detainer, you knew there was a detainer. He said yeah. And I said, well, could you explain it to me. He said, no. And then we had another conversation at a different time. Could have been the same day. Could have been the morning. But he proceeded to tell me

that he didn't bring the person up through the courtroom because the judge was on the bench. I guess to say that he didn't want to disturb the courtroom with the judge on the bench. And then later on in that day, the next day, he said that he had a feeling that the, he had a feeling that the judge wanted the person to be released.

Q. And did you have a further conversation, did you have any further conversation with him about that at some point?

A. I believe that was it. I gave -- Weeks later, I gave him a written warning for what happened. There was really no discipline to be involved in it. There was nothing in the policy that said he couldn't do what he did. Just had never happened.

Q. And then did you prepare a written policy?

A. Yes.

Q. When was that, to the best of your memory?

A. Within a couple of days. I contacted my supervisor immediately after the incident that day, immediately after the ICE agent left and immediately after speaking with Officer MacGregor, I contacted my supervisor and...

Q. Who was your supervisor?
A. It was Michael McPherson, the regional director of security at the time.
Q. And is he now the director of security?
A. He's now the director of security.
Q. And after you had consultation with Mike McPherson, what was the policy that you prepared?
A. We changed it to indicate that nobody gets released out -- through the back of the courthouse, and we adjusted property issues in a little bit more detail. Everybody had known, but didn't have it in writing.
Q. And did you at some point show that policy to First Justice Heffernan?
A. I believe that I did. Correct.
Q. And what did you do with the policy?
A. It was posted in the lockup and shared with the regional director of security and eventually the director of security.
Q. And then sometime a few weeks later was there some other directive from the higher-ups in the security department about what the policy should be?
A. I believe there was. I believe it was a

reissuing of a policy that give a broad view, just a general view of how ICE custodies are handled.

Q. At some point did you get a directive from Mike McPherson that people should be released out the back?

A. He may have said that to me. I don't remember a directive, if he did.

Q. Did you think that that would work in Newton, --

A. I did not.

Q. -- released out back?

A. I remember having a conversation with him about it and sharing my thoughts that it wouldn't work in Newton or shouldn't work.

Q. And did Newton ultimately adopt a policy of people being released out the back?

A. Not when I was chief.

Q. Did Officer MacGregor retire sometime thereafter, that you recall?

A. Yes. I don't know how much longer. Maybe six months.

Q. And do you remember a party for his retirement?

A. Yes.

Q. Do you remember anybody who you saw there?

A. I remember -- Yes.

Q. Tell us who you remember that you saw there.
A. The party took place, that probation office that I mentioned on the lower level, had an office off to the side of it where they would meet with probationers, if need be, they had a little party in there with cake, Officer Trocchio, Officer MacGregor, of course, Officer Patterson was there, and Attorney Jellinek was there.
Q. And have you had any further communication with Officer MacGregor since then?
A. Yes. Up until his retirement. I haven't spoken to him since his retirement.
Q. Since his retirement.
A. No. No.

JUDGE FABRICANT: Very good. Thank you. That's all I have.

HEARING OFFICER: Mr. Hoopes.

MR. HOOPES: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. HOOPES:

Q. Good morning, Mr. Noe.
A. Good morning.
Q. As you know, I'm Tom Hoopes, and I represent

Judge Joseph.

So you said that you had been at Newton or supervising Newton for roughly three years prior to this incident --

A. Yes.

Q. -- of April 2nd, 2018; right?

A. Yes, I believe so.

Q. And you characterized the frequency of ICE agents coming to the Newton District Court to make arrests as infrequent.

A. Yes.

Q. And would it be fair to say that that may have been one, two, three times a year? Would that be an accurate number?

A. I think so.

Q. Now, from 2015, '16, and '17, there was no real court policy giving you direction on how to interact with ICE. Would that be fair to say?

A. There had been policies throughout the years in reference to detainers and how court officers deal -- it changed a lot. And typically, I did everything the same way that I had always done.

Q. Okay. And there was a case that came down from the Supreme Judicial Court called Commonwealth versus Lunn in the summer of 2017

that addressed this issue. Do you recall that? Were you given notice of that case?

A. I could have been. I don't recall it off the top of my head.

Q. And then there was a policy that was issued in November of 2017, it was called the Lunn policy. Were you notified of that policy, specific policy, not the case, the policy, by anybody?

A. I don't recall.

Q. So if you could look with me at -- in your book.

A. Okay.

Q. It's Tab B. And there's a document there called the Lunn policy, executive office transmittal, dated November 10th of 2017, is what began.

MR. HOOPES: Sorry. I'm going to let Giana...

(PAUSE)

Q. So looking at that, can you tell us, had you ever seen that policy before today?

A. I may have. It doesn't look familiar to me but...

Q. Okay. And so if you, if you can -- The first page is APP 005.

A. Yes.

Q. If you can turn to me -- with me to APP 007. And about two-thirds of the way down, there's -- halfway down there's a Section III Roman Numeral III, that says, DHS officials taking custody of individuals at a courthouse. Do you see that?

A. Yes.

Q. And three paragraphs down there's a capital A. It says, individuals over whom the Trial Court has custody.

A. Yes.

Q. So if you and I can read that together. I'll read it out loud.

A. Okay.

Q. Consistent with Chapter 2, Sections XIV and XV, of the Court Officer Manual (current edition), when an individual who was brought into court in custody is subject to release after his or her court proceeding, court security personnel shall process that individual out of lockup in the normal course regardless of whether the individual is subject to a civil immigration detainer or warrant.

Next paragraph. If, during the processing of an individual subject to release out of the courthouse, a DHS official is present

in the courthouse and seeks admission into the courthouse's holding cell area in order to take custody of the individual pursuant to an immigration detainer or warrant, court officers shall permit the DHS official to enter the holding cell area in order to take custody of the individual once Trial Court security personnel have finished processing that individual out of the court security personnel's custody, if a security department supervisor supervisor determines that the DHS official would otherwise take custody of the individual inside or immediately outside of the courthouse.

So let's stop there. The first paragraph, Consistent with Chapter 2, Sections XIV and XV of the Court Officer Manual. So you understand -- You know the manual that you're referring to; right?

A. Yes.

Q. And that's sort of a general manual for court officers; correct?

A. Yes.

Q. And there's a specific section that it's referring to there that, in subsections XIV and XV, that give direction as to exactly how releases

are supposed to be; correct?
A. Yes.
Q. So if the Hearing Officer will permit, I'm going to approach you and show you one page from that, which at the bottom of 2-9. And in your experience as a court officer, had you reviewed that Court Officer Manual at some point?
A. Yes.
Q. And it's pretty clear in XIV.B., Prisoners and detainees will be released only from the lockup or holding room unless ordered by the court. Correct?
A. Yes.
Q. Court officers in the lockup will determine if there are no holds on the prisoner/detainee and is properly identified before the person is released. And just to be clear, that process of clearing holds, in other words, somebody wants the prisoner, that would typically take place downstairs in the lockup.
A. Yes.
Q. And in D, if the detainee comes from the sheriff's department to the court, from the sheriff's department, House of Correction, or another correctional facility, the court officer

in the lockup must call all the records of the department of the facility to determine if there are any other holds before releasing the detainee. Correct?

A. Yes.

Q. And then in XV, court officers releasing the prisoner that is posting his or her own bail will do the following: They're going to verify the person who's posting the bail, verify the accurate amount. Number 3, verify that the court officer will escort the prisoner out. Is that correct?

A. Yes.

Q. Now, so is that what they're referring here in the Lunn policy in that first paragraph, this XIV and XV?

A. Yes.

MR. HOOPES: I offer this page, if I may. If there's any objection?

JUDGE FABRICANT: No objection.

HEARING OFFICER. Yes. It's received.

MR. HOOPES: B1 -- Number 1.

EXHIBIT 1

(DOCUMENT MARKED AS EXHIBIT 1)

Q. So the second paragraph that we read, which says that, if the DHS official is there, right, again, going back to your stipulation, okay, where it says 007, that page, --
A. Yes.
Q. -- where it says, if, during the processing of an individual subject to release out of the courthouse, a DHS official is present in the courthouse... That was happening on April 2nd; correct?
A. Yes.
Q. And if we go to the next paragraph on 008, it says, before being granted entry into the holding cell area, DHS officials must present credentials and a copy of the detainer and civil immigration arrest warrant to court security personnel, sign in to the holding cell area, and surrender their weapons. Correct?
A. Yes.
Q. And that would have been, they would have to present their identification to either to you or one of your staff who was there; correct?
A. Yes.
Q. And then, lastly, it says, to the extent possible, court security personnel should

require that DHS officials transport any individuals taken into custody through the prisoner transport entrance and avoid taking individuals through the public areas of the courthouse. Correct?

A. Yes.

Q. So that's different than what you were describing for us, though; correct?

A. Yes.

Q. So you were aware of the general policy for court officers on April 2nd, 2018, but you don't recall being aware of this Lunn policy.

A. Not off the top of my head, I don't. I'm ~~S~~sure I saw it at some point.

Q. And so would it be fair to say that there were communications from above you, supervisors and supervisors' supervisors, at various times --

A. Oh, yes.

Q. -- as to various policies and various policy changes?

A. Yes.

Q. And was there ever any particular training done with regard to this new policy, that you can recall?

A. No, I don't recall any training.

Q. So on that day of April 2nd, you recall seeing the ICE officer who was there; correct?
A. Yes.
Q. And you said to the ICE officer -- you identified yourself.
A. Yes.
Q. And you knew he was there for Medina Perez; right?
A. Yes.
Q. The person down in the lockup at that point; right?
A. Yes.
Q. And you knew from your employee, Mike Walsh, who was what they call per diem, --
A. Yes.
Q. -- that there was an expectation he was going to be released; right?
A. Yes.
Q. And there was an expectation he was going to be released into ICE custody.
A. Yes.
Q. And it's your testimony that you offered the ICE officer the opportunity to go down to the sallyport; is that correct?
A. Yes.

Q. And he said, if he's coming out the front door, I'm all set.
A. Yes.
Q. And sitting here today, do you have any knowledge one way or another whether he had spoken to the ICE officer by Clerk Okstein before you arrived?
A. I had heard that since.
Q. But at that time, you didn't --
A. At that time, I had no knowledge of that.
Q. And to your recollection, that's what the ICE officer said, I'm all set, and just stayed where he was; --
A. Yes.
Q. -- is that correct?
Did Michael Walsh, the per diem, say anything to you about the ICE officer actually making a request about, being able to go down into the holding cell?
A. No.
Q. So you, after that conversation,went back downstairs, and then you got a call from Clerk Okstein; --
A. Yes.
Q. -- right?

A. (Witness nods head).
Q. And that the ICE agent was looking for assistance because there were a number of people, there were friends of Medina Perez.
A. Yes.
Q. And you went out to probation, probation said that it wasn't needed to report to probation, and you went upstairs.
A. Correct.
Q. And spoke to the ICE agent.
A. Yes.
Q. And then had the conversation with MacGregor over your phone transmission; --
A. Yes.
Q. -- is that right?
So can you tell us about, between that conversation that you had on the phone and the next couple of days, how many conversations did you have with MacGregor one on one about this?
A. I would guess that we probably had three. I know we had one that day, I believe we had another one that -- a little while after the initial conversation, and then in the morning we went over it again.
Q. And so how long were these conversations, if you

just estimate?
A. Short conversations. He answered my questions quickly.
Q. And so, a minute, two minutes, five minutes?
A. Two minutes.
Q. Okay.
A. Two minutes, maybe.
Q. And in any one of these three conversations did he ever mention to you the name David Jellinek?
A. No.
Q. Did he ever say to you that David Jellinek was the person who caused the release to happen?
A. No.
Q. Did he ever say to you that David Jellinek was the person who planned the release with him?
A. No.
Q. So now you know David Jellinek from being around the court.
A. Yes.
Q. And you had seen him there from time to time in his capacity as a bar advocate.
A. Almost daily, I believe.
Q. Almost daily.
A. Right.
Q. And so would you say that you had a business --

casual relationship or business friendship with him or just business contact relationship?

A. Business contact, I would say.

Q. And from the time you walked into the courthouse until the time you called MacGregor on the phone, did David Jellinek ever tell you that he was planning to have MacGregor release Medina Perez out the back?

A. No.

Q. Did you see David Jellinek there the next day?

A. I believe it was the next day I saw him.

Q. And did David Jellinek come up to you and say, I helped MacGregor, directed MacGregor to release him out the back?

A. No.

Q. Did he ever say I had the judge's blessing to release him out the back?

A. No, he did not.

Q. Did you speak to Judge Mary Beth Heffernan at some point right after that?

A. Yes. I don't believe it was that day. I don't think she was in that day.

Q. And so the next day you spoke to her?

A. Shortly after, whether it was the next day or the day after that.

Q. And do you recall what that conversation was, what you said to her, what she said back to you?
A. Something to the effect of, what the hell happened.
Q. You said that or she said that?
A. She said that to me.
Q. What did you say back to her?
A. I told her what I knew happened and I believe --
Q. That's what you just told us.
A. Yes. Yes.
Q. And so the name David Jellinek never came out of her mouth or your mouth to her.
A. I don't believe it did.
Q. So this party that was for MacGregor, --
A. Yes.
Q. -- was that in the spring of 2019?
A. I believe so.
Q. Maybe April of 2019?
A. Could have been six months to a year after the incident.
Q. In the courthouse.
A. Yes.
Q. In the basement?
A. In the probation.

Q. In the probation department.
A. Lower level.
Q. Attended by how many people?
A. I believe there was five of us there.
Q. Four court officers and David Jellinek.
A. Yes. Some people may have came in to wish him well throughout, grab a piece of cake at some point. But as far as the main group that was there, the court officers and Attorney Jellinek.
Q. Can you estimate today how long David Jellinek was there at the party?
A. I don't know. I was only in the party for a few minutes.
Q. Okay. And while you were there for a few minutes, did you see David Jellinek go over and shake MacGregor's hand?
A. I believe everybody did. I don't have a clear memory of them shaking hands.
Q. Now, special counsel asked you some questions about a policy that you created after this.
A. Yes.
Q. So in other words, this policy was your practice of releasing out the front.
A. The procedures that we used that were handed

down to me.
Q. Were handed down to you.
A. Yes.
Q. So you followed the policies that had been handed down to you.
A. Yes.
Q. So this Lunn policy, if that wasn't communicated to you by your supervisor, Mr. McPherson, was that ever communicated or addressed to you by Presiding Justice Mary Beth Heffernan?
A. No.
Q. It was never discussed.
A. Policy to release custodies?
Q. Yes.
A. No, it was never discussed.
Q. Specifically to release ICE custodies.
A. No, never discussed.
MR. HOOPES: So if I can approach the witness.
Q. So I'm going to show you this. I ask you to look at that. Can you identify what that document is?
A. Yes.
Q. And is that a document that you prepared?
A. Yes.

MR. HOOPES: So if I can offer this as Exhibit 2.

Q. Take a minute to get through it.

HEARING OFFICER: Any objection?

JUDGE FABRICANT: No objection.

HEARING OFFICER: Exhibit 2 is received.

EXHIBIT 2

(DOCUMENT MARKED AS EXHIBIT 2)

Q. So can you explain to us how you prepared this document?

A. Yes. We had nothing in writing specific to the Newton courthouse, so I put that in writing so there would be no confusion going forward.

Q. And is that a document that you prepared by yourself or was that a document you prepared in consultation with Presiding Justice Heffernan?

A. I prepared it myself. I believe I gave her a copy as well as Regional Director McPherson.

Q. So reading it out loud. It says, Effective Immediately. All custodies of the Newton Court that are scheduled to be released will be released out the front door of the courthouse only, and in all caps. They will be escorted to

the lobby from the courtroom or through the Probation Department. If necessary, property will be given back outside of the front door security station. Chief Noe, April 4th, 2018. Am I reading that correctly?

A. Yes.

Q. So you issued this two days after April 2.

A. Yes.

Q. And you'd agree with me that what you have here is not what's provided for in the Lunn policy.

A. Yes.

Q. Okay. And did you pass this up the chain to --

A. Yes.

Q. Okay. And to Mr. McPherson?

A. Yes.

Q. And did he agree with this?

A. After we talked, he agreed with it.

Q. Okay. And did he accept this or was there a modification later?

A. He understood. And we had to have a conversation about it, yes.

Q. Once you explained it to him.

A. Yes.

Q. Okay. So from that point on -- Your testimony is, from that point on, this was the policy for

the Newton District Court.

A. Until I left, yes.

Q. Until you left. Regardless of whatever Lunn said.

A. Yes.

Q. So you've talked a little bit about the doors, you know, with badges. So are you familiar with reports on use of a, use of a badge during a particular day, a badge history report?

A. Yes.

Q. You've seen one of those? So if I was to show you a history report for that day of April 2nd, could you tell us whether you can identify that as a history report like you've seen before?

A. Yes. Thank you.

Q. And is it fair to say, -- take your time -- is that a history report for that day, April 2nd?

A. Yes, it is.

MR. HOOPES: If I could offer this, please. Number 3.

JUDGE FABRICANT: No objection.

HEARING OFFICER. Exhibit 3 is received.

EXHIBIT 3

(DOCUMENT MARKED AS EXHIBIT 3)

Q. And so that report would show by and large, with restrictions at the top, does that include all events, does it include all events from all devices? Subject to that caveat, this shows all access, use of the card, to go through doors that require the badge that day.

A. Yes.

Q. And so somebody, like Officer MacGregor, would have had an access card; correct?

A. Yes.

Q. And his name would appear on the far right-hand column; correct?

A. Yes.

Q. So if we wanted to check out all of Officer MacGregor's entrances and exits using the badge for that day, we simply need to look on the right side; correct?

A. Yes.

Q. And where it says, in the column to the left of that, it says device, that's a description of the area that is accessed; is that correct?

A. Yes.

Q. And to the left of that, it says event, access granted, and then to the left of that there's a column that says time; is that right?

A. Yes.
Q. Thank you.
So also -- So I'm going to show you, --
MR. HOOPES: I'll get you a copy.
Q. -- I'm going to show you, it's a detainee accountability log~~in~~. Is that a document that you actually pulled for the day?
A. This is the --
Q. April 2nd?
A. Yes.
Q. And that is a, that's a document that logs in who comes in through the back door, brought in to custody?
A. This is the custody lockup, yes.
MR. HOOPES: So I'd offer this as the next exhibit.
JUDGE FABRICANT: No objection.
HEARING OFFICER: Okay.
Exhibit 4 is received.
EXHIBIT 4
(DOCUMENT MARKED AS EXHIBIT 4)
Q. So this is a sheet that the court officer who's downstairs in the lockup is supposed to complete regarding prisoners coming in and prisoners

leaving; is that correct?
A. Yes.
Q. And at the top it says, detainee accountability daily login for the Newton District Court. And then officer -- Do you recognize this handwriting? That WM?
A. That's Wesley MacGregor.
Q. And then it says, to the right it says Monday, April 2, 2018; correct?
A. Yes.
Q. And the first name in there is a woman by the name of Pamela Hodgdon; correct?
A. Yes.
Q. Identification that says F for female, and then it says Newton. Is that ~~B-O-P?~~V-O-P? ~~B~~V-O-P?
A. I can't tell what those initials are. Newton PD, is what I believe.
Q. Okay. And the next column is property received. There's a checkmark.
A. Yes.
Q. And then there's a docket and the holds. And then there's at disposition ROR. Released on recognizance?
A. Yes.
Q. And arrival time is 9:00?

A. Yes.
Q. And departure time is 3:30?
A. Yes.
Q. So she actually, according to this sheet, didn't leave downstairs lockup until 3:30; right?
A. Correct.
Q. And the column next to it says property return, Y. Meaning, yes?
A. Yes.
Q. And then the next person on there is Medina Perez. But before we get there, the third person is Bruce Demelo, who comes in at 9:45 and leaves at about 1:50?
A. Yes.
Q. So that would been even before you arrived.
A. I believe so.
Q. And then the last person is Crystal Cosme, who arrived at about 10:10 and she leaves at about 3:30; correct?
Q. Now, going back to Jose Medina Perez. M for male. Police department, comes in from Newton. Property received, there's a checkmark. Correct?
A. Yes.
Q. Which should mean that he had property; correct?

A. Correct.
Q. And then disposition, released, came in at 9:05, departure time, 3:00?
A. Yes.
Q. And property returned has just got right there with I believe a dash; correct?
A. Right.
MR. HOOPES: Can I just have a moment, Your Honor?
(PAUSE)
Thank you very much. Those are all the questions I have.
HEARING OFFICER: Any redirect?
JUDGE FABRICANT: Just a couple of things, if I may.
REDIRECT EXAMINATION
BY JUDGE FABRICANT:
Q. You just went through with Mr. Hoopes the Lunn policy. And he took you through it, pointed out some ways that it might differ from what you were doing.
A. Correct.
Q. Does that change your memory of what was normal in Newton?
A. No.

Q. Did you at some point in your conversation with the ICE officer learn that there was a second ICE officer somewhere?
A. No. I assumed that there was. I never -- He never mentioned a fellow officer. I assumed he's outside in the --
Q. But you didn't see him. You weren't told.
A. No. They've always gone in pairs. So I've never seen one by themselves.
Q. And when you spoke with Judge Heffernan the next day or the day after and, as you described it, she said what the hell happened, what information did you give her?
A. I discussed what I had learned through, in that day, interviewing different people, before I wrote my report on the incident. I spoke with Officer Walsh, I spoke to, spoke to District Attorney Jurgens, I believe I spoke to Clerk Okstein.
Q. Did you have any information about what had occurred either on or off the record between the judge and counsel in the courtroom?
A. District Attorney, District Attorney Jurgens recalled their conversation at the side bar.
Q. And what did she tell you about it?

A. She said that Attorney Jellinek requested that the custody be released so he can get an immigration attorney.

Q. And did she tell you more about that?

A. She said -- The district attorney told me that she stated that I don't know how that's going to happen, ICE is right there waiting for him.

Q. After this event, did you ever at any time talk with David Jellinek about this event?

A. I believe the next day when -- the next day or the day after, I talked to him, I still don't -- I think I said to him I still don't understand what occurred. He shrugged his shoulders.

Q. Did he ever at any time tell you anything about the event?

A. No.

JUDGE FABRICANT: I have nothing further.

MR. HOOPES: Neither do I. Thank you.

HEARING OFFICER: Thank you. You're complete for today. Thank you very much, sir.

If you could call your next witness.

JUDGE FABRICANT: Thank you. May the witness be excused?

HEARING OFFICER: Yes. Thank you.

JUDGE FABRICANT: And we had asked the next witness to come at 11:00. So I'm not sure whether she's here yet.

HEARING OFFICER: We can take our morning break now.

JUDGE FABRICANT: I've just been told she'll be here at 10:45. So that would work perfectly.

HEARING OFFICER: Okay. So we'll resume at 10:45.

JUDGE FABRICANT: Thank you.

HEARING OFFICER: Thank you.

(Recess taken at 10:31 a.m. Proceedings resumed at 11:01 a.m.)

JUDGE FABRICANT: Commission calls Judge Mary Elizabeth Heffernan.

HEARING OFFICER: Thank you.

HONORABLE MARY ELIZABETH HEFFERNAN,
SWORN

JUDGE FABRICANT: Mr. McInerney, I wonder if your microphone is on, because that was very soft.

HEARING OFFICER: Now it is.

JUDGE FABRICANT: That's better.

DIRECT EXAMINATION

BY JUDGE FABRICANT:

Q. Good morning.

A. Good morning to you.

Q. Would you tell us your name, please.

A. Certainly. Mary Elizabeth Heffernan.

Q. Great. And you just did exactly what I was going to suggest, just bringing the microphone close. Works better that way.

Would you tell us your position.

A. Yes. I'm the First Justice of the Newton District Court and the Regional Administrative Justice for Region 4 of the District Court.

Q. And is the Regional Administrative Justice role new?

A. Yes. The last two years.
Q. Would you just go through your professional background, please.
A. Certainly. I worked at -- I clerked in this building at the Appeals Court for one year after law school.
Q. That is before the Appeals Court moved over --
A. Yes.
Q. -- out of --
A. I'm that old, yes. And I went to the law firm Palmer & Dodge after that, district attorney's office in Middlesex County, ran the Massachusetts District Attorneys' Association for some years, went over to Care Group Healthcare system, Beth Israel Medical Center in the general counsel's office, and then worked in the cabinet of Governor Patrick before I was appointed to the bench.
Q. And when were you appointed to the bench?
A. February 6, 2013.
Q. And when did you become the First Justice of the Newton District Court?
A. I was appointed acting in 2015. I believe 2016 is when I was appointed permanently.
Q. Can you explain to us the role of the

First Justice?

A. The First Justice is the titular head of the court. You know, we have different departments, the probation department, the clerk's department, the maintenance department, security. And the First Justice is the person who brings those folks together, sets the tone for the courthouse, and hopefully manages things so that the business of the courthouse can get done.

Q. And is there a First Justice for each division of the District Court?

A. Yes.

Q. And does "division" refer to, generally, most instances, a particular courthouse?

A. Yes.

Q. Do you know how many courthouses -- how many divisions there are in District Court?

A. I thought there were 62, but I don't -- Don't hold me to that, please.

Q. And as the First Justice, you said you're the titular head of the court, you have those administrative roles as you've described. Do you have any disciplinary authority over other judges?

A. I do not.
Q. Do you view your role as First Justice as including passing on information to the Regional Administrative Justice or to the Chief Justice that, in your view, they should have?
A. It is.
Q. And what has been your practice during your years as a judge, that's now about 12 years, what has been your practice regarding recording of courtroom proceedings?
A. Everything is recorded. We've switched from -- We've switched over to the FTR service right now. We had an old service before. But everything -- Every hearing in Newton is recorded~~included~~, including the clerk magistrates' hearing.
Q. And the old system that you had, was that JAVS?
A. It was.
Q. And are you aware of a rule regarding recording?
A. I believe there is a rule regarding recording. I learned it anecdotally and, also, from being in the courts, I learned that you never turn the tape off.
Q. I'm going to ask you to look at the screen. And

you have a binder in front of you. This is Appendix K. Look either way. Whatever is easier for you. Look at Page 122 in the binder, you'll see what's on the screen. Is that the rule that you're referring to?

A. Yes.

Q. And does it have -- Does it in general require recording of courtroom proceedings?

A. My understanding is, yes.

Q. And are there some exceptions, some kinds of things that are not required to be recorded?

A. I believe it says certain cases that are impounded, sealed, juvenile matters.

Q. And some clerk functions, perhaps?

A. Yes.

Q. So the call of the list, perhaps?

A. Yes.

Q. And if you look at Page 123, and go down just before that the bold that says see text, just before that, does this tell you when that rule took effect?

A. It does.

Q. And when did it take effect?

A. It was adopted on December 31st, 1987, became effective February 1, 1988.

Q. In your years as a judge, when you were a new judge, do you recall any training or advice or communication with more experienced judges about recording?

A. Yes. It was anecdotally told that you should never go off the record.

Q. Was there any formal training about that?

A. I don't recall formal training, but it was certainly engrained in new judges.

Q. And in the course of your 12 years, have you ever turned off the recording or directed the clerk to do so?

A. I have not.

Q. And are you aware of any legitimate reason to do so?

A. I do not.

Q. In the Newton District Court, you said you're the First Justice and you have been effectively since 2015. Do you sit there every day or some days?

A. I was sitting there every day, up until I became the Regional Administrative Justice, and I had moved around a bunch. Our chief likes us to do that. So I go around my region often. But most of my time is in Newton, yes.

Q. So putting your mind back to 2018, which I realize is seven years ago. During that time period, were you sitting there every day or most days?

A. I was there Monday, Tuesday, Wednesday, Friday, as I presided over the Quincy drug court on Thursdays.

Q. So on Thursday you wouldn't be there. But generally, unless~~if~~ there was something taking you out for some reason, you would be there four days a week.

A. Yes.

Q. And when you were there, which courtroom would you sit in?

A. First session. Except for Wednesdays, which was the jury day in Newton. So that was the second session upstairs.

Q. And would you sit in the second session on those days?

A. Yes.

Q. If there was another -- Was there usually another judge in the building?

A. When I was there, sometimes, yes. Yes, sometimes.

Q. If there was another judge there, would you

refer to that as a visiting judge?
A. Uh-huh.
Q. Where would that person usually sit?
A. Upstairs in the judge's lobby on the second floor.
Q. And if you were doing a jury trial upstairs, and there was another judge, then where --
A. I would be in my lobby down on the first floor.
Q. Even though you might be doing a jury trial --
A. Yes.
Q. -- on the second floor. So the two judges might be sitting in opposite lobbies but sitting in different courtrooms?
A. Yes.
Q. During -- Again, putting your mind back to April of 2018 up to April 2nd of 2018. What was the usual practice in your experience if a person came into the courthouse in custody and was then released without the need to post bail and without any probation conditions?
A. They could either leave right from the dock, which you have displayed there, or if they needed -- if they didn't have to sign conditions or maybe they had some property downstairs, they

could go downstairs and retrieve that.

Q. So those two -- Those were two approaches that might occur?

A. Yes.

Q. And had you sometimes seen a person get their property without going back downstairs?

A. Yes.

Q. How would that happen?

A. They would come up with it, or the court officer would bring their property, and they would be released right from the court, from the dock, and go out the front door of the courthouse.

Q. And you're pointing to what's on the screen, which is, I believe 508. Why don't we take a look at 509 as well. That just gives you a different angle.

A. Yes.

Q. Can you see the dock in that one as well?

A. I can.

Q. And does that show you where the judge, the judge's bench is and the clerk's bench and the tables that the lawyers would use?

A. It does.

Q. Again, back up to April 2nd of 2018. So, again,

a long time ago, but I ask you to put your mind back there. Were there occasions when you had seen ICE come to court?

A. Yes.

Q. And did you have a practice regarding what should happen when ICE came to court?

A. My practice was, with any law enforcement, I ask them to, if they did not have some sort of a warrant, to sit outside and wait or check in with the court officers.

Q. And when you say "outside" --

A. Not outside the courthouse. In the lobby. We have a generalist lobby. And I would ask -- It was a practice that was instituted because, in our second session, which I don't think you have a picture of, it's a very narrow courtroom, as well as the first session is a large courtroom, it's disruptive if law enforcement effectuates service in the courtroom while the service was going on. That happened on two occasions. Not with ICE, but with other law enforcement officers.

Q. And so you would ask that they be directed to wait outside the courtroom?

A. Yes.

Q. And where would they generally wait?
A. ICE would wait on the first floor lobby.
Q. And "lobby" gets used in two ways.
A. In the lobby of the courthouse. Not the judge's lobby. They would wait right outside of the courtroom.
Q. And sometime after April 2nd of 2018 did you change that practice?
A. It was confusing at the time when we were there. I think a lot of us were confused about what to do. And I understand that more guidance came down after that, yes.
Q. Okay. After April 2nd, --
A. Yes.
Q. -- did you have some e-mail communication with Chief Justice Dawley regarding that practice?
A. Yes.
Q. And did he suggest that you consult with a lawyer in his office?
A. Yes.
Q. And did you do that?
A. I did.
Q. And we're going to come back to that e-mail. On April 2nd, a Monday, April 2nd of 2018, were you at the Newton District Courthouse?

A. I was not. I was at a funeral.
Q. And wouldn't be answering your cell phone?
A. I was not answering my cell phone.
Q. Because you were at a funeral?
A. Yes.
Q. The next day, April 3rd, were you at the Newton District Courthouse?
A. Yes.
Q. Did anyone come to talk to you about something on April 2nd?
A. Attorney David Jellinek did.
Q. And can you tell us about that? Where, when, how long? Tell us about that.
A. I also have a drug court in the Newton District Court. Attorney Jellinek was one of the attorneys that was in the roundtable that we used to have before the session. And we were having our roundtable upstairs in the second session at the witness table. And after the meeting, he told me that something had occurred in the courthouse yesterday.
Q. And did you go somewhere to talk about it or did you stay --
A. No. We were right there.
Q. And did he tell you more than that?

A. He told me that he had a client whose identity was in question, that had a fugitive from justice warrant out of Pennsylvania, that he used the services of an interpreter to go downstairs with his client to talk about clearing up the warrant, because it appeared to be cleared up during the session.

Q. Did he say anything about going off the record?

A. No.

Q. And did he say that he requested that the judge allow him to go downstairs with the defendant?

A. I believe he mentioned that, yes.

Q. And did he say anything about his conversation with the judge?

A. He did not.

Q. Did he say why he was telling you this?

A. He was -- No, he didn't say why, but I think he was letting me know that it was an incident that he brought to my attention.

Q. Did you say anything?

A. Probably. I don't remember, though.

Q. Had you been told anything by anyone else before you talked with him?

A. No.

Q. And how did the conversation end?

A. I said thank you for letting me know and I went downstairs.

Q. That day or the next day, did the Chief Court Officer come to see you?

A. I think that day he did, yes.

Q. And what did he tell you?

A. He told me that someone had gone out the back door of the courthouse and ICE was waiting in the front and they were not happy.

Q. Did he show you a memo regarding where defendants should be released?

A. Yes.

Q. And were you called upon to make any sort of decision about that memo?

A. We discussed it, and I said you better post it clearly in the first floor lobby for the public to see.

Q. And that day or the next day did Clerk Okstein come to see you?

A. Yes. That day, also.

Q. And tell us about that conversation.

A. The clerk had listened to the tape, and he told me that there were several, he thought, minutes that were -- that the judge had gone off the tape, and he -- That's all I recall him

telling me.
Q. Okay. Did he say anything about the defendant and his attorney going downstairs?
A. He did not, that I recall.
Q. On Wednesday, the 4th, so we're now -- April 2nd was a Monday. So Wednesday, the 4th, was Judge Joseph sitting in Newton at the end?
A. I think so.
Q. At this time was she sitting in the second session?
A. Uh-huh.
Q. Excuse me. Second session upstairs?
A. Yes.
Q. Did you go to see her in the lobby?
A. Yes.
Q. And did you have a conversation with her?
A. Yes.
Q. Tell us about that conversation.
A. My recollection is that I asked her what Attorney Jellinek had told me. I said what happened. And as was -- at the time, it was confusing about policies or practices, et cetera, for her, I think, and so I was just asking her what happened, if she remembers what happened, could you please tell me, and that's

all I recall from our discussion.
Q. Okay.
A. Because I had to prepare a memo for my Regional Justice and for the Chief.
Q. And we're going to talk about that in a bit. Did she say anything about going off the record?
A. No.
Q. Did you ask her anything about that?
A. I didn't.
Q. Why not?
A. I would -- I assume everyone knows that you never go off the record.
Q. But you said Clerk Okstein had said something about part of it.
A. Yes. He came in and was quite alarmed, as was I, when he told me.
Q. But you didn't ask Judge Joseph.
A. I did not.
Q. Did she say that she had authorized Mr. Jellinek and the defendant to go downstairs after his release?
A. She mentioned it, yes.
Q. And did she say anything about going to probation?
A. I believe so, yes.

Q. Would a judge's permission be required for a defendant and his attorney to go downstairs after he's ordered release?

A. No.

Q. Are there other places -- If an attorney wants to have a conference with a client, are there any places in the courtroom that could --

A. Oh, yes, there are. Attorneys move all the time. There are many rooms that one could have a conversation, yes.

Q. Is there a way to get to probation through a public access route?

A. Yes.

Q. How would you do that?

A. You would come in the front door of the courthouse, you would make a left, you would go down the stairs to the basement, which is where the probation department is.

Q. And if you were coming from the first session court, how would you do that?

A. If you were coming from the first session courtroom, you would do the same thing.

Q. During these conversations with various people, what was in your mind as to where Judge Joseph was sitting?

A. That's -- I thought that she was sitting in -- I thought this all occurred in the second session, because that's where the judges usually sit. And I was not in the building that day. I later learned it was in the first session downstairs.

Q. Did that misconception affect your imagining of how the movement occurred?

A. I would say -- Yes. Because leaving the second floor session, if you're not in custody, you would go out through the hallway, through the public door. If you were in custody, you would go down with the court officers either in the elevator or there's a back staircase, not accessible to the public, but to employees, that you would go down to probation through.

Q. So if you're not in custody, but you wanted to go talk to probation for some reason, could you get there through a public stairway?

A. Yes. You would. That's the only way you would.

Q. Did Judge Joseph tell you anything about any concerns that ICE might arrest the wrong person?

A. I don't recall.

Q. Did she say anything about being concerned that

ICE wouldn't allow an attorney/client conference?

A. I don't recall that.

Q. And when you say you don't recall, are you saying you don't recall her saying it --

A. I don't recall her saying it. It was ~~seven~~ several years ago.

Q. And during these -- After your conversation with Judge Joseph, did you talk with the Regional Administrative Justice?

A. I believe I did before and after, yes.

Q. And who was the Regional Administrative Justice?

A. Stacey Fortes.

Q. And when you talked with her, did she ask you to do something?

A. She did.

Q. What did she ask you?

A. She asked me to reduce in writing a synopsis of what happened.

Q. And did she also ask you to get the recording?

A. She did.

Q. And did you do both of those things?

A. I did.

Q. Did you have someone get the recording, make a copy, and listen to it?

A. Yes.
Q. And who did that?
A. Clerk Okstein.
Q. And did you learn further from Clerk Okstein about the off the record part of the conversation?
A. Yes.
Q. What did you learn?
A. He told me that it was a blank spot of almost a minute or two.
Q. Okay. Did you have further discussion with Regional Administrative Justice?
A. After I learned that, yes. No. I didn't after I learned that, I think. I can't remember the sequence. I spoke with her. She asked me to do those two things. I then reduced it in writing. I don't recall speaking with her afterwards.
Q. We're going to bring up your e-mail that we have. And if you look in the book at Appendix B, you will find it. So look wherever is the easiest for you. Let's just read through your e-mail. So what's the date of this e-mail?
A. Friday, April 20, 2018.
Q. So let's go -- If you go to Appendix B,

Page 540, you get to the beginning of the series. They all have -- We all know, to our frustration, you have to look at the e-mail backwards.

So looking at yours, what's the date of that?

A. Thursday, April 5, 2018.

Q. And on Thursdays, where would you be?

A. Quincy.

Q. Not in Newton.

A. No.

Q. So what were you in the middle of while you were writing this e-mail?

A. In Quincy, when I was sitting in the drug court, I would have the first session, do my drug court, including meetings, et cetera. So it was a wicked busy day over there. But I needed to reduce this to writing for my Chief.

Q. And let me ask you to make sure you have your mouth close to the microphone.

A. I'm sorry.

Q. So I'm going to read through and I'm going to stop in a couple places. So it says, on Monday, April 2nd, 2018, a defendant, who had been arrested over the weekend, was in court for

arraignment on a drug possession charge and a fugitive from justice charge, as he was also allegedly wanted in Pennsylvania. An ICE agent was in the courthouse as well with a detainer for the individual.

That much, what was your source of information for that much?

A. That was probably a combination of Attorney Jellinek and Judge Joseph.

Q. Okay. And then it says, as is usual practice in Newton Court, the agent was asked to wait outside the courthouse as he did not have a warrant but a detainer. So this says courthouse. You said earlier courtroom. Can you explain?

A. I misspoke. I did not ask him -- I did not ask them to step outside the courthouse. I cannot do that. I asked them to step outside the courtroom.

Q. So when you say you misspoke, you're talking about in the e-mail?

A. Yes.

Q. What you said here; is that accurate?

A. Yes.

Q. Then it says, there was a prolonged discussion

at some point regarding defendant's identity involving ICE, the Commonwealth, the defense attorneys and the judge, there is also an interpreter involved in this case.

That much, what was your source of that?

A. I believe that was also from Judge Joseph, Attorney Jellinek, it may have been Clerk Okstein as well.

Q. And then it says, after this discussion, the Commonwealth moved to dismiss the fugitive charge, the judge releases the defendant on PR -- Is that personal recognizance?

A. Yes.

Q. -- on the possession charge, not sure if bail was requested.

That much, what was your source of that?

A. Again, the judge and/or Attorney Jellinek.

Q. And then it says, the defense attorney asked the judge if he could utilize the services of the interpreter in probation with the defendant to the further investigate the Pennsylvania detainer so it did not hinder his client further.

What was the source of that?

A. A combination of the judge and Attorney Jellinek.

Q. Then the judge agreed, the defendant was brought to probation by a court officer, unclear if he was cuffed or not, via the back stairway.

What was the source of that?

A. That was also Attorney Jellinek and the judge.

Q. And what is the back stairway?

A. So that's where, when I thought it was all occurring in the second session.

Q. So the back stairway --

A. Back stairway.

Q. -- from the second session, would that be the public stairway, would that be the one that's within the secure area?

A. It's not a public. Within the secure area.

Q. And then it says, the interpreter and defense counsel accompanied him.

Is this also -- What's the source of that?

A. That is also the judge and Attorney Jellinek.

Q. And then it says, the ICE agent, now back inside the building, inquired the clerk if there was

any other exit for the defendant from the courthouse, told that all persons not in custody exit the court from the front exit, the ICE agent went outside again presumably to wait for the defendant.

What's the source of this information?

A. Clerk Okstein.

Q. And then at some point the defendant was allowed to leave through the back door of the courthouse, unclear if it was via the employee entrance or the probation back entrance.

What's the source of that?

A. That was Chief Court Officer Scott Noe.

Q. And then it says, ICE did not affect your officer, and the defendant was presumed to have left the rear parking lot with his friends, who had been waiting for him.

What's the source of that?

A. Also Chief Noe.

Q. If I learn any additional information, I will report it forthwith. The chief court officer has posted this policy reiterating the only exit to be used from the courthouse, except for custodies, employees, and judges, is the front

door. Thank you.

Is that all of what you said?

A. Yes.

Q. And you didn't say anything about the judge going off the record in that e-mail; correct?

A. I did not.

Q. Why not?

A. I don't know if I knew it then.

Q. Okay. So this was April 5th. You're not sure whether --

A. I don't recall when I heard that. Mr. Okstein told me that there was a gap in the tape. I just don't remember the timing of when I was told that.

Q. Okay. And then going further in Appendix B. It has some back and forth in front of Chief Dawley. I just want to get that in front of us. So if you look at Page 539, --

A. Yes.

Q. -- you have an e-mail from Chief Justice Dawley, and he says this just to you, dated April 20th, he says, there are a couple of issues here, what is the authority to tell the ICE officer to stay outside the courtroom, I'm concerned that such a practice treats ICE officers different from

other members of law enforcement and the general public. It seems to me that such a practice runs counter to the requirement that courtrooms are open to the public without exception. I recommend that such a practice end. And then he says, who was the judge that presided over the case. And then he says, who was responsible for allowing the defendant to exit the courthouse via a nonpublic entrance. And then he says, in addition to the notice posted by Officer Noe, was the court staff told and do they understand that this should not happen again.

Is that what Chief Justice Dawley sent to you?

A. Yes.

Q. And with a copy to Regional Administrative Justice then Stacey Fortes?

A. Yes.

Q. And did you respond?

A. I did.

Q. And if you turn the page over to 538, you see your response. Judge Fortes, in response to the questions, it has been my practice to politely ask ICE, who had been known to the court security staff, if they are present to detain a

defendant whom they know to be in our Newton police or sheriff DOC -- DOC meaning Department of Corrections?

A. Yes.

Q. -- custody and in the building or arriving soon, to wait outside the courtroom for the defendant to be released in order to minimize disruption in other cases, particularly in the close quarters of our second session.

Is that because you thought this happened in the second session?

A. Yes.

Q. And with the limited court security staff we have here. They have always acquiesced. I have never been shown a warrant in Newton, a detainer occasionally. Often there is no paperwork at all. And then you responded to his question as to who the judge was, and you said Judge Joseph.

A. Yes.

Q. And then you responded about how it happened. The defense attorney asked the judge after the Commonwealth dismissed the fugitive from justice case if he could, with the interpreter, speak to his client downstairs in probation in order to further explore the open warrant in Pennsylvania

which triggered the then dismissed fugitive complaint. Judge allowed it. And the judge believes the defendant was brought downstairs in custody to the probation department. And then you said, in addition to the posted written policy of Chief Noe, the clerk's office and probation have been told that the only exit from the courthouse for defendants released from custody will be the front door of the courthouse, those in custody will exit via the sallyport, employees only will use the two back entrances which are accessed only by ID card entrance and egress. Thank you. And please let me know if you need further information.

Is that, is that what you wrote?

A. Yes.

Q. If you go back to Chief Justice Dawley's questions. Look at his Question Number 3, who was responsible for allowing the defendant to exit the courthouse via a nonpublic entrance. Did you respond to that question in your e-mail?

A. No.

Q. Is there any reason you didn't respond to that question?

A. I don't recall why I did not answer that question. I may not have known.

Q. And then on April 20th, a little, just a little bit later in the day, Chief Justice Dawley writes back to you. He says, thanks for the response, 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. On the first issue, asking them to step outside the courtroom, obviously it is your call, and you should exercise your own judgment. My only hesitation is the appearance factor, especially as ICE continues their campaign of attacks on us. I don't know the answer to this. But do any other District, -- DC -- Is that District Court?

A. Yes.

Q. -- any other DC's do this. If you need any guidance from Zach -- Who's Zach?

A. Now Judge Hillman.

Q. Who was he then?

A. He was in the administrative office in the District Court legal department.

Q. If you need any guidance from Zach or our

lawyers, let me know, thank you for all you do, have a good weekend.

Did you receive that from Chief Justice Dawley --

A. I did.

Q. -- on the afternoon of April 20.

And did you consult with Zach Hillman?

A. I believe I did.

Q. And later that day, the next e-mail, over at the bottom of Page 537, thank you as well, I will reach out to Zach, thank you for your support.

So you did. You just told us at some point with Judge Zach have some consultation and then make some change in the policy --

A. Yes.

Q. -- practice. That practice, was that ever in writing?

A. No. It was a result of a disruption I had up in the second session where a trooper was trying to have a witness to a murder brought -- He was a defendant in our courtroom. It just got very confusing. So I was -- I don't want to disrupt the ongoing daily business of the court, so that's why I asked, anyone, would you please

check in with the court officers, ICE, could you wait outside, please. Of the courtroom.

Q. And then after your consultation with Zach --

A. I changed that.

Q. And do they now --

A. They do. They check in with the court officers. This was all pre Lunn. So yes.

Q. And so your recollection is that this was pre Lunn. Let's, let's take a look at Appendix B.

Now, when you refer to Lunn, are you referring to the SJC decision or are you referring to a court transmittal?

A. Both.

Q. So Appendix B. Just give yourself some time to take a look at that.

A. The 0005?

Q. Yes.

(PAUSE)

A. Okay.

Q. What was the date of this?

A. I don't -- Oh. November 10th, 2017.

Q. So it actually was --

A. Before.

Q. -- before. Was it --

A. It was -- This policy came out before April 2nd of 2018, yes.

Q. And had you yet incorporated into your practice?

A. No.

JUDGE FABRICANT: All right. That's all I have. Thank you.

HEARING OFFICER: Ms. Mulvey.

CROSS-EXAMINATION MS. MULVEY:

Q. Good morning, Judge Heffernan. We have never met, have we?

A. Oh, yes, we have. You've done evidence programs for us many times and I've met you a couple of times. Nice to see you again.

Q. I apologize. Nice to see you. I'm horrible with faces.

A. Not a problem.

Q. All right. I haven't been before you in the Newton District Court; --

A. Not that I recall.

Q. -- is that fair?

All right. And on April 2nd of 2018, we've heard -- Do you recall that was a Monday?

A. Yes.

Q. And your clerk's mother had passed away and you were going to the funeral?

A. Yes.
Q. Okay. And understandably, didn't have your cell phone on?
A. Correct.
Q. All right. And do you know that there was a time during the morning when Judge Joseph, who was sitting in that day, had a couple of questions and tried to reach you by phone?
A. I think I recall that, yes. My phone showed calls missed.
Q. All right. And do you understand she had some questions related to a different case that you handled and was looking for some guidance?
A. I don't know. Yeah. I don't remember.
Q. All right. In any event, you did come to the Newton District Court on the next day, Tuesday; is that right?
A. Yes.
Q. And Judge Joseph wasn't there?
A. No.
Q. All right. And you said that at some point that day David Jellinek approached you about this incident; --
A. Yes.
Q. -- is that right?

You said it was in connection with a drug court meeting?

A. Yes. He stayed after the roundtable was over.

Q. And when does the roundtable take place?

A. Noontime.

Q. Okay. So this would be sometime 2:00-ish?

A. Probably 1:00, closer to 1:00.

Q. Okay. The meeting was 12:00 to 1:00?

A. Uh-huh.

Q. You don't do it during lunch? You do it right before lunch?

A. Hopefully.

Q. And as of that time, 1:00 or so, nobody had told you anything about this incident; is that true?

A. True.

Q. Okay. Clerk Okstein didn't come in and say, oh, my God, Judge, we had this happen?

A. No, I don't remember him doing that.

Q. Scott Noe didn't come in and say, I have some bad news for you, Judge?

A. Not that morning, no.

Q. All right. And so the first person that told you anything about this incident was David Jellinek?

A. Yes.
Q. What he told you was frankly benign, wasn't it?
A. Benign?
Q. Well, he told you that he had a client with an identification issue?
A. Yes.
Q. And a fugitive warrant?
A. Yes.
Q. And there's nothing particularly out of the ordinary about either of those things, is there?
A. No.
Q. He told you that he wanted to speak to his client?
A. Yes.
Q. Who needed an interpreter?
A. Yes.
Q. Okay. Nothing unusual about that?
A. No.
Q. All right. He told you that he asked the judge and she allowed him to go downstairs?
A. Yes.
Q. To speak with his client?
A. Correct.
Q. Did lawyers sometimes speak with clients in the lockup?

A. When they were in custody? Of course, yes.
Q. Okay. And that was pretty much what he told you, wasn't it?
A. Yes.
Q. Okay. You said he referred to it as an incident?
A. Yes.
Q. What about that set of facts is an incident that would warrant him coming to talk to you about it?
A. I don't know.
Q. Did it strike you as odd that he was giving you this information?
A. No.
Q. Why did you think he was telling you all this?
A. I think he was telling me about it because of the ICE involvement.
Q. Well, but he didn't tell you about ICE, did he?
A. He didn't tell me about ICE. Not that I recall. But I don't know. We had a lot of discussion around the courthouse about issues around that at that time.
Q. Is it fair to say -- Yeah. At that time, you know, ICE was sort of a hot topic; right?
A. It was.

Q. And there was a lot of changing policies and things like that?
A. Yes.
Q. All right. And even among District Courts, the District Courts in Massachusetts weren't all created with the cookie-cutters, were they?
A. No.
Q. They're very, very different in physical layout?
A. Yes.
Q. In entrances and exits and courtrooms?
A. Correct.
Q. And it's really difficult to make one-size-fits-all policies for the District Courts?
A. I don't know if it is or not. You'd have to ask my chief that.
Q. Well, have you sat in different courthouses?
A. Yes.
Q. And do different courthouses do things differently?
A. Somewhat.
Q. All right. There are different doors, different accesses to lockups, there are all kinds of different things happen; right?
A. Yup.

Q. And even in Newton, access for custodies is very different in the first session than in the upstairs second session, isn't it?
A. Uh-huh. Yes.
Q. In the first session, they can bring people directly from the lockup into the dock; is that right?
A. Right.
Q. And the second session, they have to walk them up the backstairs or take the elevator?
A. Or take the elevator.
Q. And there's no dock alone in there, is there?
A. There isn't.
Q. For that reason, the call of the daily list generally takes place in the first session; is that right?
A. Yes.
Q. Why did you think that Judge Joseph was doing the daily list in the second session?
A. I just -- Because the visiting judge generally sits in the second session. And for some reason, it didn't compute in my brain.
Q. Okay. But --
A. There wasn't a -- you know.
Q. Yeah. But the daily list didn't generally

happen up there, did it?
A. It does if there are small claims going on. Like today is small claims days, so they use the first session because there are more people. So we go upstairs and do our daily list.
Q. But that -- This day, that wasn't happening, was it?
A. No.
Q. Now, fair to say there's been a lot of talk about, not just ICE in general, but this incident over the last seven years?
A. Yes.
Q. And you've heard lots of different things from of lots of different people?
A. I have?
Q. Yes.
A. Yes.
Q. And is it difficult to sort out today, in June of 2025, what you heard from who, when?
A. It's challenging.
Q. Okay. Is it fair to say that what you told the grand jury back in 2019 is probably closer to accurate than your memory today?
A. Probably.
MS. MULVEY: All right. Could

I approach the witness, Your Honor?

HEARING OFFICER: Yes.

Q. Just to make things easier, can I give you a copy of your testimony?

A. Yeah. Thanks.

Q. I'd ask you to look at Page 33, transcript Page 33. There are some Bates numbers. But if you look at transcript Page 33.

A. Transcript page 33. Yes.

Q. And I should have started, this was given on February 28th of 2019 in the Federal courthouse?

A. Yes.

Q. And if I ask you to look at Page 33, you were asked, understandably, what did David Jellinek tell you?

A. Yes.

Q. And this was the conversation after the drug court meeting that you were telling us about?

A. Yes.

Q. And you said, what I recall him telling me, and I don't, because this e-mail is a compilation of a few after I spoke to, after I spoke to him first, he told me that he had represented a fellow who they didn't know if he was wanted in Pennsylvania, ICE was also in the building

wishing to effect service on him, and he had been arrested, and I don't -- I remember him saying something about he asked the judge if he could bring his fellow downstairs after he had been released with the interpreter to talk to probation, something about trying to sort out whether the Pennsylvania warrant was still active. That's my recollection of how it first started with me, and then I said, okay, you know, and I went downstairs, I said, well, thank you for telling me or something, and I went downstairs, and when I went in to my lobby, my chief court officer came in, Scott Noe, with a policy saying -- reiterating that people go out the front door, and I said, okay, we need to reiterate this, and he told me that an incident had happened that someone went out the back door, so then it started like something happened, I knew something had happened, and I said, okay, well, tell me a little bit about it, and he said he understood the court officer had let someone out the back door, so I was alarmed at that, and I listened, and then I think the clerk came in and talked to me, too, Larry Okstein, and I was just kind of getting as

much information as I could from those parties. Does that sound like it's probably accurate?

A. Yes.

Q. Okay. And so did David Jellinek tell you anybody had gone out the back door?

A. No.

Q. Did he tell you that he talked with the court officer and made an arrangement to let his client out the back door?

A. No.

Q. Did he tell you that he told Judge Joseph he was going to do this and she said, yeah, go ahead?

A. He did not.

Q. Did he tell you -- I assume at that point you knew Assistant District Attorney Shannon Jurgens?

A. Yes.

Q. And she was assigned to your court, so she'd be there pretty much every day?

A. Yes.

Q. Did he tell you she was upset or angry about anything?

A. I don't remember that.

Q. That probably would have flagged the matter for

you, wouldn't it?
A. It may have.
Q. And I assume, if he said anything like that, you would have said, well, why, why is she upset?
A. Possibly. Yup.
Q. Don't remember anything about that?
A. I don't.
Q. Did you ever talk with Assistant District Attorney Jurgens about this?
A. I did not.
Q. And so the next thing you recall is Scott Noe coming in and saying, --
A. Yeah.
Q. -- Judge, here's what happened.
A. I think his hair was on fire, basically.
Q. Okay. This was kind of a bad day for him; right?
A. It was a bad day for all of us.
Q. Yeah. And so he told you that the court officer had let the defendant out the back door.
A. He did.
Q. And that was the first you were hearing about it; right?
A. Yes, it was.
Q. Okay. And understandably, you, too, were

concerned about it.
A. Very.
Q. All right. And at that point you still didn't know anything about off the record; is that right?
A. I did not.
Q. All right. And that time or within a day or so did Chief Court Officer Noe have a policy that was in writing?
A. Yes.
Q. And he told that we're going to put that posted in the front?
A. Yes.
Q. We want to make sure everybody knows this?
A. Yes.
Q. Because we want everybody going out the front door?
A. Yes.
Q. Okay. Now, actually, that policy, at least in terms of ICE custodies, is a little different from what the Lunn policy wanted done, isn't it?
A. Yes.
Q. Okay. And as judge -- I'm sorry -- Special Counsel Fabricant showed you, there was actually -- do you call it transmittal letters?

A. Yes.
Q. They up there send you out all kinds of things?
A. They do.
Q. And one of them was this, what we've been calling the Lunn policy, which is here's how you want you do deal with ICE?
A. Yes.
Q. And actually, dealing with ICE in terms of them taking custody, that's not really the judge's issue, is it?
A. It is not.
Q. That takes place between the court security personnel and the ICE agents?
A. It does.
Q. And so you don't usually see that happen?
A. I do not.
Q. Don't know much about how it happens?
A. No. But in the -- During my time in Newton, I have seen ICE effectuate their service from the front of the building, yes.
Q. Okay. And this transmittal letter that y'all got in November of 2017 actually said that the court wanted that to happen in the lockup, didn't it?
A. Yes.

Q. And there could be good security reasons for that; right?
A. Yes.
Q. Okay. Not all defendants are happy about going into ICE custody?
A. Yes.
Q. They might put up a fuss?
A. I don't know.
Q. All right. And certainly, if they have some friends, there's at least the potential for an unpleasant or an unsafe confrontation?
A. Very much so, in the courtroom, yes.
Q. Okay.
A. Not in security. But in the courtroom.
Q. No. But in any public area.
A. Yes.
Q. If there's a scuffle in the front lobby, and there are people there, that's just not the kind of situation anybody wants.
A. Absolutely not.
Q. And so the actual policy was that, for somebody who had come into the court in custody, was released and was going to ICE, that that should happen in the lockup; right?
A. Per Lunn. The policy.

Q. Yes.
A. Yes.
Q. And the policy that Chief -- I'm sorry -- Chief Court Officer Noe developed actually is a little different from that; is that right?
A. Yes.
Q. Okay. And you said, if you think that's right, go ahead and do it?
A. Yes.
Q. Okay. And that's one of those examples where a particular District Court may do things a little differently?
A. Yes.
Q. Now --
A. And we weren't told that that was wrong either.
Q. You were not told it was wrong.
A. No.
Q. And the next thing that happened after Chief Noe was -- that you talked to Judge Joseph the next time she was in the courtroom?
A. Yes.
Q. And I think we heard that was the Wednesday, the 4th?
A. Yes.

Q. Right. And you had a conversation with her?
A. Yes.
Q. All right. And again, you were still trying to gather information and figure out what happened?
A. Yes.
Q. Okay. And at that point you still didn't know about the off the record; is that correct?
A. I did not.
Q. All right. And so you didn't ask her.
A. I didn't.
Q. And she didn't tell you.
A. She did not.
Q. Okay. And did she answer your questions?
A. Yes.
Q. All right. Did you feel like she told you what she thought was important, as far as you remember?
A. Yes.
Q. Okay. You didn't feel like she was holding back anything or --
A. Not that I could tell.
Q. All right. And in fact, do you remember that you were the one who told her that he had gone out the back door?
A. I don't remember that.

Q. Okay. Do you remember her -- you saying to her I want to talk to you about this case, the guy went out the back door, and she said how did that happen, and you said that's what I'm trying to figure out?

A. I don't remember that.

Q. Does it sound like something that could have happened?

A. Probably, yeah.

Q. Okay. Because you were trying to figure out what happened; right?

A. Absolutely. Yes.

Q. You weren't up there to reprimand or scold her for anything, were you?

A. No. I wished that I had been in the courthouse on April 2nd.

Q. Okay. And why is that?

A. Because this would not have happened.

Q. Why is that?

A. Because I would not have -- I don't know why, but it would not have happened. I can tell you that.

Q. Well, do you generally accompany defendants down to the lockup?

A. I do not, generally.

Q. All right. And if a defendant's down there, and the court officer let him out the back door, is there any way you as the judge could stop that if you didn't know about it?

A. I would know about it.

Q. How would you know?

A. Because I would have been told, I'm sure. They just would not have done it if I had been in the building, whoever was involved.

Q. And is that because you're sort of a senior and in charge?

A. I believe so.

Q. So do you think maybe they thought that this was a situation that could be used to advantage?

A. Who?

Q. Court Officer MacGregor and David Jellinek?

A. I have no idea what they thought.

Q. Okay. But you don't think they would have pulled it with you there?

A. I do not think so.

Q. Now, you also, after your conversation with Judge Joseph, had a phone call with her; is that right?

A. I don't remember the phone call.

Q. But you know from records that it happened?

A. Yes.
Q. And in fact, she called you late on Thursday afternoon and then again on Friday, and you finally touched base on Friday morning?
A. If you say so, yes.
Q. Have you seen records that show that?
A. I haven't seen records. I understand that that occurred.
Q. And that there was a 10-minute phone call, 10 or 11 minutes?
A. That's what I've seen. I don't recall.
Q. And you don't at this point remember that?
A. I don't. I give my phone number to many new judges and they call a lot.
Q. But given what was going on at this point, your belief is that that phone call was about this incident; is that right?
A. I am not sure what it was about.
Q. All right. But you know it happened, you just don't remember what; --
A. Yes.
Q. -- is that right?
All right. Now, you also sent some e-mails and received some e-mails about this situation; is that right?

A. Some e-mails?.
Q. Yes. The e-mails that's what Special Counsel Fabricant was talking about?
A. Yes. Oh, yes.
Q. And the first e-mail, if we look at, I think it's App 540 and 541. On Thursday, April 5th, at 12:26, you sent Judge Fortes an e- mail? I'm sorry.
A. Hold on one sec.
Q. Let me wait for you to catch up.
A. 541. Yeah. 540 and 541, on Thursday, April 5?
Q. Right.
A. Yup.
Q. You were letting Judge Fortes know that this had happened?
A. I was.
Q. In fact, had you had a phone call with her before that?
A. I did.
Q. And she said would you just put it down in an e-mail?
A. Yes.
Q. And you did that, didn't you?
A. I did.

Q. And this e-mail was sort of a summary or a compilation of the various people that you talked to?
A. It was.
Q. And as Judge Fabricant pointed out, it doesn't talk about going off the record. Does that suggest to you that you hadn't yet spoken to Clerk Okstein about that part of it?
A. Yes.
Q. All right. Do you recall what it was that caused him or you to end up talking about that part of it?
A. Yes. Because, again, hair on fire, a clerk comes in and tells me that there's a large gap in the tape. Yes.
Q. Well, it happened on Monday; right?
A. Right.
Q. And this is Thursday at noontime.
A. Uh-huh.
Q. And with his hair on fire, he hasn't come in to tell you that?
A. I haven't -- I don't recall exactly when he came in to tell me.
Q. All right. But certainly, if you had known that when you were writing to Judge Fortes, you would

have included that information.
A. I would have. It may have been, you know, I think. You know what I mean? I don't know.
Q. So with his hair on fire, he still hadn't told you by Thursday?
A. I don't recall him telling me by Thursday.
Q. And when he told you, did you know he was sitting in the clerk's chair at that point?
A. I don't know if I did know that. I think he told me.
Q. All right. Did you say to him, well, why would you do it?
A. No. Clerks don't question judges when they tell them what to do.
Q. Don't clerks help new judges all the time?
A. Clerks help new judges, but they do not tell them what to do.
Q. Did you ever actually listen to the tape?
A. I believe I listened to it a long time ago.
Q. And do you that the person that asked if they could off the record was David Jellinek?
A. Well, he asked, are we on the record, my understanding is, and the judge asked the clerk to take us off the record.
Q. But could it be maybe the reverse?

A. I don't know that it was.
Q. All right. And do you know that the actual gap was 52 seconds?
A. I learned that, yes.
Q. So it wasn't several minutes?
A. Okay.
Q. All right. And did you ever talk to anybody about what happened during that time?
A. No.
Q. Now, whenever you learned that, the way that you saw this is that there were essentially two issues; is that right? One, was the court officer letting the defendant out the back, and the other with Judge Joseph going off the record; is that right?
A. At least two, yes.
Q. Well, those were the two you were aware of; is that right?
A. Well, I don't know how the -- it came to be that the court officer let the defendant out the back door.
Q. And you never did any investigation on that; is that right?
A. No. That's not mine.
Q. And when you reported this to Judge Fortes, that

was because she was the Regional Administrative --

A. Yes.

Q. Right. Now, does she have power to discipline judges?

A. No.

Q. The only person who could do that would be Chief Judge Dawley?

A. I'm not even sure he can discipline judges. I mean, there's a range of -- you know, discipline of judges is not what's within the District Court's purview, my understanding.

Q. Is there some time that the judge said something wrong, either intentionally or unintentionally, there's a meeting to discuss it to ensure that doesn't happen again?

A. Yeah. I don't know if I call that discipline.

Q. Okay. Fair enough. There's attempt made to tell the judge how to do it correctly.

A. Well, there's an attempt to discuss what happened and perhaps point out other ways to do things.

Q. All right. And that kind of thing happens not infrequent; is that right?

A. It does not happen infrequently. Correct.
Q. Now, when you and Judge Fortes were communicating, did Judge Fortes pass this on up the chain to Judge Dawley, --
A. Yes.
Q. -- Chief Judge Dawley? And do you recall why she did that?
A. I think she was as alarmed as I was.
Q. Would you take a look at Page 540.
A. Yes.
Q. All right. And the top e-mail there was April 20th of 2018?
A. Yes.
Q. Which is actually two and a half weeks after this happened?
A. Yes.
Q. And she says, Chief Judge Heffernan called me about this incident a couple of weeks ago, I asked her at that time to follow up with an e-mail outlining the incident below, I also suggested she pull the tape because there was some indication the judge involved may have gone off the record prior to the defendant going down the back stairwell, I'd spoken to the judge involved, shehchc can brief you if you need additional

info. Okay. And then she says, informing you about it now because Judge Heffernan called to let me know regional director for ICE may bring up at meeting supposedly scheduled with CJ Carey, I didn't want you or CJ Carey blind-sided by any info. Is that what she wrote?

A. Yes.

Q. Okay. And so the event that prompted her to tell Chief Judge Dawley about this was a meeting with ICE.

A. I'm not sure that -- I think that may have been one of the motivations, but I don't know.

Q. Do you see any other motivation in this e-mail?

A. Oh, I think --

Q. She said informing you about it now because Judge Heffernan called to let me know the regional director for ICE may bring up at meeting supposedly scheduled with CJ Carey, I didn't want you or CJ Carey blind-sided by --

A. I don't know if Chief Justice Fortes told Chief Justice Dawley on the phone or something. That looks like this is the first writing, yes.

Q. Okay. Now, we've also gone through or Special Counsel Fabricant went through some of

Chief Justice Dawley's responses and the back and forth; is that right?

A. Yes.

Q. And one of the things that he said was on the top of 538.

A. Yes.

Q. He was responding to your e-mail, answering some of his questions?

A. Yes.

Q. All right. And he said, Mary Beth, thanks for the response, I don't think that this situation, even if raised by ICE, is a problem. Right?

A. He did.

Q. Okay. So he wasn't concerned about it other than perhaps with consequences with ICE; right?

A. I don't know what he was concerned about.

Q. That's what he wrote; right?

A. He did write that.

Q. Okay. And is it fair to say that at this point relationships between the state court and ICE were a bit frosty?

A. It was challenging, yes.

Q. Strained?

A. I believe so. I don't know. I have never talked with ICE about it. I don't know.

Q. And then he said, it sounds like the court personnel were just trying to accommodate the attorney/client relationship by use of the interpreter; right?
A. Yes.
Q. And that certainly would be an appropriate thing to do, wouldn't it?
A. What would be an appropriate --
Q. Well, to give a defendant a chance confer with his counsel?
A. Yes.
Q. And to allow the interpreter to do his job if the client needed an interpreter?
A. Yes.
Q. All right. And in the downstairs courtroom, there isn't any private meeting space for a lawyer and a client within a courtroom; is that --
A. No.
Q. So if you need to have a private conversation, it's hard for a lawyer and an interpreter to sit in the courtroom and do that; true?
A. I think it's hard to do in any courthouse in the state.
Q. Okay. ICE was waiting in the front lobby?

A. Yes. So I was told.
Q. Okay. And --
A. I wasn't there.
Q. Having had experience with ICE, do you have some expectation of what would happen if a lawyer said, ICE, don't take him yet, I want to talk to my client?
A. I don't have any expectation.
Q. Do you think it would be reasonable for the lawyer to be concerned that maybe ICE wouldn't honor that request the way a ~~stable~~ state judge might?
A. I don't know.
Q. And the other place that conferences took place, especially for clients in custody, was in the lockup; right?
A. Yes.
Q. And again, if the client needs the interpreter, the interpreter has to go to lockup for that; is that right?
A. Yes.
Q. And so this was a pretty complicated situation from both what you heard and what you now know about this defendant situation; right?
A. Complicated how?
Q. Well, he had state court charges; right?

A. Yeah. Which were dismissed.
Q. Well, they weren't dismissed that day.
A. The possession charges? He was released on personal. The fugitive was dismissed.
Q. Right. So he had pending state court charges; right?
A. Yes.
Q. He had this warrant that might or might not be outstanding from Pennsylvania; right?
A. Yes.
Q. And he had ICE looking for him.
A. Yes.
Q. Right. And it would be reasonable for his defense lawyer to want to kind of run through those issues and what would happen next; right?
A. Yes.
Q. And it would be reasonable to do that in the lockup, wouldn't it?
A. Not if he was released from custody.
Q. Well, doesn't the Lunn policy say that he's supposed to go downstairs to the lockup to get processed?
A. For ICE?
Q. Yes.
A. Oh, maybe, yes. I don't know.

Q. Well, if that's what it says, then that would be a perfectly reasonable thing for the lawyer and the client and the judge to do; right?

A. The lawyer, the client, and the judge? I don't know why the judge would be involved in that.

Q. Well, in saying to the interpreter you can go down to the lockup?

A. Going down to the lock up with the interpreter or probation is fine.

Q. Okay. All right.

A. I don't get the question. Sorry.

Q. So there would be nothing at all wrong with a judge allowing the defense counsel to confer with his client and the interpreter in the lockup.

A. Unless -- If the person were out of custody, it would be unusual.

Q. All right. But if he's being -- If ICE is there for him, he's supposed to be processed out of custody in the lockup.

A. Right.

Q. Isn't that the Lunn policy?

A. And that did not happen. Right. So...

Q. Right. But that's what was supposed to happen.

A. Apparently, according to the Lunn policy, yes.

Q. Right. He was supposed to go downstairs in custody and get processed out there; is that right?

A. That is what Lunn says, yes.

MS. MULVEY: May I have moment?

(PAUSE)

MS. MULVEY: I have nothing else. Thank you, Judge Heffernan.

REDIRECT EXAMINATION

BY JUDGE FABRICANT:

Q. Very briefly if I may.

A. Yes.

Q. Judge Heffernan, who was it that came in with his hair on fire?

A. A couple of people. Chief Court Officer Scott Noe and Larry Okstein.

Q. Each of them separately.

A. Correct.

Q. Do you know when each of them came in?

A. Scott came in first.

Q. Okay.

A. And then I don't remember when Larry came in.

Q. You don't remember when that happened.

A. Yes.

Q. Okay. You said in answer to one of Ms. Mulvey's questions, or you adopted her phrasing, dealing with ICE is not really the judge's issue.
A. No.
Q. So you, as the judge, would you, if a lawyer makes an argument to you that ICE is going after him but he's the wrong person, how would you respond to that as a judge?
A. How would I respond to that as a judge? Well, if he was represented, I would ask his lawyer to look into it.
Q. And if the lawyer had looked into it, and had not succeeded in persuading the ICE officer, and the ICE officer still wanted to take custody --
A. Yeah. It has nothing to do with me. I would certainly not get involved.
Q. So not the judge's role.
A. Absolutely not.
Q. And would you be making suggestions regarding how this problem might be solved?
A. I would not.
Q. Would you be suggesting, well, we could detain him overnight?
A. I would not.
Q. Would you be suggesting, would you be suggesting anything about how to solve this problem?

A. I would not.
Q. Would you tell the lawyer, the lawyers, ICE is not my responsibility?
A. I'm not sure I would phrase it that way, but I would just say -- I would not get involved.
Q. Is that how you would phrase it?
A. Yes.
Q. The Lunn policy. We've talked about the Lunn policy.
A. Yes.
Q. As you look at it now, and as you talked about earlier, what the normal practice was in Newton at the time, was Newton doing something different from Lunn policy at the time?
A. I think so, but I don't believe it was outside of the Lunn policy.
Q. Okay.
A. I believe it was allowed.
Q. But as you've described, the normal practice in Newton was, if a defendant's released from custody, goes out through the courtroom in the first session.
A. Correct.
JUDGE FABRICANT: All right. That's all I have. Thank you.

MS. MULVEY: I just have another question or two.

RECROSS-EXAMINATION

BY MS. MULVEY:

Q. Are you aware that, during the morning, there were multiple calls on the Medina Perez case?

A. I'm not aware of that.

Q. All right. And if I told you that his defense lawyer, who at that point was Elizabeth Bostwick, not David Jellinek, was asking for time to investigate his identity, and Judge Joseph acquiesced, is that an appropriate thing for a judge to do?

A. Sure. Second call all the time for cases.

Q. Or a third call sometimes or --

A. Many calls.

Q. -- come back in the afternoon.

A. Yes.

Q. Because it's important to give a defense lawyer time to do his job, isn't it?

A. His or her job. Absolutely.

Q. All right. I went to school when it was all his. Sorry about that.

And if in the afternoon David Jellinek wanted more time to try to

persuade ICE that this was the wrong guy, would it be appropriate for a judge to give him that?

A. The time that is required by the defense and the assistant DA for any case is liberally given by me.

Q. Okay. Because you want to make sure everybody's rights are protected.

A. That's my job, to make sure.

Q. Right. And to make sure each side has time to do its job.

A. Yes.

Q. All right. You would never say to a lawyer, I'm not going to let you investigate that; right?

A. I don't know that I would never say that.

Q. Within reason.

A. I'm not sure I would even within reason. I'm not sure. I would have to look at it individually.

Q. All right. And certainly, even though ICE isn't your issue, you wouldn't want ICE to take the wrong person, would you?

A. Certainly not.

MS. MULVEY: Thank you.

REDIRECT EXAMINATION

BY JUDGE FABRICANT:

Q. Would you detain somebody overnight because of a question about ICE?

A. How could I? There's nolle pros. Unless they bailed on the person. No.

Q. And so there's fugitive from justice warrant -- fugitive from justice charge. It's dismissed.

A. Yes.

Q. What you then have is two misdemeanor drug charges.

A. Correct.

Q. In the normal course of things in April of 2018, on a misdemeanor drug charge, would you be setting a bail that someone can't make?

A. No.

Q. And if somebody has no criminal record?

A. No.

Q. And is there a statutory presumption in the District Court on release on personal recognizance?

A. Yes. There is now. Certainly.

Q. Was there then?

A. At the time there was. But it's more solid now with granting and all those case laws.

Q. But there's statutory provisions --
A. For sure, yes.
Q. -- that establishes a presumption, and that was in effect at the time, --
A. Yes.
Q. -- of release on personal recognizance.
A. Correct.
Q. And that applies to the District Court. Doesn't apply to the Superior Court because of the different kinds of cases.
A. Oh, yes.
Q. Oh, yes, it's different?
A. The -- I don't know about the Superior Court. I'm often told about them, but I don't know about them.

JUDGE FABRICANT: Thank you.

THE WITNESS: You bet.

JUDGE FABRICANT: That's all I have. Thank you.

MS. MULVEY: I have nothing else. Thank you.

HEARING OFFICER: Thank you. The witness is excused. Thank you, Judge.

JUDGE FABRICANT: I hope we have our next witness perhaps waiting out in the

hallway.

(PAUSE)

HEARING OFFICER: Good afternoon.

HONORABLE STACEY FORTES, SWORN

HEARING OFFICER: Please have a seat. Be as close to the microphone as possible. That would be much appreciated.

DIRECT EXAMINATION

BY JUDGE FABRICANT:

Q. Good afternoon.

A. Good afternoon.

Q. Please state your name.

A. My name is Stacey Fortes.

Q. And are you now the Chief Justice of the District Court?

A. I am.

Q. And back in 2018, what was your role?

A. I was a Regional Administrative Judge.

Q. And would you just go back through your professional background, starting from when you started practicing law, and run through the sequence of your professional history.

A. Sure. So out of law school, my first position was as an assistant attorney general, I

was an assistant district attorney when Ralph Martin was the District Attorney.

Q. So tell us years, if you can remember.

A. I think it was 1991 or '92 I started in the AG's office, around 1994 or so, maybe, I went over to the District Attorney's Office. I'm not completely sure on the dates. I was in the District Attorney's Office under Ralph Martin until maybe around '97. And then I went over to the MBTA as a labor attorney in the labor department. Dan Conley called me one day, who was a new Suffolk district attorney, and he asked me to be Chief of the District Court prosecution in Suffolk County. I went back to Suffolk County. I was appointed to the bench in December of 2006, and have been an Associate justice since then, and now Chief Justice of the District Court.

Q. And when did you become the Regional Administrative Justice?

A. Let's see. I was a Regional Administrator Justice... Maybe in -- I'm not positive of the dates.

Q. Sometime before April of 2018?

A. Yes.

Q. And did you also, sometime around then, become the First Justice of the Lowell District Court?
A. Yes.
Q. Did you hold those roles simultaneously?
A. I did.
Q. Describe for us, please, the role of a Regional Administrative Justice.
A. Okay. So the District Court is split, given its~~in~~ size, into six regions. The Regional Administrative Judge is appointed by the Chief Justice to help the Chief Justice with the administration of the District Court. So as Regional Administrative Judge, I was responsible for scheduling judges, approving the schedule in my region, dealing with day-to-day issues that came up, try to keep things off the Chief Justice's plate, so dealing with those issues, bringing things to his attention that needed to be brought to his attention, and anything that the Chief Justice designated the Regional Administrative Justice.
Q. Does the Regional Administrative Justice have disciplinary authority over other judges?
A. No.
Q. Does the Chief Justice, now that you're in that

role, have disciplinary authority over other judges?

A. Unfortunately now, yes.

Q. And is there a statutory provision that gives the Chief Justice that authority?

A. Yes.

Q. Are you aware of a rule regarding recording of proceedings in the District Court?

A. Yes. There's a District Court rule, Rule 211, requires all, all courtroom proceedings to be recorded.

Q. And you've noticed the monitor, Rule 211 is being displayed on the monitor. Also in front of you on the witness stand is a binder. That binder has hard copies of a whole set of appendices. So everything we're going to display on the monitor is also in that binder. And you can look on the monitor or in the binder, whichever is easier for you.

This is Appendix K. And after the cover page, starts at Page 122 of the appendix and goes over to Page 123. What is your understanding of the substance of this rule?

A. The rule requires all courtroom proceedings

to be recorded.

Q. And are there some exceptions?

A. Administrative matters. But everything that happens in court needs to be recorded.

Q. So call of the list, for example, the clerk is calling the list, the judge isn't sitting on the bench yet.

A. Yes.

Q. Is that an exception?

A. That's an exception.

Q. But anything the judge is doing, is that required to be recorded?

A. Yes, it is.

Q. And if you look on Page 123, go down the page to just before the bold capital letter line, just before that.

A. Yes.

Q. Does it tell you when this rule was adopted?

A. Yes. Adopted December 31st, 1987, effective February 1st, 1988.

Q. And in your -- You've been a judge since 2006. So now 18 and a half years, perhaps. You said December of 2006. During the course of your career as a judge, have you ever during that time gone off the record?

A. No.
Q. In your view, is there any legitimate reason to do that?
A. No, there's no legitimate reason to do it. There are times I would say where someone has forgotten to turn the recording machine on, but not to require that it be turned off.
Q. So have there been times when it came to your attention that not, at the direction of the judge, but through some inadvertence or error, some proceeding wasn't recorded?
A. Yes.
Q. And have you had occasion to deal with that in terms of reconstructing the record?
A. Yes.
Q. If you receive information to indicate that some of the proceeding or some part of some proceeding wasn't recorded, do you -- upon that information, is it automatic in your mind that that means the judge turned it off or is there another possibility?
A. There is another possibility.
Q. What's the other possibility?
A. Well, the possibilities that I just went through. So you could come back from a recess,

the clerk could forget to turn it on, it could be malfunctioning. There are other reasons.

Q. Are you familiar with the Lunn policy?

A. Yes.

Q. And recently there's been a new Lunn policy.

A. Yes.

Q. I want to take you back to April of 2018.

A. Yes.

Q. So put the recent one out of your mind.

A. Okay.

Q. And focus on the one that was in effect in April of 2018, and that's behind Tab B in the binder, and what you see in front of you here is the policy on the monitor.

Do you have a sort of capsule summary of the central theme of that policy?

A. The policy boils down to not to help or hinder ICE officials from performing their duties based on the Lunn holding.

Q. So be neutral.

A. Yes.

Q. How did you first hear about an event in Newton on April 2nd of 2018?

A. I got a phone call from the First Justice Mary Beth Heffernan informing me that there had

been a situation in Newton when she wasn't there involving the covering judge.

Q. And who was the covering judge?

A. Judge Joseph.

Q. And do you know when you got that phone call?

A. I don't recall today, no.

Q. You just told us in the short version what the substance of that call was, but was there more to that call?

A. Yes, yes.

Q. So tell us what you can remember.

A. So Judge Heffernan told me that there was an individual before the court being arraigned, that individual had been arraigned on a fugitive from justice charge, I believe a drug charge as well, and that there was also an ICE detainer, civil detainer, for the defendant, that ICE was there in the building to effectuate that detainer, that the fugitive charge had been dismissed, I believe the defendant was released on personal recognizance, and that somehow the defendant had gone out the back door and ICE had not been able to effectuate.

Q. And in the course of this conversation, did you say anything about some part of the proceeding

having been recorded.
A. Yes. Well, yes. Because I said, well, how did that happen. And she said, well, that's the problem, there's a portion of it that was not recorded, she said the judge involved went off the record.
Q. And did she tell you how she knew that?
A. My memory was she knew it from the clerk, her clerk.
Q. And did you ask her to do something?
A. I did. I said, Mary Beth, how do you know that, you weren't there, did you listen to the tape, the portion of the tape that you could listen to. And she said, no, should I do that, and I said yes.
Q. And did you ask her to do something else as well?
A. I also asked her to send an e-mail of what transpired.
Q. Summarize it in an e-mail?
A. Yes.
Q. All right. And let's look at, in your binder, Tab V. You'll see behind Tab V, you'll see on the monitor here we have what appears at Page 540 behind Tab V, and your e-mails of

course, as we all know, much to our annoyance, start at the back and work forward.

So at Page 540 you see an e-mail from, it says Mary Heffernan. Is she referred to as Mary Beth?

A. Yes.

Q. You see an e-mail from Mary Heffernan to you, Thursday, April 5th, 2018, 12:26 p.m. And I believe, again, because we read it earlier, what you have in front of you, is this the summary that she sent you in response to your request?

A. Yes.

Q. And then if you go further up Page 540 is there then an e-mail from you, April 20th, 2018, at 12:21 p.m., from you. And it's a little confusing, but do you remember who this was to?

A. Chief Justice Dawley.

Q. And so you said to Chief Justice Dawley, Chief, Judge Heffernan called me about this incident a couple of weeks ago, and I asked her at the time to follow up with an e-mail outlining the incident below, I also suggest that she pull the tape because there was some indication the judge involved may have gone off the record prior to the defendant going down the back stairway, I've

spoken to the judge involved, and can brief you if you need additional info. Informing you about it now because Judge Heffernan called to let me know regional director for ICE, question mark -- So did you have uncertainty about whether that was the right title?

A. Yes.

Q. We can bring up the meeting supposedly scheduled with CJ Carey. Who is CJ Carey?

A. The Chief Justice of the Trial Court, Paula Carey.

~~Q.~~ And I didn't want you or Chief Justice Carey to be blind-sided by any info.

Q. The Chief Justice of the Trial Court. So the Trial Court, is it accurate to describe it as, there are seven departments, each department has a chief, appointed by the Chief Justice of the Trial Court, and there's one Chief Justice of the Trial Court that oversees all of those seven departments?

A. Yes.

Q. Is that accurate?

A. Yes, that is.

Q. At the time, the Chief Justice of the Trial Court was Paula Carey.

A. Yes.

Q. Chief of the District Court was Paul Dawley.
A. That is correct.
Q. You were Regional Administrative Justice.
A. Yes.
Q. And the First Justice is Mary Beth Heffernan.
Mary Beth Heffernan was the First Justice.
A. That's correct.
Q. So you said you had spoken to the judge involved. So do you know when that happened?
A. I'm not sure when that happened. It would have been obviously before I sent this e-mail and after I talked to Judge Heffernan.
Q. So sometime between April 5th and earlier that day on April 20.
A. That's right.
Q. And do you know how it came about -- Where, first of all, was this conversation?
A. With Judge Joseph?
Q. Yes.
A. In the Lowell District Court on Hurd Street.
Q. And Lowell was where you were sitting.
A. That's correct.
Q. Do you know how it came about that she was sitting in the Lowell District Court?
A. I think that I said to Judge Heffernan that

Judge Joseph was either scheduled to be sitting with me or I would schedule her to sit with me so I could ask her what happened, talk to her about it.

Q. And you, as the original administrative justice, had authority over the schedule.

A. That's correct.

Q. So one way or the other, she was scheduled to sit there on some day between April 5th and April 20.

A. Correct.

Q. And I want to just go back to this e-mail from -- before we talk about the conversation with Judge Joseph. I want to go back to this e-mail from Judge Heffernan. And you'll see somewhere in here that there's a reference to the defendant and his lawyer going down to probation regarding the Pennsylvania warrant. And we'll find that.

So on Page 541, a little above the middle of the page, the defense attorney asked the judge if he could utilize the services of the interpreter in probation so the defendant can further investigate the Pennsylvania detainer so it did not hinder his client

further. That make sense to you?
A. Not to me, no.
Q. And why did it not make sense to you?
A. Because there wouldn't have been anything that probation could do about the Pennsylvania matter.
Q. So probation would be the keeper of the Triple I.
A. Yes.
Q. And so if there's a charge pending in Pennsylvania, would that show up on the Triple I?
A. Yes.
Q. Can probation change the Triple I?
A. No.
Q. Triple I comes from Federal.
A. That's right.
Q. All right. Now, on whatever day it was, between April 5th and April 20th, Judge Joseph is sitting in Lowell, you're sitting in Lowell, and you had a conversation.
A. Yes.
Q. And you said that that conversation was in her lobby or your lobby?
A. No. In my lobby. She wouldn't have had a

lobby there because she wasn't sitting there on a regular basis.

Q. How did that conversation come about?

A. I asked to talk to her over the lunch recess. So I think we, you know, sat down, the two of us, had lunch, regular chitchat about how things were going, and then I said, Shelley, Mary Beth called me about a situation in Newton, went through it with her and asked her, and I said there's a portion of it, my understanding is, it wasn't recorded, and asked her what happened, if she recalled it.

Q. And what did she say?

A. She recalled it. She told me that, again, that the defendant had been before the court for an arraignment. She told me that the defendant was charged with a drug offence, fugitive offense. There was confusion she said about the defendant's identity, and she was concerned about that and concerned about people in the audience hearing whatever confusion was about the identity, and had the parties at side bar, and there were some conversation about how the equipment in Newton worked as opposed to other courts that she had been in. Newton was still

on an old recording system. It hadn't moved to the FTDR system yet. And so there was some conversation about that with specific details. Beyond that, I don't recall.

Q. Did she talk about an incident that occurred in another court that was still on an old recording system?

A. She may have. I just don't recall.

Q. Did she ever, in the course of this conversation, did she ever directly tell you that she had told the clerk to turn off the recording system?

A. No. And I didn't, I didn't ask her directly either, but she never directly told me that, no.

~~Q. But she never directly told you that.~~

~~A. No.~~

Q. Did she tell you anything that in your view would be an acceptable reason for going off the record?

A. No.

Q. When she talked about concern about people in the audience hearing a discussion of the defendant's identity, did she explain why that was a concern?

A. I don't recall.

Q. In your view, is a discussion of a defendant's identity something that should happen off the record?
A. Not in my view but...
Q. And is it an exception to Rule 211?
A. It is, it is not.
Q. Did she say anything about being concerned that ICE would take the wrong person?
A. No. I don't recall us getting that far into the conversation about ICE and what happened because I still was just trying to figure out why there was a portion that wasn't recorded.
Q. And you were trying to figure why there was a portion that wasn't recorded. She never said there was a portion that wasn't recorded because I told the clerk to turn the recording off.
A. No. I didn't hear that in the meeting with me.
Q. Did she say anything about ICE?
A. Not that I can recall. But again, I was focused in the first part of the why there's no recording.
Q. So you don't recall her saying anything about ICE.
A. No. I mean, obviously, in the beginning of

the conversation with her, when we were talking about what happened in Newton, I think there was a preliminary conversation about it, but not into details, because, again, I was focused on...

Q. Did she say anything about wanting the attorney to have an opportunity to explain the defendant's rights to him before ICE would take him to custody?

A. I don't recall anything like that.

Q. Did she say anything about wanting to pause ICE taking the defendant into custody?

A. No.

Q. How did the meeting end?

A. I recall that I had made a copy of Rule 211 for her prior to the meeting. I also made a copy of the ICE policy. I gave her a copy. Reviewed 211 with her. Told her, Shelley, you know all courtroom proceedings have to be recorded. She said she knew that. I also believe I gave her a copy of the Trial Court ICE policy, and I think she said that she had it because she called the administrative office. And she said she understood everything, so we went back to work.

Q. She told you she knew about Rule 211, that all things need to be recorded.
A. I don't think she said specifically I know about Rule 211. But she said I know. All court proceedings need to be recorded. Yes, I know, she said.
Q. And was that the end of the conversation?
A. Yeah. As I recall it, yes.
Q. And after that meeting with Judge Joseph, did you have any further conversation about this with anybody before you sent your e-mail to Chief Justice Dawley?
A. I, at some point I talked to Judge Heffernan. I think I called her. And I said I talked to Shelley and she did not tell me she instructed the clerk to turn off the recording, Mary Beth. And Judge Heffernan by that time I think had listened to the recording, because she said, yes, she did, Stacey. And I said, well, I talked to her, and that was it.
Q. At that point were you satisfied that it wouldn't happen again, that she wouldn't go off the record again?
A. I was satisfied that, with her answer to me, that she knew what the Trial Court policy was.

Q. And so you then sent this e-mail to Chief Justice Dawley.
A. Yes.
Q. What was the next thing you heard about this?
A. After the e-mail from Chief Justice Dawley, I think Chief Justice Dawley asked to meet with me and Judge Joseph.
Q. Did you get any help from his assistants in setting up the meeting?
A. Yes.
Q. And did you -- in preparation for that meeting, did you send an e-mail to~~from~~ Joseph Jackson in Chief Justice Dawley's office --
A. Yes.
Q. -- requesting that he get a copy of the recording for Chief Justice Dawley?
A. Yes.
Q. And that is at Page 532, starting at the bottom of the page. Hi Joe, hope ~~is~~ all is well, Chief Justice Dawley asked me to forward this to you for Newton recording, and what you were forwarding was the name of the case, Commonwealth versus Jose Medina Perez, April 2nd, 2018.
A. Yes.
Q. And you sent that to Joe Jackson. And then you sent a further e-mail. You said, Joe, as you

know, there is no FTR in Newton yet. Judge Heffernan's copy of the recording is in the lobby if someone needs to pick it up for the Chief.

A. Correct.

Q. Was there then a meeting in Chief Justice Dawley's office on May 8th of 2018?

A. Off the top of my head, I don't recall the date, but I'm sure there's something referencing the date. There was a meeting in Chief Justice Dawley's office.

Q. Do you remember that meeting?

A. Yes.

Q. And who was there?

A. My memory is, Chief Justice Dawley, Judge Joseph, and I.

Q. So three people in the room.

A. That I recall.

Q. What was your role in the meeting?

A. As the Regional Administrative Judge, you have to go to a meeting with the Chief usually there as another witness to fill in anything, if you had a prior conversation with the judge, that was my purpose, but it's the Chief's meeting.

Q. Was he running the meeting?
A. Yes.
Q. Tell us please everything you remember about that meeting, what he said, what she said.
A. Well, he -- My memory is he had notified both of us what the meeting was about, and he asked her, I think at the beginning of the meeting, did you have an opportunity to listen to the recording, and then he said there was some things that he was concerned about in the recording, I think things like lack of formality in the beginning, professionalism, and then the instruction, did she instruct the clerk to go off the record, and Judge Joseph in that meeting right away said, yes, I did, and I shouldn't have done that.
Q. And had you heard her say that at any time before?
A. No.
Q. This is the first time you heard her directly acknowledge?
A. Yes. She didn't say it to me. She said it to him, yes.
Q. And beyond that conversation about going off the record, what else do you recall of this meeting?

A. So I remember, I remember not specifics, because it was his meeting, I remember him going through the incident with her, telling her it was a serious matter, very serious matter, making sure again that she understood the rule with regard to recording, that she understood the ICE policy. But the specifics of who said what -- beyond, you know, beyond that, I don't know.

Q. Did she explain in any way why she went off the record?

A. I don't recall.

Q. Did she say anything about ICE, that you recall?

A. Not, not that I can recall, no.

Q. So do you recall her saying anything about being concerned that ICE would take the wrong person?

A. I don't recall.

Q. Do you recall her saying anything about being concerned that ICE would take custody of the defendant before his attorney had a chance to confer with him?

A. I don't.

Q. Did she say anything about wanting to pause ICE taking him into custody?

A. No.

Q. Did she say anything about wanting his attorney to have a chance to explain his rights to him before ICE would take him into custody?
A. Not that I can recall.
Q. How did the meeting end?
A. My memory is it ended similar to the meeting with me, her being very apologetic about going off the record, saying she understood the policies, that she was apologetic for taking everyone's time, and that's the way the meeting ended.

JUDGE FABRICANT: All right. That's all I have at this point.

CROSS-EXAMINATION

BY MS. MULVEY:

Q. Good afternoon, Chief Justice Fortes.
A. Good afternoon.
Q. My name is Liz Mulvey. Certainly, I've never appeared before you; is that fair?
A. That's fair.
Q. Okay. This rule against going off the record or requiring that all proceedings be recorded has been in effect probably longer than you've been practicing?
A. I think that's probably fair to say, yeah.

Q. Is it also fair to say that over the years it's sometimes been honored in breach?
A. Not, not in my experience.
Q. I understand that. But would you be surprised if other judges had at various times gone off the record?
A. No. I mean, you know, I don't know what other judges do and, you know, do necessarily unless it's brought to my attention.
Q. Fair enough. And you don't, even as Chief, go, you know, around surveying people, do you?
A. No, no.
Q. So if other lawyers, judges, clerks testified that that, you know, happens for one reason or another, that wouldn't surprise you, would it?
A. When you say ~~it~~ would it surprise me --
Q. You would believe that.
A. I would, I would not not believe it.
Q. Right.
A. Yes.
Q. Right. You would accept that that happens.
A. It would surprise me, but I would accept that it happens, yes.
Q. Okay. And that rule, like other rules, for various reasons sometimes may not be honored;

right?
A. Like any rule, yes.
Q. For example, the Lunn policy as issued in November of 2017 actually says that, if for somebody who came in in custody, ICE should take custody in the lockup.
A. That's correct.
Q. And that's, among other things, a security thing, right, because you don't want a scuffle in the public area of the courthouse?
A. No. That's correct.
Q. And you know, in Newton, that wasn't the policy; right?
A. I learned that after, during this incident, yes.
Q. So that's another example of, just because there's a rule, doesn't mean everybody always follows the rule.
A. That's right. That's right.
Q. And when you had this meeting with Judge Joseph, that was sort of an informal lunchtime meeting; is that right?
A. Correct. Correct.
Q. And your main purpose was to make sure she understood you really can't go off the record.

A. That's right.
Q. You weren't suggesting to her that she had something to do with this. You wanted to make sure, don't turn off the tape.
A. That's right. And she did say that that in fact happened. I wanted to first find out what happened from her. I was hearing what happened.
Q. Okay. And your understanding was, she hadn't had a chance to listen to the recording; right?
A. When she met with me.
Q. You were just sort of raising it at that point.
A. Yes. She didn't know anything about the meeting.
Q. And you didn't take any notes because this was a lunchtime --
A. Yes.
Q. -- conversation, trying to help her understand don't do this.
A. That's correct.
Q. All right. And as a RAJ and now as a chief, that's part of your role, is to help people do the right thing.
A. That's correct.
Q. All right. And you started out the meeting by saying, I understand you may have gone off the

record.
A. Yes.
Q. And she didn't say, no, that's not true; right?
A. Well, I started off the meeting by saying that Mary Beth called me about this situation in Newton, and part of what she's telling me is that there was a portion of the hearing that wasn't recorded. I didn't say to her did you go -- because I didn't know and Mary Beth didn't know at that time.
Q. And you didn't ask her, did you?
A. No. I did not say, did you go off the record.
Q. All right. And you said I understand some of it was off the record?
A. Yes. Do you know what happened.
Q. And she didn't say, no, that's not true, did she?
A. No, she didn't say, no, that's not true.
Q. That was sort of the assumption everybody was working on?
A. What was?
Q. That part of it is off the record.
A. Yes.
Q. All right.

A. Yes.
Q. And if she remembers that you showed her or read her the rule, that would be accurate; right?
A. The rule on recording. 211. Yes.
Q. All right. And there was some conversation, and you don't recall it directly, about an incident in Waltham? Do you recall her telling you about something like had happened in Waltham?
A. I don't recall that.
Q. Do you remember in general some conversation about Waltham?
A. I don't know, no.
Q. So is it possible that you asked her, have you ever gone off the record before, and she started talking about something that had happened in Waltham?
A. It's possible.
Q. Do you know that now there actually was an incident in Waltham where a side bar was getting broadcast to the gallery?
A. I don't know.
Q. All right. But at that point was it Waltham and Newton that still had JAVS instead of FDR?
A. It was definitely Newton. I don't recall Waltham as well.

Q. All right. And she, when you gave her the rule, said, I'm sorry, I won't ever do it again, basically?

A. I -- In the meeting with me, she didn't say anything about going off the record. So it wasn't directing that. It wasn't, to me, I'm sorry, I'll never do that again. That was with Chief Justice Dawley. I never heard from her or anything in the meeting with me about confirmation one way or another that there was a portion of the proceeding that wasn't recorded.

Q. Well, you had started out by saying, I understand this happened; right?

A. Right.

Q. And she didn't dispute it; right?

A. She didn't dispute it.

Q. Okay. And so given that you already knew it, did you understand that she was agreeing with you?

A. Again, I didn't already know it. Because I was hearing it, and it hadn't been confirmed from Judge Heffernan yet. So I didn't already know it. I was telling her what I heard, and then at the end of the meeting I was saying to her, you know all courtroom proceedings have to

be recorded. She didn't say to me I'm sorry because at that point I don't -- it wasn't clear to me that she was acknowledging anything about the portion of the recording not being recorded, for lack of a better word. So I heard that first with Chief Justice Dawley.

Q. Well, if you said to her I understand it was off the record and that didn't happen, wouldn't you have expected her to say, no, that didn't happen?

A. No. I didn't say to her -- I said to her, my understanding from Judge Heffernan is there's a portion of the hearing that wasn't recorded. I didn't know whether the machine wasn't working, I didn't know what happened, why there was a portion that was not recorded.

Q. Did you ask her?

A. No, I~~.~~ ~~—~~d~~D~~idn't say, I didn't say to her, did you turn off the recording, no.

Q. Okay. Did you say why, was it off the record?

A. Again, it wasn't clear to me, other than what I was hearing from Judge Heffernan, no one had listened to the tape yet that there was a portion that wasn't recorded. I was telling her that when I spoke to her this is what I heard --

Q. Okay.
A. -- and do you remember this incident --
Q. All right.
A. -- and was there -- did something happen --
Q. All right.
A. And letting her talk to me about the incident.
Q. And did she say to you, no, I didn't go off the record?
A. No.
Q. Okay. Did you ask her directly, did you go off the record?
A. I did not.
Q. Okay. So you gave her the Rule 211?
A. I did.
Q. And you gave her the Lunn policy?
A. Yes.
Q. Which actually Newton wasn't follow; right?
A. Well, yes. Based on what we just talked about, yes.
Q. Okay. And then the focus of this meeting was not ICE and the defendant escaping, it was going off the record, wasn't it?
A. The focus of the meeting was trying to figure out what happened. Mary Beth was saying one

thing. Mary Beth wasn't there. So I said, let me talk to Shelley and see if I can piece together what happened.

Q. All right. And did you try to piece together what had happened with ICE?

A. I didn't get that far because, again, I was trying to figure out --

Q. The tape.

A. -- the tape.

Q. You were concerned about the tape; right?

A. Exactly.

Q. All right. And then there was this meeting with Chief Judge Dawley; right?

A. Yes.

Q. And again, he's running the show because he's the Chief.

A. That's correct.

Q. You didn't take any notes again, --

A. No.

Q. -- did you?

A. No.

Q. And she said it, yes, I did it, I'm sorry, --

A. That's right.

Q. -- I'll never do it again.

A. Exactly.

Q. All right. And there was some conversation about what had happened with the actual proceedings.
A. Yes.
Q. Okay. But again, the focus was making sure she understood don't go off the record; right?
A. In his meeting?
Q. Yes.
A. The focus for him was making sure she doesn't go off the record and making sure she understood the Trial Court policy, the ICE policy.
Q. Okay. Which -- Do you know she actually called and got a copye during the day that day?
A. During the day of the --
Q. The day of the hearing.
A. I believe so. Yeah. Because I think when I handed her a copy, she said she had gotten it from the administrative office.
Q. Right. She actually called and had them tell her about the policy; right?
A. Based on what she was saying, yes.
Q. And do you know there's actually an e-mail showing that they sent it to her?
A. I don't dispute that.
Q. So that was a perfectly appropriate thing for

her to do, try to get help.
A. Absolutely.
MS. MULVEY: I have nothing else. Thank you, Judge.
JUDGE FABRICANT: I have nothing further for this witness. Thank you.
HEARING OFFICER: Thank you very much. You're excused.
JUDGE FABRICANT: We have our next witness scheduled at 2:00. So if we could take a lunch break now, that would be great.
HEARING OFFICER: That's fine. We'll recess until 2:00. Thanks All.
(PAUSE)
Can I just confirm, do you have another witness after that or is that going to be the last one?
JUDGE FABRICANT: The witness after that will be Judge Joseph.
HEARING OFFICER: Okay. And that would be for tomorrow?
MR. HOOPES: Yes. We talked about that yesterday.
HEARING OFFICER: Okay.
JUDGE FABRICANT: I think the

next witness will not take two hours. If that's how we want to proceed, that's fine.

HEARING OFFICER: That's fine. And then if you could give thought over the break so that by the end of the day we can talk a little bit more about plans for after Judge Joseph's testimony, you can let us know what you're thinking is on that.

MR. HOOPES: Yes.

HEARING OFFICER: All right. Thanks very much.

JUDGE FABRICANT: Thank you.

(Luncheon recess taken at 12:52 p.m.

(Proceedings resumed at 2:01 p.m.)

JUDGE FABRICANT: The Commission calls former Chief Justice Paul Dawley.

HEARING OFFICER: Good afternoon.

former CHIEF JUSTICE PAUL C. DAWLEY, SWORN

HEARING OFFICER: Thank you. Please be seated.

DIRECT EXAMINATION

BY JUDGE FABRICANT:

Q. Good afternoon, Chief Justice Dawley.

A. Good afternoon.

JUDGE FABRICANT: Is that on?

THE WITNESS: Not sure.

JUDGE FABRICANT: I think it is.

HEARING OFFICER: No.

(PAUSE)

Q. Would you state your name, please.

A. My name is Paul Dawley. Last name is spelled D-a-w-l-e-y.

Q. Thank you.

And what do you do now?

A. Presently work as the general counsel to the University of Massachusetts Foundation.

Q. Were you -- In your previous role, were you the Chief Justice of the District Court?

A. Yes.

Q. Would you tell us, please, go back to when you became a lawyer, and just give us a brief overview of your professional background.

A. I became an attorney in 1989. I worked for approximately 12 years as an assistant district

attorney in Plymouth County. I was the Deputy First Assistant District Attorney. In 2001, I was appointed as an associate justice of the Brockton District Court. I served as the Regional Administrative Justice and the First Justice of the Court. And then in 2013 I was appointed as the Chief Justice of the District Court. In 2018, I was reappointed to additional five-year term. And then, in 2022, I retired from the bench.

Q. Can you tell us what the role is of the Chief Justice of the District Court?

A. The duties of the Chief Justice are set forth in the statute, Chapter 211B, Section 10. And essentially, it is to oversee the operation of the District Courts. There are 62 District Courts across the Commonwealth. And primarily the duties are to implement policies from the Trial Court and the Supreme Judicial Court. There are budget and personnel responsibilities. There's work, working with probation, for example, to implement recidivism reduction program, such as specialty courts, drug courts, mental health courts, implementing training, professional development, not only for

judges, but for court personnel, including clerks, implementing information technology enhancements. Case load management is a significant part of it. And there's a public outreach aspect in terms of working with the bar associations. The duties are wide ranging. Those are some of them.

Q. And does the statute authorize the Chief Justice to discipline judges of the District Court?

A. Yes, it does.

Q. Does it give you much guidance about exactly how you would go about that?

A. The statute I think is somewhat vague. The practice is, in an instance of judicial misconduct, the Chief Justice will report that to the Chief Justice of the Supreme Judicial Court, Chief Justice of the Trial Court, and then the referral to the Commission on Judicial Conduct would take place.

Q. And before you would report it, do you do some investigation?

A. Yes.

Q. Would you talk with the judge involved?

A. Typically, there would be some type of investigation. In some instances, the

information is just provided to you. In other instances, it required some investigation on my part, and ultimately, a report to the court.

Q. You said that there are 62 divisions of the District Court. And does that -- Does a division refer usually to a particular courthouse?

A. Yes. There are 62 separate District Courts in the Commonwealth. Attached to those are 158 judges, 26 clerk magistrates, one clerk magistrate appointed by the governor to each court, and then this court sets approximately a thousand employees across those 62 courts.

Q. And you said 158 judges?

A. Yes.

Q. And 62 clerks.

A. Yes.

Q. And are those -- Are the divisions located everywhere except Boston?

A. That's correct.

Q. And what serves the equivalent function in Boston?

A. The Boston Municipal Court.

Q. And what kinds of cases does the District Court hear?

A. It hears both criminal and civil cases, would be civil damage thresholds, approximately $50,000 by rule of the SJC. The criminal matters are generally matters for which a person can be incarcerated for up to two and a half years. In addition, the District Court, the subject matter jurisdiction is very wide ranging because it also includes mental health, involuntary mental health commitments, domestic abuse, 209A orders, landlord/tenant matters, and there's a whole host of administrative appeals that an individual would have a right to appear in court to challenge an administrative finding.

Q. And you refer to 209A. Is that a statute relating to restraining orders arising out of domestic abuse situations?

A. Yes.

Q. Can you talk a little about the process when a new judge is appointed to the District Court?

A. The District Court has a formal judicial orientation program. Every newly-appointed judge for the first four weeks is assigned to sit on a daily basis with a different judge, a more senior judge, with a particular focus on a particular subject matter.

The curriculum, if you will, is established by the District Court Committee on Education. That's comprised of judges, clerks, and probation officials. And what they do is identify substantive areas of the law that we anticipate are going to require judicial decision-making.

So, for example, on the criminal side, a new judge would sit with somebody to review arraignments and bail. Bail revocation, probation violation matters, jury empanelment, sentencing, case disposition on a criminal side. On the civil side, you may sit with somebody to review landlord/tenant cases, debt collection. And then, of course, the involuntary commitments for substance abuse disorder Section 35, domestic violence 209A.

So in the first four weeks, a judge is assigned to sit with a specific other judge to review these matters and gain obviously the experience and the perspective of the more experienced judge.

Q. Is it a different judge each day for those four weeks?

A. For the most part. Occasionally somebody

will sit on a pro bono one day with another judge. But it's designed -- There's quite a bit of travel involved, because a new judge is moving around and meeting a lot of different judges.

Q. And did you also meet with the new judge when you were the Chief Justice?

A. I did. The practice is, once somebody is confirmed by the governor's council, a meeting is set up in the administrative office where a new judge would meet with me as the Chief Justice as well as the administrative office staff, the lawyers and the other staff.

Q. And did your office also provide materials for each new judge?

A. Yes. Every new judge is provided materials, frankly, a large box of books, as well as electronic materials, and the materials not only come from the administrative office of the District Court, they come, some instances, the Supreme Judicial Court, Flaschner Judicial Institute, the administrative office of the Trial Court. So people would be inundated with materials to receive.

Q. Is one of the things that each new judge would

be provided with a copy of the Massachusetts Rules of Court, this book that I'm holding up?

A. Yes, it is.

Q. And every year does Thomson Reuters come out with a new version of this?

A. I believe so.

Q. Does Flaschner send a copy of the new version to every judge every year?

A. I believe so.

Q. Did the District Court in your time as Chief Justice also have educational conferences at various times?

A. We had at least one annual conference court-wide. But after I became Chief Justice, we instituted orderly regional meetings, they were referred to, where judges would -- first would be the clerks would gather in the morning, and there'd be presentation on development in the law, circuit areas of the law, and then the afternoon we'd do that same program -- or different program but the same type of approach to judges. So every three or four months we were meeting and it was an education program presented.

Q. And were there on occasion a special conference

on a particular topic, such as race and bias?
A. Yes.
Q. And all of these various conferences and programs, if a judge couldn't attend for some reason, was there a process to make sure that whatever materials might have been handed out at a conference would be sent to the judge who couldn't attend?
A. That's correct.
Q. How --
A. We would have a process where, for varying reasons, whether they were on trial, whether there was a personal commitment they had, people couldn't make it. So they would identify the administrative staff or identify who was not present and they would send them the materials.
Q. Can you tell us what a transmittal is or was when you were Chief Justice?
A. It was a communication from me on a variety of subjects, to all judges, all clerk magistrates, all chief probation officers, essentially all court staff. And within the transmittal, it could be about a development in the law, it could be a policy from the Trial Court or the SJC, could be personnel

announcements. The announcements, for instance, of new judges or the announcements of retirements. It was a way to communicate with the whole District Court system.

Q. Did you keep track of them so each one has a number so --

A. I didn't, but somebody did.

Q. Somebody on your staff did that?

A. Yes.

Q. I'm going to ask you to look at Appendix C. And you have in front of you a binder, and we're displaying on the monitor here, so you can look at either way, whether it's in the binder or on the monitor, Appendix C. And in that binder you have all of the appendices. So if you look at the first page of Appendix C, you see the front page of it, which is what's on the monitor.

A. Yes.

Q. Is that what a transmittal coming from the District Court looks like or did look like at the time?

A. Yes.

Q. Were there also transmittals that would come from the Trial Court as well?

A. Yes.

Q. And would they look somewhat similar?
A. Yes.
Q. But would it indicate that it was coming from the executive office of the Trial Court and the name of the Chief Justice of the Trial Court and/or the court administrator?
A. It would. At the top it would be clear that it was from Chief Justice Carey, for example.
Q. So looking at this one, and this is numbered transmittal number 1222, do you see it up in the right upper part of the page? Do you see that?
A. Yes. Yup.
Q. And let me ask you to go over to Page 10 in the, Page 10 in the -- using the pages on the -- I'm sorry -- Page 13, using the page numbers at the upper right corner of the page. Do you see that?
A. Yes.
Q. Okay. And -- I'm sorry.
HEARING OFFICER: Is it 12?
Q. I told you the wrong thing.
JUDGE FABRICANT: Yes, 12.
Thank you.
Q. Page 12.
A. Yes.

Q. If you look at Paragraph 6 on Page 12, do you see that that says updated immigration bench card?

A. Yes.

Q. And do you see that it says that at the December 13th, 2017, conference? ~~And w~~W~~as~~ there a conference on December 13th, 2017, specifically on the subject of race and bias?

A. Yes. It was a court-wide conference on that subject for all District Court judges.

Q. And although specifically on that subject, were there some materials handed out on other subjects?

A. Yes.

Q. And you see it says here at the December 13th, 2017, conference, we distributed a revised information and immigration matters bench card dated 12/17 -- Does that mean December of '17?

A. Yes.

Q. -- to note the Supreme Judicial Court's holding in Lunn versus Commonwealth, that Massachusetts court officers do not have the authority to hold an individual in custody solely on the basis of a Federal civil immigration detainer beyond the time that the individual would otherwise be

entitled to a release from state custody. Do you see that?

A. Yes.

Q. And do you see that it says, consistent with District Court Transmittal 1209? Is that a past transmittal that had been issued earlier?

A. Yes.

Q. Which was issued after the Lunn decision and rescinded prior District Court transmittals on that subject, this revised bench card replaces the bench card dated 10/16 -- Does that mean October of 2016?

A. Yes.

Q. -- and should be discarded.

So is this telling the recipient that here's a new bench card on immigration matters, anything you have from before this you should discard?

A. Yes, it does.

Q. And then please contact Jackie Lawson. Is she a person in the administrative office --

A. She's an administrative assistant.

Q. If you do not receive the updated bench card. And then the electronic version, -- Was this sent electronically by e-mail?

A. Yes.

Q. -- the electronic version of the new bench card is attached so you can replace Pages 125 to 126 in your 90-day guide. What's a 90-day guide?

A. 90-day guide is put together by the Education Committee. It's a condensed version of the significant amount of materials a judge receives, and it's designed by the committee to be a quick resource for judges on the things that they're most likely to encounter in their first 90 days on the bench.

Q. So is the idea that it would be a good idea for the judges to have that with them --

A. We recommend they bring it on the bench with them.

Q. And then it says, additional guidance on responding to request from the Department of Homeland Security can be found in the Trial Court's policy and procedure regarding courthouse interactions with the Department Homeland Security issued by executive office transmittal 1713 dated November 10th, 2017.

So this is advising the recipient that's where you look to get more information on the subject?

A. Yes.
Q. And we're going to look at that in just a minute. But if you go over to Tab D. We'll pull it up here on the monitor. Is this -- At Pages 15 and 16. Is this the updated bench card?
A. Yes, it is.
Q. And if you look in the bottom right-hand corner of each page, do you see where it says AODC revised 12/17?
A. Yes.
Q. Does that tell the reader that this comes from the administrative office of the District Court and that it was revised in December of 2017?
A. Yes, it does.
Q. So it should replace anything earlier on the subject?
A. Yes.
Q. And if you look at the last box on the second page, so within the box, and if you look at the bottom paragraph, do you see where it says, for guidance on the manner in which Trial Court employees and in particular court officers shall respond to request from Department of Homeland Security to provide information about and take

custody -- And I'm just going to skip a little bit. See Executive Office Transmittal 1713 dated November 10th, 2017, which contains the Trial Court's policy and procedure regarding courthouse interactions with the Department of Homeland Security. Do you see that?

A. Yes.

Q. So what did you expect judges and other court personnel in the District Court to do when they got Transmittal 1222 and the attached electronic bench card?

A. The expectation was, this would replace the prior one and would be put in the 90-day guide or available as a resource for the judges.

Q. And did you expect them to read it?

A. Yes.

Q. And see the reference to Trial Court Transmittal 1713?

A. Correct.

Q. And let's take a look at that just so we know what it's referring to. And that is Appendix B in your book. You will see that this is a transmittal issued by the Executive Office of the Trial Court dated November 10, 2017, Executive Office Transmittal 1713.

A. Yes.
Q. Was this document commonly referred to as the Lunn policy after the Lunn decision?
A. Yes, it was.
Q. And is that what your transmittal was telling judges they should look to for more information on the subject?
A. Yes. This was the document that was referred to in the bench card.
Q. And in your time as District Court Chief, were you familiar with District Court Special Rule 211?
A. Yes.
Q. We're going to pull that up. You were familiar with that.
A. (Witness nods head).
Q. This is Appendix K. And it's in your book behind Tab K and at Pages 122 to 123. What is your understanding of what this rule requires?
A. The Rule 211 is entitled Quarterly Court proceedings, and it sets forth the requirement that all courtroom proceedings be recorded electronically.
Q. Are there some exceptions?
A. There are. They're listed in the first

paragraph. They exclude the call of the list and similar matters of an administrative nature, proceedings that are being recorded by a court reporter appointed by the court, and proceedings conducted by a magistrate other than a judge.

Q. And if you go over to the second page of it, Page 123 in the appendix, and you look at the line right above near the bottom of the page, right above the part that's in capitals and in bold, do you see that it tells you when this rule was issued and took effect?

A. It was issued December 31st, 1987, and effective February 1st, 1988.

Q. In your experience as a sitting judge and as Chief Justice, were there any circumstances that, in your view, when it's permissible to go off the record?

A. I think there were some circumstances. And I can -- I'll only speak for myself.

Q. Please.

A. When I was a judge, there were some circumstances that I thought it was appropriate to go off the record.

Q. And what were those?

A. When somebody clearly wanted to speak to me

about a personal matter.

Q. Personal to who?

A. Personal to the lawyer. Something non-case related. In addition, I can particularly remember an area that was challenging, but when lawyers or members of law enforcement were in the courtroom, and they wished to bring to your attention that the individual who was the subject of the arraignment perhaps or the sentencing was a cooperating witness or an informant, and then it became more difficult to have that information in a public setting. There are obvious dangers attached to that. So those would be instances I can clearly remember when I sat in Brockton District Court dealing with a couple of those and being very cautious not to record those.

Q. And was there something that you would observe in the courtroom that would tip you off that that was what somebody wanted to talk about if somebody asked to go off the record?

A. Well, it was -- some instances would be, an assistant district attorney, it would sometimes be the defense lawyer, in some instances a member of the law enforcement would be there,

and they informed the clerk that they wanted to talk to you.

Q. And did the presence of law enforcement give you some indication?

A. In some instances.

Q. And was there another type of proceeding that you would do, not necessarily off the record, but not on the regular record?

A. There could be an in-camera review of certain information. Particularly, I think there was a Martin proceeding which is when an individual wishes to assert constitutional right, that the SJC make sure be done, and not in a courtroom, but an in-camera setting, I also believe that that they suggest that that be recorded and the recording -- I'm not sure if it's impounded, but be kept separate and apart from the case.

Q. And you say constitutional right. So a right not to testify, for example.

A. Yes.

Q. So if someone is subpoenaed to a trial and wants to say I have a right not to testify, and you need to rule about whether the person does in fact have that right. Is that --

A. Yes. Because sometimes you're going to

inquire as to whether there's a legitimate basis on which the person is asserting the privilege. For instance, self-incrimination. That obviously has potential implications to that individual, so that's the type of proceeding you would do it in.

Q. And you call that a Martin proceeding. Is that after the name of a SJC decision?

A. Yes.

Q. Are you aware that some judges in past years used to do so-called lobby conferences off the record?

A. Yes.

Q. And what's a lobby conference?

A. It's a conference among the parties with the judge in the judge's chambers.

Q. And what would such a conference be about?

A. Most likely a disposition in the case.

Q. So a potential plea.

A. Correct.

Q. Are you aware of any SJC decisions on that subject?

A. I am. The SJC, I'm not sure what year it was, but it was probably early 2000's, they issued a clear directive that unrecorded lobby

conferences should not take place.
Q. And would that be perhaps the case of Murphy versus the Boston Herald?
A. Yes.
Q. And what do you view as the lesson of that case?
A. Perhaps the importance of ensuring that the proceedings are recorded. It's a complete and accurate record established of what is being said.
Q. In 2015, did the SJC take some action to end the practice of lobby conferences off the record? A rule change, for example?
A. I believe they may have amended -- I forget what rule it is, but I know that there was an amendment to one of criminal rules in which they emphasize that proceedings should be done in open court on the record.
Q. So let's take a look at Appendix L. So you have in front of you Rule 12 of the Rules of Criminal Procedure. Are the Rules of Criminal Procedure established by the SJC?
A. Yes.
Q. And if you look at Rule 2B, -- do you see it -- it says --
A. I'm sorry. Did you say 2B?

Q. 2. I'm sorry. It's not 2B. It's 12B2. It says, plea discussions, and then it says, the judge may participate in plea discussions at the request of one or both of the parties if the discussions are recorded and made part of the record.

A. Yes.

Q. Do you see where it says that?

A. Yes, it does.

Q. And we have the reporter's notes that tell us when that change was made. So I think we'll find that at Page 143 to 144. Do you see at the bottom of Page 143 it says reporter's notes January of 2015?

A. Yes.

Q. And then it has a whole discussion of the changes made in 2015 and has a big paragraph about 12B2 and it tells us that that's when that change was made in substance. Take your time to look at it if you have any uncertainty about it.

A. Yes. And it cites Murphy versus the Boston Herald.

Q. In 2018, -- and I know it's nearly seven years ago -- what recording system did the District Court use?

A. The District Court was in the middle, I think the Trial Court generally was, too, in the middle of changing to the recording systems. The new version, if you will, of the recording system was something called For the Record, FTR. They, I think in 2018 they were in the process of implementing it across the state. My memory is they picked the largest courts first to implement that system. So there was some courts that had it, some courts did not.

Q. And the older system, was there -- The courts that didn't yet have FTR, was there consistency in those courts about what they did have?

A. I forget what it's called, but it's essentially a cassette recording. It was some type of recording that played. And when you wanted to listen to it, you would gather the cassette and put it in a system, put on headphones and listen to it.

Q. And did some of the courts have what they call JAVS?

A. Yes.

Q. What did you have to do to get a recording from JAVS?

A. I would have to say I don't know. Because if

I needed a cassette, I would give it to the administrative staff and they would request it of the court and then I received a cassette.

Q. Was it sometimes a CD --

A. Yes.

Q. -- instead of cassette? And do you know what the Newton District Court was using at the time in April of 2018?

A. They were not -- They did not yet have the FTR system. They had the old system.

Q. Did Judge Joseph become a judge of the District Court in November of 2017?

A. Yes.

Q. And at that time had you had any previous acquaintance with her?

A. No. The first time I met Judge Joseph was after she was appointed, and she come in to meet me and administrative staff as part of the judicial orientation.

Q. And did you follow the usual practice in providing orientation with Judge Joseph as you do with other new judges?

A. Yes.

Q. Did you have your staff send her or give her the usual materials for a new judge?

A. Yes.
Q. And did you assign her a mentor?
A. I did.
Q. Can you talk a little bit about the judicial mentor program, what that is and how it works or did work in 2018?
A. So every judge in the Trial Court, every newly-appointed judge receives a mentor for a two-year period. The mentors go through specific training, generally, the more experienced the judges have been on the bench longer. And the program is designed to provide support with guidance to newer judges, essentially a vehicle for their support that they can speak to and review matters with and gain the support.
Q. Does the Chief Justice choose the mentors?
A. Yes.
Q. And do the mentors get some training in being a mentor?
A. Yes. I think several times a year they attend sessions and there's mentor training.
Q. Is part of the role of a mentor that they're trained to do, that they should be available to their mentee or mentees for phone consultation

pretty much at any time?
A. Yes. The whole idea is to building a system where there's somebody available to provide a support to the newly-appointed judge.
Q. Now, I want to turn your attention to April 20th of 2018. Did you receive an e-mail from Judge Fortes about an incident in Newton?
A. Yes.
Q. And let's look at Appendix B. And Howard has up on the screen what I think is Page 540. The top of the page I'm showing on the monitor, is this the e-mail that you received from Judge Fortes?
A. Yes.
Q. And was Judge Fortes at the time the Regional Administer Justice for the region that included Newton?
A. Yes, she was.
Q. When you got this e-mail from Judge Fortes, was this the first you had heard about the incident that she describes in Newton?
A. Yes.
Q. And I'm just going to read it. Chief Judge Heffernan called me about this incident a couple of weeks ago. I asked her at that time to follow up with an e-mail outlining the incident

below, that is the e-mail from Judge Heffernan. I also suggested she pull the tape because there was some indication the judge involved may have gone off the record prior to the defendant going down the back stairwell. I've spoken to the judge involved. I can brief you if you need additional info. Informing you about it now because Judge Heffernan called to let you know regional director for ICE, with a question mark, may bring it up at meeting supposedly scheduled with Chief Justice~~J~~ Carey.

I didn't want you or Chief Justice~~J~~ Carey blind-sided by any information. Judge Heffernan can fill in anything I left out.

Did you read that e-mail when you got it?

A. Yes, I did. And attached -- Well, not attached, but I think forwarded to that e-mail was Judge Heffernan's e-mail.

Q. And did you read Judge Heffernan's e-mail?

A. Yes.

Q. Did you expect that a Regional Administrative Justice would bring to your attention the matters that needed to come to your attention?

A. Yes.

Q. Did you also expect that a Regional Administrative Justice or a First Justice or some combination of them would handle matters that they could handle so you didn't have to handle everything?

A. That's accurate. Oftentimes the First Justice or the Regional Administrative Justice, they'll deal with things and, you know, attempt to solve problems before they reach a higher level.

Q. And was there a meeting scheduled with the regional director for ICE or somebody in some similar role?

A. There was. From time to time Chief Justice Carey would meet with different areas of law enforcement. Some of those meetings I would attend with her, whether they were with the Colonel or the state police, the attorney general. It was an attempt to reach out and engage in a discussion about different policies or different issues. So she often would set up meetings that I saw for other Chief Justices would attend.

Q. And at around this time, do you recall that there was a meeting scheduled?

A. I do ---- but I'm not sure of the time, but I do

remember a meeting scheduled with the, I think it was the director of the Boston office of ICE.

Q. And this being April of 2018, was there some tension in the relationship between state authorities and Federal authorities particularly related to ICE?

A. I'm not sure I'd describe it as tension, other than I think the point of the Trial Court was we were trying to -- I think we were trying to educate law enforcement about this policy and the decision that the Supreme Judicial Court had made in Lunn and what that meant for everyday activity in the courthouses. I think her intent was to collaborate with them, make them aware of the legal restrictions we faced and inform them what we were going to do about it.

Q. When you got this, did you read the attached forwarded e-mail from First Justice Heffernan?

A. Yes, I did.

Q. Was that -- Had you had any previous awareness of what she refers to as the usual practice in Newton Court, the agent was asked to wait outside the courthouse as he did not have a warrant but a detainer? Was that something you

had any previous awareness of?

A. No, not before this e-mail.

Q. What was your reaction to it?

A. Well, I responded to it by asking essentially what authority the court had to exclude an ICE agent from being in the courtroom and expressed a little bit of concern in terms of whether that was permissible.

Q. And is that the e-mail that appears at Page 539 that you sent on April 20th at 12:31 p.m.?

A. Yes.

Q. So really just 10 minutes after the e-mail from Stacey Fortes.

A. Correct.

Q. Did you ask a series of questions?

A. I did. I essentially asked four questions. The first related to what was the authority of the court to exclude a Homeland Security agent from being in the courtroom. Secondly, who was the judge who handled this matter. Third was, who was responsible for the defendant being allowed to leave the courthouse through the non-public exit. And fourth is, what steps had we taken so that the staff understands this should never happen again.

Q. And did you get a response from --
A. Yes.
Q. -- First Justice Heffernan?
A. She gave me a detailed response to each one of them.
Q. Is that what appears starting on Page 538 and going over to Page 539?
A. Yes.
Q. And did you respond back --
A. I did.
Q. -- at the top of Page 538?
A. I did. I want to point out something.
Q. Yes.
A. Because, I think, in fairness to Judge Heffernan. As this went on -- Because my original reaction was, this is impermissible, you can't keep people out of the courtroom, there's constitutional implications to an open court. And the more I discussed this with the legal counsel both in my office and the Trial Court, particularly the people who worked on the policy, they felt that a judge had discretion to do so if they thought that the presence could be disruptive. So I'm not sure if it was at the time or shortly thereafter, I

backed off somewhat and felt that Judge Heffernan had the discretion to take that action if she felt it was warranted.

Q. And going over to your e-mail, the same day, 1:17 p.m., did you advise her to confer with Zachary Hillman?

A. Yes. Zach Hillman was the general counsel in the District Court administrative office, and I suggested that she connect with him.

Q. And is he now a judge?

A. Yes, he is.

Q. Did you hear later that she had conferred with Zach Hillman and that she had made a change in the practice?

A. That's correct.

Q. After you received the e-mail from Judge Fortes, did you get the recording from the proceeding in the Newton District Court?

A. Yes. I requested a copy of the tape recording of the, of the case in particular.

Q. And did you listen to it?

A. I did.

Q. And when you got the recording, was it in the form that the District Court produces a recording, that is, as opposed to any sort of

enhancement?

A. No. I do remember this. I do remember listening to it. And what I remember about it is having to ask for a set of headphones so I could attempt to listen more closely, because there was good deal of inaudible statements. I could figure out some of it, but there was a number of inaudibles I couldn't understand.

Q. So it was hard to make sense of it.

A. Yes.

Q. And are you aware that there has ever been an enhanced version that is sent to a vendor who has expertise in enhancing a recording?

A. I think at some point somebody told me that. I'm not sure who. But ultimately, I saw a transcript. I'm not sure when it was produced. But it was clear that this was enhanced or somebody had the ability to more closely listen to it than the original tape.

Q. At that time, did you have an enhanced version?

A. No.

Q. And did you have a transcript at that time?

A. No.

Q. So you were playing the original version of the recording and listening as best you could.

A. Correct.
Q. All right. We're going to play that recording now, and we're just going to listen to it without the transcript, just so we hear what the original sounds like.
(RECORDING PLAYING)
Q. After you listen to the recording, do you have any concerns?
A. The concern I had was to the tape being shut off.
Q. Was that the only concern?
A. At that time.
Q. And what did you do?
A. I, after I listened to it, I requested to meet with Judge Joseph and Judge Fortes.
Q. And did your assistant set up a meeting for May 8th?
A. That's correct.
Q. And did you have a meeting with Judge Joseph and Joseph Fortes?
A. Yes, I did.
Q. Where was the meeting?
A. That was in the administrative office in the District Court in my office.
Q. In your office. Was anyone present other than

Judge Joseph and Judge Fortes and you?
A. No.
Q. And going into that meeting, did you have any information about this incident other than the recording and the e-mail from Judge Fortes with the forwarded e-mail from Judge Heffernan?
A. No.
Q. Tell us about that meeting. Who said what?
A. I set the meeting up because our concern that the tape had been shut off and Judge Joseph was a new judge. So when she come in and we met with her, I told her I had listened to the tape and I had a couple of concerns that I wanted to talk to her about. I started by discussing the tape being shut off. Shortly after I discussed that, the fact that it appears the tape was shut off, Judge Joseph said to me, she acknowledged that she had directed the clerk to do that. She apologized. She indicated to me she was not aware that there was a rule that required the tape to be on. And she essentially said it would not happen again. She had been made aware of it, she had thought about it, and it wouldn't happen again.
Q. Did she tell you anything about why she went off

the record?

A. Well, we were talking about the importance of the rule. And I asked her, I said why did you shut the tape or direct the clerk to shut the tape off, and she stated something to the effect of the defense lawyer wanted to speak to her off the record because the defense lawyer was concerned that the identity of his client was not the same individual of whom there was an out of state warrant. I think it was Pennsylvania, if I'm not mistaken. There was a warrant. And the lawyer was trying to convey to Judge Joseph it was not the same person.

Q. And did she give you any indication of why a discussion about identity with respect to the Pennsylvania warrant should be off the record?

A. No. I don't think we discussed that part of it as much as we discussed the rule, the importance of adhering to the rule, and we focused more on the rule and the importance of maintaining a full, complete record. I remember specifically speaking to her about, just by the nature of the position I had, we get a large number of complaints about judges and clerks, and I remember telling her that it was my

experience that the most favorable piece of evidence always in terms of these things is the tape itself, because there are people who make accusations about failure to get due process and then you listen to the tape and realize, well, that's not accurate. So we spent a lot of time talking about the rule, the importance of it, and then she acknowledged it, she apologized, and said wouldn't happen again.

Q. Did she tell you anything about what was said off the record?

A. My memory is that it was, it was the same. It was the issue of the defendant's identity and his warrant that was out of state.

Q. Did she say anything about any discussion about ICE?

A. No, not that I recall.

Q. When you listened to the recording, you could hear some reference to ICE, could you?

A. I think you could. But frankly, I'd want to sit once again to really listen word for word.

Q. And that, of course, if you could hear it, it was the part that was on the record.

A. Right.

Q. Not the part that was off the record. Did she

say anything about being concerned, her being concerned that ICE would take the wrong person?
A. No.
Q. Did she say that she thought she had a responsibility to determine the defendant's identity with respect to the ICE detainer?
A. No. We never got to that level of discussion, and it was more about the tape being shut off, the importance of the rule.
Q. Did she say anything about being concerned that ICE wouldn't allow an attorney/client conference?
A. No.
Q. Did she say anything about wanting to pause ICE taking the defendant into custody?
A. No.
Q. Did you ask her directly whether she had anything to do with the defendant going out back?
A. Yes. So we addressed the issue of the tape, the recording being shut off first, and then I raised with her the issue of the fact that the defendant was let out this side entrance while ICE was waiting for him. And I asked her if she, first of all, if she was responsible for

that, if she was aware of it, if she had any knowledge whatsoever of it, and she strongly denied each and every one of that. The final question, I said, did you have anything at all to do with him leaving the courthouse that way, and she very strongly and adamantly denied that.

Q. And did you accept her denial?

A. Yes, I did.

Q. And did she say that she had inadvertently or unintentionally facilitated it?

A. No.

Q. How did the meeting end?

A. The remainder of the meeting was a discussion about training and the importance -- the issues that new judges deal with, the importance of engagement, particularly with other judges who are more experienced, particularly knowing what you don't know and you can rely on other sources of support to get that knowledge. And so the first part of the meeting, if I could describe it, it was somewhat stern. It was, it was right to the point. And then the rest of the meeting I would describe as more positive because it was a focus on how we -- where are we going to go from here and how do we get on a positive path.

Q. And when the meeting ended, what was your view of the matter of that situation at that time?
A. I viewed it, the whole meeting I viewed it as really a training issue. I certainly didn't view it based on what I knew at that time as a disciplinary matter. And I can tell you, I conducted disciplinary matters. If I had viewed it that way, I would have had legal counsel with me, we would have been memorializing everything that was said, I probably would have advised at the outset that there may be a need for counsel. None of that was present here because the circumstances that I knew about didn't warrant that.
Q. Now, speaking of training and going back to the subject of what training was provided for new judges. Was there any training specifically provided about Rule 211 and the requirement of recording?
A. I don't think there was. Because after this, I asked the District Court Committee on Education to incorporate it into the training going forward.
Q. And why wasn't there training about that requirement?
A. Well, first of all, it's somewhat a

procedural method. And most of the training was really bearing on substance of law so that you put a judge in a position that they can make judicial decisions based on the substance of law. It was more procedural. And my view is that people knew about it and it was kind of self-evident. It turns out over time that was not the case.

Q. Later in, within the month of May, still within the month of May, did you change her mentor assignment so as to provide her with more focused attention?

A. Yes.

Q. After these events, sometime later on, did you receive information about any practices regarding going off the record?

A. To the court generally?

Q. Yes.

A. It was --

Q. In the District Court.

A. In the District Court, I think it was sometime in the fall, there was a, there was a news report that essentially wrote about the Federal grand jury investigation of this matter. And in reading that, I spoke with a number of

people in the Trial Court, and one of the Trial Court lawyers, somebody I have great respect for, told me, you know, there is a lot of noise out there that this isn't the only time this has happened, this is a practice.

So what I did was, I asked the Regional Administrative Justices to survey each and every one of the courts and have a discussion on two issues; one, whether people were aware of the rule and complied with it and, secondly, whether they also understood that unrecorded lobby conferences were prohibited under an SJC decision. So the RAJs did that, and in short order they reported to me that this practice is not happening. And of course, their response was based on what people were reporting to them.

Q. Were you satisfied with the response you got?

A. You know, I was glad with the response because, again, it’s important that full recordings be made.

JUDGE FABRICANT: Thank you. That's all I have at this time.

HEARING OFFICER: Mr. Hoopes.

MR. HOOPES: Thank you,

Mr. Hearing Officer. I got to mic up.

CROSS-EXAMINATION

BY MR. HOOPES:

Q. Good afternoon, Chief Dawley. I got to make sure I got your title correct.

Judge Dawley, you know that I represent Judge Joseph; correct?

A. Yes, I do.

Q. And I'd like to go back to an area first that was covered by special counsel, which is the e-mails. So if you look at the e-mails which should be in V.

MR. HOOPES: If we could pause for one second.

A. Did you say B?

Q. V as in Victor.

(PAUSE)

A. Yes.

MR. HOOPES: Give me one sec, so we got to hook up.

(PAUSE)

Q. So if you could -- It's Page 540. And I believe you read it a little bit, but I'd like to go back to it.

A. Yes.

Q. This is an e-mail from Stacey Fortes on April 20th at about 12:21 p.m.

A. Yes.

Q. Correct?

A. Yes.

Q. Yeah. And it says, to read it again, it says, Chief. Now she's one of your Regional Administrative Justices.

A. Yes. Correct. There are six Regional Administrative Justices in the state, and she's one.

Q. And so she's one of the people you rely on being in communication with you if there was anything that's important that is happening within her region; right?

A. Yes.

Q. And you would have expected her to not only manage the judges who were under her to the benefit of the court but also keep you posted on any sort of incident that might cause a problem; correct?

A. Yes.

Q. Okay. And so here she says on April 20th, Chief Judge Heffernan called me about this incident a couple of weeks ago. I asked her at

that time to follow up with an e-mail about the incident. Below. I also suggested she pull the tape because there was some indication that the judge involved may have gone off the record prior to the defendant going down the back stairwell. I've spoken with the judge involved and can brief you if you need additional information. Informing you about it now because Judge Heffernan called to let me know regional director for ICE may bring up this incident at the meeting supposedly scheduled with Chief Justice Carey, and I didn't want you or Chief Justice Carey to be blind-sided by any --

Have I read that correctly?

A. Yes.

Q. And Judge Heffernan can fill in anything I left out.

So you learned subsequently just by reading below that the date of the incident was April 2 of 2018; correct?

A. Yes.

Q. And so you received this e-mail on April 20th; is that right?

A. That's correct.

Q. And so that's approximately two and a half weeks

after the incident; --

A. Yes.

Q. -- is that right?

Now, would it be fair to say that there had been a couple of issues with ICE at the Newton District Court in the year or year and a half prior? Isn't that correct?

A. I remember at least one.

Q. Yup. And so -- And that would have involved some press on Judge Heffernan; correct?

A. Yes.

Q. And you did not take the date that you received this as an indication that Judge Fortes was in any way trying to not raise this issue so you'd be alerted to it any sooner.

A. No. I read it in terms of a delay as she knew that there was a potential meeting with the ICE officials and probably that prompted her to notify us.

Q. And she got that information from Judge Heffernan.

A. Looks like Judge Heffernan.

Q. Who Judge Heffernan apparently was concerned enough to call Judge Fortes; correct? The suggestion was, we better alert Chief

Justice Dawley.

A. Yes.

Q. So that Chief Justice Dawley or Chief Justice Carey are not blind-sided at the meeting.

A. That's correct.

Q. So clearly by now, both Judge Heffernan and Judge Fortes are concerned that this might be an issue.

A. It certainly seems that way.

Q. And might have thought it was an issue prior to that; right?

A. It could.

Q. Now, you indicated that you had asked four questions on Page 539.

A. Yes.

Q. And you ran through the questions. And one was, what was the authority. And you told us that's in this e-mail that you got a response and the response was it had been my practice and eventually that practice was changed with --

A. Yes. Correct.

Q. And the second was, who was the judge that presided over the case. You got an answer to that.

A. Correct.
Q. The third one, who was responsible for allowing the defendant to exit the courthouse via a non-public entrance. Let's put a pause on that one -- put a pin in that for a second.
And fourth, in addition to the notice posted by Officer Noe, was the court staff told, and do they understand that this should not happen again?
A. Correct.
Q. Yup. And so there was a policy in place to prevent that from happening, right, which was the Lunn policy?
A. The Lunn policy.
Q. We'll come back to that.
Now, as to Number 3, who was responsible for allowing the defendant to exit the courthouse via a non-public entrance. The e-mail's sort of deafening in the silence. Nobody ever responded to Question Number 3 to you; correct?
A. Directly, that's correct.
Q. Okay. Now, eventually you set up a meeting, and the meeting was with Judge Joseph and Judge Fortes; correct?
A. Yes.

Q. And it was in your office?
A. Correct.
Q. And the three of you sat and the three of you talked, as you just described.
A. Yes.
Q. But there was nobody writing down notes.
A. That's correct.
Q. And you explained that nobody was writing down notes as part because you viewed it as just educational, informational but educational sort of meeting; is that correct?
A. That's correct.
Q. Now, it would be fair to say that you took no notes, no one took notes on that day, and there were no notes that were created by you or Judge Fortes regarding the meeting at a later time; is that correct?
A. That's correct.
Q. So in other words, there's no notes available at this point for you to refresh your recollection.
A. That's correct.
Q. So your testimony here today and your testimony before in any other proceeding regarding this was unaided by any notes to refresh your memory.
A. That's correct.

Q. Now, at the end of the meeting -- If you can go to Page 534, please, at the very top of the page.

A. Yes.

Q. It's two days later, on May 10th. It says from you to Judge Joseph, Shelley, Judge Joseph, I appreciate meeting with you and your consideration of the issues we discussed. As I mentioned, the best part of this job is that every day is a learning experience. I look forward to seeing you at the conference. Thanks and take care, Paul Dawley. That's the first one; correct?

A. That was in response to her e-mail to me.

Q. Okay.

A. Yeah.

Q. And below that is her e-mail to you two days before. Shelley Joseph to Judge Dawley, thank you for meeting with me today. I've learned and understand all that we've discussed. I look forward to seeing you at the conference next month if not before.-- That's what that says; right?

A. That's correct.

Q. And as to the sentence above that, which is, I appreciate your concern, your consideration of

the issues we discussed, as mentioned, the best part of this job is that every day is a learning experience. Now, I take it that you thought that your impression was, when she left, that she had been candid with you; correct?

A. Yes.

Q. Thank you.

Now we can go to -- We talked a little bit about Rule 211, the off the record.

A. Yes.

Q. And spend a little time. So Judge Fabricant asked you some questions about training materials, books that happened, things that are provided to new judges. And you explained as sort of a predicate to that, that every judge -- every new judge is important to you, which is why you give them a mentor for up to two years.

A. Yes.

Q. And so it would be fair to say that in your mind every judge needed a mentor just to make sure that they had somebody guiding them as they went.

A. I think for the most part that's true. I mean, people have different levels of experience, they bring different qualities to

the bench, but it's a very different job than, for instance, where I came from being a prosecutor or a defense lawyer. Much different role. So it requires I think support from somebody with more experience to help you navigate some of the issues.

Q. And one of the ways you also provided support was providing written materials; is that correct?

A. Correct.

Q. And so it would be the 90-day guide; is that correct?

A. Correct.

Q. And that's probably as big as that stipulation book that you got there?

A. It's actually very similar to this. It's a live binder.

Q. It's just a lot of material, be fair to say?

A. It is. They're constantly trying to condense it because we ask people to bring it on the bench with them.

Q. And in fact, is that the same as a benchbook or is there a separate book called the benchbook that Judge Rooney --

A. Judge Rooney's Benchbook is I think a

condensed version of the 90-day guide.

Q. And so new judges get two of these books, both about that size.

A. Yup.

Q. And Judge Fabricant, Special Counsel Fabricant showed you the West Publishing Company book called Rules. You've looked at that in the past.

A. Yes, I have.

Q. And you know that's about 1,500 pages of small type; right?

A. Very voluminous. Correct.

Q. And so you've been a new judge before; correct?

A. I wWas.

Q. And I assume that it's different being a judge than being a lawyer. You have different things that you have to pay attention to, I assume.

A. Yes.

Q. And so I assume that you must have felt, when you were a new judge, that it was a little bit like drinking from a fire hose, maybe; yes?

A. Correct.

Q. And you were trying to grasp the key concepts every day that were going to be in front of you and grow that experience; is that right?

A. Yes.
Q. So you would -- Would you agree with me that it's not reasonable to expect a new judge that's been in six months to have read every page of -- 1,500 pages of the West book?
A. That's correct.
Q. Okay. Now, it would be fair to say that, as to this Rule 211, which was passed and became effective in May 1988, that it was, for a long time it was honored more in the~~as a~~ breach than in~~a~~ fact by some people; correct?
A. Correct.
Q. And over time things have slowly morphed a little bit because of the SJC decision. There's a little less of that and less of that and less of that over time.
A. I think that that's accurate.
Q. So when you were a young assistant district attorney in Plymouth County --
A. Yes.
Q. -- area, I assume that there were judges going off the record; yes?
A. That is correct. Particularly as to most of my time was Superior Court, and it was a frequent occurrence.

Q. And in fact, in Superior Court, there was no rule about going off the record until after this incident in 2018; is that correct?
A. I couldn't speak to that. But the other difference is Superior Court at that time was stenographers as opposed to a recording system.
Q. But it wouldn't be unusual for some judge to motion to the stenographer to talk with the --
A. I've seen that occur.
Q. Okay. And in fact, sometimes there were lobby conferences with the assistant district attorneys and even with private counsel over cases, for various reasons, plea discussions, what are we going to do next, all kinds of things; correct?
A. Yes. That's correct.
Q. Now, you told us that, even though the practice has been tightening up, there hadn't been an issue really until this case that caused you to put into effect after 2018 the new training; is that right?
A. Can I ask you, what do you mean by "there hadn't been an issue?"
Q. Well, let me phrase it another way.
A. Yup.

Q. You indicated, when special counsel asked you questions, that there was nothing in the 90-day guide and nothing in the benchbook that referenced 211, be on the record all the time, nothing like that; correct?
A. Right.
Q. And so this was a wake-up call that you wanted to educate all your new judges right up front; is that right?
A. Correct.
Q. And so now, every judge, every young judge, every new judge who comes on the bench in what used to be your court, and now is Chief Justice Fortes court, is told this right up front.
A. I believe it's part of the, --
Q. The pack.
A. -- the 90-day -- Yup. Yes.
Q. Now, this Lunn case -- Before I go there, if I could just ask you one thing, which is -- I'm going to show you one document, and this is an e-mail exchange back in December 2018. One, two, three, four pages. And the bottom of the string, going up to February 19, there's an e-mail exchange with you and Paula Carey. Just look at that. And could you just read to

yourself from the bottom there.

(PAUSE)

A. Yes. I recall this.

Q. And Paula Carey was the Chief Judge of all the Trial Court at that point.

A. Correct.

Q. She was the supervising judge of all seven departments; correct?

A. That's correct.

Q. And on that last page, Judge Carey actually says, I don't know if there's a rule about going off the record in the District Court. Correct?

A. She said I do not recall a rule but my suggestion would be to look at statutes to determine whether there's anything in the law that requires recording everything. We also may want to locate rule, standards, et cetera that indicate that the judge is in charge of her courtroom. And Chief Justice Dawley would be able to tell you if there are any specific District Court standards.

Q. Okay. And so the date of this e-mail exchange is February 4th, 2019. There's many other things in there. So --

A. Yes.

Q. -- it may not be necessary to admit the whole thing. But the content is the Chief Judge of all the courts, in the Trial Courts in Massachusetts was not at that time aware of this rule; correct?

A. Correct.

Q. Thank you.

Now, moving back to the Lunn policy. So if we can set the context here a little bit for the Lunn policy. Some part of it everybody probably knows, which is in 2017, then Chief Justice Gants wrote this decision that was called Commonwealth versus Lunn; correct?

A. Lunn versus Commonwealth.

Q. Lunn versus -- Thank you.

A. Correct.

Q. And it was a case that tried to balance the interest of the state and the Federal authorities; correct?

A. That's correct.

Q. And it was a very cutting edge case in a sense, was it not?

A. It was a very significant case.

Q. Significant.

And as you've described, striking the balance is

delicate. And having it on paper is different than executing the decision; correct?

A. That's correct.

Q. And Chief Justice Carey led the committee that ended up issuing this executive office transmittal that you were shown on November 10th, 2017, probably, four or five months after the decision came down, and it's one, two, three, four pages. I mean, somebody put a lot of thought and work into what the execution was going to look like.

A. I think they had a working group, members of each department, Chief Justice Carey, and primarily it's driven by the security department.

Q. Thank you.

So the working groups would be security, would be the judiciary. Anybody else that you can recall? Maybe the clerk's office?

A. I'm sure. I'm sure they were included.

Q. And maybe probation?

A. I would think so.

Q. And so -- And this was the fruit of their labor, the product; correct?

A. Yes.

Q. And this went out from the executive office to

everybody, to judges, clerks, registers -- That would be registers of probate?

A. I would think so, registers of probate. They have registers of Land Court. I don't think that would apply.

Q. Land Court. Probation, chief probation, and all staff. And it would be fair to say that at this point in time there was a nationwide issue with regard to ICE and immigration; correct?

A. Certainly -- Yes.

Q. And this was meant to provide guidance that provided the balance so nobody was going to be left guessing in the District Courts as to how they were supposed to handle these issues, this issue, ICE comes, ICE wants to take somebody in custody, what do we do, this is the guidance. Is that correct?

A. My sense is that that policy attempted to implement the SJC decision and answer questions that court personnel would deal with frequently, to try to give them direction and guidance.

Q. Thank you.

And so did you have a sense that, besides sending it out by e-mail, zing out it goes, that there was training that accompanied this in any

way?
A. I'm sure. I would assume it was covered in terms of security. It was a matter that would have --
Q. For your court, meaning, you got these judges who are -- have to be intelligent to get on the bench, they can read, they can read the whole thing; right?
A. So when the decision issued, my office issued a legal bulletin that outlined this is the decision. In fact, I think we issued it the next day saying this decision was made, significant changes, and this is the holding of the court. Thereafter, it was subject to coverage in some of our trainings over the next several months.
Q. Thank you.
And you expected, I assume you expected the presiding justice at the very least to read the transmittal; correct?
A. Yes.
Q. Of each one of the -- How many District Courts?
A. 62.
Q. Of each one of the 62, which is a lot of courts for you to be controlling, and this was a means

to control it; right?
A. Well, I'm not sure I'd use the word "control." But it's more to support them in implementing this. And guidance.
Q. But it wasn't meant to be, I'm going to follow it if I want to follow it. This came from the top; correct?
A. Correct.
Q. There was an expectation that the SJC was run of the show here, was through her acting and all the justices were supposed to be --
A. I should put, compliance with this is required. It's not an option. Courts are required to implement the SJC decision.
Q. Thank you.
And can I ask you to go to the third page of this policy, which would be -- and if you look at -- It's Page 7, I'm told.
A. Yes.
Q. And there's a Roman Numeral III that says, DHS officials taking custody of individuals at a courthouse.
A. Yes.
Q. And then there's a Paragraph 1, Paragraph 2, Paragraph 3.

A. Yes.

Q. The first sentence of Paragraph 3 says, the security supervisor or designated officer shall inform the First Justice, or Regional Administrative Justice of the department with the jurisdiction over the person if DHS officials are present in the courthouse with the intent of arresting or taking anyone into custody, i.e a party or other participant in a case before a judge or magistrate or a person intending to business in the courthouse.

So we can talk it through. So if Medina Perez, which is the name of the individual later on on April 2nd, in question here, was in the Newton District Court, and ICE was there to take custody of him, then a security supervisor or designated officer was supposed to inform either the First Justice or the Regional Administrative Justice; is that correct?

A. Right literally, yes. Now I would say there's a lot of these courts, the First Justice is only there a couple of days a week. So whoever is sitting. I would be First Justice to me. Whatever judge is sitting should be

informed.
Q. Okay. And in addition to that, you are relying on the, I assume the policy for implementation, relying on security supervisor to have knowledge of this policy.
A. Yes.
Q. And would you have expected that a presiding justice would have had some discussion with a security supervisor in each individual court so that they were sort of on the same page on this?
A. I think that would certainly be a best practice.
Q. Okay. As you sit here today, did you know whether or not the Newton District Court actually implemented the Lunn policy on or by April 2nd, 2018?
A. I couldn't -- I'd defer to the security officials over there to tell you the answer to that.
Q. Okay. And if the presiding justice testified earlier this morning that it was not in effect on April 2nd of 2018, we'd take her word for it; right?
A. Yes.
Q. And so as you've just said, as I understood it,

this is a requirement of the SJC, and failure after having noted that this policy is a violation of the expectation of the SJC; correct?

A. Well, I'll reiterate. This was not optional. The SJC made a decision courts are required to implement. One of the holding court, the holding was clear, this policy is pretty clear. It should have been implemented.

Q. As you sit here today, do you have any information that anybody has reported Judge Heffernan to the CJC because of this violation?

A. No. But I would strongly disagree if somebody made that suggestion. I would very strongly reflect at it.

Q. Okay. And why is that?

A. Because the court -- These courts, these courts are made up of joint leadership. So when you implement policies like this, it's typically the clerk magistrate, the first justice, the chief probation officer, and the chief court officer that works as a team. And respectfully, to suggest that there's some type of misconduct by not implementing that, and I'm not sure

you're suggesting that, but if you were, I would strongly disagree with it.

Q. If I were to suggest to you that it's very probable that Judge Heffernan was trying to do the best she could, the best way she could?

A. No question. That was my experience with her at all times.

Q. And it may certainly have been that Judge Joseph was doing the best she could as best she could.

A. That may well be true.

MR. HOOPES: Thank you. Just have one moment, please?

(PAUSE)

MR. HOOPES: Nothing further. Thank you.

HEARING OFFICER: Special counsel.

JUDGE FABRICANT: Very briefly.

REDIRECT EXAMINATION

BY JUDGE FABRICANT:

Q. Chief Justice Dawley, the chief of the Trial Court, is that person appointed by the SJC among one of the judges of the seven Trial Court departments?

A. That's correct.

Q. And so is that person, while serving as chief of the Trial Court, also not sitting but also a judge of one of the seven Trial Court departments?
A. That's correct.
Q. Which of those departments was Paula Carey a judge of?
A. She was a justice of the Probate Court, Probate and Family Court.
Q. Probate and Family Court. Had she ever been a judge of the District Court?
A. No.
Q. Is Rule 211 a rule of the District Court?
A. It's a rule of the District Court and the Boston Municipal Court.
Q. Does it apply to Probate and Family Court?
A. No.
Q. Do you know whether the Probate and Family Court had or has a rule regarding recording?
A. I have no idea.
Q. The Lunn policy and the Lunn decision, Lunn verse Commonwealth decision of the SJC, are those the same thing or two different things?
A. I'm sorry. Could you repeat.
Q. The Lunn policy --

A. Yes.
Q. -- was a document that we referred to, executive office transmittal 1713.
A. Correct.
Q. And the SJC decision in Commonwealth versus Lunn -- Lunn versus Commonwealth, are those the same thing or two different things?
A. Well, they're two distinct things. The decision of the SJC was a court issuance of a decision on the matter and the policy is the Trial Court's implementation of that.
Q. The SJC decision. Was the holding of that decision that Trial Courts, court personnel, court officers, cannot hold a person beyond the time that that person would otherwise be held in state custody for purposes related to an ICE detainer?
A. Correct. They distinguish a civil detainer.
Q. So as opposed to a judicial warrant.
A. Yes.
Q. So a judicial warrant is a different story.
A. Very different.
Q. But as to a civil detainer, the holding, if I understand correctly, was that, if you get notice of a detainer, but you're otherwise --

the person is otherwise being released on personal recognizance, on bail, whatever, however they're being released, you got to release them.

A. Correct.

Q. You can't hold them. If ICE calls you up and says I'm going to be there in two hours, you can't hold them for two hours.

A. That's correct. The whole Lunn decision was the defendant was held with trial, the trial judge dismissed the case, and the court held him, Lunn, longer, until ICE got there on the civil detainer. His lawyer filed a petition, emergency petition with the SJC saying this is likely to recur. The court heard the matter, and then made it clear, you cannot hold somebody any longer than they would be held on the state charge, for example.

Q. And was that a matter of authority in the sense that state law does not give a court authority to hold somebody unless there is state law authority --

A. It has been a while since I've read the decision. But I believe the SJC had noted that this is a matter that the legislature could

address or may address, but that based on essentially Fourth Amendment precedent, the state constitution, that there was no right to hold somebody based on the civil detainer.

Q. Now, the Lunn policy, executive office of Trial Court transmittal 1713, did the SJC issue that?

A. No.

Q. Was that a policy to tell courts what they're supposed to do given that they can't hold somebody, under the SJC decision, they can't hold somebody beyond the time that the person would otherwise be held on state court charges, was it a policy to tell them, okay, now what are we supposed to do?

A. It was, as is stated, it's to provide clear guidance to judges, clerks, probation and security and all court staff on responding to DHS requests and in the presence of DHS officers in the courthouses.

Q. And what did you understand -- It may be a while since you've read it, but what did you understand to be the essence of the Lunn policy? It's a number of pages. Was there --

A. That's a hard question. There's a lot of

different aspects of this. And for instance, it deals with when ICE makes a request for information. It addresses that. It deals with situations in which a person is in custody versus not in custody. So there's a whole series of different scenarios. It also I think imposes requirements on security to record the interactions with ICE when ICE comes to the courthouse and seeks to take someone.

Q. Record not in the sense of a recording system --

A. Record in the sense as a record, a login I think it references.

Q. Was it your understanding that a judge is supposed to be neutral regarding ICE?

A. Of course.

Q. Not help, not hinder.

A. That's correct.

Q. Is that a fair summary?

A. That is correct.

Q. And also, if ICE wants to go to the lockup, supposed to allow them to go to the lockup.

A. The guidance clearly is a provision where, I believe that's the preference, if somebody's in custody, then that exchange should take place being in the lockup.

Q. Now, if ICE is going to take somebody, if the person that's in the lockup, if that person is still being held on state court charges, they haven't posted bail yet or bail hasn't been set yet or being detained without bail, and so they're going ~~to~~ back in the sheriff's custody, the House of Corrections, jail, whatever, can ICE take the person?

A. No. The person remains in the custody of the state law enforcement where they came.

Q. So in order for ICE to take somebody, that has to be a person who is eligible for release.

A. Release. Right.

Q. But you can't hold somebody longer than somebody would otherwise be held, according to the SJC.

A. That's correct.

Q. So you got to somehow do this in a matter of seconds; right? They're in the courtroom, the judge says he's released --

A. So this Section III, I read this to essentially to try to address that issue and talk about how the hand-off will occur, and that's where it speaks to the lockup provision.

Q. And what's your understanding of how the lockup is supposed to occur? Take your time to read

whatever you want to read.

A. Section 3A, second paragraph, a DHS official is present in the courthouse and seeks admission into the courthouse's holding area in order to take custody of the individual pursuant to an immigration detainer warrant, court officers shall permit the DHS official to enter the holding cell area in order to take custody of the individual once the Trial Court security personnel finish processing an individual out of the court security personnel's custody.

Q. So the word is "permit."

A. Correct.

Q. If they want to go to lockup, you got to let them go to lockup.

Now, suppose you have a court where the normal practice -- and maybe this isn't the practice in lot of places. But suppose in a particular courthouse the normal practice is that, if somebody's being released, if the judge says, I order a release on personal recognizance, if the normal practice is, and what happens then is, the court officer takes off the restraints and opens the door to the dock and the person walks out into the courtroom and out the door, if

that's the normal practice, what do you understand the implication of that -- this policy to be?

A. It would seem to be inconsistent with the policy.

Q. That practice.

A. Correct.

Q. But if that is normal practice, what is supposed to happen in terms of ICE?

A. Now let me qualify this. I'm not security expert. A lot of times just left that to the court officers. That's their expertise. When you get involved sometimes, you make it more confusing. But I would think the ultimate goal is that there be a seamless hand-off so that there's not incidents in the public area of the courthouse.

Q. So it's a little confusing of how this is supposed to happen under this policy, isn't it?

A. Correct.

Q. If you go to that paragraph, just above the paragraph we just talked about, there's a line that says, court security personnel shall process that individual out of lockup in the normal course regardless of whether the

individual is subject to a civil immigration detainer or warrant.

Do you understand that to mean that they're supposed to do whatever is normal there, supposed to do what they normally do with regard to processing the individual --

A. I think you can make a strong argument in support of that interpretation.

Q. So there's room for interpretation here.

A. Yes. One thing is, throughout the state, there's 62 courts, you get very different lockup sizes, you get very different situations in terms of a staffing at some of these courthouses. So there's some unique situations for every court, and you would think that, you know, the leadership of the court, the chief court officers work those issues out.

Q. So you would expect some coordination within the court among security, the first justice, the clerk, whoever else is involved in the leadership of the court.

A. No question.

Q. And as you read this, you wouldn't be expecting a uniform application of this policy exactly the same in every courthouse.

A. You would think there's got to be some flexibility, because not all these courthouses are the same.

JUDGE FABRICANT: All right. Thank you.

I have nothing further.

RECROSS-EXAMINATION

BY MR. HOOPES:

Q. So it's fair to say, I assume, that out of 62 District Courts, --

A. Correct.

Q. -- that most of them have a lockup.

A. There may be one or two out west that don't. They use the local police department.

Q. Okay. So that would mean almost 60 probably do; right?

A. I think so.

Q. And if you read the last page of this policy, labeled Page 8, it's the paragraph above B, it says, to the extent possible, court security personnel should require that DHS officials transport any individuals taken into custody through the prisoner transport entrance and avoid taking the individual through the public areas of the courthouse. To the extent

possible.
A. Correct.
Q. And so you would assume that every presiding justice would make a good faith effort to try to comply with this and only not comply to the extent it wasn't possible; correct?
A. Correct.
Q. Now, just one other small matter, if I can, which was raised by special counsel.
So in Massachusetts practice, the district attorney's office has a particular power, not in the Federal Court, they have the power to file what is called a nolle pros; correct?
A. That's correct.
Q. So the district attorney's office has the executive branch authority to prosecute or not prosecute regardless of the judge; correct?
A. Correct.
Q. On the one hand. On the other hand, if the system district attorney or prosecutor says, Your Honor, I'd like to dismiss, the judge has the sole power to dismiss, and it's the DA's responsibility to move for dismissal; correct?
A. That's correct.
Q. And so with regard to governor's warrants, the

governor's warrant is in the form of a complaint, so to speak, in the District Court; correct?

A. Yes.

Q. And the governor's warrant, the individual can be held without bail, bail can be set, or released in the unlikely circumstance on personal; correct?

A. Correct.

Q. And so that warrant is live or alive with that authority from the presiding justice until that complaint governor's warrant is actually dismissed; correct?

A. Yes.

MR. HOOPES: Thank you. No other questions.

JUDGE FABRICANT: Just one more.

REDIRECT EXAMINATION

BY JUDGE FABRICANT:

Q. Can an assistant district attorney nolle pros the charge of fugitive from justice?

A. I think under -- this is off the top of my head -- I think Rule 17, if I'm correct -- of the Rules of Criminal Procedure, set forth the

authority of a nolle pros, and I don't think there are any restrictions on the type of case that a prosecutor can file a nolle pros on. I might be wrong on 17. But I always thought the prosecutor retains the sole and exclusive decision whether or not to charge, and ~~in~~ the nolle nolle pros authority ~~ies~~is exclusively theirs.

Q. Rule 16. Entry of a -- And it's a latin term. Nolle prosequi. But it's usually called nolle pros. Correct? A prosecuting attorney may enter a nolle pros on pending charges at any time prior to the sentence. A nolle pros shall be accompanied by written statements ~~that~~from the nolle prosecuting attorney setting forth the reasons for that disposition. In practice, do people tend to use nolle pros or dismissal interchangeably?

A. It varies by county. It's an interesting legal issue. The source of some dispute in a number of counties where some judges have declined to act on motions to dismiss so they'll utilize the nolle pros authority. It really varies across the state.

Q. And this requirement of a written statement, does that tend to be done in the form of a

checkbox form?
A. It's usually a form, and a lot of times I've seen ~~in~~ the state in which it happens determine that procedure.
JUDGE FABRICANT: All right. Thank you.
MR. HOOPES: Thank you.
HEARING OFFICER: Okay. Thank you very much, Judge. You're excused.
JUDGE FABRICANT: Can the witness be excused?
HEARING OFFICER: Yes.
JUDGE FABRICANT: Thank you.
What remains of the Commission's case is Judge Joseph. And I understand we're going to wait until tomorrow morning.
HEARING OFFICER: Yes.
MR. HOOPES: You wanted to address --
HEARING OFFICER: Yes. And so I was hoping that we can understand what you expected after Judge Joseph's testimony.
MR. HOOPES: So I was hoping --
Can you hear me or do I need

the mic?

HEARING OFFICER: I can hear you.

MR. HOOPES: So I was expecting, based on our conversation, that after her testimony, we would the begin a case for the respondent on Friday morning. With one exception. But I believe we're probably going to call anywhere up to six witnesses. But just so the court knows, I think it's probably two hours total max. I mean, these witnesses are going to hopefully flow.

There is one possible exception. One of the witnesses is a retired judge who's also a mediator. And if she can move her mediation ever so slightly on Friday morning, she'll be here at 9:00. But she may not be able to. We may have to ask your permission to have her come over after Judge Joseph testifies.

HEARING OFFICER: Meaning tomorrow.

MR. HOOPES: Meaning tomorrow.

HEARING OFFICER: That's fine.

MR. HOOPES: And my second

question would be, if that's our time slot, meaning a couple of hours, would you be looking for us -- when would you be looking for us to have briefs done?

HEARING OFFICER: Well, I was thinking about that. And from my perspective, to the extent that both counsel would appreciate the weekend to prepare for that, that's fine with me. We can discuss the issues on Monday.

MR. HOOPES: That would be wonderful. And if I can ask, could we do summations at 9:00 a.m.? Mr. Keating has an issue at 11:00.

MR. KEATING: I have a doctor's appointment, Judge, if I can possibly keep at 11:00 on Monday. I'd like to. I don't want to interrupt the proceedings if that's not possible. But if it's possible --

MR. HOOPES: I won't be an hour.

HEARING OFFICER: Okay. Is that -- So it sounds like we could do it on Monday, the summations Monday morning.

JUDGE FABRICANT: My preference, frankly, would be to do it on Friday, but whatever you

prefer is fine.

MR. HOOPES: That would be great. I appreciate it.

HEARING OFFICER: Yeah. I think giving both sides the weekend to prepare their summations is in everybody's interest, frankly. So I think we can do that. And I think we can certainly be complete by 11:00 based on everything.

JUDGE FABRICANT: And just to be clear, respondent goes first on closing.

HEARING OFFICER: Yes.

JUDGE FABRICANT: And so our expectation, then, just so we're clear about timing is, tomorrow we're going to have Judge Joseph and perhaps Judge MacLeod. On Friday, we'll have --

MR. HOOPES: Four or five. Quick, quick.

JUDGE FABRICANT: And you think that's a total of two hours.

MR. HOOPES: Yes.

JUDGE FABRICANT: And so we're probably off Friday afternoon, it sounds like.

HEARING OFFICER: Yes.

JUDGE FABRICANT: Very good.

Thank you.

HEARING OFFICER: Anything else?

JUDGE FABRICANT: That's it.

HEARING OFFICER: Thanks All. We'll see you tomorrow.

(The proceedings adjourned at 3:47 p.m.)

C E R T I F I C A T E

I, LISA L. CROMPTON, Registered Professional Reporter, hereby certify that the foregoing is a true and accurate transcript of my stenographic notes of the proceedings in this matter on the date and time specified in the caption hereof.

IN THIS WITNESS WHEREOF I have hereunto set my hand this 19th day of June, 2025.

<%33863,Signature%>

LISA L. CROMPTON

REGISTERED PROFESSIONAL REPORTER

MY COMMISSION EXPIRES 1/17/2031

EXHIBIT 10

COMMONWEALTH OF MASSACHUSETTS

COMMISSION ON JUDICIAL CONDUCT

COMPLAINT NUMBER 2019-22

VOLUME IV

HEARING

~ BEFORE ~

HEARING OFFICER

DENIS J. McINERNEY, ESQ.

JUNE 12, 2025

9:00 A.M.

Boston, Massachusetts

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

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I N D E X

HONORABLE SHELLEY RICHMOND JOSEPH	PAGE NO.
DIRECT EXAMINATION BY JUDGE FABRICANT	~~643~~645
CROSS-EXAMINATION BY MS. MULVEY	~~725~~~~727~~781
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E X H I B I T S

EXHIBITS	DESCRIPTION	PAGE NO.
EXHIBIT 5	E-mail chain with attached Executive Office Transmittal 17-13, 5 pages	~~747~~~~749~~826

HEARING OFFICER: Good morning. We're on the record.

So this is the fourth day of the hearing on the Commission on Judicial Conduct's Complaint Number 2019-22.

I'd ask that counsel please identify themselves for the record.

JUDGE FABRICANT: Judith Fabricant, special counsel for the Commission on Judicial Conduct.

MR. NEFF: Howard Neff for Commission on Judicial Conduct.

MS. MULVEY: Elizabeth Mulvey for Judge Joseph.

MR. HOOPES: Tom Hoopes for Judge Joseph.

MR. KEATING: Michael Keating for Judge Joseph.

HEARING OFFICER: Thank you.

Good morning, Everybody.

Special Counsel, call your next witness.

JUDGE FABRICANT: And I call Judge Joseph.

HONORABLE SHELLEY RICHMOND JOSEPH,
SWORN

HEARING OFFICER: Thank you. Take your seat.

DIRECT EXAMINATION
BY JUDGE FABRICANT:

Q. Good morning.
A. Good morning.
Q. Two years ago, on June 6th of 2023, you and I met in the Commission's office for an interview, I was acting on behalf of the Commission, and your three lawyers were there, and -- the same lawyers who are here now, you were under oath, and there was a court reporter, and the court reporter produced a transcript of that interview; correct?
A. Yes.
Q. And that transcript is in and stipulated appendices which are all in the book; okay?
A. Okay.
Q. So we may refer to that ~~the~~ from time to time.

You started practicing law in 1993; correct?
A. Well, I graduated from law school in 1992. I did some work in -- I was sworn into the bar in

the end of 1992, and I started working at the end of that year or the beginning of the following year.

Q. You were at the attorney general's office, Massachusetts attorney general's office first for some period of time, and then you were with a civil law firm for a period, and then you started a private practice in 2000.

A. I did.

Q. And your office was in Newton.

A. Yes.

Q. And your work was mostly criminal defense.

A. Mostly.

Q. You spent several years as a bar advocate.

A. I did.

Q. And we've heard some testimony about what bar advocates do, and they serve as attorney for the day, from time to time in different courthouses, and getting ~~entered in~~appointed to whatever's on that day; correct?

A. Yes.

Q. And that's what you did.

A. I did.

Q. And you did that for several years, and two of those years were in the Newton District Court;

correct?
A. I don't recall how long I was a bar advocate in Newton. I think it was longer than that. I was on the bar advocate list for about seven years. And during those seven years, I was a bar advocate both in Middlesex and Suffolk County.
Q. So you think your role in Newton as a bar advocate was longer than two years.
A. I think it was longer than two years. Although, the bar advocate work that I did, I did more of it as I was beginning my law practice and little by little I --
HEARING OFFICER: Could you get just a little closer to --
THE WITNESS: Of course.
HEARING OFFICER: Thank you.
Q. Eventually your private practice picked up and you phased out the bar advocate work.
A. I did.
Q. And that happened -- You're the not the only one who followed that path; right?
A. I would expect. Right.
Q. During your private practice, sometimes you would be in Newton every day, other times there

would be a gap of some months; correct?
A. I don't think I was ever in Newton every day. There were times when I had multiple cases in Newton and I would be there every day of the week. There are other times when I had gaps in cases that I was handling and I wouldn't be in Newton for months.
Q. So let's take a look at Exhibit N, Page 243, Line 10. So you said, I had a lot of cases in Newton District Court, but they ran slow, some days I was there every week, other days it would be months until I came back. That's what you said.
A. Correct.
Q. So you had a lot of cases in Newton but it wasn't constant --
A. That's right.
Q. -- during that period of time.
And you were familiar with the courthouse.
A. I was.
Q. In 2019, the U.S. attorney brought a matter to the Federal grand jury and you were indicted on criminal charges; correct?
A. Yes.
Q. You were represented by excellent counsel;

correct?

A. Yes.

Q. Two of the same who are here -- All three of the ones who are here are excellent. Two of them represented you in the criminal case; correct?

A. That's correct.

Q. And the case was dismissed by the Federal Court based on the agreement that you entered into with the United States attorney; correct?

A. That's right.

Q. The agreement was some four pages long with the signatures on the fourth page; correct? So we're going to bring up the signature page. The agreement is Appendix M. We're going to look at Page 162, which is the signature page. And do you see your signature there?

A. I do.

Q. And see the signatures of your lawyers there?

A. I do.

Q. And now we're going to go back a couple of pages, to Page 159, which is the beginning of the agreement, and see the beginning of the agreement. And I'm going to read Paragraph 2, and you have it at Page 15~~5~~9—on your side. I'm

just going to read Paragraph 2.

Judge Joseph, -- I'm inserting the title, although it was not there -- Judge Joseph agreed that within 30 days of the effective date of this agreement she will formally refer herself to the Massachusetts Commission on Judicial Conduct and will thereafter cooperate fully in any investigation or proceeding into her conduct that has been or may be initiated or conducted by the Massachusetts Commission on Judicial Conduct until any such investigation or proceeding is closed or concluded.

Such referrals shall include, a stipulation by Judge Joseph to the accuracy of the facts set forth in the attached statement of facts. Parties agree that the attached agreed-upon statement of facts may not represent all relevant facts. Judge Joseph agrees that she will not contest the accuracy of the statement, that she does not object to the consideration or admissibility into evidence of the statement and any investigation or proceeding that has been initiated or conducted by Massachusetts Commission on Judicial Conduct,

attest in writing under penalties of perjury to compliance with the conditions of this paragraph, at the time of her submission to the Massachusetts Commission on Judicial Conduct. And then there are a couple more sentences about how the Commission reviews the Federal material and there's a sentence that makes it clear that you're entitled to --0

A. Yeah.

Q. So you did refer yourself to the Commission you did certify that you did so, and we have a statement of facts before us.

A. (Witness nods head).

Q. So let's -- Is all that correct?

A. Yes, it is.

Q. Let's look at the statement of facts which was attached to the agreement. And let's look at Paragraph 3. Again, certain title, even though I've -- Judge Joseph knew -- This is Page 163.

A. Give me one second. Okay. Thank you.

Q. Judge Joseph knew that criminal defendants in Newton District Court custody were kept in the lockup area in the basement of the courthouse and were brought upstairs by a court officer in the courtroom for the court appearances. The normal

custom and practice in Newton District Court, subject to certain exceptions, was that a defendant would be released from custody into the courtroom. This courtroom had only one public entry/exit which led to the courthouse lobby.

So you are not contesting that the normal custom and practice in Newton District Court, subject to certain exceptions, was that a defendant would be released from custody into the courtroom.

A. That's correct.

Q. Correct?

Now, while you were in practice, you had experience with lobby conferences off the record.

A. I did.

Q. And in 2015, you were practicing as a criminal defense lawyer.

A. Yes.

Q. And you became aware in 2015 that lobby conferences were no longer conducted off the record.

A. So I wasn't aware that there was a rule change. I am aware of that now. But I did know

that practice had changed a little bit, just by experience and being in court where lobby conferences were beginning to be recorded on the record.

Q. And you now know that that's because the SJC changed Rule 12 of the Rules of Criminal Procedure to require that lobby conferences be recorded.

A. That's correct.

Q. Correct? And then you became a judge on November 2nd of 2017.

A. I did.

Q. And as a new judge, you were provided with a lot of materials.

A. Yes.

Q. Some of them came from District Court, some of them came from the Trial Court, some of them came from the Flaschner Judicial Institute. There were a lot of materials.

A. There were a lot of materials.

Q. And among the materials was this binder of the Massachusetts Rules of Court. Correct?

A. Yes. It probably was the 2017 or '18 version, but it looked something like that.

Q. This issue is the 2021 version. But yes, it

would have been the version that was current at the time.

A. Yes.

Q. Your lawyer put it out yesterday, by the way, your lawyer said I think 1,500 pages. Actually, it's about 1,300 pages. But there is a section of District Court rules; right?

A. There are.

Q. You were familiar with this book even before you became a judge.

A. I was.

Q. You were familiar with it in practice, maybe even in law school.

A. I don't remember it in law school, but certainly in practice.

Q. Okay. And so you know that at the back of the book there's a way to find particular sets of rules because there's a list and then there are markings on the edge of the pages that help you find what's listed.

A. Yes.

Q. So if you wanted to look for District Court rules, you could do that by looking on the list and finding the marking and that would be where that marking is; right?

A. Yes. That's correct.
Q. And the District Court rules in this book amount to about 30 pages; right?
A. I, I don't know.
Q. Do you want to look at the book?
A. If you tell me it's 30 pages, I believe you.
Q. 30 pages you could read or scan in probably an hour; right?
A. Rules -- There are times -- I don't know if you can read them in an hour but...
Q. But it wouldn't take up 1,300 pages.
A. No.
Q. The rest of the book has the Rules of Civil Procedure, Rules of Criminal Procedure, Rules of Appellate Procedure, and the SJC court rules, the rules of Superior Court, the rules of the Land Court, the rules, et cetera, et cetera, et cetera, it has all kinds of things; right?
A. Yes.
Q. So if you wanted to look specifically at the District Court rules, you could do that and you'd get -- you'd find about 30 pages.
A. Yes.
Q. You never did as a new judge sit down with the rule book and review the District Court rules to

make sure you were familiar with the rules of the district court.

A. No, I was familiar with the rules from the practice. I did not sit down with the rule book and read the rule from, you know, the District Court rules from beginning to end.

Q. Did you read part of it, again, as part of your preparation for becoming a judge?

A. As part of my preparation for becoming a judge, there was a training program that the District Court initiated where I sat with judges for the first month or so, and I think over the course of the three and a half weeks I sat with 20 different judges and saw what they did on the bench. And I was what they called a baby judge, so I would sit next to a judge on the bench and watch daily with them, whoever they were, and I would go back and review the substantive matters either that I learned that day or that I didn't know that I needed to familiarize myself with.

Q. So you've anticipated my next series of questions. But there was never a time when you picked up the rule book, during a break or at night or anytime, picked up the rule book and said maybe I should be familiar with the

District Court rules and look through them or skim them or read them.

A. Well, I'm sure, if there was an issue that dealt with a rule, I would have referred to the rule book. I don't recall picking it up and just reading it from start to finish.

Q. You talked about this court orientation process. You spent about four weeks sitting with other judges so that you could see what each of them does on various substantive matters; correct?

A. Yes.

Q. And there were about 20 of them, because it's about four weeks, that's about 20 days, usually one judge each day, and so about 20 of them.

A. Correct.

Q. And you could ask those judges any questions you wanted to ask.

A. Absolutely.

Q. And during that period of orientation, you have no memory of ever seeing a judge go off the record; right?

A. I don't.

Q. And you now know that District Court Rule 211 requires that all court proceedings be recorded.

A. I do.

Q. The process for new judges also includes assignment of a mentor; correct?
A. Yes.
Q. And initially you were assigned Judge Michael Brooks and then that changed later; correct?
A. That's correct.
Q. And part of the mentor process, as you were told, was that you could call your mentor with questions at any time; correct?
A. Yes.
Q. And in fact, you could ask questions of any judge at any time.
A. Absolutely.
Q. And were people welcoming and forthcoming and inviting you to call them at any time?
A. Oh, of course. It was such a collegial atmosphere where judges would give you their numbers, their cell phone numbers, say call me anytime if you have a question.
Q. In the orientation manuals that you got at the beginning, there was a laminated benchcard reporting each matter; correct?
A. Yes.
Q. And there was a District Court education

conference on December 13th, 2017, focused on race and bias that you were not able to attend.

A. Yes, I was not able to attend that conference.

Q. After that, you're not sure whether you received whatever materials were distributed at that conference; is that correct?

A. The only thing I remember receiving was a book by Bryan Stevenson, because he was speaking at that conference. I don't recall receiving any of the other materials. That was given to me earlier because of the family issue, emergency that I had that I was unable to attend the conference.

Q. And you didn't contact the administrative law office to say please make sure I get the materials.

A. My father had passed away, so I wasn't able to go to the conference. And I had a couple weeks off before I came back to work, and it just wasn't on my mind to call the administrative office and ask them.

Q. Okay. But you did get District Court transmittal 12-22; correct?

A. What -- Sorry. I don't recall what

transmittal that was.

Q. That is in the binder at -- So it's Appendix C in the binder. You'll see that it's dated January 16, 2018.

A. Yes, I did receive that.

Q. And you'll see that it's addressed to all judges, magistrates, et cetera, and it goes out by e-mail, and you saw the practice of transmittals coming by e-mail.

A. I did. I don't have any independent memory of receiving this, but it did go to all judges. I did have a computer at that time, so I would imagine I received it, but I don't have an independent memory of receiving this.

Q. You were reading your e-mails.

A. I was.

Q. And if an e-mail came --

A. Yes, I was.

Q. And the transmittal makes reference to, in Paragraph 6, it makes reference to an updated immigration benchcard that was distributed at that conference that you weren't able to attend; correct?

A. Yes.

Q. Paragraph 6 on Page 12.

A. Yes.
Q. Is that correct?
And it tells you that, if you don't have it, if you didn't get it, you can contact Jackie Lawson to get it.
A. Yes. It does.
Q. And it also says that an electronic version, laminated version.
A. Correct.
Q. But an electronic version was attached to the transmittal; correct?
A. Yes.
Q. And that's on Tab D. So it's at Page 15 and 16 in the binder. The transmittal, -- going back for a minute -- it tells you that the new updated benchcard supersedes any previous benchcard.
A. Yes.
Q. And the benchcard itself tells you when it was issued. Right at the bottom it says District Court AODC revised December 2017; correct?
A. I see that now. I don't think I ever noticed that before. But yes, it does say that.
Q. It tells you, if you look at the very last

paragraph within the box, it tells you, for guidance about immigration matters, for guidance about requests ~~for~~from the DHS to take custody, you can refer to what we're calling the Lunn policy, that is Transmittal 17-13 issued by the ~~administrative law, the~~ executive office of Trial Court on November 10th, 2017; correct?

A. Yes.

Q. And when you got the transmittal and the attached benchcard, did you check to make sure you had the Lunn policy?

A. I, I don't know.

Q. Okay.

A. It's eight years ago almost, so I just, I just don't remember.

Q. So you don't know whether you found it, pulled it out, and read it to make sure you were familiar with it?

A. I have no memory of doing that.

Q. And you did later on become familiar with that policy.

A. I did.

Q. And you now know that it goes on for several pages, it has some complexity, but the essence of what it says is that all court personnel are

supposed to allow ICE to do their job, not help or hinder, allow them to go to the lockup to take custody if that's what they asked to do.

A. Right. I think the essence of the Lunn policy is you can't help or hinder and that the preferable place to take somebody in custody is from the lockup.

Q. And you now know that the Lunn decision issued by the SJC, Lunn versus Commonwealth, says that a court cannot hold a defendant in custody any longer than the person would otherwise be held for purposes of an ICE detainer.

A. Correct.

Q. On April 2nd of 2018, you were sitting in Newton District Court.

A. I was.

Q. And the First Justice was not there that day.

A. Correct.

Q. You were sitting in the first floor courtroom, the first session.

A. I was.

Q. And you had a list of cases to hear.

A. I did.

Q. You had sat in the Newton District Court about six times before.

A. I did. Although I'm not sure if I ever sat with the docket before. I was often there on a Thursday when there was no docket.

Judge Heffernan was in Quincy that day. So, they didn't schedule that -- they would assign a judge when emergencies that came in, last minute arrests or restraining orders, something of that nature.

Q. So, again, you've anticipated some of my next questions, but that's fine.

Soon that day you did have a list. And I want to call your attention to the full day docket -- the full day transcript --

A. Okay.

Q. -- of that day, which is Appendix H. But let's look at Page 47. It is Page 5 of the docket. And it is the second page -- Page 5 of the transcript. It's the second case called. It's a case of someone called -- Take your time to find it.

A. I'm sorry. Page --

Q. It's Page 47 of the appendix.

A. Okay.

Q. Within the transcript, if that's easier, --

A. Sure.

Q. -- Page 5.

A. Okay. Thank you.
Q. And it's a case of a person by the name of Pineda -- if I'm pronouncing that correctly. What you can see here is that the clerk says, the clerk says that there is private counsel that came in on Friday and requested an 11:00 a.m. call because he just filed an appearance Friday and had to be in another court. That's what the clerk says.
A. Yes, it is.
Q. And so you said second call.
A. Yes.
Q. And the Commonwealth asked the clerk, do you have the appearance. The clerk said, I don't have that. The defendant's counsel, did you understand that to mean the counsel who had been appointed and was being replaced by private counsel who had entered an appearance?
A. Let me just read.
(PAUSE)
A. I don't know. I don't know what that refers to, that he doesn't have the appearance or he doesn't have the continuance. I don't know.
Q. If you go to where it says defendant's counsel, defendant's counsel said, -- and they're not

named -- defendant's counsel said, I have originally been appointed to represent Mr. Pineda and I understand there's been a notice of appearance, may I withdraw. See that?

A. Yes.

Q. And you said you may.

A. Yes.

Q. So this was an example of a situation, and it was the second case on the list that day, a situation where retained counsel comes in and replaces appointed counsel.

A. Yes. I mean, it looks from the transcript that an attorney had filed an appearance a few days prior to replace appointed counsel.

Q. And that's something that you see happen.

A. Sure.

Q. Not unusual.

A. This situation was~~is~~ not unusual, no.

Q. And maybe it's because of stereotypes up there in the world about appointed counsel or for whatever other reason, but it happens.

A. I mean, I don't feel I can comment as to the reasons it happens. It happens for a whole host of reasons, you know, including sometimes counsel got appointed for bail purposes only

because they're not indigent and they're not entitled to private counsel. I can't speculate as to what happened here.

Q. Okay. But it happens.

A. It does.

Q. Now, not long after, the case of Mr. Medina Perez was called.

A. Correct.

Q. And the case was on the docket that day for arraignment.

A. It was.

Q. The charges were fugitive from justice based on a Pennsylvania warrant and two drug misdemeanors.

A. Yes.

Q. And you appointed the bar advocate of the day Ms. Bostwick.

A. I did.

Q. The assistant district attorney's position in the morning was that she would ask him to detain Mr. Medina Perez on the fugitive from justice charge; correct?

A. That's correct.

Q. But she would not be seeking bail on the drug charges.

A. Well, I think what she said is that she wouldn't be seeking bail on the drug charges if he was held on the fugitive from justice matter.

Q. Let's take a look at the transcript, which is Appendix G. Page 39. Appendix G. So it's toward the bottom of Page 39. And you say, Commonwealth with respect to the new charges -- I take that was a reference to the drug charges, not that the old Pennsylvania charge -- is there going to be a request. Does "request" mean bail, request for bail?

A. A bail request, yes.

Q. And she says, no, Your Honor. And then you said okay. And then she said, well, not the drug possession. And you said, the drug possession that. And she said, if they're treated separately, I'm asking that he be held without. And you said, right on the fugitive. And she said, but if he's not, I would have a bail request.

A. Yes.

Q. So did you understand that to mean she was not asking for bail on the drug charges, she was going to ask for a detention on the fugitive from justice charge, and if you did not detain on

the fugitive charge - which you didn't have to.
A. Correct.
Q. But if you did not do that, she would ask for bail on him.
A. Right. Exactly.
Q. Do you understand that?
A. Yes.
Q. So if she were to press that position, which she ultimately didn't do, but if she were to press that position, you would have to make a decision about whether to detain him on the fugitive from justice charge; correct?
A. I don't know if I'm understanding your question.
Q. If her position didn't change on the fugitive --
A. Yes. I would have to make a decision whether to hold him on the fugitive from justice charge or not or release him on bail or just release him.
Q. And in making that decision, you would have to determine whether there was sufficient evidence that he was the person wanted in Pennsylvania; correct?
A. Well, I think there's a lot of factors that go into that decision, so I don't think it's fair to what you're suggesting.

Q. That's one of the factors, --

HEARING OFFICER: Sorry. If you could be a little closer to the mic. Thank you.

Q. -- that's one of the factors that would go into it.

A. It's one of the factors.

Q. If you weren't satisfied that there was enough evidence to connect him to the Pennsylvania warrant, you wouldn't have a basis to hold him, would you?

A. Well, again, I don't think you can look at the factors individually. You really need to look at the factors as a whole. And that's one of the factors to consider, but there is a lot of factors to consider.

Q. That's one of the factors --

A. Yes.

Q. -- you would have had to consider if that decision were presented to you.

A. Of course.

Q. And Attorney Bostwick questioned whether he was the person --

A. She did. When you have a matter that's before us on the fugitive, one of the first

questions that we're trained to ask is whether or not there's a question of identification, because that really sets forth the procedure that we would follow to handle the matter for the day. So that is one of the questions that I asked at some point in the morning, and Attorney Bostwick indicated that there was a question about identification with respect to her client and the fugitive from justice matter.

Q. And she asked for time to investigate that, --

A. Yes.

Q. -- that issue. And you gave her time.

A. Of course.

Q. As the case was called multiple times over the course of the morning and she was still working on that.

A. She was. I think we called it four times. I could be wrong about that. It could have been three, it could have been five. I think it was about four times. And each time she asked for additional time to continue her investigation as to the identification of her client.

Q. And when the court was ready to recess for lunch, she was still working on it.

A. She was.

Q. And she said she had a doctor's appointment

during lunch break and asked you to not call it before 2:15 --

A. Yeah. She said she was waiting for a fax, as I recall, and she had a doctor's appointment and wouldn't be able to be back until 2:15, so she asked if we could move the session at 2:15 or at least hold this matter until 2:15.

Q. And sometime during the course of the day, maybe during the morning, maybe during the lunch break, the clerk informed you that there was an ICE officer present with a detainer for Mr. Medina Perez. Correct?

A. Yes. It was at the end of the lunch break. The first assistant clerk, who was also my session clerk that day, came in to the lobby to inform me that there wa~~i~~s an ICE detainer for Mr. Medina Perez.

Q. And the clerk informed you that it was Judge Heffernan's practice to have the ICE officer remain outside the court.

A. He did. And he said that there was a practice in the Newton District Court that prevented ICE from coming into the courtroom proceedings, and he asked if I would follow it.

Q. And you were concerned about that.

A. I was. I had never heard of a policy like

that before.

Q. And you were concerned about it because you understood that the public has a right of access to court proceedings; correct?

A. Correct.

Q. You understood that the public has a right to see and hear what's happening in court; correct?

A. That's right.

Q. And you knew, as you told me in our interview, these are public hearings open to the public.

A. That's right.

Q. And you remembered that there was a policy somewhere about ICE but you couldn't put your hands on it.

A. Correct.

Q. So you called the administrative office of the District Court and you spoke with a lawyer there.

A. I did.

Q. And the lawyer there read the Lunn policy to you.

A. Yeah. It took them a while, a short while to call -- to find it, and they had to call me back, and they read me the policy.

Q. And you concluded that you could follow

Judge Heffernan's policy.

A. Yes. We talked about the policy. It was a fairly long policy. They read it to me. And I told them the concern I had and the information that I was given about this policy. And my question was two-fold. One, do I have to -- you know, is the policy consistent with the Trial Court -- is the Newton policy consistent with the Trial Court policy; and two, is it a policy, Newton policy that has to be followed, and I was given advice on that.

Q. And after that conversation, you told the clerk to make that request to the ICE officer, to step outside the court.

A. Well, I did. I told him I would follow the Newton District Court policy. And I was a new judge, a visiting judge. I was only there for the day covering for Judge Heffernan, who was not there for the day, and I didn't feel that it was my place to not follow any policies that the court had so long as they were proper policies according to the administrative office.

Q. And so the clerk told you that he would do that.

A. Yes.

Q. And in the afternoon, after the lunch break.

A. Yes.
Q. The Medina Perez case was called at 2:48:13 p.m., and Mr. Jellinek appeared, David Jellinek appeared on behalf of the defendant; correct?
A. He did.
Q. And the transcript now, again, is on Tab G. We're going to look at Page 40. And you have stipulated to the accuracy of this transcript; correct?
A. I have.
Q. So I'm going to read from the transcript and then I'm going to stop at various times and ask you some questions about it.

So at 2:48:13 Clerk Okstein says, court officer, can you bring out the next, Mr. Perez. And court Officer MacGregor says all right. Clerk Okstein says, Judge, the next case will be Commonwealth versus Jose Medina Perez, Attorney David Jellinek has filed an appearance on behalf of Mr. Perez. And you say, good afternoon.

A. I did.
Q. Attorney Jellinek says, good afternoon, Attorney Jellinek on behalf of Mr. Perez, may we

approach briefly. You say, yes, please. And Attorney Jellinek said, thank you. Clerk Okstein said, do you want to wait for your client,. Oor do it?. Attorney Jellinek said, no, side bar. And you said, we're just going to side bar.

A. That's correct.

Q. So at that point the defendant had not been brought into the court.

A. He was in the process of being brought up. And the question was whether to wait for him to actually get into the courtroom or to begin the side bar without him since he wasn't going to be part of the side bar conversation, but since you could hear the steps coming, he was coming upstairs, I said that we could go to side bar before he was physically let into the courtroom.

Q. And an attorney certainly can waive his client's presence.

A. He could. That's not what happened here.

Q. But he said not to wait for him.

A. Right. But it was going to be a side bar anyway without his client present.

Q. When Mr. Jellinek asked to go to side bar, you granted that request.

A. I did.

Q. And you knew that that meant the public could see what was going on but couldn't hear what was being said.

A. Correct.

Q. You also knew that, as long as you were on the record, if anyone wanted to know what had been said, they could get a recording.

A. I hadn't thought of that at the time. But that is true, that if it's on the record, the public can get a recording of it.

Q. So there's still public access, although it's not so immediate.

A. Correct.

Q. Now, let's go back to the transcript. So you go to side bar. And you said -- It starts with something inaudible. Then you said, is dismissed. Is that a reference to the fugitive from justice charge?

A. I don't know what that is. That doesn't make a lot of sense looking at the transcript, so I'm not sure if that -- I'm not sure what that is.

Q. What is it that was dismissed?

A. Nothing at that point in time had been dismissed, so I'm not sure.

Q. Ultimately, in the course of the day, what was it

that was dismissed?
A. Ultimately, the Commonwealth moved to dismiss the fugitive from justice but -- that wasn't done at side bar.
Q. Did she move to dismiss or did she nolle pros?
A. She moved to dismiss. There was no nolle pros filed in that matter.
Q. So after you said it was being dismissed, you said, so it's my understanding that ICE is here.
A. Yes.
Q. And that was the first in this call of this case, that was the first mention of ICE; correct?
A. I believe so.
Q. And then Attorney Jellinek says, so there's the fugitive. And Judge Joseph says, if there's no warrant. And the assistant district attorney says, yes. And Attorney Jellinek says, there isn't ~~no something~~ inaudible that we can tie this to him. And the assistant district attorney says, I don't think it's him. Is that, as you understood it, in reference to the Pennsylvania charge?
A. I believe so.
Q. And then you said, okay. Then Mr. Jellinek says, ICE is convinced that this guy ~~--~~ I went

over to ICE, they say they have a biometric match, I went through it and did the research, there's 13 FBI numbers connected to this Social, so something's bad with the inaudible, my client denies that it's him, ICE is going to pick him up if he walks out the front door, but I think the best thing for us to do is to clear the fugitive issue, release him on a personal, and hope that he can avoid ICE. Is that what was said?

A. That's what it says, yes.

Q. So you understood that what Mr. Jellinek wanted to do, what his goal was, was to have his client avoid ICE.

A. Oh, what I -- how I interpreted that is that he had concerns that his client was not the same person that ICE thought he was, just like he wasn't the same person he was arguing that Pennsylvania thought he was, and I interpreted that as him wanting more time to do the investigation to see how that pertained to both agencies.

Q. Is that what he said?

A. Well, he said, avoid ICE. And my response was, if you need more time, we can hold him until tomorrow.

Q. And then did he accept that suggestion?
A. He didn't ultimately.
Q. So he wasn't asking for his client to be held longer so that he could work on the issue, was he?
A. Well, at that point in time I didn't know what he was asking for. I can only tell you how I interpreted it, which, as you can see from my response, is that I offered to have him held until the following day.
Q. So the assistant district attorney says, I don't think arguing ICE is really my. And Attorney Jellinek says, right. Then she says -- she's continuing but she was interrupted. She says my, my. And then you said, the other alternative is, if you need more time to figure this out, hold him until tomorrow.
A. Right.
Q. And David Jellinek says something inaudible. And then you said, then it's a different. Do you know what you were referring to?
A. I don't.
Q. Then the assistant district attorney says, there's a detainer attached to my paperwork, but I feel like that's separate and apart from what my

role is. And then Attorney Jellinek says, there is an ICE detainer, so if he's bailed out from Billerica, and then something inaudible, ICE will pick him up. Then you said, ICE is going to get him. Attorney Jellinek says something inaudible. And then you said, what if we detain him.

A. Correct.

Q. Attorney Jellinek said, are we on the record. And you said, Larry, can we go off the record for a moment. And Larry refers to the first assistant clerk who was serving as session clerk that day.

A. Correct.

Q. And the clerk said, what's that. And you had to get his attention.

A. Right. He was -- Yeah. He wasn't paying attention, so he -- I think his reference, what's that, I interpreted that as what's that, I didn't hear that.

Q. And then you said, are we off the record. And Clerk Okstein says, we're on the record. David Jellinek says, can we go off the record for a minute.

A. Correct.

Q. And when you said -- When he asked to go off the record, he didn't give any reason and you didn't ask for any reason; correct?
A. That's right.
Q. And you granted the request by asking the clerk to go off the record.
A. I did.
Q. And you told me in our interview that there didn't seem to be any reason not to allow it.
A. Correct.
Q. You said there wasn't a lot of contemplation.
A. That's correct.
Q. And you said you didn't give it much thought.
A. I didn't.
Q. And you said there really wasn't a reason.
A. No, I didn't. At that point in time, I didn't know that there was a rule preventing it. And so he asked, and I allowed it.
Q. And you said, when we interviewed, that you thought he might tell you something about why Attorney Bostwick hadn't come back after lunch.
A. She said she had a medical appointment. I wasn't sure. I figured in the past, when off the record conversations were conducted, because this was something sensitive to discuss. That

could have been one of the options.
Q. The medical thing.
A. Sure.
Q. But in fact, she had come back. She was sitting in the audience.
A. I didn't realize that at the time.
Q. And you knew that, if you're off the record, there's no record.
A. Correct.
Q. So there's no public access.
A. Right.
Q. But this was an arraignment, not a lobby conference, not a conference regarding a disposition; correct?
A. Correct.
Q. And you have no specific memory of ever seeing a judge go off the record.
A. I have no specific memory one way or the other. I didn't keep track of when people were on or off the record. Certainly, it could have happened. I just can't recall a specific matter or what was discussed.
Q. So no specific memory.
A. No, not one way or the other.
Q. And you then had a conversation off the record

for some 52 seconds.

A. Correct.

Q. And the conversation was about the Medina Perez case.

A. It was.

Q. Not about anything else.

A. No. It was about the Medina Perez case.

Q. And you have stipulated -- Getting back to the statement of facts that you agreed to.

A. Sure.

Q. -- with the U.S. attorney that, during that off the record conversation, Mr. Jellinek asked that the defendant be allowed to go back downstairs after he was released; correct?

A. After -- That he be allowed to interview his client with the assistance of the interpreter in the lockup, I would say prior to his release. After I had released him on his own recognizance but before the court officers had physically released him in the lockup.

Q. So let's take a look at Appendix M, Page 164, Paragraph 10. So after the recorder was turned off, there was a 52-second off the record side bar conference with Judge Joseph with defense attorney, with prosecutor present. In the

course of this conference, the defense attorney asked Judge Joseph to allow -- and this refers to him as A.S. I think it was intended to mean alien subject, but we'll call him Medina Perez. -- to allow Mr. Medina Perez be escorted up to the courtroom by a court officer to go back downstairs.

A. Correct.

Q. And your position is that nothing was said off the record that wasn't then~~hadn't been~~ said on the record; correct?

A. No, that's not correct. There was one thing that was different off the record than on the record, and I put that on the record as soon as we went back on the record.

Q. So maybe my question is confusing. Your position is that nothing was said off the record that wasn't then put on the record.

A. Afterwards. So there was one thing that was said off the record that was not said on the record, and that was his request to speak with his client in the lockup area with the interpreter prior to his release.

Q. And you put that on the record.

A. And I put that on the record.

Q. And other than that, your position is nothing was said off the record that wasn't said either before or after, wasn't said at some point on the record.

A. So the off the record conversation was really a continuation of the on the record conversation. The words were different, so I don't -- but there was nothing of substance that was any different than him asking to speak with his client downstairs with the assistance of the interpreter.

Q. So there was no purpose for being off the record.

A. At the time, I didn't know what the purpose was.

Q. Looking at it in retrospect, there was no purpose for being off the record according to --

A. Again, at the time, on April 2nd, I didn't know what the purpose was. I -- He asked to go off the record, and I allowed that request.

Q. And shortly before you allowed that request, Mr. Jellinek had told you that he didn't think his client was the right person for ICE and had said that he thought the best thing to do was to clear the fugitive issue, release him on

personal, and hope that he can avoid ICE.

A. Yes. That's what his response was or that's what his statement was, which is when I suggested to hold him without bail overnight.

Q. And your suggestion was to hold the defendant without bail to prevent ICE from arresting him while the attorney would investigate.

A. No. My purpose for holding him overnight was to give the attorney enough time to continue his investigation. It was already 3:00 in the afternoon. And I had afforded his morning attorney plenty of time to do her investigation, and I felt that it was only fair now that there was a new attorney, who came in after the lunch break, to give him the same courtesy that I gave her in the morning. And, --

Q. And, what she was- I'm sorry.

A. -- and in order to make sure that everybody would be back the next day, the only way I saw at the time to do that would be to detain him, hold him without bail for the night, and have everybody come back the next morning.

Q. And what she had been investigating was the Pennsylvania warrant, whether he was the right person for the Pennsylvania warrant.

A. Yes. She was investigating his identification as it pertained to the Pennsylvania warrant.

Q. And what you thought that Mr. Jellinek would be looking to investigate was whether he was the right person for ICE; correct?

A. Well, they were working off the same biometric information and identification information. So I'm not sure that you can really separate them like that. The fugitive from justice matter hadn't been dismissed yet, and his identification was important. I mean, we need to know who's coming in and out of the courthouse.

Q. But the assistant district attorney had already said she had concluded he was not the right person for the Pennsylvania warrant and she was seeking to dismiss that.

A. I'm not sure whether or not -- Let me take a look at the transcript. Give me one moment.

Q. You might look at the top of Page 41.

A. Right. That's all part of the same conversation, yes.

Q. She said, I don't think it's him.

A. I don't think it's him, yes.

Q. Meaning the Pennsylvania warrant.

A. Correct.
Q. She wasn't saying anything about ICE.
A. Correct. But she hadn't moved to dismiss it at that point in time.
Q. But you understood that she was going to.
A. Not at that -- She said I don't think it's him, then we started talking about the, as I'm looking at the transcript, the identification as it pertained to ICE as well. So kind of talking about it all at the same time.
Q. And she said, at least once, perhaps more than once, ICE is not my role.
A. Correct.
Q. So she wasn't talking about identification for ICE. She was talking about identification for Pennsylvania and she was telling you she had concluded that she didn't think it was him.
A. Well, I'm not sure -- I think she was saying that the ICE detainer was not her issue, you know, she was concerned about the two complaints that -- the Massachusetts complaints. I think the conversation that we were having was whether he was the same individual that Pennsylvania thought, that ICE thought he was, and all I was doing was trying to give the attorney more time

to do his investigation.

Q. And you thought the suggestion to hold the defendant overnight without bail, you thought that was a good suggestion for Mr. Jellinek's client; correct?

A. I did.

Q. That's what you said in your response to the Commission --

A. I did.

Q. And Mr. Jellinek didn't like that suggestion; correct?

A. He did not.

Q. You were concerned that ICE might take the wrong person.

A. Yeah. I wasn't really concerned that ICE was going to take the wrong person. ICE was not my concern. I was concerned about giving the attorney enough time to do the investigation regarding his client's identification that I thought he wanted to do. And if he could get that information and convince ICE that it wasn't who they thought he was, that would be his job. That's not my role. I wasn't concerned about ICE.

Q. So let's look at your response to the

Commission's charges at Paragraph 23, which I'll read from here, but try --

A. Is it in the book so I can read it as well?

Q. So we don't have it in our copy in hand.

A. Okay.

Q. So maybe make it bigger.

Judge Joseph disagrees either that her statements as quoted in Paragraph 23 --

HEARING OFFICER: I'm sorry. Please speak up. Speak into the microphone.

Q. Judge Joseph disagrees that her statements as quoted in Paragraph 23 conveyed an intention to assist defense counsel ~~to~~in identifying a means to ~~and~~ avoid ICE or that she subjectively had any intention. As she had tried to do throughout the day, Judge Joseph did intend to permit both of Medina Perez's counsel sufficient time to represent their client properly because she did not want ICE to take custody of Medina Perez if it was determined that he was not the person subject to the detainer. Given the preceding events, Judge Joseph's intention was to make sure that Medina Perez's counsel, who had repeatedly insisted that the ICE detainer did not pertain to his client, had a reasonable

opportunity to investigate his belief that his client was not the subject of the detainer and to present ICE with any further information he was able to obtain to establish that ICE was mistaken by his client's identity. Her suggestion was intended to explore a course of action that would ~~the~~ cause the defendant to be held without bail in state custody until morning to permit defense counsel a reasonable opportunity to make that inquiry. And then it goes on.

So you wanted to make sure that ICE wasn't going to take the wrong person; correct?

A. Again, my concern was, allowing the defense attorney enough time to investigate and do whatever job he felt that he could do with whatever information that he got. I was just trying to hit pause, just like I had four times during the morning.

Q. And your proposal was to do that by detaining him overnight.

A. That's correct. That was the only safe, secure, practical way to do it to make sure that everybody would be back the next day.

Q. And if he were -- If the fugitive from justice

charge was dismissed, you couldn't detain him overnight on that if it was dismissed.

A. That's true. But it hadn't been dismissed yet.

Q. So did you think that you would deny the motion to dismiss that charge so as to keep him overnight even though the DA was saying she didn't think it was him?

A. See, now we're speculating as to things that didn't happen. But what I was suggesting at that point in time was pause, everything stops right here, and we are going to do all of this tomorrow, we'd handle the fugitive from justice matter tomorrow, we'll handle the arraignment on the Newton charge tomorrow, he's going to get held one more day so you can do your investigation however you want to do it and get any information that you think might be helpful, if there's any helpful information, we'll all come back tomorrow.

Q. Did you consider the question of what the legal authority would be to detain him overnight?

A. At that point in time, I don't think I got to analyze it in those terms. I was really just trying to hit pause and bring everybody back

tomorrow to give him the time that I thought he was requesting to do the investigation that he wanted, and I really wanted to extend him the same courtesy that I had given prior counsel over the morning to do exactly what she had done.

Q. So the question of what legal authority there would be to keep a person at the jail overnight, you didn't think about that.

A. Well, it would have been, it was by agreement, we would have just continued the matter until the following day. And I guess, technically, if the fugitive of justice matter hadn't been dismissed, which it wasn't at that point in time, that could have been a legal way to do it as well. But I don't think I really contemplated that at the time. I think it was just really more continue all of this until tomorrow, we'll do all of this tomorrow.

Q. And didn't think through the question of authority to detain him.

A. No. You can hear in the transcript that we've played, it all happened very quickly, and I was responding to the statements that I was hearing and the questions I was being given,

really, I was just trying to hit pause and say, sure, happy to give you more time.

Q. And you said it happened very quickly. You were the judge; right?

A. Sure.

Q. You were in charge.

A. I was.

Q. You could slow it down if you thought that appropriate, couldn't you?

A. Well, that's what I tried to do, by saying I'm going to give you your time, let's come back and do this tomorrow.

Q. So you could slow down the proceeding in the courtroom if you thought that appropriate, couldn't you?

A. I suppose.

Q. You could take a recess and go into your lobby and pause some more, couldn't you? Call your mentor.

A. Hypothetically.

Q. Call another judge.

A. Well, that already happened. I spent a good portion of the lunch break and then 45 minutes afterwards doing that. So we didn't get back on the bench until 2:48, which we typically get

back at 2:00. I knew this case was being called at 2:15. So there was a significant delay in starting the session so that I did have an opportunity to call down to the administrative office and seek guidance.

Q. But as to this question of detaining him overnight when the assistant DA is saying it's not him for the fugitive from justice warrant, and you're -- the question of whether you could detain him overnight, whether there was legal authority to detain him overnight, you didn't think to look into that, ask someone's advice about that?

A. I wasn't analyzing it that way. I was just trying to find the solution to the problem I thought he was asking me about, which was can I please have some more time to do my investigation.

Q. And that wasn't -- He rejected that suggestion; right?

A. He rejected that, which is why he got released on his own recognizance.

Q. And you told me in an interview that you were very concerned about who is this guy, you really wanted to determine who he was.

A. Yes.

Q. And you told me that you felt that you had a responsibility to everybody involved, the defendant, the attorneys, the district attorney's office, ICE, everybody needed to know who he was.

A. Correct.

Q. And you felt that it would be an injustice to -- for ICE to take him if he was the wrong person.

A. I don't know if I -- whether or not I used the word "injustice." I was very concerned about knowing who the individual was that was being arraigned in my courtroom that day given all of the identification issues that we had been facing that day.

Q. And you didn't want an injustice to happen in the courthouse; correct?

A. You never want injustice to happen. You want fairness to happen.

Q. Even if he was the right person, you were not confident that the ICE agents would either delay their seizure of the defendant to permit an attorney/client conference or an attorney conference to take place once they had taken him custody; correct?

A. Can you repeat that? I don't understand your

question.

Q. This is your response to Commission's charges at Paragraph 24. You said that you were not confident that the ICE agents would either delay their seizure of the defendant to permit an attorney/client conference or permit an attorney/client conversation to take place once they had taken him into custody. Right?

A. Right. That's why I suggest -- That's why the attorney asked if he could just speak with his client in the lockup area prior to his release to ICE custody, and I allowed that to happen.

Q. And you wanted to pause the ICE arrest. That's what you told me in our interview.

A. Not necessarily. I just wanted his attorney to be able to speak with him.

Q. Well, let's look at your interview, Page 216. So this is Appendix M, Page 216 of the appendix. Let's look at Line 5. And you said, it would just pausing everything. Right?

A. I'm just reading the paragraph.

Q. Sure. Read as much as you feel you need to to understand the context.

(PAUSE)

A. Right, ~~S~~so, as I say a few lines before that, the question of why didn't you feel like you needed to put that on the record, meaning that he could speak with his client in the lockup needing the assistance of the interpreter. And my answer was -- He asked me to. I didn't feel as if I needed to. But he asked. And I was under the impression he was going to go directly into ICE custody. And it seemed as if it was important for him to be able to speak to his client before that, and~~s~~ I paused so that he would have the assistance of the interpreter in order to do that.

Q. And then you say, it was just pausing everything. Correct?

A. It was pausing everything because they were going to be taking him into ICE custody. Yeah. It was a place he could have a quick conversation before that happened.

Q. And then you went back on the record. And we'll go back to the transcript, Exhibit G, and we'll go back to Page 40 -- Page 41. So when you went back on the record, there was no more discussion about whether the defendant was the right person for ICE; correct?

A. So where, -- I'm sorry -- where are we talking?
Q. Exhibit G.
A. Talking about 2:50:57?
Q. Yes.
A. Yes. Correct.
Q. So back on the record. There's no more mention of the question of whether the defendant is the right person for ICE.
A. Correct.
Q. Correct? And I'm just going to read the transcript at this point.
A. Okay.
Q. So Clerk Okstein says, Judge, we're back on the record on Mr. Jose Medina Perez, Attorney Jellinek on behalf of Medina Perez. And you say, good afternoon, Mr. Jellinek. Attorney Jellinek says, good afternoon. Attorney Jellinek then says, after some extensive research into the various FBI numbers and then something inaudible Social Security numbers, as well as obtaining a photo from Pennsylvania, we don't believe that this gentleman is the same gentleman on the fugitive from justice warrant. Did it strike you as odd

that it's the defense attorney who's saying that -- saying it first?

A. It did. But ultimately, it didn't matter.

Q. And then the assistant district attorney confirms it. She says, Your Honor, with the information that I have, I don't think that there is enough tying him to the Pennsylvania warrant, there's a great deal of other out of state records, I do believe that some of them belong to this individual, but that is not what's at issue.

A. Correct.

Q. And you said, okay. And the assistant district attorney said, so at this point I would dismiss the. And you said, the fugitive. She says, count one. And you said, okay. And then she says, there's not a bail request for counts two and three. Those are the drug counts.

A. Yes.

Q. But I would ask that for a pretrial conference date on those. And you said, okay. And then Attorney Jellinek said, absolutely. You said, that's fine. Attorney Jellinek said, I would ask that, I believe he has some property downstairs, I'd like to speak with him

downstairs with the interpreter if I may. And you said, that's fine, of course. And then he said, thank you. And the clerk said -- I'm sorry. You said, Commonwealth no bail request on counts. The District attorney said, yes. The clerk said, so do you want me to arraign him. And you said, yes, please. And then -- This is the district attorney said, yes, please. And you said, yes. Defense counsel said, yes. And then Clerk Okstein goes through the arraignment process. And defense attorney says, could we have May 29th for a pretrial. The clerk says, May 29th. Defense attorney says, please. And then you said, sir, I'm going to enter a plea of not guilty on your behalf, Attorney Jellinek has filed his appearance to represent you in this matter, are you privately retained. Jellinek says, yes. And then you said, okay, sir, you are entitled to request an examination to determine whether you're a drug-dependent person who would benefit from treatment, if you choose to exercise this right, you must do so in writing within five days, and your attorney can further explain that to you. Mr. Jellinek says, thank you. Clerk says, all right, Judge.

Attorney Jellinek says, thank you. Clerk says something inaudible. Attorney Jellinek says, all set, Mr. Clerk. And you said, wait just a second.

And then turning over to the next page. You see the clerk speaking to you. Now, the clerk is right in front of you; correct?

A. Correct.

Q. So he can turn around and speak to you in a soft voice, but it's still on the record.

A. Yes.

Q. And he said -- When we listen to the tape -- And you've heard the tape recording now multiple times --

A. Yeah.

Q. -- in this proceeding. So you can hear that it's a softer voice. He says, there was a representative from ICE here in the court to visit the lockup. Correct?

A. Correct.

Q. And you said, that's fine, I'm not going to allow them to come in here, but he's been released on this.

Now, you had already told the

clerk that ICE couldn't come into the courtroom, correct, in accordance with Judge Heffernan's practice?

A. Correct.

Q. And -- so you said it again at this point.

A. Right. I felt bound by the Newton District Court policy that we were following.

Q. So then probation officer asked, are we still doing the $150 attorney fees. You said, No, he's privately retained. And then you reiterated ~~what~~the date, May 29. And then the clerk gives him the standard warning. And then Court Officer MacGregor asks, he's released, Mr. Clerk? Clerk says, what's that? Court Officer MacGregor, he's released? Clerk says, he is. Attorney Jellinek says, yup. And then you said, he is.~~,~~ Mr. Jellinek asked if the interpreter can accompany him downstairs to further interview him. And Attorney Jellinek says, yes, please. And you said, and I've allowed that to happen. And then Attorney Jellinek says, thank you. According to this, Attorney Jellinek says again, thank you, Your Honor. And you said, you're welcome. Clerk says, thank you, Judge, that's all we have. That's all -- we're all done for

now. So that ended the proceeding.
A. Yes.
Q. And during the course of that proceeding, of that on the record portion back in open court, the interpreter is interpreting for the defendant; correct?
A. Yes, he is.
Q. And in the recording, you can hear that voice in the background; correct?
A. Correct.
Q. And you knew throughout that on the record in open court, in part, you knew that the ICE officer was not in the courtroom.
A. Correct.
Q. So when you said that the defendant was released, you knew that the ICE officer was not in the courtroom.
A. Correct.
Q. And you knew that, when you said he was going downstairs with his lawyer, the ICE officer was not in the courtroom.
A. I didn't hear --
Q. That the ICE officer was not in the courtroom.
A. That's correct.
Q. And you knew that the ICE officer was out in the

main lobby outside the courtroom; correct?

A. I don't know where the ICE officers were.

Q. Well, let's go back to -- First of all, let's go back to the transcript where Mr. Jellinek says -- We're back to the top of Page 41. There's a big paragraph with Mr. Jellinek talking.

A. Where are we again? Sorry.

Q. Top of ~~P~~page 41. Mr. Jellinek is talking. And he says, ICE is going to pick him up if he walks out the front door. Did that give you a clue about where the ICE officer was?

A. You know, I didn't know. I just assumed that -- I didn't know how many officers there were. I was under the impression there would be one officer.

Q. But where did you think they were?

A. I thought one, at least one was in the lobby. I expected that there ~~one more w~~could be more in the lobby as well~~aswell~~.

Q. But nobody told you that; right?

A. No.

Q. And when I interviewed you, -- let's look at Appendix N, Page 218, Lines 8 and 9 -- I had asked you -- We had a conversation about how the ICE

officers could get to the lobby.
A. Right.
Q. And then I asked you, they can't get there from here -- or you said, they can't get there from here, but they can certainly get there any other way they want.
A. Right.
Q. And then you said, why is that, you know, relevant, there were ICE agents waiting in the lobby. So that's where you thought they were.
A. Right. But if you actually look a couple lines down from there, I said that I assume that there was an ICE van in the back.
Q. So you said, I only know that, referring to ICE agents waiting in the lobby, I only know that because the chief court officer was standing in front of the doors in first session. I'm ~~G~~going to say blocking the door. Right? I'm not sure, you know, what the intention was. And then at some point later on you said you thought they might have a van in the back. Correct?
A. Just the next couple of lines. After I say, I'm not sure that was their intention or not, you asked standing in the front of the doors inside the courtroom or outside the courtroom.

I said, inside the courtroom and I assume that there was an ICE van in the back.

Q. But nobody told you that, did they.

A. No.

Q. Now, let's turn to the time period after April 2nd.

A. Okay.

Q. You were not in Newton on April 3rd.

A. I was not.

Q. On April 4th, you were in Newton again.

A. (Witness nods head).

Q. And you were in second session because Judge Heffernan was there in the first session.

A. Correct.

Q. And Judge Heffernan came up to your lobby to see you.

A. She did.

Q. And she told you that a defendant who was wanted by ICE had escaped through the sallyport; correct?

A. Yes.

Q. And your position is that that's the first you'd heard about it.

A. It is.

Q. You did not say anything in that conversation

with Judge Heffernan about going off the record.
A. I didn't. I asked her how that happened, and she said that she was trying to figure that out.
Q. And she didn't ask you about going off the record; correct?
A. No.
Q. And you told me, when we interviewed, that the issue of going off the record just didn't come to mind.
A. Correct. At that point in time, I didn't know that there was a policy preventing it.
Q. So it just didn't come to your mind.
A. It just -- No.
Q. And you did not tell her that you were concerned that ICE would take the wrong person; correct?
A. It was a very brief conversation. I don't recall the specifics of what we talked about. We talked about generally what happened, and that was it.
Q. And you didn't tell her that your intention was to pause ICE taking the defendant into custody; correct?
A. I'm not sure that we got that far into what happened, other than her trying to determine on a security basis how somebody could have been

released out the sallyport and not have been apprehended by ICE.

Q. But you didn't tell her that.

A. Again, I don't recall seven years later the full substance of the conversation. I know we talked very frankly for a couple minutes and then that was it.

Q. And then sometime in the next couple of weeks you were sitting in the Lowell District Court.

A. Yes. Close to about three weeks later.

Q. I'm sorry?

A. Close to about three weeks later.

HEARING OFFICER: Get close to the mic.

Q. Sometime been April 5th and April 20; correct?

A. Yes.

Q. And Stacey Fortes was then the Regional Administrative Justice for that region and she was the First Justice for the Lowell District Court.

A. She was.

Q. She's now the Chief Justice.

A. She is now the Chief Justice.

Q. And the Regional Administrative Justice has the power, has the authority to schedule judges --

A. Correct.
Q. She asked you to come to her lobby during the lunch break.
A. Right.
Q. She didn't tell you why.
A. No.
Q. She didn't tell the topic of the conversation. But she asked you to come to the lobby.
A. Yeah. She said why don't you grab your lunch and come on into the lobby.
Q. And you sat there and ate lunch and had a conversation.
A. Yeah.
Q. And she said to you that it was her understanding that part of -- She brought your attention to the Newton event.
A. She did.
Q. And she said it was part of her understanding -- it was her understanding that part of the proceeding was not recorded, and she asked what happened. Right? She didn't accuse you. She said it was her understanding that part of the proceeding was not recorded, and she asked what happened. Right?
A. Correct.

Q. And you told me, when I asked you about that conversation with Judge Heffernan, that you acknowledged it immediately; correct?
A. I did.
Q. You did or you told me that?
A. Well, I told you that and I did.
Q. Is it your position in response to the Commission's charges that you've acknowledged it immediately? Let's look at --
A. I would have if she said that it was in -- And I recall that she showed me the rule, and that was the first that I had heard that there was a rule preventing unrecorded conversations in the courtroom.
Q. But let's look at Paragraph 37 of your response to the Commission's charges. So let's go to the -- read the part of what the Commission charges is accurate. And you said the RAJ invited Judge Joseph to her chambers during the lunch recess, and they spoke while having lunch, and Judge Joseph learned from the RAJ of the evidence, of the existence of Special Rule 211, which prohibited off the record recordings, Judge Joseph told the RAJ that she was unaware of the rule prohibiting off the record proceedings and expressed her understanding of the rule and promised that she would observe the rule in all future proceedings. Is that correct?

A. Correct.

Q. And then Judge Joseph denies that she was less than fully candid as she believe~~s~~d that the RAJ understood that Judge Joseph had directed that the conference take place off the record and that it was that understanding that prompted the meeting and the discussion about Special Rule 211 and its purpose. Right? That's what you said.

A. Yes. That's what I said.

Q. But you didn't say that you acknowledged it; correct?

A. I don't understand your question.

Q. Well, there's a difference between assuming or believing that she knew it and acknowledging it directly; correct?

A. Again, I'm not really understanding what you're saying. It made sense that I denied that I was less than fully candid, and I believe that at the time Chief -- well, at the time, First Justice Fortes understood that I had directed the conference to take place off the record and that -- I'm just having a hard time regarding -- and it was that understanding that prompted the meeting the discussion about the

rule.

Q. So you believed that she understood that you had directed the clerk to go off the record.

A. Yes. I mean, she said it when we started the meeting that she understood that part of record -- part of the conversation was off the record.

Q. She didn't say, I understand you told the clerk to go off the record; correct?

A. No. I don't remember the specific words. But it was clear that we were talking about the same thing. That's why she opened the book, read me the book, and she even printed a copy of the rule for me.

Q. But you never said to her directly, I told the clerk to go off the record.

A. Again, I don't remember. But it was clear that we were off the record. And I was the judge, so whether the words came out or it was inferred, I can't speak as to what the exact words that was said seven years ago.

Q. You talked to her about the recording equipment in Newton; right?

A. I did.

Q. And you talked about an incident in another

court; right?
A. In Waltham, yes.
Q. In Waltham. And that was an incident in which the recording system or the amplification system malfunctioned; correct?
A. The amplification system was -- We were having a side bar conference on a rather sensitive matter, concerning somebody's mental health, and I was notified by attorneys that were sitting in the audience that it was amplifying in the audience as opposed to just being at side bar.
Q. And that's not the way --
A. No.
HEARING OFFICER: Speaking of amplifying. Thank you.
Q. And so on that occasion, you turned off the record so that that wouldn't happen; correct?
A. I did. Actually, what I did, I just disconnected the microphone that was at the side bar. So the record was going on in the courtroom, but I just disconnected the microphone when the side bar conversation was occurring.
Q. And you talked about that with Judge Fortes --

A. I did.
Q. -- when she asked you about this.
A. Yes.
Q. In Newton, on April 2nd or at any other time, there was no malfunction of the recording system; correct?
A. No.
Q. It was a decision you made to direct the clerk to turn off the record; correct?
A. Right.
Q. You did not tell Judge Fortes in that conversation that you were concerned that ICE might take the wrong person.
A. Again, I don't remember the full extent of the conversation. We spoke about the case. She was worried about me having gone off the record and was really there to guide me. I was a new judge in her region. And it was a very friendly conversation. You know, I don't -- I would have shared with her everything that was relevant as I remember it.
Q. But you didn't tell her that you were concerned that ICE would take the wrong person; right?
A. Again, I don't remember the specifics of the conversation that we had.

Q. So you don't remember telling her that ICE wouldn't allow an attorney/client conference.

A. Again, I can't recall sitting here today exactly the conversation that we had. You know, I just -- I'm sorry. I just can't say for sure.

Q. So then you don't remember telling her that you were just pausing the arrest.

A. I wasn't pausing anything. I was trying to afford the attorney the time to speak to his client before he was taken into ICE custody, which is where I presumed he was going.

Her concern was the fact that I had gone off the record, she gave me the rule, she gave me a copy of the Lunn policy, which I had had because I received it on that day, and that was really the concern and some of the conversation. It wasn't a very long conversation. We finished our lunch and went back to session. I just don't recall the, you know, the complete dialogue of what we talked about, but we had a very open back and forth dialogue about exactly what happened that day.

Q. And the next thing you heard about this event was, I believe it was May 2nd, you got an e-mail from Chief Justice Dawley's administrative

assistant inviting you to come to a meeting with Chief Justice Dawley on May 8th.

A. Correct.

Q. And you got the recording from the clerk.

A. After I received that notification -- His e-mail had indicated what he wanted to talk about, that he wanted to talk about that matter. So I actually was sitting in Newton. And while I was there, I requested a copy of the -- They were on the old system. We talked about the JAVS system. So I requested a copy of the CD so that I could listen to the hearing prior to meeting with Chief Justice Dawley.

Q. And you did listen to it.

A. I did.

Q. And so when you went into the meeting with Chief Justice Dawley, you had listened to the recording.

A. I had.

Q. And you knew that the recording showed that you had told the clerk to turn off the record.

A. Right.

Q. So when you went into that meeting, and Chief Justice Dawley asked you about going off the record, you acknowledged --

A. Of course.
Q. -- to the Chief Justice that you had gone off the record. Correct?
A. Of course I did.
Q. And you apologized for it.
A. I did.
Q. And you told him that the off the record discussion was about the defendant's identity with respect to the Pennsylvania warrant; correct?
A. And it was, yes.
Q. And -- It was? You're saying that the off the record discussion was about the issue of identity regarding the Pennsylvania warrant?
A. No. The off the record conversation was about the defendant's identity, period, and also the defendant's request to -- the defense attorney's request to speak to his client downstairs with the assistance of the interpreter prior to his release.
Q. Before the off the record discussion, the assistant district attorney had told you that she didn't believe he was the person wanted in Pennsylvania; correct?
A. Correct.

Q. So the off the record discussion, ~~before~~regarding the off the record discussion, that issue was done; correct?

A. Again, it was the off the record conversation, as best as I remember, it was really a continuation of the conversation that started on the record. The only difference is that the defense attorney asked that the client to speak with his attorney in the lockup prior to his release from state custody, which I allowed. But I don't know that you can separate the identification issues. They're all part of and parcel of the same thing.

Q. But you weren't talking about Pennsylvania in that off the record discussion.

A. Again, it was a continuation of the conversation that happened on the record.

Q. The Chief Justice asked you if you had anything to do with the defendant being released out the back; correct?

A. He did.

Q. And you denied it.

A. I did.

Q. And you did not say that you were concerned that ICE would take the wrong person.

A. Again, I don't recall the specific things

that we talked about other than what happened during that matter.

Q. You did not say that you thought you should determine if defendant was the right person for the ICE detainer.

A. No, I don't believe so. I just -- I don't -- I don't know that I understand your question.

Q. Well, should we go back to your interview with me in Appendix ~~M~~N, Page 229, when you said, starting at Line 8, you said, I certainly felt that I had a responsibility as a judge to everybody involved, the defendant, the attorneys, whoever they may be, the district attorney's office, ICE, everybody, we needed to know who he was, it didn't matter to me whether this was on or off the record, ascertaining his identity was a huge importance to me, and I felt there was responsibility to know who he was.

So you told me that you had a responsibility to determine his identity for all purposes, including the ICE detainer; correct?

A. Well, I'm looking at it, that I wanted to know who the defendant was, period.

Q. But you didn't tell Chief Justice Dawley that you thought you had a responsibility to

determine if he was the right person for the ICE detainer; correct?

A. I'm just going back to look at the transcript.

Q. Yup. Take your time.

(PAUSE)

A. So if you go back to the page before, you have the whole conversation. You know, we were just talking about the identity of defendant and as it pertained to everybody. And again, I was just trying to be fair to everybody and give everybody enough time to do whatever job they felt that they needed to do for the person that's before me.

Q. But you thought you had a responsibility to determine who he was and that included for ICE; correct?

A. No. I was affording his attorney enough time to investigate his identity as he saw ~~it~~ fit.

Q. So go back to that big paragraph where you're answering on Page 229. We've got a list of people who you thought you had a responsibility as to ascertaining his identity. The list includes ICE; correct?

A. It does. But I don't think that what ~~was~~

I meant by that was that I had the responsibility to determine his identification for ICE purposes. I wasn't concerned about ICE. I was concerned about the attorney having enough time to do whatever investigation he felt necessary to help his client. The fact that ICE was there, it really didn't make a difference, other than the fact that the issue of identification was raised. And that's why I hit pause, which is the word I use here, let's come back tomorrow, let's do this tomorrow.

Q. So when you refer to ICE here in this paragraph long answer, that's what you meant, was to give the attorney an opportunity to figure out? It wasn't that you were supposed to make a determination.

A. No. I didn't need to make a determination.

Q. Well, certainly, you didn't need to make a determination. But your answer here was not that you -- You're telling me now, you're telling the hearing officer now, that your answer did not indicate that you thought you had a responsibility to everybody, district attorney's office, ICE, everybody, we needed to know who he was.

A. Again, I felt that I needed to be fair to everybody that was before me, and I wanted to everybody to be able to do their jobs as they wanted to do their jobs.

Q. All right.

A. And that includes ICE.

Q. And in that -- So that includes ICE, that you wanted ICE to be able to do the job as they should, and part of that issue is whether it's the right person; correct?

A. Yes. But that's not my determination. That's, you know, that was for the attorney to figure out if he could --

Q. Certainly not your determination.

A. No.

Q. You know that now.

So in this conversation with Chief Justice Dawley, you did not say that you intended to pause the ICE arrest; correct?

A. Again, I don't recall the specific words that we said, and there was no discussion about pausing any arrest.

Q. But that was part of what you told me at our interview, right, that you were just pausing? Correct?

A. Right. I was pausing to continue the matter until tomorrow so that everybody could come back and do the jobs that they needed to do.

Q. And you did not say to Chief Justice Dawley, as you have said in your response to the Commission's charges, that you had the unintended effect of assisting in what happened. Right? This is Paragraph 32 of the response.

So Judge Joseph agrees that the unintended effect of her assent to allow defense counsel and the interpreter to accompany Medina Perez to the lockup was to assist defense counsel's plan, but denies that she had any knowledge of the plan. And then it goes on. Or that she intended to assist the plan or that she intended to permit anything other than the retrieval of the defendant’s property. And it goes on.

So in response to Commission's charges, you said you agreed that you had the unintended effect of assisting defense counsel's plan. You didn't tell Chief Justice Dawley that, did you?

A. Again, I wouldn't have -- I mean, I had no intent to help the defense attorney with his plan. So that's what I would have told

Chief Justice Dawley, and that's exactly what I did tell Chief Justice Dawley.

Q. But you didn't tell him you had an unintended effect of assisting; correct?

A. I don't know. Again, I don't remember the words that we used, but I can't imagine that I would have included that.

Q. And what you told Chief Justice Dawley was that you denied completely that you had anything to do --

A. I didn't have anything to do with it.

Q. But we're talking about the conversation with Chief Justice Dawley. You denied completely that you had anything to do with it.

A. Of course.

Q. And in your interview with me, I asked you, a similar question, I asked you if you had done anything to facilitate, and at that time you did say that you wanted to pause the ICE arrest, but you did not say that you had the unintended effect of assisting or intentionally assisting; correct?

A. Right.

Q. And you deny completely that you had anything to do with it.

A. Right. I didn't.

JUDGE FABRICANT: That's all I have. Thank you.

HEARING OFFICER: Ms. Mulvey.

MS. MULVEY: Thank you.

CROSS-EXAMINATION

BY MS. MULVEY:

Q. Good morning, Judge Joseph.

A. Good morning.

Q. Okay. I just want to sort of fill in some of the gaps without repeating everything that you've already said. Fair enough?

A. Sure.

Q. Okay. Now, you've talked a little bit about your background as a defense lawyer, both as a bar advocate and private counsel.

A. I did.

Q. Did you also spend some years on the law enforcement side?

A. As a prosecutor, yes.

Q. Tell us about that, please.

A. So when I finished law school, I actually worked at the State House as legal counsel for a state senator for about six months, and then I was hired by the attorney general's office where

I spent the next -- close to seven years of my career. While at the attorney general's office, I spent some time in family bureau, family community crimes bureau, where I worked with victims of violent crimes who would at that time sue the state for financial recovery as a result of being victims of violent crimes, and it was my determination whether or not to award out-of-pocket expenses or not. I then went to the criminal bureau where I spent five years as a special assistant district attorney, working as a~~sn~~ ADA~~baby~~ at the Suffolk County attorney's office, and in between those five years I was there for a year in District Court, and then -- well, which was then District Court, now we call it the Boston Municipal Court, and then I spent three months back at the attorney general's office in the insurance fraud bureau where I prosecuted insurance fraud cases, before coming back to the district attorney's office as a special assistant, where I spent the last four years in Superior Court, again, back in the gang unit.

Q. And as a result of working both as a prosecutor and criminal defense lawyer, how did you see your role as the judge?

A. I saw my role as kind of an intermediary before -- between both. Having been on both sides, my role was to be fair to everybody who appeared before me. I had been a prosecutor and I had appeared before many judges. I had been a defense attorney, I tried many cases, I was in court very often. And I wanted to make sure that everybody who came before me and what felt fair, felt that they had an opportunity to be heard, and that I handled their matters, you know, so that they felt that, you know, that they were able to be heard.

Q. Did that include ICE?

A. It did.

Q. And if Attorney Jellinek had said, yes, let's just come back in the morning, let me see what I can do, was it your assumption ICE would come back?

A. Absolutely.

Q. And depending on how successful David Jellinek had been, what did you think ICE would do?

A. If they were convinced that they didn't have the proper paperwork that -- or identification of the defendant, that they would have released the detainer and then not be able to serve the

detainer.

Q. Did you think that continuing the proceeding for one day and having ICE come back to give David Jellinek time, if that's what he wanted, did you think that that was obstructing or impeding or hindering ICE?

A. Not at all. I thought it was giving the attorney time that he needed. It was already 3:00, a little bit later in the afternoon. You know, the court closes down at 4:30. I was just trying to give him as much time as he needed to do whatever investigation he wanted to do.

Q. Let me back up a little. We've heard that this was a Monday in the Newton District Court?

A. It was.

Q. And you said you think it was the first time you had a docket. Can you tell us what that means?

A. Yes. So there's a docket of cases that are scheduled to be in court every day. As I had indicated a little bit earlier, Newton is a little unusual in that it's a small court. It only represent one town, the town -- or the city, the City of Newton. And on Thursdays, the First Justice doesn't sit in Newton, she sits over in Quincy to handle their recovery court.

And so a visiting judge sometimes, not all the time, comes to Newton to sit in case of any emergencies. On all other days there is a judge that's assigned to Newton District Court and handles whatever cases are on the list for that day. So this being a Monday, I had all the weekend arrests plus anything that had been scheduled to be heard that day.

Q. So by Newton standards, was this a busy day?

A. It actually was a busy day, particularly for a Newton standard. Not a lot happens in Newton. I think we had about 20 cases on the list, which is very busy for Newton.

Q. And as we've heard, First Justice Heffernan was not there that day?

A. Correct.

Q. As a visiting judge, how did you see your relationship or responsibility with the First Justice or the Presiding Judge?

A. So I always like to -- The First Justices are, you know, the leader of the court, and I always like to follow how they like to do things in their court.

Q. Was that part of sort of trying to be fair or trying to respect everybody?

A. Absolutely. We're taught that we're judges, we're independent, we can make our own decisions. Particularly as a new judge who's learning and meeting my colleagues for the first, second, third time, I certainly want to be respectful and fair to judges, particularly senior judges who have practices and policies that are specific to their courts, because every court is different.

Q. At this point, by April of 2018, can you give us some idea of how many different District Courts you've sat in over five months?

A. I believe at that time there were eight District Courts in the region where I was assigned to. So, certainly, sometimes we would sit out of region if we needed to cover for somebody else. So it was a possibility that I sat in more than eight, but I at least sat in eight courts.

Q. And if you sat down and you thought about it and made a list, would you be able to come up with something unique or perhaps even odd about every single one of them?

A. Oh, absolutely.

Q. Just the way it works.

A. It's just the way it works. Every District Court -- They're all built at different times. They're not cookie-cutter courts. They're all different.

Q. Now, during the morning, one of cases that came before you was Jose Medina Perez; is that right?

A. Correct.

Q. And this was a misdemeanor drug arrest --

A. Yes.

Q. -- over the weekend.

A. Yes.

Q. Were there, as we've heard, two additional nuances or facets or complications?

A. There were.

Q. One was the Pennsylvania warrant and one was the ICE detainer?

A. Correct.

Q. Now, you I think said to Special Counsel Fabricant on your direct exam something about the Pennsylvania warrant and the ICE detainer using the same biometric information?

A. Yes.

Q. Could you tell us what you meant by that?

A. So I was under the assumption that -- So when

somebody's arrested on a criminal offense, there's a bail determination made. There was -- This individual was held without bail over the weekend between his arrest and the time of his arraignment. And it was then that they determined that -- it was during that time that they determined that he was also alleged to have been a fugitive from justice out of Pennsylvania. And it all goes into the same central computer system so all law enforcement agencies get their information off that same central system.

Q. Okay. And so when you say the same biometric information, do you, as either a prosecutor or defense lawyer, have some understanding what the police department actually does to figure out there's a fugitive warrant and an ICE detainer?

A. I believe that they've just got to type into it the system and then up pops the information.

Q. And do they do that by name or height or eye color or fingerprint? What do they use?

A. So it's my understanding they use their name and the date of birth, and that alerts all other law enforcement agencies that an inquiry has been made.

Q. And biometric, does that mean fingerprinting?

A. I believe it means fingerprints and maybe any other information that they may have about the person.

Q. And knowing that basically Pennsylvania and ICE would be relying on the same sources, did that enter into your thinking?

A. It did.

Q. How?

A. Well, if one agency got it wrong, there's certainly a possibility that the other agency was wrong, too.

Q. And was that what the lawyers were telling you?

A. Exactly.

Q. Did you think it was fair to give them a chance to prove that to whoever?

A. I did. I mean, I had two lawyers who were questioning their client's, same client's identification based on the same, I'm going to say biographical, biometric information.

Q. And in fact, as the day evolved, did somebody, -- and maybe we'll talk about who in a minute -- did somebody convince the Commonwealth that Pennsylvania had the wrong guy?

A. They did. And what was odd about it is that in the morning the assistant district attorney

was adamant that that's who Pennsylvania thought he was, and she had made a call, I believe to the department, and they said, yes, we're going to come and get him. And there was also a photograph that had been shown to me that was inconclusive to me as to whether they were the same person or not. I think the photograph was from the Pennsylvania arrest eight years prior. And I couldn't tell whether it was the same person or not. So -- And then after the lunch break, it appeared as if ~~where~~ she didn't believe it was the same person that she was -- she received some information to convince~~d~~ her of that.

Q. The prosecutor.

A. The prosecutor, yes.

Q. Let's go back to the morning. We heard that there were three or four calls of Mr. Medina Perez's case?

A. Yes.

Q. Is that common in the District Court, that they'll do a second or a third call?

A. There is. Typically, when there's an interpreter involved.

Q. Why is that?

A. Because you want to give the attorney time to

speak with their client. Oftentimes -- I don't know whether this was the case on this day or not -- the interpreter has multiple people that they have to the interpret for. And so oftentimes that takes some time to do that. In a case such as this and any case of this matter, you need to afford the attorney time to speak with their client so that they can determine if there are any issues, questions of identification. Again, that's the first issue, the question that we ask as judges on a fugitive matter. And then to get whatever information they need from their client.

Q. Who was representing Mr. Medina Perez in the morning?

A. So in the morning, I appointed Attorney Bostwick to represent him.

Q. And she's referred to as a bar advocate?

A. She was the bar advocate. She was our duty attorney for the day. And Newton typically only has one duty attorney, because typically the list isn't very long, so they just assign one attorney to handle the case, indigent clients that appear for arraignment.

Q. And so had somebody determined that

Mr. Medina Perez was indigent?
A. Yes. I was actually told he was marginally indigent. He was afforded an opportunity to have a court-appointed attorney, but the fee for that would be little bit more. I also want to say that, if somebody does come in and doesn't have an attorney, and if there is a question of detention as opposed to release that day, a bar advocate would be appointed for bail purposes only, just to make sure that person has an advocate for arraignment.
Q. But in this case, it was because Mr. Medina Perez was marginally indigent --
A. Correct.
Q. And we've seen some mention of $150. Is that what he'd pay?
A. Yes. That's a statutory fee for court-appointed counsel.
Q. Now, at some point in the morning did you attempt to reach First Justice Heffernan?
A. I did.
Q. Tell us about that.
A. So there was -- And I don't remember all of the detail, but there was another matter on the list where I believe I was told that it was a

file she had in her office as opposed to in the clerk's office. So somehow it didn't make its way into the courtroom. And we couldn't find it. And so I called her in the morning just to find out if she knew where that file was, since the clerk's office couldn't find it and it was on the list.

Q. And how did you try to reach her?

A. I called her on her cell phone. I didn't know she was at a funeral. I just knew she wasn't at court. So I wouldn't have called. But I called her on her phone and left a message.

Q. Did you get any response?

A. I didn't.

Q. Now, did Attorney Bostwick continue to represent Mr. Medina Perez throughout the morning?

A. She did.

Q. And in fact, right up until the time court recessed for the luncheon break, --

A. That's correct.

Q. -- was she representing Mr. Medina Perez?

A. She was.

Q. And based on what you knew, did she intend to continue to represent him after the lunch break?

A. She did. In fact, she asked if she could come back a little bit late after the lunch break because she had a medical appointment which -- and she was waiting for a fax. So it was pretty clear to me that she intended to come back after the lunch break to continue to represent Mr. Medina Perez.

Q. Up until the point of the luncheon recess when Attorney Bostwick was saying can we start at 2:15 instead of 2:00, had you seen David Jellinek that morning?

A. I hadn't.

Q. Did he appear on any other matters that morning?

A. He did not.

Q. Did you see him sitting around in the back of the courtroom?

A. I did not.

Q. Did he say anything on the record?

A. In the morning session?

Q. Yes.

A. No. He wasn't there.

Q. Now, so we saw around 12:40, 12:45 there was the luncheon recess?

A. Yes.

Q. And you know in Massachusetts we eat lunch from

1:00 to 2:00; is that right?

A. Correct.

Q. All right. Up until the time of luncheon recess, were you aware that there was an ICE officer --

A. No.

Q. -- in the courthouse?

A. I was not.

Q. How did you become aware of that?

A. So towards the end of the lunch break, when I was sitting in the lobby, assistant clerk magistrate -- First Assistant Clerk Magistrate Okstein came into my lobby and informed me of that.

Q. Do you recall what he said?

A. He said, Judge, just want to let you know that the Medina Perez matter that is coming in at the end of the afternoon, that there's an ICE agent here with a detainer, and that Newton District Court has a policy that does not permit ICE agents to sit in the courtroom during matters, would you like me to follow that policy.

Q. And had you ever heard of a policy like that before?

A. I had not.
Q. What did you think?
A. Well, I asked him -- Particularly new judges rely on our clerks. And having practiced in Newton, I knew Clerk Okstein a little bit. I'm like, you know, do we -- do you have a copy of that policy. And he informed that it was state court protocol, it was a proper practice. I'm not sure what word he used. So there wasn't -- And I said, do other judges do that, do you have to do that. Like, you're the judge. And I stated, do we have any policies around about how to handle ICE matters in the courthouse. I figured there's a policy for everything, there has to be a policy. And he didn't -- he says, yes, I know there's a policy, you know, let me see if I can find it. I started looking for a policy. I was looking in my training materials. I looked. I couldn't find it in my materials. I started looking in Judge Heffernan's office to see if I could find anything for any guidance. When I realized I wasn't easily putting my hands on anything, I called down to the administrative office for some guidance from the legal counsel who were there for us when you have questions.

Q. Why did you spend so much time? Why didn't you just say, well, if that's Judge Heffernan's policy, we'll do it?

A. Because it seemed odd to me to have a rule to exclude anybody from the courtroom. And it just, it just made me pause and say I just want to make sure I can do this. It just didn't seem right to me.

Q. Well, why didn't you just say to Clerk Okstein, I don't care what Judge Heffernan does, I'm not doing that?

A. Because I was a four-month-old judge and sitting in somebody else's court and I wanted to be respectful to Judge Heffernan and her policies, also, and if it is part of the policy that was proper or allowed, I certainly wanted to follow it.

Q. Did you call Downtown to the District Court office?

A. I did.

Q. Did you speak to somebody there?

A. I did.

Q. Do you recall who it was that you spoke to?

A. I believe I spoke with Ellen Shapiro and I may have also spoken with Zach Hillman. I don't

remember whether I spoke with him or not. I remember speaking with Ellen Shapiro.

Q. Were there actually a couple of calls?

A. There were a couple of calls. I called -- It was during a lunch break. And I left a couple of voicemail messages for various people. I think I left one for Ellen, I left one for Zach. After getting both their voicemails, I actually called the administrative assistant to the administrative office. Her name is Sarah Adamson. And I said, Sarah, I really need some help, are there any of the legal counsels available. There is at the time. I said I don't care who you talk to, but I have this issue here in Newton and I would really like to get some guidance. And she said, let me get back to you. And then within a few minutes, I believe Ellen Shapiro called me.

Q. Did you have a conversation with her about this situation with ICE?

A. I did.

Q. And tell us about that.

A. So I recall saying to her, I have a situation

here in Newton where I've been asked to exclude ICE from the courtroom. I said, can we do that, is there any guidance that you can offer as to whether that protocol is proper, and if so, do I have to follow it, because I just have some concerns about excluding people from a courtroom. And she said, let me get back to you. And there is a policy.

HEARING OFFICER: Trying to be respectful.

Is there any way we can just do something about the noise here?

MS. MULVEY: Would it make sense, Your Honor, just to take -- I'm almost moving topics. Would it make a sense to take a break and let them do what --

HEARING OFFICER: Sure. I didn't mean to interrupt.

MS. MULVEY: It doesn't matter.

HEARING OFFICER: Are you okay with that?

Why don't we take our 10-minute break now.

(Recess taken at 10:52 a.m.

Proceedings resumed at

11:11 a.m.)

HEARING OFFICER: Thank you, Court Officer, for taking care of that.

I hope it doesn't get too warm back there. And if it does, we'll put that back into operation.

Thank you. You may continue.

MS. MULVEY: Thank you.

Q. Judge Joseph, we were talking about your calls with the administrative office of the District Court; is that right?

A. Yes, yes.

Q. And when they called you back, what happened?

A. So when they called me back, they read me the Lunn policy and --

Q. The whole thing?

A. A lot of it. I think it was the whole thing. Certainly, the relevant parts to it. And then I asked, again, you know, is the Newton policy -- can I do this, and I was given the advice and I remember this story, that the Newton policy is not inconsistent with our policy.

Q. I'm sorry. Not?

A. Not inconsistent. Correct.

Q. All right.

A. So you can make the decision you want to make. So I'm the new judge, it's on me. I go, what should I do? She says, you're the judge. But I'm a new judge. And if I have discretion, I wouldn't have normally done that. She says, you're the judge, you make the decision that you want. And I said, you know what, I'm a visiting judge, I'm a new judge, I'm not doing anything that the First Justice in this court wouldn't want me to do so long as it's proper under our policies.

MS. MULVEY: Okay. May I approach the witness?

HEARING OFFICER: Yes.

Q. Let me show you an e-mail with a document. Do you recognize that?

A. I do.

Q. What is it?

A. So that's an e-mail that was sent to me by Ellen Shapiro with a copy of what we refer to as the Lunn policy, the November 10th of 2017 policy.

Q. What time was that e-mail sent?

A. So the e-mail was sent to me at 3:19 --

Q. All right.

A. -- in the afternoon. But it was --
Q. I was going to say, is she forwarding to you an earlier e-mail?
A. Yes. So it was scanned in to me at 1:54 in the afternoon that day.
Q. And is that about the time you were having these conversations and getting the policy read to you?
A. Yes. That was still within that lunch period and prior to -- like I said, I delayed coming back on the bench because I was trying to understand this policy and that was during that time period.
HEARING OFFICER: I'm sorry. Can you just clarify for me, when you say that it was scanned in to you, what does that mean?
A. So it looks like Ms. Shapiro scanned, it looks like she scanned the policy at 1:54 in the afternoon, which is around the time that I had called for some advice. I had called earlier, and she got the policy and scanned it in. It looks like it was e-mailed to me at 3:19 in the afternoon. So I received the physical copy of the policy after the hearing, but she read me the policy around 1:54 prior to the hearing.

HEARING OFFICER: Got it.

Q. Actually, if we look at it, does it look like some serial number for a scanner sent it to Ellen Shapiro at 1:54?

A. Yes.

MS. MULVEY: I'd offer this as the next exhibit. I think it's 4, maybe.

HEARING OFFICER: 5. Exhibit 5 is received.

EXHIBIT 5

(DOCUMENT MARKED AS EXHIBIT 5)

Q. Now, attached to this is four pages of what we've been calling the Lunn policy; is that right?

A. That's correct. I don't have a copy here anymore but...

Q. Oh, I apologize.

A. Yes. I saw that that was attached. Thank you.

Q. And do you remember Ellen Shapiro reading to you the part about people who were in custody and being released?

A. I do.

Q. Is that in Section A on the bottom of Page 3?

A. Yes.

Q. And it says, Individuals over whom the Trial Court has custody.
A. Correct.
Q. And then it talks about an individual who was brought in—to court in custody and is subject to release after his or her court proceeding.
A. Yes.
Q. Right? Now, at the point this was being read to you, the prosecutor had not yet told you she'd changed her mind on the Pennsylvania warrant; is that true?
A. That's correct.
Q. So at the time this was being read to you, did you know what was going to happen?
A. I didn't.
Q. All right. And did she read the part about how people -- Well, strike it. If he wasn't released, was ICE going to get him?
A. No.
Q. All right. So if you were, for example, were to hold him for Pennsylvania, --
A. Correct.
Q. -- what would happen?
A. I believe that in the hierarchy of what would happen, because we had him on state charges in

Newton, which included the fugitive ~~of~~from justice matter, if I held him without bail on the fugitive from~~of~~ justice matter or the Newton matter, ~~you know,~~which wasn't an issue at that time, then we would have kept custody of him until Pennsylvania made the determination whether or not to come in and take him, so to speak. So Massachusetts on behalf of Pennsylvania would have had control of the body, for lack of a better word.

Q. Okay. And does that mean that ICE would or would not take custody of him?

A. ICE would not have been able to take custody of him.

Q. All right. And so ICE would be an issue if for some reason the Pennsylvania warrant wasn't an issue?

A. Correct.

Q. And during the lunch hour, did you have an understanding that that was sort of a live issue, what's the story on Pennsylvania?

A. Yes. And that's when we continued matter until the end of the lunch break, a little further than the lunch break, so that the attorney could continue to do her investigation

on whether he was the same person that was subject to the Pennsylvania warrant.

Q. All right. Now, I assume, since your issue was ICE in the courtroom, you and Ms. Shapiro were sort of looking very carefully at what it said about where ICE could and couldn't go?

A. Exactly.

Q. All right. And if we -- I guess we don't need to read the whole thing. But did you read through or did you have it read for you -- to you Section A to see if it said anything about ICE in the courtroom?

A. Yes, we did. And I know that -- We actually read the sections a couple different times, because I didn't physically have a copy, and we were going back and forth, and she was having to repeat reading it to me. We were bBoth together trying to make whatever determination we needed to make.

Q. All right. And after that process was done, did the two of you decide it didn't say you couldn't keep ICE out of the courtroom?

A. Yes. And again, her word was it's not inconsistent.

Q. And did she read to you parts about where ICE

was permitted to go?
A. Yes.
Q. And what was your understanding about that after she read the policy to you?
A. So after she read the policy and indicated that having ICE remain outside the courtroom during the proceeding was not inconsistent, she also told me that they are permitted to go to the lockup and that that's a preferred place to take custody of somebody because it's the most secure and safest place to do that.
Q. Did that make sense to you?
A. Made complete sense.
Q. All right. Had you ever, either as a judge or a defense lawyer, been in a lockup at the Newton District Court?
A. Only as a defense lawyer.
Q. How did you come to be in the lockup as a defense lawyer?
A. If I had clients who were in the lockup area. If I was the bar advocate, and I needed to interview a client, I would interview a client in lockup, you know, for arraignment purposes or whatever needed to happen. And if I had a client in the lockup that was being transported

elsewhere after a case, then I would go to the lockup to interview my client or talk to my clients, is probably a better word, before being released to wherever they were going next. So, yeah, to interview clients.

Q. And did you know how custodies got in and out of the lockup?

A. So from my experience, if you came in custody, you came in through the sallyport. If you left in custody, you left through the sallyport.

Q. And the sallyport is that secure door leading into the fenced area that we --

A. Yeah. It's secure. That black fence area we saw at the view.

Q. And so somebody, a sheriff or ICE or whoever, could pull up a vehicle and it would be a very short distance?

A. Yes.

Q. To transport the prisoner?

A. Yes. So the vans would pull right in, they'd come out the doorway, and go in. I never witnessed that, but that's what we knew happened.

Q. After your last conversation with Ellen Shapiro, did you speak with Clerk Okstein again?

A. I did.
Q. What did you tell him?
A. I told Clerk Okstein that I had tracked down the policy and that I would follow Chief Justice -- chief Justice -- First Justice Heffernan's policy.
Q. Did you ever actually talk to any of the ICE agents yourself?
A. No. I never saw any of the ICE agents that day.
Q. Never laid eyes on them?
A. No.
Q. Did you know how many were there?
A. I did not.
Q. Now, after your conversation with Attorney Shapiro, did the session start up again?
A. At some point, yes. I don't recall how much after that, but yes.
Q. And who showed up for Mr. Medina Perez?
A. Mr. Jellinek.
Q. How did you learn that that was happening?
A. The case was called, and then there he was. And I was told by the clerk, as we saw in the transcript, that Mr. Jellinek had filed an

appearance of counsel.

Q. Was that the first time you saw David Jellinek that day?

A. It was.

Q. Was he somebody you knew from court business?

A. He was. I didn't know him well. But I knew him because he was a defense attorney, and we would oftentimes -- often -- a handful of times were in the same court at the same time, so I knew his face and I knew enough to say hello to him.

Q. Now, if we look at the transcript --

A. I'm sorry. He also appeared before me when I was a judge. I sat in the Waltham court, also, and he used to take bar advocate cases in Waltham, and I do recall he appeared before me once when I was on the bench as well.

Q. Now, do you have the transcript there?

A. I do. Can you just tell me what section it is, please?

Q. It's Section G. And I think we're somewhere around App 40.

A. Okay.

Q. And I'm looking at the part that starts at 2:48:48. Do you see that?

A. I see 2:48. Yes, I do.
Q. Okay. And is this when you first got to side bar or they first got to side bar?
A. Yes. Yes.
Q. Okay.
A. I was looking above, the paragraph above that says 2:48:13, but that's just when the case was called. So the side bar began at 2:48:48.
Q. And we've heard you would sort of roll~~ing~~ your chair over to the side where the lawyers were?
A. Yes.
Q. And was David Jellinek there?
A. He was.
Q. Was Assistant District Attorney Jurgens there?
A. Yes.
Q. Standing side by side?
A. Standing side by side.
Q. And if we go to the next page. Attorney Jellinek had been pressing his point that this wasn't the fellow that ICE was looking for?
A. Right.
Q. Was he consistent about that?
A. He was.
Q. All right. And he said, I think the best thing to do is to clear the fugitive issue, release

him on a personal, and hope that he can avoid ICE. Did you think that that meant he was going out the back door?

A. Oh, God, no.

Q. Did you think that by "avoid ICE" he meant in any improper way?

A. No.

Q. Is there any way you would have been a party to that?

A. No. Absolutely not.

Q. If we look down at the next thing you said, does that help you figure out how you interpreted what he was saying?

A. Well, it does. Because as soon as he said that, my response is, if you need more time to figure this out, we could -- I said hold until tomorrow. I think hold him until tomorrow is probably what I said, but it just probably didn't get picked up in the transcript. Same sentiment.

Q. And when you said, if you need more time to figure this out, what was in your mind?

A. That if he wanted time to investigate his client's identity and time to convince ICE that it wasn't who they thought he was, if he wasn't

who they thought he was either, that I'd be happy to give him time to do that.

Q. We've heard this is almost 3:00 in the afternoon?

A. It was.

Q. All right. Why didn't you say, I'll give you another hour?

A. It was getting to be late in the day. I'm very sensitive to custodies and -- as a judge, as a lawyer. I just know the court officers always like to get the custodies out as soon as possible. I didn't know that he'd be able to get that information in an hour or so, so I thought the best thing to do was to give him as much time as he needed, I had given the attorney hours in the morning, I'd give him the same courtesy, done with court by then, so everybody just come back tomorrow.

Q. Now, I think you said on direct that ultimately Attorney Jellinek said, no, that's not what I want; right?

A. Correct.

Q. Was that on the record?

A. I don't remember.

Q. Well, if we read through, do you see any place

on the record where Attorney Jellinek says, no, I don't want more time, I don't want to come back tomorrow?

A. I don't.

Q. Did he ultimately tell you, no, that's not what I want?

A. He did.

Q. Is it fair to assume, then, that that must have been part of the continuation off the record?

A. That must have been -- Yes, that must have been off the record.

Q. Do you actually remember that?

A. I don't.

Q. But do you remember he didn't want more time?

A. Yes.

Q. Once he told you, no, I don't want to come back tomorrow, did you drop the issue of holding him?

A. I did.

Q. When you were talking about holding him tomorrow, did you see that as any different from holding him from first call to second call or holding him over the lunch break?

A. I didn't.

Q. Why not?

A. Because I had given the attorney in the

morning enough time to do her investigation. I wanted to give him the same amount of time to do his investigation. And given the time of the day, I just thought holding him until the following day would be the best way to give him enough time to do that. Plus, I wasn't coming back the next day and thought maybe another judge would handle it.

Q. Would it have broken your heart?

A. It would not have broken my heart.

Q. Okay. When you said, hold him until tomorrow, did you think that would allow him to escape ICE if he was the right guy?

A. No, no. To hold him, meaning detain him, keep him in custody for the evening with no opportunity to post a bail. No. He was coming back to Newton District Court the following day. And the attorney would come back, the assistant district attorney would be there, ICE would certainly be, everybody would just come right back the following day. The only question would be whether or not I would be there. I may come back to handle the matter or who -- they may have swapped us or maybe I would have been off to wherever I was going the next day.

Q. And certainly, if his lawyer said, yes, that's what I want, I want to come back tomorrow, did you think it would be all right for you to do that?
A. Of course.
Q. And over his lawyer's objection, did you make any attempt to hold him?
A. No.
Q. You also said that the thing you do remember that was different was that he asked to speak to his client downstairs with the interpreter.
A. Yes.
Q. Did that strike you as crazy or an unusual request?
A. Not at all.
Q. Why not?
A. I thought it was a completely appropriate request. I was under the impression that he was going to go back downstairs, pick up his property, and go right into ICE custody through the sallyport, and in order for him to have an opportunity to speak with his lawyer, that would be the -- I mean, his client, that would be the only place to securely do that.
Q. Did you have any role in how ICE would actually

get him, where they would actually get him?
A. No, no.
Q. And so were you actually thinking, well, okay, he can go downstairs or he could go to the sallyport or go out the front, was that, as a judge, was that your responsibility?
A. No. That's a security issue. And I was familiar with the Lunn policy where, as far as I knew, it was all going to happen in the lockup.
Q. And in fact, once you went back on the record, you arraigned Mr. Medina Perez.
A. I did.
Q. And you gave him some required statutory drug warnings?
A. I did.
Q. And just as things were winding down, you had ordered him released; is that right?
A. I did.
Q. And that was released from state custody?
A. Released from state custody. I did not set a bail on the state charges. And the fugitive matter at that point I dismissed.
Q. Once you had ordered him released, did you think you had any further say or responsibility in what would happen to him?

A. No.
Q. Did Clerk Okstein then tell you to just wait a second?
A. He did.
Q. And he said there was a representative from ICE here in the court inaudible to, to visit the lockup?
A. Yes.
Q. And you said, that's fine, I'm not going to allow them to come in here, but he's been released on this.
A. Yes.
Q. What did you mean by that?
A. What I meant is that that's fine, they can go to the lockup, but in compliance with Newton District Court policy, they can't come into the courtroom to access the lockup, but they can use any of the other entrances and opportunities to get to the lockup that they're able to.
Q. Did you think that the ICE agents had walked or taken the T to the Newton District Court?
A. No. I assume they drove.
Q. All right. And would you assume that they would be placing Mr. Medina Perez into a vehicle?

A. Yes.
Q. Is there a place at the courthouse where that happens?
A. Typically in the sallyport.
Q. Did you actually think about that or concern yourself with the logistics?
A. I didn't. That's really a security issue. But you know, I just had the policy read to me, and it makes complete sense to take custody of somebody in the lockup where they're already there anyway and it's the most secure place. I mean, I wouldn't want -- It's just the most secure place to do it.
Q. Now, the court recessed as Mr. Jellinek and the interpreter and Mr. Medina Perez were going downstairs; is that right?
A. Yes, yes.
Q. And having seen the transcript, did you actually handle two more short matters afterwards?
A. I did.
Q. Do you recall what time you left the courthouse that day?
A. Sometime around 4:30.
Q. As of that time, had anybody told you what had happened with Mr. Medina Perez?

A. No.
Q. What did you think happened?
A. I figured he went into ICE custody and that was the end of it.
Q. The next day, did you sit in the Newton District Court?
A. I didn't.
Q. When were you next there?
A. I was in Newton two days later. So on the 4th, on that Wednesday.
Q. On the 3rd, on Tuesday, did anybody call you up and say, let me tell you about Mr. Medina Perez?
A. No.
Q. Did anybody call you up and say, what happened, what did you do?
A. No.
Q. What happened on Wednesday, April 4th?
A. So on Wednesday, April 4th, I got to the courthouse, I went in and checked in with Judge Heffernan, and she gave me my assignment for the day. She asked if I would handle the jury session upstairs. So I went up to the second floor lobby. I handled the matters that were on that day. Some were jury matters, some were not jury matters. There was some overflows

from the first session. And then when the session was down on a break, either I went down to her lobby or she came up to my lobby, I can't remember, and we talked about the Medina Perez case. That's when she notified me that, she said that he had been released out the back and had not been apprehended by ICE.

Q. Was that the first you were hearing it?

A. That was the first I heard of it.

Q. What did you say to her?

A. I said, how did that happen.

Q. What did she say?

A. She said, that's what I'm trying to find out.

Q. Do you recall exactly what she said and what you said?

A. I don't recall everything that she said. She did tell me she had talked to Attorney Jellinek by then and that either she was going to or she had, I don't recall, talked to the chief court officer and other court officers who were there, and she wanted to find out from me what happened, so we briefly discussed what happened.

Q. Did you tell her that you had gone off the record?

A. No.

Q. Did she ask you?
A. No.
Q. At that point did you know that it was against the rule?
A. I didn't. I didn't know until Judge Fortes told me a couple of weeks later.
Q. If you had known it was against the rule, would you have done it?
A. Oh, God, no.
Q. Have you done it since?
A. No.
Q. Did you also talk about another case with First Judge Heffernan during that conversation?
A. We did. And that's actually how the conversation started. Up in the second session, there was a matter that had some public attention, and there were cameras in the courtroom, and the clerk had asked me whether that would be okay or not. When there's cameras in the courtroom, you need permission in order to record. And I said, I'm fine. And so she had said, you know, I just want you to know, I'm the First Justice, and I like to know when there's cameras in a courtroom. So I apologized and said, I'm so sorry, I would have thought the

clerk told you that, when the question came to me, I assume you know, and thanks for letting me know, and then she said, let me ask you about a case on Monday. So that's how it came up. Yup.

Q. After that conversation on Wednesday, did you have a different -- a second conversation with First Judge Heffernan about the Medina Perez case?

~~Q~~A. I did. During our conversation on Wednesday, she was very concerned about the identity of Mr. Medina Perez saying that now we don't know where -- who he is or where he is and, you know, we don't know what warrants he may have or what can we do. You know, so we talked with that. And that really upset me, so I called her on Thursday, sometime late in the day, I left her a voicemail message. She called me back on Friday morning, and we talked about it a little bit, really just on the public safety concern. I had asked if he had been arrested on the warrant yet. She said no. And I said, I'm really concerned that we don't know who he is, I don't want him to be --. So she said, don't worry about it, you know, it happens and, you know, that's -- We just talked about it for a few minutes.

Q. Is that the last time you talked about

Mr. Medina Perez with first Justice Heffernan?
A. I believe so.
Q. Let's move then to RAJ Fortes. Did there come a time when you were sitting the Lowell District Court?
A. Yes. I believe I was scheduled -- We get our schedules a month in advance. I believe I was scheduled to sit there. If not, I was switched to sit there, which oftentimes happens, also. But regardless, I was sitting there on a day when she was sitting as well.
Q. Is that a bigger, busier court than Newton?
A. A much busier court.
Q. And is there usually more than one judge there?
A. There's usually about five judges there.
Q. What happened at lunchtime?
A. At lunchtime, she came into the lobby. ~~And~~ I was in the ~~a~~ visiting judge's lobby, where I was sitting. And said, why don't you grab your lunch and come in and talk to me.
Q. Did you do that?
A. Of course.
Q. What happened?
A. So I went into her office, we sat at a round table, we talked about our kids. We've known

each other for a little bit of time. We weren't friends outside of work, but I've known her for a number of years. She was asking how things were going. I was a new judge in her region, so she just wanted to get a check in to see how things were going since I was sitting there. And then she said she wanted to talk to me about a matter I had handled in Newton a few weeks prior.

Q. Did you know that was on the agenda?

A. I did not.

Q. What did she say?

A. Again, I don't recall how she identified that case. I hadn't thought about it in a few weeks. But she said something that made me understand that that was the case that she wanted to talk about.

Q. And what can you recall about that conversation?

A. I don't recall the specifics of the conversation, other than at some point she either asked or I told her or she said that she knew, but we started talking about how did that conversation part of the hearing end up being off the record.

Q. As you understood it, was the reason she was

raising it because she knew you'd been off the record?

A. At that point, yes.

Q. Did you try to hide it or deflect or anything?

A. No, no.

Q. Did you say, no, I didn't do that?

A. Not at all.

Q. What happened?

A. She says there's a rule that prevents that. She had a copy of the rule. I think she opened up the book and took a xerox copy that she had made of the rule and handed it to me, and we talked about that, and that was it. And she was wicked nice. She's like, listen, you're not in trouble, I just want you to know that I'm here to help you, like I just want to make sure that you're doing all that you need to be doing, and I thanked her for the rule, and that was it.

Q. Do you remember her also giving you a copy of the Lunn policy?

A. I do. I remember she said, and I have a copy of the Lunn policy. As you all know, I got a copy e-mailed to me that day when I requested it.

Q. When you got that Lunn policy in Newton, what

did you do with it?
A. I read it again and then I put it in my binder.
Q. Did you give it to anybody else?
A. I did. I made a copy of it for the clerk's office. Actually, I made two copies. I gave one to the clerk magistrate and one to Assistant Clerk Okstein, because they couldn't put their hands on it either, and I left one actually on Judge Heffernan's desk, also.
Q. When you spoke with Judge Heffernan, did you attempt to answer her questions and be honest and candid?
A. Of course.
Q. And when you spoke to RAJ Fortes, did you attempt to answer her questions and be honest and candid?
A. Yes.
Q. Did each of them have slightly different focuses?
A. They did. So Judge Heffernan was concerned with the security issue, for lack of a better word, you know, how did he get out the back door without ICE having apprehended him. That really seemed to be the focus of her concern.

Judge Fortes was, the focus of her concern was part of the matter had been conducted off the record, and that was really her focus.

Q. Now, we've also heard that you were asked to meet with Chief Justice Dawley; is that right?

A. I was.

Q. Do you remember that meeting?

A. I do.

Q. What do you remember about that?

A. So I remember, you know, going to his office and he -- And I knew, as I said earlier, that that's the case that he wanted to talk about, so the next time I sat in Newton, I got a copy of the CD. At that point, I knew that part of the record -- part of the hearing had been conducted off the record, and so I assumed that that's what he wanted to talk about. So I wanted to hear it before I got there. So I listened to the recording. I went to his office. It was Judge Fortes, Judge Dawley, myself in his office. He said, do you understand why you're here, and I said, yes, to talk about the case. I don't think I remembered the name of it at that point, but the case in Newton where the defendant had been released out the back door

and avoided ICE. He said, well, that's the case I want to talk to you about, what I want to talk to you about is having gone off the record. And that's what we spent a lot of time talking about again.

Q. And what did he tell you about that?

A. He told me a number of things, you know, the record is your friend, this isn't old times when it happened a lot. He said you should always -- The record is your best protector, it's your friend, and there's a rule, and you now know about the rule, so don't do it again, and use this as a learning experience, go to the judges.

Q. How did the meeting end?

A. It ended on a very positive note. He thanked me for coming in, and I thanked him for the opportunity to come in, and that was it.

Q. And did you send him an e-mail afterward?

A. I did. I followed up with an e-mail either that day or the next day thanking him and reassuring him that I heard, I listened, and it won't happen again.

Q. Did you get a response from him?

A. I did.

Q. What was that?

A. Essentially, thanks for meeting with me and, you know, looking forward to seeing me at the upcoming judicial conference that we have every year.

Q. At the time you left Chief Justice Dawley's office, did you think that that would be the end and it should be moving forward?

A. I did. Each time I have a conversation about this case, I think it's over and then it comes back.

Q. Okay. Chief Justice Dawley told you that the record is your friend?

A. He did.

Q. Do you believe that?

A. I absolutely believe that.

Q. Do you wish you had a record of what happened --

A. I do.

Q. -- during those 52 seconds?

A. No question.

MS. MULVEY: May I have a moment?

(PAUSE)

MS. MULVEY: I have nothing else. Thank you.

JUDGE FABRICANT: Very briefly.

THE WITNESS: Sure.

REDIRECT EXAMINATION

BY JUDGE FABRICANT:

Q. When you proposed -- Well, let me put this a little differently. I think I just heard you say in response to Ms. Mulvey's question that you viewed detaining the defendant overnight, sending him back to the jail, that he would stay overnight, and come back to the courthouse, you viewed that as essentially the equivalent of putting it on for further call. Is that right?

A. I mean, at the time I'm not sure that I really analyzed it in that way. But yes. I was just trying to give him more time, and that seemed to be the proper way to do it or a way to do it.

Q. And the way that you had in mind that you would do that was you would use the fugitive from justice charge, which authorizes detention without bail if the underlying offense is violent, you would use that charge even though the assistant DA said, I don't think it's him, you would use that charge to send him back to the jail and have him detained overnight.

A. No, no, no. So what I was thinking is that

there would be agreement to do this, and the attorney would agree, everybody would be on the same page, he would be detained overnight and come back the next day.

Q. So with agreement of his attorney, your idea was, you send him back to jail and he'd be detained overnight, even though the law says you can do that only if it's a violent offense underlying and even though the assistant DA says I don't think it's the same person.

A. Well, that's if you analyze it under the fugitive of justice matter. I mean, I guess, if you want to get technical, you could do the arraignment. Pause it there. I haven't arraigned him yet. All come back tomorrow, do this tomorrow. That's all I was trying to do.

Q. Send him back to the jail to do it.

A. Yes. With the agreement of his attorney.

Q. Okay. And you thought, if the attorney agrees with that, then you can do it even though there wasn't a legal basis for it.

A. No. I thought, under the circumstances, that is the solution that I was offering his attorney to give him more time to do what I thought he was asking me to do.

Q. And you said, if I heard you correctly, that you thought he would go right into ICE custody; correct?
A. Well, I figured he would go down to the lockup and that ICE would take custody of him in the lockup.
Q. And Mr. Jellinek had argued quite vociferously that he was the wrong person, and he had said I think the best thing for us to do is clear the fugitive issue, release him on the personal, and hope he can avoid ICE. And what you thought was, that he was abandoning that argument; right?
A. No, no. I thought that he didn't want his client held overnight and he would deal with the identification issues in the -- in another forum.
Q. So you thought that he was acquiescing in the idea that his client was going to go down to lockup, ICE was going to go to lockup, he was going to be handed over from the lockup to ICE, even though Mr. Jellinek was arguing quite vociferously that he was the wrong guy.
A. No. What I thought ~~is~~ wouldhat happen~~ed~~, is that I offered a solution, if you want more time to investigate his identification, I'm going to

give you more time. And the best way, in my opinion then, to do that would have been to hold his client overnight without any possibility of bail so that everybody that had any involvement in the case would come back the next day, period.

Q. But he didn't accept that.

A. He didn't accept it. That's why I released him on his own recognizance. Done.

Q. And your expectation, releasing him on his own recognizance, was that his lawyer was basically acquiescing that ICE was going to take him.

A. I didn't make any judgment about what his lawyer was thinking.

JUDGE FABRICANT: All right. That's all I have. Thank you.

MS. MULVEY: Nothing else. Thank you.

HEARING OFFICER: Thank you very much.

JUDGE FABRICANT: And that completes the Commission's case at this time.

HEARING OFFICER: Okay. So do you have a witness?

MR. HOOPES: Our witness moved

her schedule, so she'll be here tomorrow morning at 9:00.

HEARING OFFICER: Okay.

MR. HOOPES: And we'll be -- Within the two hours, we'll have our witnesses. We'll be done.

HEARING OFFICER: Tomorrow morning.

MR. HOOPES: Yes.

HEARING OFFICER: So with that, I think we're recessed for the day.

(The proceedings adjourned at 11:48 a.m.)

C E R T I F I C A T E

I, LISA L. CROMPTON, Registered Professional Reporter, hereby certify that the foregoing is a true and accurate transcript of my stenographic notes of the proceedings in this matter on the date and time specified in the caption hereof.

IN THIS WITNESS WHEREOF I have hereunto set my hand this 17th day of June, 2025.

<%33863,Signature%>

LISA L. CROMPTON

REGISTERED PROFESSIONAL REPORTER

MY COMMISSION EXPIRES 1/17/2031

Exhibit 11

COMMONWEALTH OF MASSACHUSETTS

COMMISSION ON JUDICIAL CONDUCT

COMPLAINT NUMBER 2019-22

VOLUME V

HEARING

~ BEFORE ~

HEARING OFFICER

DENIS J. McINERNEY, ESQ.

JUNE 13, 2025

9:00 A.M.

Boston, Massachusetts

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

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HEARING OFFICER: Good morning. This is the continuation on the hearing of the Commission on Judicial Conduct's Complaint Number 2019-22.

Counsel, would you please identify yourselves for the record.

JUDGE FABRICANT: Judith Fabricant, Special Counsel for the Commission on Judicial Conduct.

MR. NEFF: Howard Neff, Commission on Judicial Conduct.

MS. MULVEY: Elizabeth Mulvey for Judge Joseph.

MR. HOOPES: Tom Hoopes for Judge Joseph.

MR. HOOPES: Michael Keating for Judge Joseph.

HEARING OFFICER: Thank you.

MR. SULLIVAN: And excuse me. My name is Daniel Sullivan. I'm the general counsel for the Trial Court.

And we have two trial court officials testifying this morning. I'm just here in the instance if there's any question you ask as well.

Thank you.

HEARING OFFICER: Great. Thank you very much.

Ms. Mulvey.

MS. MULVEY: Judge Joseph calls upon Bonnie MacLeod.

HEARING OFFICER: Good morning.

HONORABLE BONNIE H. MACLEOD,

SWORN

HEARING OFFICER: Thank you. Please be seated.

DIRECT EXAMINATION

BY MS. MULVEY:

Q. Good morning. Would you tell us your name, please.

A. Good morning. My name is Bonnie Hilly MacLeod.

Q. Are you a retired judge?

A. I am.

Q. How long have you been retired?

A. I retired from this building in June of 2016.

Q. What courts did you sit on?

A. All told, this is the court I left.

Q. The whole thing.

A. The whole thing. I was appointed to the

District Court in 1989. I sat in a variety of District Courts, usually long stints, until I was appointed to the Superior Court in November of 2002.

Q. So you spent about 13 or 14 years on each of them?

A. Right. Exactly. 13 years in Hingham on the District Court, and then I stayed later than that just so that I could stay with -- my longer, my longer presence was on the Superior Court.

Q. Can I take you back? Can you tell us about your professional background before you were appointed to District Court?

A. Certainly. I was admitted to the bar in 1972. For those of you who can't count, it's 52 plus years now, which amazes me. My first legal job -- I left -- I was -- While I was in law school and for about six months thereafter, I was the head law librarian at a law firm called Hill and Barlow. I left Hill and Barlow when I was appointed as assistant district attorney in Middlesex County, and that would have been in September of 2023.

Q. 2023?

A. Sorry. 1973. And I was in the appellate division of the district attorney's office and I tried felony cases, and then eventually I was appointed chief of the appeals division in the district attorney's office, and my very first case that I've argued was in this very courtroom before the full bench of the Supreme Judicial Court.

Q. All right.

A. Thereafter, I left the district attorney's office in September of 1976. I had been asked by one of the justices of this court, of the Supreme Judicial Court to consider moving to an office called the Office of Bar Counsel, about which I knew nothing whatsoever. But apparently they were looking for trial lawyers. And so I ended up becoming the first assistant bar counsel in the bar counsel's office. I was elevated to first assistant bar counsel thereafter. And I was chief of the litigation division, which is, basically, I was the person litigating bar discipline cases and presenting the evidence. And I stayed there until I was appointed to the District Court in May of 1989.

Q. When you were on the District Court, did you sit

in a number of different District Courts?
A. I did. I sat -- Oh, I'm sorry. With my, with my career. I also taught for 42 years at four of the Boston law schools, professional ethics.
Q. All right.
A. I stopped that in 2018.
Q. Okay.
A. Because I got too busy at JAMS.
Yes. When I sat in -- I was named to the Cambridge District Court, but I never sat there, not one day in 13 and a half years. For some reason they wanted to put me in the so-called higher crime courts. So I ended up in Lynn, and I spent five years with Salem and Lynn, situation where I was in Lynn three days and Salem two days and back and forth, and I did that until July of 1994. And then after that, I went to Chelsea District Court, which for those of you who don't remember where Chelsea was in those days, it was in Cambridge. And it was in Cambridge for seven years, I believe. I kind of ended up in Cambridge. Just across the room -- across the yard from where I was supposed to be sitting. I was there for a substantial period of

time. I think 1994 to at least 1999. And then I went back to Salem and Lynn for a little bit. And then my son was playing football for Whitman High School, and I asked if I could go to Malden. So I sat in Malden District Court until I was appointed to the Superior Court in 2002.

Q. And in the course of your time in the District Court, did you run into different practices and customs in the various courts?

A. The District Court is like -- well, in my view, each court has its own culture. And every time you went to a new District Court, you had to figure out kind of who rules the roost, is it probation, is it the clerk's office.

I can remember, one day, people came to the District Court because nobody could figure out whose job it was to carry the restraining order into the courtroom. Because they had to be vetted by probation first, and probation said it wasn't their job to bring -- And this was the culture of the court. It was always this kind of testimony.

So you really had to meet with the chief court officer for that court, the

clerk, and the district attorney and whomever to figure out what's the culture of this court. And, you know, basically, I hate to say it, but who do you want me to be, I mean, what control do I have over the gathering. And each court is really like sui generis.

Q. Did you also run into lots of different judges in the various courts?

A. Certainly, I did.

Q. Now, we've heard that, in November of 1989, Special Rule 211 was implemented in the District Court.

A. Yes.

Q. Is that right?

A. I do. I'd been on the bench maybe about five months when it was enacted. Not so much fanfare --

Q. I was just going to ask you, would you tell us about the fanfare and the training that accompanied that rule.

A. In terms of training, I really don't remember any. We were told that you had to ensure that the tape was on and that things were being recorded, that proceedings were being recorded.

And then, of course, I remember

sitting in Williamstown with a bunch of my colleagues from different courts and we're arguing about what's a proceeding and what's administrative, what does this mean, and that we kind of all concluded, it meant that it was kind of what we decided it would be. I mean, in other words, given the heft of whatever was going on. Obviously, a hearing was a proceeding, an arraignment was a proceeding. But things that might have pertained to that may not be part of a proceeding.

So again, that likewise I think was somewhat sui generis in the type that it was being decided by an individual judge at an individual time as to what was on the record and what was not. And I know I'm going back a little bit historically, maybe, and things certainly felt likely to have changed since I left the court in 2002, but it was really kind of up to --

Oftentimes, we didn't have anybody even to run the machine. And when I would stay after 6:00 to 8:00 doing matters, because we didn't have a Juvenile Court and they're doing juvenile, I was it. I was taking

the record with my -- I was writing, filling out the docket sheet, I was running the recorder, I was -- I mean, it was all there in front of me. I mean, again, it was -- necessity is the mother of invention.

Please remember, in my courts, we did over 100 cases a day, and that's why, when I came to the Superior Court for a while, I thought it was naptime.

Q. Vacation?

A. Yeah.

Q. Both in District Court and in Superior Court, did you as a judge go off the record on occasion?

A. I did.

Q. Did your colleagues do likewise?

A. Oh, yes.

Q. If you consider the entirety of your career from 1989 to 2016, did the frequency of off the record proceedings or discussions decrease over the years?

A. I think it did, only because of the nature of the Superior Court. But the reasons -- I still obviously did them. And I think I had the instincts and the judgment to decide when to do

them and when they made sense. I know, I know in this very courthouse -- thank God the statute of limitations -- I know I probably did it at least once a week.

Q. And can you just give us a couple of examples of when a judge might go off the record?

A. Well, I tried in my mind to categorize them when I understood, you know, the subject matter about which I'd be speaking, like when did I do it, for what reasons. And I think sometimes -- I mean, the obvious one I think to a lot of people has to do with safety, the safety of either a litigant or a party or whatever. So something, some concern. For example, it was not uncommon in any court I ever was, all of the District Courts and here in the Superior Court, for a district attorney, an assistant DA, and defense counsel ask if they could come up and go off the record, and it was always something like, well, judge we're not asking, you can see we're not asking for very high bail and it's because defense counsel's client is a cooperating witness and is going to lead us to X, Y, and Z, and so we don't want you to think we're crackers by not asking for higher bail,

there's good reasons and obviously reasons we do not want to put on the record but would just -- that's what we're going to do. So that would be one. And that was, that was pretty routine -- not routine, but would happen. That would be the number one I remember, both in the -- all of the District Courts I sat in and certainly a couple of times in the Superior Court.

Q. Okay.

A. And another would be privacy issues, where somebody -- the lawyers would ask to approach the bench. Once, I remember one of my court officers here came to me one day and said, Judge, the juror upstairs, she is just overwrought, she's crying and she won't tell me why, but she's telling me she can't sit, and you know. And I remember the jury selection and, ironically, she was one of the people I was kind of thinking about for the eventual foreperson on the jury. Oh, what's that about. And I said why don't you bring her down. And she was overwrought and she was crying. And the lawyers came up to the side bar with me, and I said off the record, and I asked her what was going on. She had just learned the day before that her husband had been

diagnosed with a terminal illness and that she couldn't get it out of her head. Now I don't believe that is something that needs to be on the record. I then went on the record and said this juror is excused for good cause shown. And to me, that's enough. I don't need to make a record that she had to make that private disclosure.

That happened lots of little times, people making private disclosures about things that they would rather not see the light of day. And again, it's a matter of judgment as to whether or not you make a record of that kind of thing.

Q. When lawyers asked -- Were there occasions when lawyers asked you to get off the record?

A. Oh, yes. Most of -- Yeah. A lot of the time I would do that is, you know, when the lawyers would ask.

Q. Would you necessarily know what it was they wanted to say?

A. No.

Q. You just said a minute ago that you could put it on the record after the fact or something like that?

A. It was something that was a matter of -- again, it would not be probably intimate details. It would just be, no, thank you, everyone, this juror has done whatever. And in some cases it would be something I would never put on the record. I would just tell the lawyers thank you and back off, particularly when you have a cooperating witness, a confidential informant, somebody who didn't want their address known because whatever, those types of things I would necessarily go back on the record in any way.

Q. And if something untoward happened at an off the record conversation, did you as the judge have a way to kind of fix that?

A. Oh, yes. In fact, if somebody came up -- I think if the lawyers came up and they started talking about something that -- I would say this isn't an off the record conversation, or if it came out, then go back and I would say counsel has explained to me that there are good and whatever reasons, blah, blah, blah, and I would put that on the record. But sometimes -- I don't think I ever got snookered, for want of a better word. I trust lawyers. I think lawyers

trusted me. So I was really careful, you know, as I said, not to get snookered. And I don't remember it ever happening. And I know they trusted me.

One of the other instances, for example, when I would do something with the lawyers is, I mentioned to you all Chelsea was actually in Cambridge. And for someone like me, who doesn't drive, it was really interesting in the morning to take the commuter rail to the Green Line, walk to -- you know, and get off at Lechmere and then ~~trying~~ try to find out where the Chelsea District Court was.

But imagine, if you will, how it would be for someone who is arrested overnight in Chelsea, went in a van the next morning and brought to Cambridge where they had never been in their entire lives, and then the Commonwealth doesn't ask for bail, so it's time for them to go home, how do they get home from Cambridge.

So the first thing, I would ask the lawyers to come up and say off the record, and I would say to the DA -- I would say to the defense attorney, does your client have a way to

get home, does he know how to get home, well, is there anyone here for him today to bring him home. And if he would -- if he said no, then what do you do. I said, well, so we'll just have to give him directions. And then I had this drawer in my bench, and it was full of $10 bills that I had put there, and I would give a $10 bill to the court officer, and the court officer would then take the guy out, give him directions, how to get to the Green Line, and tell him to get off at Haymarket, then take the bus to Bellingham Square. I mean, this happened every day. And the people were being dumped into Cambridge and never given any thought about what might happen on the other ~~hand~~end.

And so we had -- It became a matter of where DA was sneaking money into my drawer, the court officers in my drawer, I went in the drawer one day and it's full of $10 bills, I mean, because everybody was now contributing to the transportation for the -- the defendant. That's the District Court.

Q. In terms of cases and litigants and just the management of a day, is there a difference between the District and the Superior Court?

A. Oh, for sure.

Q. Tell us about that.

A. Well, the management was such that -- Again, in the District Court, you never really know -- I never sat in Newton. Oh, I did. I sat one day in Newton. But that, too, was in Cambridge at the time, for a very short period of time.

Again, you've got a sense of the culture. Some courts are much busier than the others. I tend to, fortunately or unfortunately, end up in the busier ones. So you never knew on a given day how to manage. And I will say, this is probably not the great way to do things, but if you heard there were some 20 changes of plea, they would round up all the people who are going to plead guilty in the back and you would then tell them all their rights and then you do it individually and say did you hear everything I said to all those 12 other people in the room. That's how you did, again, if you had 50 or ~~19~~ a hundred cases a day as a District Court judge, you do not -- you know, you try not to rush that over what's required. But you certainly try to do what Jim Dolan used to say, gets the donuts made, and the donuts is getting

those hundred people's cases done on that given day.

So the culture would depend on the court. I really -- And there was a very strong symbiosis between the court officer, the judge, the probation -- the head of probation or whoever was there, the assistant district attorney, you kind of all had -- you worked the same session, you knew what was, you know, what was going on and what needed to be done on a given day.

Q. And when you would come into a District Court, would you rely on those people to sort of show you the ropes in that court?

A. Totally.

Q. Do you think your experience was different from that of your colleagues?

A. I do not.

Q. Do you know Judge Shelley Joseph?

A. I do not. I know of her. I know I've seen her in passing. I want -- I haven't -- I kind of avoided her since you and Attorney Hoopes and I spoke the first time, because I just forgot that we actually were in the Montgomery Summit together. I didn't even say hello to her. My

companion, my friend Andrea Kramer, who was with me, said, oh, I see Judge Joseph, let's go see her. I said, you know what, why don't you go say hi and give her our best. I just didn't want to -- And likewise, we're on the same Inn of Court and it turned out that she's on my team. And when I learned she was on my team, I haven't been to a meeting since I learned it. Because, again, I didn't want it to appear -- because you know how rumors and stuff fly, that the two of us were having a, you know, glass of Pinot Grigio together, and God knows I can be had for a glass of Pinot Grigio.

MS. MULVEY: Thank you, Judge MacLeod. I have nothing else.

CROSS-EXAMINATION

BY JUDGE FABRICANT:

Q. Good morning, Judge MacLeod.

A. Good morning, Judge Fabricant.

Q. For this purpose, I'm special counsel.

A. Sorry, Counsel.

Q. We have an adjudicator on the bench, and that's not me.

Judge MacLeod, you said that, when you were sitting as a judge, you would go

off the record at times and you knew when to do it and when not to do it.

A. Yes.

Q. And when not to do it was when you were dealing with something that was a matter of particular public attention or controversy that the public was particularly going to want access to, that was the, no, I'm not going to do it; right?

A. I don't necessarily agree with that. I can't say that. Because the public can be a very nosy group of people. And I remember a case where there was a family feud and there was a 19-year-old married to an 18-year-old. It was a mixed race couple. The parties were fighting. And the couple wanted to tell me privately what they wanted to do. And believe me, there was this many people in the courtroom to see what was going to happen with that case. And I let them come over to the side bar and I went off the record.

Q. There is a right of public access to the courts; right?

A. There is. I wish I trusted the public as much as other people.

Q. We may debate how much any of us trust the

public and we may debate how much any of us trust the media and how fair the media can be.

A. True.

Q. But the constitution, --

A. Yes.

Q. -- the Federal constitution, the state constitution, case law provides a right of public access to the court.

A. Absolutely.

Q. And you know that if you go off the record in a case that involves a kind of subject matter that is getting particular public attention, the fact that you go off the record there is going to catch public attention; right? You know that.

A. I guess. I think that's well said. But, again, the public always has an itch to know, but that doesn't mean that at a particular time they're entitled to know.

Q. The SJC has said, --

A. Yes.

Q. -- the U.S. Supreme Court has said the public is entitled to know what goes on in the courts.

A. Right. But even the District Court rule talks about the fact that matters might be administrative, and if, as a judge, I deem

something to be an administrative matter, as to, you know, whether they -- for example, the things I used to do in Malden was I would say to the court officer, I would say it was before lunch, the person was about to be let go, and I said, you know, this person probably hasn't eaten since he was arrested at 6:00 yesterday morning, could you, you know, maybe bring him back downstairs -- when you bring him back downstairs to get his stuff, would you make sure he gets a sandwich before you put him out the sallyport.

Q. And that would be a good example of the kinds of things that would be administrative. Doesn't have to do with the substance of the case, doesn't have to do with whether somebody's going to be released or not released, doesn't have to do with whether somebody's going to be detained or not detained. It's a side issue that doesn't involve the substance of the case.

A. I would say yes to that.

Q. Okay. When you started practicing law in 1972, the District Court had no recording at all; correct?

A. I believe that's correct.

Q. It was referred to, as some courts around the

country have referred to as, not a court of record; right?

A. (Witness nods head).

Q. And anything that was adjudicated in the District Court in that period of time was subject to trial de novo in Superior Court.

A. Correct.

Q. There were no jury trials in District Court.

A. Correct.

Q. Anybody didn't like what happened in District Court, they could go to the Superior Court.

A. Yes.

Q. They could have a jury trial or they could have another bench proceeding and do it all over again, and maybe that was one of the justifications for not having a record; right?

A. (Witness nods head).

Q. And that changed over the years. District Court came to have jury trials, the trial de novo system in a gradual way was eliminated eventually --

A. Correct.

Q. Now, you were last in the District Court in 2002; correct?

A. Correct.
Q. And then you moved to Superior Court.
A. Yes.
Q. And over the years, both when you were in the District Court and when you were in the Superior Court, you did lobby conferences off the record.
A. Yes.
Q. Some judges did and some judges didn't. And in the Superior Court at least, it was a topic of some controversy --
A. It was.
Q. -- among the judges.
You were the sort of judge who read the decisions coming out of the SJC.
A. I sure was.
Q. And you know that over those years there were a series of comments in SJC decisions about the practice of lobby conferences off the record.
A. Correct.
Q. You know that in 1992, when you were on the District Court, the SJC issued Commonwealth versus Fanelli, that's F-a-n-e-l-l-~~y~~i, and they said, note that if lobby conference is held, the better practice is to record it. Do you

remember that?
A. I do. And that's why I did not do -- actually, I did not do lobby conferences. I would go off the record while I was on the bench, but I was -- I didn't do -- I don't remember anything about any lobby conferences on the Superior Court.
Q. On the Superior Court.
A. On Superior Court.
Q. So from 2002 --
A. Right.
Q. -- forward, --
A. Yes.
Q. -- you did not do any conferences off the record -- I want to make sure we're clear about what -- about the use of the term "lobby conference."
A. Right. Because I don't -- I mean, bringing people into my lobby and doing conferences, I did not do that.
Q. But you also didn't go off the record in any conference with the lawyers in Superior Court when you were talking about the substance of the case.
A. I did. But I did it when the lawyers would

ask to approach. I can give you a quick example. And that is this: I had a civil case where two of the -- two very well-known lawyers, very fine trial lawyers came in front of me involving the death of an individual who had been hit by a car. And the contention was, by the defendant, that the individual who hit the person in the crosswalk was not in the course of his employment. And so I said, well, I guess, looking at the docket, we ought to make some room for a motion for summary judgment, and the two lawyers looked at each other and said can we do a side -- said can we go off the record, Judge. They came over and they explained to me that they were trying to work out a settlement and that -- which they would prefer if the adjuster, who was sitting in the back of the courtroom, was not aware of.

Q. That was a civil case.

HEARING OFFICER: And that was --

A. That was an off the record conference about the case. And it's certainly substantive in nature.

Q. That was a civil case.

A. That was a civil case.
Q. And in the Superior Court in those days, a lot of stuff happened off the record in civil cases; right?
A. (Witness nod head).
Q. Civil cases were very different from criminal cases.
A. Right. But this was probably in 2014 this happened. But yes. Still the same.
Q. So in 2014, in the Superior Court, --
A. Right.
Q. -- there were court reporters.
A. Right.
Q. It was maybe the beginning of the time --
A. You could kind of do this. (Demonstrating).
Q. Well, if the -- more than that --
HEARING OFFICER: If I may, can, can the record reflect what the witness just did, --
THE WITNESS: I'm sorry.
HEARING OFFICER: -- when she said you could kind of do this, you put your right hand to the side.
THE WITNESS: Right.
HEARING OFFICER: I just want to make sure the record's clear.
A. That would be -- Yeah. Just gestured to the

court reporter that it wasn't on the record.
Q. But more than that, in a civil case in the Superior Court in the days when the court had court reporters and not electronic recording, what would often happen in Superior Court was that you'd have a court reporter in the courtroom in the morning when you were doing trials, and then in the afternoon when you were doing non-evidentiary proceeding, such as the kind of case conference that you're referring to, the court reporter would be back in her office making a transcript, and unless there was a pro se, you would do it off the record.
A. That's correct.
Q. But that was in civil cases; right? You couldn't do that --
A. Absolutely.
Q. -- in criminal cases. Criminal cases were a whole different story.
A. Exactly.
Q. When you were on the Superior Court, having in mind what the SJC had said, when you had a conference about the substance of a case, you would not go off the record.
A. That is correct.

Q. And the SJC reiterated, in 2002, in Commonwealth versus Serino, S-e-r-i-n-o, we again recommend that unrecorded lobby conferences be avoided. Do you remember that?

A. I do.

Q. Then, in 2007, they got more emphatic. Do you remember this? Murphy versus the Boston Herald.

A. Yes.

Q. Do you remember the Murphy case?

A. I remember it well.

Q. He was a colleague on the Superior Court.

A. Yes, I do remember.

Q. And he had done a lobby conference off the record in a case involving an allegation of rape of a teenager.

A. Yes.

Q. Do you remember that?

And the Boston Herald ran -- and then of course it took off on other media. But it started with the Boston Herald. They ran a series of articles in which they attributed to Judge Murphy some language in an off the record lobby conference that a judge would not want to have attributed to him.

A. Exactly.

Q. Correct? And he sued the Boston Herald for defamation. Do you remember that?
A. I do.
Q. Much to the amazement of judges in general, he won. Do you remember that? He won a judgment. And it went to the SJC, and the SJC affirms the judgment, and they dropped a footnote. The footnote said, if you remember, if there ever was a case that demonstrates the need for lobby conferences where cases or other court matters are discussed to be recorded, this is the case. This litigation, with all its unfortunate consequences for those involved, might not have occurred if the critical lobby conference had been transcribed. We trust that the lesson learned here will be applied by trial judges to prevent unnecessary problems that often arise from unrecorded lobby conferences. Do you remember that?
A. I do.
Q. And that got a lot of attention across the courts -- do you remember that -- and across the bar?
A. It did.
Q. And then, going back a little bit --

District Court Rule 11 doesn't apply to Superior Court.

A. Correct.

Q. Or didn't at the time that you were on the Superior Court. And in the time that you were on Superior Court at least, there was no rule about recording, there was a practice.

A. (Witness nods head).

Q. And as we talked about, over the years there were many discussions amongst Superior Court judges, some of them still did it, until 2015 when the SJC prohibited lobby conferences off the record in the revision of Rule of Criminal Procedure 12(b). Do you remember that?

A. I do.

JUDGE FABRICANT: That's all I have. Thank you.

REDIRECT EXAMINATION

BY MS. MULVEY:

Q. I just want to be clear, Judge MacLeod. We heard a lot of talk about a lobby conference.

A. Right.

Q. Is that different than a minute or two at the side bar?

A. Totally. It's not the same thing.

Q. Why not?

A. Well, usually a lobby conferences, as I remember it when I was an assistant DA, I was in the lobby with the defense attorney and the judge, and we would be kind of hashing around what the recommendation was versus what was and what the Commonwealth wanted to do, and we would, we would have that whole substantive conversation in the lobby with the judge, and then we would go out on the record and do whatever it was as the judge would say something, well, I don't need to hear from the victim. All of that would get hashed out in the lobby conference, which usually was not on the record back in those days, and we'd go out and do whatever we were going to.

But it's very different as opposed to, again, District Court, in District Court, you know, I used to say to people, you know, this is McJustice. We are McDonald's of the justice world, because we do not have the time or the capability to necessarily engage in a perfect courtroom atmosphere, but we do what we do to get the work done every single day.

Q. And do people in the District Court do the best they can to be fair to everybody?
A. No question in my mind.
MS. MULVEY: Thank you.
JUDGE FABRICANT: Very brief follow up, if I may.
RECROSS-EXAMINATION
BY JUDGE FABRICANT:
Q. Judge MacLeod, the difference between what you describe as a lobby conference and something off the record at side bar very brief is that it's brief.
A. Right.
Q. And that may or may not be the only difference depending on what it's about; correct?
A. It may.
Q. That series of SJC decisions in which they commented about lobby conference, the message, as you understand it and as it was broadly understood, was going off the record is a big risk; correct?
A. That's correct. But they never say don't do it.
Q. Until 2015, when they said it's --
A. Exactly.

Q. -- part of the plea conference -- They did say in 2007, --

A. Should be avoided, yes.

Q. -- this wouldn't have happened, --

A. Yes.

Q. -- and we wouldn't be here, all of the unfortunate consequences of this case would not have happened if we had a record so that we knew exactly what was said off the record.

A. No question. That's exactly what it says.

JUDGE FABRICANT: Thank you.

THE WITNESS: Good?

MS. MULVEY: I have nothing else. Thank you.

HEARING OFFICER: Thank you.

MS. MULVEY: Judge Joseph calls Elizabeth Bostwick.

ELIZABETH BOSTWICK, SWORN

HEARING OFFICER: Thank you.

DIRECT EXAMINATION

BY MS. MULVEY:

Q. Good morning, Attorney Bostwick. Would you just tell us your name for the record, please.

A. Good morning. My name is Elizabeth Bostwick.

Q. And we've heard, in 2018, you were a bar advocate in, among others, the Newton District Court?
A. Yes.
Q. Can you tell us a little bit about your professional background up until 2018?
A. So I became a lawyer in January of 2000. I'm a graduate of Northeastern Law School. I worked for a small firm for a while, and then I went to corporation counsel's office, City of Boston, and then I did private practice for a period of time, and went back to corporation counsel's office for a short while, and then I returned to private practice again, solo practitioner.
Q. And at the time we're here about, were you involved in representing criminal defendants?
A. I was. I was a member of the Middlesex Defense Attorneys, which is the agency or non-profit that handles bar advocates who work for Middlesex County.
Q. We've heard that term "bar advocate." When you're a bar advocate, what do you do?
A. You represent people who are determined indigent by the probation department. It's typical that you work in a couple different

courts and you make quote-unquote a duty day where you're the attorney helping the court handle any matters that, you know, you have indigent defendants or a variety of things, Section 35 or whatever, helping the court representing those folks.

Q. You said you might have a duty day. What would you do on a duty day?

A. I mean, it really depended on the court's needs. Right? So you were basically making the commitment to being the lawyer of the day and stay, you know, for whatever the court needed, so you could represent a variety of people on a variety of issues.

Q. So would you essentially spend your day at that court in case somebody needed a court-appointed lawyer?

A. You would, yes.

Q. Were you the bar advocate or the duty attorney on April 2nd, 2018, in Newton?

A. I believe that's accurate. I have no memory of the specific day, but yes.

Q. That sounds like something you probably would have been doing at that time?

A. In 2018, yes.

Q. Were you assigned on April 2nd, 2018, to represent a defendant named Jose Medina Perez?
A. Yes.
Q. Do you have some memory of the case and the proceedings?
A. I have some memory, but it was a while. I also was undergoing cancer treatment at the time; so...
Q. A time to forget.
A. No. But it was just -- I mean, I was physically undergoing cancer treatment; so...
Q. Was that the only day you had any involvement with Mr. Medina Perez?
A. Yes.
Q. Do you remember that it was a Monday morning?
A. No.
Q. Do you recall that he had been arrested and was being detained when he showed up for his arraignment?
A. I recall that he was detained.
Q. Do you recall what the charges were?
A. I recall that, I recall that what was at issue was the fugitive of justice warrant. Right? From Pennsylvania. That's what I recall.

Q. Do you recall that he had been arrested on state misdemeanor drug charges?
A. I believe so. I don't have specific memory of that but..
Q. You do remember something about a fugitive warrant?
A. I do.
Q. And had you dealt with those before?
A. Yes.
Q. Can you tell us from the perspective of a defense lawyer what you needed to do if they had someone with a fugitive warrant?
A. Ideally, I mean, ideally, you can, you try to figure out if that is the person. And, you know, there's a lot of ways to try to do that. Obviously, as a lawyer on duty, you know, I have, I have somewhat limited access. I don't have a computer, you know. I may have a phone on me. Certainly, the phones are much different now than they used to be. So I have a little -- somewhat of a computer. But you try to determine if that is in fact the person.
Q. When you say "that is in fact the person," can you just explain what you mean by that?
A. Sure. You try to determine whether the

individual that is being held on the fugitive from justice warrant is in fact the person on the warrant from the other state.

Q. How does the fugitive of justice warrant get hooked up with the person in the first place when they're arrested?

A. I think they match them, I think they match them on name and perhaps date of birth.

Q. And are there sometimes questions about whether this is truly the person who's the subject of the warrant?

A. Yes.

Q. Was that true for Mr. Medina Perez?

A. I don't have a specific memory of that. I mean, I do recall, I do recall being struck by the photo. Right? So they had a photo of him in the booking process and then there was a photo that came with a warrant, I believe.

Q. And when you looked at those, did you have some impression about whether this was the right guy?

A. My recollection was it was a different looking individual, different looking man.

Q. Do you have a general recollection that there was an issue about his identity while you represented him?

A. I believe that I was trying to convey that I did not think it was him.
Q. To whom were you trying to convey that?
A. To the court and the Commonwealth.
Q. Who was representing the Commonwealth?
A. Shannon Jurgens.
Q. Was she somebody that you knew?
A. I knew her from the court.
Q. And what was your impression of her?
A. I mean, I also had some good experiences with Shannon.
Q. As a reasonable, fair prosecutor?
A. I thought that she was a very fair and just prosecutor.
Q. Back in 2018, did you know an attorney named David Jellinek?
A. I did.
Q. How did you know him?
A. I knew him -- He was actually employed in City of Boston for a while as well.
Q. When you worked or overlapping?
A. I think, yeah, I think it was somewhat of an overlap. I mean, he worked in the police department. I worked in corporation counsel's office.

Q. Did you also know him from the criminal defense work or bar advocate work?
A. Yes.
Q. Do you remember seeing David Jellinek that morning in the Newton District Court?
A. I have no memory of that.
Q. In the course of representing Mr. Medina Perez, did you ask for second and third call?
A. I believe I did, yes.
Q. Is that a common practice in District Court?
A. Yeah. I mean, I could be doing multiple things, you know, getting pulled in different directions, you know. I don't think that was my only case that day. I mean, Newton wasn't a terribly busy court, but I don't think it was the only thing that happened that day.
Q. And what was the purpose of asking for a second or a third or more calls?
A. I think I was trying to gather additional information. I think I was probably dealing with another issue as well, another client.
Q. Was it common to, in District Court to ask a judge for a little more time to do something?
A. Sure.
Q. And was that generally granted?

A. Sure. Absolutely.
Q. Do you recall who the judge was that day?
A. I do.
Q. Who was that?
A. Judge Joseph.
Q. Had you had experience with Judge Joseph before?
A. No.
Q. She was a relatively new judge?
A. I don't know that. I don't think I appeared before her before.
Q. In the course of the morning, do you recall an ICE agent being in the Newton District Court?
A. Yes.
Q. What do you recall about that?
A. I just recall that he was in the courtroom all morning. I did speak with him. I think, you know, he was there for Mr. Pena.
Q. Mr.?
A. Oh, Perez.
Q. Right. Okay. So in addition to the fugitive warrant, did you know there was an ICE issue as well?
A. I knew there was a detainer.
Q. And were you representing him with respect to that ICE issue as well?

A. I was representing him in terms of the criminal charges in the District Court, and certainly, to the extent, you know, that I could be helpful on the detainer issue, I would be helpful.

Q. Did you spend time that morning at intervals investigating Mr. Medina Perez's case?

A. I remember -- Yes, yes.

Q. Do you remember whether he spoke English?

A. He did not speak English.

Q. How would you communicate with him?

A. There was an interpreter.

Q. Were you able to even have a basic conversation with him in English?

A. I don't remember that. I do know Spanish, but I don't remember that.

Q. Was there anybody there connected with Mr. Medina Perez?

A. He had, I remember he had some friends there for a while.

Q. Do you remember how many friends?

A. I don't.

Q. Do you remember speaking with them at all?

A. I did speak with them.

Q. And was that in -- don't tell us about it, but

in connection with this situation?
A. Yes.
Q. Did you continue to represent Mr. Medina Perez through the lunch hour?
A. My understanding was I did.
Q. And do you have a big book of tabbed exhibits in front of you?
A. I do.
Q. Can I ask you, if you would, to take a look at Exhibit H, please? H, like Harry.
A. Yes.
Q. And if you would, would you turn to Page 147. And I'm talking about transcript pages, not physical pages.
A. I believe I'm there.
Q. Do you have that?
A. Yes.
Q. All right. And up at the top the clerk is saying, so, ma'am, Ms. Bostwick has been appointed to represent you. Was that what you meant, there were other clients besides Mr. Medina Perez you were being appointed for?
A. That's what the transcript says.
Q. Okay. And if we scoot down to Line 16, the clerk says, Judge, that leaves us with

Mr. Perez, and Attorney Bostwick, are we still -- and you said I just sent a fax.

A. That's what it says.

Q. Do you have a recollection of sending a fax?

A. I think, I think I did send a fax to his employer.

Q. Okay. Was that part of your investigation about his identity?

A. Yes.

Q. Okay. And then the clerk says, so that just leaves, and there's a conversation with Judge Joseph and another lawyer named Mr. Harrington?

A. Yes. That's what the transcript shows.

Q. And then if we go over to Page 149, at Line 18, are you speaking again?

A. That's what the transcript indicates, yes.

Q. And you said, I think, Your Honor, I have an appointment this afternoon, and I wanted to ask if we could have a -- and I understand that the interpreter has to be somewhere as well, if maybe we could have Mr. Medina's case called at 2:15 or so, so that would just give me time and then we're not just waiting. Do you remember needing a little time for a medical appointment?

A. I do.
Q. And did Judge Joseph give you that time?
A. Yes.
Q. Again, is that something most judges would do if you said can I come back at 2:15?
A. Yes.
Q. Did you leave the courthouse anticipating that you would come back and continue to represent Mr. Medina Perez?
A. That was my understanding.
Q. Up until that point, had Attorney Jellinek approached you and told you he had been retained?
A. Nobody contacted me telling me that he had secured private counsel.
Q. Do you remember seeing Mr. Jellinek before you left for lunch?
A. I don't remember that.
Q. Do you remember giving him any documents?
A. I don't remember that.
Q. Okay. You went off to lunch and your medical appointment?
A. Yes.
Q. While you were away from the courthouse, did anybody contact you to tell you that you would

no longer be representing Mr. Medina Perez?
A. No.
Q. Did you show up thinking you still represented him?
A. I did.
Q. What do you remember about coming back in the afternoon?
A. I remember I came back probably pretty close to 2:00, 2:15. I remember that I ran into Attorney Jellinek. He indicated to me that he had been retained.
Q. Was that the first you were hearing of it?
A. Yes.
Q. Did you have a conference with him about Mr. Medina Perez's case?
A. I'm sure I must have said something, something to him. I don't remember what specifically.
Q. Do you remember giving him any documents or any of your file?
A. I don't.
Q. What did you do after that?
A. I stayed in the courtroom, you know. I didn't know if, you know, I was going to be relieved for the afternoon, so I stayed.

Q. As part of being the duty attorney, would you normally stay until the court proceedings conclude for the day?

A. I mean, it would be common -- Sometimes. Right? If the clerk called me and said we don't need you to come back and -- you know, I would probably have gone home.

Q. Okay. But you were back first to represent Mr. Medina Perez and then you continued to stay in case anybody needed you?

A. I -- My memory is I continued to stay because I came back for Mr. Medina. I didn't know if [inaudible] -- That's what I remember.

Q. Where did you sit?

A. My memory is that I sat to the right side -- if you're facing the bench, I sat to the right side.

Q. Okay. Is that the side where side bars would be held?

A. Yes.

Q. Did you see a side bar take place in Mr. Medina Perez's case?

A. Yes.

Q. Were you sitting in the gallery looking at it?

A. I wasn't sitting in the gallery. I was

sitting behind the bar.

Q. So, actually, within the bar enclosure?

A. Yes.

Q. And were you able to hear the side bar?

A. No.

Q. Was there white noise that went on?

A. I'm sure there was. I don't know.

Q. But even from within the bar you weren't able to hear what they were saying?

A. No.

Q. Do you know whether parts of it were on or off the record?

A. I mean, my memory is that I did know that we went off the record at some point, but I couldn't tell you when that was.

Q. And could you hear anything at all from either the on or off the record part?

A. No.

Q. Did you see Judge Joseph speaking with David Jellinek and Shannon Jurgens?

A. Yes.

Q. Did anything appear unusual or out of the ordinary to you as you watched it happen?

A. I have no memory of anything unusual.

Q. Just sort of another day, another side bar?

A. I just know that they were at side bar addressing the court.

Q. After that finished, do you recall that Mr. Medina Perez was arraigned?

A. I don't remember when that occurred. I think he would have been arraigned earlier.

Q. In any event, there was some sort of continued proceeding and he was then released? Do you recall that?

A. Yes.

Q. Do you recall some discussion in open court about Attorney Jellinek going downstairs to speak with Mr. Medina Perez?

A. Yes.

Q. And the lockup would be downstairs?

A. Yes.

Q. Had you had experience in the Newton District Court speaking with clients in the lockup?

A. Yes.

Q. Was that unusual?

A. No.

Q. If you -- or if the client needed an interpreter, would the interpreter go to the lockup?

A. Sure.

Q. Was that again pretty routine?
A. No. I mean, it wasn't unusual. No, it was not unusual.
Q. If you needed it, it happened.
A. Of course. I'm sorry.
Q. Once they went downstairs, do you remember what you did next?
A. I don't.
Q. Do you remember seeing either Attorney Jurgens or Attorney Jellinek later that day?
A. Yes.
Q. What do you recall about that?
A. I remember leaving the courthouse. I believe I ran into them on the outside area of the courthouse.
Q. Physically outside the building?
A. Yes.
Q. What do you recall about that?
A. I recall being there and Attorney Jurgens is there and I think David Jellinek came out.
Q. Do you recall either having or overhearing any conversation about Mr. Medina Perez?
A. I don't recall specific conversation, no.
Q. Do you remember saying to Attorney Jellinek, I know what you did and you obstructed justice?

A. I don't have a memory of that.
Q. Did you at that point know that Mr. Medina Perez had gone out the back door?
A. He didn't come upstairs with Attorney Jellinek.
Q. Did you expect that that's what would be happening?
A. That's what I thought would have happened, yes.
Q. And did you have an understanding at that point about why that didn't happen?
A. I didn't know.
Q. Did you understand what had happened with the Pennsylvania warrant?
A. In terms of --
Q. Of why he wasn't being held on the warrant?
A. My understanding, I think that the DA agreed that it wasn't him.
Q. Did that surprise you?
A. I had tried to make that argument earlier. I thought it wasn't him, and so I think she agreed.
Q. Okay. But not while you were representing him.
A. No.
Q. Do you recall anything else about your

interaction with either Attorney Jurgens or David Jellinek?

A. No.

Q. Did you ever get contacted or interviewed by the Federal U.S. attorney or anybody investigating this case?

A. No.

Q. Were we the first ones who came looking for you?

A. Yes.

Q. And was that probably December of this year -- last year, 2024?

A. I believe that's correct, yes.

MS. MULVEY: I have nothing else. Thank you, Attorney Bostwick.

JUDGE FABRICANT: I'll be very brief.

CROSS-EXAMINATION

BY JUDGE FABRICANT:

Q. Good morning, Attorney Bostwick.

A. Good morning.

Q. You were appointed to represent Mr. Medina Perez, and you worked hard for him; right?

A. Certainly.

Q. And you worked right up until the lunch break,

and then court recessed, and you thought you were going to come back and continue to represent him.

A. Absolutely.

Q. And then Mr. Jellinek came in and took over.

A. Yes. I think -- Yes.

Q. And that happens sometimes; right?

A. Of course.

Q. It's not an unusual event.

A. No.

Q. And we can all speculate about why it happens. Maybe there are some unfair stereotypes out there in the world about appointed counsel. But in any event, it happens; right?

A. Sure.

Q. And when you came back and you sat in the courtroom, you said you sat inside the bar. So from the perspective of the bench, you'd be visible, wouldn't you?

A. Yes.

Q. You were not at side bar.

A. No.

Q. And you couldn't hear what was said at side bar.

A. No.

JUDGE FABRICANT: I have

nothing further. Thank you.

MS. MULVEY: I have nothing else. Thank you.

HEARING OFFICER: Thank you very much.

MR. HOOPES: Judge Joseph would call judge, retired Judge Carol Ball.

HEARING OFFICER: Good morning.

Former HONORABLE CAROL S. BALL, SWORN

DIRECT EXAMINATION

BY MR. HOOPES:

Q. Good morning.

A. Good morning.

Q. Again, would you state your name and spell your name for the record.

A. Yes. My name is Carol Ball. C-a-r-o-l, middle initial S, and last name B-a-l-l.

Q. And I'm stopping but I'm going to call you Judge Ball or Attorney Ball.

A. Yeah.

Q. Whatever you want.

A. Yeah. When you and I worked at the DA's office only like 80 years ago; so...

Q. 45. So you were a judge, --

A. Yes.
Q. -- and now you're retired; is that correct?
A. Yes.
Q. Could you share with the hearing officer your education, training, experience both as a lawyer and as a judge.
A. Okay. I went to Northeastern Law School -- we have a reunion of Northeastern Law group here -- in Boston. I clerked for the Superior Court in this building. And then I was an assistant DA in Middlesex County across the river for eight years. Tried a lot of cases. We were all very lucky because the -- there had been -- the full-time bill was passed right before we started. Up until that point, lawyers from the Commonwealth of Massachusetts who were DA's would try cases in the morning, criminal cases in the morning, and then they all had civil practices in the afternoon.

So I can't remember the year was, but as of right after we got out of law school, that law was passed that DA’s would be full-time. And therefore, there were a whole bunch of senior DA's who were making their living off their practice in the afternoon. So

they had quit and run off and run their practice. And young people like me, Tom, got a chance -- I tried my first murder a year into the job. So in my ~~anyway. Ee~~ight years, I was trying murder, rape, the usual felony stuff. Quite fun.

Q. Then after you left, did you enter private practice?

A. Yes. After that, I wanted to learn to try civil cases. I went to an insurance defense firm and was there for four or five years, and then for the next five or six years I was variously on my own or working in sharing expenses in conjunction with another lawyer or two. I had a trial practice, trying civil cases and also defense. And I did a lot of criminal -- not a lot, but a fair amount of criminal defense work.

Q. And was that criminal defense work in both the District Court and Superior Court?

A. It was. And Federal. Little bit in Federal Court.

Q. And at some point were you appointed to the bench?

A. Yes. 1996. Lightning struck and I was

appointed to the Superior Court.

Q. And you were in the Superior Court for how long?

A. 19 and a half years. I retired on May 31st, 2015.

Q. Thank you.

Now, during the course of your practice, private practice, did you have occasion to experience judges going off the record?

A. Left, right, and center. I mean, I -- Yes.

Q. In both the District Court and in the Superior Court.

A. Yes.

Q. Could you explain that in more detail.

A. Yes. Back -- The whole on and off the record thing was a progression. And back when I was a law clerk and assistant DA, we spent hours in judges' lobbies with the lawyers in the lobby. Mostly -- I was in Superior Court mostly, as a law clerk entirely. Lobby was the traditional -- you heard it described here, with both sides going, the judge saying what would you like me to do, so defense counsel would take it down to their client. So lobby conferences.

In addition, there was a fair amount of side bar stuff when you were in

assignment sessions, like the first session here. People actually refer -- I'm not going to beat a dead horse about that. People would go on and off the record for various reasons. It became, it became -- Popular sounds correct, but I don't mean that. People became aware that this balance of lobby conferencing and doing stuff in the public was a problem for reasons we've all discussed. And the courts pushed us towards going, towards going on the record and definitely not doing stuff in the lobby because it looked like there were accusations -- You didn't want people to think when we're at the lobby laughing and joking and cutting a deal. You know, that was not -- They want people to see we're doing serious business. And so there was definitely -- The move was to go to side bar and do it in full sight of the public even if not in the hearing of the public.

There was, there was ~~some~~ resistance all along the way of this progression. Because it was a very popular practice with lawyers on both sides, with judges, because everybody felt people were, and they were, it's human nature, were much more -- you'd get the real scoop if

you're off the record, that people are much more willing to give a judge the full information for any, you know, any number of reasons, privacy reasons, office politics reasons, witness problems, and so we all felt that we were -- I mean, the goal here was to do justice in the individual case, you know. And to do that, you, as a judge, you want as much information as you possibly can.

And there is just -- to this day I -- you know, I ~~notice~~ know that I retired in 2015. I would have been in tears about the fact that this rule was not probably -- finally passed -- She's laughing. She's right. -- to go on the record, you know, to be all on the record all the time. Because I really meant that it allowed us to do justice to have the opportunity to get the real scoop on some things, if you will. And that is -- I understood that that's what it was.

Q. So when you were on the bench as a Superior Court judge, did you go off the record?

A. Yup.

Q. And could you describe that progression and how you conducted those when you were on the

Superior Court?
A. Well, when you're saying off the record, you mean in lobby conferences and in addition to all the other stuff.
Q. Well, if we could separate the two.
A. Yeah.
Q. First describe the actual lobby conference and then what you would do when you're out on the bench.
A. Right. Well, the lobby conference increasingly became not in the lobby anymore but out on the record. We're out at side bar, as you've all discussed, and the conversation would be off the record initially when the transition was made out into the courtroom. And then increasingly it became on the record. For lobby conferences. And it was the same -- basically, I have to say, I found it less intrusive than I thought it would be, would still be able to -- in open court you would still be able to, even though side bar off the record even, there still was clearly the appearance to the public that we were doing our job, that it was, you know, a real, a real -- like you see justice work without having to know how the sausage was actually

made, which one judge says, public doesn't need to know how the sausage is made. That's literally an old thought. Words not to live by anymore. But anyway.

Q. And when you --

A. —Oh, ~~sorry~~sidebar. Other stuff.

And the other was, both the same. I sat in -- As the years go by in the Superior Court, you get seniority, you get a lot more choice of our courts you sit in and what sessions you sit in. And I became, I became someone who sat in this building on the sixth or seventh -- seven, I think, seventh floor. And I did a lot of -- It wasn't just lobbies. It was also -- It was case management session, so you're going out to trial, what motions do need to be filed here, have they been filed, discovery, you know, years of stuff, discovery turned over.

And there were lots of side bars on that. And mostly counsel saying, Judge, can we approach and someone saying can we go off the record. And it would often be things like, listen, I got a doctor's appointment at lunch, can I come back at 2:15, look, my guy wants to go pro se and it's really not in his interest,

Judge, can you give me a second call so I can try to talk with him, his wife, you know. Lord knows judges don't want lawyers -- defendants to go pro se. So you know, there would be that kind of stuff. So there was all kinds of just getting business done. And I didn't -- Well, anyway.

Q. Did you require counsel to provide the reason before they came up to --

A. No. You know, I really like lawyers. And I trusted lawyers. I really felt that -- I always trusted that lawyers were doing the right job, were helping counsel and doing the right job for their clients. So I err -- We all have different attitudes about it. But I err on the side assume that counsel's asking to go off the record or approach or go off the record, they were doing it for reasons that were consistent with their representing their client effectively. And if there was a problem, then you deal with it at the time.

Q. Were you aware of other judges in the Superior Court?

A. Oh, yes.

Q. And when you were in the District Court, private

practice, were you aware that it was not just one judge, that it was multiple judges --

A. Yes.

Q. -- going off the record?

Did Judge Joseph ever appear before you in the Superior Court?

A. She did.

Q. And would that have been occasions when you would have gone off the record?

A. Absolutely. She was in the AG's office across the street. They bring all their cases in Suffolk, so she was in front of me all the time at first.

Q. Now, you were present yesterday when there was a question about pausing the proceeding; correct?

A. Uh-huh. Yes.

Q. And can you share with us any custom and practice that you had with pausing the proceeding without requiring an analysis mentally about all the justifications and reasons for doing that?

A. Well, I'm assuming that we're talking -- What I heard yesterday was the conversation about Judge Joseph's proposal to hold the defendant overnight on the out of state warrant and put it

over until people have had a chance to figure out all the identity of Mr. -- blanking on...

Q. Medina Perez.

A. -- Medina Perez. And that -- Yes, I'm aware of hearing that. It is -- It was interesting -- Well, anyway. It is true that instead of a bar analysis, bar exam kind of analysis of that, where spot the ethical problem, you could see that since -- I mean, in effect, the Pennsylvania warrant at that point was sort a nullity, whether it was a de jure nullity or what, but it was de facto a nullity, it's kind of like -- But the defense attorney here -- I mean, you would never do that without the defense attorney running along and you're assuming that the defense attorney, by him saying that's a great idea, let’s do it, has his client's authority to basically in effect waive his right to a bail hearing that day. So that it didn't -- to be honest, it didn't occur to me that if that's what counsel wanted, I'm trying to get justice on an individual case, for everybody involved, and it just wouldn't occur to me -- I mean, I would have to worry about the paper to hold him on, you know, what do we hold him on here. But just

wouldn't occur to me that that's not properly done. Probably a good thing I'm not a judge anymore.

Q. And have you done that in the past --

A. Oh, yesah. ~~In the first case.~~

Q. Are you aware of other judges in this courtroom -- in this courthouse who have done that in the past?

A. I think, yeah. Yes, some. You know, as my former chief said, there was lots talking about at lobby conference. There was definitely a group of us that thought strongly that going off the record assisted in the job and the group that said, hey, the SJC's not happy with this, it's not a good idea anyway. There were definitely people that did it and people that didn't do it.

Q. Lastly, in your experience both as a prosecutor and as a private counsel and as a judge, has it been a custom and practice of almost every judge to be concerned at the end of the day about pushing custodies out and getting it done so that the court officers and the court staff don't have to remain?

A. Oh, yeah. There were a few vans here in this court, there's a van that comes by at noon, they drop them all off in the morning. Vans from Middlesex, from

Essex, from Norfolk. They're all in here dropping the bodies off. They would bring -- We all referred to them as the bodies in the lockup. And drop the defendants off. And then they make circuit at lunchtime. So there's a huge push to get the defendants who are custodies out the door by lunch so that they can go. Because once the vans start coming back in the afternoon, they stop at a particular time. And if you have custodies that aren't ready to go, that van's got to come back, but it's got to come back after stopping in Brockton, in Dedham, and you're going to have court officers, like our friend Vance here, sitting on the eighth floor at 7:30 or 8:00 at night before the defendant is picked up and go back. And the defendants don't like it either because they miss dinner. You know what I mean? So the idea is to get the custodies out the door, get the business done properly, but get the custodies out the door as soon as you can. It's only fair to courthouse staff.

MR. HOOPES: Thank you very much.

CROSS-EXAMINATION

BY JUDGE FABRICANT:

Q. Good morning, Judge Ball.

A. Good morning, Judge Fabricant.

Q. Very nice to see you.

A. You, too.

Q. You talked about needing some paper to hold somebody on.

A. Yup.

Q. Right? It's called a mittimus.

A. Yeah.

Q. And the mittimus goes with the person who is in custody from the court security or from the court to whoever's going to be the custodian, the jails or whoever else; right?

A. Yup.

Q. And it needs to say what he's being held on.

A. Yes.

Q. Right? So you need to come up with something that he's being held on~~; right~~?

A. Yup. Right.

Q. Did you ever -- You never sat on the District Court; correct?

A. No.

Q. You became a Superior Court judge in 1996.

A. Correct.
Q. You retired you said 2015; is that right?
A. Yup.
Q. Somehow I was under the impression it was '16. But it was '15.
A. It was '15.
Q. You spent a lot of time in your years on the Superior Court in this building.
A. Yup.
Q. This building is really, really busy; right?
A. Oh, yes.
Q. It's the busiest. The Superior Court.
A. It's great. It's a great place to sit. It's moving.
Q. And the other place where you spent a lot of time was Brockton Superior Court.
A. Correct.
Q. And that is also a very busy court.
A. Yup, yup.
Q. So the process you described with the vans coming and going, and if it's not ready, they have to come back later and court officers having to stay late, and missed their dinner, that happens in this building; right?
A. Oh, yeah.

Q. And it probably happens in Brockton, too.
A. Oh, yes.
Q. Newton District Court, do you think it happens there?
A. Well, I think they probably don't stop by as often. But it does matter if there's a body -- sorry, That sounds horrible. -- if there's a defendant there to pick up. It does. They have to come back. But you're absolutely right, it's not as busy.
Q. A much less busy court, --
A. Yes.
Q. -- as far as you know.
A. Yes.
Q. When you started practicing law in 1977, you were assistant district attorney, and you said you were very lucky.
A. Yeah.
Q. The way the district attorney's office is usually started, you start at the District Court.
A. Yes.
Q. And then if you do a good job, you move to Superior Court.
A. Yes.
Q. And in your case, it happened quickly.

A. Yeah. Because there was a lot of transition.
Q. ~~Because there was a lot of transition.~~
When you started practicing at the District Court in 1977, recording was a new thing; right? It probably wasn't in all the District Courts.
A. Sure. Absolutely.
Q. Just being installed. District Court judges weren't used to it. District Court practitioners weren't used to it.
A. Yeah. Nobody particularly liked it.
Q. Nobody liked it. And many of the judges who were on the District Court in 1977 were still there in 10 or 12 or 15, 20 years later; correct?
A. Yes. Until they hit 70 and they had to...
Q. In Massachusetts, just to be clear, --
A. Yeah.
Q. -- judges have mandatory retirement at age 70; correct?
A. Yes.
Q. By constitutional amendment enacted in 1974, maybe?
A. Good.
Q. Some judges like that and some don't. Some

chiefs like it and some don't.

A. Exactly.

Q. You were appointed to the Superior Court in 1996.

A. Correct.

Q. It was actually February of 1996 --

A. Yes.

Q. -- that you joined the Superior Court.

A. Valentine's Day.

Q. So the last time you would have appeared at the District Court -- Let me just step back a minute. You were doing -- You were trying serious cases; correct?

A. Yes.

Q. As a lawyer.

A. Yes.

Q. But you still might from time to time appear in District Court.

A. Bread and butter. OUIs.

Q. OUIs?

A. Definitely bread and butter in private practice.

Q. Because that actually -- that sort of high volume practice works better for earning a living --

A. Yes.
Q. -- than the more serious cases than in Superior Court.
A. Yes.
Q. Now, the last time you would have appeared in the District Court would have been late 1995.
A. Yes.
JUDGE FABRICANT: Okay. That's all I have. Thank you very much.
THE WITNESS: Don't you want me to walk me through -- I.
MR. HOOPES: Thank you very much.
HEARING OFFICER: Thank you, Judge.
MR. HOOPES: Judge Joseph calls Allison Koury. I believe she's right outside.
HEARING OFFICER: Good morning.
ALLISON KOURY, ESQ., SWORN
DIRECT EXAMINATION
BY MR. HOOPES:
Q. Ms. Koury, could you just say your name again and spell it, please, for the --
A. Sure. Allison, A-l-l-i-s-o-n, K-o-u-r-y.
HEARING OFFICER: Could I ask

if you could stay as close to the microphone as possible.

THE WITNESS: Sure.

HEARING OFFICER: You can move it closer to you if that would be better.

THE WITNESS: Very good.

HEARING OFFICER: Thank you.

Q. And you're an attorney.

A. I am.

Q. And could you share with the hearing officer your education, training, and experience.

A. I received my bachelor's from Providence College, my JD from Suffolk, and my LLM from BU.

Q. And you graduated and got your JD. What did you do next?

A. I started working as a tax lawyer, and did that for couple of years, maybe three years, while I got my LLM. And then I realized that is not what I wanted to do, and I was very unhappy at the time. At the time I was young and had nobody to worry about but myself, so I knew I should change fields before I got too used to making a lot of money, so to speak, so I became a bar advocate.

Q. And what year would that have been? When would that have been?
A. That would have been the early 1990's.
Q. And how long were you a bar advocate before you went to something else?
A. So I was a bar advocate until 2001 when I got married, had a baby, and switched to appeals, so that I could stay home and have a more flexible schedule, and I stayed in appeals until my baby got his license, and then I went back to Trial Court.
Q. And what year would that have been?
A. 2017.
Q. And during your first stint as a bar advocate, what courts were you bar advocate?
A. Just Lowell District Court.
Q. And so, again, that would have been Lowell District Court in what years, from when to when roughly?
A. Roughly in the 1990's.
Q. And so when you became a bar advocate again in 2017, which courts did you act as bar advocate for?
A. I was assigned to Waltham and Newton and eventually Superior.

Q. And so can you tell the hearing officer, how many days a week do you think you were in Newton?
A. I was in court four times a week, and it could be Newton, it could be Waltham. It just -- Whenever I had cases. But it was many times a week.
Q. So if we look at the transcript, you were actually in court in the Newton District Court on a case on April 2nd of 2018. Do you have a memory of that?
A. I do not. I have been told I was there.
Q. Aside from that, did you have experience with regard to custodies coming in, custody defendants or defendants in custody, coming into the Newton District Court and then being taken out of the Newton District Court?
A. Yes.
Q. And did you also have experience with people who came in in custody and then being released from custody?
A. Yes.
Q. And based on your observations and your experience with regard to the Newton District Court, when an individual was being released

from custody in the Newton District Court, where were they released to?

A. They would go back downstairs. If they had come up in shackles, they would be brought back downstairs to remove the shackles. Even if they weren't in cuffs or shackles, they would go back downstairs to retrieve their property.

Q. Now, if you had a client who was released, would you see it as being unusual at all to be going downstairs to speak to him before he left?

A. Not at all. There are a number of reasons why I might go downstairs. Like --

Q. What would they be?

A. If something maybe confusing had taken place, I would want to go downstairs and make sure I was able to talk to the defendant before they actually left the building, or I might have a question for them, and especially when there was an interpreter involved, and either of those things, I wanted to answer the defendant's questions or ask a question, I would want to make sure that I did that right away before -- while I still had both people in the building.

Q. Going back to your time in Lowell. That was in the mid to late '90's, if I understood it

correctly?
A. Uh-huh. Yes.
Q. Did you observe the practice up there with judges going off the record?
A. Yes.
Q. I'm sorry. Go ahead.
A. It was a different era back then.
Q. Okay. And one particular judge up there went off the record.
A. Yes.
MR. HOOPES: Thank you. That's all I have. Thank you.
JUDGE FABRICANT: Very brief.
CROSS-EXAMINATION
BY JUDGE FABRICANT:
Q. Good morning, Ms. Koury.
A. Good morning.
Q. On April 2nd of 2018, you were in the Newton District Court because you had been appointed to represent a person by the name of Pineda, if I'm pronouncing that correctly.
A. That doesn't ring a bell.
Q. So let me show you the docket. Let me see if that refreshes your memory.
JUDGE FABRICANT: If I may

approach.

HEARING OFFICER: Yes.

Q. Take your time to read as much of it as you need to.

(PAUSE)

A. Okay. Yes.

Q. And take a look at -- Look at behind Tab H in that binder that you have in front of you. You have a binder in front of you.

A. Oh, yes.

Q. Turn to -- Looking at the numbers up in the upper right-hand corner, turn to APP 047, please. And then this is a mini~~us~~cript, so look at Page 5 in the transcript. Do you have that in front of you?

A. I see that, yes.

Q. And you can see that the clerk says, going down about -- to Line 10, the clerk says, calling the matter of Commonwealth versus Pineda, and then the Commonwealth, the assistant district attorney who's not named here, says there is a private counsel that came in on Friday and requested an 11:00 a.m. call because he just filed an appearance Friday and had to be in another court, I believe I do have the request.

And then the judge, again, not named here, says second call. And then the assistant district attorney says, okay, you have that. And then the clerk says, I have that. And then defendant's counsel -- So that would be you at that point; right?

A. Yes.

Q. It says, I had originally been appointed to represent Mr. Pineda, and I understand there's been a notice of appearance, may I withdraw.

A. I see that, yes.

Q. And the judge -- the court says, okay, you may.

A. (Witness nods head).

Q. So that was a situation where you had been appointed, and then the defendant or somebody on his behalf retained counsel, and retained counsel came in and replaced you.

A. Yes.

Q. And that just happens sometimes.

A. Yes.

Q. It probably still happens sometimes. And there are lots of reasons why it might happen. But it happens. It's not a surprising thing when it does happen; correct?

A. It can still be surprising for me. But yes,

I see what you're saying.
Q. But it's not a rarity; correct?
A. No.
JUDGE FABRICANT: All right. Thank you. That's all I have.
MR. HOOPES: Thank you. Thank you very much.
HEARING OFFICER: Thank you very much.
Judge Joseph calls retired Judge Sevelin Singleton.
former HONORABLE
SEVELIN B. SINGLETON, III,
SWORN
HEARING OFFICER: Thank you. Please be seated.
DIRECT EXAMINATION
BY MR. HOOPES:
A. Mr. Hoopes.
Q. Good morning, sir.
A. Good morning.
Q. Judge, would you state your name again for the record and spell it.
A. Sevelin B. Singleton, III. Sevelin is spelled S-e-v-e-l-i-n.

Q. Thank you.
So you were a lawyer, then a judge; correct?
A. Correct.
Q. Would you please share your education, training, and experience to the hearing officer.
A. Undergraduate degree, Bachelor of Science, business administration, Northeastern University Law School, JD. And from there, Mass Commission Against Discrimination. I think I stayed there one year. Then I left there and went to the Middlesex district attorney's office. I believe I was there for two years. I had taken a leave of absence from that office to run for city council in the City of Cambridge. I did not win. Thank goodness. From there, I became legal counsel for the City of Cambridge and opened my own private practice.
Q. And for how long a period of time were you in private practice?
A. Again, maybe two to three years.
Q. In what year did you get appointed to the bench?
A. 1989.
Q. And to which court were you appointed?
A. The court I grew up in, Cambridge District Court. The neighborhood.

Q. And how long a period of time were you at the Cambridge District Court?

A. Actually sitting?

Q. When did you retire?

A. 2014.

Q. And during the course of time that you were sitting on the bench as a judge of the Cambridge District Court, did you engage -- have experience with the custom of going off the record?

A. Yes.

Q. Could you explain that to the court, please.

A. Even though I frowned upon it when asked for a lobby conference or to go off the record, I would press the attorney, usually the defense attorney, as to its reason, and often, of course, they did not want to put that reason on the record, I said at least give me a hint. If the hint was a good hint which required something off the record, a brief off the record moment, then I would grant that request if there was no objection from the district attorney.

Q. And did you continue that practice up until the time you retired?

A. I did.

MR. HOOPES: No other questions. Thank you.

JUDGE FABRICANT: If I may have just a minute.

(PAUSE)

JUDGE FABRICANT: I have no questions for this witness. Thank you.

HEARING OFFICER: Thank you.

THE WITNESS: At least a good morning to you.

JUDGE FABRICANT: Good morning, Judge Singleton.

MR. HOOPES: Judge Joseph calls Mr. Gerrity.

MARK GERRITY, SWORN

HEARING OFFICER: Please be seated.

DIRECT EXAMINATION

BY MR. HOOPES:

Q. Good morning, sir.

A. Good morning.

Q. Could you state your name again for the record and spell it for the court reporter.

A. Absolutely. It's Mark Gerrity, spelled M-a-r-k G-e-r-r-i-t-y.

Q. And sir, can you tell the hearing officer where you're employed, by whom?

A. I'm employed by the Massachusetts Trial Court as a deputy chief information officer in charge of security infrastructure.

JUDGE FABRICANT: I'm sorry. I couldn't hear all of that answer.

A. I'm sorry. Yeah. Deputy chief information officer with the Massachusetts Trial Court and I'm responsible for the security infrastructure in the court.

JUDGE FABRICANT: Security infrastructure?

A. Correct. Infrastructure.

HEARING OFFICER: And if you could just move the microphone as close to you as possible, that would be very helpful.

THE WITNESS: Yup.

HEARING OFFICER: Thank you.

Q. Now, could you just briefly describe what your title means. What do you do?

A. So what my title is, I manage a team within the Trial Court that is responsible for the installation, the maintenance, service, and repair of all the electronic security systems

within the Trial Court, and that includes CCTV, access control system, meaning card swipes, x-ray machines that you see out the entry into the courts, walk-through metal detectors, and also the two-way radio communications.

Q. And so those are all the courts. That would include the Newton District Court.

A. That is correct. Yup.

Q. And so if I were to show you what's been entitled a history report that's in as Exhibit 3, you're familiar with the concept of the exhibit history?

A. Absolutely. Yup.

Q. Okay. So if I could show you at this time that exhibit but with several lines in it.

MR. HOOPES: And I'd ask to admit this version because it's got a couple of lines to make it a little easier for you to follow. And I don't know how you'd like to mark it. I was going to suggest as 3-A.

HEARING OFFICER: 3-A sounds fine.

Any objection?

JUDGE FABRICANT: No objection.

HEARING OFFICER: 3-A is

received.

EXHIBIT 3-A

(DOCUMENT MARKED AS EXHIBIT 3-A)

Q. Looking at that, can you identify that as an electronic access document for the Newton District Court for April 2nd of 2018?

A. Yes, I can.

Q. And at my request, did you go back out to the Newton District Court and make observations to confirm that everything seemed to be in order and was in order on this day?

A. That is correct, yes.

Q. And so if you could -- I'm going to point you to Page 3 of 5. And on the third line, there are categories going across the top. There's a location, group, Trial Court, but there's a start and date time, start time, and other information, but there's also a time event, device name, and code; correct?

A. That is correct. Yup.

Q. And so looking at entry labeled 110 on the left-hand side, that -- if you go under the device, indicates that it was utilized by one Wesley MacGregor, and it indicates that it's 5

and then 228 and then B, capital B, and then lockup, and then arrow sallyport area.

A. That's correct.

Q. So does that mean that the access was from the lockup area to the sallyport in the back?

A. That is correct. So the individual would be standing inside of the lockup with a card reader, presented a card at the reader, and would open the door and allow you access into the sallyport.

Q. Go down two levels to 113. It's the same entry, again by Wesley MacGregor. That's going out, correct, from the lockup into the sallyport area?

A. That is correct.

Q. And going to the next page. Beginning at the top, there are entries for 167 at 12:54, and that indicates, again, lockup arrow sallyport area Wesley MacGregor, then that's Mr. MacGregor going out; correct?

A. That is correct.

Q. And below that in 168. That's B sallyport area going into the lockup.

A. Correct. Correct. So that would be from the exterior of the building sallyport into the

lockup.

Q. And so the next area entry below that is B lockup arrow sallyport area at 12:56. So he'd be going back out at that point.

A. That's correct. Yup.

Q. So we've got him going out at 12:54, in at 12:55, and out again at 12:56; is that correct?

A. Yes.

Q. And then the next time we see Mr. MacGregor is in 177, we see lockup exit to staff; correct?

A. That's correct.

Q. And then the next entry we see is 186, which is 1:51, which is lockup out to the sallyport area; correct?

A. That's correct. Yup.

Q. And that's, again, Mr. MacGregor.

A. That is correct.

Q. And then at 188 at 1:53 we see sallyport area lockup. So he's coming back into the courthouse; is that correct?

A. Yes.

Q. And then the next entry regarding the lockup with Mr. MacGregor, because there's other entries with regard to him, but with regard to the lockup, is 211, it's an exit at 3:01 point÷03, or

seconds, B lockup area, out to the sallyport area, by Mr. MacGregor.

A. That's correct.

Q. So again, that entry with him at 3:01 in the afternoon is him opening that back door; correct?

A. 3:01 denotes that is from the lockup out to the sallyport area.

Q. Thank you.

Now, when you were out at the Newton District Court, did you observe whether or not there were keycard access from the dock down to the lockup?

A. So there is a door in the lockup on the same level as the lockup that goes -- leads to a set of stairs that goes to the dock in the courtroom.

Q. And so if we don't see any keycard access regarding that, which goes down the stairs to the lockup area, being used, what would be the explanation?

A. The general explanation would normally mean that the door's potentially propped.

MR. HOOPES: Okay. Thank you. That's all I have.

CROSS-EXAMINATION

BY JUDGE FABRICANT:

Q. In 2018, were the doors that went from the dock -- or do you know whether the doors that went from the dock into the courtroom and the other door inside the dock from the stairway to the dock or from the dock to the stairway, do you know whether those used electronic key cards or whether they used physical keys?

A. So the door I've been referring to is actually on the ground, the basement level, inside the lockup area into a set of stairs. That system has been in place for I would say quite some time. It was before my tenure with the Trial Court. So I would say, yes, to the best of my knowledge.

JUDGE FABRICANT: So let's bring up that photograph so we can show the door of the lockup.

Q. I want to preface, the question I'm asking about has to do with the door of the dock. If I said lockup, I misspoke. So the door that goes from the stairway into the dock or from the dock back to the stairway, and the door that goes from the dock out to the courtroom or from the courtroom back to the dock. Those are the

doors I'm asking about.
A. So I can preface that by -- the court was in session, and I wasn't able to get up the stairwell into that area.
Q. So when you went out to look --
A. I could not access that area.
Q. And you went out to look recently; correct?
A. That's correct.
Q. Not in 2018.
A. No.
Q. Were you in this role in 2018?
A. I was the security systems administrator in 2018.
Q. So here's a picture of the dock. We actually have another picture that shows the door a little bit ajar. Let's see if we can find it. Yeah. Well... Okay. So we're now looking at Page 513, I think, Page 513. The door that is in the foreground there, --
A. Yup.
Q. -- does that have an electronic card reader as far as you can tell?
A. I do not see one.
Q. What do you see there?
A. I see the key lock on the door. Yup.

Q. Okay. And then the other door that's inside the dock, can you tell --

A. From what I can see sitting here, it is the same setup as the door in the foreground. It's a key lock, it appears to be.

Q. And in that door at the bottom of the stairs, --

A. Correct.

Q. -- that one would have to go through to get from --

JUDGE FABRICANT: Thank you.

Q. So we're now looking at Photograph Number 316, I think.

MR. NEFF: 515.

Q. 5156. I'm sorry. So that door that you can see there that you have to go through to get from the lockup into the stairway or from the stairway into the lockup, is that the door you referred to earlier?

A. That is correct, yes.

Q. And that does have an electronic key lock.~~happen --~~

A. It does. And you can actually see it actually sticking off the door slightly.

Q. And you said that, ~~and~~in some cases, if there isn't an entry on this document, that might mean that the door was propped.

A. That's correct. Yes.
Q. And that sometimes happens; correct?
A. It does.
Q. Shouldn't happen, but it sometimes does.
A. Too much.
JUDGE FABRICANT: All right. Thank you.
Oh, one more question, if I may. I'm sorry.
Q. As we look through this list, as we look under the column that says Device, --
A. Yup.
Q. -- in some places you see a name as opposed to a location description; correct?
A. That is correct.
Q. So, for example, near the bottom on the first page, at the second line from the bottom, you see Judge Klein's office. Do you know that as of -- Do you know who Judge Klein was?
A. I do not.
Q. Do you understand that to refer to the office or lobby being used by the First Justice?
A. I wouldn't -- Yes, I would guess without actually knowing. It would be a guess.
Q. Okay. We don't want you to guess.

A. Yeah.
Q. But from your experience in dealing with these kinds of documents --
A. So I can -- If I could. A lot of times space allocations change within a courthouse, and we never know about it. It might just be a local thing within the courthouse. There -- Before my tenure, there was a lot of locations that refer to a location based on maybe the First Justice and they use their names. We, as we get into, moving forward, ~~in~~ doing upgrades in buildings, we correct that. So the person may have retired many years ago, and the staff knows the location, but we are not familiar.
Q. So if you look at the rest of that line, it says that the person who used the key card to access wasn't Judge Klein, it was Judge Joseph; correct?
A. Yes.
Q. So would you take that to mean that that office that this document refers to as Judge Klein's was being used at least that day by Judge Joseph?
A. Yes.
JUDGE FABRICANT: All right.

Thank you.

MR. HOOPES: Thank you.

HEARING OFFICER: Thank you very much.

MR. HOOPES: So in the evidence at this point are two memorandum by ICE officers. We'd ask permission to have those read for the record. I know they're part of the record, but there's a public nature of this. If that's acceptable, we will call a witness to do the reading.

HEARING OFFICER: That's acceptable.

JUDGE FABRICANT: This witness shouldn't be sworn; right? Or should he be sworn --

MR. HOOPES: I think he should be sworn the same --

HEARING OFFICER: I'll take a stab at this.

Do you solemnly swear that the reading you will be providing us today shall be fully accurate?

THE WITNESS: I do.

DOUGLAS BROOKS, ESQ., SWORN

DIRECT EXAMINATION

BY MR. HOOPES:

Q. Sir, would you state your name again for the record, please.

A. Douglas Brooks.

Q. And can you spell it, please?

A. D-o-u-g-l-a-s, last name B-r-o-o-k-s.

Q. And you're an attorney?

A. I am.

Q. And I have here with us in the record as a report a memorandum that was written by an ICE officer that's entitled Appendix O DHS ICE memorandum investigation, Officer Richard Simmons, dated April 18th, 2018. I'm going to show you this, sir, and I'm going to ask you if you would kindly read it, beginning with the first line, which is April 2nd of 2018.

A. (Reading) On April 2nd, 2018, I, Deportation Officer, DO, Richard Simmons, responded to a Secure Communities, SC, hit based on arrest by Newton police. The subject, A079677654, Oscar Pegeuro, March 2nd, 1979, a/k/a Jose Medina Perez, August 15th, 1981, of the

Dominican Republic, was arrested by Newton police and charged with possession of Class B, ~~(~~cocaine~~)~~. Subject has no other known criminal history. I arrived at the District ~~--,~~ Newton District Courthouse at approximately 09:30 hours. At security, I identified myself and asked for the chief court officer. The security officer stated he was not around but the other court officers on duty were in the courtroom. I entered the courtroom and sat in the designated area of police directly next to a court officer and a Newton police officer. A Newton police officer -- I believe his first name is Jason -- greeted me by asking if I was here for this guy, Perez. I said, yes, I have a detainer and warrant. He said that he had the paperwork already.

As I observed the court proceedings throughout the morning, during a brief recess I introduced myself to a court officer situated near me. I asked him if I would be able to take custody of the subject in lockup at the conclusion of his arraignment. He said that I could and that it would be better for him and the other court officer in the

court, as they were the only two court officers around. I said that would be great, as I was alone currently, and for officer safety reasons, it would be best.

The subject's arraignment took some time and was not called until after lunchtime. Throughout the day, as circumstances permitted, the court officers, the assistant district attorney, ADA, the clerk magistrate, and the defense attorney were all made aware of my presence and intent to arrest for Peguero upon his release from state custody. In addition, I could see that both the ADA and defense attorney were in physical possession of the immigration detainer.

Just before the lunch break, approximately 12÷30 hours, the female defense attorney approached me and asked if I was with ICE. I stated yes, how can I help you. She was explaining to me her reservations about her client being a wanted person out of Pennsylvania and the subject that I was in court for based on the information in the detainer. I assured her that her client was subject of an ICE detainer, confirmed through biometrics. Ultimately, at

approximately 13÷10 hours, the case was held over to the afternoon session.

I re-entered the courtroom at approximately 14÷00 hours. As I sat in the courtroom waiting for the session to begin, a male attorney, not present in the courtroom earlier in the day, introduced himself as the subject's defense counsel and asked if I was with ICE. I stated yes, how can I help you. He went on to say that he believed there was -- there to be a case of mistaken identity with his client. I told him that I knew his client's identity. He proceeded to read and to point out differences in his client's height and weight compared to the subject cited in the detainer. I told him that I was not concerned with those discrepancies. I further told him that I was only concerned with this client's biometric match. I explained that his client had been previously removed from the U.S. and that his presence is evidence of his illegal entrance into the U.S.

After the conversation with the defense attorney, I spoke with the ADA in greater detail about the subject's immigration

history. I explained his previous deportations and that he would be presented for prosecution to the U.S. attorney's office for re-entry after deportation when he comes into ICE custody.

At approximately 14÷10 hours, the clerk had entered the courtroom and asked if I was with ICE. I stated yes. He asked if I had a warrant, and I, again, stated yes, I have it right here. I asked if he wanted it or wanted to see it, and he said no. The clerk went on to say that the judge wants me to tell you to leave the courtroom. I said, leave the courtroom? The clerk said yes. I said, why am I being told to leave the courtroom? He stated that the judge didn't want her courtroom being intimidated by the presence of ICE. It should be noted that I was in plain clothes, with all my branding and gear covered by a shirt and jacket. I asked again if he was telling me to leave the courtroom, and he said the judge doesn't want anyone being intimidated by ICE.

I left the courtroom, and the clerk followed me out to the front lobby/security area. He explained to me that he would let me know as soon as a decision on the

case had been rendered. The clerk returned to the courtroom, and shortly thereafter the clerk returned to speak to me again and stated that if the subject is released, he will be released either through the courtroom or brought back down to the lockup and released into the courthouse. I asked, so he will come up the stairs over there and into the lobby to use the main exit? He stated yes.

At that time I expressed to him the serious matter of officer safety. I pointed out that I was currently alone and there are three males that have waited all day for the subject. The subject's defense attorney has been meeting with them off and on throughout the afternoon. I asked the clerk if it was at all possible if it would be better for officer safety reasons for me to take the subject into custody in lockup. He said, no, I'm sorry, and returned to the courtroom.

It should be noted that it is Massachusetts Trial Court policy to allow ICE officers into the lockup to take aliens into custody. However, I was refused this opportunity.

At this time, I waited outside the courtroom for a decision at approximately 14÷21 hours and contacted my team to see if there was anyone available for backup. Deportation Officer, DO, Domenico Federico responded and arrived at the court approximately 30 minutes later. I never left the front lobby. The clerk came out of the court at approximately a 14÷50 and said the subject was being released. The clerk went on to say that the subject would be brought back down to lockup and then escorted by a court officer to the lobby/security area where I was waiting.

The ADA came out sometime later, I would estimate no more than 10 minutes, and stated to me that she had a bad feeling that the subject was released out of the back of the building. She based her feeling on a, quote, look that she got from the subject's defense attorney. We told her that we were just waiting for the court officer to bring the subject upstairs, and she commented on why it was taking so long. The clerk met us in the lobby and stated that the subject should be coming up any minute and went back to the courtroom. The ADA

asked the victim witness advocate, VWA, to inquire about the subject, then went downstairs. Within a few minutes, the VWA returned and informed that he did not see the subject in lockup and that the only other way to leave the building is from lockup, but he doubted that the court officers would have allowed that to happen. The ADA also made a similar statement that she couldn't believe that would happen.

We increasingly became suspicious that the suspect was not in lockup, and Deportation Officer Federico stated he would go to the sallyport at lockup. He exited the front entrance and went around to the back of the courthouse on foot. Deportation Officer Federico reported that he noticed a court officer outside talking to correctional officers that were inside the transport van. DO Federico explained to the court officer that we were waiting for our subject to be brought upstairs in the lobby so we could take him into custody. The officers stated the name of the subject before DO Federico and very sarcastically said that he released him out the back door. DO Federico asked why did he do so, knowing that we were in

the building with a detainer and warrant of arrest. The officer responded to DO Federico in an arrogant tone, that he just let him go from the back.

Ultimately, late in the afternoon, the chief court officer was suddenly available. He advised that the subject was released out the back of the building but couldn't explain why. It was explained to us by multiple court personnel that it required the assistance of someone with a security pass, court personnel.

Q. Thank you. I'm going to show you next what's been marked as Appendix P, DHS ICE Memorandum of Investigation, Officer Domenico Federico, dated April 18th, 2018, and ask you to read that as well.

A. (Reading) On April 2nd, 2018, at about 2:15 p.m., I, Deportation Officer Domenico Federico, received a phone call from Supervisory Detention and Deportation Officer, SDDO, Stephen Wells, requesting that I would assist Deportation Officer, DO, Richard Simmons at the Newton District Court located at 1309 Washington Street, West Newton,

Massachusetts. I grabbed my duty gear and proceeded to that address in order to assist DO Simmons.

I arrived at about 2:51 p.m. and parked my government issued vehicle in the front of the building. I contacted my colleague via cell phone about his location in the building and then entered the main entrance. I was greeted by a court security officer at the checkpoint and identified myself as deportation officer and showed my credentials. I explained to the officer that I was there on official business and looking for DO Simmons.

Once passed through the security, I noticed DO Simmons was just outside the courtroom. DO Simmons stated that the clerk had informed him just a few minutes ago that the subject was going to be released. The clerk also stated that the subject was going to be brought back down to lockup and escorted by a court officer to the lobby where we were.

Within a few minutes, a female Assistant District Attorney, ADA, greeted us and seemed to be aware about the subject's case. We told her that we were just waiting for the court officer

to bring the subject upstairs, and she commented on why it was taking so long. The clerk met us in the lobby and stated that the subject should be coming up any minute and went back to the courtroom. The ADA asked the victim witness advocate, VWA, to inquire about the subjects, and he went downstairs. Within a few minutes, the VWA returned and informed that he did not see the subject in lockup, and that the only way to leave the building is from lockup, but he doubted that the court officers would have allowed for that to happen. The ADA also made a similar statement that she couldn't believe that would happen.

I became increasingly suspicious that the subject was not in lockup, and I informed DO Simmons that I would go to the sallyport near the lockup and exited the courthouse through the front entrance. I walked to the rear of the building and noticed a court officer outside talking to correctional officers that were inside their transport van. I identified myself as a deportation officer to the court officer and showed him my credentials. I explained to the court officer that we were

waiting for our subject to be brought upstairs in the lobby so that we could take him into custody. The officer stated the name of the subject before I did, Peguero, and very sarcastically said that he released him from the back door. I asked him why he had - why, he hasd donedid so, knowing that we were in the building with a detainer and a warrant of arrest. The officer responded with an arrogant tone, that he just let him go from the back. I informed DO Simmons and returned to our office.

MR. HOOPES: Thank you very much. That's all I have. You can step down.

(PAUSE)

MR. HOOPES: Judge Joseph would call Michael McPherson. He may be outside. There he is. Thank you.

HEARING OFFICER: Good morning.

MICHAEL McPHERSON, SWORN

DIRECT EXAMINATION

BY MR. HOOPES:

Q. Good morning, sir.

A. Good morning.

Q. I'm going to ask you to keep your voice up and tell the hearing officer and court reporter your

name again. Spell your name.

A. Michael McPherson, M-c-P-h-e-r-s-o-n.

Q. Sir, are you employed today?

A. Yes.

Q. And by whom?

A. The Trial Court, Massachusetts Trial Court.

Q. And what's your position?

A. Director of security.

Q. And director of security for the entire Trial Court?

A. Yes, sir.

Q. And so we've addressed this a little bit prior to your testimony, but can you again describe what the Trial Court is made up of, how many departments?

A. Trial Court is made up of seven departments, the -- Do you want me to list all seven?

Q. Sure.

A. Housing, juvenile, land, appeals, probate, and Supreme. Not Supreme. I'm missing one.

Q. That's okay. BMC?

A. The BMC.

Q. Yeah. Thank you.

So there are courthouse facilities within each one of those departments, I take it?

A. There is. There's 94 courthouses within the state.
Q. And do you have -- At this point under your command you have roughly how many court officers?
A. 1,035.
Q. I'm sorry?
A. 1,035.
Q. Now, back on April 2 of 2018, did you have a position within the Trial Court?
A. I was the regional director of security. With 1,035, approximately 955 are court officers, the rest are administrative.
Q. Thank you.
And so back on April 2, 2018, you were in a supervisory capacity?
A. I was the regional director of Middlesex and Essex County.
Q. And so would that region include the Newton District Court?
A. Yes.
Q. And did you become aware of the incident that brings us here today --
A. Yes.
Q. -- on that day of April 2nd, 2018?

A. Yes, I believe so.
Q. And did that cause you to conduct an investigation yourself?
A. Yes.
Q. And did you come to learn that there was a practice in the Newton District Court of releasing individuals out the front of the first session courtroom?
A. I was made aware of it through the investigation, yes.
Q. And did you have an opinion as to whether that was proper or not?
A. It was not proper. Our policy is to release people from the lockup.
Q. And is that based on the Court Officer Manual?
A. Correct.
Q. And was that based at the time on the Lunn policy as well?
A. Yes.
Q. And when the Lunn policy came out in November of 2017, as the supervisor, did you take any action to disseminate that to your staff?
A. Yes. I believe through e-mails and also I have chiefs meetings. So when I have the chiefs meetings, it's brought up at chiefs meetings and

again through e-mails and maybe a possible memo.
Q. And in evidence is a, is a -- Exhibit 2 is a revised policy for the Newton District Court issued on April 4th, 2018. I'll show you the policy. And have you seen that policy before?
A. I have.
Q. When did you first see that policy?
A. I believe maybe on 4/5. Somewhere around the time it was written by Chief Noe.
Q. And did you find that policy acceptable?
A. Absolutely not. I told him that policy, take it down, and that's not the policy we'd be following.
Q. And what policy did you put in place?
A. The policy that's in the Court Officer's Manual.
Q. Which is all custodies come in, all custodies go back out the back door?
A. Everyone's released out the back door.
Q. And ICE individuals -- Would individuals be swept by ICE with a detainer would be taken from the lockup?
A. We allow the ICE to come to the lockup themselves in custody for safety precautions for everybody involved.

MR. HOOPES: Thank you. I have no other questions.

CROSS-EXAMINATION

BY JUDGE FABRICANT:

Q Good morning, Director McPherson.

A. Good morning.

Q. The last time we spoke you were regional director; correct?

A. Yes, I believe so.

Q. Congratulations on your promotion.

A. Thank you.

Q. You learned on April 2nd of 2018 that the practice in the Newton District Court was that people were released through the courtroom and out the front; correct?

A. Correct.

Q. And that was not proper in your view.

A. Absolutely not.

Q. But that was the practice that you learned.

A. I learned that, yes.

Q. And there are 94 courthouses and 62 District Courts, and as much as you try to make things uniform, it doesn't always work.

A. It doesn't.

Q. And after this happened, Chief Noe issued this

policy -- Oh, it is dated -- dated April 4th under Chief Noe's signature. And you said, no, that's not proper; correct?

A. Correct.

Q. And then you had some back and forth with Chief Noe about that; correct?

A. Correct.

Q. He said, well, if we release people out the back, that's the -- that's where the police officers park and that's a problem; right?

A. Correct.

Q. So his view was, it wasn't a good idea to release people out the back; correct?

A. Correct.

Q. And did you end up with some middle ground?

A. There was no middle ground. The policy is the policy. And unfortunately, for the Newton police officers' vehicles. The safest way to release someone is through the sallyport.

Q. So your view is, whatever, whatever the local chief might say or do, your view was the policy is the policy.

A. Correct.

JUDGE FABRICANT: Okay. Thank you.

MR. HOOPES: Just one.

REDIRECT EXAMINATION

BY MR. HOOPES:

Q. So you were aware of what the policy was in Newton. Did that have same application when the individual prisoner had property? In other words, would they go downstairs or would they go out the front?

A. We release them through the sallyport because we have to do a check on every individual, see if they have any warrant, see if there's any hold on them, we call the sheriff's department and check with probation and, yeah, to return over their property and sign for their property, and then we release them.

Q. So your understanding at the time of April 2nd, 2018, was that, if no property, they went out the front, if they had property, they went downstairs; correct?

A. I'm confused. They shouldn't be going out the front.

Q. But they were.

A. Yes.

Q. Which you weren't happy about.

A. Yes.

Q. But at the same time, if they had property, they went back downstairs.

A. Correct.

MR. HOOPES: Thank you.

JUDGE FABRICANT: Just one more.

RECROSS-EXAMINATION

BY JUDGE FABRICANT:

Q. In that process of discussion about what was actually happening, which made it different than what should have been happening, did you learn that court officers bring the property up to the courtroom with the person or run down and get it for the person?

A. I'm not sure if I understood that. I just know that the policies weren't being followed.

Q. So you don't know either way whether that was something that would happen.

A. At that court, I do not know that.

JUDGE FABRICANT: Thank you.

MR. HOOPES: Thank you.

HEARING OFFICER: Thank you very much.

MR. HOOPES: I was going to say Your Honor. Mr. Hearing Officer, there's one

photo that we referenced earlier on. It's of the left side -- of the right side -- It's of the left side. I don't believe it was... Yeah. We didn't -- I promised that I'd bring it. I'm bringing it. I'm going to offer this as the next and last exhibit.

HEARING OFFICER: And what --

MR. HOOPES: This is a photograph of the left side of the gallery.

HEARING OFFICER: And what number is this?

MR. HOOPES: This would be, number 6, I believe.

JUDGE FABRICANT: Just to be clear, this is what we have here in the blowup; correct?

MR. HOOPES: Yeah. We blew it up. This is for the record.

HEARING OFFICER: Great.

I assume no objection.

JUDGE FABRICANT: No objection.

HEARING OFFICER: Exhibit 6 is received.

EXHIBIT 6

(DOCUMENT MARKED AS EXHIBIT 6)

MR. HOOPES: That's the case for Judge Joseph.

HEARING OFFICER: Thank you very much. Anything further from you, Special Counsel?

JUDGE FABRICANT: Nothing further. Thank you.

HEARING OFFICER: Terrific.

So with that, the evidence is closed at this point. And what remains is the summations on Monday morning and then the post hearing briefing.

So I just want to note a couple of matters that I'm hoping counsel will address either in your summations or your post hearing briefing or both. I expect you're planning -- I'm not sure my mic is working anymore, so I apologize. Just let me know if you can't hear me. I've got it turned on.

JUDGE FABRICANT: Just a little -- It may be the batteries.

HEARING OFFICER: Yeah. So it’s -- I believe it's on. I'll just speak up.

I expect you're planning to do this in any event, but I just wanted to make sure I flag this for you now so that we're all on the same page in this regard.

The CJC charges that Judge Joseph engaged in misconduct in violation of Massachusetts General Law Chapter 211C, Section 2(5), and a number of rules of the Code of Judicial Conduct.

Special Counsel, if you could please make clear what specific conduct you allege violates each particular rule or statutory provision, what specific subsections of Massachusetts General Law Chapter 211C, Section 2(5), you allege Judge Joseph violated, and what conduct you allege was willful.

And counsel for Judge Joseph, I'd like you to note if there are any -- if there's any specific rule or statutory provision that you agree was violated as well as your arguments for why the specific rule and statutory provisions cited in the CJC formal charges were not violated.

I would also ask that you both include in your summation and/or your post hearing briefing what you believe are the relevant mitigating or aggregating factors that you think I should take into consideration.

And finally, I would also like

to make sure that you address what sanctions, if any, are appropriate given the evidence presented during this hearing.

JUDGE FABRICANT: May I just ask, do you want us to do that in closing argument or do you want us to do that in the --

HEARING OFFICER: I leave that to you. I leave that to you. I just wanted to make sure that, before we complete everything, the summations and the post hearing briefing, that I've heard from both sides on all of those issues.

MS. MULVEY: Our issue is, it sounds like you're looking for a degree of specificity from the CJC that isn't in the petition. Could we have -- I understand we had initially contemplated simultaneous filings. But given that there's going to be that we say these acts violated these rules or sections, could we have even just a couple of days extra to respond to that since right now we don't really know exactly the answers to those questions?

HEARING OFFICER: Well, my perspective was, but I'm willing to be persuaded

otherwise, that both sides exchange their briefs, and I would like to confirm what we're all agreeing makes sense in terms of the schedule, but I was hoping that -- We're going to get the final transcripts from this proceeding by Thursday of next week, June 19th, so it would be two weeks after that that I would get from each side their initial post hearing briefing, and then one week after that I would get your responses to the other side's filing.

MS. MULVEY: That's fine. As long as we get a chance to respond to the specifics.

HEARING OFFICER: Yes. You will absolutely get that chance through the response.

MS. MULVEY: That's fine.

HEARING OFFICER: And that's why I thought having simultaneous exchange through the first initial period, two weeks after we get the transcripts, and then one week after that I'll get your responses to each other's briefing. And then with that, the hearing will be officially closed, and then that will start my 30-day clock in terms of my issuing my report and my recommendation.

JUDGE FABRICANT: If I may, what I have in mind, although I can certainly change it, is that, in closing, I would spell out very specifically exactly what conduct violates exactly what rule and what provision of the statute. I have not contemplated at this stage, the closing stage making recommendations about sanctions, but I have contemplated putting that in the post hearing briefing, but I'll do it as you prefer.

HEARING OFFICER: I'm fine with you doing it that way, whatever you would prefer in that regard. I just want to know your position on that before the hearing is officially closed and then I start working on my report and recommendation.

JUDGE FABRICANT: Thank you.

MR. HOOPES: Thank you.

HEARING OFFICER: Anything further?

MR. HOOPES: Not from respondent.

HEARING OFFICER: Okay. With that, we are recessed for today. Thank you very much. 9:00 a.m. on Monday for summations.

(The proceeding adjourned at 11:14 a.m.)

C E R T I F I C A T E

I, LISA L. CROMPTON, Registered Professional Reporter, hereby certify that the foregoing is a true and accurate transcript of my stenographic notes of the proceedings in this matter on the date and time specified in the caption hereof.

IN THIS WITNESS WHEREOF I have hereunto set my hand this 19th day of June, 2025.

<%33863,Signature%>

LISA L. CROMPTON

REGISTERED PROFESSIONAL REPORTER

MY COMMISSION EXPIRES 1/17/2031

Exhibit 12

COMMONWEALTH OF MASSACHUSETTS

COMMISSION ON JUDICIAL CONDUCT

COMPLAINT NUMBER 2019-22

VOLUME VI

HEARING

~ BEFORE ~

HEARING OFFICER

DENIS J. McINERNEY, ESQ.

JUNE 16, 2025

9:00 A.M.

Boston, Massachusetts

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

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HEARING OFFICER: Good morning.

This is obviously the sixth day of our hearing on the Commission on Judicial Conduct's Complaint Number 2019--22. And this morning we're going to have closing statements by both parties, and we will be starting this morning with Mr. Hoopes, on behalf of Judge Joseph.

MR. HOOPES: Good morning. It's been a long seven years, a long seven years. And when you know someone, and when you know that they're not capable of what's described in the indictment, and when you know that they're not capable of the conduct that's charged here, then you can defend on the burden of proof or you can do it differently. You can simply search for the truth. And in this case, that's what we've done, for seven years, until we arrived here with you which, frankly, has been as eye-opening as anything preceding it.

Now, the truth, though, was shredded beneath the clouds that in the front of the grand jury for a long time, and then the truth was hidden for a long time behind the Jencks Act, and then initially it was still

hidden when it came to the CJC. But Special Counsel joined with us, with that then administration, and we finally got many of the documents we were hoping for and looking for and, frankly, thrilled to see.

But what we got for documents wasn't nearly enough. It was just the beginning. There were things to do, people to see, people to talk to, interviews, but the one simple thing that we learned at the end of that was this: David Jellinek is a liar.

Now, David Jellinek is just not any liar. David Jellinek is a criminal who, for some reason, is still practicing his trade, not just as a lawyer, though, but as a liar. Now, lawyers go to school to get a JD, to learn how to argue inferences. David Jellinek went to school to get a JD, but he may also have attended some school somewhere for liars. But David Jellinek must have cut some classes, not read the material, gotten kicked out of school, because he is a very bad lawyer and a very, very bad liar.

So if you look simply and carefully enough the lies are obvious. He is

not the mastermind that he thinks he is and in a sense he's not the mastermind of this case, because what he did here was sort of mindless, beyond the pale, committing his crimes in plain sight, so to speak, in many ways, in front of people that he knew, who would instantly wonder what happened. But David Jellinek has a PhD in manipulation. He could teach the school, run the academy, and hire the faculty. He has out-manipulated court officers and clerks, lawyers and prosecutors, and many judges along the road of this case, in the Newton District Court, in the Federal Court, and here before you, and before that, the CJC.

Now, like most bad liars, though, the manipulation takes an added light from the lies, and his bad lies in the clear light here tell it all. Now, he seemed to like to lie first in the morning chronologically, which is what he did here. He said what? He said he was at the Newton District Court on the morning of April 2nd of 2018. He got there mid morning, is what he claimed. But he said that he arrived, and he told you why he was hired, he told you what he supposedly heard from ICE, to

be out in the courtroom, kicked out of the courtroom into the hallway, he talked about when he spoke to ICE, he claimed that he saw his client, he claimed that he thought about a fee agreement, he talked about a conversation with Ms. Bostwick, he said he received documents from Ms. Bostwick, all in the morning. Well... And he talked a little bit about check and cash, and we'll talk about that a little bit later.

What is the simple proof of the lies? ICE, the transcript, the interpreter, Ms. Bostwick, Judge Joseph. He said he was there in the morning. The ICE agent, Simmons, who you heard from through his own report, said one thing; he didn't see him that morning. Ms. Bostwick said she didn't see him that morning, she didn't talk to him that morning, she didn't give him any documents that morning. Judge Joseph said that she didn't see him that morning, which is why she said hello in the afternoon session on the tape. The interpreter, Mendoza, thought he was the prosecutor because of all the talking he did in the afternoon. How could he have interpreted for him in the morning if he thought he was the district attorney?

So if you go back through his lies, he could not have arrived in the morning, he could not have been hired as he said because they saw him and they liked his performance. There was no performance. There's not a word in the transcript that says David Jellinek, appearing, Your Honor, for anything in the morning, let alone putting on a masterful performance.

Supposedly he said that he heard ICE asked out of the courtroom. If you look at the transcript, there's not one word about any of that happening on the record, and it couldn't have, because it happened in the afternoon, and it was never on the record.

Seeing his client? He couldn't have seen his client. If he had seen his client, Mendoza could talk about it, tell about it, explain about it, not what was said, but that there was actual contact. He didn't remember any.

Now, that's about 10 lies. And if you remember, when I was asking him questions, who's telling the truth, you or the ICE agent, and if it was the ICE agent, then we

have half a dozen lies. I underestimated. We're already at 10, and we haven't even gotten to the afternoon. He exceeded expectations in lying. But his manipulations are countless, without being able to be numbered, innumerable.

So as court goes, there are different forms of manipulating and lying. There are untruths, there are half truths, and there are expectations that you would be truthful in a particular situation you are not, all arising to the level of false statements or perjury, depending on the circumstances.

He manipulated the assistant district attorney before the case was called, he never said a word about his plan. He manipulated the ICE agent before the case was called, never said anything about his conversation with MacGregor. He manipulated the clerk, never said a word, the other court officers besides MacGregor. That's just before the case was called. While the case was called, never raised his hand and said, oh, Judge, I've talked to Mr. MacGregor and this is what we've agreed to do, never said that so that the DA could hear it, never said that so that the clerk

could hear it. After the case was done, the same manipulations.

Now, manipulations come easy to him. It's almost unfathomable to imagine, if you are a practicing lawyer with any sense of ethics, that the next morning you would knock on the door of the presiding justice of the Newton District Court, have an ex parte conversation to tell her about a little incident about somebody going out the back and only tell a thumbnail of the story and not tell the First Justice~~fist of~~ what was really important, which was that he had a conversation with MacGregor and out Medina Perez went because of that conversation. From that morning on, she didn't know for days and months any such thing happened. Didn't say anything to the clerk, didn't say anything to the chief court officer Noe. Didn't come over to the ADA the next day and say, you were right, this is what I did.

So if you counted all of these lies, out and out, half truths, failures to disclose, David Jellinek must have been setting a one-man record for liars, by a lawyer, lies by a lawyer, or a lawyer's lies, not only in the

Newton District Court, but for any court in the Commonwealth of Massachusetts ever.

Now, he's not done, though, in some ways. Because from April 3rd on, he said nothing. He was hiding in plain sight every day, going to work, nobody saying anything. Bizarre. But at the same time, he was keeping track of what was happening. He knew about the subpoena to MacGregor and that MacGregor was going to the grand jury.

So he claimed that he didn't talk to him between April 3rd and that date when he found out about the subpoena. Can we believe that? Do you believe that? His co-conspirator? Now, the co-conspirator was doing one huge favor, the biggest favor that a co-conspirator could do for David Jellinek. When I asked Noe, and Noe was asked, Officer Noe, Court Officer Noe, when you interviewed MacGregor, did he say anything about David Jellinek, the answer was no.

Now, for whatever reason, and we'll get to that, MacGregor was keeping his mouth shut. Jellinek was keeping track of MacGregor, because if MacGregor was keeping his

mouth shut, Jellinek still had options. And he sat on it and sat on through May, through June, through July, through August, through September, through October, until he got a call from Clerk Okstein's lawyer, oh, the grand jury's in action and they're coming for you, you are a target. Now, he called the lawyer. And when he heard that word "t-a-r-g-e-t," he must have known bad things can happen.

Now, he claimed he wasn't afraid of going to jail. I know no one who is not afraid of going to jail. 20 years, five years, 36 months. If most people, who are made as human beings, get sweaty palms when they see the blue light behind them and wonder if it's for him, for you, for somebody you're with, then he clearly had sweaty palms at the very least. But he said to you, oh, he was just worried about his livelihood and providing a family and professional career. That is not the case. He was worried about everything.

Now, he went in to see the U.S attorney's office, after his lawyer had made contact, and we can presume he did the usual thing, which is, he called, said I'm going to

talk to you, give you the attorney proffer, and I'm going to bring him in, and in he went, and he cooperated for a number of months.

And the reason we know that he was keeping track of MacGregor to see what his options were is because MacGregor had a retirement party in the spring, after Jellinek had been in to see the U.S. attorney's office no less than five times, and who showed up at the party for MacGregor, four court officers and one other person, Jellinek. And while Jellinek had been throwing MacGregor under the bus and causing him to be indicted and him alone, along with Judge Joseph, he walked over to shake his hand.

Now, what kind of a person would do something like that? A master manipulator, who has probably did a fellowship in manipulation. So he knew what his cards looked like exactly.

And when I asked him, I said, so it was a trade. What did he say? It was a trade. I said it was a trade for what you were going to be able to tell him about the 52 seconds. And he said, yeah, it was. He said,

he said that was the core of it. I said they had everything in front of it, everything in back of it, it was what was said in those 52 seconds off the record, and he agreed. He knew that's what it was about, and they knew that was what it was about. And so he got immunity.

Now, you know better than anyone in this courtroom that giving complete immunity to the mastermind of a plot with no corroboration is beyond unusual, and it's tantamount to prosecutorial suicide, because you always, always, always, as a prosecutor, particularly in white collar cases, either need more corroboration or you need a piece out of them, because if you don't take a piece out of them, no jury will believe them, because they know what anybody on the street knows, you can make anything up. And these people made that deal. And that either means that they didn't care about a conviction, they cared about just an indictment, whatever happened after that, or they were fools, and they are not fools. You know and I know and they know one thing: Ties lie. People with ties lie. In the white collar

world of prosecution, people who wear ties are the bread and butter of making cases. So you have to do the other things, the actual work.

Now, Jellinek gave them two things that they were looking for in the 52 seconds, one, what he said to her, and of course, there's variations on that, got infinitely longer, if you could put his nose next to the timeline, you would watch Pinocchio grow. On November 8th, he said, I requested that the judge release Medina Perez through the lockup area. That's all he said. By the time he got to the grand jury, he added, oh, he said that he thought Medina Perez could be released out the back door. That's -- Sounds like two words. Small thing. That's the case. He said one other thing. What was in her mind, he was asked, February of 2019. What did he say? He said he didn't know what was in her mind. He wasn't a mindreader. So that was 2019, 2020, '21, '22, '23, '24, he came and spoke, sat down or did the Zoom, as we understand it, with the special prosecutor in December 2024. She asked him the same question. You said you didn't know. He said not true. She said she

understood his plan and, yeah, that's what we'll do. That's the core of the case. That's the core that they traded for. That's the core that they didn't care about. Once he made the trade, he just made it better.

Now, it's useful to look at the things ~~that~~ I would suggest that the Federal authorities did not do, because it had spill-over effect into this proceeding. If you look at the document ~~that~~ they produced, they ignored the Lunn policy as the governing factor, they ignored the Lunn policy and the court officer manual, governing factor for where the exit would be, they focused on this mirage that some people are calling the common practice of the point of release in Newton, but they papered their way through that. They ignored the statements that they had in the front of their nose, the interpreter statement that we've discussed. They ignored the ICE statement that they had. They had. We didn't see it for months and years. They had it before they pulled the trigger on this case. They didn't do any of the work that would have seemed to them the collection of small lies all gathered up

into one whopper, for the morning, and we've been over it, they would have known he wasn't there in the morning. They didn't accurately state a time he arrived, because he never arrived, why he was hired, all the litany that we talked about earlier.

More telling than that, there was an attorney general in Massachusetts named Frank Bellotti, he used to say, if you're going to indict in a case like this, you better be careful, because sloppiness takes you nowhere and it hurts everyone. And in here, they never ordered the transcript of the day. We did that. He had an iPad. They never asked to get the iPad, to go through it, to see what the schedule was, the things that were missing for Special Counsel. They never saw it. They never followed up on his calendar.

But the most telling thing, the eagerness to just pull the trigger to ruin somebody was the fact that they never spoke to Ms. Bostwick. You heard her here. We asked her, Ms. Mulvey asked her, the vital question, did the Federal authorities, the FBI, the assistant U.S. attorney ever speak to you. The

answer was no. Really? In a case of this magnitude, the woman who was there in the morning, who could tell you whether he was lying or not, you never knocked on her door, you never made a call, you never interviewed her? There's only one explanation for that. And it's not that they're sloppy. Because I assure you, -- I've been in cases with these people -- they are not stupid. The only possible explanation is, they didn't want to hear, it might get in the way of their project.

Now, probably the most mysterious thing is this whole notion that check versus cash. Now, Mr. Jellinek told the prosecutors and told the grand jury, do you solemnly swear to tell the truth, the whole truth and nothing, but the truth so help you God. I do. And how were you paid. I was paid by check. You were in a proffer session. You know you have an obligation to tell the truth. If you don't, it's a thousand and one violation. You know that. Yes, I do. How were you paid. I was paid by check. Did they ever ask for the check? No. If they had, we'd have it. Did they ever look for the bank account? No. If

they had, we'd have it. Did they ask for his tax record? No. We would have it. Did they ever ask for his accounting records? No.

Now, if you were supervising these people, and they did something like that, they would be demoted to going forfeiture cases. There's no explanation for this other than they didn't want to do it. Because they are not sloppy. They know what they're doing. And then he walks in six years later to the office of Special Counsel by Zoom and confessed. It was cash. Now, nobody forgets whether it was check or cash. And he didn't.

And Special Counsel is much quicker about these things, trying to pay attention to the truth, than her predecessors, and she followed up and asked, where are the bank accounts, let's go back and check, that's what you said, you said check, now you're saying cash. Which is it? And he said, oh, I'll go look for it. You heard him. I asked him. You said you'll go look for it. And we don't have it today. If we don't have it today, that means Special Counsel didn't get it today. Really?

Why is that important? It's

not just important, it's critical. Because the important question before you is, why the lies, why all the morning lies, why this 10, not six, 10 lies that have a destructive weight of a piece of cement onas their case. Why? Well, if you weren't there in the morning, why are you lying about it? So talking it through with you, it could have only been because somehow he got there at a time when was different than the morning. And why is that important? Because it goes to how he got to these people. How did they find him, if they didn't see him perform, if he didn't smile at them as he went by, how did he get introduced to them.

Well, it seems like the only natural candidate for that would be Wesley MacGregor, who was the court officer at that point. We don't know for sure, but there's nobody else really around. And if Wesley MacGregor made the introduction, and there's no check and they're supposedly only a thousand dollars in cash, could have been more, could have been much more, we don't know, into whose pocket did that cash go. All one? Split? Who knows?

But going to back to not asking the questions, I would suggest, I would suggest and I know you know what I'm talking about, what person would ever risk immunity in a case like this to lie? Because as soon as you lie, you get caught and you have no immunity. You're dead. You're going to jail. And so why would he lie about something like check versus cash? If you front that at the very beginning, they'll give you a pass. You know that. I know that. They'll give you a pass, as long as you front it. The only possible explanation, we can't say for sure, but we don't have to, is that something untoward happened between those two, and MacGregor was smart enough to not name Jellinek. Because he can explain, oh, I let him out the back door. You can't explain as a court officer beyond the tape. If you're Jellinek, you can't explain handing cash to a court officer in return for a referral. Maybe there's another explanation. That's as good as I can do. But I would suggest to you something at a crisis level, more important in their minds than letting somebody out the back, is driving this host of lies about the morning. It's too wild a

whopper to take a risk otherwise.

Now, without trying to be critical of anybody here, because the CJC has its process, CJC filed these charges, then they talked to Jellinek, then they talked to the interpreter, then they talked to the ADA. They never talked to Bostwick. They never looked into any of the things in the transcript. But, by then, it was too late. We were on this path. And in the end, thank God we were. But we were on this path, a path that David Jellinek excused because he said, oh, I was just, what, I was just advocating for my client.

Now, there's a preliminary section to the Massachusetts bar rules that says that in a section, Preamble 5 that says that an attorney's conduct is -- has to conform with the requirements of the law. And he knew this didn't conform to the requirements of the law, and Federal authorities knew it didn't conform to the requirements of the law, because they named him in there as the mastermind and co-conspirator.

Now, even the Bible, in the Torah and the revelation says that you need two

witnesses. What did Federal authorities have? What does Special Counsel have? They have a liar. So maybe we can update, if that's humanly possible, the Torah and the new testament and say you need two credible witnesses. That means for thousands of years, for thousands of years things that were important to human kind where you were going to have a penalty of any kind needed corroboration. They understood that. Somehow that's gotten lost here. Is there any good reason for it? I would suggest not.

And if Special Counsel suggests that Mr. Mendoza is that credible second person, he shot himself in the foot. Because whatever his impressions were, he was clear that it had been seven years, clear that he had memory issues, couldn't remember the correct locations of things as simple as where the side bar took place, recognized there was white noise, distance. Even Ms. Bostwick, who was sitting in the front row, right inside the rail, with the rail to her back, said I couldn't hear, I didn't hear a thing. Didn't hear off the record, didn't hear on the record. And he didn't know what the Lunn policy was. So clearly, he could

misinterpret many things. But the most critical thing is that he thought David Jellinek was the prosecutor.

Now, the assistant district attorney is not their second witness. The assistant district attorney is our second witness, Judge Joseph's second witness. Was anybody more credible than the woman who stood before you and sat before you and testified? She said that, as far as she was concerned, the off the record was just a continuation of the on the record. She was right there. Nothing was said that gave her the impression that Medina Perez was doing anything other than going out the side door -- excuse me -- going out the front door. Although she may have used the word "misguided," she didn't think that Medina Perez was going out the back door. She said nothing was said in that regard. She thought Judge Joseph was just offering Jellinek time. She didn't know about the Lunn policy either, she knows it now, and she thought that Judge Joseph was complying with it. She also agreed that it was not a good thing for ICE to take the wrong person. If they were looking for

help for their second person, they got none, and we got everything we needed.

Now, the next witnesses from Special Counsel are the three Newton District Court witnesses that really told us what really happened. And that's what this hearing, and in some respects, if not all respects, is really about. What actually happened that day? And Court Officer Noe said to you three things: ICE isn't there very often, so they don't deal with this often, he had his interaction with ICE, and he claimed to have offered them the opportunity to go down or to stay up and wait at the front door. But Noe didn't know about the conversation ICE had had with Clerk Okstein. And he may or may not ever heard about the Lunn policy. Because he was doing things the old way. That's what he said. In very good faith and very honestly.

But the two witnesses that you heard from the Newton District Court that were most critical I would suggest were, one, Clerk Okstein and, two, Judge Mary Beth Heffernan. Now, Clerk Okstein told you that going off the record was nothing to get excited

about as far as he was concerned. He told you that people go downstairs in custody for their property. He said that when he spoke to Judge Joseph about ICE in the lobby, she didn't ever say anything to him about them not being able to access through the lockup. All she talked about was whether they could be in the courtroom or not.

But he showed, I would suggest, great courage in answering your questions, questions that had never been asked before. He interpreted the order by Judge Joseph to also include that ICE couldn't go anywhere into the lockup, they had to wait out front. He interpreted that as Judge Heffernan's policy. Some seven years later, for the very first time, we heard that out of his lips.

And then we heard from Judge Heffernan. Now, Judge Heffernan said that she only knew about Rule 211 anecdotally. Anecdotally is a cute word for I've never read it before. She thought custodies could go down to get property. She told us that Jellinek, when he saw her the morning of April 3rd, never told her this agreement with MacGregor, never

told her his involvement with Medina Perez going out the back door, or that Judge Joseph had blessed it.

She talked about her e-mail policy discussion with Judge Dawley, and she acknowledged that she had this policy in effect, we've learned that nobody else in the Commonwealth of Massachusetts had it, and she got rid of it. But the critical thing that she said to you were that she claimed that she knew about Lunn, that's what she claimed, she claimed and said that she had acknowledged that she hadn't implemented it. She admitted that the Lunn policy says that, when ICE is present, they're supposed to be able to take the individual from the lockup. But she went on with questioning from Special Counsel to say that, oh, the policy was a little confusing and her policy was not inconsistent with Lunn. Really? Seriously?

Now, she acknowledged that it was important to give the defense attorney time. She acknowledged that no one would want ICE to take the wrong person. And critically, she was asked the following questions: Did you feel

like she, meaning Judge Joseph, told you what she thought was important as far as you can remember? Answer, yes. You didn't feel like she was holding anything back. Not that I could tell. And that you would have been the one to tell Judge Joseph that Medina Perez went out the back door when you talked that morning. Yes. Mary Beth Heffernan was not trying to reprimand Judge Joseph. She was trying to find out what happened.

Now, that same bell, you know the line of bells, and they have the bells that play the same sort of sound, you know, depth and quality. We heard from the other two judges, the senior judges, from Judge Fortes. And Fortes called her in. The conversation was about Newton and it was precisely because they both understood that she had gone off the record. Though Judge Fortes never asked her, that was the focus of the meeting. They didn't get into ICE. Judge Fortes at this point seven years later has no memory of any conversation about Waltham, but you have the documents that support it. As far as Judge Fortes was concerned, it was an educational meeting,

permission, permission was accomplished. She never said a word about half truths, part truths, anything other than the truth from Judge Joseph.

Probably another of the most important witnesses was judge Dawley. He acknowledged that he hadn't offered any training in the manuals, separate training, whatever on the issue of off the record. He thought being a new judge was like drinking from a fire hose. He acknowledged that Judge Carey, who is the judge of all judges in the Trial Court, had in an e-mail acknowledged that she didn't know about this Rule 211. He, himself, had been off the record on certain circumstances. He laid out what the criteria was for the governor's warrant, and he explained that Lunn was clear and mandated, but the most important thing he said for our purposes here was, I asked him, did you think she was candid, and he said yes.

Now, Judge Joseph testified, and you heard her testimony, she worked so hard that morning and afternoon to find out about this policy. But Judge Heffernan was excluding people, ICE, who had a perfect right to be

there. She asked Okstein about it. She called down to the office of the administrator of the District Court, they talked her through it, they e-mailed it to her, she followed.

When she was speaking, she was asked to go off the record. Before that, Jellinek said, best thing we could do is release him and see if he can dodge ICE, and she interpreted that as, he was asking for more time. And the reason we know that that is a more than reasonable interpretation is the person in this courtroom testifying before you who had the least axe to grind ever interpreted it the same way, the assistant district attorney, because she never heard anything, on or off the record, inconsistent with that, and said she thought one was just a continuation of the other.

And at the end of the case, Clerk Okstein turns around and says what? ICE is here, they want to take him. And what does Judge Joseph say? She says, they can't come in here, but he's released. And there are four other ways, three at least, for them to get downstairs. Who knows where ICE is? But ICE

can come in the back, ICE can go down the stairs, ICE can take the car around the back, ICE can go down the other set of stairs.

Now, there's not one whip of evidence showing, not one scintilla, as Ms. Mulvey said to you at the very beginning, showing that Judge Joseph had any other thought in her mind, any improper, impure thought or motivation. But in addition to that, we put on a case, and we put on the case of involving first Ms. Bostwick.

Now, besides Ms. Bostwick, putting a pin in the balloon of the morning that David Jellinek was trying to float, she said one other thing that was telling about the state of mind of David Jellinek. Remember, he said, when he was asked questions by Special Counsel, I saw Ms. Bostwick afterwards, and Ms. Bostwick said to me, oh, I think you obstructed justice. Ms. Bostwick said I have no memory of saying anything like that. David Jellinek, like the central figure in crime and punishment was hearing voices of his crime, and he knew from April 2nd on that he was in deep trouble.

Ms. Khoury, the attorney, said

going downstairs to get your property was the thing to do here. Judge Heffernan had agreed with that. Clerk Okstein had agreed with that. And she would have wanted to talk to her client, too.

But, you know, one of the most powerful things I would suggest, hope, were the three judges, experienced judges, of the Massachusetts court, who said to you three things: They had been off the record many times, in the District Court, in the Superior Court, throughout their careers, and they had seen other judges do exactly the same thing. And it was not for some bad purpose. It was forgetting the business of the court done.

Judge Ball, who you heard from, Judge Ball sat in this courthouse six months out of the year, six months in Brockton. Why did they have her here? Because she could move cases. She knew how sausage was made. So other people who are prim could do the trials. And without her -- And they were very happy to have her year after year after year working that hard. She used every tool in her kit to get things done so that the wheels of justice in

Suffolk County and Plymouth County did not come to a screeching halt. And even the people sitting here today, we're happy to bless the fact that she used those tools. So to say 2025, oh, some things changed and it's a bad thing, is beyond ridiculous.

Judge MacLeod said she did the same thing, and she also told us that justice was a little bit like McCourt, McJustice, you know when you have to move things fast. But the most important thing I would suggest to you was, she talked about the fact that how necessary it was to facilitate people being open and honest, and that was the purpose that she used off the record for.

But the most important thing came from the lips of Judge Ball. She said, I trust lawyers, I like lawyers, if somebody asked to go off the record, she believed presumptively that they were there for a good purpose. And if she had done that, as she did for all those years, her trust was never betrayed. What does that mean? That means that she never ran into a David Jellinek. Nor would anybody ever reasonably think that they'd run into a

David Jellinek.

Now, you heard from the ICE agents through their testimony they needed to be heard. That was their testimony. And they said one key thing, beyond the fact that Jellinek wasn't there. They basically begged to be allowed to go into the lockup, because they knew that the policy, the Lunn policy, and they knew about Lunn, was there for the public's protection and for their protection. And you heard from the chief, now of security, supervising at that time, and he said, when asked about the policies at the Newton District Court, were they, -- I think I was trying to be careful about it -- were they consistent with the Lunn policy, court officer policy, and to be gentle about it. His answer was, no.

Now, on April 2nd of 2018, there was one person in that courtroom who knew about the Lunn policy, which is the key in court to the case. Not the 52 seconds. The Lunn policy. That was a policy, as Judge Heffernan described, that Judge Dawley really described, was put together in response to the Lunn decision, recognizing that it was a delicate

balance, committees put months of work into it, they worked very hard to put that together, they distributed it widely, they had every expectation that all of judiciary would read it, that court officers, supervisors would get to read it, that everybody would know about it.

Judge Joseph, if you read that transcript, did everything right on every case that day, which she particularly did everything right on this case, on the Medina Perez case, because she was the only person in the courtroom who knew about the Lunn policy. She called for it, it was read to her, she wanted to implement it, she got copies. And what did she do with it when she left for the day? She took the policy -- we have it here -- and she dropped a copy on the clerk's desk, she dropped a copy on the first assistant's desk, and she also dropped a copy on Mary Beth Heffernan's desk. Right here.

How would you feel if you were the Chief Justice, the Presiding Justice, and you walked in, and your rookie, your baby judge who was filling in for you that day dropped that piece of paper on your desk? I think you would

know that there was a policy that nobody in your courthouse seemed to be aware of, not the clerk, not the court officer, not the assistant district attorney. Is it sort of crazy that these people all along have wanted to penalize the only person who made the judiciary look good that day?

So I have to say, in closing, when I finally got the chance, when we finally got the chance, and I read the Clerk Okstein's grand jury, I said to myself, oh, my word, this is what really happened. And then I watched you ask him a question that neither counsel asked, which is, did you tell ICE that they could go other ways? And he said no. Why? Because he misinterpreted the policy in Newton and thought that's what Judge Joseph was ordering, even though she hadn't said it. He confessed. And when you ask that question, you got that answer, I thought, oh, that's what really happened.

But then Judge Heffernan got on the stand. And she said, I knew about Lunn, whether she did or didn't, but I never implemented. And I thought, oh, my God, oh, my God, that's what happened. Now, you heard her

say at the beginning of her testimony, my job as the presiding Justice is getting everybody together, make sure we're on the same page.

You heard Judge Bonnie MacLeod say my job is to gather everybody together and make sure that they're on the same page.

So if one says it's their responsibility as the Presiding Justice no matter how they divided up authority in the courthouse, and the person who is the Presiding Justice says that's my responsibility, how did the Lunn policy fall through the cracks all these years.

Now, it doesn't matter that she claimed that she met Jellinek in the afternoon. It was a little of an ex parte conversation. Because you know that of course Jellinek had his hair on fire and went in in the morning, and there's no way Noe didn't go see her right away, and there's no way that Okstein didn't go see her right away. But who cares? What's really important is that, when she confessed, she added, oh, confusing time, it was, my policy was consistent with Lunn.

In what parallel universe is her policy consistent with Lunn? Lunn was

there, mandating into the lockup, if at all possible. T, there was no impossibility that day, mandating that for the protection of the courtpublic so thatof the public that there weren't -- [inaudible]my colleagues -- any scuffles in the courtroom. And most important, for the protection of our law enforcement people in the lockup. And but for her policy that ICE couldn't go downstairs and but for that, we wouldn't be here today.

Now, having said that, I asked the question of Judge Dawley. I said, well, do you think that, you know, she should be complained to the CJC. And I said that simply to make a point. And the point is that her policies were just the contributing cause. She was trying to do the best she could every day, just like everybody else, except one person, David Jellinek.

No judge in this courthouse today or before or hopefully in the future has ever met someone like David Jellinek, Judge Ball, who did cases with hundreds of people, Judge MacLeod, who done cases with thousands of people, lawyers from within the Commonwealth, out the Commonwealth, nobody has ever met a liar

and a manipulator and a scammer like that. And if there was no David Jellinek, the imperfect policies of Judge Heffernan would probably still be there today. Because he was the stress point that no one anticipated.

It's a little bit like, Judge Joseph was walking down the sidewalk, and some scaffold fell on her head, and somebody's blaming her for walking down the sidewalk. Who dropped the scaffolding? Who hoisted the rope? It doesn't do us any good here to cast blame. Because I would suggest to you you're going to take all this in, you're going to write findings, I think that without question the SJC is going to be dying to hear what you have to say and take any kind of remedial measure.

But in the end, I would ask you that it's enough. We don't need to throw anybody to the wolves, you don't need to throw another person to the wolves, we don't need to throw other people to the wolves. Other people have been doing the best they can in the judiciary. Only David Jellinek is the criminal here. And if we throw someone to the wolves, the wolves are insatiable, insatiable, and we

won't gain anything. We need to be better than them and end this now.

Thank you.

HEARING OFFICER: Thank you, Mr. Hoopes.

JUDGE FABRICANT: Good morning, Judith Fabricant, Special Counsel for the Commission on Judicial Conduct.

I need to make a couple of comments about Mr. Hoopes' argument. I have no doubt that you will make findings based on the evidence and nothing that isn't in the evidence, but we heard quite a bit here in this closing argument that wasn't in the evidence, starting with what was essentially a character reference by Mr. Hoopes when there was no character evidence in the witness -- among the witnesses in the evidence.

We heard a speculative theory about Mr. Jellinek paying off Officer MacGregor. There was no evidence of that. In fact, Mr. Hoopes asked Mr. Jellinek a question about that, and Mr. Jellinek said absolutely not. If Mr. Hoopes wanted to bring in Officer MacGregor, perhaps he could have. He didn't. There is simply no evidence of that.

Mr. Hoopes said that the assistant district attorney said that what Judge Joseph was doing was to give Mr. Jellinek more time. She didn't say that. She said something different, which we'll talk about, but she didn't say that. So we've had a lot here. And there was some argument about Judge Ball and her role and how the court viewed it. There's been some argument about how U.S. attorneys operate, how the justice department operates. None of that is in evidence. And I know that you will make findings based on the evidence.

I also think it's important to note that the Commission is not the U.S. attorney, the Commission's charges are not the indictment, and this hearing is not the trial of the indictment. This is an entirely different matter. The U.S. attorney may or may not have done some things that they would otherwise do, may or may not have had whatever motivation they had, may have not done some things that Mr. Hoopes thinks they should have done. That is not what this hearing is about.

This hearing is about the charges made by the Commission on Judicial

conduct whose responsibility it is to monitor judges' compliance with the Code of Judicial Conduct and with the provisions of Chapter 211C, and to take action when it has reason to believe that there has been a violation by a judge of those requirements. So that's what this hearing is about, and I know that you will make your findings and your ruling about those issues.

Now, as I said when we started, there's one central factual dispute, and that is what was said in the 52 seconds off the record. And we've spent five days of evidence to resolve that one disputed fact. Some of the evidence that's been presented actually bears on that dispute, a lot of it has been peripheral. I'm going to keep my focus on that central issue, on the facts that I ask you to find based on what was said in those 52 seconds, on what Joseph said, Judge Joseph said afterward, and on the undisputed facts.

So how do you resolve the one disputed issue. We're all thoroughly familiar with the factors that a fact-finder can consider. You consider whether the witnesses have a bias or motive to tell you anything other

than the whole truth, you consider the demeanor of the witnesses, as I know you have and will, you consider whether their testimony is consistent in itself and with their previous statements and with the other evidence, and most important in this case, I suggest is to consider the plausibility of the conflicting versions in light of what was said on the record and in light of the surrounding circumstances.

Two most conflicting witnesses obviously are Judge Joseph and Attorney David Jellinek. Judge Joseph is the responding party, her judicial career is at stake, her reputation is at stake. She's biased by definition.

What about David Jellinek. He's a practicing lawyer. And you heard a lot about him from Mr. Hoopes. But he's a practicing lawyer who appears in the Newton District Court almost daily and in other courts regularly and has for 25 years and he continues to have positive professional relationships with court personnel.

You've heard a lot about his proffer and grant of immunity. Counsel relies

heavily on that to suggest that he had reason to make a false accusation. But David Jellinek was fully aware that he could assert a Fifth Amendment privilege, refuse to speak and refuse to testify. He knew what might follow from that, but he also knew that he would defend himself vigorously and he would have had a lot of ground for defense. His duty was to his client, not to ICE. And as Officer MacGregor told him and Chief Court Officer Noe confirmed here, there was no rule at the time against releasing someone out the back.

And as respondent has emphasized, the official Trial Court policy favored bringing ICE to the lockup, which was entirely outside Mr. Jellinek's control. So if Mr. Jellinek had asserted his privilege and been prosecuted, he would have had plenty of room for defense.

And Attorney Jellinek fully understood that waiving his privilege and accepting immunity was a two-edged sword. He could not be prosecuted if the U.S. attorney believed he told the full truth, but he would lose his immunity and would be prosecuted for

perjury at least if the U.S. attorney believed that he told any material untruth.

You have the proffer letter and the immunity letter in evidence as AA, and you may be familiar with these types of letters. The phrasing has a certain in terrorem effect, the witness is warned in no uncertain terms that he is at the mercy of the U.S. attorney's unreviewable evaluation of the truth of his statements. Surely, a lawyer with an active and successful practice would not risk his career and his freedom with a fabricated accusation.

What about demeanor. Mr. Hoopes has said a lot about demeanor. And you will evaluate demeanor, and I have no doubt you observed the witnesses, and you don't need much comment from me~~made~~ on that topic. But I will make a couple of comments. David Jellinek answered the questions from both sides directly, even when the answers would hardly make him look good. He acknowledged that what he did for his client was on the edge of ethical. Mr. Hoopes characterizes it as criminal, Mr. Jellinek disagrees, but he admits this was borderline. He acknowledged what he doesn't remember and he

acknowledged that in some respects, particularly when and why he came to Newton that day and when he spoke with various people, his memory after seven years differs from what appears in the full day transcript. He didn't dance around those questions. He answered them directly.

What about Judge Joseph's demeanor. She did dance around, as you saw. And I'll mention a couple of examples, and I know you'll review the transcripts and I know you have your own recollection, but I'll mention a couple of examples.

The first on a point that was hardly worth quibbling about, but she did quibble. I asked her about the case of Mr. Pineda, second on the list that day, when retained counsel had filed an appearance and appointed counsel, who turned out to be Allison Khoury, a witness here, withdrew. The only significance of this fact is that substitution of retained counsel for appointed counsel is a frequent occurrence. It happened twice that day. It's not a reason to be puzzled, as Judge Joseph said she was in Paragraph 13 of her response to the charges.

But instead of just answering yes to my question, she talked around it and she talked about cases when a defendant who's not indigent, but has no counsel on arraignment, so the court appoints counsel just for bail and that lawyer doesn't come back and retained counsel comes in. That might happen. But the transcript was right in front of her, and it shows that that's not what happened in the Pineda case. Attorney Khoury was there on April 2nd because she had been appointed previously. She came back and she was replaced by retained counsel. Nothing significant, nothing unusual, except that judge Joseph didn't want to acknowledge it.

A similar example more significant to the issues here is when I asked her whether detention on the fugitive from justice charge would require a determination that the evidence was sufficient to connect the defendant to the warrant, and she talked at length about the factors as if the other factors would somehow justify holding someone without evidence that he was the person named in the underlying warrant.

A little later I read from the transcript where Mr. Jellinek said, the best thing for us to do is to clear the fugitive issue, release him on a personal, and hope he can avoid ICE. I asked her whether she understood that Mr. Jellinek's goal was to have his client avoid ICE, exactly as he said, and she would not acknowledge that she understood he meant exactly what he said. She insisted that she interpreted that as that he wanted more time to investigate, to see how it pertained to both agencies. That's the theory she's putting forward now, and that the lawyers have argued, but it's not what Mr. Jellinek had just said to her on the record.

And then, when she was answering her lawyer's questions, she said that she thought that detaining the defendant overnight, sending him to the jail, was analogous to putting a matter on for further call during the court day. And when I asked her if that was really what she meant, she insisted it was. After a career as a criminal defense lawyer, could she really be so cavalier about sending a defendant to the jail overnight with

no legal basis. That's preposterous. But once she had said it, in response to her lawyer's questions, she insisted on sticking to it.

The way she answered my questions was reminiscent of Chief Justice Fortes' description of the conversation in Lowell, when Judge Fortes was the Regional Administrative Justice. Chief Justice Fortes' testimony was very precise. She told you that she asked Judge Joseph an open-ended question without any accusation, that she had been told that part of the proceeding was not recorded. But she didn't assume that that meant that the judge had told the clerk to turn off the recording. She knew there were other possibilities. The clerk could have forgotten to turn it on after the lunch break or the equipment might have malfunctioned or otherwise.

So she said to Judge Joseph, I understand that part of the proceeding was not recorded. What happened. And Judge Joseph did not say I told the clerk to turn off the recording or the defense lawyer asked to go off the record and I did. The first time Judge Fortes heard Judge Joseph say directly

that she went off the record was in Chief Justice Dawley's office on May 8.

Instead, in her conversation with Judge Fortes, Judge Joseph danced around, as she did here, she asked questions about how the recording system worked in Newton and how that system was different from the newer system in other courts and she talked about a time when she turned off the record in Waltham because of a malfunction there. And Judge Fortes didn't remember it, but Judge Joseph talked about it here and in my interview with her, which is Exhibit N. But she never directly answered Judge Fortes' question what happened.

While we're talking about that conversation, there's another point to mention. Chief Justice Fortes testified that, when she told Judge Joseph that everything has to be recorded, Judge Joseph said she knew that. Chief Justice Fortes did not testify that Judge Joseph said she knew about Rule 211. And I'm not suggesting that you should find from that statement that she did know about Rule 211 before Chief Justice Fortes showed it to her, although she should have known about it. What I

do suggest is that her position changes with the context and the audience, as it did in her testimony here.

Let's turn to consistency as a factor in evaluating credibility. Respondent's counsel has been very thorough and has found some inconsistencies in Mr. Jellinek's statements on periphery points, which Mr. Jellinek has acknowledged. But his account of the material facts has not changed, from the time of his first interview with the U.S. attorney in November of 2018 through his testimony here.

Counsel has emphasized that Mr. Jellinek did not go around the courthouse before the afternoon call, before the afternoon call telling people that he had a plan to get his client out the back. Why would he do that? That would destroy the plan. And he didn't go around afterward saying that he had the judge's blessing. Well, why would he do that? He had no reason to want to cause trouble to the judge. To the contrary, he preferred to talk with the judge off the record to protect both himself and her and to keep it as private as possible

afterward.

Judge Joseph, on the other hand, has taken a series of shifting positions. The most glaring inconsistency is her effort to backtrack on the statement of facts that she agreed to with the U.S. attorney and that she's agreed not to contest before the Commission in return for dismissal of criminal charges in September of 2022.

She stipulated that the normal custom and practice in Newton was that a defendant released from custody would be released into the courtroom. We heard from security director McPherson that that should not have been the practice, and we heard from some lawyers that that was not always what happened. But Judge Joseph stipulated that that was the normal custom and practice, and the chief court officer as well as the assistant district attorney, the clerk, and the First Justice have confirmed that it was. And it didn't depend on whether somebody had property. The assistant district attorney and the chief court officer said the court officer would run down and get the property, or would bring it up if the court

officer had reason, as in this case, to believe that the person was going to be released on personal recognizance.

Judge Joseph started backtracking on her stipulation during her interview under oath in June of 2023, and you can see this in Appendix N, Pages 190 to 192. Her positions on what she knew and didn't know, what she intended, and what she did and didn't do have also shifted. She told Chief Justice Dawley that the off the record conversation was about the Pennsylvania warrant. She told him nothing about any discussion about ICE. He could hear a reference to ICE on the recording, but not more than that. And of course he did not know and could not know, aside from what she told him, anything that was said off the record.

And when Chief Justice Dawley asked her whether she had anything to do with the defendant being released out the back or any responsibility for it or any knowledge of it, she denied it. Emphatically and adamantly.

In her interview with me under oath on behalf of the Commission, she gave the same emphatic denial. But she also said that

she thought she had a responsibility to determine whether the defendant was the right person for ICE, she thought she had that responsibility to ICE, and she intended to pause the ICE arrest to allow for an attorney/client conference. She resisted acknowledging that in her testimony here, but you will see that in the transcript of her interview which is in evidence.

In her response to the Commission's charges, Paragraph 32, she says that her conduct had the unintended effect of assisting in the defendant's avoidance of ICE. She did not say that in her interview with me and she did not say any of these things in her meeting with the Chief Justice Dawley. These are all material inconsistencies.

Whose version of what happened is more plausible? Which version finds support in the recorded part of the proceeding and in the testimony of other witnesses? The recording has no bias. It cannot lie or spin or misremember. David Jellinek's version is consistent with what both he and Judge Joseph said on the record and with the other witnesses

on the record.

Judge Joseph was the first to mention ICE as soon as they were at side bar. David Jellinek did not open that topic. She said it's my understanding that ICE is here. What did this communicate to Mr. Jellinek? It conveyed that she was concerned about ICE, she understood that he would be concerned, and she was inviting him to discuss how to deal with that concern.

And what does it tell us? She had said that she didn't know why he asked to go to side bar. But this tells us she did know or at least she inferred ICE was there, and that was the topic to be discussed at side bar.

David Jellinek heard this as an invitation to do exactly what he hoped to do, he made his argument about identity and then he told the judge clearly and directly what he wanted to accomplish, release on personal and try to avoid ICE.

Her statements gave him reason to think she was open to~~uld~~ helping him and she now acknowledges that she was trying to help him. She says so in Paragraph 12 of her response to

the charges. She says she made what she thought was a good suggestion for his client, keeping the defendant in state not Federal custody.

What remained for David Jellinek was to tell Judge Joseph how he had proposed to accomplish his goal and what he needed from her to make it possible. He needed his client to go back downstairs, contrary to what she has stipulated was the normal practice in that court. If the defendant went back downstairs, he thought he could get him released out the back. That's why he asked to go off the record and that's what he told her off the record. Her response as he remembers it was, that's what we'll do, we'll proceed that way, or something like that. This version makes sense, it's plausible and consistent with the record and with what happened.

Mr. Jellinek acknowledges that his conduct was skirting the edge of ethical. Would an attorney characterize his own conduct that way if he were fabricating? If there were a more favorable version for himself, wouldn't he offer it? And would he do what he did if he didn't think he had the judge's permission?

Mr. Jellinek had too much to lose without the judge's permission. He was and still is a regular in the Newton District Court, he cultivates relationships with court personnel, and he benefits from those relationships. Would he jeopardize all of what he had gone through?

David Jellinek felt the need for the judge's blessing. He came in to the side bar discussion knowing what he needed from the judge and looking to gauge whether he ~~had~~ had that opportunity. Her statements on the record signaled to him that he did have the opportunity he needed, her suggestion to hold the defendant overnight, ICE is going to get him, what if we detain him. He listened carefully, and he saw the opportunity he was looking for. That's when he asked to go off the record in that context. He had a specific purpose to tell her how he would accomplish what he was trying to do and what he needed from her to make it possible. He tells her exactly why he needed to go off the record, what he wanted to say to her, and did say to her.

Her version is implausible, it doesn't make sense. She would have you ~~us~~ believe

that Mr. Jellinek asked to go off the record for no reason with no purpose, not to say anything secret or private, not to say anything other than exactly what was said later on the record. Would a lawyer ask to go off the record with no purpose for no reason with no intention to say anything private?

There's been evidence that some judges did go off the record in the years when she was practicing, and that may be so. But context is key. She knew what came immediately before the request to go off the record. She knew that ICE was the topic and Attorney Jellinek's hope that his client could avoid ICE. And she was the first to mention ICE. There was no room for doubt that that was what he wanted to talk about. It was with that knowledge that she immediately granted his request to go off the record.

What about the other witnesses to this conversation? Assistant District Attorney Jurgens, Shannon Jurgens McDermott and Interpreter Eric Mendoza have different memories of what they heard, but the general sense of what they heard both on and off the record and

the impression that they both gleaned is consistent, the judge was trying to help the defendant avoid ICE.

Eric Mendoza is a bit rough around the edges, but he has no bias and no reason to want to incriminate anyone. He doesn't remember much about the morning, when he served on a number of cases and nothing unusual happened. He doesn't remember whether the defense attorney on this case in the morning was male or female. It didn't matter to him. He couldn't hear everything at side bar and he doesn't claim that he could and he can't quote specific words or phrases. But he heard enough to get an impression, the impression that the judge was unhappy about ICE being there and she was suggesting that this particular person be let go out the back, and that a decision was made for him to be let go out the back.

He remembers that because it bothered him. He felt disappointed in the court. As he said it, you kind of lose faith in the system a little. He's spent a lot of time in courtrooms. He may not understand the fine points, but he has a sense of what is supposed

to happen and what is not supposed to happen, and he knew this was not supposed to happen. That's why he remembered it.

What about Shannon McDermott? Her testimony was clear and precise and consistent with her previous statements. She fully understood her role. She said right away that ICE was outside her role, she would take no position regarding ICE. She was there at the side bar, and she listened. But having said she would take no position, her focus was not on the discussion about ICE. Her focus was the criminal charges that she was there to prosecute.

Her memory of the conversation at side bar was limited and does not fully match David Jellinek's testimony or Eric Mendoza's. She does not remember anyone saying anything about going out the back. Although, Chief Court Officer Noe testified that she -- and he testified to this on cross-examination, that she told him later that she had a sense that that might happen, that she couldn't believe a court officer would do that.

She heard and understood enough

of the conversation between Attorney Jellinek and Judge Joseph to make her uncomfortable with the judge and the defense attorney talking about how the defendant could avoid ICE. She described the conversation as sketchy. That was in her grand jury testimony. She acknowledged it in her testimony, she's a few years older and a little more professional and maybe that's not a word she would use today, but that was the word she used and she acknowledged it. She remembers the judge saying, what should we do. Well, what should we do about what? It had to be about ICE. There was nothing else left for the court to do in that case that day. The fugitive from justice charge was dismissed and there would be no bail request on the misdemeanor charge.

Counsel pointed out, and we had some discussion with Ms. McDermott on this topic, that a judge can set bail even if the DA doesn't request it, especially if there is reason to think the defendant won’t come back to court. And if ICE takes him, they might not bring him back to court, whether he's the right person or the wrong person. So that might

prevent him from appearing.

There was some suggestion that maybe Judge Joseph would have set bail to keep him in state custody so that he would appear in court. But if that were the purpose, then it would have been necessary to keep him detained until the case was resolved, unless she thought ICE was going to forget about it, which is extremely unlikely. Maybe a judge would do that on a charge of rape or robbery or drug trafficking that might lead to a sentence of incarceration with credit for the period in detention. But these were misdemeanor charges with no criminal record. The docket is in evidence and you can see that the case was ultimately disposed by pretrial probation, not by incarceration. Unless the motive were to keep the defendant away from ICE, this would not be a case where a judge would set bail without a request from the DA.

Respondent puts a lot of emphasis on Ms. McDermott going out to the main lobby after the proceeding ended and waiting with the ICE officer, telling him that the defendant would come out from the public

doorway. Ms. McDermott told us why she did that. She knew there was a sallyport downstairs, although she didn't use the office, she didn't go downstairs, but she knew it was there. But she didn't believe a court officer would release a defendant that way, knowing that ICE was waiting upstairs, and she knew that the normal practice was that a defendant would come out through the courtroom as indeed Judge Joseph has stipulated.

Let's talk about what happened after the matter went back on the record and back to open court. There was no more discussion of the defendant's identity for ICE, no more mention of whether he was the right person for ICE. Why not? Because it was no longer a concern. There was a plan. The judge and the defense attorney knew what was about to happen.

You heard from Judge MacLeod, -- and this was interesting -- she had a long judicial career first on the District Court and then on the Superior Court. She said, and I think this is not what she was brought in for, I think she was brought in to

testify that judges go off the record, but she said that, when she would go off the record, she would then put a sanitized version of that discussion on the record.

That was exactly what happened here. Judge Joseph and Mr. Jellinek engaged in a little performance for the benefit of everyone in the courtroom, especially the court officers who had control of the secure doors. The attorneys established that the defendant was not the right person for the Pennsylvania warrant, so the fugitive from justice charge would be dismissed, there would be no bail on the drug charges, and the defendant would be released on personal recognizance.

Then Mr. Jellinek made public his request that the defendant go back downstairs. He said I think he has some property downstairs and I'd like to speak with him downstairs with the interpreter, if I may. Judge Joseph said, that's fine, of course. So at this point, everyone in the courtroom knows he's going downstairs, and the arraignment proceeds.

And there's been a lot of talk

about whether it was common for a lawyer to go down to the lockup with a client after the client had been ordered released with the interpreter if necessary. And maybe it was. Although Judge Joseph has stipulated again that the normal practice was to release a defendant into the courtroom and out the front door, and you've heard from various witnesses, that a court officer would go down and get the property if he hadn't already brought it back up with the defendant.

But whether it was common to go downstairs or not, Judge Joseph clearly thought that she needed to give permission for them to go downstairs, and she said on the record that she did give permission. When Officer MacGregor asked if the defendant was released, she responded, he is. And then she said, Mr. Jellinek asked if the interpreter can accompany him downstairs to further interview him and I've allowed that to happen.

The clerk then reminded her that ICE was present to visit the lockup. She responded, fine, I'm not going to let them come in here, but he's released on this. Why say

that at that moment? She had already told the clerk to follow the First Justice's practice of excluding ICE from the courtroom, and there was no request to change that at this point.

In context, her saying that might seem to be a kind of nonsequitur, but it was not a nonsequitur. It expressed her awareness of the effect of excluding the ICE officer from the courtroom. ICE was not there to see and hear what was happening and when, to know that she had ordered the defendant released and had allowed the defendant to go down to lockup. She knew ICE wasn't in the courtroom to hear it and she made sure it would stay that way long enough for Attorney Jellinek to put his plan into effect.

Both the clerk and Attorney Jellinek interpreted her response as indicating that she would not allow ICE to go to the lockup. She rejects that interpretation and emphasizes that there were other ways to get there. Indeed there were. Only there were obstacles. If they were to go through the building, they need to be escorted by someone with a security pass and to get there before the

defendant left. And if they were to go around outside to the back and into the fenced area where a sheriff's van ~~0~~was waiting for another detainee, and then knock on the door to seek entry to the lockup, they would have to know exactly when he was going downstairs and when he was going to be released and maybe they'd also have to have someone wait upstairs in case he changed the plan and went back that way. Not being in the courtroom to see and hear, they could hardly accomplish any of this.

I want to be clear. In excluding ICE from the courtroom, Judge Joseph was following the practice of the First Justice, and the Commission does not fault her for that. She was new, she was not in charge of that courthouse, and that was the First Justice's practice. But in announcing at that moment that I'm not going to let them come in here, she was acknowledging that she knew the effect in this case. ICE is waiting outside the courtroom, expecting him to go out through the courtroom, according to the normal practice, having no way to know that he's going another way and no way to do anything about it.

So why would she do this?

Excuse me just a moment.

(PAUSE)

Why would she do it? There's been no suggestion that she was a political activist or a zealot of some kind, and the Commission doesn't contend that she was. The contention, rather, is that she stepped out of the judicial role. She was trying to help. She saw a problem, a potential injustice. ICE might arrest the wrong person. She wanted to prevent that. But that was not her role as a Massachusetts District Court judge. Her role was to address the state charges before her.

Regarding ICE. Her obligation was to be neutral, both in reality and in appearance, to do nothing to help or hinder, as Chief Justice Fortes said and as Judge Joseph repeated. The assistant district attorney understood that. She was neutral regarding ICE. That's exactly what Judge Joseph should have done. The assistant district attorney was three years out of school, but she knew that that's what she was supposed to do and that's what Judge Joseph should have done.

Instead, as Ms. McDermott said, the judge's conduct on that day was a misguided effort to do what she thought was right, to help the defense attorney get his client out of a difficult situation. Having stepped out of her role then, instead of acknowledging error and taking responsibility for it -- if she had done that, I don't think we'd be here, but instead of acknowledging her error and taking responsibility for it, Judge Joseph has continued to claim that she did have some proper role regarding ICE.

In response to the charges in Paragraph 23, filed in December of 2024, six and a half years, more than six and a half years after the fact, says she was trying to help, she wanted to resolve the issue of whether the defendant was the person ICE wanted. She thought it was her responsibility.

Her further response in Paragraph 12 says that David Jellinek resisted what I thought was a good suggestion for his client.

Paragraph 15 says that she wanted to ensure that defendant's conference

with his attorney would happen before he was taken into ICE custody, not that she wanted to give him more time to investigate. That's a theory that she's presented here. But that's not what's in her response to the charges. None of this was within her role.

And now, in this hearing, instead of acknowledging that she did facilitate what happened, she has this new theory she was just trying to give the defense attorney more time, even though he never asked for more time, and even if it would mean sending the defendant to jail overnight with no legal basis to do that.

Let's turn to what happened after April 2nd. On April 4, she had a conversation with Judge Heffernan. There was no falsehood. But she did not volunteer relevant information. She was not candid. If what she says now is true, that this conversation was when she first learned that defendant was released out the back -- And I'm not suggesting she learned the outcome earlier, but that she learned what was going to happen.

But if this was the first time

she had heard about it, wouldn't it have dawned on her in this conversation that she had unwittingly facilitated, that she had allowed it to happen? As she said in her response to the charges, that she unintentionally facilitated, although she did not say it in her testimony here. Wouldn't she have wanted to share that new recognition with the First Justice? Wouldn't she have wanted to ask what should I do, how do I keep this from blowing up? Or if she didn't feel comfortable with the First Justice enough to do that, wouldn't she have called someone else to talk it through and think about what to do? Her mentor? A judge friend?

Then sometime within the next couple of weeks she had a conversation with the regional administrative justice. Again, there was no falsehood, but no acknowledgment in response to Judge Fortes' question, what happened. There was a lot of talking around it, but she never said I told the clerk to turn off the record. She was not candid and she was not honest about that conversation after in her interview under oath with me on behalf of the

Commission. In that interview, she said she acknowledged going off the record immediately. That's in Appendix N, Page 240, Line 13.

And in her testimony here she said she did acknowledge it. That's not so. Chief Justice Fortes testified that that was not so. And in Judge Joseph's response to the charges at Paragraph 37, she said she assumed that the Regional Administrative Justice knew. Judge Fortes didn't assume anything, but she now says she assumed.

If it had happened the way she says now, then by the time of her conversation with the Regional Administrative Justice, she knew that the defendant avoided ICE, she knew what she had said and what Attorney Jellinek had said on the record, and now she knew she had violated the rule. Wouldn't it have dawned on her then, if it hadn't already, how it would look to others? Wouldn't she have realized what she says in her response that she unintentionally facilitated and that others would think she facilitated intentionally, wouldn't she have wanted to explain to the

Regional Administrative Justice what happened, again, to ask what should I do, how do I keep it from blowing up, do I have to tell the chief? But she didn't do that. She talked about the recording equipment, the Waltham incident, the issue of the defendant's identification for Pennsylvania. Again, if she didn't feel comfortable enough with the Regional Administrative Justice, wouldn't she have wanted to call her mentor or a judge friend to talk it through?

Then comes May 8th, the meeting with Chief Justice Dawley. At this point she had listened to the recording. She knew that the recording showed she went off the record and she knew that that violated Rule 211. There was no way to deny it. She had to acknowledge it and show remorse for it. So she did. She also knew what the recording would reveal about what was said on the record.

Now, you heard the original recording. It actually doesn't reveal a whole lot, but she knew what it could reveal. Surely she could perceive how it would look and surely she understood by this point that she had

facilitated what happened, even if, as she claims, her involvement was unintentional.

But in response to the Chief's direct questions regarding her involvement in the release of the defendant from the lockup, she adamantly denied having anything to do with it. She didn't say she was concerned about ICE taking the wrong person, she didn't say, as she told me under oath, that she thought she had the responsibility to determine his identity for ICE, she didn't say, as she told me under oath, that she intended to pause the ICE arrest to make sure his attorney could have a conference with him first, and she didn't say, as she is now, that she was trying to give his attorney more time to investigate. Even she has now acknowledged that her denial of having anything to do with this release out the back was not fully accurate. Her position in response is that she did facilitate unintentionally, that by allowing the defendant to go downstairs, she allowed it to happen. But she didn't tell the Chief Justice that. She tried to protect herself rather than to participate candidly and honestly in a discussion of what was now a

problem for the court and how the court would have to deal with it.

Again, the issue is role. She wasn't a school child called to the principal's office, she wasn't a criminal suspect with a right to remain silent, or even a civil deponent who's best advised to answer the questions and volunteer nothing. She's a judge in a position of high honor and great -- and high authority and great responsibility, including the duty to be candid and honest with court leadership.

And even now, after all this time and opportunity to think about what happened and to think about the role of a judge, and after all of what she has suffered, and there's no doubt she has suffered, she still doesn't acknowledge what it means to be a judge.

Paragraph 22 of her further response compares her suspension from the bench during her indictment with the immunity granted to the defense attorney as if there were some unfairness in their different treatment. But a judge is held to a higher standard than an attorney, indeed a higher standard than almost anyone. Apparently she still doesn't accept

that higher standard.

I submit that Judge Joseph facilitated what happened not inadvertently, not unintentionally, but knowingly, understanding that by allowing the defendant and his attorney to go downstairs after she ordered the defendant released, she was providing an opportunity to the defendant to be released out the back while ICE waited in front.

She didn't know there was an arranged plan. She didn't know about the conversation between Mr. Jellinek and Court Officer MacGregor, but she knew what Attorney Jellinek hoped would happen and she did what she could to make it possible. She did it not out of any political motive and not out of any ill intention. To the contrary, she did it in an effort to prevent what she thought was an imminent injustice. But in doing so, she violated her obligation as a judge to serve the rule of law, to uphold both the reality and appearance of integrity, impartiality, and independence of the judiciary.

When she realized that her conduct was coming to light, she tried to

protect herself. She was not candid and honest with the Chief Justice as the code required her to be. What she told the Chief Justice was false.

In her interview with me on behalf of the Commission under oath, she gave the same falsehood. She offered various explanations, as she has here, but she still did not acknowledge, as she did in her response to the charges, that she even unintentionally facilitated what happened, and she repeated her denial to you here in this courtroom, without acknowledging that she facilitated what happened even unintentionally.

Judge Joseph has garnered sympathy in some quarters, and indeed she is in a sympathetic position. The United States attorney went after her in a way that came as a shock to the judiciary and the bar and surely came as a shock to her, based on conduct when she had been a judge for only five months. She was indeed new as a judge when she encountered the Medina Perez case. The relationship between the Massachusetts judiciary and Federal officials was tense and the atmosphere around

ICE in courthouses was fraught.

A more experienced judge might have recognized that this was the time to be as careful as one could ever be, to be completely transparent, not just to stay on the record, but to stay in open court so that there could be no question about what was happening. She was not experienced, and perhaps she could be excused for not recognizing how dangerous the situation was.

But it doesn't take experience to be honest, to tell the truth, the whole truth. What it takes to do that is courage, especially when what you're going to tell doesn't make you look great. Judge Joseph did what she did and she said what she said when she was asked about it, and what she did and said undermined public trust and confidence in the Massachusetts judiciary and brought the judicial office into disrepute. Sympathy cannot protect her and cannot protect the public from the consequences of her conduct.

Excuse me for just a minute.

(PAUSE)

Turning to the violations.

General Laws Chapter 211C authorizes the Commission on Judicial Conduct to discipline judges for violations of the Code of Judicial Conduct as well as for willful misconduct under Section 2(5)(B) and conduct prejudicial to the administration of justice for unbecoming the judicial office that brings the judicial office into disrepute.

I will address the code violations and explain which ones the Commission contends also violate these statutory sections, starting with the least serious and ending with the most serious.

First, Judge Joseph violated District Court Rule 211 by going off the record. She concedes that she did that. She said she didn't know about the rule, but it was her obligation to know. She says others did the same. That doesn't change the violation.

The definition section of the Code of Judicial Conduct, which is on the screen there, -- I'm sorry that it's not big enough, but it's on the screen -- the definition says, defines law to include court rule. Rule 2.2 of the Code of Judicial Conduct requires a judge to

uphold and apply the law.

So the violation of District Court Rule 211 was a violation of Rule 2.2 of the Code of Judicial Conduct. The violation of District Court Rule 211 was also a violation of Rule 1.2 of the Code of Judicial Conduct, also on the screen, which requires that a judge act at all times in a manner that promotes public confidence and independence, integrity, and impartiality of the judiciary and avoid impropriety and the appearance of impropriety.

Comment 5 to Rule 1.2 teaches that violations of law violate Rule 1.2. The violation of District Court Rule 211, if she didn't know about Rule 211, is also a violation of Rule 2.5 of the Code of Judicial Conduct, which requires the judge to perform judicial duties and administrative duties competently. The judge has to know the law and the rules that apply to the court she sits on and has to apply the law and the rules.

Accepting that she did not know about the rule, I do not argue that this violation was willful. If she did know about the rule then, I would suggest it was willful.

Either way, it was prejudicial to the administration of justice and unbecoming a judicial officer and has brought the judicial office into disrepute in violation on General Law 211C, Section 2(5)(B).

The second more serious violation is that Judge Joseph demonstrated bias and gave the appearance of bias as between the defendant and ICE by what she did in assisting defense counsel in implementing his plan and by what she said on the record and by going off the record in this context.

On the record she introduced the topic of ICE, which was not within her proper concern. She said ICE is going to get him. First, she said, I understand ICE is here. Then she said, ICE is going to get him, what if we detain him. Then she went off the record right after the defense attorney had told her that his goal was to avoid ICE. Her comments and going off the record in that context gave the appearance that she was trying to help the defendant avoid ICE, as indeed she was. All the witnesses who heard some or all of the discussion, David Jellinek, the assistant

district attorney, and the interpreter got that impression.

Her demonstration of bias as between the defendant and ICE and the appearance of bias was a violation of Rule 2.2 of the Code of Judicial Conduct which requires a judge to perform all duties of the judicial office fairly and impartially. It was also another violation of Rule 1.2 of the Code of Judicial Conduct which requires a judge to act at all times in a manner that promotes public confidence in the independence and integrity and impartiality of the judiciary and avoid impropriety and the appearance of impropriety.

The demonstration of bias I suggest was willful in violation of Chapter 211C, Section 2(5)(B). She knew that she was supposed to be neutral toward ICE and to appear neutral, but she chose to do otherwise. It was also prejudicial to the administration of justice and unbecoming a judicial officer, and there can be no question that it has brought the judicial office into disrepute in violation of Chapter 211C, Section 2(5)(B).

Third and most serious, lack of

candor and honesty. In her meeting with Chief Justice Dawley and in her interview under oath with me on behalf of the Commission, as well as with you as hearing officer in this proceeding. This is a violation of Rule 2.16 of the Code of Judicial Conduct which says a judge shall cooperate and be candid and honest with judicial disciplinary authorities.

The First Justice and the RAJ are not disciplinary authorities, so her lack of candor with them did not in itself violate Rule 2.16. But part of their roles was to pass on information that the Chief Justice should have in fulfilling his duties, so that a lack of candor with them was effectively a lack of candor with the Chief Justice as well.

With Chief Justice Dawley and in her interview with me and here in this courtroom, she was more than just not candid, she was dishonest. This I submit was willful misconduct prejudicial to the administration of justice and unbecoming a judicial officer, that brought the judicial office into disrepute, in violation of General Laws Chapter 211C, both sections 2(5)(B) and (D).

The violation of Rule 2.16, and

particularly a willful violation, goes to the essence of the judicial rule. Honesty of every judge is essential to public trust and confidence in the judiciary which in turn is essential to rule of law.

I'm going to turn to mitigating and aggravating factors and recommended sanctions.

There are two mitigating factors, and I've already mentioned both. First, she was very new as a judge. And second, she's already suffered quite a lot. There's no question about that. I suggest there is one aggregating factor. It is essentially the flip side of what I said a few moments ago. The aggravating factor is the context of the controversy in which this event occurred.

Judge Joseph was new as a judge, but she was not new as a lawyer, and she could not have been living in a bubble. She had to know that anything involving ICE would trigger scrutiny and she had to know that the way a judge handled it would affect public trust and confidence in the judiciary. That context and her failure to recognize it and respond to it appropriately was an aggravating factor.

As for sanctions, I'll address the three categories of misconduct from least to most serious.

First, going off the record in violation of District Court Rule 211, and based on that District Court rule violation, in violation of Rules 2.2, 1.2, and 2.5 of the Code of Judicial Conduct. Now, I've recited a list of rules. But this is the least serious of the violations. If it stood alone, it would warrant minimal discipline. But where a matter has become as public as this matter has, the resulting discipline has to be public, because the public has a right to know the result. Any private discipline would fail to promote public confidence in the judiciary as the Commission is mandated to do.

Lowest level of public discipline authorized by law is a public reprimand, and so that is the recommendation I make to you, a public reprimand with conditions of monitoring for a period of time.

The next more serious violation is actual bias and the appearance of bias in violation of Rules 2.2 and 1.2 of the Code of

Judicial Conduct. Here it is necessary to differentiate between actual and apparent. I urge you to find both. Based on both, the appropriate sanction is a public censure, which is the higher level of public condemnation above public reprimand. Again, with a period of monitoring.

If the violation were the appearance of bias without actual bias, that is, if she had created the appearance of bias by what she said on the record and by going off the record, but did not actually assist in the defendant's avoidance of ICE, then I would suggest that the appropriate sanction would be public reprimand, again, with a period of monitoring.

Finally, the third violation is the lack of candor and honesty with disciplinary authorities, in violation of Rule 2.16 of the Code of Judicial Conduct, including under oath in this courtroom and in her interview with me and on behalf of the Commission as well as with Chief Justice Dawley.

As has been the case in so many other contexts, the attempt to cover up, to

deny, and obfuscate, her refusal to accept responsibility is more serious than the underlying violations and warrants the most severe sanctions.

In past cases, when a judge has violated Rule 2.16, the SJC has concluded that the judge can no longer command respect and authority essential to the performance of a judicial function and on that basis can no longer serve as a judge. That is all the more necessary where, as here, this violation occurs in the context of other violations.

The SJC does not in itself have authority to remove a judge from office. That authority rests with the legislature and governor. The highest level of discipline the SJC can impose and what it has done in past cases when a judge has violated Rule 2.16 is indefinite suspension without pay and referral to the legislature and the governor. That I suggest is the appropriate sanction for this violation.

I know you have listened carefully to all of the evidence and that you have reviewed and will further review all of the

materials before you and will make findings and rulings based on all of the evidence. That is all the Commission asks for.

Thank you for your attention throughout this matter of great importance to the Massachusetts judiciary.

HEARING OFFICER: Thank you, Special Counsel, and thank you, Mr. Hoopes.

It's been extremely helpful to hear your arguments today, and I want to commend all counsel for the quality of your arguments and the presentation of the evidence during this hearing.

As we've discussed on Friday, it's my understanding that we will have final transcripts from the hearing by this Thursday. Counsel will then submit your initial post hearing briefs with your proposed findings of fact and conclusions of law by Thursday, July 3rd, and your responses to each other's initial briefs by the following Thursday, July 10th. At that point the hearing will be closed, and I will then issue my report and recommendation within 30 days.

I also want to express my deep

appreciation for your exemplary professionalism throughout this matter, including your commitment to working so cooperatively with each other throughout this process. That is very much appreciated.

I look forward to reviewing your upcoming submissions.

And with that, I believe we're done for today, unless there's anything else either of you have.

MR. HOOPES: Thank you.

JUDGE FABRICANT: Thank you.

HEARING OFFICER: Thank you very much.

We're adjourned.

(The proceedings adjourned at 11:00 a.m.)

C E R T I F I C A T E

I, LISA L. CROMPTON, Registered Professional Reporter, hereby certify that the foregoing is a true and accurate transcript of my stenographic notes of the proceedings in this matter on the date and time specified in the caption hereof.

IN THIS WITNESS WHEREOF I have hereunto set my hand this 19th day of June, 2025.

<%33863,Signature%>

LISA L. CROMPTON

REGISTERED PROFESSIONAL REPORTER

MY COMMISSION EXPIRES 1/17/2031

EXHIBIT 13

COMMONWEALTH OF MASSACHUSETTS
COMMISSION ON JUDICIAL CONDUCT

COMPLAINT NUMBER 2019-22

VOLUME I

HEARING

~ BEFORE ~

HEARING OFFICER

DENIS J. McINERNEY, ESQ.

JUNE 9, 2025

9:00 A.M.

Boston, Massachusetts

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

(As amended by stipulation of the parties and as approved by the Hearing Officer on October 1, 2025.)

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

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

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

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

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

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

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

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

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

HEARING OFFICER: Thank you

very much.

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

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

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

proving the charges by clear and convincing evidence.

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

JUDGE FABRICANT: Thank you, Mr. McInerney.

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

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

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

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

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

HEARING OFFICER: That is all fine with me.

JUDGE FABRICANT: Thank you.

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

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

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

JUDGE FABRICANT: Thank you.

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

I want to start with what’s undisputed.

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

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

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

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

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

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

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

One of the cases that came before Judge Joseph on that date was Commonwealth versus Medina Perez, and there are various names for him in various documents. I'm using the name that appeared in the District Court docket at the time. Mr. Medina Perez faced three charges, a charge of being a fugitive from justice based on a warrant from Pennsylvania and two misdemeanor drug charges.

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

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

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

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

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

He spoke with Assistant

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

have it under control.

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

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

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

difference and no purpose for going off the record.

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

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

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

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

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

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

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

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

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

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

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

With Judge Heffernan, she did

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

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

With Chief Justice Dawley, in her sworn interview with me on behalf of the Commission, Judge Joseph acknowledged going off the record, but denied having anything to do with the defendant's release out the back.

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

I thank you for your attention.

HEARING OFFICER: Thank you, Special Counsel.

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

MS. MULVEY: Thank you.

Do you mind if I move around a little?

HEARING OFFICER: No. Of course.

MS. MULVEY: Kind of crowded back there.

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

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

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

HEARING OFFICER: If I can interrupt for one second. Mr. Neff, are you able to --

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

(PAUSE)

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

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

MS. MULVEY: Sure. Thank you.

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

basis for all of the media reports.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

happens in the District Court.

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

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

But after the 52 seconds,

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

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

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

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

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

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

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

She handled two more matters

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

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

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

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

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

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

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

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

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

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

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

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

yes, that's what we'll do.

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

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

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

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

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

on what happened at side bar.

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

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

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

Thank you.

HEARING OFFICER: Thank you very much, Counsel.

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

JUDGE FABRICANT: All right. David Jellinek.

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

DAVID JELLINEK, SWORN

HEARING OFFICER: Special counsel.

DIRECT EXAMINATION

BY JUDGE FABRICANT:

Q. Please state your name.

A. David Jellinek.

HEARING OFFICER: Just one second. Sorry.

(PAUSE)

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

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

HEARING OFFICER: Ok.

(PAUSE)

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

for the moment.

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

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

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

HEARING OFFICER: Okay. Great.

JUDGE FABRICANT: Can you hear now?

HEARING OFFICER: Yes.

JUDGE FABRICANT: Ok. Great.

HEARING OFFICER: Thank you.

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

A. Yes. Mild.

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

A. Yes.

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

A. Thank you.

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

A. Thank you very much.

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

professional background.
A. I'm a lawyer. I --
HEARING OFFICER: I'm sorry. I'm not sure that I'm hearing Mr. Jellinek the same as I'm hearing everybody else.
JUDGE FABRICANT: Let's make sure that that's --
A. I'm a lawyer.
HEARING OFFICER: Yes. just stay close to the mic.
THE WITNESS: Sure.
HEARING OFFICER: That would be great. Thank you.
THE WITNESS: Trying to avoid the feedback from before.
A. I'm a lawyer. I've been practicing since 2000. I went to BC Law school. I did a one year clerkship in Arizona, state court of appeals, and I started with CPCS in 2001, worked in the Worcester office and Cambridge office in '06, and I went to the Boston Police Department working in the legal affairs division until '08, and then I left for the Obama campaign for a month, and then I went out on my own.

Q. And the CPCS, Committee for Public Counsel --
A. Yes.
Q. The state and public --
A. The state and public defender. Correct.
Q. Okay. And in your private practice, did you also serve as a bar advocate?
A. Yes. I continued to do bar advocate work, probably half to 75 percent of my practice.
Q. And are you still in private practice?
A. Yes.
Q. And still doing some bar advocate work?
A. Yes.
Q. Okay. And I want you to take your mind back to April of 2018. And I know that that's a little more than seven years ago, so it's a bit of a challenge. But I'm going to ask you a series of questions that relate to how things were in April of 2018.

As of that time, what was your experience in the Newton District Court as to how often you were there, what kind of work you did there?
A. Sure. I was a bar advocate there, which meant that I picked up duty days, which are days when you're assigned and you help out anyone who

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

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

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

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

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

better.
Q. Did you feel that you got to know the judge a little bit than --
A Yes. Absolutely.
Q. Okay. Were you familiar with the courthouse staff?
A. Excuse me?
Q. Were you familiar with the courthouse staff?
A. Yes.
Q. And were you friendly with the courthouse staff?
A. Not to the extent that we would go out on our own. But friendly in the courthouse, sure.
Q. A professional friend.
A. Yes.
Q. Did you sometimes bring them coffee or other things?
A. Yes. Particularly on a Tuesday, I made it a point, because everyone had to stay and work longer for drug court, and usually on a first break or lunch I'd have coffee and some lunches, because oftentimes clients in the afternoon, they hadn't eaten or they had to travel for an hour or two to get there.
Q. And so the clients in the drug court, just so we're clear, these are people who had been

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

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

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

A. Yes.

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

A. Sure. There's an entryway that's somewhat modern. You walk through that. And there's a metal detector. Clerk's office is off to the right. The main courtroom is ahead of you a little bit to the left. There's a bathroom to the left and elevator to the left as well. There's stairs to go down to probation, all the way to the left, and stairs to go up to the second floor courtroom for the trial session.

Q. And those stairs that you just referred to, are those publicly accessible.

A. Yes. Those are the public stairs.
Q. On the screen is Page 509 of the appendix, Appendix U, Page 509. You also have in front of you, you have a binder that has all the appendices, and they are -- the pages are sequentially numbered in the upper right-hand corner.
THE WITNESS: Thank you, sir.
A. Yes.
Q. So let me ask you to look at that photograph and tell us what it is.
A. That's the main session of the courtroom. The judge would sit up front. The clerk would be at the next level down. The DA just sat on the left and defense would sit on the right. That glass box to the left was the dock where defendants would be brought up if they were in custody.
Q. And let's look at the photograph at Page 511.
A. Okay. I can pull up the rest.
JUDGE FABRICANT: Does that have a number?
MR. NEFF: Here.
Q. Okay. What do you see in that photograph?
A. That is essentially taken from what would be

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

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

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

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

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

Q. And there's a door --

A. Yes.

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

A. Yes.

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

A. Yes.
Q. And what is the orientation of that door in relation to where the judge's bench is and where the exit to the courtroom is?
A. If you were standing looking at that, the judge's bench would be slightly to your right and the exit to the courtroom would be behind you.
Q. Okay. Do those three photographs fairly and accurately represent what you've been -- what you've described?
A. Yes, they do.
JUDGE FABRICANT: All right. And I offer those three in evidence, please.
HEARING OFFICER: No objection?
MR. HOOPES: No objection.
HEARING OFFICER: They're admitted.
Q. If your client is going into or out of the dock, is it that door that your client goes into or out of?
A. Depends where they're coming from. If they're in the audience, if they are in custody, then, yes, they would go through that door. If they're leaving the dock, and they're released,

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

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

A. Yes.

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

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

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

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

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

A. Yes.
Q. If the person is leaving, how does the person go out?
A. Well, usually they remove the restraints in the dock. And when the person would be released, they would walk out through that little gap there, at the bottom which leads to the public area, and then out the back door, which would --
Q. And were there exceptions to that?
A. Yes.
Q. On April 2nd of 2018, were you in the Newton District Court?
A. Yes.
Q. And do you remember the reason that you went there that day?
A. No, I don't remember the reason I was there initially that day.
Q. And over the course of this proceeding and the series of discussions that we've had, have you made some effort to refresh your memory on that point as to what brought you there that day?
A. Yes. We checked the court docket from that day and we checked my diary, and I think my computer cuts off the calendar after five years

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

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

A. No.

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

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

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

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

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

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

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

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

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

A. Yes.

Q. And did they pay you?

A. Yes.

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

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

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

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

Q. Okay. Did you get some paperwork?

A. Yes.

Q. And what did you learn as to what he faced?
A. Well, he was charged, if I remember correctly, with being a fugitive from justice and with possession of an illegal substance. I believe it was Class B or C. I don't remember clearly. In Newton.
Q. And did he have another problem that you were aware of?
A. Well, the fugitive from justice charge was from Pennsylvania, and it was apparently a warrant for operating under the influence of drunk driving in Pennsylvania.
Q. And was there another problem that he had?
A. There was another problem that I heard or learned, that ICE, Immigration, was in the area and apparently he had an immigration detainer as well.
Q. And did you make some effort to investigate his identity with respect to the Pennsylvania warrant and the ICE detainer?
A. Yes. And what began to become clear was that the Pennsylvania warrant was not the same gentleman that was in the lockup. I don't -- I'm not going to refer to him by name because I don't know who was who. But the Pennsylvania

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

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

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

Q. Did he persuade you?

A. No.

Q. Did you persuade him?
A. No.
Q. And after your conversation with him, what did you understand he was going to do?
A. My understanding, that he would be detaining Mr. Medina Perez when he was released.
Q. Did you have a discussion with the assistant district attorney regarding the Pennsylvania warrant?
A. Yes. At some point the ADA determined that it was not right gentleman in custody. In other words, the gentleman in custody was not the same person under the Pennsylvania warrant.
Q. And did she tell you what she intended to do regarding the fugitive from justice charge?
A. She told me that that would be dismissed.
Q. So if the fugitive from justice charge was dismissed, that leaves, as state charges, the drug charges.
A. Correct.
Q. Did she tell you what she intended to do regarding the drug charges?
A. Yeah. She said, because he had no state record and because it was a minimal charge, that she would not request bail.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Q. So does this show where you were?

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

Q. So let go back to Page 509.
A. I would have been sitting to the right.
Q. Okay. The counsel table chair to the right.
A. Yes. Or against the bar to the right, where I usually left my bag.
Q. Okay. And so you had this conversation with Officer MacGregor in the courtroom. Was anybody else there?
A. No.
Q. And tell us about the conversation that you had with Mr. MacGregor.
A. To the best of my memory, I said something like I think they have the wrong guy and I'm concerned. He said, you know, is there anything I can do. And I said, I think if he goes out the front, they're going to detain him, and there's nothing we can do about that. He said I'm allowed to let him out the basement if I have permission, basically. I said can we do that. He said if you can get him downstairs with a legitimate reason, I can let him out the back door if it's cleared.
Q. So after your conversation -- Is that the whole conversation, that you recall?
A. Essentially, yes.

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

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

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

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

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

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

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

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

A. I was hopeful.

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

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

Q. And did he need to go downstairs?

A. Yes.

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

So was the case called at that point?

A. 2:48 p.m.?

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

A. Yes.

Q. Two hours and 48 minutes and 13 seconds.

A. Yes, that's when the case was called.
Q. Okay. So let's play the recording, and I'll ask you to follow along in the transcript.
(RECORDING PLAYING)
Q. We'll stop there. And I'm just going to read the transcript. And I'll let you know that the transcript has been stipulated as accurate.
So what we've heard so far is, Clerk Okstein says to the court officer can you bring up the next, Mr. Perez. And Officer MacGregor, all right. Clerk Okstein, judge, the next case is Commonwealth versus Jose Medina Perez, Attorney David Jellinek has filed an appearance on behalf of Mr. Perez. Judge Joseph, good afternoon. Attorney David Jellinek, good afternoon, David Jellinek on behalf of Mr. Perez, may we approach briefly. Judge Joseph, yes, please. Attorney Jellinek, thank you. Clerk Okstein, do you want to wait for your client? Or do it? Attorney Jellinek, no, side bar. Judge Joseph, we're just going to side bar.
Is that what you see there at Page 40 of the transcript?
A. Yes.

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

A. Yes.

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

A. Yes.

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

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

Q. Okay. Let’s resume the recording.

(RECORDING PLAYING)

Q. Let's pause there.

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

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

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

Attorney Jellinek, something inaudible.

Judge Joseph, then it's a different --

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

Attorney Jellinek, something inaudible.

Judge Joseph, what if we detain him.

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

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

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

(RECORDING PLAYING)

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

Judge Joseph --

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

Did I read that correctly?

A. Yes.

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

A. Yes, I did.

MR. HOOPES: Objection.

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

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

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

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

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

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

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

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

A. Yes, I did.

Q. And what was your impression?

A. My impression was 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.

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

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

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

A. Yes.

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

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

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

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

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

somebody?
A. Well, I was trying to protect essentially everybody, but myself and the judge, most primarily, because if we had -- if she had said, no, you can't do that, fine, I never said this, she never said it off the record. If she wanted to help me, it was better that that's off the record than on the record for her protection as well. So it wouldn't have changed how I spoke.
Q. And so my question, if she had said, no, we're staying on the record, what would you have done?
A. I would have said exactly the same thing.
Q. Okay. And when the judge told the clerk to go off the record, to turn off the record, did that affect your thinking?
A. Yeah. Yes. It made me feel like she might be more sympathetic to hearing what I had to say.
Q. And what did you say off the record?
A. I said that I was very concerned that ICE, as I said on the record, ICE had the wrong individual, because this was supposedly biometric data that didn't match up, and that I 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 I knew that ICE was out front, so that might be a way for him to avoid getting into ICE custody.

Q. And what did she say?

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

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

A. Not to my memory.

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

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

Q. And how did you know that?

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

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

A. I believe she ordered them out at some point

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

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

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

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

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

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

A. Yes.

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

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

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

A. Yes.

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

A. Yes.

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

(RECORDING PLAYING)

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

(RECORDING PLAYING)

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

At one point, and this is about

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

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

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

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

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

Q. And then further down on Page 43 Judge Joseph

says -- After Court Officer MacGregor says he's released, Clerk Okstein says he is. You said yup. Judge Joseph says he is. And then Judge Joseph, Mr. Jellinek asked if the interpreter can accompany him downstairs to further interview him. Did you intend to further interview him?

A. I wanted to speak to him for a moment, yes, but not an extensive interview.

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

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

Q. And what happened next?

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

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

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

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

A. I went back upstairs.
Q. And were you done for the day then?
A. I believe, yeah, I was done for the day. If my memory is correct, court was pretty much done at that time.
Q. And did you leave the courthouse?
A. I did.
Q. On your way out of the courthouse, did you see Assistant District Attorney Shannon Jurgens McDermott?
A. I actually saw her in the courtroom on my way back upstairs. I looked upstairs. I saw her in that main area of the courtroom.
Q. Okay. Did you have any conversation with her?
A. Very briefly.
Q. Okay. And do you remember that conversation?
A. To the best of my memory, I said what's wrong, she said ICE is pissed at me, said are you pissed at me, she said something like yes or...
Q. Okay. And when you went out to get to your car, did you see Attorney Bostwick?
A. I did. We were both walking out at the same time.
Q. Did you have a conversation with her?

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

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

A. Yes.

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

A. Yes.

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

A. I did.

Q. Tell us first how that came about.

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

Q. And how did the conversation end?

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

problem, something to that effect.
Q. Was anyone else present for that conversation?
A. No.
Q. And why did you have that conversation with her?
A. Because she's the presiding judge, and I wanted her to know that something had occurred in the courthouse the day before and that at least some people didn't think it was proper and that ICE had been angry with the district attorney.
Q. Did you say anything about going off the record?
A. No, not to my memory.
Q. Why not?
A. It didn't seem relevant at that point. In the earlier part of my practice, in the early 2000's, that was not uncommon.
Q. This was 2018. Was it common or uncommon at that point?
A. I hadn't been off the record in a while at that point. But in the earlier 2000's, with CPCS, we would go off the record frequently or even meet in the judge's lobby, in the chambers for lobby conferences to discuss cases.
Q. What's a lobby conference?
A. Lobby conference would be, usually the

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

Q. What was the purpose of that?

A. Often to work out a plea.

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

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

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

A. Yes.

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

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

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

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

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

A. Not to my memory, no.

Q. Never?

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

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

A. Not to my memory, no.

Q. And why not?

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

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

A. Not to my knowledge, no.

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

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

Q. Meaning a dismissal of the fugitive --
A. Yes. Correct.
Q. Okay.
A. Correct.
Q. At some point did you learn that you would be subpoenaed to the grand jury?
A. Yes.
Q. And how did you learn that?
A. I learned it from a lawyer who called me one afternoon and said he was representing Mr. Okstein, who had been subpoenaed.
Q. The clerk.
A. Yes. And that he thought I would be as well and that I should come speak to him.
Q. And did you hire a lawyer to represent you?
A. I did, yes.
Q. And who was that?
A. Bob Peabody.
Q. And is he present?
A. He's -- Yes.
Q. Did you believe that you would have a Fifth Amendment right to refuse to speak with the U.S. attorney or to refuse to testify to the grand jury?
A. That is a difficult question. I don't think

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

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

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

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

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

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

JUDGE FABRICANT: Okay. Thank you.

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

A. Yes.

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

A. Yes.

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

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

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

A. I believe that was the date, yes.

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

A. Yes.

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

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

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

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

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

A. Absolutely.

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

A. Yes.

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

A. Yes.

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

A. Yes.

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

A. No.

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

A. Yes.

Q. And did you find some things that --

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

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

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

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

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

JUDGE FABRICANT: Okay.

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

MR. HOOPES: Same objection.

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

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

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

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

Q. What did you mean?

A. I meant that she was --

MR. HOOPES: Objection. Sorry.

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

JUDGE FABRICANT: Allow him to answer or...

HEARING OFFICER: Yes.

Q. What did you mean?

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

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

A. I believe that was the date, yes.

Q. And was your testimony truthful?

A. Yes.

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

A. Yes.

Q. What was your view at the time?

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

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

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

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

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

A. Absolutely.

Q. Is that something you have said --

A. I have said it in the past. Yes. Absolutely. It's on the edge of ethical and it's on the edge of legal. And that's one of the reasons that we went off the record and it's one of the reasons that I think this came up. It is. It's a little bit in the gray area.

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

A. Yes.

Q. And do you still to this day?

A. Yes.

Q. And for as long as he continued to work, do you continue to be friendly with Court Officer MacGregor?

A. Yes.

Q. Did he retire at some point?

A. To my knowledge, yes.

JUDGE FABRICANT: I have

nothing further at this time. Thank you.

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

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

MR. HOOPES: Yes. Thank you.

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

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

HEARING OFFICER: We're back on the record.

Mr. Hoopes.

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

CROSS-EXAMINATION

BY MR. HOOPES:

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

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

that right?
A. Yes.
Q. And you're the one who asked to go to side bar; correct?
A. Correct.
Q. And nothing unusual about that; correct?
A. Not in my opinion, no.
Q. And when you got to side bar, it was a side bar; right? It was at the side of her bench; correct?
A. Correct.
MR. HOOPES: And so with the hearing officer's permission.
Q. There's a photo of the courtroom right to your left there.
A. Yes.
Q. And the judge was on the bench.
A. Yes.
Q. And you and Ms. Jurgens were right at the side; correct?
A. Yes. Right around where the stairs are.
Q. So right maybe here; is that correct?
A. Yes.
Q. And you wanted to go to side bar because you wanted it not out in public; correct?

A. Correct.
Q. And you wanted to speak reasonably softly; is that right? So the public wouldn't be hearing what you had to say exactly; right?
A. Well, there's also white noise that goes on so the public can't hear.
Q. Okay. But be that as it may, you were keeping your voice down; correct?
A. Yes. Correct.
Q. And I assume that you wanted the judge to be able to hear what you were saying; correct?
A. Correct.
Q. Because that's what you were doing, you were there to try to ask for something; correct?
A. Yes.
Q. And so when you were speaking, you spoke directly to her so she could see your face; right?
A. Correct.
Q. And Ms. Jurgens was there because she was the assistant district attorney; right?
A. Correct.
Q. She had an important role in whatever was going to be said in side bar; correct?
A. Yes.

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

A. Yes.

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

A. Yes.

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

A. Yes.

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

A. Probably about there.

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

A. Yeah.

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

A. She responded at certain points. Correct.

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

A. Depends on your point of view.

Q. Yeah. Well, I mean, you never had a sense that she was hard of hearing; right?
A. No, no.
Q. You talked to her before.
A. Yup.
Q. And she understood every word you had to say.
A. Yes.
Q. She was watching you and watching the judge and keeping track of the whole situation; right?
A. Can't speak for her.
Q. Yeah. But she was paying attention; correct?
A. I can't speak for her.
Q. Okay. Did you respond when special counsel asked you about the comment from Ms. Jurgens saying that it wasn't -- ICE wasn't her issue?
A. Yes.
Q. And you heard her say that; correct?
A. Correct.
Q. So the transcript is accurate; right?
A. Transcript's accurate.
Q. So she was listening and hearing certain things; right?
A. At least those things, yes.
Q. Now, at some point your client was sent downstairs, right, to the lockup?

A. Yes.
Q. And you went with him.
A. Yes.
Q. The interpreter went with you.
A. Yes.
Q. When you left, everybody else was in the courtroom, remained in the courtroom. Nobody came down with you. Correct?
A. Correct.
Q. And when you were down there, you talked to your client, you said for a short period of time.
A. Yes.
Q. And one of the reasons you wanted to talk to him was to exchange phone numbers; is that right?
A. To my memory, yes.
Q. Okay. So that you could prepare for the next time he came back; right?
A. Yes.
Q. Let me see if I understand this correctly. You have told us and you've told many people involved with the Federal Government and this prosecutor, special prosecutor, that your intention was that he would escape ICE; right?
A. That he would avoid being arrested by ICE, yes.

Q. Okay. And so you thought he needed your phone number to be in touch with you to come back again if he's avoiding ICE, escaping ICE?
A. Yes. Just because someone is avoiding ICE doesn't mean they won't return to court. I expected him to come back on the next date. I give all my clients my phone number.
Q. So you and he talked briefly.
A. Yes.
Q. The interpreter was there.
A. Yes.
Q. Officer MacGregor did something at that point; right?
A. Yes.
Q. Opened the door?
A. Yes.
Q. Released him?
A. Yes.
Q. Did you peer out to see if ICE was out back?
A. Not to my memory.
Q. So if the doors for that day show that you were downstairs for about six minutes, what you did you do to fill the time?
A. I believe that I went downstairs, I spoke to my client for a little while, he had to be

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

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

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

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

A. Yes.

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

A. I believed he had property downstairs, yes.

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

A. Yes.

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

A. To my memory, yes.

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

A. Yes.

Q. And where did you meet with them?

A. In the courtroom.

Q. They were waiting in the courtroom.

A. To my memory, yes. It was in the back of the courtroom.
Q. And you had a conversation with them.
A. I believe it was a very brief conversation, but yes.
Q. And so it was in the back of the courtroom, is your memory.
A. To my memory, yes.
Q. And where were they in the back of the courtroom and where were you?
A. My memory is that they had spent most of the session -- Can't see it from there. But if you're walking into the courtroom, just to the right, in the back row or the second to last row.
Q. And what did you say to them and what did they say to you?
A. I don't remember specifically, but I think they said something like good job, and I said thank you.
Q. Had you been paid by that point?
A. Yes.
Q. And where was the ADA?
A. Probably near her desk or leaving the room.
Q. In the same main courtroom.

A. Probably.
Q. Now, you told us that the ADA was angry at you, pissed off at you; right?
A. Seemed that way, yes.
Q. And she said something to you like, I know what you did and that was not the right thing to do; right?
A. I don't remember if that's what she said or not.
Q. Well, you just testified that it was -- I didn't like what you did, that wasn't the right thing. Correct?
A. I think she said something along the lines of, ICE is mad at me.
Q. She said ICE is mad at me.
A. Something like that, yes.
Q. And was ICE in the courtroom at the time?
A. Not to my knowledge. I don't know.
Q. ICE was out in the hallway?
A. I don't know where they were.
Q. And when you saw the ADA, and she said that, did you say, what are you upset for, you were there when we had the conversation at side bar?
A. I don't remember if I said that or not.
Q. You didn't say, what are you upset for, I didn't

do anything wrong, the judge gave me her blessing. You didn't say that, did you?
A. It was not that long a conversation. I don't remember.
Q. Well --
A. But I don't believe I said that, no.
Q. Yeah. Okay. Because she was accusing you of doing something wrong. And if you hadn't done anything wrong, that was the time to let her know; right?
A. Not sure I agree with the question.
Q. Well, let's go back a little earlier. What time -- Can you tell the hearing officer what time of the morning or the afternoon did you first have a conversation with the assistant district attorney?
A. Probably around 10:30 or 11:00.
Q. Okay. So just to lock that in. If I can grab... So today you're telling us that this all happened in the morning when you first met her about 10:30; right?
A. Could have been 11:00, could have been 11:15.
Q. Sometime in the morning before noon.
A. Yes. Probably.
Q. And the discussion was about Pennsylvania having

the wrong guy; right?
A. That was probably the initial conversation, yes.
Q. You wanted him released; right?
A. Yes.
Q. You wanted to address the bail issue; correct?
A. Yes.
Q. And ICE was looking for him; right?
A. Yes.
Q. And so what time was it of the day on April 2nd, 2018, that you and Wesley MacGregor spoke and agreed that MacGregor was going to let him out the back once he came downstairs? What time was that conversation?
A. Again, that's not the conversation we had. He and I spoke over the lunch break, but he -- That was not an agreement that was made.
Q. Oh. Well, over the lunch break, between 12:00 and 1:00, between 1:00 and 2:00?
A. Between 1:00 and 2:00.
Q. And you were in the courtroom?
A. Yes.
Q. And he said -- You expressed to him that you were upset about the fact that your client was potentially going to ICE custody?

A. I was upset that, yes, that ICE might get the wrong guy.
Q. And you suggested that they had the wrong guy; correct? You just said that; right?
A. I don't believe --
Q. And he said, you get him downstairs, I can get him out the back; right?
A. He said, if I remember right, if you get him downstairs, I'm allowed to let him out the back.
Q. And I'm sure at that point you said no way; right?
A. No.
Q. Okay. You didn't say you can't do that, did you?
A. No. Because I've seen other people released out the back. I knew it was possible.
Q. Okay. You had seen other people go out the back with ICE in the courthouse?
A. No.
Q. Okay. So you told us several times now that you knew that ICE was there; right?
A. Yes.
Q. And ICE was waiting for him; correct?
A. I assume they were waiting for him. I didn't know if they were doing anything else there.

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

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

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

A. That was the goal.

Q. Thank you. That was the goal.

A. Uh-huh.

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

A. It wasn't that linear.

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

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

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

to go down and talk to his client; right?

A. That's true.

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

A. Correct.

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

A. That's not quite what I said.

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

A. It was not quite that simple.

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

A. No.

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

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

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

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

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

Q. Well, --

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

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

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

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

A. No.

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

A. No.

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

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

A. No.

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

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

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

A. Sounds like it, yes.

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

A. No, it's not what I'm saying.
Q. Well --
A. I'm saying that, after she had dealt with the matters that related to her, I'm not sure if she was as focused on the conversation about the Federal issues of ICE. And she said -- and I don't remember the exact language -- that's not my business.
Q. Oh, because sometimes people are focused on what's important to them and what they're thinking; right?
A. Sure. Yeah.
Q. But you agree that she's right there when you were continuing talking; right? All about ICE; right?
A. Yes.
Q. And in fact, she said not my business; right?
A. Yes.
Q. Now, I think you've also said very recently that you thought she maybe didn't get it because she was inexperienced. Or newish, was the word you used. Right?
A. She was a relatively new ADA, yes.
Q. So you hadn't met her and talked to her during your two or three months often; right?

A. Yes.
Q. And you knew that she had been in the district attorney's office now for almost three years; right?
A. Yes.
Q. And that she had supervised in other courts, up to 10 or 11, ADA's; right?
A. I didn't know her work history.
Q. And she handled thousands of cases.
A. Probably. Most DA's have.
Q. Maybe thousands more than you.
A. I don't know.
Q. Well, that's not newish and inexperienced, is it?
A. She was not a Superior Court ADA. She was a supervisor, alone in the Newton District Court. And she said, basically, it's not him, so the Pennsylvania warrant is dismissed and we're not asking for bail. And at that point, I'm not sure she was paying too much attention after that.
Q. So your claim today and prior to today is that, if you said something, she might not have got it. She might have not have. It might have been subtle, she might have been inexperienced,

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

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

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

A. Probably.

Q. Well --

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

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

A. Yes.

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

A. That's my memory, yes.

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

A. I don't know.

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

A. Yes.

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

notes. Have you seen those notes?
A. I believe I have, yes.
Q. Oh, so then you know that, when asked, Page 5, when asked whether you had any further interaction with ADA Jurgens after coming upstairs from the lockup following Medina Perez's release, Mr. Jellinek responded that ADA Jurgens was in the lobby with the ICE agents, not in the courtroom. Do you remember saying that?
A. I believe she was -- had been in the lobby with the ICE agents. She was in the courtroom when I spoke with her to the best of my memory.
Q. That's not what you said to Special Counsel. And she's a lawyer. You're supposed to be truthful with her; right?
A. Did the best I could.
Q. And so -- let's see -- today is June the 9th; right?
A. Yes.
Q. So six months ago, you put the ADA in the courtroom -- excuse me -- the ADA out of the courtroom and in the hallway with the ICE agents, and today you put the conversation inside the courtroom; right?

A. That's my memory.
Q. And you said they were all angry with each other.
A. Appeared that way.
Q. Meaning, somebody was angry with -- the ICE agents were angry with Ms. Jurgens; right?
A. What she said to me, yes.
Q. And when you saw Ms. Jurgens talking to the ICE agents, did you see any court officer? Did you see Scott Noe? You know who he is; right?
A. There's multiple questions there. I do know who he is. I believe he's retired.
Q. No. My question is, did you see Scott Noe outside?
A. I don't remember.
Q. Okay. So when you came out, your memory is that you just saw the ICE guys and Ms. Jurgens; right? And they were angry at her.
A. Seemed that way.
Q. And you just walked away; right?
A. Yes.
Q. You didn't say -- walk over to them and say it's not her fault, did you?
A. No, not to my memory.
Q. You let her just be on it, ICE guys, herself, right?

A. To my memory, yes.
Q. You didn't walk over to the ICE agents and say, guys, he went out the back, I arranged for him to go out the back. You didn't do that, did you?
A. Not to my memory, no.
Q. You worked with law enforcement for a couple of years, didn’t you? You've been on the Boston PD?
A. Yes.
Q. Did you think that you owed any duty to any police officer in the Commonwealth of Massachusetts to be open and honest with them? Like the ICE agents there that day? Did that go off in your head? To explain to them that it wasn't the DA who caused this problem, it was you?
A. I'm sorry.
Q. Let me back it up. You've been in law enforcement before; correct?
A. Yes.
Q. You've helped law enforcement enforce laws; right?
A. Yes.
Q. Your feeling here was, not this time, I'm not

going to tell ICE anything; right?
A. Wasn't my job to tell ICE anything.
Q. Well, --
A. That's a different role.
Q. -- whose job was it? She didn't know that you had planned this with MacGregor; right?
A. She was, as you said, standing next to me. If she had been paying attention, she would have heard it.
Q. Well, would I be over the top by saying you left her hanging out to dry?
A. I don't know how she felt about it. She said she was angry with me. And the next time we met, it was okay.
Q. So there's a lot of people who work in the Newton District Court; right?
A. Yes.
Q. And you take great pride in knowing these people; right? The clerk, Mr. Okstein, other people in the clerk's office?
A. Again, it's a multiple part question. I take pride in knowing people who work in the court, yes.
Q. Including the clerk's office?
A. Yes.

Q. Including the probation department?
A. Yes.
Q. You never walked up to any one of those people prior to the afternoon call list and said, ICE is here, you know ICE is here, and I'm going to arrange for my client to go out the back door. You didn't do that, did you?
A. Nope.
Q. So afterwards you never said to any of those people, I had the blessing of Judge Joseph; right?
A. I didn't speak to any of them after that, no, not that day.
Q. Well, before that day in court ended, you saw Ms. Bostwick; correct?
A. Yes.
Q. Now, Ms. Bostwick was the lawyer who was the bar advocate who was there in the morning; right?
A. Yes.
Q. And she's the lawyer that you replaced.
A. Yes.
Q. And you knew that she was in the back of the courtroom in the afternoon; correct?
A. Yes.
Q. What time did you first notice her?

A. I don't remember.
Q. But she was certainly there until you walked out.
A. We walked out at the same time. I don't know where she was before that. But it was her job to be there that day.
Q. And as you walked out with Ms. Bostwick, you weren't shy about the attorney/client privilege. You told her I just got him released out the back; right?
A. I said the guy just got released out the back.
Q. Oh.
A. I might have said I did. I might have said --
Q. You don't remember whether you were even truthful with her; right?
A. (No response).
Q. So tell us, where was this conversation?
A. That was in the parking lot off to the side of the building.
MR. HOOPES: So if the hearing officer can allow me.
Q. So this is a, this is a little bit of a blowup. So this is the back of the courthouse.

A. Would you like me to point it out?
Q. That'd be great.
A. If I'm right --
JUDGE FABRICANT: If the witness steps away from the microphone, he won't be amplified.
THE WITNESS: I understand.
HEARING OFFICER: Mr. Hoopes. If you could. Thank you.
A. Looks to me like that is the Newton District Court and that is the police station.
Q. And where was your conversation with Ms. Bostwick?
A. In this area here.
Q. So facing the courthouse, to the right.
A. Correct. From Washington Street.
Q. And she said to you, you've obstructed justice.
A. I don't think it was that clear or direct.
Q. Well, you may have obstructed justice.
A. Something along those lines, yes.
Q. And if you may have obstructed justice, then you may have engaged in a criminal act; right?
A. If you obstruct justice, that's a crime, yes.

Q. Now, this discussion with Ms. Bostwick in the parking lot right after court -- which would have been at roughly what time?
A. 3:00 or 3:30 probably.
Q. That's a conversation that you never shared with Federal investigators, did you?
A. I honestly don't remember. I thought I did, but I don't remember.
Q. Well, as a matter of fact, did Federal investigators, to your knowledge, ever interview Ms. Bostwick?
A. I have no idea.
Q. Did Federal investigators ever confront you or ask you about anything with regard to conversations they had with Ms. Bostwick?
A. Not to my memory.
Q. Now, when Ms. Bostwick said that you may have obstructed justice, what did you say?
A. I said -- Again, this was a long time ago. I don't remember my specific language. But I think I said I don't believe I did.
Q. Well, did you say to her, I made a deal with MacGregor to let him out the back?
A. No.
Q. Did you say to her, I didn't obstruct justice,

Judge Joseph gave her blessing? That was the time to tell her; right?

A. I don't know what you're --

Q. Well, did you say that to Ms. Bostwick?

A. Not to my memory.

Q. So you got in your car; correct?

A. I would have, yes, most likely.

Q. You drove home. Went back to your office. Which was it?

A. Probably home.

Q. You walked in the door, right, of your house?

A. Yes.

Q. Did you talk to your wife about what happened that day? Not what was said. Not what was said. Did you speak to your wife about it?

A. I don't believe she was home at that time. Probably later that evening.

Q. Speak to your parents that evening?

A. No, probably not.

Q. Well, that night, thinking about it, did you have any fear whatsoever about what might have happened next, to you, being prosecuted?

A. No. I didn't think I'd be prosecuted. I was a little -- I was concerned by what Ms. Bostwick said, and I thought about what I had done, and I

didn't think it was obstruction.
Q. Now, you've been in the Newton District Court now for a number of years; right?
A. Yes.
Q. And normally you've been there as a bar advocate; correct?
A. As a what?
Q. As a bar advocate?
A. Yes.
Q. And some private cases.
A. Yes.
Q. And it's a smaller courtroom; right?
A. Yes.
Q. And smaller court generally; right?
A. Yes.
Q. Fewer cases there than say Waltham; --
A. Yes.
Q. -- correct? Or even Lowell District Court; right?
A. Yes.
Q. And a number of people share the bar advocate assignments; correct?
A. Correct.
Q. But you're one of a very few people who handles the drug court; correct?

A. I was back then. I'm not anymore.
Q. Okay. But back then, on April 2nd of 2018, it was you and maybe one other person?
A. I believe so, yes.
Q. And being on the list or being one of the two people who would do the drug court gave you extra cases, extra assignments; right?
A. It wasn't necessarily extra assignments. It was to continue the case into the drug court and you took whatever was there.
Q. Now, the bar advocate's pay back then was $53 an hour?
A. Sounds about right.
Q. And you had a case load typically of 50 to 60 cases?
A. Sounds about right.
Q. But this -- Newton District Court was what you would consider to be a home court for you; right?
A. It’s one of two courts I was the bar advocate in routinely.
Q. The other one was Waltham; correct?
A. Correct.
Q. And so the person who's the presiding justice at the Newton District Court would be of some

importance to you; correct?
A. Yes.
Q. And that was Judge Heffernan; correct?
A. Correct.
Q. And Judge Heffernan had seen you working as a bar advocate now for, by that time, four, five years?
A. Probably, yes.
Q. Experience with you in regular cases?
A. Yes.
Q. Experience with you in the drug court?
A. Yes.
Q. And you were concerned about what she might hear about what happened on April 2nd, so you wanted go see her; correct?
A. Loosely, yes.
Q. Okay. And you wanted to talk to her; correct?
A. Yes.
Q. And you went to see her in the morning, I think you've said in the past?
A. I believe it was in the morning, yes.
Q. And you believe the conversation took place in her first floor chambers?
A. If my memory's correct, yes.
Q. And there was nobody else at the time in the

chambers?
A. That's my memory.
Q. And the conversation took place around 8:45 before she got on the bench.
A. That's my memory, yes.
Q. And you wanted to tell her that -- Because you knew the ADA and the ICE officer were upset, you thought it would be prudent to talk to Judge Heffernan; right?
A. I thought she should know what had happened in her courtroom because there might have been something she should know about, particularly with regards to the ADA.
Q. So when you're walking into a judge's lobby, ex parte, by the way; right? Nobody else is there.
A. (No response).
Q. She's somebody you see every day that you're in Newton District Court; right?
A. Whenever she's on the bench.
Q. Yup. Which is a lot; correct?
A. Not necessarily. Just a couple of days a week.
Q. Well, you're in that courtroom twice a week?
A. Once or twice a week, yes.

Q. Okay. Which can be a lot for most people; right?
A. I don't know what other people do.
Q. Yeah. So I mean, she's the presiding justice. Did you think for a minute that you owed her the duty to tell her the whole truth, nothing but the truth, so help you God, as to what happened the day before?
A. I would have answered any questions she asked me truthfully. Absolutely.
Q. No. You're the one who knocked on the door.
A. I asked the clerk to ask her if I could come by.
Q. But you're the one who made the approach.
A. Yes.
Q. You said to her -- Quoting your comments to the Special Counsel. Mr. Jellinek stated that he advised Judge Heffernan there was an issue with Medina Perez's identity and he was let out the back door. He added he didn't recall saying anything to her about going off the record. He also added that he didn't recall saying anything about going back downstairs with the defendant. Mr. Jellinek stated he didn't recall saying anything to Heffernan, Judge Heffernan about

going back downstairs with him to probation. Judge Heffernan told him she already knew about the incident and not to worry.

That was what you remembered in sum; right?

A. Yes. That sounds right.

Q. So I mean, we're beyond attorney/client privilege. This is being honest with a member of the judiciary. Do you think that you owed it to her to tell her that you had had this conversation with her court officer about letting him out the back? Yes or no?

A. She said she already knew about it.

Q. No. She said she knew about the incident. Are you telling us -- Oh. Are you telling the hearing officer that you interpreted that to mean that she already knew that MacGregor had made this deal with you?

A. I don't know what she knew. I -- She said I know about it, basically just go away, and I didn't respond.

Q. Well, I would assume that you valued her opinion of you.

A. I do, yes.

Q. And you valued whether or not she had confidence

in your honesty and integrity; correct?
A. Yes.
Q. And you know under the Board of Bar Overseers ethical rules that you're supposed to be honest and forthright with members of the judiciary at all times; correct?
A. Yes.
Q. Did you say one word to her about your conversation with MacGregor?
A. Not to my memory.
Q. So when you left that lobby, she may have known that MacGregor let him out; right?
A. She may have.
Q. But she didn't know that you were the mastermind of the whole thing; right?
A. I don't follow the question. She knew what she knew. I don't know what else she knew.
Q. You didn't tell her I had the conversation with MacGregor, we agreed my client was going out the back. You didn't tell her that.
A. I don't remember. I don't believe I did.
Q. I mean, you wouldn't quarrel with me about mastermind; right? That's -- I mean, it's easy to look it up online, that it’s somebody that controlled it, planned it, directed it. That was you; right?

A. It was my idea.
Q. Yeah.
A. And I argued for my client.
Q. And you got a BA and a JD. And you'd never say that MacGregor was the mastermind, would you?
A. No, probably not.
Q. Okay. I mean, certainly, you certainly didn't say, you certainly didn't say to Judge Heffernan, oh, by the way, Judge Joseph blessed it. You never said that; right?
A. Not to my memory, no.
Q. And in fact, you came back to that same courthouse on May the 29th, right, for the next date on Medina Perez, correct?
A. Yeah. Probably had a few other cases on that day, too.
Q. And Judge Heffernan was in the courtroom?
A. I don't remember.
Q. But you never told any judge who was sitting that day, when Medina Perez didn't show up, that you knew everything that had happened, you knew why he wasn't there, you were involved in it. Anything. Right?
A. Again, it's a bit of a compound question. But no. I assumed he was either going to return

for court or wasn't, and I don't know whether he was in ICE custody or whether he was simply not coming to court in default.

Q. So you had conversations I assume on that same day when you back in court on April 3rd, the next day after April 2nd, with other people because you were in court on other cases; right?

A. I believe I did, yes.

Q. So you would have talked to people in the clerk's office probably?

A. Probably spoke to the clerk of the courtroom, yes.

Q. Yeah. Spoke to the people in probation probably; right?

A. Probably, yes.

Q. Nobody talked about this, this disappearance out the back door with your client.

A. No.

Q. And you didn't initiate it; correct?

A. Not to my memory, no.

Q. Now, tell us, from the time you left the courthouse on April 2nd until Wesley MacGregor -- the courthouse -- got a grand jury subpoena, did you have conversations with Mr. MacGregor about this incident?

A. Potentially brief ones, yes. I might have thanked him or asked if that was -- if he was okay.

Q. Well, you knew he had a court appearance for - grand jury appearance; correct?

A. It was before I found out about the grand jury subpoena, yes.

Q. No. I said between. Yeah. Well -- And you knew he got a subpoena; right?

A. At some point I found out, yes.

Q. And how long before the subpoena was returnable?

A. I have no idea.

Q. So if you were to answer how many times you talked to Wesley MacGregor between April 2nd, when you left and when you found out that there was a grand jury subpoena for him, how many times did you talk to him?

A. In general or about this?

Q. About this.

A. Maybe twice.

Q. And what was your conversation?

A. What I just said, I probably thanked him at one point. And then when I found out that ICE was upset or there might be things happening, I asked him if he was okay in his job.

Q. Now, I assume you were sort of tracking this grand jury; right? I mean, you knew MacGregor had gone in.

A. I didn't know when he went in.

Q. But you knew somebody hit him with a subpoena.

A. Yes.

Q. And it couldn't have been a mystery to you as to what the subpoena was for.

A. I was told it was for this case.

Q. So if they're going to subpoena MacGregor, then it's very possible somebody's going to subpoena you.

A. Yes.

Q. So were you tracking other people in the courthouse who got subpoenaed before you did?

A. I had no access to any grand jury. I don't what you mean by "tracking."

Q. Did you know that Scott Noe got a grand jury subpoena?

A. No.

Q. Did you know that Mike Walsh got a grand jury subpoena?

A. No.

Q. Did you know that Clerk Okstein got a grand jury subpoena?

A. Yes.
Q. When was that?
A. I don't remember.
Q. Before his attorney had called you.
A. No.
Q. When his attorney called you.
A. When . . .
Q. So you go in to see, you go in to see Federal authorities on or about November 8th, 2018; correct?
A. Yes. That sounds right.
Q. And so if this event happened on April 2nd, and if MacGregor was in testifying in the middle of July --
A. I don't know when he testified.
Q. But you knew he got a subpoena to go testify.
A. I was told he did, but I don't know when it was for or when he testified.
Q. How'd it make you feel?
A. When he got a subpoena?
Q. Yeah.
A. I was upset. I didn't like the idea. I liked the guy. Didn't think it was fair.
Q. Well, as we said, you must have been thinking they were coming for you, too; right?

A. I didn't have a fear for my own subpoena until I spoke to the attorney who called me, after he had spoken with Mr. Okstein.

Q. And that was maybe two weeks before November 8th; correct?

A. I don't remember the timeline, but probably two weeks to a month before, yeah.

Q. And when the attorneys spoke to you, he was calling to tell you that they were looking -- the Federal authorities were looking to subpoena you; right?

A. He mentioned that I might be a target and I should get a lawyer.

Q. And I assume at that point you began to be concerned; right?

A. Yes. Sure.

Q. And in fact, you called the lawyer; right?

A. Yes.

Q. Mr. Peabody, right?

A. Correct.

Q. Who was a friend; right?

A. He was a mentor of mine. Yes.

Q. And based on what you heard from Mr. Okstein's lawyer, you were afraid of potential jail time; right?

A. Not in that moment, no.
Q. Well, would it be fair to say that you talked to some people in town? Right? Lawyers who are friends?
A. I spoke to Mr. Peabody.
Q. You talked to nobody else.
A. Not to my memory, no. I did speak to one other lawyer who I knew and I gave a brief rundown of the situation. I didn't talk about my role in it. She quoted me her price. And I called Mr. Peabody. I was closer with him.
Q. So you talked to Mr. Peabody. As far as you know, Mr. Peabody contacted Federal authorities; correct?
A. That's my understanding.
Q. And then arranged for you to go have a conversation with them; correct?
A. Correct.
Q. And you went in to speak with them pursuant to what's called a proffer letter; right?
A. Yes.
Q. Or sometimes a queen for a day letter; right? Which is you typically --
A. Never heard it referred to as that.
MR. HOOPES: So pop that up.

So can we go to the second page? Yeah.

Q. So it's a two-page letter; right?

A. One page of substance. Yes.

Q. Two-page letter. And your signature's on the second page; right?

A. Yeah.

Q. And that's your signature?

A. Yes.

Q. That's Mr. Peabody's signature?

A. Yes.

Q. And I'm sure that the Federal prosecutors ran through the letter with you before they started talking; right?

A. To my memory, yeah.

Q. So they said that you needed to give an accurate and complete proffer; right?

A. They -- Yeah. That's the goal. As complete as I could.

Q. And then you spoke to them.

A. Yes.

Q. And then you went back and you spoke to them a second time; is that right?

A. I believe so, yes.

Q. And that would have been January 15th, I think special counsel referenced, correct?

A. 14th or the 15th. Yes.
Q. And that is pursuant to the proffer letter. The same terms; right?
A. I believe so, yes.
Q. Have to be accurate, detailed, and complete.
A. I'm not sure that it says that in the proffer letter, but that was the intent.
Q. And then your grand jury testimony was nine days later, on January the 24th; right?
A. Sounds right.
Q. And before you went in for the grand jury testimony, you got what we call a letter of immunity; correct?
A. Say that again.
Q. You got what's called a letter of immunity; right?
A. Yeah. I received an immunity letter. Yes.
Q. An immunity letter. And that letter is a little more detailed. Again, you have to give complete, truthful information.
A. I believe it's to be honest to the best of your ability.
Q. Well, let's go to Paragraph 1. See that? Second sentence. You must provide complete and truthful information --
A. Yes.

Q. -- to all law enforcement personnel. If his testimony is requested, he must testify truthfully and completely before any grand jury. Correct?

A. Yes.

Q. The next sentence. You can't withhold any information; correct?

A. That's what it says in the letter, yes. That's what I signed.

Q. And you must not attempt to protect any person or entity through false information or admission. Correct?

A. Correct.

Q. Including yourself.

A. That's the idea of the immunity letter, yes.

Q. So is it fair to say, sir, that before you went in to speak to them on November 8th, you were afraid of doing jail time?

A. No. It really hadn't -- Jail hadn't occurred to me at that point. I was more worried about the subpoena and career issues.

Q. Career issues. Meaning, losing your livelihood.

A. Possibly. That was my biggest worry at that point, yes.

Q. Not being able to support your family.

A. Correct.
Q. But I'm sure you knew that at some point before you were immunized that they were investigating Federal crimes; right?
A. Yes.
Q. Federal crimes that were punishable by incarceration in a Federal prison; right?
A. In the statute, yes, it's punishable by prison.
Q. Yeah. In fact, one of the indictment counts was punishable by 20 years; right?
A. To my memory, yes.
Q. Conspiracy, five years; right?
A. I'm not an expert in those statutes. But yes, I believe so.
Q. So for you to get this get out of jail free card, this immunity letter, you needed to have something to offer them; right?
A. Yes. I'd offer my truthful testimony.
Q. Okay. You were going to tell them that you were the mastermind; right?
A. I was going to tell them that it was my idea, yes.
Q. In return for something, they were going to give you a complete pass. When I say "complete

pass," you understand, before we finish that question, that there were all kinds of ways that they could have rewarded you but for your attorney's efforts, they could have done what's called a 5K, plea, and do a reduced sentence. You understand that; right?

A. We didn't discuss those things.

Q. Could have been placed on probation; correct?

A. I assume that's an option, yes.

Q. But you didn't get either of those.

A. No.

Q. You got complete immunity.

A. Yes.

Q. Did anybody explain to you how rare it is for the mastermind of any crime Federally to ever be immunized, --

A. No.

Q. -- as in testify against somebody else?

JUDGE FABRICANT: Can we have one person speaking at a time, please.

Q. Go ahead. What were you going to say?

A. I was going to say no, I never had that conversation.

Q. So the only thing that you needed to give them really was the judge blessing it in those

52 seconds; right?
A. Not sure I follow the question.
Q. Well, they had a tape that had before the 52 seconds, they had a tape that had the after the 52 seconds. The only piece of evidence that you could provide them that they didn't have on tape was your version of what happened in those 52 seconds; right?
A. There were other things we discussed. But yes. That was the core --
Q. That's the core. Correct. And so they traded immunity for you for the core, which was those 52 seconds; right? Yes?
A. If you'd like to phrase it as a trade, sure.
Q. Did you tell them or did they tell you that Ms. Jurgens was up there and didn't know anything about that this guy was going to go out the back?
A. Not to my memory, no. We didn't discuss that.
Q. I mean, she's the only other witness to the 52 seconds; right?
A. Not the only other witness, no.
Q. Oh. Well, clerk Okstein?
A. Correct. And Judge Joseph.

Q. And Judge Joseph.
Now, you sort of quickly discussed with us this morning that fee arrangement which you had with the boss of Mr. Medina Perez. Do you remember that? Right? You made a fee arrangement with him; right?
A. With his employer, yes.
Q. Yeah. And in that fee arrangement, you said that you were going to be paid a thousand dollars; right?
A. Correct.
Q. And you said this morning and you said previously that the employer paid you by check; right?
A. That's my memory of it, yes.
Q. Now, did the U.S. attorney's office ever ask you for your checks to confirm that?
A. Not to my memory, no.
Q. Did they ever say what's my bank account -- what's your bank account?
A. Not to my memory, no.
Q. And you told them about that information pretty early on. I mean, you talked to them about that in January before you went into the grand jury; right? You said the employer paid you by check;

right?
A. Again, that's my memory of it and that's my memory of what I told them.
Q. And then, in fact, you went in to the grand jury and testified a few days later; right?
A. That's my memory, yes.
Q. And so when you go in front of a grand jury, 13 to 23 people in a room; right?
A. It was -- Yeah. There were a lot of people in the room.
Q. And it's you along with the prosecutors; right?
A. Yes.
Q. Mr. Chow was with you; correct?
A. Yes.
Q. And you raised your right hand and you swore to tell the truth, the whole truth, and nothing but the truth, just like you did today; right?
A. Yes.
Q. And you told them that the boss paid you right there by check.
A. That was my memory of it, yes.
Q. Now, on December the 20th of 2024, just six months ago, you went and spoke in person with Attorney Fabricant, did you not?
A. No. The judge and I spoke via Zoom.

Q. Oh, by Zoom. Okay. And was Mr. Neff there?
A. I believe so, yes.
Q. And whether or not it was by Zoom or in person, you understood that she was asking you questions and expecting that you were going to tell her the truth.
A. Yes.
Q. The whole truth and nothing but the truth.
A. To the best of my recollection, yes.
Q. So on Page 2 of the report, it says Mr. Jellinek stated that they gave him a thousand dollars in cash for his work that day and that he planned to work out the details of his ongoing representation later. In fact, they followed up and they said, when asked whether he went before the Federal grand jury, he testified that the people who hired him wanted him to get Medina Perez out of custody, and they paid him a thousand dollars, and he said yes. When asked whether they said person paid by check, he responded yes.

So six months ago you told the former chief justice of the Massachusetts Trial Court that it was by check.

A. Well, I was -- Yeah.

Q. And then cash; right?
A. My memory six months ago was not as clear as it was in the grand jury. When she refreshed my memory as to what I said in the grand jury, that made sense.
Q. Well, when she refreshed your memory. You said cash. And in fact, you promised to go back to your bank records to confirm whether the payment you received was check or cash, and you said I'm waiting on the bank for the 4/20/18 statement.
A. Correct.
Q. And so that would have been two months ago.
A. Yes.
Q. And I take it, you hadn't gotten that statement; right?
A. No, I have not.
Q. That's the same statement that the Federal authorities didn't ask you for back then seven years ago; right?
A. They didn't ask me for anything about my banking, no.
Q. And you're not denying that you said it was cash when you talked to the special prosecutor.
A. When I spoke to special prosecutor, I did say cash at first, yes.

Q. So your attorney's here in the courtroom today.
A. Yes.
Q. You know with him or without him that you have an obligation in front of this hearing officer to tell the truth, the whole truth, and nothing but the truth; right?
A. That's the oath I took, yes.
Q. And if you got cash, that's not what you told the grand jury.
A. No. I told the grand jury I got a check.
Q. Because if it was cash, then you would have committed perjury.
A. I don't believe so, no.
Q. Well, if it was cash, and you told them it was a check, that's not perjury?
A. I believe that would have been a mistake. And I believe it was by check. My memory was not as clear seven years after the fact when I first spoke to Judge Fabricant.
Q. So I mean, it's kind of an important thing; right? You kind of want to be able to say I got paid X amount of money, that's all it was worth, and you should believe me. Right? I mean, I'm assuming you had that check, if you actually had one, back in November of 2018 when you first

talked to Federal authorities; right?
A. When you say I had the check, what do you mean?
Q. You would have gotten it back from the bank.
A. No. I --
Q. You would have bank statements that had the deposit on it; right?
A. If they asked for it, I'm sure I could have found it.
Q. So did you deposit the check?
A. Yes.
Q. Did the Federal authorities ask you to account for that particular check in any documents that you had reporting your income?
A. No.
Q. So without the check, we have no way of knowing if it was a thousand dollars or $10,000; right?
A. No, you do not.
Q. We don't know whether you took all the money or you split the money, some of it to somebody else; right?
A. I, I -- You don't -- I don't know what you know or don't know. I know what I testified to.

Q. Well –

MR. HOOPES: Want me to keep going?

HEARING OFFICER: I think we're to the point where we could take a lunch break, if now's a good point from your perspective?

MR. HOOPES: I think, at the risk of holding everybody up, I'd say yes. Thank you. Yeah.

HEARING OFFICER: It would be best to take a break now?

MR. HOOPES: I think so.

HEARING OFFICER: Okay. Is that okay from your perspective, Special Counsel?

Okay. So we're going to take our lunch break. I'd ask the witness, Mr. Jellinek, not to speak to anybody about your testimony or about this hearing in general during this break.

THE WITNESS: Yes.

HEARING OFFICER: And we're going to resume again at 2:00. Thank you All.

(Luncheon recess taken at 1:03 p.m.

Proceedings resumed at
2:00 p.m.)
HEARING OFFICER: So we're back on the record.
Back to you, Mr. Hoopes.
MR. HOOPES: Thank you very much, Mr. Hearing Officer.

Q. So at the end of the morning, just before lunch, you told us that it wasn't cash but it was a check; right?

A. I told you that was my memory, and that's what I told the grand jury, and that's the best of my recollection, yes.

Q. Well – But as we've been over, you spoke to special counsel on December 20th of 2024, just six months ago; correct?

A. Yes.

Q. Okay. And you said to the special counsel that, in the first interview meeting with Federal authorities, you didn't have immunity, that it was a proffer session, you explained you did not feel entirely comfortable, and was concerned at the time of the November 28th proffer meeting that you'd be indicted. You said that to them; correct?

A. That was a long question. But I believe you're asking if I said I was worried at the proffer meeting that I could be indicted.

Q. Yes.

A. And that is correct. Yes. Of course. I didn't have immunity. I had no proffer letter.

Q. Well, you went on to add that you weren't comfortable and that the only reason you could have hedged on your answers to the prosecutor during that meeting about cash versus check was because you didn't have immunity.

A. I don't believe that I said I hedged on that particular point. I may have not remembered exactly what I said to the special counsel.

Q. Well, you used the word "hedge"; right?

A. I just said I don't remember my exact language to special counsel.

Q. But you wouldn't have used the word "hedging" with Federal prosecutors unless you had something specific in your mind; correct?

A. No.

Q. Well, would you share with us what you thought you hedged on?

A. I honestly don't know exactly what you're talking about at this point.

Q. Well, on Page 5 of your interview with special counsel, you said the only reason you could think that you would have hedged on your answers to the prosecutor during that meeting, that first meeting, was that you didn't have immunity.

A. Yes. The only reason that I could think that I might have hedged about anything. That doesn't mean I did or that I didn't. The only thing I can think of in speaking to the judge when she asked for the first time, said I might have hedged when I didn't have a proffer letter, but I don't believe I did.

Q. Just to make it clear. So you want to go back from having received cash and making, today in front of the hearing officer, you want to make it, it was a check; right?

A. To the best of my recollection, that's what I said at the grand jury, which was nearer in time. So yes, I believe it was a check.

Q. So what was it that you saw in the notes of the prosecutor that Judge Fabricant referred to this morning that you didn't agree with? She asked you a question. She said, the notes and you didn't agree with them.

A. I honestly don't remember what she was referring to. There may have been a moment when the FBI agent wrote something down that was different than what I said. I don't remember.

Q. So now going back to the afternoon session of April 2nd, 2018. That was the first time that you had contact that day with Judge Joseph; correct?

A. I don't remember. I may have had -- I may have appeared before her in the morning. I don't remember.

Q. And so you had known Judge Joseph a little bit when you both were in private practice, --

A. Yes.

Q. -- as much?

A. A little bit.

Q. You had been out to coffee with her once to get some advice on something?

A. Correct.

Q. And you had seen her around a handful of times prior as when she was the judge.

A. That's correct. And the coffee was a follow-up to an MCLE that she and I went to.

Q. And so she was somebody that, you know, would smile at you and say hello when she saw you?

A. As much as I remember, yes.
Q. Okay. Now, you told us that, this morning that the point of release for people in custody, who are released from custody would be out the front, except if they had property; right?
A. Not necessarily only if they had property.
Q. Yes. Only if they had property.
A. No. There might be other reasons --
Q. So going down the stairs was not that unusual; right?
A. No.
Q. And you were familiar with the Lunn policy at that point, were you not?
A. No, I wasn't.
Q. Okay. So --
MR. HOOPES: Can we call up...
Q. Okay. So what you're looking at is the Lunn policy. And it's from the stipulations here by counsel. And it's stipulation -- It's Appendix B. And I'm assuming it's been moved into evidence.
And so you know that there was a case called Lunn back in July of 2017.
A. Yes.
Q. And the Trial Court made efforts to put that

case into effect by developing standards.
A. I -- No, I didn't know. I'm not a judge.
Q. So looking at this, this is the first time that you've seen this thing called the Lunn policy.
A. I may have seen it once or twice before, but I don't -- I haven't memorized it, no.
Q. So if we go to APP007, at B, and we go down to Subsection A where it says, individuals over whom the Trial Court has custody, and then it says, consistent with Chapter 2, Section XIV and XV of the Court Officer Manual, when an individual who was brought into court in custody is subject to release after his or her court proceeding, court security personnel shall process that individual out of lockup in the normal course regardless of whether the individual is the subject of a civil immigration detainer or warrant. Did you read that?
A. That's what it says, yes.
Q. So that means that regardless of whatever deviant practice or practice deviating from this was going on in Newton District Court, that under the Lunn policy, your client was supposed to go downstairs no matter what. Did you realize that?

A. I'm not sure I follow your question.
Q. So your client was brought in to the Newton District Court from the Newton Police Department; correct?
A. To my knowledge, yes.
Q. And since he was on a -- being detained at least on a warrant, among other things, he would have been brought in in custody; correct?
A. Yes.
Q. And he would have been brought in the back door through the sallyport area; correct?
A. Yup.
Q. And placed in lockup.
A. Yup.
Q. So technically, he was brought into court in custody; right?
A. Yes.
Q. Okay. Well -- So this policy, which is the Lunn policy, which governs all the courts in Massachusetts as of November 2017, required that defendants who came into custody -- came into the courtroom and courthouse in custody, go out again the way they came in, through the lockup.
A. Again, I'm not a judge (inaudible) to know about what it is (inaudible).

Q. Okay. But if I'm correct, then there was no magic in Judge Joseph sending him downstairs; correct? That's where he was supposed to go.
A. Not necessarily. That's not where a lot of the releases happened.
Q. Well, if he was -- Not where they happen. Where he was supposed to go, would have been downstairs; right?
A. What I'm telling you is I don't know where he was supposed to go. I'm not a court officer or a judge.
Q. Okay. But in your head, you thought you had to do something, like ask in order for him to go downstairs. Is that right?
A. Because I had seen a lot of individuals released directly out of that glass portion in the courtroom. Yes, upstairs. Released out of the glass portion upstairs. And so I felt I needed to arrange for him to be back downstairs.
Q. Well, but not when ICE was involved; right? I mean, the Lunn policy is specifically addressing people who come in in ICE.
A. Again, I don't know the policy. I had nothing to do with it.
Q. And you told us this morning that you didn't

think it was unusual for you to be able to go downstairs and to speak to your client before being released; correct?

A. No, no. That happens sometimes.

Q. As a matter of fact, he'd been given these drug rights; right? Those hadn't been explained to him.

A. Correct.

Q. As well as the fact that ICE was looking for him; correct?

A. Correct.

Q. So you asked to go to side bar, you went to side bar, and there's the recording pieces that we heard this morning.

MR. HOOPES: Will you pull that up, please.

Q. And on Page 33 --

A. Could you tell me --

Q. APP033. Page 4.

A. Of which tab?

Q. Tab G.

A. You're on 33?

Q. Yes. At the bottom, it says recording starting at 2:48.

A. Sure.

MR. HOOPES: Okay. If I could just have one moment.

HEARING OFFICER: Do you want APP33 or APP40? I want just to make sure that we're all –

MR. HOOPES: Yup. That's a good point by special counsel. I see. They're double-sided.

HEARING OFFICER: Yup.

MR. HOOPES: Yup. Okay. Thank you.

Q. So in Number 40. Page 40. APP040. Page 40.

A. Okay. Yes.

Q. So they ask you whether or not you want your client up and you said no. You said you're going to side bar.

A. Yes.

Q. You say ICE is convinced that this guy and you say again that you've been through this and you think that there's 13 FBI numbers connected to the Social, something's bad with inaudible, my client denies that it’s him. ICE is going to pick him up if he walks out the door, I think the best thing for us to do is to clear the fugitive issue, release him on personal, and hope that he can avoid ICE.

The ADA says I don't think arguing ICE is really my -- you say right, the ADA says my, my, and the Judge Joseph says the other alternative is, if you need more time to figure this out, hold until tomorrow. Right?

A. That's what the transcript says, yes.

Q. Okay. So this comment by you about releasing him on personal met with the response or the alternative is to hold him until tomorrow. Correct?

A. I don't know if it met that response. There are few overlapping conversations. That's what the transcript reads as.

Q. Okay. So you don't doubt the transcript; correct?

A. No. The transcript I don't doubt. Not at all.

HEARING OFFICER: Could I ask that you speak a little bit closer to the microphone.

THE WITNESS: Oh, I apologize.

HEARING OFFICER: Thank you.

A. I agree, the transcript is as it reads.

Q. And then it goes on. ADA Jurgens says there's a detainer attached to my paperwork but I feel like that's separate and apart from what my role

is. Attorney Jellinek says there's an ICE detainer so if he's bailed out from Billerica, ICE will pick him up. And Judge Joseph says ICE is going to get him. You say something. And she says what if we detain him. Right? So she's not responding to any suggestion by you that anything other than detaining him is what she's offering; right?

A. I don't know what was in her mind. I'll tell you that I didn't hear it that way.

Q. Okay. But you, again, you don't know what was in her mind. But that's what's in the transcript; right?

A. That is one way to read the transcript, yes.

Q. But you didn't want that; correct? You didn't want him detained overnight.

A. No. I was advocating for my client.

Q. No. That's not what I asked you. I said you didn't want him detained overnight; right?

A. No. I was advocating for my client. He wanted to be released. That's what I was arguing for.

Q. And so if he had been detained and held overnight, then you would have come back the next day; correct?

A. Possibly.
Q. ICE would have come back the next day; right?
A. Or ICE would have removed him from Billerica that night.
Q. Well, if ICE didn't have him at that point, right, if ICE didn't have him, then they're coming back to court the next day?
A. Right.
Q. Because the fugitive warrant then would be dismissed; right?
A. As far as I understand, yes.
Q. Okay. She could have held him on the fugitive warrant, he could have been there on the warrant, and then come back the next day; right?
A. Yes. Unless ICE picked him up in Billerica that night.
Q. Well, they can't pick him up if he's on a fugitive warrant; right?
A. I don't know.
Q. You don't know the law. Okay.
Now, at that point you say can we go off the record.
A. I believe I asked, as the transcript's stipulated to, are we on the record.
Q. Are we on the record. And from there, you

wanted to go off the record; right?
A. Actually, it was judge Joseph who said can we go off the record.
Q. Well, you said are we on the record.
A. Correct.
Q. And she said can we go off the record. Right?
A. Correct.
Q. Now --
HEARING OFFICER: I'm sorry. But you also said can we go off the record; correct?
A. Later on, yes.
HEARING OFFICER: Later on.
A. Yes. Absolutely.
HEARING OFFICER: Okay.
Q. So you just said now that you didn't understand what it was that she was thinking when she said that; correct?
A. Which part?
Q. The part about let's detain him.
A. No. I did have an inkling as to what she was meaning.
Q. Well, I think that your comment was is that -- And when I asked you, was she agreeing with you, you said you didn't know what she was thinking;

right?
A. I don't know what was in her head. All I know is how I heard what she was saying. I said this is one reading of this transcript and I had a different one in the moment.
Q. So then we have the off the record conversation; correct?
A. Yes.
Q. And two things get raised on the off the record conversation. Right? The first is, you're, again, advocating for him to be released; is that right?
A. Yes.
Q. And you also raised issue of you going downstairs to see your client; right?
A. Yes.
Q. Now, as to the part that has to do with what you said when the tape recording was shut off, that you asked that he be able to go downstairs and be released to the lockup area; correct?
A. That was essentially what I was arguing for, yes.
Q. And under the Lunn policy, that's what was going to happen anyway; correct?
A. I don't know. I was unaware of the policy.

Q. Now, when you spoke to Federal prosecutor the first time on November 1st -- November 8th, 2018, you said that you requested Judge Joseph release him through the lockup area because you thought it was okay for the defendant to be released from the lockup area; correct?

A. Yes.

Q. Okay. Now, you gave a number of different statements over time; correct? You gave -- You were back for three more interviews and one grand jury appearance; correct?

A. Yes, I did. I spoke to them at those times.

Q. And then you spoke to special counsel again in December of 2024; correct?

A. I believe so, yes.

Q. And you told special counsel that there was -- your recollection is that essentially that -- you said to her that -- said to Judge Joseph, that if ICE was waiting out front, you thought it would be best to be released out the back door. Is that correct?

A. Yes. Yes. That is essentially what we were discussing.

Q. Okay. So in other words, you were asking for essentially what was in the ICE policy; correct?

A. Again, I don't -- I didn't know the policy. In my reading of that the way you described it just now is released in the normal course. And I would say the majority of releases in Newton occurred through the courtroom and out of that glass lockup.

Q. Now, just a little bit ago you said that you weren't sure what was in Judge Joseph's mind when you were -- during your conversation with her, with Ms. Jurgens present at side bar; correct?

A. I don't believe you could ever know completely what's in someone else's mind, but I certainly knew or it felt like it was she was agreeing to.

Q. So when you were interviewed in February of 2012, you said as much as that to Federal authorities -- 2019. I'm sorry. February 12, 2019, Jellinek stated that he had no idea what was in Joseph's mind during and after the side bar conversation in the courtroom. That'd be accurate; right?

A. Yes.

Q. You spoke to special counsel on December 20th, 2024. And when you were asked whether you believed that Judge Joseph understood what was

being said during the side bar, you responded yes. When asked what Judge Joseph did or said that caused him to say that she understood the side bar discussion, you responded, yeah, she said that's what we'll do.

A. Essentially, yes.

Q. And yeah, that's what we'll do is that he'll go down the stairs and be released from downstairs; right?

A. Correct.

Q. Which is exactly conforming with the Lunn policy; correct?

A. Again, I don't know the policy. I don't know how it conforms or doesn't.

Q. Now, at some point right after that, because the matter was only 52 seconds, you went back on the record; correct?

A. Yes.

Q. And when you were on the record, you asked for certain things to be read into the record. She read certain things into the record. Correct?

A. What are you saying I asked to be read into the record?

Q. Well, did you -- You asked her that it be put on the record, sir, that you be allowed to go

downstairs to speak to your client?
A. Yes.
Q. When you were on side bar. Yeah. Okay. So we have this back on the recording at 2:57 p.m. The clerk says, judge, we're back on the record. There's a recitation of everything that's going to happen; right?
A. Yes. That's what the transcript says.
Q. And then at the end there's a section where, a little bit farther down, where the clerk says to her, essentially, ICE is here and would like to take custody. And he says that to her. And she responds, he's released on this, that's okay, but they're not coming in here, essentially; right?
A. Yes. According to the transcript, yes.
Q. And you of anybody is familiar with Newton District Court; right? You know the places that can be accessed to the lockup; right? You can go down the step, come into the main courtroom, and go down the stairs; right?
A. Yes, you can.
Q. You can go around the back and come in through the sallyport; right?
A. I've never gone in that way, but you could.

That's the way prisoners come in.
Q. You can go through probation and go in that way; right?
A. No. There's keycards. I can't. But you could.
Q. But an officer, an officer could.
A. Yes. Sure.
Q. Now, you've told us that you came to the Newton District Court that morning, but you don't know why you were there.
A. I don't remember, no.
Q. At one point you told the grand jury that you believed you had other cases there that day.
A. I believed I do -- I believed I did, yes.
Q. At another point you said that you were there for your own case that day?
A. I thought so, yeah. I believe I was.
Q. And at another point you said that you were there and Medina Perez's friends, the boss, had seen you perform and liked what they saw; correct?
A. Yes.
Q. But the fact is that you didn't perform anything that day. Right? You never were heard in the morning. On any transcript or any audio.

Right?
A. I was shown a transcript that doesn't include anything from me, but I believe I was there and did argue.
Q. So are you saying you think that the transcript is wrong?
A. It could be. My memory is that I was in the court that morning.
Q. Well, at one point you said that you thought that you were there perhaps on the Pamela Hodgkin case, which was on the list that day.
A. Could have been. My understanding is that I didn't inherit that case until a little bit later. And because the way Masscourts work, my name is attached to it now as opposed to then.
Q. Well, were you shown the docket entries for the case that day, for the Hodgkin case, that you filed your appearance the next month?
A. Yes.
Q. Okay. So that you couldn't have been representing her on that day; right?
A. I don't believe so, no.
Q. Now, Ms. Bostwick was there as the bar advocate; correct?

A. That's my understanding, yes.
Q. Well, did you see her there in the morning?
A. I believe I did, yeah.
Q. And where did you have contact with her?
A. I don't believe we had any substantive contact.
Q. Well, where would you have been sitting in the Newton District Court on that day?
A. Typically, if you go through the middle bar area, I sit off to the right, and she was probably sitting over there as well. That's where the defense lawyers tend to sit.
Q. So you would have been somewhere over here.
A. Correct.
Q. And --
A. Usually, I think. Don't remember that date specifically. But yes, that's usually where I sit.
Q. And you would have recognized her and she would have recognized you?
A. Most likely, yes.
Q. And did you talk about this client Medina Perez?
A. Not much, to my memory, no.
Q. And -- Not much. What did you talk about with her?

A. I probably said good morning.
Q. About Medina Perez.
A. I probably didn't even ask her about it until I was approached by his friends.
Q. Well, you told us this morning that you thought you were approached by his friends about 10:30?
A. Yeah, 10:30-11:00 o'clock probably, yeah.
Q. And so when you talked to them, where did you talk to them? Is that inside the courtroom or outside the courtroom?
A. The best recollection I have is it was in the back of the courtroom during a break.
Q. And the conversation was that we want you as the lawyer and we'll make some financial arrangements with you.
A. That was to my memory, yes.
Q. And so you would have completed that discussion by what time?
A. I really don't remember. 11:00, 11:15.
Q. And did you tell Ms. Bostwick that you had been retained at 11:00, 11:15?
A. Yes.
Q. You did.
A. I did.
Q. And where did you tell her that you had been

retained at 11:00, 11:15?
A. I don't remember. Probably in the courtroom.
Q. And after you told her that you had been retained at 11:00, 11:15, why did she keep on working on the case?
A. Maybe it was later. I don't remember the exact time.
Q. So maybe 11:00 isn't correct. Maybe it was later than 11:00.
A. Might have been closer to 12:00. I don't remember her last appearance when she stood up last on the case.
Q. If she was still working on the case after 12:00, and you had been retained, why would she do that?
A. She wouldn't. I don't remember the exact time I was retained.
Q. So are you sure you were there in the morning, sir?
A. To the best of my memory, I was there in the morning, yes.
Q. Okay. Well, to the best of your memory. So you're saying that it's possible that you weren't there in the morning.
A. I know I was there before the lunch break,

which qualifies to me as the morning. I don't remember if I got in at 9:00, 9:30, but it was in the morning.

Q. Well -- So the lunch break was about 12:45 or so.

A. Correct.

Q. And so you're saying you were there before 12:45.

A. Yes.

Q. And you spoke with Ms. Bostwick before 12:45.

A. It's entirely possible at the break I'm remembering when they hired me was the beginning of lunch break and I talked to her during the lunch break. Like I said, I don't remember the specific timing. They approached me during a break in the session.

Q. So Ms. Bostwick left and went to a doctor's appointment at 12:45, and they set the case down for her to come back a little bit late. So at 12:45 she couldn't have known that you were on the case; right?

A. If that's what you say the order of events was, sure.

Q. So in fact, you weren't there before let's say 12:30; right?

A. Again, I think I was there, and I think that's why his friends approached me, because I made an argument. To the best of my memory, I was there making argument that morning.

Q. So if there's nothing on the transcript that says you were there in the morning, and Ms. Bostwick has no memory of you being there in the morning, why do you remember you were there in the morning?

A. That's my memory.

Q. Well, if you didn't get to represent Medina Perez because they saw your work because you're nowhere on the transcript and you don't have any cases for that day, how is it that these people got to you of all people?

A. You'd have to ask them. I don't know.

Q. Well, no. You've already told us that -- you say they liked the way I dealt with a prior case. There was no prior case for you.

A. My memory is there was.

Q. But again, why you, sir? Meaning, you weren't the only lawyer who was standing up on cases that day; right?

A. Probably not.

Q. There were other lawyers, good lawyers.

Arthur Kelly was there; correct?
A. I don't remember if he was there or not, but he's a good lawyer.
Q. And so if they had asked around and said who's a good lawyer, we don't like this bar advocate, why you?
A. I don't know. I would have told them to hire Arthur Kelly.
Q. Well, they came to you, and you didn't tell them to hire Arthur Kelly, did you?
A. He had gone by that point, if I remember right. And they asked for me, so I said sure, I'll represent him. Said I think you've got a really good lawyer, I wouldn't do anything about it, can't change the situation, but if you want to, you can hire me.
Q. Well, you certainly could have given Arthur Kelly's number and he could have come back; right?
A. Sure.
Q. But you're firm with the hearing officer, that they approached you; right?
A. Yes.
Q. And are you firm that nobody pointed him in your direction?

A. Not to my knowledge, no.
Q. Do you think Mr. MacGregor pointed him in your direction?
A. I don't believe so, no.
Q. So tell us, your office is about seven- to nine-minute drive --
A. Yes.
Q. -- from the courthouse; right?
A. Yes.
Q. It's right there in Newton; --
A. Yes.
Q. -- right? Somebody picks up the phone, you're in your office, you're in court seven minutes later.
A. Yeah. Depending on whether I have to put a tie on or not. Absolutely.
Q. And so you want to leave it with the hearing officer in the hearing that they picked you for some reason that you don't know, because you weren't working that day, you didn't have any cases on that day, you weren't on any transcript for that day, it's just random that they got to you.
A. No. That's not -- everything I said is accurate.
Q. So what's not accurate?

A. It was multiple things you said there. And I was working that morning. I just don't remember exactly what case I was on.

Q. Well -- So you told Federal authorities you carry an iPad; correct?

A. Yes.

Q. And you have a habit of writing on it or doodling on it when you're in court; correct?

A. I don't doodle on it, but I write on it, yeah.

Q. And they knew that you had an iPad, right, because you told them?

A. Yes.

Q. And did any Federal authority ask to see your iPad?

A. Not that I remember, no.

Q. To check whether or not you're telling the truth about whether you were there in the morning or not?

A. They did not ask, no.

Q. To tell us whether -- To help tell whether you're telling the truth about how you got the case?

A. I didn't hear -- Is -- What's the question?

Q. The question is, you didn't offer to show your

iPad to anybody, nobody checked on it; correct?
A. Nobody checked on it, no.
Q. So when the boss, when the boss of -- How did you know he was the boss of Mr. Medina?
A. He told me he was his employer.
Q. He was his employer. Did he tell you what company that was?
A. I don't remember.
Q. But when he said he was going to hire you, you demanded that there be some sort of fee arrangement; correct?
A. Well, ethically you have to have some agreement before you represent someone. He had all the documents for Mr. Medina Perez, so I said, yeah, I'll represent him, but we're going to need some kind of agreement going forward.
Q. Yup. And as a matter of fact, you wouldn't -- you said you wouldn't represent this individual unless you got paid; right?
A. Generally, that's how private counsel works, yes.
Q. Yeah. Well, you weren't doing it because you were in service of some cause; right? You were doing it because you were going to get paid.
A. Yes.

Q. And of all the people who were representing Mr. Medina Perez that day, which is only two of you, Ms. Bostwick was court-appointed, and so she was going to get $53 an hour, but you were the guy that got a thousand dollars for three hours work. Right?

A. I don't remember if it was three. Could have been four.

Q. You're the one that got the thousand dollars; right?

A. Yes.

Q. Now, you told special counsel you couldn't remember if you signed a fee agreement with them at the time or left that until another day.

A. Correct.

Q. That's kind of ridiculous, isn't it? I mean, were you carrying fee agreements with you in your pocket?

A. Generally don't carry them. But I sometimes I have one available on my iPad that I could have shown them. But I didn't that day.

Q. Well, if it's available on your iPad, then it's always on your iPad; right?

A. No. Sometimes I have blank ones that I leave like in a desktop location I could get to

easily, but I didn't have one with me that day that they could sign.

Q. Now, if you arrived there at whatever time you arrived, you were hired, you got the documents, you reviewed them, and you spoke again with his employer, did you ever, did you ever meet with Medina Perez that morning?

A. Yes.

Q. What time?

A. I don't remember.

Q. Well --

A. Probably just before the lunch break or during the lunch break.

Q. And that would have been -- You don't speak Spanish; right?

A. No.

Q. And that would have been you and the interpreter; right?

A. To the best of my recollection, yes.

Q. So you would have met Medina Perez with the interpreter by going downstairs; correct?

A. It's possible we had a brief conversation in the lockup upstairs. I don't remember the details of my first conversation with Mr. Medina Perez.

Q. But you would have had the interpreter there with you.

A. To my memory, yes. It's possible he knew enough English to say minor things to me. It's possible that I understood most of it from his friends at that point and what the assignment was.

Q. Now, you've told various people at various times that you got the paperwork related to Medina Perez from different people. From the ADA.

A. Yes.

Q. From the court clerk.

A. Yes.

Q. And from the probation officer.

A. Yes. Probably with Gloria.

Q. And also, you got material from Ms. Bostwick.

A. Yes.

Q. Now, you knew ICE was in the building.

A. Yes.

Q. And you had heard -- You would have heard Judge Joseph say no ICE in the courtroom during the morning session; right?

A. I believe so, yes.

Q. So would it surprise you to note that the whole

transcript has been reviewed and never a word from Judge Joseph about that in the morning?

A. As I said, it was my memory. It might have been the clerk. It might have been someone else that told me.

Q. Instead of putting it on the record, somebody told you.

A. Again, I said I don't remember exactly how I found that out that morning.

Q. Now, when you spoke to MacGregor, that was just before -- it was during the lunch break; right?

A. When I spoke to him substantively about this, yes, that was during the lunch break.

Q. And was ICE in the courtroom when that happened?

A. No, they were not.

Q. Now, you know that the ICE agent says he didn't see you there in the morning at all.

A. I don't know that, no.

Q. Well, either you're correct or the ICE agent is incorrect. Either you were there or you just told us a half a dozen stories. Which is it?

A. I don't think I follow your question. I don't believe it's answerable.

JUDGE FABRICANT: The witness said he didn't know what the ICE agent said

about this, so I have to object to the question.

HEARING OFFICER: If you could rephrase the question, please.

Q. You're saying to us that – So, let me phrase it a different way. You've recounted a story about what happened between you and MacGregor that nobody witnessed, just the two of you; right?

A. Yes.

Q. And you're recounted a story about what happened on the off the record conversation for those 52 seconds; correct?

A. Yes.

Q. So are you as sure about the fact that you were there in the morning as you are about those other two things, what MacGregor said?

A. Well, let me answer it this way. I believe I was there in the morning. I know the transcript doesn't show that. So I don't know what you're getting at and what your theory is as to how or why I got there. But I know that day I was there, for some reason, whether I was advancing a case or arguing something, and they approached me during a break. That's all I remember.

Q. Well, no. The point is, is that -- I guess my question is, are you making up the fact that you

were there in the morning or not?
A. As I said, to the best of my recollection, I was there in the morning.
Q. So it's possible your recollection is not correct.
A. Of course.
Q. Of course.
A. Yeah, of course. It's eight years ago.
Q. Well, it's been -- It's eight years ago when you first spoke to Federal authorities. And memories tend to disintegrate quickly. We know that from the most recent research; correct?
A. I don't know what we know as a community. I know that the defense bar knows what memories tend to do and become unreliable over time.
Q. And that may have happened to you.
A. Can happen to anybody. Of course.
Q. But that may have happened to you.
A. As I just said, it could happen to anybody. Of course.
Q. That may have happened to you, too.
A. Could happen to anyone. Of course. It could happen to me. It could happen to you.
MR. HOOPES: Can I just have a moment, Your Honor?

(PAUSE)

Q. So Mr. Jellinek, you said I think on questions from special counsel that you were trying to protect the judge; is that right?

A. That was part of my motivation to go off the record or to attempt to go off the record, yes.

Q. But the DA was there to protect the judge; correct?

A. I don't know -- No. The DA's there to prosecute.

Q. Well, but the DA was hearing everything that was being said; right?

A. Again, I don't know what the DA heard.

Q. And when you went down to talk to Judge Heffernan the next morning, it was the same issue, which is, you weren't trying to protect anybody when you went to see her except yourself. You weren't trying to protect the judge. Correct?

A. No, that's not my motivation. That wasn't my motivation to talk to Judge Heffernan. It was to tell her what happened.

Q. But you didn't tell her everything that happened; correct?

A. No. I didn't spend 20 minutes talking to

her, no.
Q. So let's go back to your first interview with Federal authorities on November 8th. You say that you requested that the judge release Medina Perez through the lockup area because you thought it was okay for a defendant to be released from the lockup area; correct?
A. I thought it had happened and it was okay for it to happen, yes.
Q. And you didn't give them anything that she said back at that point. She made no statement back to you; correct?
A. I'm sorry. I don't follow the question.
Q. She didn't make any statement one way or another.
A. Who would --
Q. Judge Joseph.
A. At what time?
Q. At that time. Right? So you're talking to Federal authorities.
A. Yes.
Q. And you said to them, I asked her -- specifically, you requested that Judge Joseph release Medina Perez through the lockup area because you thought it was okay for defendant to

be released from the lockup area. That's what you said; right?

A. I believe so, yes.

Q. Yeah. And you gave no response from Judge Joseph; correct?

A. If it's not in my notes, I probably didn't. But I might have said something. I don't know.

Q. If it's not in the notes, then you didn't say it.

A. Well, no, that's not quite what I said. I may have said something but it's not in their notes. That's a different statement.

Q. Oh, so if you said something -- You may have said something but they didn't put it in their notes.

A. Correct.

Q. Well, they would be interested, would they not, in whatever Judge Joseph had to say in response? Correct?

A. I don't know what they were interested in at that point.

Q. So if you had said to them that she responded in some affirmative way that signaled that she was fine with him going out the back door, they would have put that in the notes, don't you

think?
A. They also would have probably asked me directly, and I don't remember that they asked me directly either. I don't think that's in the notes either. I think what is in the notes is parts of a full conversation.
MR. HOOPES: That's all I have at this time. Thank you.
HEARING OFFICER: Special Counsel, do you have follow up?
JUDGE FABRICANT: Yes, please.
REDIRECT EXAMINATION
BY JUDGE FABRICANT:
Q. Mr. Jellinek, I want to turn to the immunity letter.
JUDGE FABRICANT: And can you bring back up...
A. Which tab?
Q. It's not in the appendix, but Mr. Neff will post it on the monitor.
A. Sure.
JUDGE FABRICANT: And while he's setting that up, Mr. McInerney, I'm going to want to offer this in evidence. I don't have a clean copy of it right now. I will have a

clean copy of it tomorrow. So unless there's objection, I'd like to bring it in tomorrow and offer it in evidence.

HEARING OFFICER: That's fine. I see there's no objection.

MR. HOOPES: None.

JUDGE FABRICANT: And that would be both the immunity letter and the proffer letter.

HEARING OFFICER: That's fine.

Q. What we have on the screen now is the immunity letter. Mr. Jellinek, can you see it?

A. Yes.

Q. So I'd like to call your attention to numbered Paragraph 1. Mr. Hoopes read part of it. I'd like to read all of the sentence that begins: He must not attempt to. Do you see that? It starts around the middle of --

A. Yes.

Q. -- the line.

(Reading) He must not attempt to protect any person or entity through false information or omission or, -- and this is the part that Mr. Hoopes did not read -- or to implicate falsely a person or entity. Do you see that?

A. I do.
Q. Did you attempt to implicate falsely any person or entity?
A. No.
Q. Did you tell the truth to the grand jury?
A. Yes.
Q. And did you tell the truth to the U.S attorney in your interviews with them?
A. Yes.
Q. And when you spoke with me on December 20th, and Mr. Neff was there, did you talk a little bit about -- did you say that the only reason you could think of that you would have hedged on your answers to the prosecutor during that meeting was you did not have immunity?
A. Correct.
Q. And did you add that you did not remember ever having a different memory from what was in the transcript of your grand jury testimony?
A. Correct.
Q. And did that have anything to do with whether you were paid in cash or by check?
A. No.
Q. Did you go on to say -- Mr. Dunn explained that the immunity -- Did you go on to say that the

immunity made you more comfortable, but you do not think it changed anything about what you remember?

A. That's correct.

Q. Now, this event happened on April 2nd of 2018; correct?

A. Yes.

Q. So that's now a little more than seven years ago.

A. (Witness nods head).

Q. So in that time, have certain aspects of your memory faded?

A. Of course. Yes.

Q. The matters that were the focus of your grand jury testimony, that is what happened at side bar, what happened off the record, your conversation with Mr. MacGregor, and your client going out the back, has your memory changed about that?

A. No.

Q. And let's turn to your role in representing your client there that day. Tell us what you viewed as your role.

A. I viewed my role that day like I do all the time. It's to, as zealously as possible,

advocate for my client.
Q. And what in particular were you trying to accomplish?
A. On that day, he was adamant that it wasn't him, he was adamant that this person they were attempting to detain through immigration was not him, as I said, his boss or his friend were viably with a birth certificate that appeared authentic, and the ICE paperwork was not a judicial warrant, it was an administrative warrant directed to Newton, that had no biometric data that linked it to the gentleman in custody. So at that time my job was to try to get him out of custody and away from anything that might endanger him.
Q. So when the judge made suggestions about detaining him, did that, in your view, serve purposes you were trying to serve?
A. It implied that she understood the problem, but not fully, because that did not serve the purpose I was trying to achieve.
Q. Did you think that you had an obligation to tell anybody other than the judge what your approach was to in trying to achieve your purpose?
A. No. In fact, I think it's the opposite. I

think I shouldn't be telling anybody else, like the prosecutor, what my approach was going to be.

Q. And if you told the prosecutor before this side bar conference, before the off the record conference, what did you think might happen?

A. I imagine that ICE would put one person down by the lockup and one person up in front of the building.

Q. And if you talked around the courthouse about it, the clerk's office or in probation or anywhere else, what do you think would happen?

A. The same. That ICE would be more prepared to get him.

Q. As a lawyer representing clients, is it your practice to talk about your strategy in general?

A. No.

Q. Did you think that what you were doing that day was a crime?

A. No.

Q. Do you think so now?

A. No.

Q. You did say earlier, though, that you thought it was on the edge of ethical.

A. Yes. And, you know, Federal indictment makes

you think that some of the things you've done might be on the edge of ethical and legal.

Q. And do you still think it was on the edge of ethical?

A. Absolutely.

Q. You told us about a series of conversations with the ICE officer, the assistant district attorney, court officer MacGregor. Can you try to put those in sequence?

A. My initial conversation would have been with the district attorney to get the paperwork together, and at that point she probably said something like I'm investigating whether this is really him. I believe the transcript reflects that she did mention on the record she wasn't sure if she was investigating him. I believe I got the paperwork from Ms. Bostwick. So my conversation probably would have been with the ADA, then with Ms. Bostwick, and then I would have checked in with the ADA, I would have spoken to probation to get the Triple I, I believe I got permission from the ICE to do that, and review it in the courtroom, and then I would have spoken with Officer MacGregor during the lunch break after I reviewed the Triple I.

Q. So you think that was the sequence.
A. Yes.
Q. Assistant district attorney, Ms. Bostwick, the ICE officer, and Officer MacGregor.
A. Well, yeah. And probation in between to get the documents.
Q. To get the Triple I.
A. Yes.
Q. You made reference earlier to a CORI. What's a CORI?
A. A CORI is a Massachusetts, criminal record.
Q. A Massachusetts, criminal record.
A. Yes.
Q. And you get that from probation.
A. Yes.
Q. When you spoke with Judge Heffernan the next day, what did you think she already knew?
A. I don't know what she already knew and what she was thinking. I know that, when I went in, it was a very brief conversation, and the implication I got was that she understood everything that happened, I had given her a full briefing, and I was okay and to go away.
Q. Did she seem willing to spend more time with you that morning?

A. Not that morning, no.
Q. On May 29th, so that would have been the next date, the date for pretrial conference in the case, you told us earlier that Mr. Medina Perez didn't show up.
A. Correct.
Q. Did you know where he was?
A. No.
Q. Did you know whether he was or wasn't in ICE custody?
A. I did not.
Q. And I'm not asking you the substance of any communications you had with him, but had you had communication with him in the interim?
A. Not to my knowledge, no. And one of the Problems that I had to deal with that day was ICE doesn't always tell you where they are, how to get them back to court.
Q. When you go to lockup to talk with your client, if you have a client in custody, how do you get there?
A. Usually I would say 99 percent of the time you go to the court officer's station next to the glass box and then they open the door and let you go downstairs. Usually they radio down

and say attorney coming down.

Q. You said 99 percent of the time. So what would be the other percent?

A. I've had some major knee surgeries, and there were times I couldn't get down those stairs. So there is a way to get into the lockup through probation, and occasionally I had to take the elevator and ask to be let in through probation and escorted into lockup.

Q. And would that still require a court officer to let you in?

A. Absolutely. Yes. Someone -- The probation department has to let you in probation and the court officer would have to meet you at the back and unlock that door.

JUDGE FABRICANT: All right. That's all I have. Thank you.

HEARING OFFICER: Anything further, Mr. Hoopes?

MR. HOOPES: Just a little bit, if I may.

RE-CROSS EXAMINATION

BY MR. HOOPES:

Q. So three things, if I can. So go back, sir, and talk a little bit about what was in -- what you

thought was in Judge Joseph's mind. Right?
When you first spoke to the Federal authorities about that issue, it was the February 12th, 2019 interview. And you said, and I'm quoting you, Jellinek stated that he had no idea what was in Judge Joseph's mind during and after the side bar conversation in the courtroom.
A. Again, that's correct. I did not know what was in her mind. I only knew what my reading of statements [inaudible] the implications were. I had made inferences.
Q. So that was in February of 2019; right?
A. Yes.
Q. So if we advance from 2019 to 2020, '21, '22, '23, when you spoke to special counsel in December of 2024, you said, and I'm quoting, when asked whether he believed Judge Joseph understood what was being said at side bar, Mr. Jellinek responded yes.
A. That's correct.
Q. And you had no idea what was in --
JUDGE FABRICANT: Can he finish his answer, please?
A. I made an inference, yes, that I understood her intent.

Q. So when asked what Judge Joseph did or said that caused him to say that she understood the side bar discussion, Mr. Jellinek responded, she said, yeah, that's what we'll do. That's what you told…

A. That's correct.

Q. special counsel; right?

A. Yes.

Q. Okay. And you were asked about that same topic in 2019, six years prior, you never said, yeah, that's what we'll do. You never quoted a single word from her in response; right?

A. I don't remember saying -- I don't remember the details of the meeting. If that's what the report from the FBI said, as I said earlier, I believe those are fragments of our conversations. The whole thing may have been slightly different. But if that's what it says there, then you can read that.

Q. Now, the second point is what you said to her. So in your very first interview, November 8th, 2018, with Federal authorities. You requested that Judge Joseph release Medina Perez through the lockup area because you thought it was okay to be released from the lockup area. Is that correct?

A. I got a little lost in your question. But yes, I believe it was okay to be released from the lockup area.

Q. And as we've discussed today, being released from the lockup area was the place that they were supposed to take him, into the lockup; right?

A. Again, I don't know that policy. My reading of the paragraph you put up is that he should be released in the normal course. In Newton, that would be up through the glass box on the first floor.

Q. But you testified in front of the grand jury on January 24th, 2019. You said that you thought that Medina Perez could be released out the back door if he was received from downstairs.

A. That's correct.

Q. You never said that in your first interview in November; correct?

A. I don't remember what I did or didn't say. I said that in that interview. I don't remember every detail of the interview, but they may not have written down every single word that I said.

Q. You didn't say anything in the second interview on January 14th; correct?

A. Again, same answer. I don't have a specific memory of everything, what was said every word for word. I do think I said it at some point. It may not be in their notes.

Q. You just think that the Federal authorities who were investigating the case missed something that you said that was reported.

A. They may have. I don't know.

Q. So you remain practicing in Newton District Court; correct?

A. Yes.

Q. And you knew that Mr. MacGregor had been called to the grand jury; correct?

A. I found that out at some point, yes.

Q. And that he continued working for some period of time.

A. Yes.

Q. And you'd see him almost every time you came over to Newton; correct?

A. I don't remember exactly when he left Newton, but I saw him a number of times after that day.

Q. Until he left.

A. Yes.

Q. And did you tell him that you were in talking to Federal authorities in November?

A. I don't believe I told him that, no.
Q. Did you tell him you were in talking with Federal authorities in January?
A. No, I don't believe I said that.
Q. Did you tell him you testified in front of the grand jury?
A. No, I don't believe I told him that.
Q. Did you tell him that you were interviewed again by Federal authorities in February?
A. Not to my memory, no.
Q. How about March; did you tell him you were in for the last time in March of 2019?
A. I don't believe I told him. I don't remember.
Q. But there was a retirement party for Mr. MacGregor in the spring, right after your last testimony; correct?
A. I don't know the timing of it. I know there was a retirement, yes.
Q. And you were there.
A. I believe I was.
Q. You were there, shook his hand. Do you remember that?
A. I might have been. Was it at the courthouse or was it at a different location?

Q. Courthouse.
A. I probably was in the courthouse, yes.
Q. And you didn't say anything to him then.
A. I don't remember, no.
MR. HOOPES: No other questions. Thank you.
JUDGE FABRICANT: Nothing further. Thank you.
HEARING OFFICER: If I may, I just have a couple clarifying questions.
Sir, if you -- I'll just read it to you. I'm sure you remember it. From the transcript. It APP043. This is after the off the record conversation that Clerk Okstein says, quote, there is a representative from ICE here in the court inaudible to, to visit the lockup. Judge Joseph, that's fine, I'm not going to allow them to come in here but he's been released on this.
I believe you testified that your understanding from that was that ICE would remain upstairs.
A. Yes.
HEARING OFFICER: What's -- Could you explain that to me.

A. By saying that I'm not going to allow them to come in here, I understood that to mean within the courtroom and within the lockup, because that's sort of one space, versus the lobby, which is another space.

HEARING OFFICER: But they were specifically being -- asking to visit the lockup, and she said that's fine.

A. I don't believe the "that's fine" refers to them visiting the lockup.

HEARING OFFICER: Okay. Just so I'm clear, the language, again, is Clerk Okstein saying that there's a representative from ICE here in the court inaudible to, to visit the lockup. Judge Joseph, that's fine, I'm not going to allow them to come in here, but he's been released on this.

A. If that's what the transcript says, that might be what she meant. That's not what I interpreted.

HEARING OFFICER: Okay. You interpreted it to mean that the ICE people should stay upstairs in the lobby --

A. Yes.

HEARING OFFICER: -- of the

courthouse.
A. Yes.
HEARING OFFICER: Okay. The other thing is, on April 3rd, when you were speaking to Judge Heffernan, I believe you said that you thought that she knew what had happened -- that you thought that she should know what happened, and I think you said something to the effect particularly with respect to the ADA.
A. Yes.
HEARING OFFICER: Could you explain that.
A. Sure. The ADA has to be in front of the judge every day in that court. And the ADA was upset by the way things had happened the day before, and I thought the judge should know that someone in her courtroom had been aggrieved and she'd have to see that person that day.
HEARING OFFICER: The ADA had been aggrieved?
A. Yes.
HEARING OFFICER: Did you explain how the ADA had been aggrieved?
A. Not in any great detail, no.

HEARING OFFICER: In any detail? There was no --

A. If my memory's right, I said ADA Jurgens was upset yesterday, ICE got mad at her, and she was upset, I thought you should know about it.

HEARING OFFICER: And she didn't ask what was she upset about?

A. No, not to my memory.

HEARING OFFICER: Okay. And by the way, Mr. Medina Perez, he had property in the lockup area.

A. Yes, he did. I believe he did.

HEARING OFFICER: Okay. And finally, were you aware of the special Rule 211 that said you should not be going off the record?

A. Not at that time, no, I wasn't aware that we were not allowed to go off the record.

HEARING OFFICER: Anything further, Counsel?

JUDGE FABRICANT: Nothing further. Thank you.

MR. HOOPES: Nothing.

JUDGE FABRICANT: May this witness be excused?

HEARING OFFICER: Yes. Thank you.

JUDGE FABRICANT: And I'm sorry to say, we don't have our next witness present, because Mr. Hoopes was more efficient than we predicted.

So we will try very hard to have Ms. McDermott here at 10:00 tomorrow morning. As you know, we are scheduled to have Mr. Mendoza on Zoom at 11:00. We had asked Ms. McDermott to come at 2:00, but we'll try to get that moved up to 10:00.

HEARING OFFICER: Okay. That would be very good, if you could.

MR. KEATING: 9:00?

HEARING OFFICER: No. We're on for 10:00 tomorrow. Normally we'll be starting at 9:00, but tomorrow we're starting at 10:00.

So with that, we're adjourned. Thank you All.

(The proceedings adjourned at 3:07 p.m.)

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EXHIBIT 14

COMMONWEALTH OF MASSACHUSETTS
COMMISSION ON JUDICIAL CONDUCT

COMPLAINT NUMBER 2019-22

VOLUME II

HEARING

~ BEFORE ~

HEARING OFFICER

DENIS J. McINERNEY, ESQ.

JUNE 10, 2025

10:00 A.M.

Boston, Massachusetts

Lisa L. Crompton, CSR (MA)(RI), RPR
(As amended by stipulation of the parties and
as approved by the Hearing Officer on October 1, 2025.)

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THE HEARING OFFICER: Good morning Everybody. We're on the record.

My name is Denis McInerney. I'm the hearing officer in this matter.

We're here in connection with the Commission on Judicial Conduct's Complaint Number 2019-22 against Judge Joseph.

Yesterday we had a viewing at the Newton District Courthouse first thing in the morning, and then we resumed here at the Suffolk County Courthouse for opening statements and testimony.

At the beginning, I would like to ask both parties, to have counsel identify themselves for the record, please.

JUDGE FABRICANT: Judith Fabricant, special counsel for the Commission on Judicial Conduct.

MS. MULVEY: Elizabeth Mulvey for Judge Joseph.

MR. HOOPES: Tom Hoopes for Judge Joseph.

MR. KEATING: Michael Keating for Judge Joseph.

MR. NEFF: And Howard Neff for

the Commission on Judicial Conduct.

HEARING OFFICER. Thank you.

So, with that, we concluded at 3:00 yesterday with the first witness, and I'll ask special counsel to call the next witness.

JUDGE FABRICANT: All right. And I'm about to do that.

I'd like to just offer the document that we referred to late in the day yesterday, the proffer letter and the immunity agreement, and I'd like to hand up -- So I have a copy ready for marking and a copy with holes punched in case you want to put it in your binder. And if you would like to have it in the electronic form, we can certainly send that.

HEARING OFFICER: Great. Thank you very much.

No objection?

MR. HOOPES: No.

HEARING OFFICER: Thank you.

You're good.

JUDGE FABRICANT: And with that, the Commission calls Shannon Jurgens.

JUDGE FABRICANT: And Mr. McInerney, I just want to again ask your

permission. We have the next witness ready on Zoom, which we expect to have ready on Zoom at 11:00. And if he's ready at 11:00, we'll want to interrupt this witness.

HEARING OFFICER: Yes.

MS. MULVEY: That's fine.

HEARING OFFICER: Yes.

JUDGE FABRICANT: Thank you.

DIRECT EXAMINATION

BY JUDGE FABRICANT:

Q. Good morning.

A. Morning.

Q. Please state your name.

A. Shannon McDermott.

Q. And Ms. McDermott, please tell us your professional background.

A. I started as an assistant district attorney in 2015 for the Middlesex County DA's office, where I worked for four years, then in September of 2019, I worked at Keney & Sams, a small office in Boston, until March of 2020, then I went to the Suffolk District Attorney's office, and then in May of 2021 I became an assistant clerk magistrate at Malden District Court, which I still am today.

Q. I'm going to ask you a lot of questions about April of 2018. And I know that that's nearly -- actually, it's a little more than seven years ago, so it's challenging to take your mind back to that time, but that's what I need to ask you to do.

As of April 2nd of 2018, what was your position?

A. I was the only district attorney at the Newton District Court.

Q. In that capacity, did you have a title of supervisor?

A. Yes.

Q. And what was your role? What did you do?

A. So as I said, I was the only assistant district attorney in Newton District Court, so I was assigned to prosecute all of the cases that came through that courthouse, supervise myself, and the victim witness advocate, and then there was one, you know, staff, support staff that helped as well. That was really our whole office there.

Q. So were you in the courtroom every day?

A. Yes.

Q. And every time a case was called before the

court, were you the person standing up?
A. Yes.
Q. Where was your office?
A. My office was in the Newton Police Station, which the building is connected to the Newton District Court. I was on the second floor, which is within the detective bureau.
Q. Was there another office in the courthouse associated with the district attorney's office?
A. Yes.
Q. Who used that office?
A. The victim witness advocate.
Q. Did you ever work in that office?
A. I did not.
Q. As of April 2nd of 2018, how long had you been in that role in the Newton District court?
A. I believe I went to Newton in March, so about a month, a few weeks.
Q. About how many arrests were there in the Newton District Court? Say, how many a week?
A. Not many. Not many at all. Five, maybe, would be average. I guess I could bring it up to 10, but I think that would have been rare. Just roughly. My best guess.
Q. When in court you worked in, not regular.

A. Exactly.
Q. Did you have occasion to deal with ICE detainers?
A. Yes.
Q. And what was the practice about ICE detainers, about the paperwork, who would get it, when, how?
A. There is a couple ways. Sometimes I would get it when I got the packet in the morning from the police department, the police prosecutor, with the new arrests for that day, sometimes it would be in it, sometimes I know it gets sent to the clerk's office, so sometimes I would get it from them. There was a couple of different ways that I could have obtained that paperwork.
Q. Would it be something that you would get?
A. Yes, yes, at that time.
Q. And were you aware of, in the course of the day, who else would get it, who else would have it?
A. I know that the clerk's office got it and that it was always something given to the security department, the court officer. I don't know who else got it.
Q. When you're in the courtroom in Newton, where do you sit or stand?

A. Well, the main courtroom, as you walk in, there's a left -- there's a table on the left, table on the right, and mine was on the left.

Q. And let's bring up the Photograph 509, which was received in evidence yesterday.

Okay. So you see the photograph on the monitor. And can you just indicate on the photograph where would be your place?

A. I think I was on the left.

Q. Okay. And what is -- If you're on the left, at that chair and table, what's immediately to your left?

A. With the glass?

Q. Yes.

A. That would be the dock, we call it, where a custody comes up from lockup.

Q. So a person in custody would be in that dock.

A. Correct. Now that I'm looking at this, I could have been in the left or right chair. I don't remember.

Q. Do you see in the glass in the dock something that looks like a metal circle?

A. Yes.

Q. What is that?

A. I don't know if it was a speaker or if it was

amplified it all. I can't remember. But it was just a way for the person in the dock to hear better in that area.

Q. And if an interpreter was helping a defendant in the dock, where would the interpreter stand?

A. They would be outside along, you know, that small alleyway on the left talking through that metal piece.

Q. So when you say "outside," you mean outside the dock?

A. Correct.

Q. And talking through that metal piece?

A. Correct.

Q. Again, taking your mind back to April of 2018. When a defendant was in custody and was then released from custody, how would that happen?

A. If they were going to be released, the court officer, who -- you can't see it, but there would be a little seat to the left outside the photo where there's a court officer seat, and they would just unlock the door to the dock and they would walk right out.

JUDGE FABRICANT: Let's bring up photo Number 513, Page 513.

Q. Does this show what you were just talking about?

A. Yes.
Q. And was what you can see, the piece of furniture that you can see on the left, is that the court officer's station that you're talking about?
A. Yes.
Q. And the door that you can see there that looks like it's slightly ajar in the photo, is that the door that you were talking about?
A. Yes.
Q. And, so you said the court officer would go in there and take off the restraints and the person would just come out?
A. Yes.
Q. And then when the person's leaving the courtroom, how does the person leave the courtroom?
A. There is a door in the back of the courtroom.
JUDGE FABRICANT: And why don't we bring up -- We'll get to the photograph that shows that. There it is. And what number is this?
Q. All right. So this is numbered Page 512 of the appendix. Does this show the door that you're referring to?
A. Yes.
Q. And Photograph 509 was already received in

evidence yesterday. Photograph 513 and 512, do those fairly and accurately depict what you described?

A. Yes.

JUDGE FABRICANT: And I offer those in evidence.

HEARING OFFICER: Any objection?

MS. MULVEY: No objection.

Q. What if a defendant had property downstairs? And what we're talking now about a defendant who doesn't have to go check in with probation, doesn't need the bail posted, is being released. What is the property -- How would the defendant get the property?

A. My best memory is one of the court officers would just run it up to them.

Q. On that date, April 2nd of 2018, I want to draw your attention to a case involving a Mr. Medina Perez. Do you remember the charges?

A. Yes.

Q. What were the charges?

A. There was a possession of a drug charge, I think it was B, but I don't remember, and a fugitive from justice charge.

Q. And what's a fugitive from justice charge?

A. It's a mechanism to kind of hold somebody when they have an out of state warrant, so the language of the charge is fugitive from justice from X state for Y charges.

Q. So it's a Massachusetts criminal charge for the purpose of effectuating a warrant from another state.

A. Correct.

Q. On that day, with respect to Mr. Medina Perez, you said he had a drug charge and a fugitive from justice charge. Were you also aware of an ICE detainer?

A. Yes.

Q. And was there an ICE officer in the courtroom for part of the day?

A. Yes. At some point they arrived.

Q. And did you speak with him?

A. Yes, at some point.

Q. And did he show you a photograph or a video or something to that effect?

A. I don't remember a video. He had paperwork that he showed me.

Q. Okay. Did you notify others of the presence of ICE and the detainer?

A. I'm sure I mentioned the detainer. I don't

know whether I told others about the ICE officer or not. There wasn't very many people there.

Q. Did you become aware at some point in the course of the day that the ICE officer left the courtroom?

A. Yes.

Q. And do you know what caused the ICE officer to leave the courtroom?

A. My understanding is he was asked to wait outside.

Q. Do you know who asked him to wait outside?

A. I think it was the judge asked someone to ask him. I don't remember exactly how it happened, I guess is my answer.

Q. Do you know where he went?

A. I think he just went right in the hallway.

Q. In the hallway, the main lobby of the courthouse?

A. Correct.

Q. Was the case called, the Medina Perez case called a number of times over the course of the day.

A. Yes.

(INTERRUPTION)

HEARING OFFICER: Okay. It's not playing anymore; so go ahead.

JUDGE FABRICANT: Okay.

Q. So the case was called a number of times over the course of the day?

A. Yes.

Q. And was it then put on for further call?

A. Several times, yes.

Q. And during the course of the morning, what information did you have about the Pennsylvania warrant?

A. I knew that it was not -- I guess Pennsylvania OUI/DUI charge. I'm sure I had a piece of paper reflecting that. I don't remember what other supporting documents I had for that.

Q. Did you at some point in the morning inform the court that you were going to ask to detain the defendant on the fugitive from justice charge?

A. Yes, at first I did.

Q. And why was that your position at that point?

A. So generally the practice that we were taught in the DA's office when there's a fugitive from justice charge, you reach out to the out of state body, sheriff's office, the police and see if it's something that they want to come extradite, come pick the person up for. Most

times they say yes. Sometimes they say no. When they say yes, we ask that they be held without bail pending the out of state authorities coming to pick up the person to face the warrant in the other court -- in the other state.

Q. And in the course of the morning, when you were taking that position, had you yet been in touch with the Pennsylvania authorities?

A. I don't recall. I don't remember.

Q. At some point later on in the course of the day did you get more information? Did you get a photograph?

A. Yes.

Q. And did you review the photograph with the defendant's attorney?

A. I reviewed it with a couple of people. But it was the booking photo from Pennsylvania is what someone gave me and I can't remember who. That is what I reviewed with definitely a couple people.

Q. And in the course of the morning, did you take a position regarding bail on the Massachusetts charges?

A. Yes. I was not going to be asking for bail on the possession charge.

Q. And why was that?

A. At the time in my office, the mandate was on nonviolent misdemeanors. We were not to ask for bail.

Q. And I want to just call your attention to a transcript of the proceeding. This is Appendix G. I want to take a look at Page 39 at the bottom of the page and going into Page 40. And you have in front of you a book that has all of the appendices that have been received in evidence. So if it's easier to look at that, rather than refer to the monitor, that's fine.

So looking at Page 39, at the bottom and going over to the top of Page 40, so do you see where, five lines from the bottom, the judge asks Commonwealth with respect to the new charges, is there going to be a request? What did you understand, is there going to be a request?

A. A bail request.

Q. Okay. And what did you say?

A. I said no, Your Honor.

Q. And the judge says okay. And what did you say?

A. I said, well, not on the drug possession.

Q. And the judge says that the possession that --

and then what did you say?
A. If they're treated separately, I'm not going to ask that he's held without.
Q. And what did you mean by "if they're treated separately"?
A. The state charges are the Newton charges -- I don't remember if it was state police or Newton. The charge versus the fugitive from justice charge.
Q. And then the judge says, right on the fugitive. What did you say?
A. But if he's not, I would have a bail request.
Q. So if he's not what?
A. So sometimes you argue -- Sometimes a judge won't hold somebody without bail on a fugitive charge, in which case I would have asked for a number on the same.
Q. Bail on the fugitive charge.
A. Correct.
Q. But not bail on the misdemeanors.
A. No.
Q. All right. Now, in the afternoon, did Attorney Jellinek appear for the defendant?
A. Yes.
Q. And at the beginning of when he appeared, did you and he go to side bar?

A. At some point we went to side bar. I don't recall at what point that was.

Q. So we're going to bring up a transcript again, starting at Page 40, and we're going to go to 2:48:13 p.m. And we're going to play the recording. The initial part of the recording is pretty good, but you can see the transcript. So we're going to play the recording at 2:48:13 p.m. until the end of that first clip.

(RECORDING PLAYING)

Q. So does that refresh your memory that Mr. Jellinek asked to go to side bar and you went to side bar?

A. Yes.

Q. Did you have an understanding of why you were going to side bar?

A. No, not before.

JUDGE FABRICANT: Let's put up Photograph Number 511 if we could.

Q. Is this where -- This is Number 511 of Appendix U. This was admitted in evidence yesterday. Does this show where you would be at side bar?

A. Yes.

Q. And where would the judge be when you're at side

bar?
A. The judge would just stay in the chair and kind of shuffle over to the, closer to the right side of the photograph, and the attorneys would stand on the outside, on the right side.
Q. And is there a microphone for the recording system at that part of the bench?
A. Yes. I can't see it in the photo, but there's the little black microphone.
Q. Now, we're going to go back and play the recording. Now that we're at side bar, it's much harder to hear. But again, we have the transcript starting with at the bottom of Page 40 and going over to page 41.
(RECORDING PLAYING)
Q. So looking at the transcript, at the beginning, Judge Joseph says something inaudible is dismissed. What was it that was being dismissed?
A. The fugitive from justice charge.
Q. And then she says, so it's my understanding that ICE is here.
A. Yes.
Q. Attorney Jellinek says, so there's the fugitive. Judge Joseph says, if there's no warrant. What

did you understand that to be referring to?
A. If I was going to dismiss the fugitive from justice charge, then there's no out of state Pennsylvania warrant.
Q. And you then said yes; is that right?
A. Yes.
Q. And then Attorney Jellinek says, there isn't something inaudible that we can tie this to him. What do you understand that to refer to?
A. I believe the Pennsylvania warrant.
Q. And then you said, I don't think it's him. Is that right?
A. Yes.
Q. And was that also in reference to the Pennsylvania warrant?
A. Correct.
Q. And Judge Joseph said, okay. And then Judge (verbatim) Jellinek says, ICE is convinced that this guy, and he goes on and talks about his discussion with the ICE agent and what he saw in the records. And he says, ICE is going to pick him up if he walks out the front door, but I think the best thing for us to do is to clear the fugitive issue, release him on a personal, and hope he can avoid ICE. You said,

I don't think ICE is really my -- Is that right?
Is that what you said?
A. Yes.
Q. What did you mean by that?
A. I think I finished it somehow in the transcript saying, ICE has nothing to do with my role as a prosecutor.
Q. And so what was your view about any discussion relating to this?
A. That I did not have an opinion or a standing, it's not my job, doesn't have anything to do with my job.
Q. Were you neutral about it?
A. Yes.
Q. So a little later the judge says, the other alternative is if you need more time to figure this out hold until tomorrow. Attorney Jellinek says something inaudible. Judge Joseph says, then it’s a different. And then you said, there's a detainer attached to my paperwork but I feel like that that's separate and apart from what my role is. Was that a reiteration of you're neutral about it?
A. Yeah. I think I was finishing my thought that ICE isn't my business.

Q. And then Attorney Jellinek says, there's an ICE detainer, so if he's bailed out from Billerica, ICE will pick him up. Judge Joseph says, ICE is going to get him. Attorney Jellinek says something that is inaudible. Judge Joseph says, what if we detain him. What was your understanding of what was going on in that conversation between Attorney Jellinek and Judge Joseph?

A. Just --

MS. MULVEY: Objection.

Q. Well, did you have an impression of what Judge Joseph was conveying in that conversation?

MS. MULVEY: Objection.

HEARING OFFICER: I'm going to allow it. I'm going to allow it.

JUDGE FABRICANT: Allow the witness to answer.

HEARING OFFICER: Yes.

A. Just for both Judge Joseph and Attorney Jellinek, just options to have him not to leave with ICE, to be walked out into the hallway.

Q. Discussing options.

A. Yes.

Q. Then Attorney Jellinek says, are we on the

record. Judge Joseph says, Larry, can we go off the record for a minute. Larry is Clerk Okstein?

A. Correct.

Q. And Clerk Okstein says, what's that. Judge Joseph says, are we off the record. Clerk Okstein says, no, we're on the record. Attorney Jellinek says, can we go off the record for a minute.

Going off the record in the course of a matter on a case, was that something you had experienced before?

A. No.

Q. Do you have a feeling about that?

A. I had never experienced that before while a case is being discussed.

Q. Were you concerned about it?

A. Yes.

Q. And the conversation that had occurred with respect to the options to have him leave without encountering ICE, did you have a feeling about that, an impression about that?

A. I just -- It wasn't my role. I didn't think it was not really a proper conversation, but I stayed out of it.

Q. But you didn't think it was a proper conversation.

A. Correct.

Q. Did it make you uncomfortable?

A. Yes.

Q. When you went off the record, the three of you went off the record, tell us everything you can remember about the discussion off the record.

A. I don't remember a lot of what was on the record and what was off the record. The best I can say was it was sort of a continuation of the last few thoughts and pieces of conversation. You know, just ICE being there. Like I don't remember any quotes or any direct statements at all. It was just a continuation of the same type of conversation.

Q. So without quotes, do you have a general sense of the substance or do you have a general sense of the substance of the conversation?

A. Yes.

Q. What was your sense -- What is your sense of the substance of the conversation?

A. Just different options to have the individual not be taken by ICE.

Q. And what sort of options?

A. To the best of my memory, I think whether, if

there is a bail put on him. I, I can't be certain. I don't remember.

Q. Okay. Would looking at your grand jury testimony help you?

A. Yes.

Q. So let me ask you to look in particular -- There's copy of your grand jury testimony. I would ask you to look particularly at Pages 45 to 46.

HEARING OFFICER: Yes.

Q. And just to establish, did you testify before the Federal grand jury on January 10, 2019?

A. I did.

Q. And this is, as far as you can tell, an accurate representation of your testimony?

A. Yes, it is.

Q. So 45 to 46. And the bottom of 45 is where I think the most pertinent part starts, but look at however much you need to make sure you understand the contents.

(PAUSE)

A. My memory's refreshed.

Q. Okay. So what's the best you can remember now that your memory's refreshed of what you heard?

A. Now that I reviewed this, I remember also

saying at that time -- I didn't remember any direct quotes or statements -- but that was the gist was Attorney Jellinek saying I have a plan. I don't know if he used the word "plan." But that was the impression that I got.

Q. Okay. And do you remember --

HEARING OFFICER: If I can just interrupt one second. I'm hearing another person speaking, and I'm just not following what that could be.

JUDGE FABRICANT: I'm hearing the same thing.

HEARING OFFICER: If we could take a two-minute break so that we can try to solve this, that would be helpful. Sorry to interrupt.

JUDGE FABRICANT: Okay.

HEARING OFFICER: We're off the record for a minute while we try and solve this. Thank you.

(PAUSE)

HEARING OFFICER: We're back on the record.

And we think Mr. Neff has solved this particular riddle, so you may continue with your questioning. Sorry to interrupt.

Q. Ms. McDermott, I think what you had just told us

was that you remembered Mr. Jellinek saying something to the effect of, but not the exact words, I have a plan.

A. Yes.

Q. Is that your best memory of what he said off the record?

A. Yes.

Q. And did you hear Judge Joseph saying something off the record?

A. Just I think before he said that, it was something to the effect of, you know, what could we do and him saying, I have a plan, it's all set. [Inaudible.]

Q. And again, did you have concern about that?

A. Yeah. The conversation made me uncomfortable.

Q. And why did it make you uncomfortable?

A. Because my training was that ICE, that just didn't play a calculus in a criminal case.

Q. In the course of the discussion at side bar, whether on or off the record, was there discussion about where the ICE officer was waiting?

A. At some point in the day there was. I don't remember when.

Q. So you're not sure whether it was during that side bar.

A. I don't remember.

Q. Did you say anything -- Was there any reference to an immigration lawyer, that you recall?

A. Not that I recall.

Q. And now I want to turn back to the recording and back to the transcript, starting when everybody went back on the record and everybody went back to open court. So we're going to play the recording starting at 2:50:17 p.m., and this appears at Appendix G, Pages 41 to 43. It's 2:50:57. Pardon me.

(RECORDING PLAYING)

Q. So Ms. McDermott, at the beginning of that section Mr. Jellinek says, after extensive research into the various FBI numbers, Social Security numbers, as well as obtaining a photo from Pennsylvania, we don't believe that this gentleman is the same gentleman as on the fugitive from justice warrant. And then you said, with the information I have, I don't think there's enough tying him to the Pennsylvania warrant but that there are other out of state records, I do believe that some of them belong to this individual, but

that's not what's at issue, and then shortly thereafter you said you were going to dismiss the fugitive from justice charge.

Was there something a little off sequence in his saying it and then you saying it?

A. I mean, yes. I am the only person that can move to dismiss it.

HEARING OFFICER: I'm sorry. Could you speak into the microphone.

THE WITNESS: Oh, sorry.

A. I just said that the ADA is the only person that can make a decision to dismiss it. I mean, obviously, an attorney can ask for something to be dismissed. But I moved to dismiss it, so usually I would be the one to say that.

Q. And then later on, a little bit further out on Page 42, Mr. Jellinek says, I would ask that he, I believe he has some property downstairs, I'd like to speak with him downstairs with the interpreter if I may.

In your experience, was it unusual at the Newton District Court, was it unusual for a defendant and the interpreter, after the defendant had been ordered released,

to go back downstairs?
A. Yes.
Q. Then over on the top of Page 43, the clerk says to the judge, there was a representative from ICE here in the court to, to visit the lockup. And the judge says, that's fine, I'm not going to allow them to come in here but he's been released on this. How did you understand that?
A. Just that the clerk was alerting that -- everyone that the ICE officer was there, and that the judge said that's fine, but he's not going to come into the courtroom or I guess the lockup, if that's what the clerk is referencing as well.
Q. So I want to make sure I understand what you just said. Did you understand the judge to be saying something about whether ICE could go into lockup?
A. I don't have a memory of that. In reading the transcript, it was just that the ICE officer wasn't going to be permitted to come into the courtroom.
Q. And then later on, about six bullet points from the end, the judge -- the court officer asks, he's released, the judge says he is,

Mr. Jellinek asked if the interpreter can accompany him downstairs to further interview him.

In your experience in the Newton District Court with a defendant who has been ordered released, was that unusual?

A. Yes.

Q. All right. Now, what happened next?

A. I don't know how long it took me, but I finished my business, and then I was going to walk back to my office, so I went out into the hallway, I thought I saw the ICE officer was still there. I don't recall how much later after this recording ended at 2:55. I just was, oh, you're still here. And that's when I learned that the individual hadn't come out -- come up out of lockup.

Q. So before that, did the court officer open the door to the dock and let Mr. Jellinek and the interpreter in and let everybody go downstairs?

A. Yes.

Q. And did you see that happen?

A. I'm sure I did. I can't remember.

Q. Okay. So when you went out into the hallway, you saw that the ICE officer was still there,

did you have some conversation with the ICE officer?

A. Yeah. I just, oh, you're still here, has he not come up yet, you know, they could still be talking, something like that.

Q. After what you had heard in the courtroom, did you have any -- what was your expectation as to where the defendant was going to come out?

A. Right up the back door of that main courtroom that you showed in one of the earlier exhibits.

Q. In accordance with what you had previously experienced in Newton.

A. Correct.

Q. Did you have any thought that there was another way he might be released?

A. No.

Q. Did you say anything to the ICE officer as to where he would come out?

A. I just said he has to come out this way. I just, you know, kind of didn't know what to tell him. This is the only way out.

Q. Were you aware of any other way out?

A. I mean, unless you're leaving in custody, no.

Q. And did you wait with him for some period of time?

A. I did.

Q. Did you become concerned?
A. Yeah. It was just a really long time. So I decided, huh, I wonder what's going on.
Q. Did you do something to inquire?
A. At some point I -- The victim witness advocate's office is downstairs. He came, I think he came up. And I just said, I was like, Mike, is there another door that they can -- you know, down there. I think he just said I don't think so.
Q. And did he go to check?
A. He may have. I can't remember.
Q. Okay. Did you see Mr. Jellinek again that day?
A. Yes.
Q. Did you have some interaction with him?
A. Yes.
Q. Tell us about that, please.
A. At some point he came out the way I expected everyone to come out of the main courtroom, through the door, and he had a property bag in his hand. And then I can't remember if I said something to him before or after he went into one of the conference rooms in the hallway, and came back out and left. And at some point, I put it together what had happened. And I don't recall

if somebody else said something, too, or if I just figured it out and I -- At some point -- I can't remember if it was still inside the hallway or right outside the front door, but I said I know what you did and that was not the right thing to do.

Q. What did you figure out?

A. That he had somehow facilitated the individual leaving.

Q. After that happened, did you call your supervisor?

A. Yes.

Q. And why then?

A. Because it was a very unusual day, and the ICE officer was very upset, it was not, you know -- An individual was let out the back door, and it was something that I felt I needed to report to my supervisor, because I was uncomfortable with what had happened.

Q. What was your overall impression of what had happened?

A. Just that it was wrong. He was -- Yeah.

Q. Did it affect -- Did the experience affect your view of the court?

A. Of the -- In general? No, not really.

Q. Did you have a view about Judge Joseph's role?

A. I mean, I think I've said it before. Misjudgment, misguided attempted to do what she thought was right.

JUDGE FABRICANT: All right. Thank you. I have nothing further for this witness.

What I'd like to do, if everyone is in agreement, is have her step down and take Mr. Mendoza on Zoom if he's here.

HEARING OFFICER: I assume that makes sense from your perspective as well.

MS. MULVEY: Yes, that’s fine.

HEARING OFFICER: So we'll take a two-minute break while you try to plug us in by Zoom.

JUDGE FABRICANT: Thank you.

HEARING OFFICER: I'd ask that the witness -- if I could ask the witness not to talk about your testimony to anybody or this hearing during this break for you. We'll see you back probably in an hour or so. Thank you.

(PAUSE)

HEARING OFFICER: We're back on the record.

JUDGE FABRICANT: We're back on the record?

HEARING OFFICER: Yes, we're Back on the record.

And I'll leave it to you to call the witness, and then I'll swear him in.

JUDGE FABRICANT: All right. So the Commission calls Eric Mendoza.

HEARING OFFICER: Thank you.

Mr. Mendoza, can you hear me? Mr. Mendoza, can you hear me? Hello?

MR. NEFF: The only microphone --

HEARING OFFICER: Is there only one microphone?

JUDGE FABRICANT: Mr. Mendoza, are you able to hear the hearing officer?

THE WITNESS: No. I can hear you.

HEARING OFFICER: I'll try one more time. Mr. Mendoza, can you hear me? Mr. Mendoza? Can you hear me?

MR. NEFF: The only microphone is on the laptop.

HEARING OFFICER: If you could

just bring the laptop up, that would be probably the best.

(PAUSE)

HEARING OFFICER: Can you hear me, Mr. Mendoza?

THE WITNESS: Yes, sir.

HEARING OFFICER: If it's okay, under these circumstances, just for this particular part of the proceeding.

Good morning, Mr. Mendoza. First, let me swear you in. If you would please raise your right hand.

ERIC MENDOZA, SWORN

HEARING OFFICER: All right. Thank you.

I just have -- Because this is the only Zoom testimony, I have a few additional questions just to make sure we've covered these things. And we do this, Mr. Mendoza, for any witness who is testifying remotely.

Could I ask, where are you physically located at this time?

A. I'm presently in Las Cruces, New Mexico.

HEARING OFFICER: Okay. Is anyone physically in the room with you at this

time?
A. No, Your Honor.
HEARING OFFICER: And what materials and devices do you have with you right now?
A. I think just my phone. I'm not too sure about my laptop because it's old.
HEARING OFFICER: Got it.
And please tell us, what is currently on your screen?
A. I see you and I believe I'm on the screen with my name on it.
HEARING OFFICER: Okay. And are you in communication with anyone other than the people who are conducting your examination and myself today right now?
A. No, no.
HEARING OFFICER: Okay. If anything changes in this regard during your testimony, please let us know.
A. Yes, Your Honor.
HEARING OFFICER: Thank you.
With that, I will return the laptop.

DIRECT EXAMINATION

BY JUDGE FABRICANT:

Q. Good morning, Mr. Mendoza.

A. Good morning.

JUDGE FABRICANT: We're going to pause for just a moment while Mr. Neff plugs in the computer in a different location.

(PAUSE)

Q. All right. Mr. Mendoza, you recall, we met on Zoom before. I'm Judith Fabricant. I'm serving as special counsel for the Commission in this case.

A. Yes.

Q. And now would you tell us what you see on your screen besides yourself.

A. Well, I'm in the top corner and you're in my main screen with -- I don't know -- maybe people in the background or a jury. I'm not sure.

Q. Okay. You see me and people in the background.

A. Yes, ma'am.

Q. All right. Thank you.

Mr. Mendoza, would you please tell us your professional background.

A. Well, I was a certified or a vetted interpreter for about, about 20 years.

Q. And in Massachusetts, with the Massachusetts court system, what was your role?

A. Pretty much a vetted interpreter where I was able to do certain cases, like moving violations, things that dealt with domestic issues. But major trials was -- although I may have been able to do them, I wasn't there in the process yet. So I was a vetted, like I was a vetted interpreter.

Q. So was vetted a credential that was not at the level of certified?

A. According -- Based on the courts. Correct. Yes.

Q. Okay.

A. But I was certified in other aspects of interpretation.

Q. And what is the role of an interpreter in a courtroom?

A. To basically give the information or interpret what is being said in and around the defendant or the client.

Q. And who are you interpreting for?

A. Usually -- I forget the, I forget the acronym that they use. But it's basically people who do not speak or have difficulty communicating in

English from Spanish.
Q. So the person who needs assistance with English, is that the person who you are interpreting for?
A. Yes. Yeah. If it has to do with Spanish, yes.
Q. And when that person speaks to the court, to the judge, to the lawyer, are you then interpreting what that person says?
A. Correct. Yes.
Q. Did you for some period of time serve as an interpreter in the Newton District Court?
A. In the Newton District Court?
Q. Yes.
A. Yes.
Q. Okay.
A. Yeah.
Q. And how long a period did you do that?
A. I don't know. Like maybe half a dozen to a dozen times I was in that courtroom.
Q. Okay. And I should put the question a little differently. How long a period did you serve as an interpreter for the Massachusetts court system?
A. Oh, I don't know. Anywhere between a year and a half, two years, maybe.

Q. Okay. And then you said you were in the Newton District Court, you said you thought half a dozen times?

A. Yeah. Newton. Maybe more. Yeah.

Q. In the Newton District Court, do you remember the physical arrangement of the courthouse?

A. Yeah. Yes.

Q. And I want to take you back to April of 2018.

A. All right.

Q. I know that's a little more than seven years ago.

A. Yeah.

Q. A lot has happened since.

A. Yeah.

Q. But I'm going to ask you to put your mind back into that time frame.

A. Okay.

Q. So in that time frame, if you were interpreting in the first session in the Newton District Court, the main courtroom on the first floor, --

A. Yes.

Q. -- if there was a defendant in custody, and if the defendant was in the dock, where would you be?

A. Before or while I'm interpreting?

Q. While you're interpreting, if the defendant is in the dock.

A. Okay. If the defendant's in the dock, it's like a concealed area, like some type of plexiglass or something like that, and then there's a little cutout area, and I would stand usually facing the courtroom and listening to the judge or listening to whoever is speaking or proceeding and letting the client know through the, through the little hole in the dock, the dock.

Q. If the defendant is not in the courtroom, is being brought up, you're waiting for him, but he's not yet in the courtroom, he's not yet in the dock, and there is something going on, where would you be?

A. Well, in Newton, it was, it was different. It was set up differently. Like there was a chair specifically set up for the interpreters. So that was usually -- you're facing the court, usually on the left side. There could have been one on the right side as well, but usually on the left side in that particular courtroom. Normally, in most courtrooms you're sitting behind the defendant -- the defense or the

prosecuting attorney, they have a section for you to sit at.

Q. And is that always where you were or did you at times move around?

A. Yeah. I was able to move around. And as the hearings went through the day, I might sit closer towards either the attorneys, just to be able to listen and approach the court quicker.

Q. I want to call your attention to April 2nd of 2018.

A. Okay.

Q. Were you serving as interpreter in Newton that day?

A. I believe so, yes.

Q. And do you remember a case involving a Mr. Medina Perez?

A. Yes.

Q. Do you remember that that case was called several times over the course of the day --

A. Yes.

Q. -- and then set for further call?

A. Yes.

Q. Were you aware that there was an ICE officer present?

A. Yes.

Q. Were you aware that there was a detainer for Mr. Medina Perez?

A. Only because it was shown to me, yes.

Q. It was shown to you.

A. Yes.

Q. Now, in the afternoon, the afternoon session, after a series of calls in the morning, I want to call your attention to the afternoon session, and do you recall that at one point in the afternoon session the lawyers went to side bar and spoke with the judge at side bar?

A. Yes.

Q. And at that point, when they started the side bar conversation, was the defendant, Mr. Medina Perez, was he in the dock or not in the dock?

A. I, I don't believe he was.

Q. Okay. And when they started, when he was not in the dock, where were you while you were waiting for the defendant?

A. Towards the left, close to the table of where the attorneys sit, kind of set away. Like you don't -- I don't have to listen to what's being said or what the judge is doing at side bar. Sometimes you can hear. Sometimes you can't.

But I was trying to set back -- I don't know -- just being respectful. I wasn't right there. Nobody had to say, hey, move away or anything.

Q. Were you able to hear some of what was being said at side bar?

A. A little bit.

Q. Who did you hear speaking?

A. I heard the judge speaking. And both attorneys were there, but the gentleman was speaking to her more. That's what I recall.

Q. The male attorney more than the female attorney?

A. Yes, ma'am.

Q. And what did you hear?

A. I mean, I -- It was a while ago. I know that the judge wasn't happy with ICE being there, wasn't happy with the fact that he might have to be released or let go or -- and that he was going to be detained. So yeah. That's pretty much what I heard.

Q. When you say "the judge wasn't happy," what was it that gave you the impression that the judge wasn't happy with that situation?

A. She didn't like the fact that ICE was around. I don't even think they were in the courtroom. But the fact that ICE was there, I don't think

she was like happy about that.

Q. Was there -- Were there words or tone that gave you that understanding?

A. Yeah. Yeah. I don't -- I can't say specifically what she said. But she didn't like the fact that, regardless of what she did, this person was going to be detained by ICE.

Q. And tell us -- I know you don't remember exact words. We all understand that it was a long time ago.

A. Yeah.

Q. The best you can, what was the substance of what you heard?

A. What was the what?

Q. The substance of what you heard. The gist of what you heard, the best --

A. Oh, the gist of what I heard was that she wasn't happy, and there was possibly an agreement to -- instead of the client -- You're usually released out the front. So if somebody leaves the courtroom, that's, that's -- whose case has been heard. They usually leave the front of the court. Maybe go and sign some papers or something. But she was suggesting that this particular person be let go out the

back. Now, I -- that's like the gist of what I heard. But that he'd be let go out the back or a different way.

Q. After the proceeding came to its conclusion and the defendant was ordered released, what happened?

A. Well, I believe, I believe the defendant had to be brought up and then notified that something was going to happen or that he was going to be released. But I don't think he knew that he was going to be released out the back door. So when he came back up, there was that discussion, and then when he went back down, and that's when, that's when he was released.

Q. Who went back down?

A. I believe the court officer was in front, the defendant was in front of me, I was in back of the defendant, and the attorney was behind me.

Q. And had you previously had occasion to go down to the lockup after a defendant had been ordered released?

A. In Newton or --

Q. Yeah, in Newton.

A. -- in the court at all? No.

Q. In the Newton District Court.

A. No, no.
Q. And on the way downstairs, did you have any conversation with the attorney?
A. The attorney asked me if I was good with all this. And I just said to him, that's not for me to make a decision or judgment on what the judge decides, I'm just here to like interpret and be unbiased.
Q. When you went -- When you were downstairs, --
A. Yes.
Q. -- did you interpret something briefly? And I'm not asking for what. Did you interpret something briefly between the attorney and the defendant -- I'm not asking for what was said. But did you interpret something briefly?
A. Yes.
Q. And about how long did that take?
A. Couple minutes.
Q. Okay. And then what happened?
A. Are you asking me what I interpreted and what the reaction was when I interpreted or...
Q. No. I don't want to, I don't want you to tell us what you interpreted. But after you interpreted, what was the next thing that happened?

A. The defendant went down the hallway, took a right, the door was open for him, and he went out the back door.

Q. Did what happened there that day affect your view of the court?

A. Yes, ma'am.

Q. Tell us how.

A. You're doing your job for like justice and to do the right thing. And when a decision is made, especially coming from a judge, you kind of like wonder if everything you see or hear -- you kind of like lose faith in the system a little. You'd like to think that it's a certain -- it's just happening right there, but I've noticed that it's happening throughout the country.

JUDGE FABRICANT: All right. Thank you, Mr. Mendoza. I have nothing further. Mr. Hoopes will have some questions for you.

THE WITNESS: Okay.

CROSS-EXAMINATION

BY MR. HOOPES:

Q. Good morning, Mr. Mendoza.

A. Good morning.

Q. My name is Tom Hoopes, and I represent

Judge Joseph.
A. Okay.
Q. And sir, you said you were a vetted court reporter -- or court interpreter in the Massachusetts system for about a year and a half; right?
A. Yes, sir.
Q. And that would have been from when to when?
A. I'm not sure of the dates. It would have been about, about a year and, about a year and four months prior to this, prior to this case.
Q. And you were working at the time for a woman named Ms. Barrios; is that correct?
A. Correct.
Q. And --
A. Well, it's kind of -- That was -- It's kind of complicated. Because in the courts, I worked for her. But at the same time, when I wasn't in the courts, I was working for an agency that would allow or that was allowed to send in vetted interpreters. So I was kind of working for both the state and for a private agency.
Q. Okay. So you had two places that you were working, one private and one the state; is that right?

A. Correct.
Q. And your employment, I think you've told us or you made statements in the past, didn't work out with Ms. Barrios; right?
A. Right. Yes.
Q. And so you never followed through to become a certified interpreter.
A. I was basically not allowed to.
Q. Okay. And if I can, you spoke at some point to the -- to Ms. Fabricant or to special counsel; correct?
A. Yes.
Q. And the date of that I believe was February 24th of 2025. Does that sound about right?
A. I'm sorry. What was that for?
Q. So you spoke to the attorney who was just asking you questions in the past; right?
A. Yes.
Q. Yeah.
A. Yes, yes.
Q. And the date of that was after the beginning of this year; correct?
A. Yes.
Q. Now, that morning at the Newton District Court, what time did you arrive?
A. What time did I arrive to the court in

Newton?

Q. Yes.

A. I don't recall. But if the session started at 8:00 or 9:00, I was usually there about a half hour, 45 minutes before.

Q. Okay. And so were you interpreting that day just for one case, for Mr. Medina Perez, or were you interpreting for other cases?

A. I was interpreting for other cases.

Q. And on the Medina Perez case, do you have a memory as you are with us today as to what time you first interpreted on that case?

A. No. No. It was, it was definitely -- There was definitely -- He was definitely called first session, but that could have been between anywhere between 9:00 and 11:00.

Q. Okay. And so the case was called originally, and Mr. Medina Perez was brought up for you to do the interpreting; correct?

A. Yes.

Q. And there was an initial discussion, appearance in front of the judge, and you interpreted that; correct?

A. Yes.

Q. And there was a prosecutor, who is a woman, who

was present for that; correct?
A. I'm not sure, I'm not sure what you mean. There was a what?
Q. There was a -- So there's two sides. You know that.
A. Yes.
Q. There's a prosecutor --
A. Yeah.
Q. -- and a defense attorney; correct?
A. Yes.
Q. And the prosecutor that morning for Mr. Medina Perez's case was a woman; right?
A. I believe so. I'm not sure which attorney was which. I'm sorry.
Q. So in the morning, the attorney representing Mr. Medina Perez was also a woman, in the morning. You remember that.
A. I'd say so, yes.
Q. And that person was different than the person who appeared in court in the afternoon; correct?
A. Yeah. I believe, I believe, I believe one of the attorneys stepped in for her or something happened where another attorney came in.
Q. Okay. And so in the morning you were up in the first session courtroom in Newton; yes?

A. I was, yes.
Q. And Mr. Medina Perez was brought up; yes?
A. Yeah.
Q. And you did the interpreting. And then there was a recess after that; correct? Or they continued the matter to allow some time. You recall that.
A. Yes. Yes. Afterwards.
Q. Yeah. And so they brought Mr. Medina Perez back downstairs; right?
A. I believe so, yes.
Q. To the lockup.
A. Yeah.
Q. And the next time that you had contact with Mr. Medina Perez was in the morning or in the afternoon?
A. You tell me.
Q. You're the witness, sir.
A. Once again, you're talking in the morning or you're talking in the afternoon? Because if we're talking in the afternoon, I had one final, I had one final time with Mr. Medina upstairs and then I communicated or interpreted for him downstairs.
Q. And so let's -- Thank you. Let's go back to the

morning. Was that first time the only time in the morning that you had contact with Mr. Medina Perez, in the morning?

A. No. I believe he was brought up twice.

Q. And so both times that you had contact were there in the courtroom in the morning.

A. Was in the courtroom in the morning, yes.

Q. In the morning. So, it was in the courtroom with the judge on the bench and the attorneys right there in the courtroom; correct?

A. Yes.

Q. And that was the only contact that you had in the morning with Mr. Medina Perez; right?

A. I believe so. I think so, yeah.

Q. Okay. And it would be fair to say that you never saw him again until he was brought up in the afternoon; right?

A. Correct.

Q. So in the morning there was a discussion that you interpreted about whether they had the right individual that Pennsylvania wanted; right?

A. Yeah. They needed to compare --

Q. I'm sorry?

A. Yes. They needed to confirm because everybody was worried of the fact that ICE was

there. So they wanted to make sure who he was and what was going to be done.

Q. Well, so you say they were worried about ICE being there. Did you hear any discussion about ICE in the morning?

A. Yes. Well, we were kind of -- I'm kind of like a court employee. So we're somewhat notified just for safety sake that ICE may be present.

Q. Okay. So ICE was there. But what did you hear that there was some concern that ICE was there? And from whom?

A. I guess the concern was from the employees or people that were there that ICE was present.

Q. Okay. But you never heard anything said by the judge in the morning about ICE; correct?

A. I, I don't think so, no.

Q. And do you remember, was there an announcement that ICE was not allowed in the courtroom in the morning or not?

A. I don't remember that announcement.

Q. Okay. And so did you see anybody that was -- that you knew to be an ICE officer in the courtroom in the morning?

A. I would have to say I was guessing.

Q. Okay. And so what is your memory? Were there a few people in the audience in the morning or almost nobody or a lot of people?

A. You mean general population --

Q. Yeah.

A. -- in the audience?

Q. Yeah.

A. People in the audience?

Q. Yeah, number of people.

A. There was several.

Q. I'm sorry?

A. There was several people in the audience.

Q. Several people in there. Between one and five, between 1 and 10?

A. Maybe more. But I'll say 1 and 10, but more closer to 10.

Q. Okay. And over time in the morning, the number of people in the courtroom thinned out, diminished as cases were called, as cases were resolved; correct?

A. Yes.

Q. And so you, sitting where you were sitting in the courtroom, you wouldn't have had any problem looking around to your right or behind you and actually seeing anybody who was in the

courtroom; right?
A. Correct.
Q. Because the distance from where you were sitting to the audience is only a matter of a few feet; correct?
A. Yes.
Q. Now, so can I ask you, had you ever heard at any time from 2017 until today about what's called a Lunn policy, L-u-n-n policy?
A. A what policy?
Q. I'm going to say Lunn or Lunn. Sounds like Lunar. But it's L-u-n-n in English and it's pronounced the Lunn or the Lunn policy. Have you ever heard of that before?
A. No.
Q. And so were you given any training as an interpreter as to policies and procedures and things in court just besides -- in addition to the language issues?
A. Yes.
Q. Okay. And in any of that training did anybody draw to your attention that there was a thing, a document, a policy in Massachusetts beginning in November of 2017 into 2018, that policy was called the Lunn policy?

A. A Lunn policy?
Q. Lunn, yes. L-u-n-n.
A. I'm not sure if that was presented to me. But not, my supervisor, Ms. Barrios, was pretty thorough. And if I had to read something, I'm sure I would have gotten it.
Q. So this policy deals with how to handle people in custody when ICE is there to take custody. So sounds like you never read that policy.
A. I -- Probably not.
Q. Okay. And so you wouldn't know that that policy requires that individuals who are in custody that ICE is waiting for or advises that they be taken into custody by ICE in the lockup.
JUDGE FABRICANT: Objection. The witness says he doesn't know anything about the policy.
HEARING OFFICER: I'll allow it.
Q. Let me rephrase.
A. I had been, I had been present with authorities taking clients, taking clients in lockup, yeah. I've been, I've been exposed to that, yes.
Q. Okay. And had you ever seen ICE take custody in

the front lobby at the Newton District Court? Yes or no? If you remember, you remember. If you don't, you don't. If the answer's yes, it's yes. If it's no, it's no. That's okay.

A. No. The screen, the screen shut off. So you may want to go back approximately two minutes and let me know what you were saying.

Q. It didn't like my question.

A. Excuse me?

Q. So I'll ask the question again.

A. Yes.

Q. So you had interpreted at the Newton District Court a half a dozen or so times?

A. Yeah. Maybe a little more, yeah.

Q. Okay. And in any of those times were you interpreting when ICE was there to take custody of somebody?

A. I don't think so.

Q. So for you to say that a policy was that ICE takes custody out of the front lobby of the Newton District Court, you wouldn't have any basis for that because you've never seen it before; right?

A. What -- The procedures that ICE do is what ICE does, not -- I had nothing to do with the

policy.

Q. Okay.

A. And whether I know it or not, they're going to operate either way whether the judge lets it or not or whether ICE, ICE is going to do something or not.

Q. Okay. Now, in the afternoon session, you were there for the afternoon because Medina Perez was still an active case; correct?

A. In the afternoon session, I'm still there, whether there's -- until I'm dismissed by the judge.

Q. Understood. And in the afternoon, was Medina Perez the only case that you were there for?

A. Oh, yeah. That was, that was the only or last Spanish case.

Q. And so when the case was called, you told us earlier that you were sitting at the special desk or carrel that they had for interpreters?

A. I may have been sitting closer. That's what I mentioned, that there's a, there's a legal desk where the prosecutor or defender -- I'm not sure in Newton which one it is back there, but I may have been like leaning up against that table

or sitting right, right at that table.
Q. But you weren't over by the dock because there was nobody in the dock when the case was first called; correct?
A. Correct.
Q. And so do you remember whether or not, when the case was called, the parties stayed talking to the judge in the open court or do you remember if they went to side bar?
A. I'm not sure what you're asking.
Q. Do you have any memory of where the conversation between the two lawyers and the judge first took place in the afternoon about Medina Perez?
A. It started open and then it went to side bar.
Q. And so when it was open, you would have been next to the conversation or next to the lawyers; correct?
A. I was kind of behind the attorney, because the defendant wasn't up there yet.
Q. Yup. And there was no interpreting for you to do.
A. Excuse me?
Q. There was -- No defendant means there was no interpreting for you to do; correct?
A. Correct.

Q. And so when they moved the side bar, they moved away from you to your right and up next to the judge; right?

A. No. They moved closer.

Q. Closer to the judge? Or closer to you?

A. No. Closer to me.

Q. Oh. Because you were on the right side now or on the left side facing the judge?

A. Facing the judge, I'm on the left side.

Q. So in your memory, the side bar was on the left side, not the right side of the courtroom.

A. When you're looking at the court, on the left side.

Q. That's where you remember the side bar to be.

A. Yes.

Q. And so do you recall, was there -- when they moved to side bar, was there any white noise in the courtroom? Do you know what white noise is?

A. Yes, there was.

Q. And there was white noise in Newton at that time?

A. That's what I just said. Yes.

Q. And so when they moved the side bar, and they're talking, there's white noise in the courtroom. I just want to make sure I understand that.

That's a yes; correct?
A. I'm not sure if it's in the whole courtroom. I thought -- From what I recall, was right at The little system itself. But it could have been throughout the whole courtroom.
Q. And the purpose of the white noise is to make it harder for people in the audience to hear the conversation; correct?
A. I don't believe there was an audience.
Q. Oh, you think there was nobody else in the courtroom at that point.
A. I don't believe there was.
Q. Okay. But the white noise was on anyway; right?
A. Yes.
Q. And are you saying that the white noise had no impact on your ability to hear what was being said at side bar?
A. No, I'm not saying that.
Q. And --
A. I'm saying that's why I didn't hear everything that was being said, because there was white noise and it was side bar. It's not my position to be listening.
Q. Okay. So today do you have a memory as to whether or not the whole conversation at side

bar was being recorded or not being recorded?
A. I don't believe side bar is recorded, especially if there is white noise. I'm not sure, though.
Q. But you don't know.
A. If I was to make a - if I was a gambling man, I would say that it wasn't recorded.
Q. Now, you've said that you heard the judge say something about the defendant being sent downstairs; is that right?
A. I -- Being let go. Not being sent downstairs.
Q. About being let go.
A. Yes.
Q. So if the judge used words "he's released," that would be consistent with what you heard.
A. If the judge said what?
Q. He's being released, Medina Perez is released, that would be consistent with what you heard.
A. Yes.
Q. And if the judge said to the lawyers, why don't we detain him overnight, that would be consistent with what you thought the judge was saying about avoiding ICE; right?
A. No.
Q. So tell us, why did you think that the judge was

concerned about Medina Perez avoiding ICE?
A. It was -- I'm not hearing you well. But you mentioned something about having --something having to be overnight, and I don't know what that has to do with...
Q. Well, let's break it into two parts. I think you've told us that you couldn't hear the conversation very well; right?
A. Correct.
Q. You could hear bits and pieces; right?
A. Correct. Right.
Q. And from those bits and pieces, that's why you drew the inference that there was some effort on the judge's part to avoid ICE, from those bits and pieces; right?
A. To let the client out, to let the -- to release the client.
Q. To release the client. So you heard the judge say to release the client; is that right?
A. No. I heard a judge say let the client go.
Q. And that was still at side bar?
A. I believe she might have said it even before that, but I recall at side bar.
Q. And how about -- At some point the conversation moved back to the open court; right? Or do you

not remember?
A. Not -- I don't -- Yeah. Because they have to finish the session.
Q. And would it be fair to say that it's hard for you to remember what you heard from side bar and what you heard said at open court seven years ago? I'm sorry.
A. It may not be exactly the time frame that it occurred.
Q. Okay. So in the afternoon there were two lawyers speaking to the judge; correct?
A. Correct.
Q. One was a woman; right?
A. Yes.
Q. And one was a male; correct?
A. Correct.
Q. And you said previously that you thought that the male was the district attorney, the prosecutor, because he was doing all the talking; right?
A. Correct.
Q. So if you thought he was the prosecutor, it's pretty fair to say that you never talked to Medina Perez with him alone prior to going downstairs after court completed; right?

A. I believe I may have. I don't, I don't recall.
Q. You have no memory.
A. I said I don't recall. I said I believe I may have, but I'm not entirely sure during the first session.
Q. During the first session in the morning or in the afternoon?
A. In the morning.
Q. And so -- But it's fair to say you thought the man there in the afternoon was the prosecutor at the beginning; right?
A. Yes.
MR. HOOPES: May I just have a moment, Your Honor?
HEARING OFFICER: Sure.
JUDGE FABRICANT: Mr. Mendoza, we're just pausing just for a minute. Just stay with us, please.
(PAUSE)
MR. HOOPES: Mr. Mendoza, that's all I have. Thank you very much.
JUDGE FABRICANT: Mr. Mendoza, I'm going to be very brief.

REDIRECT EXAMINATION

BY JUDGE FABRICANT:

Q. You said that in the course of your time working as an interpreter in the Massachusetts court system that you had been exposed to situations in which ICE went to the lockup to take custody of someone. Did I understand that correctly?

A. Yes.

Q. Did that happen, --

A. Yes.

Q. -- did that happen in Newton or in other courthouses?

A. In other courthouses.

Q. Did you ever see that happen in Newton?

A. No.

JUDGE FABRICANT: That's all I have.

Perhaps Mr. Hoopes has more, perhaps the hearing officer has questions for you, so stay with us a little longer.

THE WITNESS: Okay.

MR. HOOPES: Yes. You're back with me again, Mr. Mendoza.

RECROSS-EXAMINATION

BY MR. HOOPES:

Q. So you told us, when I asked you questions earlier, that there were two lawyers in the morning dealing with the Mendoza -- Medina Perez case, -- I'm sorry -- the Medina Perez case, both of them were women; correct?

A. Both of them were what?

Q. Women. Female lawyers.

A. There was always a man and a woman and one of the women was switched. One of the attorneys came in and there was another -- there was a different attorney.

Q. So the one --

A. That was a woman.

Q. So there was a woman initially and then there was a man; is that right?

A. That's not what I said.

Q. I'm not understanding you. In the morning, who was representing Mr. Medina Perez, a man or a woman?

A. I was under the assumption it was a man.

Q. Oh.

A. So it's irrelevant for me because I just need to do the interpreting. So whether it's a

prosecutor or defendant, it's almost irrelevant. I just have to interpret for the client.

Q. So would it be fair to say that today you don't remember in the morning whether Mr. Medina Perez was represented by a woman or a man or do you believe it was a man?

A. I believe it was a man.

MR. HOOPES: Thank you. No other questions.

JUDGE FABRICANT: Just stay with us a little longer just in case the hearing officer wants to ask you anything.

THE WITNESS: Okay.

HEARING OFFICER: Yes. It may easiest if I just go down there.

JUDGE FABRICANT: Mr. Mendoza, just stay with us a little longer. The hearing officer has some questions for you.

THE WITNESS: Okay.

HEARING OFFICER: Can you hear me, Mr. Mendoza?

A. Yes, sir.

HEARING OFFICER: So my only question relates to your location during the proceedings. And I don't know how easy it is

for us to do this. But in Exhibit U -- And this is -- We'll start with page APP 508. Are you able to see this?

A. Yes.

HEARING OFFICER: Okay.

A. Wait. Yes.

HEARING OFFICER: So can you describe, looking at this page, where you were located before Mr. Medina Perez came upstairs? So we're in the afternoon session. At the beginning of the session, before there is a side bar, I believe you said that you were behind where the attorneys were. Is that correct? Is that what you said?

A. On the -- So if -- I believe the little, the little hole where you speak to the client, that, that -- the major thing on that picture is the dock itself. So there's the desk right, right there, I believe -- Nope. Closer. Right around there. There's a sign in the picture. I can't see the picture. There you go. So I believe, I believe that's, that's the attorney's desk. I was like standing right on the corner of the dock.

HEARING OFFICER: Do you see

where I'm pointing with my pen?
A. Yes, sir. Right around there. That's what I recall.
HEARING OFFICER: I see. And so -- And I'm pointing now to the area where, if somebody were inside the dock, you would be speaking through this hole right here? Is that right?
A. Is that, is that -- I can't see the hole. But if that's where the hole was, yes.
HEARING OFFICER: It's just to the right of the door to the dock.
A. Yes. And normally I'd be sitting, approximately diagonally towards the back there would be a chair.
HEARING OFFICER: Okay. I understand what you're saying.
Do you see where there's a place for the court officer, there's a location? Do you see where I'm pointing?
A. Okay.
HEARING OFFICER: Is that where the court officer often sits?
A. If you say so. I would be sitting around, right around him.

HEARING OFFICER: Okay. So my understanding from what you're saying is you basically would have been located somewhere between that location where the court officer typically sits and that door to the dock.

A. Yes. But during the side, during the side bar, I was, I was closer, because it was the end of the day, they were making a decision as to what they were going to do with the client, so I was standing a little closer, but I wasn't able to hear everything. Either way, I had to notify the client of what was going to happen, and a decision was made for him to be let go out the back door. So whether I know who the prosecutor was or who the defendant was or what the decision was made, I had to tell the client what was going to happen, and the client had to decide whether he was going to go with what was agreed upon.

HEARING OFFICER: Okay. I was just asking you about your physical location, sir. But I understand you.

With that, I've got no further questions.

JUDGE FABRICANT: All right.

I'm going to ask one more question, if I may.

REDIRECT EXAMINATION

BY JUDGE FABRICANT:

Q. Mr. Mendoza, I'm going to try and hold up the same photo. Can you see it again?

A. Yup. Yes. That's a little clearer.

Q. You can see that there's the door to the dock.

A. Yes.

Q. A little bit on the same side. The dock is a rectangle.

A. Yes.

Q. On that same glass wall of the dock, right next to the door, there's a little metal circle.

A. I don't remember where the stairs were inside the dock or outside. I think they're inside there.

Q. Okay. So what I want to direct your attention to is -- Again, the dock is a rectangle.

A. Yes.

Q. On the other wall of the dock.

A. Yes.

Q. The wall that is not where the court officer sits is not where the door is.

A. Correct.

Q. The other wall, there's another little metal

circle. If the client is in the dock, which one of those little metal circles do you speak through?

A. The one, the one around the corner, the one in the middle that you just mentioned.

Q. In the middle, meaning along the longer wall?

A. Yes.

Q. Not the one next to the door; is that right?

A. No.

Q. All right.

A. Correct.

JUDGE FABRICANT: Thank you. Stay with us a little longer just in case anybody else wants to --

HEARING OFFICER: That was a very helpful clarification. Thank you for that.

JUDGE FABRICANT: All right. I think we're all finished.

May this witness be excused?

HEARING OFFICER: Yes.

JUDGE FABRICANT: Thank you very much, Mr. Mendoza.

THE WITNESS: Thank you.

JUDGE FABRICANT: Thank you. You have completed your testimony. Thank you.

HEARING OFFICER: At this point, we've been going for a couple hours. I think it probably makes sense to take a 10-minute break.

JUDGE FABRICANT: Yes.

Before we do that, may counsel approach side bar just very briefly?

HEARING OFFICER: Sure.

SIDE BAR CONFERENCE

HEARING OFFICER: Let me make sure. Do we have any white noise --

JUDGE FABRICANT: I think the hearing officer -- I mean the court reporter is hearing us directly, not through any device.

HEARING OFFICER: Fine.

JUDGE FABRICANT: We're having a little trouble remembering whether Shannon McDermott was sworn -- now, I am aware of SJC authority that it actually is not essential as long as they're aware of necessity to tell the truth.

HEARING OFFICER: I will swear her in as soon as she comes back.

MS. MULVEY: I thought you did.

HEARING OFFICER: I will confirm that everything she's already testified to is the truth.

JUDGE FABRICANT: Thank you. Maybe you did.

HEARING OFFICER: I'm not sure. I'll do it again. Thank you.

(SIDE BAR CONFERENCE ENDS)

(Recess taken at 12:05 p.m. Proceedings resumed at 12:20 p.m.)

JUDGE FABRICANT: Can we have Ms. McDermott come back, please.

(PAUSE)

HEARING OFFICER: Thank you, Ms. McDermott. Apologies for interrupting your testimony.

THE WITNESS: Okay.

HEARING OFFICER: It has been brought to my attention that I likely didn't swear you in at the beginning. So if I can ask you if you solemnly swear that the testimony you've already given and will be giving is the truth, the whole truth, and nothing but the truth?

THE WITNESS: yes.

HEARING OFFICER: Can you please raise your right hand and swear to that?

THE WITNESS: Yes, I do swear.

HEARING OFFICER: Okay. With that...

CROSS-EXAMINATION

BY MS. MULVEY:

Q. Good afternoon, Ms. McDermott.

A. Hi.

Q. My name is Liz Mulvey. We've never met before; is that right?

A. That's right.

Q. And can I apologize now to you for when I call you Jurgens?

A. Oh, that's fine, too.

Q. Okay. I'm going to do the best I can, but you've been Jurgens for six years. Okay.

You told the special counsel that, after kind of everything that was over, you saw David Jellinek in the front lobby of the courthouse; is that right?

A. Yes.

Q. And you said to him, I know what you did and it wasn't the right thing.

A. Yes.
Q. Did David Jellinek say to you, Shannon, what are you talking about, I told the judge the court officer was going to let him out the back door?
A. No.
Q. Did he say to you, Shannon, what you are talking about, Judge Joseph said this was okay?
A. No.
Q. Did he say, Shannon, come on, you knew what was going to happen?
A. No.
Q. Did you know what was going to happen?
A. No.
Q. What did David Jellinek do or say when you said I know what you did and it wasn't the right thing?
A. He smiled and he didn't say a word.
Q. Now, when you said to David Jellinek, I know what you did, what did you mean?
A. Helped facilitate Mr. Medina Perez leaving the courthouse.
Q. All right. And what did you mean when you said it wasn't the right thing?
A. Well, I think by that time I knew that it had been from the security door downstairs somehow

and just -- that wasn't okay to do.
Q. All right. And I think you told us on direct that you had either figured it out or somebody had told you --
A. Yeah. I can't remember how I learned, but by that time, I had learned about it.
Q. All right. By the time you learned that he went out the back door, he was long gone and hard to find; right?
A. Correct.
Q. All right. You were present at side bar for both the on the record and off the record conversation; is that right?
A. Yes.
Q. And I think you told us that in your mind they kind of blend together?
A. Yes.
Q. You said off the record was kind of a continuation of the on the record?
A. Yes.
Q. And you had trouble kind of sorting out in your mind what was on the record and what was off the record?
A. That's fair, yes.
Q. And if you didn't have a transcript, you

wouldn't be able to tell at all. Is that fair?
A. Yes.
Q. It all kind of blends in?
A. Yes.
Q. And one thing that you did remember that was new off the record was David Jellinek asking to go downstairs to speak with his client in the lockup; is that right?
A. Yes, he did ask that.
Q. That was the part you remembered as being new; is that true?
A. I don't know -- I always remembered him asking to go back downstairs. I don't think I could have told you it was on or off the record --
Q. Okay.
A. -- before seeing a transcript.
Q. Okay. So we know from the transcript that it wasn't before you went off the record, so it must have been while you were off the record; true?
A. Yes. Must have been. Yes.
Q. Now, you also told us that you don't have a real clear memory of what was actually said at side bar. Is that true?

A. True.
Q. And I'm going to ask you a little bit more in detail later. But is it fair to say that, whatever it was that David Jellinek said, you walked out the door thinking that Medina Perez was coming out the front door. Is that true?
A. I did, yes.
Q. And certainly, as an assistant district attorney, you weren't going to go out and lie to ICE, were you?
A. No.
Q. And you wouldn't be part of a plan to avoid ICE; right?
A. I would not.
Q. And so if there were a plan discussed at side bar on or off the record to help Medina Perez go out the back door and avoid ICE, you wouldn't then go out to the ICE agents and say he's coming out the courtroom door, would you?
A. I would not.
Q. You would have, if you heard anything like that, done something; right?
A. Probably.
Q. Now, if David Jellinek had said at side bar, the court officer -- if I take him downstairs, the court

officer will let him out the back door, and the judge said, yes, that's what we'll do, is there any way you would have gone out to the hall and told ICE he's coming out this door?

A. No.

Q. So is it fair to say that, without remembering exactly what was said, it wasn't that?

A. Correct.

Q. All right. And it wasn't anything that would have given you that impression; right?

A. Correct. I did not have that impression.

Q. And in fact, you have spoken with Special Counsel Fabricant, haven't you?

A. Yes.

Q. And she pretty much asked you that same question; right? Whatever was said, what did you think after it. Right?

A. Yes.

Q. And you said I thought he's coming out the front door.

A. Yes.

Q. And that's the truth, isn't it?

A. It is.

Q. Now, if somebody in that courtroom had said, either at side bar or out loud, we've made a

decision that he's going to go out the back door, that's the kind of thing you'd remember, isn't it?

A. Yes.

Q. Did that happen?

A. Not to my memory.

Q. Would you forget something like that?

A. I don't think I would have.

Q. Now, you said about Judge Joseph, in response to one of Special Counsel Fabricant's questions, you thought that she had made a misguided attempt to do what she thought was right?

A. I did say that.

Q. And you had no reason to believe, having been present at side bar, that she knew that David Jellinek was going to have him released out the back door, do you?

A. I do not.

Q. And when you say a misguided attempt to do what she thought was right, are you referring to the idea that maybe there was a way that ICE wouldn't get him?

A. Right.

Q. Okay. Now, at side bar David Jellinek was claiming very vociferously that his client was

not the guy ICE was looking for; right?
A. Yes.
Q. And certainly, no one would want ICE to take the wrong guy, would they?
A. No.
Q. That's not a good thing, is it?
A. It is not.
Q. All right. And so what Judge Joseph was actually doing was offering David Jellinek time to try to convince ICE this wasn't the guy.
A. I don't know if that's what the offer was for or not.
Q. Well, you know that that's what she had been doing all morning, right, giving more time?
A. The more time, for me, I thought was to figure out the Pennsylvania warrant.
Q. All right. But --
But not just you, but Attorney Bostwick was asking for more time;
right?
A. Correct. Yeah. Absolutely.
Q. And there was a second call and a third call --
A. Absolutely.
Q. -- and a fourth call?
A. Many, yes.

Q. All right. And all of those were with you and Attorney Bostwick; is that right?
A. I don't remember at which point Attorney Bostwick withdrew because of the private appearance by Attorney Jellinek, but Attorney Bostwick was certainly there in the morning, and at some point, that I can't recall, Attorney Jellinek came in.
Q. Well, let's see if we can try to shed a little light on that. Do you have the book of exhibits there?
A. I do.
Q. And would you take a look at Exhibit H, please. And Exhibit H is a transcript of the full day. Can you take my word for that?
A. Yes. I am with you.
Q. All right. And if you could, would you look at Page 147.
A. I'm sorry. Are we talking about within the transcript?
Q. Yes.
HEARING OFFICER: Can you give us the --
Q. The transcript page, not physical page.
A. Okay. I'm here.

Q. All right. And if we look at Line 16, the clerk is saying, and that's just, Judge, that leaves us with Mr. Perez and Attorney Bostwick, are you still, and Ms. Bostwick says I just sent a fax?

A. Yes, I see that.

Q. Do you remember that happening?

A. Not specifically but...

Q. All right. But we can tell from the transcript Ms. Bostwick was still there representing Medina Perez and she was trying to sort out the identity issue; --

A. Yes.

Q. -- is that right?

A. Yes.

Q. All right. And then Judge Joseph asked Mr. Harrington whether he needed more time. Right? Do you see that, the next line?

A. I do see the next line that says that as well.

Q. All right. And if we flip over to two pages later, 149, there's a period where Judge Joseph and the clerk are talking to Mr. Harrington; is that right?

A. Yes.

Q. And again, you would be there because you'd be

representing the Commonwealth on that case, whatever it was?
A. Correct.
Q. All right. And then if we get to Page 149, and we look at Line 18, do you see that?
A. Yes.
Q. All right. Then Ms. Bostwick is speaking again?
A. Yes.
Q. And she says, I will, and then she says, I think, Your Honor, I have an appointment this afternoon and I wanted to ask if we could have a -- I understand that the interpreter has to be somewhere as well, if maybe we could have Mr. Medina's case called at 2:15 or so, so that would give me time and then we're not just waiting, and the clerk says, at 2:15.
A. Yes.
Q. Do you recall that happening?
A. Not specifically, but it sounds right.
Q. All right. And then if we flip to Page 150, Ms. Bostwick says, somewhere, and then the clerk interrupts and says, and the interpreter's okay with that, too, 2:15, and Ms. Bostwick says, I have a medical appointment at 1:30, Judge Joseph says, not a problem, Ms. Bostwick says, so I

don't know if I'm going to be able to get back at 2:00, Judge Joseph says, not a problem, the clerk says, that's fine, court says, we'll hold it, do you have to be somewhere else today. And now she's talking to Mr. Harrington?

A. Yes, I see that.

Q. And if we slide down to Line 18, all of that happened just before 12:40 in the afternoon; is that true?

A. Yes.

Q. Okay. So does that refresh your recollection that at least as of the lunch break Attorney Bostwick was actively representing Jose Medina Perez?

A. Yes.

Q. All right. And you don't have any recollection of interactions with David Jellinek before that, do you?

A. I don't.

Q. Now, Attorney Bostwick was doing things, like she said, sending a fax, and at one point do you recall she asked for something called a Triple I?

A. That makes sense that she would.

Q. Help us out. What's a Triple I?

A. It's an out of state record.
Q. All right. And is that something a defense lawyer might want to see if they're trying to investigate identity?
A. Yes.
Q. And you understood Ms. Bostwick had some questions about her client's identity, who was he really; --
A. Yes.
Q. -- right? And appropriately she was trying to figure it out.
A. Correct.
Q. And appropriately Judge Joseph was giving her time, repeated calls, to try to figure it out.
A. Yes.
Q. And she gave her the lunch break to try to figure it out.
A. Yes.
Q. And there's nothing wrong with a judge giving a lawyer time to do his or her job; right?
A. No.
Q. Okay. Now, would you take a look at the transcript. And why don't we look at the typed version because I think it's a little cleaner. That's Exhibit G. And --

JUDGE FABRICANT: G?

MS. MULVEY: G. I'm sorry. G, like girl.

Q. And it's App 34?

HEARING OFFICER: Are we using the A or the B transcript?

MS. MULVEY: It's A.

HEARING OFFICER: So don't you want to use the B or...

MS. MULVEY: Oh, I'm sorry. Sure. Let's go to 40. I didn't realize they were in here one after the other. I apologize.

HEARING OFFICER: Thank you.

Q. At 40.

A. 40, yes.

Q. And if we look, we see 2:48, and that's the beginning of the afternoon call for Mr. Medina Perez's case?

A. Yes.

Q. All right. And the clerk says, Attorney Jellinek filed an appearance. And everybody's in open court at that point; is that right?

A. Yes.

Q. And then Attorney Jellinek asks to go to side

bar.

A. Yes.

Q. All right. And you all go up to side bar?

A. Yes.

Q. Okay. And if we look at the picture up here, is that where we all are?

A. Yes.

Q. All right. Now, you said that the judge would sort of scooch over, roll the chair over to here?

A. Yes, generally.

Q. And then you and David Jellinek would stand there?

A. Yes.

Q. All right. And there's some stairs here?

A. Yes.

Q. I don't know how tall you are. Do you climb up on the stairs?

A. I'm pretty tall. I don't remember if I stood on the stairs or not.

Q. Okay. But either way, you and David Jellinek are standing side by side at the side bar; --

A. Yes.

Q. -- is that right? And the clerk's over here somewhere?

A. Yes.
Q. All right. Now, at that point the first part of this side bar was on the record; is that right?
A. Yes.
Q. And we see Judge Joseph, is dismissed, so it's my understanding that ICE is here. That's the part that starts at side bar; is that right?
A. Yes.
Q. Okay. And we know you're there because you say yes?
A. Right.
Q. And Attorney Jellinek, again, starts saying this is the wrong guy?
A. Right.
Q. And if we continue onto Page 49, he's pleading his case that this is the wrong guy?
A. Yes.
Q. Okay. And you said, and you pointed it out, I don't think arguing ICE is really my, and that means you're not getting involved in is he the guy ICE is looking for or not.
A. Correct.
Q. All right. And David Jellinek at the end says, I think the best thing for us to do is to clear the fugitive issue, release him on a personal,

and hope that he can avoid ICE. Now, did you interpret that as meaning I'm going to let him out the back door?

A. I did not.

Q. What did you think that meant?

A. That he was going to try to figure a way for him to avoid the ICE officer, but I didn't know how.

Q. And one way would be to convince the ICE officer this isn't the guy; right?

A. Sure.

Q. He's successfully done that with the Pennsylvania warrant, hadn't he?

A. He had.

Q. All right. So, if he's done it once, he could very well think he could do it again; true?

A. True.

Q. And if we look at what Judge Joseph says is, the other alternative is, if you need more time to figure it out, hold until tomorrow.

A. That is what it says, yes.

Q. And did you understand that Judge Joseph was once again offering this defendant's lawyer time to do whatever he could on the issue of identity?

A. Yeah.
Q. All right. And again, nothing wrong with that, is there?
A. Not, not necessarily, no.
Q. All right. And she says, hold until tomorrow?
A. Yes.
Q. All right. And then they say, if he's bailed out from Billerica, ICE will pick him up, and she says, ICE will pick him up?
A. Right.
Q. And what all that means is, Billerica is the overnight pretrial place?
A. Yes.
Q. Is that where they send them?
A. Yes.
Q. All right. And if somebody goes to Billerica and posts bail, they walk out the door but ICE can take them right then; right?
A. Right.
Q. Whereas if they bail, et cetera, they don't make bail, they're held in custody and they're brought back for the next appearance.
A. Correct.
Q. And so if he were held at Billerica overnight and brought back in the morning, you'd be there;

right?
A. Yes.
Q. David Jellinek could come back.
A. Yes.
Q. ICE could come back.
A. Yes.
Q. And we can pick up where we left off and see if David Jellinek had had any luck convincing ICE this wasn't the guy; right?
A. Yeah.
Q. All right. And there would be nothing wrong with that, would there?
A. Well, holding someone without bail on an ICE detainer I don't think is part of the bail consideration. So that's -- What I thought was, maybe we were still talking about the Pennsylvania warrant. I don't recall. It could have been both.
Q. Okay. But there's a couple of parts there. First, if his lawyer says, yes, I'd like you to hold him, there's no problem; right?
A. It depends what the reason is to hold someone. You need a reason.
Q. Well, one reason, if you're talking about bail, is to make sure he's going to show up for the

next appearance.
A. Absolutely. Yes.
Q. And one of your roles as the district or assistant district attorney is to make a bail request?
A. Yes.
Q. But the judge isn't bound by your request, --
A. No.
Q. -- is she?
A. No.
Q. And if you say, Judge, I want bail, the judge can say, no, I'm going to release him on personal?
A. Absolutely.
Q. And vice-versa. You could say I'm not asking for bail and the judge can say I have concerns I'm going to set bail.
A. Sure.
Q. That's the judge's role.
A. Absolutely.
Q. And one of the things that might make a defendant likely not to show up is if he's not the guy everybody's talking about.
A. Sure.
Q. And so if you had concerns about or if a judge

had concerns about a defendant's identity, it wouldn't be unreasonable to impose bail to make sure he shows up, whoever he is.

A. Right.

Q. And that would have been a reasonable thing, again, for Judge Joseph to be thinking, wouldn't it?

A Yes. To set bail, yup.

Q. Now, she then says, what if we detain him; right?

A. Yes.

Q. And did you understand, again, that meant kind of hanging onto him while David Jellinek tried to sort things out?

A. Yes.

Q. All right. And then David Jellinek basically said, no, I don't want any of that to happen; right?

A. Yes.

Q. Okay. And he asked to go off the record.

A. Yes.

Q. He didn't say why?

A. No.

Q. You didn't know why?

A. No.

Q. And you don't anticipate Judge Joseph would have known why.

A. No. I can't speak to that. But I don't know why.

Q. All right. And there was an exchange and the clerk turned off the recording.

A. Yes.

Q. The clerk didn't say, Judge, what are you doing, there's a rule against this.

A. No.

Q. You told us you're a clerk magistrate now.

A. Yes.

Q. Could you tell us what that is in the Massachusetts system?

A. Sure. An assistant clerk magistrate, we have a number of roles. One of them is to assist in the courtroom session, facilitating calling cases on the record. That's one of many things. That would be what Mr. Okstein was doing on that date. We also order search warrants, do applications for criminal complaints, small claims, Many, many other things. But one of the roles is to assist in the courtroom, calling a list.

Q. Sort of half courtroom clerk and half type of

judge?
A. Sure.
Q. All right. And when you're sitting as a clerk magistrate, one of the things you do, try to help the new judge?
A. Yes, sometimes.
Q. And do new judges sometimes say --
A. Sometimes.
Q. -- how do I handle this?
A. (Witness nods head).
Q. And you know that's something that happens between clerks and judges; right? Clerks who are experienced try to help new judges not to do something they shouldn't do.
A. Sure.
Q. And Clerk Okstein didn't say, no, you can't go off the record, did he?
A. No.
Q. Then there was this 52 seconds off the record; right?
A. Yes.
Q. And the only firm memory you have is David Jellinek asking to go speak with his client downstairs?
A. In terms of like a statement, yes.

Q. Okay. Now, you've been dragged into this and asked questions on a number of occasions; is that right?

A. It is.

Q. All right. Now, the first time you were interviewed by somebody from the U.S. Attorney's office; is that right?

A. Yes.

Q. And if I suggested to you that was in October of 2018, does that sound about right?

A. Yes. That could be right.

Q. And that was a phone call?

A. I don't remember, but probably.

Q. Okay. And at that point did you know that David Jellinek was talking to the U.S. attorney's office?

A. I did not.

Q. Did you know that he -- Well, he hadn't yet. You didn't know anything about his interactions; is that right?

A. I did not.

Q. Did you know anything about Clerk Okstein's interactions with the U.S. attorney's office?

A. I did not.

Q. And do you recall telling the U.S. attorney in

October of 2018 that you remembered the defendant's attorney asking at side bar to speak to his client in the lockup and thinking that it was odd?

A. Yeah, that sounds, that sounds accurate.

Q. Do you remember at that point saying anything about a plan or anything like that?

A. I don't recall.

Q. Okay. And then you had another interview with the U.S. attorney's office; is that right?

A. At some point, yes.

Q. And this was January 9th of 2019. Does that sound about right?

A. Yes. Yes, it does.

Q. And you went there?

A. I did.

Q. And at this point you had counsel representing you?

A. I did.

Q. All right. And you were asked again some questions about the side bar?

A. Yes.

Q. And you said at this point that you found the side bar discussion weird or sketchy. Does that sound like something you would say?

A. Yeah, I guess so, yeah.
Q. Okay. And that Jellinek and Joseph discussed options to avoid defendant being turned over to ICE?
A. Yes.
Q. And was that the bail and the detainer and the holding him overnight?
A. Right.
Q. Is that what you meant by that?
A. I believe so, yes.
Q. You weren't suggesting that you heard David Jellinek say, well, why don't we avoid ICE by taking him out the back door?
A. No.
Q. And the next day you testified to the grand jury; is that right?
A. Yes.
Q. All right. And is it fair to say that your memory of that side bar was probably better in January of 2019 than it is in June of 2025?
A. Yes.
Q. All right. And did you tell the grand jury at that point, so I don't have a memory of what was on and off the record, but having heard the recording now, what else was discussed at side

bar was Attorney Jellinek's request to have Mr. Medina Perez brought back downstairs to lockup, there was also a short discussion and, again, I remember zero direct quotes, but there was the continued discussion between Judge Joseph and Attorney Jellinek of sort of what can we do, and I just have a memory again, I can't remember any direct words of Attorney Jellinek, but saying something to the effect of, is he all set, I have a plan, I don't remember him saying I have a plan, but it was the gist and it was that -- that is what I got from their exchange was, you know, what should we do, and he is like I've got it under control, that sort of thing. Again, I don't remember any words, but that was the impression that I was getting at side bar, and after that is when he asked still at side bar if his client could be brought back downstairs to speak with him.

A. Yes.

Q. Does that sound like the most accurate you're going to do?

A. It's a lot of words. But yes, that is what I said.

Q. And certainly, nothing about any plan or I've

got it, meaning I'm going to get him out the back door.

A. Right.

Q. Now, in terms of going back down to speak to his client -- Have you ever been a defense lawyer?

A. No.

Q. Okay.

A. Actually, one case, for about a week.

Q. Did you have trouble finding a place in the courthouse to have a private talk with your client?

A. No. Because I had been an ADA in that courthouse.

Q. Okay. Well, for the rank and file, there aren't a lot of private places to speak to a defendant, are there?

A. It depends on the courthouse, but that's fair.

Q. In Newton. I'm sorry.

A. There's actually conference rooms out in the hallway.

Q. There's a conference room?

A. Yeah. I think there might be one.

Q. But, for example, if you're in a courtroom, and you need an interpreter, there's not really a

good place to huddle and have a private conversation.

A. In the courtroom, no. It's small.

Q. Okay. And everybody knew that ICE was in the front hall, --

A. Yes.

Q. -- is that right, --

A. Yes.

Q. -- waiting for Mr. Medina Perez?

A. Yes, I believe so.

Q. And would it be a legitimate concern that, if he walked out the doorway with his lawyer, they might not be quite as respectful of the attorney/client privilege and they might not give him a chance to talk to his counsel?

A. That's fair.

Q. And so there would be a legitimate reason to think, well, we don't want to walk out in the hall because he may get grabbed before I get a chance to talk to him.

A. Maybe.

Q. And that leaves the lockup, doesn't it?

A. It does, yeah.

Q. There wouldn't be really any other place he could go.

A. Well, there was no one else in the courtroom but...
Q. Well, there was one more matter, wasn't there?
A. Oh. I don't remember. I don't remember there being anything else, but there could have been.
Q. If you look at the transcript --
A. If the transcript says there was, then there may have been another one.
Q. All right. And his friends were there? Do you remember --
A. I believe there was one person there.
Q. Okay. And he had some property in the lockup?
A. Yes.
Q. All right. And so sometimes defendants would go down and get their own property?
A. Not in my memory but... That's just my memory.
Q. Not in your month there?
A. Yeah. Exactly.
Q. Okay. Now, in the month that you were there or in the time that you were there, had you had ICE take into custody any other defendants?
A. I don't have a memory of, at Newton, that happening prior to this case.

Q. Okay. So fair to say you didn't have any experience with how or where ICE did that in Newton?
A. Correct.
Q. Were you, as an assistant district attorney, familiar with something called a Lunn policy?
A. I am not.
Q. As a clerk magistrate, are you familiar with a policy about how defendants should be taken into ICE custody?
A. We just got a new one. I don't know what it's called. But I'm familiar with it.
Q. Okay. And did you know that there was a prior version?
A. I'm sure that there was.
Q. If you take a look at page -- I'm sorry -- Exhibit B in the book in front of you.
A. Okay.
Q. And this is a transmittal memo. Do you -- As a clerk magistrate now, are you on the receiving end of these sometimes?
A. Yes.
Q. All right. And it says to judges, clerks, registers, chief probation officers, and all staff?

A. Yes.
Q. From the chief justice of the Trial Court and court administrator?
A. Yes.
Q. And it says policy and procedures regarding interactions with the Department of Homeland Security?
A. Yes.
Q. Is that similar to the one that you said you just got a new one?
A. Yes.
Q. All right. And if we turn to App 7, which is the third page.
A. Okay.
Q. Do you see a Section 3, DHS? That's Department of Homeland Security?
A. Yes.
Q. Officials taking custody of individuals at a courthouse?
A. Yes.
Q. And Section A is individuals over whom the Trial Court has custody?
A. Yes.
Q. All right. And it says, consistent with Chapter 2, Sections --

A. Uh-huh.
Q -- 14 and 15 of the court officer manual --
A. Yes.
Q. I assume that's not something you had; --
A. I did not.
Q. -- is that right? Okay. When an individual who was brought into court in custody and subject to release after his or her court proceeding, that's Mr. Medina Perez; right?
A. Yes.
Q. All right. Court security personnel shall process that individual out of lockup in the normal course regardless of whether the individual is subject to a civil immigration detainer or warrant; right?
A. Yes.
Q. Okay. And then it says, if, during the process, processing of an individual subject to release out of the courthouse, -- Again, that's Mr. Medina Perez?
A. Yes.
Q. -- a DHS official is present in the courthouse and seeks admission to the courthouse's holding cell area in order to take custody of the individual. Now the holding cell area, is that

what we've been calling the lockup?

A. Yes.

Q. Okay. Court officers shall permit DHS officials to enter the holding cell area; right?

A. Yes.

Q. And what that means is, if the DHS officials, if ICE wants to go to the lockup, they may.

A. Yes.

Q. And that's exactly what Judge Joseph said.

A. I don't remember. I don't recall what --

Q. Do you recall special counsel reading you, when the clerk said ICE is here, they want to visit the lockup, and she said that's fine, but they can't come in here?

A. Oh, yes.

Q. All right. And so she was complying with that policy, wasn't she?

A. Yes, yes.

Q. And if we keep going there, it says they can enter once trial court personnel had finished processing that individual out of the court security personnel custody.

A. Yes.

Q. If a security department supervisor determines that the DHS official would otherwise take

custody of the individual inside or immediately outside of the courthouse. And again, that's Mr. Medina Perez; right?

A. Yes.

Q. All right. And then the last paragraph there says, to the extent possible, court security personnel should require that DHS officials transport any individuals taken into custody through the prison or transport entrance and avoid taking the individual through the public areas of the courthouse. Right?

A. Yes.

Q. And the prisoner transport entrance is this sallyport that we've talked about?

A. Yes.

Q. And you knew that was there. There was a place where vans would pull up and they take the people in custody directly from the van 5 feet to the door?

A. Yes.

Q. And that would be called the sallyport? Does that sound --

A. Yes.

Q. And what this policy is saying is, if ICE is taking somebody, they should go out through that

door; right?
A. Yeah, that is what this says.
Q. And that you understand is a security thing, it's not great to have ICE try to take custody of people in public areas?
A. Right.
Q. Because you just don't know what's going to happen?
A. Sure.
Q. Okay. And so in terms of Mr. Medina Perez going down to the lockup, that's exactly where, per the policy, he was supposed to go, isn't it?
A. I think if he was still in custody, yes.
Q. Okay. They were supposed to process him for release down there?
A. Well, I'm just reading the section, any individual whom the Trial Court has custody.
Q. Right. And it says, people who are brought into court in custody and is subject to release.
A. Okay.
Q. Right. That's him; right?
A. Yes, yes.
Q. Okay. And ICE should have been permitted to go down there, should have been required to go down there and take him; right?

JUDGE FABRICANT: I think this calls for an interpretation of the policy.

A. I'm not -- I'm trying to read it quickly.

Q. All right. The last paragraph says, to the extent possible, court security personnel should require that DHS officials transport any officials taken into custody through the prisoner transport entrance?

A. That is what this says.

Q. All right. And so if ICE had been permitted to go down to the lockup, as they had asked, all of that would have happened; right?

A. I would assume so.

Q. And it wasn't Judge Joseph that prevented them from going to the lockup, was it?

A. From going to lockup.

Q. She said that's fine; right?

A. If that's what the transcript says. I don't remember this part at all; so...

Q. Okay. All right. Now, the rest of the appearance for Mr. Medina Perez was pretty routine; right? He was arraigned and he was given drug warnings?

A. Yes.

Q. And then he and David Jellinek and the

interpreter went downstairs to the lockup?
A. Yes.
Q. And you gathered up your stuff and at some point you went out to the lobby?
A. Yes.
Q. And you saw the ICE agent there.
A. Yes.
Q. And you told him he's coming out this door.
A. Yes.
Q. And you stood there and you waited with him.
A. Yes.
Q. And at some point you thought, gee, this is kind of taking a long time; --
A. Right.
Q. -- right? And at that point you asked somebody to go check.
A. Yeah. I don't remember if I asked him to check or I may have -- I just remember it was Michael Owens, the advocate, and I was just kind of asking any other doors.
Q. When you say "advocate," you mean the victim witness advocate?
A. Yes.
Q. Is that somebody who works with your office?
A. Correct.

Q. All right. Then you're standing there and David Jellinek comes out with his property bag?
A. Yes.
Q. And everything kind of gets disrupted. The ICE agents weren't happy?
A. Oh. Yes.
Q. Somebody goes running around to the back. Do you recall that?
A. That sounds like probably what happened. I don't specifically recall.
Q. And at some point, after you figured out what had happened, you called your supervisor; --
A. Yes.
Q. -- is that right? And the reason you called your supervisor was because of this escape; right?
A. Yes.
Q. Okay. And you were actually asked a question about that call at the grand jury.
A. Yes.
Q. Do you recall that?
A. Yes.
Q. And did you say -- You were asked, a member of the grand jury wants to inquire as to why it is at that time that you -- Where am I? With the

context there. A member of the grand jury asked, getting back to the side bar conference when the recording was turned off and you had a feeling of discomfort, a member of the grand jury wanted to inquire as to why it is at that time that you did not go and immediately contact the supervisor about the recording shut off and the discussion about this way to get Medina Perez out while avoiding ICE. And you said probably because I didn't think he was going to escape, I thought he was going to get released and go with ICE and then it would be just sort of another day, and that was weird but, well, you know, it happened. So once it didn't happen, I immediately called my boss.

A. Yes.

Q. Is that true?

A. Yes.

Q. All right. And so up until the time you learned he had gone out the back door, it was just, you know, kind of an odd day; right?

A. Yeah. It was something I didn't feel I had to immediately report.

Q. All right. And once he went out the back door, that changed everything, didn't it?

A. Yes.

MS. MULVEY: May I have one moment?

(PAUSE)

MS. MULVEY: I have nothing else. Thank you.

JUDGE FABRICANT: Very briefly. Very briefly, Ms. McDermott.

REDIRECT EXAMINATION

BY JUDGE FABRICANT:

Q. You said, in response to one of Ms. Mulvey's questions, that an ICE detainer was not part of bail conditions. What -- Taking your mind back to the spring of 2018. What were legitimate considerations for an ICE consideration, condition, what were legitimate considerations for setting bail under the law as it stood at that time in Massachusetts?

A. So I mean, what I would consider in asking for bail is default history, the sentence that they might be facing, so their motivation not to return to court, whether they had other open cases, whether they had a strong defense. There's a number of factors.

Q. So had there been a decision of the SJC a few

months earlier regarding the issue of what was proper to consider in setting bail?

A. Yes. Commonwealth versus Brangan.

Q. Can you tell us the essence in your view what the teaching of that case was?

A. It was that -- Bail is meant to ensure the Defendant’s return to court. For instance, a DA can argue dangerousness associated with bail. One way it affected my job.

Q. And just to make sure we've got it here on the record. That's Commonwealth versus Brangan,

A. Brangan

Q. B-r-a-n-g-a-n?

A. Yes.

Q. And the essence of the holding was the legitimate purpose of bail is to ensure the defendant's return to court.

A. Correct.

Q. And not other things.

A. Yes.

Q. Now, if somebody has an ICE detainer, and ICE takes custody of the person, person -- ICE might bring the person back to court or might not.

A. Sure.

Q. Assuming it's the right person for ICE to take,

ICE might bring the person back and might not. And if it's not the right person for ICE to take, ICE might bring the person back and might not; correct?

A. Correct.

Q. So on that issue of how ICE relates to whether the person is going to appear, it doesn't matter whether it's the right person or it isn't the right person, does it?

A. I guess not. What I'm -- It's not part of my calculus in requesting bail.

Q. So you as an assistant district attorney would not take into consideration whether there was or wasn't an ICE detainer, whether the person was or wasn't the right person for an ICE detainer. That wouldn't be part of your consideration as to whether you requested bail or not.

A. Correct.

Q. And in your view, again, back in the spring of 2018, was that a legitimate part of consideration with respect to bail?

A. I mean, the view on ICE and detainers in the courtroom has changed so many times. I mean, our office has always said it's not part of the district attorney's job to consider that, and

what the judge's policies are, I don't know. I just know that, you know, for the criminal case, what I consider when I'm asking for bail and other factors.

Q. The criminal cases that you prosecuted, criminal charges that you were prosecuting, were the focus of your attention; correct?

A. Correct.

JUDGE FABRICANT: Okay. Thank you.

I have nothing further.

MS. MULVEY: I have nothing else. Thank you.

JUDGE FABRICANT: May this witness be excused?

HEARING OFFICER. Yes. Yes.

Thank you very much.

HEARING OFFICER: Given the hour, does counsel agree this is a good time to break for lunch?

JUDGE FABRICANT: Yes.

HEARING OFFICER: So we'll resume at 2:00. Thank you.

(Luncheon recess taken at 1:03 p.m.

Proceedings resumed at
2:01 p.m.)
HEARING OFFICER: Good afternoon.
I'll defer to you, Special Counsel, to call your next witness.
JUDGE FABRICANT: Thank you.
And the Commission calls Lawrence Okstein.
(PAUSE)
JUDGE FABRICANT: While he's coming to the witness stand, Mr. McInerney, counsel have now agreed that the whole set of photographs that's in Appendix U should be received in evidence with your permission.
HEARING OFFICER: Absolutely. Got it, Judge.
JUDGE FABRICANT: Thank you.
And there's another photograph --
MR. HOOPES: Yes. And I will bring that in the morning to add. So that will be the collection of photographs.
HEARING OFFICER: That's fine.
JUDGE FABRICANT: Thank you.

MR. HOOPES: And they all come from one set of photos. This one was missing.

HEARING OFFICER: Understood.

Thank you very much.

Would you please raise your right hand.

LAWRENCE JOSEPH OKSTEIN, SWORN

HEARING OFFICER: Thank you. Please have a seat.

DIRECT EXAMINATION

BY JUDGE FABRICANT:

Q. Good afternoon.

A. Good afternoon.

Q. Tell us your name, please.

A. Lawrence Joseph Okstein.

Q. And what is your occupation?

A. I am the first assistant clerk magistrate at the Newton District Court.

Q. And going back through your career, can you give us a brief overview of your professional history?

A. Sure. From 1993 to 1995 I was an assistant district attorney in Norfolk County, with William Delahunt, from 1995 to 2014 I was in private practice, general law practice, and then

from December 29th of 2014 to present I've been in the Newton District Court, first as an assistant clerk magistrate and now as the first assistant clerk magistrate.

Q. And what's your role as first assistant clerk magistrate?

A. So I conduct criminal show cause hearings, so when the police are seeking criminal complaints against individuals, I hold hearings to determine whether there is probable cause to issue a criminal complaint, I conduct small claims trials, I handle CMVI or civil motor vehicle infractions hearings, I process appeals to the various courts within the divisions of the district court. I also issue search warrants upon finding probable cause, arrest warrants upon finding probable cause, and that's generally -- and I sit in the session to assist the judge when the session clerk is otherwise unavailable.

Q. And you said that before you became first assistant clerk, you were an assistant clerk. When you were an assistant clerk, were you more frequently sitting in the session?

A. I, again, we have a session clerk. So we are a small court. If the session clerk is unavailable due to sickness, vacation, or any

other reason, I would sit in the session to assist.

Q. Okay. I'm going to ask you to give us a general description of the physical layout of the building and the courtroom. We're going to put up some photographs to assist in this. So let's start with Photograph 509, Page 509, Appendix U.

And Mr. Okstein, in front of you on the witness stand is a binder that has a set of exhibits that have been received in evidence. The photographs are at Tab U. So you can look at them there or you can look at them on the screen, whatever is easier. And there are page numbers in the upper right-hand corner, and those are the page numbers that I'm going to refer to.

So what do you see here in Photograph Number Page 509?

A. So -- Page 509. Are they marked page numbers?

Q. In the upper right-hand corner, there's a red number. Actually, in the book --

A. I see the numbers. Okay.

So on Page 509 I see what appears to be the first session of the Newton District Court.

Q. And what are we looking at from the perspective of this photograph?

A. So you're looking at a shot of where the judge sits, which is the far back, with the seat, what appears to be the false bookcase, if you will, in the back with two flags, and then in front of where the judge sits is where the session clerk or whoever's covering for the session clerk would sit, and then the litigants would be at the table that you see where -- with the two chairs, and then if there was a custody, the person in custody would be where you see the glass enclosure up close.

Q. Is that referred to as the dock?

A. The dock, yes.

Q. And let's pull up Photograph Page 506. And what do you see here?

A. So Page 506 is a picture, a photograph of the entranceway to the clerk magistrate's office, so the first floor of the Newton District Court.

Q. If you're coming out -- Looking at this photograph, if you're walking out the door of the courtroom, the public door of the courtroom, where are you in this photograph?

A. So you can just make out the bench that's on

the left-hand side. The door to the first session is just past that bench, on the right-hand side.

Q. And so you'd be coming out and turning to your left to go into the clerk magistrate's office if you're coming out of the courtroom?

A. Yes. Yes. If you walk out of the first session courtroom, you walk out and you turn to your left, that's what you would see. This is the view.

Q. If you're in the clerk's office, in your office, and you're going into the courtroom, is there another way to get there?

A. There is. So if you walk through the clerk's office, there is a back entranceway into the courtroom.

Q. And does that lead to a secure door on the side of the courtroom?

A. Yes. So the only people that are allowed back there are court personnel, court officers, clerks, judges. And so, yes, that was the secure area back there.

Q. And do you need a security pass to open that door?

A. Yes, you need a pass and you put it up to the

little reader.

HEARING OFFICER: Could I ask that you speak a little closer to the microphone, sir.

THE WITNESS: Sorry. Yes.

HEARING OFFICER: Thank you.

JUDGE FABRICANT: It is partly probably because I'm having him turn to the photograph.

Q. Let's bring up Photograph 512, Page 512. So what do you see here?

A. So on Page 512 you have a photograph of the exit way of the first session. So if you were leaving the first session, you would walk through those double doors and into the main corridor where you just saw the clerk's office to your left.

Q. And what are those benches that you see back there behind the bar?

A. So the benches are for the public, it's where the public would sit, or if there are observers of the court, if you will.

Q. And let's just bring up Photograph 513. What's that?

A. So Page 513 is a photograph of the dock, if

you will. So that's where people in custody would sit, where there's a little bench there, and stand before the judge, they approach the glass that faces the bench so the judge could hear them.

Q. And let's bring up 512. Is this the same one we just looked at?

Do part of your responsibilities, if you're serving as the clerk in the courtroom, do part of your responsibilities include managing the recording system?

A. Yes.

Q. And back in the spring of 2018 -- And now everything else I'm going to ask you is going to relate to April of 2018, which I realize is seven years ago, but I'm going to ask you to put your mind back to that time frame.

A. Sure.

Q. In that time frame, what kind of recording system did you have?

A. It was called JAVS. I'm not sure what JAVS stood for. It's J-A-V-S. It was -- That was the recording system that we used.

Q. Has that since been replaced by something else?

A. It has. It has.

Q. And the new system, what's that called, For
A. I believe it's called FTR, For the Record.
Q. So focusing on JAVS. If you needed to get access to a recording after a proceeding, what did you have to do?
A. So what I personally did was ask someone in our office who was well versed in the technology side to make a copy of a proceeding, they would come into the courtroom, they could pull up the proceeding through JAVS, make a recording on a CD or disc, if you will.
Q. So you'd get it in the form of a CD?
A. Yes.
Q. Nowadays, with the FTR system, what do you do?
A. Now it's all online. You request a copy online, pay for it online.
Q. And for you, if you want to listen to something --
A. I go on For the Record, I have a pass, and I can listen to the proceeding that was requested.
Q. So turning to April 2nd of 2018. Before that day, had you had experience with ICE detainers?
A. I had seen them before, yes, so I'd seen both detainers and warrants.
Q. And how often?

A. It felt like they were coming fairly regularly around that time frame. So I'd see them a few times a week.

Q. And if you were serving as the clerk for the session, would you get the detainer?

A. Yes. They would make their way to me. Typically, I believe the court officer probably got them from the police. I'm not sure how it came to be in the court's possession. But someone would give it to me, I would then distribute a copy if I had it to the Commonwealth, defense attorney, and I would let the judge know that we have one.

Q. And up to that day, had you had experience with ICE taking custody of someone from Newton District Court?

A. I had seen individuals taken into custody outside of the courthouse by ICE.

Q. Outside the courthouse. Outside what part?

A. The front. Outside the front door, on the street.

Q. And prior to that day, and it was 2018, had you had -- had you seen ICE going to the lockup in the Newton District Court?

A. I personally had not seen that.

Q. Were you aware of that happening?

A. I was not aware if it happened or not. I -- Typically, I wasn't in the courtroom. But I had never heard of it happening. I've never seen it happen.

Q. On that day, were you working as a clerk in the courtroom with Judge Joseph?

A. I was. The session clerk was unavailable, so I was covering.

Q. During the course of the day, were there times when things were active in the courtroom and then breaks?

A. Yes. We would call the list to start the day, find out who was present, who wasn't present, the judge would get a handle on how much business there was and how much time she or he needed to allot to the cases, so -- and then we would take a break so that the attorneys could talk to their clients or the DA's office or -- the judge would come back out when the session clerk, or in this case, myself would tell the judge that we had business for her to deal with.

Q. And were you in and out of the courtroom --

A. I was.

Q. -- during that time?

A. I was.

Q. During the course of that morning, did you see an ICE officer in the courtroom?

A. I did. I did see an ICE officer in the courtroom.

Q. And how did you become aware that that person was an ICE officer?

A. So I think I first saw the ICE officer in the hallway. I can't remember precisely how I knew it was him, he was an ICE officer. Typically, they had a tag on or they identified themselves, introduced themselves. But I don't recall on that day how I knew, but I knew that the gentleman, one of the gentleman sitting in the benches area that I pointed out in the courtroom was from ICE.

Q. Who was the first justice at Newton District Court at the time?

A. Judge Mary Heffernan.

Q. And was she the judge who would be sitting there most often?

A. Yes.

Q. Did she have a practice regarding ICE agents in the courtroom?

A. So it was her practice, my understanding of the practice, was that, if the ICE officer was present in the court indicating that he or she

wanted to take custody of a litigant, that they would -- she would ask that they wait outside the courtroom so that they're not in the courtroom, and that if they're going to take custody of the person, that they do it outside the courtroom, so it's not going to interfere with the business of the court.

Q. And would she speak to the ICE officer --

A. No.

Q. -- or would she have you do it?

A. No. She would let the session clerk know, or if I was in the session, she would tell me to let the ICE officer know that that was the preference of the court.

Q. And was that preference, that practice, ever put in writing anywhere?

A. No. Each judge that came in had their own way of doing things, so to speak. So it wasn't something that other judges had to follow, but some judges did follow it and some judges had their own idea of how things should go, and we would follow that judge and whatever that judge wanted.

Q. So, on April 2nd, 2018, --

A. Yes.

Q. -- you're serving as the session clerk, Judge Joseph is sitting in the first session courtroom. Was Judge Heffernan in the building that afternoon?

A. No, Judge Heffernan was not present on April 2nd, 2018.

Q. Did you talk to Judge Joseph about ICE being there?

A. I did. We had a conversation about the ICE officer being present in the courtroom.

Q. And did you have a conversation with her about Judge Heffernan's practice?

A. I did. I did.

Q. Tell us that conversation as much as you can.

A. So I spoke to Judge Joseph, and I let her know that there was an ICE officer in the courtroom, and we talked a little bit about it. Judge Joseph -- I asked her how she wanted to handle the situation, and she in turn asked me what Judge Heffernan's custom was, that she wanted to follow whatever Judge Heffernan did typically, and I advised her what Judge Heffernan did typically, and she said that's what we want to do here today.

Q. Do you know when in the course of the day that

conversation occurred?
A. I think it was probably a little past 10:00 a.m., maybe, or -- around that time, but I'm not positive of the exact time.
Q. Did you have one conversation with her or more than one conversation about ICE and how to handle ICE being there?
A. I believe we had just that one conversation where I just wanted -- I knew that, you know, she was fairly new to the bench, and I wanted to inform her of the ICE officer, and I think she was trying to make a reasonable decision, so I think following the first justice was a way that...
Q. And did you at some point communicate with the ICE officer what you understood to be the preference of the court?
A. I did. After I left Judge Joseph, I walked to the ICE officer and let him know the preference of the court was that he, if he intended to take custody of the individual he was there for, that it was preferred to do so outside of the courtroom.
Q. And did you give him direction or make a request to him regarding where he would physically be?

A. He asked should he wait in the hallway. I said that's fine, you can wait in the hallway. I think he asked me about which door the person would come out of, and I just pointed to the front of the building, which is right in the hallway. And he said, okay, I'll wait out in the hallway.

Q. At some point later in the day did you have further conversation with the ICE officer?

A. Yes. I had -- So toward the very end of the day, so late, later in the afternoon, almost toward the ending time of court, he asked me if the defendant was going to be released and go to lockup to, or downstairs in the basement to where the cells are, to get, to get the person he was interested in taking custody of, and he asked me to ask the judge if he could do that.

Q. Did you tell him you would ask the judge?

A. I did tell him I would ask the judge.

Q. We're going to come back to that. At this point what I want to do is play the recording of the afternoon call of the Medina Perez case.

A. Okay.

Q. So we're going to play that recording. What you have in front of you, in the binder in

front of you is a transcript, which is at Appendix G and starts at Page 40 in Appendix G. So you can turn to that. We'll also have the transcript on screen. So you can refer to the screen or binder in front of you.

(RECORDING PLAYING)

Q. So in this first clip, counsel says he wants to go to side bar and not to wait for his client. Is that your understanding of what happened?

A. That's my understanding, yes.

Q. Is that your memory of what happened?

A. That is my memory.

Q. Do they at that point go to side bar?

A. They did.

Q. The two attorneys and the judge?

A. And I believe someone was present from probation as well.

Q. Okay. And would that often happen that –

A. Yeah. Someone from probation-- they often changed out who was there during the lobby -- during these little conferences. So one person could be there and then leave and another probation officer. But usually probation is somewhere in that mix.

Q. When they were at side bar, what were you doing?

A. I was marking cases, cases that we had

already done, so I was filling out the docket sheets, next dates, what had happened in the court proceeding, attorneys were asking me for dates or, you know, whispering to me about something, so I was really taking care of what I needed to do from a clerk's perspective.

Q. Were you paying attention to the conversation at side bar?

A. No.

Q. All right. We're going to play the next clip.

(RECORDING PLAYING)

Q. So that conversation that appears in the transcript and we heard on the recording, although it's a little difficult to hear, until we get to the point where the judge says, are we on the record, did you hear any of that conversation?

A. No.

Q. And then when she said, are we on the record, the first time she said that, did you hear her say it?

A. I think I wasn't paying attention, so I asked her to repeat herself, because I just wasn't paying attention.

Q. And then the transcript indicates you said,

what's that. Is that your memory of --
A. Yes. That was my way of asking what happened, what she wanted me to do because I just wasn't paying attention.
Q. And then, according to the transcripts, she says, are we off the record. You say, no, we're on the record. And then Mr. Jellinek says, can we go off the record for a minute.
A. Yes.
Q. Had you had previous experiences in District Court with going off the record?
A. Do you mean Newton District Court specifically or just in general?
Q. Well, let's start with Newton.
A. So I think that there were other judges that would go off the record to greet an old friend or to talk about something that was personal. So that happened on occasion. And from my experience in Newton, it didn't happen a tremendous amount, but it did happen. Different judges coming into the court.
Q. Did you have experience in Newton with judges having conferences off the record about the substance of a case or about the matters in a case?
A. No. Well, typically, it was to discuss

something a little -- something personal, personal to the judge and whoever they were talking to.

Q. Meaning personal to the lawyers, or --

A. Yeah, personal to the lawyers. So if they had an old college roommate or a friend or somebody they hadn't seen in many, many years, and they were appearing in Newton and they wanted to say hello or ask about their family, they didn't want that to all be part of the tape recording , so they said could you shut that off for a second, they say hello, and put it back, they ask that it be back on.

Q. Going back earlier in your career to when you were a new lawyer in your earlier years of your law practice.

A. Uh-huh.

Q. Had you had experience with conversations with judges off the record?

A. Yes. As a practitioner, I definitely had experiences with judges more often, because I practiced with my father who had been a practicing attorney for 50 years, so a lot of judges knew him or knew my mother and they wanted to say hello or ask how they were or something

like that. So oftentimes it was much more common. It's not common now. But it was common that a judge would say, hey, let me ask you a couple of questions and it would all be not taped.

Q. And back in those early years of your career, had you had experience with substantive conversations off the record?

A. Only in lobby conferences. So going back to the lobby conferences, which was earlier in my career, they were not tape recorded. It would be in a lobby of a judge, the judge, the prosecutor, usually a criminal defense, the defense attorney. And oftentimes, a judge would have somebody else just sit in the room to make sure that there was somebody else in the room other than the defense attorney and the prosecutor. But those weren't taped. And then at some point they started to recommend that those conferences be taped, so judges would have tape recorders and tape the lobby conference.

Q. And in the 2018 time frame, April 2nd of 2018 frame, in particular, were the judges doing lobby conferences off the record that you knew of?

A. No, not that I'm aware of.

Q. And were judges doing other kinds of conferences other than what you've described off the record that you knew of?
A. Not off the record. Sometimes they would hold side bar -- conferences but on the record in the courtroom.
Q. On the record.
A. On the record, right. But --
Q. Were you aware of a rule about recording?
A. I wasn't at the time this all happened. I of course now am aware.
Q. And when the judge asked you to go off the record, what did you do?
A. I went off the record.
Q. And did you have any concern about that at that point?
A. Not at that point, no.
Q. When you went off the record, when you turned off the recording, and the judge and the lawyers were talking, what were you doing?
A. I was just marking my cases and dealing with the clerk -- clerical part of my job, of being in the courtroom, marking paperwork and --
Q. Were you listening to their conversation?
A. No.
Q. Did you hear any of their conversation?

A. No.
Q. And then at some point did you go back on the record?
A. I did.
Q. And let's play the back on the record part.
(RECORDING PLAYING)
Q. Mr. Okstein, if you look on Page 42 of the transcript, and you go about a third of the page, about a third of the way down the page, Mr. Jellinek says, I would ask that he, I believe he has some property downstairs, I'd like to speak with him downstairs if I may. Was that something that was usual in your experience in the first session in the District Court?
A. Well, I wasn't in the first session all that often. But I hadn't seen an interpreter go down into custody for -- with the defendant like that, but that doesn't mean it didn't happen. I just, I hadn't seen it.
Q. It wasn't in your experience.
A. In my experience, I hadn't seen it.
Q. Okay. Now, at the bottom of the page where we just stopped, and Judge Joseph says wait just a second, let's go -- let's play a little more.
(RECORDING PLAYING)

Q. Mr. Okstein, you said to the judge, there is representative from ICE here in the court to visit the lockup.

A. Yes.

Q. What did you intend to be asking her or conveying to her at that point?

A. So I was conveying the ICE officer's or agent's request to visit the lockup to take the individual he was interested in into custody.

Q. Was that the request you told us about a little while ago?

A. Yes.

Q. And her response, that's fine, I'm not going to allow them to come in here, but he's been released on this, how did you understand that response?

A. I understood that response to be following the practice of the court, the officer was an agent, wasn't coming into the courtroom, wasn't coming into the courtroom to go down into the lockup, but she was releasing the prisoner and he was free to leave, and whatever happened after that was between him and ICE.

Q. And did you have any understanding as to whether ICE could go to the lockup another way?

A. I think at that time there was a policy that indicated that ICE agents were permitted to go to lockup. I had never seen them in Newton go to the lockup. I had never seen in Newton that occur, in my experience. But I think under the policy that the court put out to all the clerks and judges, I think that a judge could allow it.

Q. And did you understand that Judge Joseph was allowing it?

A. No. As I understood it, Judge Joseph was saying the agent was not permitted to come into the courtroom down the stairs through the courtroom to lockup but that she was releasing him and he was, the individual was free to leave, and then she was just following the practice of the court, that this gentleman would leave and if the ICE agent wanted to take him into custody he would.

Q. And the practice of the court, are you referring to Judge Heffernan's practice?

A. Yes. Well, refer to Judge Heffernan's practice, but more specifically, that's what I believe that Judge Joseph was following.

Q. And what was the practice of the court as to how a defendant would leave the courtroom when the

defendant was released from custody?
A. So my experience is that the defendant would leave through the front door. So they get their possessions, and the court officer would walk with them up the stairs, and they literally would walk right out the front door.
JUDGE FABRICANT: Let's continue playing.
(RECORDING PLAYING)
Q. Now, when the judge says, Mr. Jellinek asked if the interpreter can accompany him downstairs to further interview him, was that something in your view consistent with the practice you had seen previously in that courtroom?
A. Well, in the limited time that I'd been serving as the session clerk in the courtroom covering for a clerk, I hadn't seen that.
Q. Hadn't seen that.
A. I had not.
Q. You told us earlier that the ICE agent asked you if he could go to the lockup and you said you would ask the judge. Did you convey back to him an answer?
A. I did. I let him know.
Q. So let's try to get as close as we can to when you

conveyed that back to him.
A. So after we were done with, with my reading what happened in the case, and Attorney Jellinek walked down the stairs to the lockup with the court officer and the interpreter and then a defendant, I -- the hearing was over, I went out of the courtroom, the ICE officer was waiting in the hallway, and I conveyed to him that the -- you know, what had happened, that he could not go down to the lockup, that the individual would be -- was released from custody and would be coming up and going out the front door.
Q. And what was the basis for your telling the ICE officer that he couldn't go to the lockup?
A. That's how I understood -- That's what I understood Judge Joseph's decision to be in that respect.
Q. At some point did the ICE officer express a concern to you?
A. He did. He didn't say anything specifically. He was more speaking of, there was another individual in the courtroom with the defendant, and he expressed that he was alone that day at the Newton District Court and he was going to call another agent to come assist him so he --

That's what he expressed initially.
Q. Did he express concern about being alone?
A. Yes. He expressed concern about being alone and that the defendant had a friend, he wasn't sure who the friend was, but he was in the courtroom waiting for him; so...
Q. And did you do something about that?
A. So yeah. When he expressed his concern about that situation, I called the chief court officer, who was in his office downstairs, and expressed to him that I'd be more comfortable if he came upstairs and stayed with the ICE agent to make sure that there was no confrontation to occur, and he did, he came up.
Q. And at some point -- That conversation you just talked about, you have an officer who's expressed his concern to you, so you called the chief court officer, can you place that in time?
A. So, that, again, that would have been after the hearing was conducted, that would have been while the defendant, the defense attorney, the interpreter, the court officer were downstairs. So that's -- When they were all downstairs, I was on the first floor by the front door in the hallway area, and that's where the ICE

representative was. So it was sometime after the hearing concluded but before the court closed at 4:30.

Q. And the chief court officer --

A. He came right up, yeah.

Q. And did you or the chief court officer tell the ICE officer where you expected the defendant to come out?

A. So yeah. Definitely one of us did. I don't remember if it was me. I definitely, if I was asked, I would have said the front door. I just don't remember if it was the chief who said the front door or myself. But I would have said that if I was asked.

Q. And the front door of what?

A. The front door of the courthouse. So opposite the courtroom, when you walk out of the first session, you literally walk right out the courthouse right through the doors.

Q. When you're having this conversation, are you outside the building or inside the building?

A. I'm inside the building in the hallway with the ICE officer and at that point with the chief court officer.

Q. And where -- How were you expecting the

defendant to come into that hallway, what we've been referring to as the main lobby of the courthouse?

A. I was expecting that the defendant would be -- I guess not -- "supervised" isn't the right word, but accompanied by a court officer, brought up the steps, and then they would walk out the front door.

Q. So is that the stairway that comes from the probation counter?

A. Yes. That's where the public would go down.

Q. At some point that day did you become aware that the defendant wasn't coming out into the main lobby?

A. So I stayed with the chief court officer and the ICE officer for probably about five or 10 minutes, and then I left to do other things that I needed to do to close up the court. But in that five or 10 minutes, the prosecutor had come out of the courtroom. I don't know what she had been doing prior. But she came out of the courtroom and she asked, you know, whatever they were still doing here. I asked the ICE officer what he was still doing here. I was somewhat surprised that he was still there. And he said

that he was waiting for the defendant to come out through the door that we told him was going to happen. So...

Q. And did you at some point learn what had happened?

A. Yes. So it became clear as we approached the 4:30 time frame, when the court's closing up, that the defendant wasn't coming out. We also saw the defense attorney came up and walked by the ICE agent and the prosecutor and the chief court officer and walked out the door for the day. So he was leaving. So I wasn't sure where his client was, but he was leaving.

Q. The next day, was Judge Heffernan back in Newton District Court?

A. I believe it was the next day. I don't -- I'm not a hundred percent sure. I believe it was the very next time I saw Judge Heffernan, I think it was the next day.

Q. So you're not sure which day the next time --

A. No. I think it was April 3rd, the next day, but it could have been April 4th. I just don't remember exactly.

Q. Did you have a conversation with her?

A. I did.

Q. Tell us about that conversation, please.
A. So typically, when Judge Heffernan is not in the court, when she comes back to the court, she'll ask did everything go okay, is there anything I should know about or any problems, because she's just trying to monitor how the day went for everybody. And I let her know that there was an issue, I didn't quite understand at that time the magnitude fully, but I said there was an issue with this person leaving the court not through the front door and the ICE agent was waiting and wasn't able to take him into custody.
Q. And did you talk to her at all about the recording?
A. I did. I let her know that -- She asked me a little bit about the hearing and what had happened, and I was trying to remember what had happened and in my mind tell her. And I did, I did say at some point the tape was off, and that's it.
Q. Did you at some point listen to the recording?
A. I did. I listened to the recording. Because I was trying to figure out, I was trying to figure out if I had said anything or if the

judge said -- I was trying to figure out why the defendant didn't come up through the front, and I thought if I listened to the tape maybe I missed something that the judge said or I said or the defense attorney said, and so I listened to the tape and I didn't hear anything that addressed that issue.

Q. Sometime later, did Judge Joseph ask you for a copy of the recording?

A. Yes. I believe I bumped into Judge Joseph maybe a week or so after, could have been two weeks, sometime in that time frame, when she was visiting the court, and she asked me for a copy of the tape.

Q. And did you have someone make a copy for her?

A. I did. Well, I had had multiple copies made anyway, so I just gave her one that we had.

Q. And who else did you give a copy to at some point?

A. Judge -- Well, I took one to listen to, Judge Heffernan asked for one, I think the Trial Court asked for several. They wanted it several different ways, because it was a little choppy, start, stop, start, stop, and a couple times the tape captured some but not all. So we

made sure that the whole day proceedings was captured on tape so whoever was listening could hear the whole day, not just a part of the day.

Q. That request that came from the Trial Court, can you place that in time at all?

A. I would say it was probably a couple of weeks after my seeing Judge Joseph maybe or a week after seeing Judge Joseph or somewhere -- It was sometime after that week that I saw Judge Joseph.

Q. And was that Dan Sullivan, general counsel for the Trial Court, who made that request?

A. My best recollection is, it might have been Joe Jackson from the administrative office, and sometime Dan Sullivan, general counsel, had made a request but requested not just the day, they wanted the day before, the day after. So they were changing up what they wanted from the clerk's office; so...

Q. And to the best of your memory, that request that was changing and asking for the day before, the day after, the whole day, did that come from Joe Jackson or from Dan Sullivan?

A. I don't recall. I think that the ultimate request came from Dan Sullivan, from the general

counsel's office, but I don't know why he was requesting -- That's what he requested. That's my recollection.

Q. Was Joe Jackson in the administrative office of the District Court?

A. I think so. At the time, yes. I think he dealt with those like tape issues and stuff like that.

Q. So was he working for working for Chief Justice Paul Dawley?

A. I believe so. In the administrative office.

JUDGE FABRICANT: That's all I have for you at this time. Counsel may have some questions for you.

HEARING OFFICER: Mr. Hoopes?

MR. HOOPES: Thank you.

CROSS-EXAMINATION

BY MR. HOOPES:

Q. Good morning.

A. Good morning, sir.

Q. My name is Tom Hoopes, and I represent Judge Joseph. Nice to meet you.

A. Nice to meet you, too.

Q. Thank you for your testimony so far. But I'd like to go back a little bit --

A. Sure.
Q. -- and ask you some questions, if I might.
A. Sure.
Q. So let's go straight to April 2nd. Event happens on that day that you've described, some events happened after that day.
A. Right.
Q. That was some seven years ago?
A. Yes.
Q. And so, I think it would be fair to say that you remember some things, some things you don't remember; correct?
A. Yes.
Q. And at the time, it didn't seem like to you something you needed to take notes on, so you don't have any notes; correct?
A. Correct.
Q. And nobody asked you to make notes at that point?
A. No.
Q. So did you start out as the session clerk at the very beginning of the morning?
A. I'm trying to remember. Because when I looked at the transcripts that were from the hearings, it starts around 10:00. We usually

start the day at 9:00. So I wasn't sure if I started out the day or when the -- The session clerk's mother had passed away, so I'm not sure if she found that out and left or how I ended up going into the session. But the first that I had of going into the session here on the tape is 10:00.

Q. So you started when you heard it; right?

A. Yeah.

Q. But you were the session clerk for the entire day.

A. Yes. Yup.

Q. And so talking about it today, you seem to have some specific memories of this case, Medina Perez.

A. Yes.

Q. Okay. And do you remember today that initially, when the case was called, Medina Perez was represented by Ms. Bostwick?

A. Yes.

Q. And you I assume are familiar with Ms. Bostwick?

A. I am.

Q. She's a bar advocate?

A. Yes.

Q. She's been a bar advocate there for a number of years; --

A. Yes.

Q. -- right? She's there often, to say the least?

A. She was at that time, yes.

Q. Yup. And the ADA was Shannon Jurgens?

A. Yes.

Q. And she had been there just about a month or so at that point?

A. Yes. They change over fairly quickly. I think she had been there for a little while, yeah.

Q. Just so I have it in time. So this is 2018, April of 2018. How long had you been the clerk -- been a clerk there?

A. I started December 29th of 2014. So maybe four years, a little over.

Q. Okay. And you've been promoted. So you've been the first assistant clerk on that day for --

A. From 2015 -- November of 2015 I was promoted.

Q. Okay. And so Ms. Bostwick represented Mr. Perez for the morning essentially; correct?

A. Yeah. She was appointed in the morning by Judge Joseph, yes.

Q. And when you listen to the tape for the day, you

don't hear any reference to ICE by you in the morning.

A. No. No. I don't think I reference ICE ever other than asking the judge about the lockup, going downstairs. The conversation I had with Judge Joseph was in her lobby.

Q. And do you have a firm memory as to when that conversation took place? Could it have been in the morning, could it have been at the lunch break?

A. I don't have a firm recollection. I thought it was in the morning hour. When I say "morning," I mean around the 9:00, 10:00 area, but I don't -- I couldn't tell you the exact time.

Q. Okay. And the first time you noticed ICE in the courthouse was you thought sometime in the morning.

A. Yes. I saw him in the hallway.

Q. And later on that morning you saw him actually in the courtroom.

A. I did.

Q. And he was sitting in the courtroom.

A. He was.

Q. So if I showed you a blow-up, if I can, of the courtroom. Do you have a recollection -- So

we've got two. We've got -- This is a blow-up from the bench view out the door to the left side and this is a blow-up of the other side.

A. Yes.

Q. And I'll just put this one here. Do you have a recollection today of where you saw him.

A. I do. He was sitting in the front row on the right-hand side.

Q. So right up here.

A. That's the left-hand side.

Q. I'm sorry. The left. Well, okay. So we're --

A. I think. If I'm looking at it correctly. So I'm looking at the one behind that.

Q. When you say "left-hand side," looking at the bench --

A. I'm sorry. You're correct. So if I'm looking at the bench walking into the courtroom, it would be on the left-hand side, front row.

Q. Okay. So it would be fair to say that he would have had a front row seat.

A. Yes.

Q. And do you have a recollection of how many people were in the courtroom that day, like spectators --

A. I don't, I don't recall how many. It wasn't

the busiest day. There definitely were other people. I just don't remember how many.

Q. It was a Monday.

A. It was -- I don't, don't remember. But like I said, it wasn't the busiest day, but there was definitely other court business.

Q. Yup. And it would be fair to say that oftentimes in District Courts Monday's an arraignment day for arrests over the weekend and some other --

A. Traditionally it's the busiest day.

Q. Now, do you have a memory of whether the ICE agent was there the entire time before you said something to him or not?

A. I think when I came out -- when I came into the courtroom to handle cases, I saw him sitting there, and I think that's what prompted me to have a conversation with Judge Joseph, just to make sure I knew what she expected and wanted.

Q. So was this a conversation during the course of the morning? Again, I'm asking the same question. Or could this have been a conversation that was over the lunch?

A. I believe it was in the morning hours.

Q. But you're not sure.

A. I'm not sure.
Q. Okay. And the conversation was about ICE being in the courtroom?
A. Yes. I let her know that there was a representative from ICE present in the courtroom.
Q. And you also told her, as I understood it, that Judge Heffernan's policy was no ICE in the courtroom.
A. It was not -- I would say her practice.
Q. Her practice.
A. Yeah.
Q. Well --
A. Yeah. Because every judge is a little different. So it wasn't a policy you had to follow, but it was definitely Judge Heffernan's practice.
Q. And not everybody had to follow it because the judge is the judge of that particular court that particular day.
A. Yes. Yeah.
Q. But you knew that that was Judge Heffernan's preference.
A. I did know, yeah.
Q. And if you had known it was her preference, you

would have said something to Judge Joseph.
A. Well, I said, I said something to Judge Joseph when I saw the ICE agent. I knew that Judge Joseph was a fairly new judge, so I wanted to alert her to it and ask her what she wanted me to do, if anything. And she in turn asked me, well, what was Judge Heffernan's usual practice, what did Judge Heffernan usually do, so I told her, and she said let's just follow what Judge Heffernan usually does; so...
Q. And you knew that Judge Joseph was a fairly new judge because -- a rookie judge, so to speak; right? Because you had seen her practice in that court before as a lawyer; right?
A. I'd seen her a couple times, but I knew she was a lawyer for sure.
Q. And -- So you had that conversation. Do you recall her saying anything to you about she wanted to check on the policy by calling the administrative offices?
A. I do remember that, yes.
Q. And so in fact she did call; correct?
A. Yes. I think I left at the point she was starting to call, but she did indicate to me -- I think she asked me if I had a copy of the

policy handy. I went to my office, I couldn't put my hands on the actual policy. So she said don't worry about it, I'm going to call anyway to make sure I understand the policy.

Q. So based on your experience, limited experience as a session clerk, but experience as the first assistant clerk, some judges follow that practice, but not all.

A. Correct.

Q. When they were at the Newton District Court.

A. Correct.

Q. Were you aware of that practice of asking ICE to step out of the courtroom being utilized or practiced in any other District Court?

A. I didn't know one way or another.

Q. Okay. Now, the policy that she was asking you about, that was called the Lunn policy; correct?

A. You mean Judge Joseph was asking?

Q. I'm sorry. Judge Joseph, yes.

A. Yes. It was a fair case.

Q. And you went to look for it?

A. Yes.

Q. And it would be fair to say that clerks have their own organization, right, where they transmit documents and policies and things like

that, that keep you updated?
A. An Association of clerks and magistrates. Yes. Oftentimes we'll get transmittals of important cases or rules. But this was a policy that was generated and transmitted by the Trial Court to all the clerks.
Q. To all the clerks.
A. All the clerks.
Q. So whatever you had, you were the first assistant.
A. Yup.
Q. And I suppose in some ways very responsible in that courthouse for running the daily sort of functions.
A. I try to, I try to do my best.
Q. And I'm sure -- The clerk himself is a little older; correct?
A. He's a little older, yes.
Q. And so he relied on you to sort of be at the mouth of the information coming in from both of those sources.
A. I would imagine that's true.
Q. Now, after, did she get back to you and tell you exactly what the results were, the communications?

A. Did Judge Joseph?
Q. Yes.
A. I think she said that she was able to get someone in town or she -- I knew she was calling in town. I think she got to talk to somebody. I'm not sure who. But I think she said she was all set. Because I continued to look for the policy. She said don't worry about it, that she had -- I think she said she had spoken to someone, she now knew the answer to her question.
Q. So you've read the Lunn policy?
A. A while ago, but yes.
Q. Okay. And so it would be fair to say, with regard to that policy, that that policy doesn't say anything about whether ICE can be in the courtroom; correct? It has to do with ICE getting custody of individuals to whom they want to take custody; correct?
A. Correct. It was kind of differentiated between the detainers and the warrants and taking them into custody and when the judge should hold someone in custody and whatnot.
Q. And so without us reading through this, -- though we can -- it's, as you know it now, that

Lunn policy mandates that District Court personnel allow, permit, and require ICE to go into a lockup in order to take custody of an individual in District Court; correct?

A. Yes. I think we received the transmittal to that effect. That's a -- if requested, they should have access. And I think there's a whole protocol, that the court officer should take them into, take them into the prison or cell block and transfer --

Q. So that was the policy that was in effect on April the 2nd, 2018; correct.

A. I believe so.

Q. Yeah. And so when you went in to see Judge Joseph, you went in to see her about this issue of whether ICE could be in the courtroom; correct?

A. Whether she wanted the ICE agent to be in the courtroom.

Q. And she answered yes, you could, after you pointed the administrative District Court that you could follow, we could follow, she could follow the practice of Judge Heffernan and ask ICE to stand out; correct?

A. Yeah. So that was -- She told me in her

lobby, in her lobby. She said that she preferred to just follow what Judge Heffernan customarily did.

Q. And she said nothing, that you could recall, about asking -- telling ICE that they couldn't take custody down in the lockup.

A. No. Because at that point there was no question -- like the ICE officer hadn't requested that and that wasn't part of our conversation at that point.

Q. Okay. Now, Ms. Bostwick stayed representing Medina Perez all the way up to the lunch break.

A. Yes.

Q. Like just before 1:00?

A. Yes. Lunch break was 1:00 to 2:00.

Q. And she was allowed to come back a little late because she had a medical appointment that day?

A. Yes.

Q. But at some point Jellinek showed up in court; correct?

A. My recollection is that he filed an appearance at the lunch break.

Q. Okay.

A. Sometime over the 1:00 to 2:00 mark.

Q. And -- So you would have seen him around there or you

would have heard that he filed an appearance?
A. I don't recall if he was there earlier in the day, but he definitely was there right at 2:00 when we were starting after lunch. So I assume he was in the courthouse doing something, whether it be he had court business or other filings or -- I don't recall specifically whether he came to the courtroom at all prior to the lunch break.
Q. And there were court officers there that day; correct?
A. I believe there were two court officers there that day, one who sat with the custodies, one in the courtroom, and then at some point the chief came from another court, he kind of supervised three different courts, and he showed up, too.
Q. So we can talk about that for a minute. So Wesley MacGregor was there that day?
A. Yes.
Q. And he was handling the custodies?
A. Yes.
Q. And Michael Walsh was there that day as a --
A. Yes. I had met him a couple of times. He was retired.
Q. Retired. He was there as what we call a per

diem?
A. Yes.
Q. And -- but the chief, his name is Scott Noe, --
A. Yes.
Q. -- Scott Noe, was not there until later; right?
A. I didn't see him until later. I think I -- My best recollection is that he came from some other court at some point during the day. I don't know when. But he was -- I was told he was in the building.
Q. And the Lunn policy requires that the chief court officer, which would have been Noe, would do at least two things, one would be to make sure that there's notice given to the presiding justice of the court that ICE was there; right?
A. Correct.
Q. But the presiding justice was out.
A. Correct.
Q. And to make sure that the Lunn policy was followed with regard to access to ICE in the lockup; correct?
A. Yes. I wasn't in the session too often, but that's my understanding.
Q. Okay. So if I'm understanding it correctly, your communication to the ICE agent, there was

only one at that point.
A. Correct.
Q. It was two-fold. One is, they're being asked to step outside of the courtroom.
A. Yes.
Q. And second -- And that was directly from Judge Joseph; right?
A. Correct.
Q. But the second was, that, no, he couldn't take custody in the lockup. But that was your interpretation of what Judge Joseph was saying.
A. So the second communication with the ICE officer would have been after we concluded for the day. And the answer to your question is, yes, that's what I interpreted Judge Joseph's directive to be.
Q. So -- Okay. Thank you. So -- But sitting here today, you have no memory of having one more conversation with the ICE agent.
A. I don't recall having any other -- other than which door he'd be going out of initially, and then secondarily, the -- when he asked for permission to go to the lockup. I don't recall having other communications with him.
Q. So you indicated, when special counsel asked you

some questions, your previous memory was that ICE had taken custody out on the street in the front door area.

A. I had seen that once before.

Q. You had seen that before.

A. I actually saw it, yeah.

Q. Now, court ends; right? Before court ends -- Judge Fabricant, special counsel, ran you through the transcript of the end of that proceeding; right?

A. Yes.

Q. And we heard already that you said something to Judge Joseph about ICE being there, right, and wanting to take custody in the lockup.

A. Yes. I was just, I was just reminding her that the ICE officer was there, because he was waiting out in the hallway, and I conveyed his request to go down to lockup.

Q. And you actually put -- It's on the record that you conveyed that, and she said that's fine, they're not coming in here, in essence; correct?

A. Correct.

Q. So it would be fair to say that there were at least two or three other ways at the Newton District Court that they could have access to

the lockup, correct. One is, to go around the back.
A. Yeah.
Q. They can come in the sallyport --
A. Yeah. They could have gone around the back of the courthouse and knocked on the door and have the court officer provide access or they could have just walked down the public stairs -- well, they could have gone through the back way and there's the -- where the lockup is situated, they could have walked through the hall -- You're right. There's two different ways other than the way down the stairs.
Q. Or third, unless you're including the one you just relayed, go downstairs, have someone escort them through probation.
A. Correct.
Q. So there were several different ways.
A. Sure.
Q. And with the sallyport, were you aware that there was a van, pickup van inside the sallyport that afternoon?
A. No, I was not aware.
Q. So if there were no van there, then they could have just driven in.
A. Sure.

Q. With their unmarked vehicle, whatever it is.
A. Sure.
Q. And then take into custody.
A. Sure.
Q. Now, we talked about Ms. Bostwick. You knew David Jellinek, too; correct? You had seen him from time to time.
A. I think they were calling, because they were both duty attorneys.
Q. Both bar advocates.
A. Both bar advocates.
Q. Got it. And you saw him there. He came in for the drug court on Tuesday afternoon?
A. Typically, he did. He did the drug court.
Q. And so he was there fairly frequently, at least once a week; right?
A. For sure.
Q. And I mean, he'd say hi to you, you'd say hi to him.
A. Typically. I try to say hi to everybody. But yes.
Q. Yup. And he was at least friendly, as far as you could see, with many of the court personnel.
A. He was familiar with all the court personnel, yes.

Q. And so were you present when the conversation between David Jellinek and Wesley MacGregor letting Medina Perez out the back?
A. No.
Q. And did David Jellinek approach you before the 2:00 session after he filed his appearance and tell you that he had a conversation with Wesley MacGregor?
A. No.
Q. When you saw him walk out, when you were with the ICE agents, did David Jellinek come over to you and say I had the judge's blessing to let him out, anything like that?
A. No. He just walked straight by us.
Q. Didn't say a word?
A. No.
Q. He was there the next morning?
A. Was he there the next morning? Is that what you just said?
Q. Yeah. David Jellinek.
A. I have no idea. I don't know.
Q. From that day, April 2, until today, has he ever said Wesley MacGregor and I together conspired to let him out?
A. No. I have not talked to him about it.

MR. HOOPES: Can I just have a moment?

(PAUSE)

MR. HOOPES: Thank you very much. No other questions.

JUDGE FABRICANT: I just want to clarify one point.

THE WITNESS: Sure.

REDIRECT EXAMINATION

BY JUDGE FABRICANT:

Q. The ways to get to the lockup, if not through the courtroom and into the dock and down the stairs, how many other ways are there?

A. So you could go through the -- where the clerk's office and the judge has her lobby, you go down the set of stairs, that's a secure area, you could come back through the [inaudible] and go down that back stairwell and that leads to the lockup. You could go, as counsel indicated, you could go around the building and knock on the door. They could open the sallyport door for you. And the other way you could do it, I suppose, is you could, -- just trying to think -- you could go through -- come down the front stairs. You'd have to go through probation, I believe; so...

Q. And once you went through probation, would you have to get through a secure door?
A. Yeah. There was a secure door. You would have to use your pass or you'd have to knock and they'd have to let you in the courthouse.
Q. So each of those ways that you've described, would you have to get through a secure door?
A. Yes.
Q. So you would need somebody with a pass --
A. Yes.
Q. -- to let you through.
A. Yes. You couldn't just walk through.
JUDGE FABRICANT: That's all I have.
MR. HOOPES: That's all I have.
HEARING OFFICER: So I just have one clarifying question for me.
When you spoke to the ICE agent after the proceeding, did you tell the ICE agent that they were not -- that he was not allowed to go to the lockup period or did you say you're not allowed to go to the lockup through the courtroom?
A. I think what I said was just what the judge

said, which is, you're not allowed to come in here and go to the lockup.

HEARING OFFICER: I'm sorry. Say that again.

A. I said you're not allowed to go in the way they had all gone down through the courtroom. I think I said to the ICE agent that he could not go in the courtroom down to the lockup.

HEARING OFFICER: Did you tell him there are other ways to get to the lockup?

A. I didn't discuss it with him, no.

HEARING OFFICER: You knew he wanted to go to the lockup.

A. I did overhear. He made it clear.

HEARING OFFICER: And were you clear with him? Do you believe that you told him you just can't go to the lockup through the court?

A. I didn't say just. I think I was under the impression he couldn't go to the lockup at all.

HEARING OFFICER: Based on what?

A. Based on, when I asked the judge, I said there was someone here to visit the lockup, I think is how I phrased it, to get the person

intended to be taken. And she said something like, okay, but I'm not going to allow him in here but he's released. I took that to mean that she was following Judge Heffernan's practice of releasing him, he'd walk out the court front door, and if they wanted to take him into custody, that's where they would take him into custody. So that's what I was under the impression.

HEARING OFFICER: Okay. And so your impression was that he was not going to be allowed to go to the lockup area from any direction.

A. Correct. I didn't go over with him the different ways. I didn't think he would be going to the lockup area.

HEARING OFFICER: But you did understand Judge Joseph to be saying he can't go to the lockup area through the court.

A. Yeah. I understood that just how she said it. Because I listened to the tape, too. That's how she said it. And that's how I took it. But I took her to mean I'm -- when she said I'm releasing him, what she meant was, he's going to walk out, and so if they want him, they

can take him, but it's not my, not my issue.

HEARING OFFICER: Okay. I have no further questions.

Any follow-up?

JUDGE FABRICANT: May this witness be excused?

HEARING OFFICER: Yes.

JUDGE FABRICANT: Thank you, sir.

And again, Mr. Hoopes is much more efficient than predicted. And so we don't have a next witness ready. We will have Scott Noe at 9:00 in the morning, Judge Heffernan at 11:00, and Judge Fortes, Chief Justice now, Chief Justice Fortes at 2:00 tomorrow.

HEARING OFFICER: Okay. So with that, unless the parties have anything else to cover, we're recessed for the day.

(The proceedings adjourned at 3:16 p.m.)

EXHIBIT AA (DOCUMENT SUBSEQUENTLY MARKED AS EXHIBIT AA)

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EXHIBIT 15

COMMONWEALTH OF MASSACHUSETTS
COMMISSION ON JUDICIAL CONDUCT

COMPLAINT NUMBER 2019-22

VOLUME III

HEARING

~ BEFORE ~

HEARING OFFICER

DENIS J. McINERNEY, ESQ.

JUNE 11, 2025

9:00 A.M.

Boston, Massachusetts

Lisa L. Crompton, CSR (MA)(RI), RPR
(As amended by stipulation of the parties and
as approved by the Hearing Officer on October 1, 2025.)

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JUDGE FABRICANT: The Commission now calls Scott Noe, who, I take it, is in the hallway.

HEARING OFFICER: We're on the record. And if counsel could just introduce themselves for the record.

JUDGE FABRICANT: I'm sorry for jumping the gun here.

Judge Fabricant for the Commission on Judicial Conduct.

MR. NEFF: Howard Neff for the Commission on Judicial Conduct.

MR. HOOPES: Tom Hoopes for Judge Joseph.

MS. MULVEY: Elizabeth Mulvey for Judge Joseph.

MR. KEATING: Michael Keating for Judge Joseph.

HEARING OFFICER: Great. Thank you very much.

JUDGE FABRICANT: He'll be right with us, I'm told. Apparently the highway that comes up from the South Shore is problematic this morning.

HEARING OFFICER: Totally

relate to those issues. No issue whatsoever.

(PAUSE)

HEARING OFFICER: Good morning.

PAUL SCOTT NOE, SWORN

HEARING OFFICER. Thank you.

Please be seated.

DIRECT EXAMINATION

BY JUDGE FABRICANT:

Q. Good morning.

A. Good morning.

Q. Please tell us your name.

A. First name is Paul, middle name is Scott, last name is Noe, N-o-e.

Q. And do you go generally by Scott?

A. I do.

Q. Thank you.

And Mr. Noe, would you tell us briefly your professional background?

A. I began my career in law enforcement with the Norfolk County Sheriff's Department, and I became a court officer six years into that. Still stand at Norfolk County, worked nights, was a court officer until I retired between '15, in 2019, became chief court officer in Concord, Waltham, Newton courts in 2015.

Q. So I want to just make sure we've got the sequence there. So in 2015 you became the chief court officer for three courts, Newton, Waltham, and Concord?

A. Yes.

Q. And then in 2019 you retired from the court officers.

A. Correct. The start to the end of 2019.

Q. And what do you do now?

A. Retired from the courts and the sheriff's department and I work for NAGE, National Association of Government Employees. I'm a union rep for the court officers.

Q. So NAGE represents the court officers in Massachusetts.

A. Yes, court officers, probation officers.

Q. Court officers and probation officers.

A. Yup.

Q. I'm going to ask you to give us a general virtual tour of the Newton District Court, and we have some photographs that we're going to show assist in that process, and that binder in front of you has a set of exhibits that are appendices that have already been admitted in evidence. Appendix U is the photographs. So

look at them in the binder or look at them on the screen as is more convenient for you.

So let's start with what's right in front of you here, which is Page 526 of the appendix. What is this?

A. This is the front door of the Newton courthouse.

Q. And --

HEARING OFFICER: If you could just be a little closer to the mic. Much appreciate that. Thank you.

A. That's the front door to the Newton District Court.

Q. And what level is that when you enter the door?

A. Well, the picture is taken from the street level. You climb up those 10 steps and you're at first level of the courthouse.

Q. So once you're in the courthouse and go in those doors, how many levels does the courthouse have?

A. You have one down below, which is at ground level, when you go out in the back of the courthouse it’s at ground level, it goes downhill from there. So you have the lower level, that first level, and then the second floor level.

Q. So three floors altogether.

A. Yes.
Q. One of which is below ground at the front and at ground level at the back.
A. Yes.
Q. When you enter from the front, through this door, where are you?
A. You're in the main lobby of the courthouse at the security entrance.
Q. And let's go to 523. And what do we see there?
A. So the right would be coming through those front doors to the courthouse, and that's the security station, security office to your right.
JUDGE FABRICANT: And, is his voice loud enough at this point?
HEARING OFFICER: It's pretty good. If you could get just a little closer to the mic for everybody in the court, I think that would be great. Thank you.
Q. So that's the security equipment you come through if you come through that main door.
A. Yes.
Q. And what else do you see in this main hallway?
A. That's the entry door from the main entrance off of the main road. That door to your right

is the security office, where a lot of administrative things are done.

Q. And let's go to the Number 506. What do you see there?

A. That's -- To your right would be that main door that you come in through and that door in front of you is the entrance to the clerk's office.

Q. Do we see here some of the security equipment?

A. Yes.

Q. So if you just come through the security equipment, you've got the clerk's office just to your right?

A. Correct.

Q. And you see that bench along the left wall there?

A. Yes.

Q. If you got to the end of the bench where the picture doesn't show, what would be there?

A. That would be the entrance to courtroom one of Newton District Court.

Q. And let's go to 525. What's that?

A. That is the entrance to courtroom one on the first floor.

Q. And the chair, the bench that we see there, is that the end of the bench that we saw in the

last picture?

A. Yes. Same bench.

Q. And then there's a chair next to it?

A. Yes.

Q. Was that chair usually there?

A. I believe it was.

Q. Let's go to 509. What do you see here?

A. That's courtroom one of Newton District Court, the judge's bench, clerk's seating area, DA's table, and defense attorney's table.

Q. And which side are the DA and the defense attorney usually?

A. Typically, the DA would be on the left side of that picture, and defense attorney would be on right, on the left side of the dock.

Q. So the DA, if there's a defendant in custody, the DA would be closer to the defendant than the defense lawyer is.

A. Yes. Typically.

Q. And do you see, along that glass wall of the dock, do you see a little, a little metal circle?

A. Oh, yes.

Q. What's that, what's that used for?

A. That's the opening so you could hear clearly

from the dock. It's not -- I don't think it's a microphone on it, but it would be for that.

Q. It's a space for hearing?

A. Yes.

Q. If there's an interpreter, would the interpreter use that to speak to the person in the dock?

A. Yes.

Q. Let's look at 510. What do we see here?

A. That's the right side of the same courtroom. That's the two exit doors.

Q. Those two exit doors there, are those for public or for other people?

A. Those are for employees. The one on the right is typically -- almost leads you directly into the clerk's office, along the left brings you to the employee elevator and entrance to the judge's lobby.

Q. And those two desks that we see there, who uses those?

A. Typically, probation would sit at one and the other one is used for administrative duties.

Q. If there's a witness in the courtroom, where would the witness be?

A. The witness stands back in the bar.

Q. Okay, Let's bring up 512 -- 511. What do you

see here?
A. That's the view from those same pictures you just looked at looking at from the judge's bench, on the side of the bench.
Q. If there's a side bar conference, is that where it would occur?
A. Yes. And there's a swinging door that brings -- gives access to the judge's bench.
Q. And is that how the judge goes in and out, through that swinging door?
A. Yes.
Q. And let's go to 512. What do you see here?
A. That's a view looking back from where we just were, looking back at the exit of courtroom one.
Q. So if you were standing at the judge's bench or at the clerk's bench, is this what you would see?
A. Yes. The defendant stands in the block box. There's a microphone there.
Q. So if the defendant is not in custody, is that where the defendant would stand, just behind the bar?
A. Correct.
Q. And are there seats for spectators on both sides of the entrance?

A. Yes.
Q. And if you look down, is that the audience section on the other side?
A. Correct.
JUDGE FABRICANT: I don't know that this has a number yet.
MR. HOOPES: Nope.
JUDGE FABRICANT: We'll get it in.
Q. Let's go to 513. And we're going to go through a series starting with 513. So what is this that you see here?
A. That's the custody dock and the second -- the first door brings you into the custody dock, the second door brings you into a stairwell and down to the lockup.
Q. So two doors.
A. Correct.
Q. Are those both doors that you need a keycard to open and close?
A. Neither door has a keycard. They're both key open.
Q. So help me understand the distinction there.
A. Manual keyed open.
Q. So an old-fashioned key.
A. Yes.

Q. Physical key.
A. Right.
Q. And are they -- You could see here that both of them look like they're a little bit ajar.
A. Yes.
Q. Would that be the normal condition for those doors?
A. Typically, they're kept ajar, to give access for us to come up and down or maintenance.
Q. If there's a person who's in custody who's in the dock, would they be ajar?
A. No. They'd be secure.
Q. And who's responsible for securing?
A. The court officers.
Q. And then let's go to 514. What do we see there?
A. That's a view from inside the dock.
Q. So if a person is inside the dock, is that -- would the person be standing or sitting in that location?
A. Correct. It looks to be looking at the judge's bench.
Q. Let's go to 515. What's that?
A. That's the stairwell bringing you down to the lockup, exiting the dock.
Q. So look to the left of that photograph, it looks

like there's an open door. Is that that second secure door?

A. Yes, it is.

Q. And let's go to 516. What's that?

A. That brings you down to the door that gives you access to the lockup area.

Q. And then 517. What's that?

A. That is from inside the lockup. Not sure which direction that's in. Oh, I believe, when you enter that door that we just saw, it would be straight in. And so it was typically used for storage. And one of the prisoner cells to the right.

Q. Then let's go to 527. Now, can you describe what that is generally?

A. Yes. That's the rear of the building. The building to the left is the Newton District Court. It's ground level from behind now. And the building to the right is the Newton Police Department.

Q. And can you see a sort of fenced area there between the two buildings?

A. Yes. That's the sallyport.

Q. And what is a sallyport?

A. Sallyport is where custodies are brought in,

transported in. And in this particular case, the arrest could be walked over from the Newton Police Department or, typically, brought in from the sheriff's department, in the back of the van and deliver the prisoner that way.

Q. So that fenced area, is that for the purpose of putting a van in --

A. Yes.

Q. -- for transporting people in custody?

A. Yes.

Q. And what characterizes a sallyport as opposed to any other kind of exit and --

A. A sallyport, typically they're secured to keep the public from gaining access to them or from somebody escaping while they're being transported in, if they're brought in to the courthouse. That particular sallyport had a door. It had fencing that was on an electronic runner that locked up, but there was a problem with the -- with that door. It would get jammed closed sometimes. So typically, when I was chief, that door was left open.

Q. Okay. Now, taking our virtual tour back inside. So we're now back in that -- in the lockup area. From there, if you wanted to go inside to a

public area, where would you be going?
A. Well, at the end of this first brick wall, there's an access door for employees, and electronic access to the back stairwell, which would bring you up to the judge's lobby and all the way to the second floor to the courtroom.
Q. So you're now talking on the outside of the building.
A. Yes. Prior to going into the sallyport, there's an employee entrance, only accessed electronically.
Q. And is there actually more than one in different locations along the back of the building?
A. On the back of the building, there's one there, yes, there's one behind the sallyport, where there's a parking area, and then on this side of the building there's a maintenance entrance you can electronically access.
Q. And each of those doors that would bring you into the secure area, do you need a security pass to get in and out of those?
A. Yes.
Q. So envisioning that we're back inside the building and you're in that secure hallway, if

you go down the secure hallway, and you've got those secure doors that are there, but you need a security pass to go in and out, so envisioning that we're going down that secure hallway, where do you eventually get?

A. Coming in through that employee entrance I just mentioned?

Q. Once you're inside.

A. Okay. Once you're inside of this first entrance, at the end of that brick wall, you'll enter a stairwell, and the stairwell you can take up to both floors or you can use your electronic access card to go in behind the probation department or another door that brings you into the lockup area.

Q. So that first stairwell that you just referred to, is that within the secure space?

A. It's not a lockup area but it's secured for employees only.

Q. So you can't get into that stairwell without a security pass.

A. Correct.

Q. If you walked down that secure hallway to eventually get to a place where, at that lower level, without going up or down, you could with

a security pass get out of the secure area into a public area?

A. You'd have to go through several doors to get -- you'd have to go through probation department or somehow go through the lockup area and back up to the courtroom.

Q. So if you go through the probation department, if you have -- if you're escorted by somebody who has a security pass, can you go through a secure door and end up in the public area of probation?

A. Yes, yes.

Q. And let's look at Photograph 519. What's that?

A. That's the lockup officer's office.

Q. Where is that?

A. Located in the lockup on the lower level.

Q. Is there also an office somewhere in the lower level for the chief court officer?

A. Yes.

Q. Where's that?

A. That's back out through probation, back out to the public area, and it's a locked office.

Q. So is that on the public side of that secure door in the downstairs --

A. Yes.

Q. -- location? Is there a phone in the chief court officer's office?

A. Yes.

Q. Is there also a phone in this office in the lockup?

A. Yes.

Q. Now, if you went to where -- to the chief court officer's office, you went through that secure door, so you're now in the public space, you're at the location where the probation, the public probation desk is, is there a way to get upstairs from there?

A. Yes.

Q. Tell me about that.

A. It's a public hallway.

Q. Okay.

A. So if you came out of the chief court officer's office, to the right there's an entrance into the counter area for probation, and then there's a stairwell that brings you back up to the first floor or the second floor.

Q. Public stairway.

A. Yes, public stairway.

Q. Going back to the sallyport. How many vehicles fit there? Now I want you to -- Things of

course could have changed. -- take your mind back to be April of 2018. That's a long time ago. So that's what these questions are about, April of 2018.

A. Yes.

Q. How many vehicles would fit?

A. One vehicle.

Q. And the sheriff's vans, the vans that came from the sheriff's department that transported people in custody, how big were they?

A. They're long. They have extended bumpers on the back. I don't know the length of them. But very long. I think one in and secure the whole sallyport.

Q. Was the fence at the back of the sallyport usually kept opened or closed?

A. The gate itself was typically kept open.

Q. And why was that?

A. Because it had jammed -- I was told when I became chief it had a history of jamming and vans couldn't get out once they were in there, they'd secure the sallyport and the van couldn't get out. Manually.

Q. So it was usually kept open.

A. Yes.

Q. And you told us earlier that the police department is next to the courthouse.
A. Yes.
Q. We saw that photograph with the police department back there.
A. Yes.
Q. Now, I'm going to ask you about some practices. Again, I'm asking about the way things were done in April 2018. So you became the chief court officer you said in 2015.
A. Yes.
Q. So you had been the chief court officer for about three years at that point?
A. Yes.
Q. So in that time frame, what was the standard practice if a defendant who had been in custody was being released from custody and didn't need to go check in with probation and didn't need to wait for somebody to post bail, was just being released? What was the standard practice?
A. Standard practice would be that he was released from the courtroom, from that dock.
Q. And how was that -- I'm sorry.
A. From the dock in the courtroom.
Q. How exactly would that work?

A. Typically, they'd bring the custody back up, bring his property up with him, the lockup officer would stay in the dock with him, there would be a court officer in the courtroom, the case would be resolved, if it was determined that the custody was to be released, then the court officer would bring the custody out, and depending on what the property bag had in it, they could just hand him his property bag and tell him he was all set to go, or he would have to check in to probation from there, if he had something in there that was unacceptable inside the courthouse, then it would be brought to the front door security, the front door security would hold onto the bag until he did any business he had to do inside the courthouse, in the clerk's office and anything in probation, and when he exited, he received his property.

Q. When the person is in the dock, is the person usually in restraints?

A. Yes.

Q. When in that sequence of events would the restraints be removed?

A. He'd be seated inside the dock, the cuffs would be removed, and he'd be escorted out.

Q. Before April 2nd of 2018, in your experience, was anybody ever released through the sallyport door?
A. Never.
Q. Why not?
A. Never when I was the chief. And I inquired with prior chiefs when I became chief and then I inquired after this incident occurred.
Q. Why would that not be the way that someone would be released?
A. Because you'd be releasing them into the police department's parking lot.
Q. And what would you want to prevent there?
A. Well, typically, there are weapons involved and the police are coming in and out of work. You don't want them to run into a police officer who arrested them early in the day, or the night before. Could be running -- could be dropped off by his wife. Could be a bad scene releasing him out to the police department's parking lot.
Q. Before April 2nd of 2018, was there in the Newton District Court any written policy or written instructions about how anybody was to be released?
A. No. There's a standard in the

policy/procedures for Trial Court. It didn't - Each building's different. I supervised in three buildings at the time, and they all release different.

Q. And was that because of the physical situation?

A. Correct.

Q. Before April 2nd, 2018, did you have experience with ICE coming to the Newton District Courthouse?

A. Yes.

Q. And how often did that happen in Newton?

A. Very rarely.

Q. Would you become -- When it did happen, would you be informed of a detainer?

A. Typically, the van arrives with the custody.

Q. So from the police station or from the sheriff's department?

A. Yes. And copies would be distributed. In the normal circumstance, from my experience and all of my years in the many different courts that I've worked in, typically, the detainer would arrive with the custody.

Q. On April 2nd of 2018, when did you arrive in Newton?

A. Sometime in the afternoon. I'm not certain

of the time. If I was to guess, I'd say 2:00 p.m.

Q. Okay. So we don't want guesses. But your best estimate, if you can.

A. Yeah. Afternoon time. It was in the afternoon I arrived on that day.

Q. Okay. And when you arrived, what did you do?

A. I came in through that employee entrance in the back, went straight up to first session through the probation department, I believe I dropped off things in my office, then I went straight up to the first session and entered the first session courtroom.

Q. And when you went into the first session courtroom, was anything happening there?

A. No. They were waiting for the judge to take the bench.

Q. And was there any person present?

A. Court Officer Mike Walsh was seated in the courthouse.

Q. Did you have any conversation with him?

A. Yes. I said, hi, Mike, how's everything going. He said, good Chief, we have one case left, it should be done in a few minutes.

Q. Okay. And did he give you any more information?

A. He said the custody that's downstairs has the ICE detainer, should be coming up, he's going to be released on our case.

Q. So he had that information at that point. He gave you that information.

A. Correct. Typically, in Newton Court, being such a small setup and not that many custody cases in particular, you would know before you even bring the custody up if he was going to be released.

Q. So if the court officers would know before the custody -- before bringing the person in custody up that the person was going or was likely to be released, would that have indications for how property would usually be handled?

A. Correct. If you know he's not being released, if he's -- the sheriff's department is not going to be returning to them, then you just -- there would be no property typically coming in from the sheriff's department unless he was going to be released. A new arrest has the property. But you find out in advance if they're asking for bail, and then that would dictate if you bring the property up to custody.

Q. How would you find that out if they're asking

for bail?

A. Typically, the court officer that's assigned to the courtroom would know from speaking to the district attorney, the clerk, the defense attorney.

Q. After you spoke with Officer Walsh, what did you do?

A. He, he informed me of the case that was -- the one case that we had remaining in custody, what was going on, he said the ICE agent's outside for him, outside the courtroom.

Q. And then what did you do?

A. I went out to the public hallway. There was the associate court officer Tony Caruso at his station, and the ICE agent was leaning up against the wall next to what we saw, he would have been looking just like we're looking at this picture right now. Would be at the courtroom. His back was at the wall next to the security office looking at the courtroom.

Q. And did you have conversation with him?

A. Yes.

Q. Tell us about that conversation.

A. I introduced myself as the chief, told him the custody would be coming up soon, I believe

the last name was Perez Medina, said he would be coming up soon, said he's going to get released on the charges here, you can go to the sallyport, back in to the sallyport if you'd like to pick him up, or you can wait right here, he's going to be released from here. I informed him there was a van, when I came in, there was a van in the sallyport. So there's a van in the sallyport, you can go around there, if you'd like, or you can wait here, he'll be released from here.

Q. With the van in the sallyport, would ICE have been able to put a vehicle in the sallyport?

A. No.

Q. What would they have had to do with the vehicle?

A. They would either have had to walk to the sallyport, go to a regular parking space.

Q. And what was his response when you told him that?

A. He said, no, I'm fine, as long as he's coming out from there.

Q. And did you tell him anything about where you expected the person would come out?

A. I had already told him you could go around or --

Q. And would you normally be in uniform?

A. Yes. I was.
Q. And then after you had that conversation with the ICE officer, what did you do?
A. I spoke -- I believe I gave Tony Caruso a bathroom break, so he could use the restroom, just to the left of those doors.
Q. So did you cover the equipment while he was doing that?
A. Yes. And then I went back down to my office.
Q. And when you were down in your office, did you receive a phone call?
A. Yes. Approximately 10 minutes after getting back to my office, I got a call from Clerk Okstein.
Q. And what did Clerk Okstein say?
A. Clerk Okstein said, the custody with the ICE detainer is being released, has to sign papers with probation, but he has several friends in the building, there could be a problem, and any chance you could go out there. I'm literally 20 feet away from the probation counter. Hung up the phone.
Q. And what --
A. There was nobody in there at the counter. There was a young lady Ashley Medeiros working

there. And I said, did the ICE custody come out yet to sign papers, and she said he doesn't have to sign papers.

Q. And so then what did you do?

A. I said, okay, and I headed up to the first floor.

Q. And what --

A. Through the stairwell.

Q. And what did you do? The public stairwell?

A. Yes. The ICE agent was leaning against the wall where I had left him 15 minutes earlier. I said to him, where is, where is your custody. He said he hasn't come up yet. And I looked through the glass of the doors and saw that there was nobody on the bench. Called on my radio to the lockup court officer. He didn't respond. Called again. He didn't respond. I went over to the phone at the security desk, called lockup, Officer MacGregor answered the phone.

Q. And tell us about your conversation with Officer MacGregor.

A. I asked him where the ICE custody was.

Q. And what did he answer?

A. After a little delay, he said he was

released. I think I had asked him twice. Where is he, where is he. And he said I released him out the back.

Q. And how did you respond to that?

A. I was upset. I said, why would you do something like that. And I hung up the phone quickly, looked at the ICE agent, said he was released out the back.

Q. Over the next few days or weeks, did you have further conversation with Officer MacGregor?

A. Yes.

Q. Did you get varying answers to the question of why?

A. Yes.

Q. To what he did?

A. Yes.

Q. Can you tell us what the varying answers were?

A. The initial statement he made to me was, I didn't have the detainer in hand.

Q. And then did you get a different kind of answer?

A. I followed that up with, but you knew there was a detainer, you knew there was a detainer. He said yeah. And I said, well, could you explain it to me. He said, no. And then we had another conversation at a different time. Could have been the same day. Could have

been the morning. But he proceeded to tell me that he didn't bring the person up through the courtroom because the judge was on the bench. I guess to say that he didn't want to disturb the courtroom with the judge on the bench. And then later on in that day, the next day, he said that he had a feeling that the, he had a feeling that the judge wanted the person to be released.

Q. And did you have a further conversation, did you have any further conversation with him about that at some point?

A. I believe that was it. I gave -- Weeks later, I gave him a written warning for what happened. There was really no discipline to be involved in it. There was nothing in the policy that said he couldn't do what he did. Just had never happened.

Q. And then did you prepare a written policy?

A. Yes.

Q. When was that, to the best of your memory?

A. Within a couple of days. I contacted my supervisor immediately after the incident that day, immediately after the ICE agent left and immediately after speaking with Officer MacGregor, I contacted my supervisor

and...

Q. Who was your supervisor?

A. It was Michael McPherson, the regional director of security at the time.

Q. And is he now the director of security?

A. He's now the director of security.

Q. And after you had consultation with Mike McPherson, what was the policy that you prepared?

A. We changed it to indicate that nobody gets released out -- through the back of the courthouse, and we adjusted property issues in a little bit more detail. Everybody had known, but didn't have it in writing.

Q. And did you at some point show that policy to First Justice Heffernan?

A. I believe that I did. Correct.

Q. And what did you do with the policy?

A. It was posted in the lockup and shared with the regional director of security and eventually the director of security.

Q. And then sometime a few weeks later was there some other directive from the higher-ups in the security department about what the policy should be?

A. I believe there was. I believe it was a reissuing of a policy that give a broad view, just a general view of how ICE custodies are handled.

Q. At some point did you get a directive from Mike McPherson that people should be released out the back?

A. He may have said that to me. I don't remember a directive, if he did.

Q. Did you think that that would work in Newton, --

A. I did not.

Q. -- released out back?

A. I remember having a conversation with him about it and sharing my thoughts that it wouldn't work in Newton or shouldn't work.

Q. And did Newton ultimately adopt a policy of people being released out the back?

A. Not when I was chief.

Q. Did Officer MacGregor retire sometime thereafter, that you recall?

A. Yes. I don't know how much longer. Maybe six months.

Q. And do you remember a party for his retirement?

A. Yes.

Q. Do you remember anybody who you saw there?

A. I remember -- Yes.
Q. Tell us who you remember that you saw there.
A. The party took place, that probation office that I mentioned on the lower level, had an office off to the side of it where they would meet with probationers, if need be, they had a little party in there with cake, Officer Trocchio, Officer MacGregor, of course, Officer Patterson was there, and Attorney Jellinek was there.
Q. And have you had any further communication with Officer MacGregor since then?
A. Yes. Up until his retirement. I haven't spoken to him since his retirement.
Q. Since his retirement.
A. No. No.
JUDGE FABRICANT: Very good. Thank you. That's all I have.
HEARING OFFICER: Mr. Hoopes.
MR. HOOPES: Thank you, Your Honor.
CROSS-EXAMINATION
BY MR. HOOPES:
Q. Good morning, Mr. Noe.
A. Good morning.

Q. As you know, I'm Tom Hoopes, and I represent Judge Joseph.

So you said that you had been at Newton or supervising Newton for roughly three years prior to this incident --

A. Yes.

Q. -- of April 2nd, 2018; right?

A. Yes, I believe so.

Q. And you characterized the frequency of ICE agents coming to the Newton District Court to make arrests as infrequent.

A. Yes.

Q. And would it be fair to say that that may have been one, two, three times a year? Would that be an accurate number?

A. I think so.

Q. Now, from 2015, '16, and '17, there was no real court policy giving you direction on how to interact with ICE. Would that be fair to say?

A. There had been policies throughout the years in reference to detainers and how court officers deal -- it changed a lot. And typically, I did everything the same way that I had always done.

Q. Okay. And there was a case that came down from the Supreme Judicial Court called

Commonwealth versus Lunn in the summer of 2017 that addressed this issue. Do you recall that? Were you given notice of that case?

A. I could have been. I don't recall it off the top of my head.

Q. And then there was a policy that was issued in November of 2017, it was called the Lunn policy. Were you notified of that policy, specific policy, not the case, the policy, by anybody?

A. I don't recall.

Q. So if you could look with me at -- in your book.

A. Okay.

Q. It's Tab B. And there's a document there called the Lunn policy, executive office transmittal, dated November 10th of 2017, is what began.

MR. HOOPES: Sorry. I'm going to let Giana...

(PAUSE)

Q. So looking at that, can you tell us, had you ever seen that policy before today?

A. I may have. It doesn't look familiar to me but...

Q. Okay. And so if you, if you can -- The first page is APP 005.

A. Yes.
Q. If you can turn to me -- with me to APP 007. And about two-thirds of the way down, there's -- halfway down there's a Section III Roman Numeral III, that says, DHS officials taking custody of individuals at a courthouse. Do you see that?
A. Yes.
Q. And three paragraphs down there's a capital A. It says, individuals over whom the Trial Court has custody.
A. Yes.
Q. So if you and I can read that together. I'll read it out loud.
A. Okay.
Q. Consistent with Chapter 2, Sections XIV and XV, of the Court Officer Manual (current edition), when an individual who was brought into court in custody is subject to release after his or her court proceeding, court security personnel shall process that individual out of lockup in the normal course regardless of whether the individual is subject to a civil immigration detainer or warrant.
Next paragraph. If, during the processing of an individual subject to release

out of the courthouse, a DHS official is present in the courthouse and seeks admission into the courthouse's holding cell area in order to take custody of the individual pursuant to an immigration detainer or warrant, court officers shall permit the DHS official to enter the holding cell area in order to take custody of the individual once Trial Court security personnel have finished processing that individual out of the court security personnel's custody, if a security department supervisor supervisor determines that the DHS official would otherwise take custody of the individual inside or immediately outside of the courthouse.

So let's stop there. The first paragraph, Consistent with Chapter 2, Sections XIV and XV of the Court Officer Manual. So you understand -- You know the manual that you're referring to; right?

A. Yes.

Q. And that's sort of a general manual for court officers; correct?

A. Yes.

Q. And there's a specific section that it's referring to there that, in subsections XIV and XV,

that give direction as to exactly how releases are supposed to be; correct?

A. Yes.

Q. So if the Hearing Officer will permit, I'm going to approach you and show you one page from that, which at the bottom of 2-9. And in your experience as a court officer, had you reviewed that Court Officer Manual at some point?

A. Yes.

Q. And it's pretty clear in XIV.B., Prisoners and detainees will be released only from the lockup or holding room unless ordered by the court. Correct?

A. Yes.

Q. Court officers in the lockup will determine if there are no holds on the prisoner/detainee and is properly identified before the person is released. And just to be clear, that process of clearing holds, in other words, somebody wants the prisoner, that would typically take place downstairs in the lockup.

A. Yes.

Q. And in D, if the detainee comes from the sheriff's department to the court, from the sheriff's department, House of Correction, or

another correctional facility, the court officer in the lockup must call all the records of the department of the facility to determine if there are any other holds before releasing the detainee. Correct?

A. Yes.

Q. And then in XV, court officers releasing the prisoner that is posting his or her own bail will do the following: They're going to verify the person who's posting the bail, verify the accurate amount. Number 3, verify that the court officer will escort the prisoner out. Is that correct?

A. Yes.

Q. Now, so is that what they're referring here in the Lunn policy in that first paragraph, this XIV and XV?

A. Yes.

MR. HOOPES: I offer this page, if I may. If there's any objection?

JUDGE FABRICANT: No objection.

HEARING OFFICER. Yes. It's received.

MR. HOOPES: B1 -- Number 1.

EXHIBIT 1

(DOCUMENT MARKED AS EXHIBIT 1)

Q. So the second paragraph that we read, which says that, if the DHS official is there, right, again, going back to your stipulation, okay, where it says 007, that page, --

A. Yes.

Q. -- where it says, if, during the processing of an individual subject to release out of the courthouse, a DHS official is present in the courthouse... That was happening on April 2nd; correct?

A. Yes.

Q. And if we go to the next paragraph on 008, it says, before being granted entry into the holding cell area, DHS officials must present credentials and a copy of the detainer and civil immigration arrest warrant to court security personnel, sign in to the holding cell area, and surrender their weapons. Correct?

A. Yes.

Q. And that would have been, they would have to present their identification to either to you or one of your staff who was there; correct?

A. Yes.

Q. And then, lastly, it says, to the extent possible, court security personnel should require that DHS officials transport any individuals taken into custody through the prisoner transport entrance and avoid taking individuals through the public areas of the courthouse. Correct?

A. Yes.

Q. So that's different than what you were describing for us, though; correct?

A. Yes.

Q. So you were aware of the general policy for court officers on April 2nd, 2018, but you don't recall being aware of this Lunn policy.

A. Not off the top of my head, I don't. I'm sure I saw it at some point.

Q. And so would it be fair to say that there were communications from above you, supervisors and supervisors' supervisors, at various times --

A. Oh, yes.

Q. -- as to various policies and various policy changes?

A. Yes.

Q. And was there ever any particular training done with regard to this new policy, that you can

recall?
A. No, I don't recall any training.
Q. So on that day of April 2nd, you recall seeing the ICE officer who was there; correct?
A. Yes.
Q. And you said to the ICE officer -- you identified yourself.
A. Yes.
Q. And you knew he was there for Medina Perez; right?
A. Yes.
Q. The person down in the lockup at that point; right?
A. Yes.
Q. And you knew from your employee, Mike Walsh, who was what they call per diem, --
A. Yes.
Q. -- that there was an expectation he was going to be released; right?
A. Yes.
Q. And there was an expectation he was going to be released into ICE custody.
A. Yes.
Q. And it's your testimony that you offered the ICE officer the opportunity to go down to the

sallyport; is that correct?
A. Yes.
Q. And he said, if he's coming out the front door, I'm all set.
A. Yes.
Q. And sitting here today, do you have any knowledge one way or another whether he had spoken to the ICE officer by Clerk Okstein before you arrived?
A. I had heard that since.
Q. But at that time, you didn't --
A. At that time, I had no knowledge of that.
Q. And to your recollection, that's what the ICE officer said, I'm all set, and just stayed where he was; --
A. Yes.
Q. -- is that correct?
Did Michael Walsh, the per diem, say anything to you about the ICE officer actually making a request about being able to go down into the holding cell?
A. No.
Q. So you, after that conversation, went back downstairs, and then you got a call from Clerk Okstein; --

A. Yes.
Q. -- right?
A. (Witness nods head).
Q. And that the ICE agent was looking for assistance because there were a number of people, there were friends of Medina Perez.
A. Yes.
Q. And you went out to probation, probation said that it wasn't needed to report to probation, and you went upstairs.
A. Correct.
Q. And spoke to the ICE agent.
A. Yes.
Q. And then had the conversation with MacGregor over your phone transmission; --
A. Yes.
Q. -- is that right?
So can you tell us about, between that conversation that you had on the phone and the next couple of days, how many conversations did you have with MacGregor one on one about this?
A. I would guess that we probably had three. I know we had one that day, I believe we had another one that -- a little while after the initial conversation, and then in the morning we

went over it again.
Q. And so how long were these conversations, if you just estimate?
A. Short conversations. He answered my questions quickly.
Q. And so, a minute, two minutes, five minutes?
A. Two minutes.
Q. Okay.
A. Two minutes, maybe.
Q. And in any one of these three conversations did he ever mention to you the name David Jellinek?
A. No.
Q. Did he ever say to you that David Jellinek was the person who caused the release to happen?
A. No.
Q. Did he ever say to you that David Jellinek was the person who planned the release with him?
A. No.
Q. So now you know David Jellinek from being around the court.
A. Yes.
Q. And you had seen him there from time to time in his capacity as a bar advocate.
A. Almost daily, I believe.
Q. Almost daily.

A. Right.
Q. And so would you say that you had a business - casual relationship or business friendship with him or just business contact relationship?
A. Business contact, I would say.
Q. And from the time you walked into the courthouse until the time you called MacGregor on the phone, did David Jellinek ever tell you that he was planning to have MacGregor release Medina Perez out the back?
A. No.
Q. Did you see David Jellinek there the next day?
A. I believe it was the next day I saw him.
Q. And did David Jellinek come up to you and say, I helped MacGregor, directed MacGregor to release him out the back?
A. No.
Q. Did he ever say I had the judge's blessing to release him out the back?
A. No, he did not.
Q. Did you speak to Judge Mary Beth Heffernan at some point right after that?
A. Yes. I don't believe it was that day. I don't think she was in that day.
Q. And so the next day you spoke to her?

A. Shortly after, whether it was the next day or the day after that.
Q. And do you recall what that conversation was, what you said to her, what she said back to you?
A. Something to the effect of, what the hell happened.
Q. You said that or she said that?
A. She said that to me.
Q. What did you say back to her?
A. I told her what I knew happened and I believe --
Q. That's what you just told us.
A. Yes. Yes.
Q. And so the name David Jellinek never came out of her mouth or your mouth to her.
A. I don't believe it did.
Q. So this party that was for MacGregor, --
A. Yes.
Q. -- was that in the spring of 2019?
A. I believe so.
Q. Maybe April of 2019?
A. Could have been six months to a year after the incident.
Q. In the courthouse.
A. Yes.

Q. In the basement?
A. In the probation.
Q. In the probation department.
A. Lower level.
Q. Attended by how many people?
A. I believe there was five of us there.
Q. Four court officers and David Jellinek.
A. Yes. Some people may have came in to wish him well throughout, grab a piece of cake at some point. But as far as the main group that was there, the court officers and Attorney Jellinek.
Q. Can you estimate today how long David Jellinek was there at the party?
A. I don't know. I was only in the party for a few minutes.
Q. Okay. And while you were there for a few minutes, did you see David Jellinek go over and shake MacGregor's hand?
A. I believe everybody did. I don't have a clear memory of them shaking hands.
Q. Now, special counsel asked you some questions about a policy that you created after this.
A. Yes.
Q. So in other words, this policy was your practice

of releasing out the front.
A. The procedures that we used that were handed down to me.
Q. Were handed down to you.
A. Yes.
Q. So you followed the policies that had been handed down to you.
A. Yes.
Q. So this Lunn policy, if that wasn't communicated to you by your supervisor, Mr. McPherson, was that ever communicated or addressed to you by Presiding Justice Mary Beth Heffernan?
A. No.
Q. It was never discussed.
A. Policy to release custodies?
Q. Yes.
A. No, it was never discussed.
Q. Specifically to release ICE custodies.
A. No, never discussed.
MR. HOOPES: So if I can approach the witness.
Q. So I'm going to show you this. I ask you to look at that. Can you identify what that document is?
A. Yes.

Q. And is that a document that you prepared?
A. Yes.
MR. HOOPES: So if I can offer this as Exhibit 2.
Q. Take a minute to get through it.
HEARING OFFICER: Any objection?
JUDGE FABRICANT: No objection.
HEARING OFFICER: Exhibit 2 is received.
EXHIBIT 2
(DOCUMENT MARKED AS EXHIBIT 2)
Q. So can you explain to us how you prepared this document?
A. Yes. We had nothing in writing specific to the Newton courthouse, so I put that in writing so there would be no confusion going forward.
Q. And is that a document that you prepared by yourself or was that a document you prepared in consultation with Presiding Justice Heffernan?
A. I prepared it myself. I believe I gave her a copy as well as Regional Director McPherson.
Q. So reading it out loud. It says, Effective Immediately. All custodies of the Newton Court that are scheduled to be released will be

released out the front door of the courthouse only, and in all caps. They will be escorted to the lobby from the courtroom or through the Probation Department. If necessary, property will be given back outside of the front door security station. Chief Noe, April 4th, 2018. Am I reading that correctly?

A. Yes.

Q. So you issued this two days after April 2.

A. Yes.

Q. And you'd agree with me that what you have here is not what's provided for in the Lunn policy.

A. Yes.

Q. Okay. And did you pass this up the chain to --

A. Yes.

Q. Okay. And to Mr. McPherson?

A. Yes.

Q. And did he agree with this?

A. After we talked, he agreed with it.

Q. Okay. And did he accept this or was there a modification later?

A. He understood. And we had to have a conversation about it, yes.

Q. Once you explained it to him.

A. Yes.

Q. Okay. So from that point on -- Your testimony is, from that point on, this was the policy for the Newton District Court.

A. Until I left, yes.

Q. Until you left. Regardless of whatever Lunn said.

A. Yes.

Q. So you've talked a little bit about the doors, you know, with badges. So are you familiar with reports on use of a, use of a badge during a particular day, a badge history report?

A. Yes.

Q. You've seen one of those? So if I was to show you a history report for that day of April 2nd, could you tell us whether you can identify that as a history report like you've seen before?

A. Yes. Thank you.

Q. And is it fair to say, -- take your time -- is that a history report for that day, April 2nd?

A. Yes, it is.

MR. HOOPES: If I could offer this, please. Number 3.

JUDGE FABRICANT: No objection.

HEARING OFFICER. Exhibit 3 is received.

EXHIBIT 3

(DOCUMENT MARKED AS EXHIBIT 3)

Q. And so that report would show by and large, with restrictions at the top, does that include all events, does it include all events from all devices? Subject to that caveat, this shows all access, use of the card, to go through doors that require the badge that day.

A. Yes.

Q. And so somebody, like Officer MacGregor, would have had an access card; correct?

A. Yes.

Q. And his name would appear on the far right-hand column; correct?

A. Yes.

Q. So if we wanted to check out all of Officer MacGregor's entrances and exits using the badge for that day, we simply need to look on the right side; correct?

A. Yes.

Q. And where it says, in the column to the left of that, it says device, that's a description of the area that is accessed; is that correct?

A. Yes.

Q. And to the left of that, it says event, access

granted, and then to the left of that there's a column that says time; is that right?

A. Yes.

Q. Thank you.

So also -- So I'm going to show you, --

MR. HOOPES: I'll get you a copy.

Q. -- I'm going to show you, it's a detainee accountability log. Is that a document that you actually pulled for the day?

A. This is the --

Q. April 2nd?

A. Yes.

Q. And that is a, that's a document that logs in who comes in through the back door, brought in to custody?

A. This is the custody lockup, yes.

MR. HOOPES: So I'd offer this as the next exhibit.

JUDGE FABRICANT: No objection.

HEARING OFFICER: Okay.

Exhibit 4 is received.

EXHIBIT 4

(DOCUMENT MARKED AS EXHIBIT 4)

Q. So this is a sheet that the court officer who's

downstairs in the lockup is supposed to complete regarding prisoners coming in and prisoners leaving; is that correct?

A. Yes.

Q. And at the top it says, detainee accountability daily login for the Newton District Court. And then officer -- Do you recognize this handwriting? That WM?

A. That's Wesley MacGregor.

Q. And then it says, to the right it says Monday, April 2, 2018; correct?

A. Yes.

Q. And the first name in there is a woman by the name of Pamela Hodgdon; correct?

A. Yes.

Q. Identification that says F for female, and then it says Newton. Is that V-O-P? V-O-P?

A. I can't tell what those initials are. Newton PD, is what I believe.

Q. Okay. And the next column is property received. There's a checkmark.

A. Yes.

Q. And then there's a docket and the holds. And then there's at disposition ROR. Released on recognizance?

A. Yes.
Q. And arrival time is 9:00?
A. Yes.
Q. And departure time is 3:30?
A. Yes.
Q. So she actually, according to this sheet, didn't leave downstairs lockup until 3:30; right?
A. Correct.
Q. And the column next to it says property return, Y. Meaning, yes?
A. Yes.
Q. And then the next person on there is Medina Perez. But before we get there, the third person is Bruce Demelo, who comes in at 9:45 and leaves at about 1:50?
A. Yes.
Q. So that would been even before you arrived.
A. I believe so.
Q. And then the last person is Crystal Cosme, who arrived at about 10:10 and she leaves at about 3:30; correct?
Q. Now, going back to Jose Medina Perez. M for male. Police department, comes in from Newton. Property received, there's a checkmark. Correct?

A. Yes.
Q. Which should mean that he had property; correct?
A. Correct.
Q. And then disposition, released, came in at 9:05, departure time, 3:00?
A. Yes.
Q. And property returned has just got right there with I believe a dash; correct?
A. Right.
MR. HOOPES: Can I just have a moment, Your Honor?
(PAUSE)
Thank you very much. Those are all the questions I have.
HEARING OFFICER: Any redirect?
JUDGE FABRICANT: Just a couple of things, if I may.
REDIRECT EXAMINATION
BY JUDGE FABRICANT:
Q. You just went through with Mr. Hoopes the Lunn policy. And he took you through it, pointed out some ways that it might differ from what you were doing.
A. Correct.
Q. Does that change your memory of what was normal

in Newton?
A. No.
Q. Did you at some point in your conversation with the ICE officer learn that there was a second ICE officer somewhere?
A. No. I assumed that there was. I never -- He never mentioned a fellow officer. I assumed he's outside in the --
Q. But you didn't see him. You weren't told.
A. No. They've always gone in pairs. So I've never seen one by themselves.
Q. And when you spoke with Judge Heffernan the next day or the day after and, as you described it, she said what the hell happened, what information did you give her?
A. I discussed what I had learned through, in that day, interviewing different people, before I wrote my report on the incident. I spoke with Officer Walsh, I spoke to, spoke to District Attorney Jurgens, I believe I spoke to Clerk Okstein.
Q. Did you have any information about what had occurred either on or off the record between the judge and counsel in the courtroom?
A. District Attorney, District Attorney Jurgens

recalled their conversation at the side bar.

Q. And what did she tell you about it?

A. She said that Attorney Jellinek requested that the custody be released so he can get an immigration attorney.

Q. And did she tell you more about that?

A. She said -- The district attorney told me that she stated that I don't know how that's going to happen, ICE is right there waiting for him.

Q. After this event, did you ever at any time talk with David Jellinek about this event?

A. I believe the next day when -- the next day or the day after, I talked to him, I still don't -- I think I said to him I still don't understand what occurred. He shrugged his shoulders.

Q. Did he ever at any time tell you anything about the event?

A. No.

JUDGE FABRICANT: I have nothing further.

MR. HOOPES: Neither do I. Thank you.

HEARING OFFICER: Thank you.

You're complete for today. Thank you very much, sir.

If you could call your next witness.

JUDGE FABRICANT: Thank you. May the witness be excused?

HEARING OFFICER: Yes. Thank you.

JUDGE FABRICANT: And we had asked the next witness to come at 11:00. So I'm not sure whether she's here yet.

HEARING OFFICER: We can take our morning break now.

JUDGE FABRICANT: I've just been told she'll be here at 10:45. So that would work perfectly.

HEARING OFFICER: Okay. So we'll resume at 10:45.

JUDGE FABRICANT: Thank you.

HEARING OFFICER: Thank you.

(Recess taken at 10:31 a.m. Proceedings resumed at 11:01 a.m.)

JUDGE FABRICANT: Commission calls Judge Mary Elizabeth Heffernan.

HEARING OFFICER: Thank you.

HONORABLE MARY ELIZABETH HEFFERNAN,
SWORN

JUDGE FABRICANT: Mr. McInerney, I wonder if your microphone is on, because that was very soft.

HEARING OFFICER: Now it is.

JUDGE FABRICANT: That's better.

DIRECT EXAMINATION
BY JUDGE FABRICANT:

Q. Good morning.
A. Good morning to you.
Q. Would you tell us your name, please.
A. Certainly. Mary Elizabeth Heffernan.
Q. Great. And you just did exactly what I was going to suggest, just bringing the microphone close. Works better that way.
Would you tell us your position.
A. Yes. I'm the First Justice of the Newton District Court and the Regional Administrative Justice for Region 4 of the District Court.

Q. And is the Regional Administrative Justice role new?

A. Yes. The last two years.

Q. Would you just go through your professional background, please.

A. Certainly. I worked at -- I clerked in this building at the Appeals Court for one year after law school.

Q. That is before the Appeals Court moved over --

A. Yes.

Q. -- out of --

A. I'm that old, yes. And I went to the law firm Palmer & Dodge after that, district attorney's office in Middlesex County, ran the Massachusetts District Attorneys' Association for some years, went over to Care Group Healthcare system, Beth Israel Medical Center in the general counsel's office, and then worked in the cabinet of Governor Patrick before I was appointed to the bench.

Q. And when were you appointed to the bench?

A. February 6, 2013.

Q. And when did you become the First Justice of the Newton District Court?

A. I was appointed acting in 2015. I believe

2016 is when I was appointed permanently.

Q. Can you explain to us the role of the First Justice?

A. The First Justice is the titular head of the court. You know, we have different departments, the probation department, the clerk's department, the maintenance department, security. And the First Justice is the person who brings those folks together, sets the tone for the courthouse, and hopefully manages things so that the business of the courthouse can get done.

Q. And is there a First Justice for each division of the District Court?

A. Yes.

Q. And does "division" refer to, generally, most instances, a particular courthouse?

A. Yes.

Q. Do you know how many courthouses -- how many divisions there are in District Court?

A. I thought there were 62, but I don't -- Don't hold me to that, please.

Q. And as the First Justice, you said you're the titular head of the court, you have those administrative roles as you've described. Do

you have any disciplinary authority over other judges?

A. I do not.

Q. Do you view your role as First Justice as including passing on information to the Regional Administrative Justice or to the Chief Justice that, in your view, they should have?

A. It is.

Q. And what has been your practice during your years as a judge, that's now about 12 years, what has been your practice regarding recording of courtroom proceedings?

A. Everything is recorded. We've switched from -- We've switched over to the FTR service right now. We had an old service before. But everything -- Every hearing in Newton is recorded, including the clerk magistrates' hearing.

Q. And the old system that you had, was that JAVS?

A. It was.

Q. And are you aware of a rule regarding recording?

A. I believe there is a rule regarding recording. I learned it anecdotally and, also, from being in the courts, I learned that you

never turn the tape off.

Q. I'm going to ask you to look at the screen. And you have a binder in front of you. This is Appendix K. Look either way. Whatever is easier for you. Look at Page 122 in the binder, you'll see what's on the screen. Is that the rule that you're referring to?

A. Yes.

Q. And does it have -- Does it in general require recording of courtroom proceedings?

A. My understanding is, yes.

Q. And are there some exceptions, some kinds of things that are not required to be recorded?

A. I believe it says certain cases that are impounded, sealed, juvenile matters.

Q. And some clerk functions, perhaps?

A. Yes.

Q. So the call of the list, perhaps?

A. Yes.

Q. And if you look at Page 123, and go down just before that the bold that says see text, just before that, does this tell you when that rule took effect?

A. It does.

Q. And when did it take effect?

A. It was adopted on December 31st, 1987, became effective February 1, 1988.

Q. In your years as a judge, when you were a new judge, do you recall any training or advice or communication with more experienced judges about recording?

A. Yes. It was anecdotally told that you should never go off the record.

Q. Was there any formal training about that?

A. I don't recall formal training, but it was certainly engrained in new judges.

Q. And in the course of your 12 years, have you ever turned off the recording or directed the clerk to do so?

A. I have not.

Q. And are you aware of any legitimate reason to do so?

A. I do not.

Q. In the Newton District Court, you said you're the First Justice and you have been effectively since 2015. Do you sit there every day or some days?

A. I was sitting there every day, up until I became the Regional Administrative Justice, and I had moved around a bunch. Our chief likes us to do that. So

I go around my region often. But most of my time is in Newton, yes.

Q. So putting your mind back to 2018, which I realize is seven years ago. During that time period, were you sitting there every day or most days?

A. I was there Monday, Tuesday, Wednesday, Friday, as I presided over the Quincy drug court on Thursdays.

Q. So on Thursday you wouldn't be there. But generally, unless there was something taking you out for some reason, you would be there four days a week.

A. Yes.

Q. And when you were there, which courtroom would you sit in?

A. First session. Except for Wednesdays, which was the jury day in Newton. So that was the second session upstairs.

Q. And would you sit in the second session on those days?

A. Yes.

Q. If there was another -- Was there usually another judge in the building?

A. When I was there, sometimes, yes. Yes,

sometimes.
Q. If there was another judge there, would you refer to that as a visiting judge?
A. Uh-huh.
Q. Where would that person usually sit?
A. Upstairs in the judge's lobby on the second floor.
Q. And if you were doing a jury trial upstairs, and there was another judge, then where --
A. I would be in my lobby down on the first floor.
Q. Even though you might be doing a jury trial --
A. Yes.
Q. -- on the second floor. So the two judges might be sitting in opposite lobbies but sitting in different courtrooms?
A. Yes.
Q. During -- Again, putting your mind back to April of 2018 up to April 2nd of 2018. What was the usual practice in your experience if a person came into the courthouse in custody and was then released without the need to post bail and without any probation conditions?
A. They could either leave right from the dock, which you have displayed there, or if they

needed -- if they didn't have to sign conditions or maybe they had some property downstairs, they could go downstairs and retrieve that.

Q. So those two -- Those were two approaches that might occur?

A. Yes.

Q. And had you sometimes seen a person get their property without going back downstairs?

A. Yes.

Q. How would that happen?

A. They would come up with it, or the court officer would bring their property, and they would be released right from the court, from the dock, and go out the front door of the courthouse.

Q. And you're pointing to what's on the screen, which is, I believe 508. Why don't we take a look at 509 as well. That just gives you a different angle.

A. Yes.

Q. Can you see the dock in that one as well?

A. I can.

Q. And does that show you where the judge, the judge's bench is and the clerk's bench and the tables that the lawyers would use?

A. It does.
Q. Again, back up to April 2nd of 2018. So, again, a long time ago, but I ask you to put your mind back there. Were there occasions when you had seen ICE come to court?
A. Yes.
Q. And did you have a practice regarding what should happen when ICE came to court?
A. My practice was, with any law enforcement, I ask them to, if they did not have some sort of a warrant, to sit outside and wait or check in with the court officers.
Q. And when you say "outside" --
A. Not outside the courthouse. In the lobby. We have a generalist lobby. And I would ask -- It was a practice that was instituted because, in our second session, which I don't think you have a picture of, it's a very narrow courtroom, as well as the first session is a large courtroom, it's disruptive if law enforcement effectuates service in the courtroom while the service was going on. That happened on two occasions. Not with ICE, but with other law enforcement officers.
Q. And so you would ask that they be directed to

wait outside the courtroom?
A. Yes.
Q. And where would they generally wait?
A. ICE would wait on the first floor lobby.
Q. And "lobby" gets used in two ways.
A. In the lobby of the courthouse. Not the judge's lobby. They would wait right outside of the courtroom.
Q. And sometime after April 2nd of 2018 did you change that practice?
A. It was confusing at the time when we were there. I think a lot of us were confused about what to do. And I understand that more guidance came down after that, yes.
Q. Okay. After April 2nd, --
A. Yes.
Q. -- did you have some e-mail communication with Chief Justice Dawley regarding that practice?
A. Yes.
Q. And did he suggest that you consult with a lawyer in his office?
A. Yes.
Q. And did you do that?
A. I did.
Q. And we're going to come back to that e-mail.

On April 2nd, a Monday, April 2nd of 2018, were you at the Newton District Courthouse?

A. I was not. I was at a funeral.

Q. And wouldn't be answering your cell phone?

A. I was not answering my cell phone.

Q. Because you were at a funeral?

A. Yes.

Q. The next day, April 3rd, were you at the Newton District Courthouse?

A. Yes.

Q. Did anyone come to talk to you about something on April 2nd?

A. Attorney David Jellinek did.

Q. And can you tell us about that? Where, when, how long? Tell us about that.

A. I also have a drug court in the Newton District Court. Attorney Jellinek was one of the attorneys that was in the roundtable that we used to have before the session. And we were having our roundtable upstairs in the second session at the witness table. And after the meeting, he told me that something had occurred in the courthouse yesterday.

Q. And did you go somewhere to talk about it or did you stay --

A. No. We were right there.
Q. And did he tell you more than that?
A. He told me that he had a client whose identity was in question, that had a fugitive from justice warrant out of Pennsylvania, that he used the services of an interpreter to go downstairs with his client to talk about clearing up the warrant, because it appeared to be cleared up during the session.
Q. Did he say anything about going off the record?
A. No.
Q. And did he say that he requested that the judge allow him to go downstairs with the defendant?
A. I believe he mentioned that, yes.
Q. And did he say anything about his conversation with the judge?
A. He did not.
Q. Did he say why he was telling you this?
A. He was -- No, he didn't say why, but I think he was letting me know that it was an incident that he brought to my attention.
Q. Did you say anything?
A. Probably. I don't remember, though.
Q. Had you been told anything by anyone else before you talked with him?

A. No.
Q. And how did the conversation end?
A. I said thank you for letting me know and I went downstairs.
Q. That day or the next day, did the Chief Court Officer come to see you?
A. I think that day he did, yes.
Q. And what did he tell you?
A. He told me that someone had gone out the back door of the courthouse and ICE was waiting in the front and they were not happy.
Q. Did he show you a memo regarding where defendants should be released?
A. Yes.
Q. And were you called upon to make any sort of decision about that memo?
A. We discussed it, and I said you better post it clearly in the first floor lobby for the public to see.
Q. And that day or the next day did Clerk Okstein come to see you?
A. Yes. That day, also.
Q. And tell us about that conversation.
A. The clerk had listened to the tape, and he told me that there were several, he thought,

minutes that were -- that the judge had gone off the tape, and he -- That's all I recall him telling me.

Q. Okay. Did he say anything about the defendant and his attorney going downstairs?

A. He did not, that I recall.

Q. On Wednesday, the 4th, so we're now -- April 2nd was a Monday. So Wednesday, the 4th, was Judge Joseph sitting in Newton at the end?

A. I think so.

Q. At this time was she sitting in the second session?

A. Uh-huh.

Q. Excuse me. Second session upstairs?

A. Yes.

Q. Did you go to see her in the lobby?

A. Yes.

Q. And did you have a conversation with her?

A. Yes.

Q. Tell us about that conversation.

A. My recollection is that I asked her what Attorney Jellinek had told me. I said what happened. And as was -- at the time, it was confusing about policies or practices, et cetera, for her, I think, and so I was just

asking her what happened, if she remembers what happened, could you please tell me, and that's all I recall from our discussion.

Q. Okay.

A. Because I had to prepare a memo for my Regional Justice and for the Chief.

Q. And we're going to talk about that in a bit. Did she say anything about going off the record?

A. No.

Q. Did you ask her anything about that?

A. I didn't.

Q. Why not?

A. I would -- I assume everyone knows that you never go off the record.

Q. But you said Clerk Okstein had said something about part of it.

A. Yes. He came in and was quite alarmed, as was I, when he told me.

Q. But you didn't ask Judge Joseph.

A. I did not.

Q. Did she say that she had authorized Mr. Jellinek and the defendant to go downstairs after his release?

A. She mentioned it, yes.

Q. And did she say anything about going to

probation?
A. I believe so, yes.
Q. Would a judge's permission be required for a defendant and his attorney to go downstairs after he's ordered release?
A. No.
Q. Are there other places -- If an attorney wants to have a conference with a client, are there any places in the courtroom that could --
A. Oh, yes, there are. Attorneys move all the time. There are many rooms that one could have a conversation, yes.
Q. Is there a way to get to probation through a public access route?
A. Yes.
Q. How would you do that?
A. You would come in the front door of the courthouse, you would make a left, you would go down the stairs to the basement, which is where the probation department is.
Q. And if you were coming from the first session court, how would you do that?
A. If you were coming from the first session courtroom, you would do the same thing.
Q. During these conversations with various people,

what was in your mind as to where Judge Joseph was sitting?

A. That's -- I thought that she was sitting in -- I thought this all occurred in the second session, because that's where the judges usually sit. And I was not in the building that day. I later learned it was in the first session downstairs.

Q. Did that misconception affect your imagining of how the movement occurred?

A. I would say -- Yes. Because leaving the second floor session, if you're not in custody, you would go out through the hallway, through the public door. If you were in custody, you would go down with the court officers either in the elevator or there's a back staircase, not accessible to the public, but to employees, that you would go down to probation through.

Q. So if you're not in custody, but you wanted to go talk to probation for some reason, could you get there through a public stairway?

A. Yes. You would. That's the only way you would.

Q. Did Judge Joseph tell you anything about any concerns that ICE might arrest the wrong person?

A. I don't recall.
Q. Did she say anything about being concerned that ICE wouldn't allow an attorney/client conference?
A. I don't recall that.
Q. And when you say you don't recall, are you saying you don't recall her saying it --
A. I don't recall her saying it. It was several years ago.
Q. And during these -- After your conversation with Judge Joseph, did you talk with the Regional Administrative Justice?
A. I believe I did before and after, yes.
Q. And who was the Regional Administrative Justice?
A. Stacey Fortes.
Q. And when you talked with her, did she ask you to do something?
A. She did.
Q. What did she ask you?
A. She asked me to reduce in writing a synopsis of what happened.
Q. And did she also ask you to get the recording?
A. She did.
Q. And did you do both of those things?
A. I did.

Q. Did you have someone get the recording, make a copy, and listen to it?
A. Yes.
Q. And who did that?
A. Clerk Okstein.
Q. And did you learn further from Clerk Okstein about the off the record part of the conversation?
A. Yes.
Q. What did you learn?
A. He told me that it was a blank spot of almost a minute or two.
Q. Okay. Did you have further discussion with Regional Administrative Justice?
A. After I learned that, yes. No. I didn't after I learned that, I think. I can't remember the sequence. I spoke with her. She asked me to do those two things. I then reduced it in writing. I don't recall speaking with her afterwards.
Q. We're going to bring up your e-mail that we have. And if you look in the book at Appendix B, you will find it. So look wherever is the easiest for you. Let's just read through your e-mail. So what's the date of this e-mail?

A. Friday, April 20, 2018.
Q. So let's go -- If you go to Appendix B, Page 540, you get to the beginning of the series. They all have -- We all know, to our frustration, you have to look at the e-mail backwards.
So looking at yours, what's the date of that?
A. Thursday, April 5, 2018.
Q. And on Thursdays, where would you be?
A. Quincy.
Q. Not in Newton.
A. No.
Q. So what were you in the middle of while you were writing this e-mail?
A. In Quincy, when I was sitting in the drug court, I would have the first session, do my drug court, including meetings, et cetera. So it was a wicked busy day over there. But I needed to reduce this to writing for my Chief.
Q. And let me ask you to make sure you have your mouth close to the microphone.
A. I'm sorry.
Q. So I'm going to read through and I'm going to stop in a couple places. So it says, on Monday,

April 2nd, 2018, a defendant, who had been arrested over the weekend, was in court for arraignment on a drug possession charge and a fugitive from justice charge, as he was also allegedly wanted in Pennsylvania. An ICE agent was in the courthouse as well with a detainer for the individual.

That much, what was your source of information for that much?

A. That was probably a combination of Attorney Jellinek and Judge Joseph.

Q. Okay. And then it says, as is usual practice in Newton Court, the agent was asked to wait outside the courthouse as he did not have a warrant but a detainer. So this says courthouse. You said earlier courtroom. Can you explain?

A. I misspoke. I did not ask him -- I did not ask them to step outside the courthouse. I cannot do that. I asked them to step outside the courtroom.

Q. So when you say you misspoke, you're talking about in the e-mail?

A. Yes.

Q. What you said here; is that accurate?

A. Yes.
Q. Then it says, there was a prolonged discussion at some point regarding defendant's identity involving ICE, the Commonwealth, the defense attorneys and the judge, there is also an interpreter involved in this case.
That much, what was your source of that?
A. I believe that was also from Judge Joseph, Attorney Jellinek, it may have been Clerk Okstein as well.
Q. And then it says, after this discussion, the Commonwealth moved to dismiss the fugitive charge, the judge releases the defendant on PR -- Is that personal recognizance?
A. Yes.
Q. -- on the possession charge, not sure if bail was requested.
That much, what was your source of that?
A. Again, the judge and/or Attorney Jellinek.
Q. And then it says, the defense attorney asked the judge if he could utilize the services of the interpreter in probation with the defendant to the further investigate the Pennsylvania

detainer so it did not hinder his client further.

What was the source of that?

A. A combination of the judge and Attorney Jellinek.

Q. Then the judge agreed, the defendant was brought to probation by a court officer, unclear if he was cuffed or not, via the back stairway.

What was the source of that?

A. That was also Attorney Jellinek and the judge.

Q. And what is the back stairway?

A. So that's where, when I thought it was all occurring in the second session.

Q. So the back stairway --

A. Back stairway.

Q. -- from the second session, would that be the public stairway, would that be the one that's within the secure area?

A. It's not a public. Within the secure area.

Q. And then it says, the interpreter and defense counsel accompanied him.

Is this also -- What's the source of that?

A. That is also the judge and Attorney Jellinek.

Q. And then it says, the ICE agent, now back inside the building, inquired the clerk if there was any other exit for the defendant from the courthouse, told that all persons not in custody exit the court from the front exit, the ICE agent went outside again presumably to wait for the defendant.

What's the source of this information?

A. Clerk Okstein.

Q. And then at some point the defendant was allowed to leave through the back door of the courthouse, unclear if it was via the employee entrance or the probation back entrance.

What's the source of that?

A. That was Chief Court Officer Scott Noe.

Q. And then it says, ICE did not affect your officer, and the defendant was presumed to have left the rear parking lot with his friends, who had been waiting for him.

What's the source of that?

A. Also Chief Noe.

Q. If I learn any additional information, I will report it forthwith. The chief court officer has posted this policy reiterating the only exit

to be used from the courthouse, except for custodies, employees, and judges, is the front door. Thank you.

Is that all of what you said?

A. Yes.

Q. And you didn't say anything about the judge going off the record in that e-mail; correct?

A. I did not.

Q. Why not?

A. I don't know if I knew it then.

Q. Okay. So this was April 5th. You're not sure whether --

A. I don't recall when I heard that.

Mr. Okstein told me that there was a gap in the tape. I just don't remember the timing of when I was told that.

Q. Okay. And then going further in Appendix B. It has some back and forth in front of Chief Dawley. I just want to get that in front of us. So if you look at Page 539, --

A. Yes.

Q. -- you have an e-mail from Chief Justice Dawley, and he says this just to you, dated April 20th, he says, there are a couple of issues here, what is the authority to tell the ICE officer to stay

outside the courtroom, I'm concerned that such a practice treats ICE officers different from other members of law enforcement and the general public. It seems to me that such a practice runs counter to the requirement that courtrooms are open to the public without exception. I recommend that such a practice end. And then he says, who was the judge that presided over the case. And then he says, who was responsible for allowing the defendant to exit the courthouse via a nonpublic entrance. And then he says, in addition to the notice posted by Officer Noe, was the court staff told and do they understand that this should not happen again.

Is that what Chief Justice Dawley sent to you?

A. Yes.

Q. And with a copy to Regional Administrative Justice then Stacey Fortes?

A. Yes.

Q. And did you respond?

A. I did.

Q. And if you turn the page over to 538, you see your response. Judge Fortes, in response to the questions, it has been my practice to politely

ask ICE, who had been known to the court security staff, if they are present to detain a defendant whom they know to be in our Newton police or sheriff DOC -- DOC meaning Department of Corrections?

A. Yes.

Q. -- custody and in the building or arriving soon, to wait outside the courtroom for the defendant to be released in order to minimize disruption in other cases, particularly in the close quarters of our second session.

Is that because you thought this happened in the second session?

A. Yes.

Q. And with the limited court security staff we have here. They have always acquiesced. I have never been shown a warrant in Newton, a detainer occasionally. Often there is no paperwork at all. And then you responded to his question as to who the judge was, and you said Judge Joseph.

A. Yes.

Q. And then you responded about how it happened. The defense attorney asked the judge after the Commonwealth dismissed the fugitive from justice case if he could, with the interpreter, speak to

his client downstairs in probation in order to further explore the open warrant in Pennsylvania which triggered the then dismissed fugitive complaint. Judge allowed it. And the judge believes the defendant was brought downstairs in custody to the probation department. And then you said, in addition to the posted written policy of Chief Noe, the clerk's office and probation have been told that the only exit from the courthouse for defendants released from custody will be the front door of the courthouse, those in custody will exit via the sallyport, employees only will use the two back entrances which are accessed only by ID card entrance and egress. Thank you. And please let me know if you need further information.

Is that, is that what you wrote?

A. Yes.

Q. If you go back to Chief Justice Dawley's questions. Look at his Question Number 3, who was responsible for allowing the defendant to exit the courthouse via a nonpublic entrance. Did you respond to that question in your e-mail?

A. No.

Q. Is there any reason you didn't respond to that question?

A. I don't recall why I did not answer that question. I may not have known.

Q. And then on April 20th, a little, just a little bit later in the day, Chief Justice Dawley writes back to you. He says, thanks for the response, 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. On the first issue, asking them to step outside the courtroom, obviously it is your call, and you should exercise your own judgment. My only hesitation is the appearance factor, especially as ICE continues their campaign of attacks on us. I don't know the answer to this. But do any other District, -- DC -- Is that District Court?

A. Yes.

Q. -- any other DC's do this. If you need any guidance from Zach -- Who's Zach?

A. Now Judge Hillman.

Q. Who was he then?

A. He was in the administrative office in the

District Court legal department.

Q. If you need any guidance from Zach or our lawyers, let me know, thank you for all you do, have a good weekend.

Did you receive that from Chief Justice Dawley --

A. I did.

Q. -- on the afternoon of April 20.

And did you consult with Zach Hillman?

A. I believe I did.

Q. And later that day, the next e-mail, over at the bottom of Page 537, thank you as well, I will reach out to Zach, thank you for your support.

So you did. You just told us at some point with Judge Zach have some consultation and then make some change in the policy --

A. Yes.

Q. -- practice. That practice, was that ever in writing?

A. No. It was a result of a disruption I had up in the second session where a trooper was trying to have a witness to a murder brought -- He was a defendant in our courtroom. It just got very confusing. So I was -- I don't want to disrupt

the ongoing daily business of the court, so that's why I asked, anyone, would you please check in with the court officers, ICE, could you wait outside, please. Of the courtroom.

Q. And then after your consultation with Zach --

A. I changed that.

Q. And do they now --

A. They do. They check in with the court officers. This was all pre Lunn. So yes.

Q. And so your recollection is that this was pre Lunn. Let's, let's take a look at Appendix B.

Now, when you refer to Lunn, are you referring to the SJC decision or are you referring to a court transmittal?

A. Both.

Q. So Appendix B. Just give yourself some time to take a look at that.

A. The 0005?

Q. Yes.

(PAUSE)

A. Okay.

Q. What was the date of this?

A. I don't -- Oh. November 10th, 2017.

Q. So it actually was --

A. Before.
Q. -- before. Was it -
A. It was -- This policy came out before April 2nd of 2018, yes.
Q. And had you yet incorporated into your practice?
A. No.
JUDGE FABRICANT: All right. That's all I have. Thank you.
HEARING OFFICER: Ms. Mulvey.
CROSS-EXAMINATION MS. MULVEY:
Q. Good morning, Judge Heffernan. We have never met, have we?
A. Oh, yes, we have. You've done evidence programs for us many times and I've met you a couple of times. Nice to see you again.
Q. I apologize. Nice to see you. I'm horrible with faces.
A. Not a problem.
Q. All right. I haven't been before you in the Newton District Court; --
A. Not that I recall.
Q. -- is that fair?
All right. And on April 2nd of 2018, we've heard -- Do you recall that was a Monday?
A. Yes.

Q. And your clerk's mother had passed away and you were going to the funeral?
A. Yes.
Q. Okay. And understandably, didn't have your cell phone on?
A. Correct.
Q. All right. And do you know that there was a time during the morning when Judge Joseph, who was sitting in that day, had a couple of questions and tried to reach you by phone?
A. I think I recall that, yes. My phone showed calls missed.
Q. All right. And do you understand she had some questions related to a different case that you handled and was looking for some guidance?
A. I don't know. Yeah. I don't remember.
Q. All right. In any event, you did come to the Newton District Court on the next day, Tuesday; is that right?
A. Yes.
Q. And Judge Joseph wasn't there?
A. No.
Q. All right. And you said that at some point that day David Jellinek approached you about this incident; --

A. Yes.
Q. -- is that right?
You said it was in connection with a drug court meeting?
A. Yes. He stayed after the roundtable was over.
Q. And when does the roundtable take place?
A. Noontime.
Q. Okay. So this would be sometime 2:00-ish?
A. Probably 1:00, closer to 1:00.
Q. Okay. The meeting was 12:00 to 1:00?
A. Uh-huh.
Q. You don't do it during lunch? You do it right before lunch?
A. Hopefully.
Q. And as of that time, 1:00 or so, nobody had told you anything about this incident; is that true?
A. True.
Q. Okay. Clerk Okstein didn't come in and say, oh, my God, Judge, we had this happen?
A. No, I don't remember him doing that.
Q. Scott Noe didn't come in and say, I have some bad news for you, Judge?
A. Not that morning, no.
Q. All right. And so the first person that told

you anything about this incident was David Jellinek?

A. Yes.

Q. What he told you was frankly benign, wasn't it?

A. Benign?

Q. Well, he told you that he had a client with an identification issue?

A. Yes.

Q. And a fugitive warrant?

A. Yes.

Q. And there's nothing particularly out of the ordinary about either of those things, is there?

A. No.

Q. He told you that he wanted to speak to his client?

A. Yes.

Q. Who needed an interpreter?

A. Yes.

Q. Okay. Nothing unusual about that?

A. No.

Q. All right. He told you that he asked the judge and she allowed him to go downstairs?

A. Yes.

Q. To speak with his client?

A. Correct.

Q. Did lawyers sometimes speak with clients in the lockup?

A. When they were in custody? Of course, yes.

Q. Okay. And that was pretty much what he told you, wasn't it?

A. Yes.

Q. Okay. You said he referred to it as an incident?

A. Yes.

Q. What about that set of facts is an incident that would warrant him coming to talk to you about it?

A. I don't know.

Q. Did it strike you as odd that he was giving you this information?

A. No.

Q. Why did you think he was telling you all this?

A. I think he was telling me about it because of the ICE involvement.

Q. Well, but he didn't tell you about ICE, did he?

A. He didn't tell me about ICE. Not that I recall. But I don't know. We had a lot of discussion around the courthouse about issues around that at that time.

Q. Is it fair to say -- Yeah. At that time, you

know, ICE was sort of a hot topic; right?
A. It was.
Q. And there was a lot of changing policies and things like that?
A. Yes.
Q. All right. And even among District Courts, the District Courts in Massachusetts weren't all created with the cookie-cutters, were they?
A. No.
Q. They're very, very different in physical layout?
A. Yes.
Q. In entrances and exits and courtrooms?
A. Correct.
Q. And it's really difficult to make one-size-fits-all policies for the District Courts?
A. I don't know if it is or not. You'd have to ask my chief that.
Q. Well, have you sat in different courthouses?
A. Yes.
Q. And do different courthouses do things differently?
A. Somewhat.
Q. All right. There are different doors, different accesses to lockups, there are all kinds of

different things happen; right?
A. Yup.
Q. And even in Newton, access for custodies is very different in the first session than in the upstairs second session, isn't it?
A. Uh-huh. Yes.
Q. In the first session, they can bring people directly from the lockup into the dock; is that right?
A. Right.
Q. And the second session, they have to walk them up the backstairs or take the elevator?
A. Or take the elevator.
Q. And there's no dock alone in there, is there?
A. There isn't.
Q. For that reason, the call of the daily list generally takes place in the first session; is that right?
A. Yes.
Q. Why did you think that Judge Joseph was doing the daily list in the second session?
A. I just -- Because the visiting judge generally sits in the second session. And for some reason, it didn't compute in my brain.
Q. Okay. But --

A. There wasn't a -- you know.
Q. Yeah. But the daily list didn't generally happen up there, did it?
A. It does if there are small claims going on. Like today is small claims days, so they use the first session because there are more people. So we go upstairs and do our daily list.
Q. But that -- This day, that wasn't happening, was it?
A. No.
Q. Now, fair to say there's been a lot of talk about, not just ICE in general, but this incident over the last seven years?
A. Yes.
Q. And you've heard lots of different things from of lots of different people?
A. I have?
Q. Yes.
A. Yes.
Q. And is it difficult to sort out today, in June of 2025, what you heard from who, when?
A. It's challenging.
Q. Okay. Is it fair to say that what you told the grand jury back in 2019 is probably closer to accurate than your memory today?

A. Probably.

MS. MULVEY: All right. Could I approach the witness, Your Honor?

HEARING OFFICER: Yes.

Q. Just to make things easier, can I give you a copy of your testimony?

A. Yeah. Thanks.

Q. I'd ask you to look at Page 33, transcript Page 33. There are some Bates numbers. But if you look at transcript Page 33.

A. Transcript page 33. Yes.

Q. And I should have started, this was given on February 28th of 2019 in the Federal courthouse?

A. Yes.

Q. And if I ask you to look at Page 33, you were asked, understandably, what did David Jellinek tell you?

A. Yes.

Q. And this was the conversation after the drug court meeting that you were telling us about?

A. Yes.

Q. And you said, what I recall him telling me, and I don't, because this e-mail is a compilation of a few after I spoke to, after I spoke to him first, he told me that he had represented a

fellow who they didn't know if he was wanted in Pennsylvania, ICE was also in the building wishing to effect service on him, and he had been arrested, and I don't -- I remember him saying something about he asked the judge if he could bring his fellow downstairs after he had been released with the interpreter to talk to probation, something about trying to sort out whether the Pennsylvania warrant was still active. That's my recollection of how it first started with me, and then I said, okay, you know, and I went downstairs, I said, well, thank you for telling me or something, and I went downstairs, and when I went in to my lobby, my chief court officer came in, Scott Noe, with a policy saying -- reiterating that people go out the front door, and I said, okay, we need to reiterate this, and he told me that an incident had happened that someone went out the back door, so then it started like something happened, I knew something had happened, and I said, okay, well, tell me a little bit about it, and he said he understood the court officer had let someone out the back door, so I was alarmed at that, and I listened, and then I think the

clerk came in and talked to me, too, Larry Okstein, and I was just kind of getting as much information as I could from those parties. Does that sound like it's probably accurate?

A. Yes.

Q. Okay. And so did David Jellinek tell you anybody had gone out the back door?

A. No.

Q. Did he tell you that he talked with the court officer and made an arrangement to let his client out the back door?

A. No.

Q. Did he tell you that he told Judge Joseph he was going to do this and she said, yeah, go ahead?

A. He did not.

Q. Did he tell you -- I assume at that point you knew Assistant District Attorney Shannon Jurgens?

A. Yes.

Q. And she was assigned to your court, so she'd be there pretty much every day?

A. Yes.

Q. Did he tell you she was upset or angry about anything?

A. I don't remember that.
Q. That probably would have flagged the matter for you, wouldn't it?
A. It may have.
Q. And I assume, if he said anything like that, you would have said, well, why, why is she upset?
A. Possibly. Yup.
Q. Don't remember anything about that?
A. I don't.
Q. Did you ever talk with Assistant District Attorney Jurgens about this?
A. I did not.
Q. And so the next thing you recall is Scott Noe coming in and saying, --
A. Yeah.
Q. -- Judge, here's what happened.
A. I think his hair was on fire, basically.
Q. Okay. This was kind of a bad day for him; right?
A. It was a bad day for all of us.
Q. Yeah. And so he told you that the court officer had let the defendant out the back door.
A. He did.
Q. And that was the first you were hearing about it; right?

A. Yes, it was.
Q. Okay. And understandably, you, too, were concerned about it.
A. Very.
Q. All right. And at that point you still didn't know anything about off the record; is that right?
A. I did not.
Q. All right. And that time or within a day or so did Chief Court Officer Noe have a policy that was in writing?
A. Yes.
Q. And he told that we're going to put that posted in the front?
A. Yes.
Q. We want to make sure everybody knows this?
A. Yes.
Q. Because we want everybody going out the front door?
A. Yes.
Q. Okay. Now, actually, that policy, at least in terms of ICE custodies, is a little different from what the Lunn policy wanted done, isn't it?
A. Yes.
Q. Okay. And as judge -- I'm sorry --

Special Counsel Fabricant showed you, there was actually -- do you call it transmittal letters?

A. Yes.

Q. They up there send you out all kinds of things?

A. They do.

Q. And one of them was this, what we've been calling the Lunn policy, which is here's how you want you do deal with ICE?

A. Yes.

Q. And actually, dealing with ICE in terms of them taking custody, that's not really the judge's issue, is it?

A. It is not.

Q. That takes place between the court security personnel and the ICE agents?

A. It does.

Q. And so you don't usually see that happen?

A. I do not.

Q. Don't know much about how it happens?

A. No. But in the -- During my time in Newton, I have seen ICE effectuate their service from the front of the building, yes.

Q. Okay. And this transmittal letter that y'all got in November of 2017 actually said that the court wanted that to happen in the lockup,

didn't it?
A. Yes.
Q. And there could be good security reasons for that; right?
A. Yes.
Q. Okay. Not all defendants are happy about going into ICE custody?
A. Yes.
Q. They might put up a fuss?
A. I don't know.
Q. All right. And certainly, if they have some friends, there's at least the potential for an unpleasant or an unsafe confrontation?
A. Very much so, in the courtroom, yes.
Q. Okay.
A. Not in security. But in the courtroom.
Q. No. But in any public area.
A. Yes.
Q. If there's a scuffle in the front lobby, and there are people there, that's just not the kind of situation anybody wants.
A. Absolutely not.
Q. And so the actual policy was that, for somebody who had come into the court in custody, was released and was going to ICE, that that should

happen in the lockup; right?
A. Per Lunn. The policy.
Q. Yes.
A. Yes.
Q. And the policy that Chief -- I'm sorry -- Chief Court Officer Noe developed actually is a little different from that; is that right?
A. Yes.
Q. Okay. And you said, if you think that's right, go ahead and do it?
A. Yes.
Q. Okay. And that's one of those examples where a particular District Court may do things a little differently?
A. Yes.
Q. Now --
A. And we weren't told that that was wrong either.
Q. You were not told it was wrong.
A. No.
Q. And the next thing that happened after Chief Noe was -- that you talked to Judge Joseph the next time she was in the courtroom?
A. Yes.
Q. And I think we heard that was the Wednesday, the

4th?
A. Yes.
Q. Right. And you had a conversation with her?
A. Yes.
Q. All right. And again, you were still trying to gather information and figure out what happened?
A. Yes.
Q. Okay. And at that point you still didn't know about the off the record; is that correct?
A. I did not.
Q. All right. And so you didn't ask her.
A. I didn't.
Q. And she didn't tell you.
A. She did not.
Q. Okay. And did she answer your questions?
A. Yes.
Q. All right. Did you feel like she told you what she thought was important, as far as you remember?
A. Yes.
Q. Okay. You didn't feel like she was holding back anything or --
A. Not that I could tell.
Q. All right. And in fact, do you remember that you were the one who told her that he had gone

out the back door?
A. I don't remember that.
Q. Okay. Do you remember her -- you saying to her I want to talk to you about this case, the guy went out the back door, and she said how did that happen, and you said that's what I'm trying to figure out?
A. I don't remember that.
Q. Does it sound like something that could have happened?
A. Probably, yeah.
Q. Okay. Because you were trying to figure out what happened; right?
A. Absolutely. Yes.
Q. You weren't up there to reprimand or scold her for anything, were you?
A. No. I wished that I had been in the courthouse on April 2nd.
Q. Okay. And why is that?
A. Because this would not have happened.
Q. Why is that?
A. Because I would not have -- I don't know why, but it would not have happened. I can tell you that.
Q. Well, do you generally accompany defendants down

to the lockup?
A. I do not, generally.
Q. All right. And if a defendant's down there, and the court officer let him out the back door, is there any way you as the judge could stop that if you didn't know about it?
A. I would know about it.
Q. How would you know?
A. Because I would have been told, I'm sure. They just would not have done it if I had been in the building, whoever was involved.
Q. And is that because you're sort of a senior and in charge?
A. I believe so.
Q. So do you think maybe they thought that this was a situation that could be used to advantage?
A. Who?
Q. Court Officer MacGregor and David Jellinek?
A. I have no idea what they thought.
Q. Okay. But you don't think they would have pulled it with you there?
A. I do not think so.
Q. Now, you also, after your conversation with Judge Joseph, had a phone call with her; is that right?

A. I don't remember the phone call.
Q. But you know from records that it happened?
A. Yes.
Q. And in fact, she called you late on Thursday afternoon and then again on Friday, and you finally touched base on Friday morning?
A. If you say so, yes.
Q. Have you seen records that show that?
A. I haven't seen records. I understand that that occurred.
Q. And that there was a 10-minute phone call, 10 or 11 minutes?
A. That's what I've seen. I don't recall.
Q. And you don't at this point remember that?
A. I don't. I give my phone number to many new judges and they call a lot.
Q. But given what was going on at this point, your belief is that that phone call was about this incident; is that right?
A. I am not sure what it was about.
Q. All right. But you know it happened, you just don't remember what; --
A. Yes.
Q. -- is that right?
All right. Now, you also sent some e-mails and

received some e-mails about this situation; is that right?

A. Some e-mails?.

Q. Yes. The e-mails that's what Special Counsel Fabricant was talking about?

A. Yes. Oh, yes.

Q. And the first e-mail, if we look at, I think it's App 540 and 541. On Thursday, April 5th, at 12:26, you sent Judge Fortes an e- mail? I'm sorry.

A. Hold on one sec.

Q. Let me wait for you to catch up.

A. 541. Yeah. 540 and 541, on Thursday, April 5?

Q. Right.

A. Yup.

Q. You were letting Judge Fortes know that this had happened?

A. I was.

Q. In fact, had you had a phone call with her before that?

A. I did.

Q. And she said would you just put it down in an e-mail?

A. Yes.

Q. And you did that, didn't you?
A. I did.
Q. And this e-mail was sort of a summary or a compilation of the various people that you talked to?
A. It was.
Q. And as Judge Fabricant pointed out, it doesn't talk about going off the record. Does that suggest to you that you hadn't yet spoken to Clerk Okstein about that part of it?
A. Yes.
Q. All right. Do you recall what it was that caused him or you to end up talking about that part of it?
A. Yes. Because, again, hair on fire, a clerk comes in and tells me that there's a large gap in the tape. Yes.
Q. Well, it happened on Monday; right?
A. Right.
Q. And this is Thursday at noontime.
A. Uh-huh.
Q. And with his hair on fire, he hasn't come in to tell you that?
A. I haven't -- I don't recall exactly when he came in to tell me.

Q. All right. But certainly, if you had known that when you were writing to Judge Fortes, you would have included that information.
A. I would have. It may have been, you know, I think. You know what I mean? I don't know.
Q. So with his hair on fire, he still hadn't told you by Thursday?
A. I don't recall him telling me by Thursday.
Q. And when he told you, did you know he was sitting in the clerk's chair at that point?
A. I don't know if I did know that. I think he told me.
Q. All right. Did you say to him, well, why would you do it?
A. No. Clerks don't question judges when they tell them what to do.
Q. Don't clerks help new judges all the time?
A. Clerks help new judges, but they do not tell them what to do.
Q. Did you ever actually listen to the tape?
A. I believe I listened to it a long time ago.
Q. And do you that the person that asked if they could off the record was David Jellinek?
A. Well, he asked, are we on the record, my understanding is, and the judge asked the clerk

to take us off the record.
Q. But could it be maybe the reverse?
A. I don't know that it was.
Q. All right. And do you know that the actual gap was 52 seconds?
A. I learned that, yes.
Q. So it wasn't several minutes?
A. Okay.
Q. All right. And did you ever talk to anybody about what happened during that time?
A. No.
Q. Now, whenever you learned that, the way that you saw this is that there were essentially two issues; is that right? One, was the court officer letting the defendant out the back, and the other with Judge Joseph going off the record; is that right?
A. At least two, yes.
Q. Well, those were the two you were aware of; is that right?
A. Well, I don't know how the -- it came to be that the court officer let the defendant out the back door.
Q. And you never did any investigation on that; is that right?

A. No. That's not mine.
Q. And when you reported this to Judge Fortes, that was because she was the Regional Administrative --
A. Yes.
Q. Right. Now, does she have power to discipline judges?
A. No.
Q. The only person who could do that would be Chief Judge Dawley?
A. I'm not even sure he can discipline judges. I mean, there's a range of -- you know, discipline of judges is not what's within the District Court's purview, my understanding.
Q. Is there some time that the judge said something wrong, either intentionally or unintentionally, there's a meeting to discuss it to ensure that doesn't happen again?
A. Yeah. I don't know if I call that discipline.
Q. Okay. Fair enough. There's attempt made to tell the judge how to do it correctly.
A. Well, there's an attempt to discuss what happened and perhaps point out other ways to do things.

Q. All right. And that kind of thing happens not infrequent; is that right?

A. It does not happen infrequently. Correct.

Q. Now, when you and Judge Fortes were communicating, did Judge Fortes pass this on up the chain to Judge Dawley, --

A. Yes.

Q. -- Chief Judge Dawley? And do you recall why she did that?

A. I think she was as alarmed as I was.

Q. Would you take a look at Page 540.

A. Yes.

Q. All right. And the top e-mail there was April 20th of 2018?

A. Yes.

Q. Which is actually two and a half weeks after this happened?

A. Yes.

Q. And she says, Chief Judge Heffernan called me about this incident a couple of weeks ago, I asked her at that time to follow up with an e-mail outlining the incident below, I also suggested she pull the tape because there was some indication the judge involved may have gone off the record prior to the defendant going down

the back stairwell, I'd spoken to the judge involved, she can brief you if you need additional info. Okay. And then she says, informing you about it now because Judge Heffernan called to let me know regional director for ICE may bring up at meeting supposedly scheduled with CJ Carey, I didn't want you or CJ Carey blind-sided by any info. Is that what she wrote?

A. Yes.

Q. Okay. And so the event that prompted her to tell Chief Judge Dawley about this was a meeting with ICE.

A. I'm not sure that -- I think that may have been one of the motivations, but I don't know.

Q. Do you see any other motivation in this e-mail?

A. Oh, I think --

Q. She said informing you about it now because Judge Heffernan called to let me know the regional director for ICE may bring up at meeting supposedly scheduled with CJ Carey, I didn't want you or CJ Carey blind-sided by --

A. I don't know if Chief Justice Fortes told Chief Justice Dawley on the phone or something. That looks like this is the first writing, yes.

Q. Okay. Now, we've also gone through or Special Counsel Fabricant went through some of Chief Justice Dawley's responses and the back and forth; is that right?

A. Yes.

Q. And one of the things that he said was on the top of 538.

A. Yes.

Q. He was responding to your e-mail, answering some of his questions?

A. Yes.

Q. All right. And he said, Mary Beth, thanks for the response, I don't think that this situation, even if raised by ICE, is a problem. Right?

A. He did.

Q. Okay. So he wasn't concerned about it other than perhaps with consequences with ICE; right?

A. I don't know what he was concerned about.

Q. That's what he wrote; right?

A. He did write that.

Q. Okay. And is it fair to say that at this point relationships between the state court and ICE were a bit frosty?

A. It was challenging, yes.

Q. Strained?

A. I believe so. I don't know. I have never talked with ICE about it. I don't know.

Q. And then he said, it sounds like the court personnel were just trying to accommodate the attorney/client relationship by use of the interpreter; right?

A. Yes.

Q. And that certainly would be an appropriate thing to do, wouldn't it?

A. What would be an appropriate --

Q. Well, to give a defendant a chance confer with his counsel?

A. Yes.

Q. And to allow the interpreter to do his job if the client needed an interpreter?

A. Yes.

Q. All right. And in the downstairs courtroom, there isn't any private meeting space for a lawyer and a client within a courtroom; is that --

A. No.

Q. So if you need to have a private conversation, it's hard for a lawyer and an interpreter to sit in the courtroom and do that; true?

A. I think it's hard to do in any courthouse in

the state.

Q. Okay. ICE was waiting in the front lobby?

A. Yes. So I was told.

Q. Okay. And --

A. I wasn't there.

Q. Having had experience with ICE, do you have some expectation of what would happen if a lawyer said, ICE, don't take him yet, I want to talk to my client?

A. I don't have any expectation.

Q. Do you think it would be reasonable for the lawyer to be concerned that maybe ICE wouldn't honor that request the way a state judge might?

A. I don't know.

Q. And the other place that conferences took place, especially for clients in custody, was in the lockup; right?

A. Yes.

Q. And again, if the client needs the interpreter, the interpreter has to go to lockup for that; is that right?

A. Yes.

Q. And so this was a pretty complicated situation from both what you heard and what you now know about this defendant situation; right?

A. Complicated how?
Q. Well, he had state court charges; right?
A. Yeah. Which were dismissed.
Q. Well, they weren't dismissed that day.
A. The possession charges? He was released on personal. The fugitive was dismissed.
Q. Right. So he had pending state court charges; right?
A. Yes.
Q. He had this warrant that might or might not be outstanding from Pennsylvania; right?
A. Yes.
Q. And he had ICE looking for him.
A. Yes.
Q. Right. And it would be reasonable for his defense lawyer to want to kind of run through those issues and what would happen next; right?
A. Yes.
Q. And it would be reasonable to do that in the lockup, wouldn't it?
A. Not if he was released from custody.
Q. Well, doesn't the Lunn policy say that he's supposed to go downstairs to the lockup to get processed?
A. For ICE?

Q. Yes.
A. Oh, maybe, yes. I don't know.
Q. Well, if that's what it says, then that would be a perfectly reasonable thing for the lawyer and the client and the judge to do; right?
A. The lawyer, the client, and the judge? I don't know why the judge would be involved in that.
Q. Well, in saying to the interpreter you can go down to the lockup?
A. Going down to the lock up with the interpreter or probation is fine.
Q. Okay. All right.
A. I don't get the question. Sorry.
Q. So there would be nothing at all wrong with a judge allowing the defense counsel to confer with his client and the interpreter in the lockup.
A. Unless -- If the person were out of custody, it would be unusual.
Q. All right. But if he's being -- If ICE is there for him, he's supposed to be processed out of custody in the lockup.
A. Right.
Q. Isn't that the Lunn policy?

A. And that did not happen. Right. So...
Q. Right. But that's what was supposed to happen.
A. Apparently, according to the Lunn policy, yes.
Q. Right. He was supposed to go downstairs in custody and get processed out there; is that right?
A. That is what Lunn says, yes.
MS. MULVEY: May I have moment?
(PAUSE)
MS. MULVEY: I have nothing else. Thank you, Judge Heffernan.
REDIRECT EXAMINATION
BY JUDGE FABRICANT:
Q. Very briefly if I may.
A. Yes.
Q. Judge Heffernan, who was it that came in with his hair on fire?
A. A couple of people. Chief Court Officer Scott Noe and Larry Okstein.
Q. Each of them separately.
A. Correct.
Q. Do you know when each of them came in?
A. Scott came in first.
Q. Okay.

A. And then I don't remember when Larry came in.
Q. You don't remember when that happened.
A. Yes.
Q. Okay. You said in answer to one of Ms. Mulvey's questions, or you adopted her phrasing, dealing with ICE is not really the judge's issue.
A. No.
Q. So you, as the judge, would you, if a lawyer makes an argument to you that ICE is going after him but he's the wrong person, how would you respond to that as a judge?
A. How would I respond to that as a judge? Well, if he was represented, I would ask his lawyer to look into it.
Q. And if the lawyer had looked into it, and had not succeeded in persuading the ICE officer, and the ICE officer still wanted to take custody --
A. Yeah. It has nothing to do with me. I would certainly not get involved.
Q. So not the judge's role.
A. Absolutely not.
Q. And would you be making suggestions regarding how this problem might be solved?
A. I would not.
Q. Would you be suggesting, well, we could detain

him overnight?
A. I would not.
Q. Would you be suggesting, would you be suggesting anything about how to solve this problem?
A. I would not.
Q. Would you tell the lawyer, the lawyers, ICE is not my responsibility?
A. I'm not sure I would phrase it that way, but I would just say -- I would not get involved.
Q. Is that how you would phrase it?
A. Yes.
Q. The Lunn policy. We've talked about the Lunn policy.
A. Yes.
Q. As you look at it now, and as you talked about earlier, what the normal practice was in Newton at the time, was Newton doing something different from Lunn policy at the time?
A. I think so, but I don't believe it was outside of the Lunn policy.
Q. Okay.
A. I believe it was allowed.
Q. But as you've described, the normal practice in Newton was, if a defendant's released from custody, goes out through the courtroom in the

first session.
A. Correct.
JUDGE FABRICANT: All right.
That's all I have. Thank you.
MS. MULVEY: I just have
another question or two.
RECROSS-EXAMINATION
BY MS. MULVEY:
Q. Are you aware that, during the morning, there were multiple calls on the Medina Perez case?
A. I'm not aware of that.
Q. All right. And if I told you that his defense lawyer, who at that point was Elizabeth Bostwick, not David Jellinek, was asking for time to investigate his identity, and Judge Joseph acquiesced, is that an appropriate thing for a judge to do?
A. Sure. Second call all the time for cases.
Q. Or a third call sometimes or --
A. Many calls.
Q. -- come back in the afternoon.
A. Yes.
Q. Because it's important to give a defense lawyer time to do his job, isn't it?
A. His or her job. Absolutely.

Q. All right. I went to school when it was all his. Sorry about that.

And if in the afternoon David Jellinek wanted more time to try to persuade ICE that this was the wrong guy, would it be appropriate for a judge to give him that?

A. The time that is required by the defense and the assistant DA for any case is liberally given by me.

Q. Okay. Because you want to make sure everybody's rights are protected.

A. That's my job, to make sure.

Q. Right. And to make sure each side has time to do its job.

A. Yes.

Q. All right. You would never say to a lawyer, I'm not going to let you investigate that; right?

A. I don't know that I would never say that.

Q. Within reason.

A. I'm not sure I would even within reason. I'm not sure. I would have to look at it individually.

Q. All right. And certainly, even though ICE isn't your issue, you wouldn't want ICE to take the wrong person, would you?

A. Certainly not.

MS. MULVEY: Thank you.

REDIRECT EXAMINATION

BY JUDGE FABRICANT:

Q. Would you detain somebody overnight because of a question about ICE?

A. How could I? There's nolle pros. Unless they bailed on the person. No.

Q. And so there's fugitive from justice warrant -- fugitive from justice charge. It's dismissed.

A. Yes.

Q. What you then have is two misdemeanor drug charges.

A. Correct.

Q. In the normal course of things in April of 2018, on a misdemeanor drug charge, would you be setting a bail that someone can't make?

A. No.

Q. And if somebody has no criminal record?

A. No.

Q. And is there a statutory presumption in the District Court on release on personal recognizance?

A. Yes. There is now. Certainly.

Q. Was there then?

A. At the time there was. But it's more solid now with granting and all those case laws.

Q. But there's statutory provisions --

A. For sure, yes.

Q. -- that establishes a presumption, and that was in effect at the time, --

A. Yes.

Q. -- of release on personal recognizance.

A. Correct.

Q. And that applies to the District Court. Doesn't apply to the Superior Court because of the different kinds of cases.

A. Oh, yes.

Q. Oh, yes, it's different?

A. The -- I don't know about the Superior Court. I'm often told about them, but I don't know about them.

JUDGE FABRICANT: Thank you.

THE WITNESS: You bet.

JUDGE FABRICANT: That's all I have. Thank you.

MS. MULVEY: I have nothing else. Thank you.

HEARING OFFICER: Thank you. The witness is excused. Thank you, Judge.

JUDGE FABRICANT: I hope we have our next witness perhaps waiting out in the hallway.

(PAUSE)

HEARING OFFICER: Good afternoon.

HONORABLE STACEY FORTES, SWORN

HEARING OFFICER: Please have a seat. Be as close to the microphone as possible. That would be much appreciated.

DIRECT EXAMINATION

BY JUDGE FABRICANT:

Q. Good afternoon.

A. Good afternoon.

Q. Please state your name.

A. My name is Stacey Fortes.

Q. And are you now the Chief Justice of the District Court?

A. I am.

Q. And back in 2018, what was your role?

A. I was a Regional Administrative Judge.

Q. And would you just go back through your professional background, starting from when you started practicing law, and run through the sequence of your professional history.

A. Sure. So out of law school, my first position was as an assistant attorney general, I was an assistant district attorney when Ralph Martin was the District Attorney.

Q. So tell us years, if you can remember.

A. I think it was 1991 or '92 I started in the AG's office, around 1994 or so, maybe, I went over to the District Attorney's Office. I'm not completely sure on the dates. I was in the District Attorney's Office under Ralph Martin until maybe around '97. And then I went over to the MBTA as a labor attorney in the labor department. Dan Conley called me one day, who was a new Suffolk district attorney, and he asked me to be Chief of the District Court prosecution in Suffolk County. I went back to Suffolk County. I was appointed to the bench in December of 2006, and have been an Associate justice since then, and now Chief Justice of the District Court.

Q. And when did you become the Regional Administrative Justice?

A. Let's see. I was a Regional Administrator Justice... Maybe in -- I'm not positive of the dates.

Q. Sometime before April of 2018?
A. Yes.
Q. And did you also, sometime around then, become the First Justice of the Lowell District Court?
A. Yes.
Q. Did you hold those roles simultaneously?
A. I did.
Q. Describe for us, please, the role of a Regional Administrative Justice.
A. Okay. So the District Court is split, given its size, into six regions. The Regional Administrative Judge is appointed by the Chief Justice to help the Chief Justice with the administration of the District Court. So as Regional Administrative Judge, I was responsible for scheduling judges, approving the schedule in my region, dealing with day-to-day issues that came up, try to keep things off the Chief Justice's plate, so dealing with those issues, bringing things to his attention that needed to be brought to his attention, and anything that the Chief Justice designated the Regional Administrative Justice.
Q. Does the Regional Administrative Justice have disciplinary authority over other judges?

A. No.
Q. Does the Chief Justice, now that you're in that role, have disciplinary authority over other judges?
A. Unfortunately now, yes.
Q. And is there a statutory provision that gives the Chief Justice that authority?
A. Yes.
Q. Are you aware of a rule regarding recording of proceedings in the District Court?
A. Yes. There's a District Court rule, Rule 211, requires all, all courtroom proceedings to be recorded.
Q. And you've noticed the monitor, Rule 211 is being displayed on the monitor. Also in front of you on the witness stand is a binder. That binder has hard copies of a whole set of appendices. So everything we're going to display on the monitor is also in that binder. And you can look on the monitor or in the binder, whichever is easier for you.
This is Appendix K. And after the cover page, starts at Page 122 of the appendix and goes over to Page 123. What is your understanding of the substance of this

rule?
A. The rule requires all courtroom proceedings to be recorded.
Q. And are there some exceptions?
A. Administrative matters. But everything that happens in court needs to be recorded.
Q. So call of the list, for example, the clerk is calling the list, the judge isn't sitting on the bench yet.
A. Yes.
Q. Is that an exception?
A. That's an exception.
Q. But anything the judge is doing, is that required to be recorded?
A. Yes, it is.
Q. And if you look on Page 123, go down the page to just before the bold capital letter line, just before that.
A. Yes.
Q. Does it tell you when this rule was adopted?
A. Yes. Adopted December 31st, 1987, effective February 1st, 1988.
Q. And in your -- You've been a judge since 2006. So now 18 and a half years, perhaps. You said December of 2006. During the course of your

career as a judge, have you ever during that time gone off the record?

A. No.

Q. In your view, is there any legitimate reason to do that?

A. No, there's no legitimate reason to do it. There are times I would say where someone has forgotten to turn the recording machine on, but not to require that it be turned off.

Q. So have there been times when it came to your attention that not, at the direction of the judge, but through some inadvertence or error, some proceeding wasn't recorded?

A. Yes.

Q. And have you had occasion to deal with that in terms of reconstructing the record?

A. Yes.

Q. If you receive information to indicate that some of the proceeding or some part of some proceeding wasn't recorded, do you -- upon that information, is it automatic in your mind that that means the judge turned it off or is there another possibility?

A. There is another possibility.

Q. What's the other possibility?

A. Well, the possibilities that I just went through. So you could come back from a recess, the clerk could forget to turn it on, it could be malfunctioning. There are other reasons.

Q. Are you familiar with the Lunn policy?

A. Yes.

Q. And recently there's been a new Lunn policy.

A. Yes.

Q. I want to take you back to April of 2018.

A. Yes.

Q. So put the recent one out of your mind.

A. Okay.

Q. And focus on the one that was in effect in April of 2018, and that's behind Tab B in the binder, and what you see in front of you here is the policy on the monitor.

Do you have a sort of capsule summary of the central theme of that policy?

A. The policy boils down to not to help or hinder ICE officials from performing their duties based on the Lunn holding.

Q. So be neutral.

A. Yes.

Q. How did you first hear about an event in Newton on April 2nd of 2018?

A. I got a phone call from the First Justice Mary Beth Heffernan informing me that there had been a situation in Newton when she wasn't there involving the covering judge.

Q. And who was the covering judge?

A. Judge Joseph.

Q. And do you know when you got that phone call?

A. I don't recall today, no.

Q. You just told us in the short version what the substance of that call was, but was there more to that call?

A. Yes, yes.

Q. So tell us what you can remember.

A. So Judge Heffernan told me that there was an individual before the court being arraigned, that individual had been arraigned on a fugitive from justice charge, I believe a drug charge as well, and that there was also an ICE detainer, civil detainer, for the defendant, that ICE was there in the building to effectuate that detainer, that the fugitive charge had been dismissed, I believe the defendant was released on personal recognizance, and that somehow the defendant had gone out the back door and ICE had not been able to effectuate.

Q. And in the course of this conversation, did you say anything about some part of the proceeding having been recorded.

A. Yes. Well, yes. Because I said, well, how did that happen. And she said, well, that's the problem, there's a portion of it that was not recorded, she said the judge involved went off the record.

Q. And did she tell you how she knew that?

A. My memory was she knew it from the clerk, her clerk.

Q. And did you ask her to do something?

A. I did. I said, Mary Beth, how do you know that, you weren't there, did you listen to the tape, the portion of the tape that you could listen to. And she said, no, should I do that, and I said yes.

Q. And did you ask her to do something else as well?

A. I also asked her to send an e-mail of what transpired.

Q. Summarize it in an e-mail?

A. Yes.

Q. All right. And let's look at, in your binder, Tab V. You'll see behind Tab V, you'll see on

the monitor here we have what appears at Page 540 behind Tab V, and your e-mails of course, as we all know, much to our annoyance, start at the back and work forward.

So at Page 540 you see an e-mail from, it says Mary Heffernan. Is she referred to as Mary Beth?

A. Yes.

Q. You see an e-mail from Mary Heffernan to you, Thursday, April 5th, 2018, 12:26 p.m. And I believe, again, because we read it earlier, what you have in front of you, is this the summary that she sent you in response to your request?

A. Yes.

Q. And then if you go further up Page 540 is there then an e-mail from you, April 20th, 2018, at 12:21 p.m., from you. And it's a little confusing, but do you remember who this was to?

A. Chief Justice Dawley.

Q. And so you said to Chief Justice Dawley, Chief, Judge Heffernan called me about this incident a couple of weeks ago, and I asked her at the time to follow up with an e-mail outlining the incident below, I also suggest that she pull the tape because there was some indication the judge

involved may have gone off the record prior to the defendant going down the back stairway, I've spoken to the judge involved, and can brief you if you need additional info. Informing you about it now because Judge Heffernan called to let me know regional director for ICE, question mark -- So did you have uncertainty about whether that was the right title?

A. Yes.

Q. We can bring up the meeting supposedly scheduled with CJ Carey. Who is CJ Carey?

A. The Chief Justice of the Trial Court, Paula Carey. And I didn't want you or Chief Justice Carey to be blind-sided by any info.

Q. The Chief Justice of the Trial Court. So the Trial Court, is it accurate to describe it as, there are seven departments, each department has a chief, appointed by the Chief Justice of the Trial Court, and there's one Chief Justice of the Trial Court that oversees all of those seven departments?

A. Yes.

Q. Is that accurate?

A. Yes, that is.

Q. At the time, the Chief Justice of the Trial Court was Paula Carey.
A. Yes.
Q. Chief of the District Court was Paul Dawley.
A. That is correct.
Q. You were Regional Administrative Justice.
A. Yes.
Q. And the First Justice is Mary Beth Heffernan. Mary Beth Heffernan was the First Justice.
A. That's correct.
Q. So you said you had spoken to the judge involved. So do you know when that happened?
A. I'm not sure when that happened. It would have been obviously before I sent this e-mail and after I talked to Judge Heffernan.
Q. So sometime between April 5th and earlier that day on April 20.
A. That's right.
Q. And do you know how it came about -- Where, first of all, was this conversation?
A. With Judge Joseph?
Q. Yes.
A. In the Lowell District Court on Hurd Street.
Q. And Lowell was where you were sitting.
A. That's correct.

Q. Do you know how it came about that she was sitting in the Lowell District Court?

A. I think that I said to Judge Heffernan that Judge Joseph was either scheduled to be sitting with me or I would schedule her to sit with me so I could ask her what happened, talk to her about it.

Q. And you, as the original administrative justice, had authority over the schedule.

A. That's correct.

Q. So one way or the other, she was scheduled to sit there on some day between April 5th and April 20.

A. Correct.

Q. And I want to just go back to this e-mail from -- before we talk about the conversation with Judge Joseph. I want to go back to this e-mail from Judge Heffernan. And you'll see somewhere in here that there's a reference to the defendant and his lawyer going down to probation regarding the Pennsylvania warrant. And we'll find that.

So on Page 541, a little above the middle of the page, the defense attorney asked the judge if he could utilize the services

of the interpreter in probation so the defendant can further investigate the Pennsylvania detainer so it did not hinder his client further. That make sense to you?

A. Not to me, no.

Q. And why did it not make sense to you?

A. Because there wouldn't have been anything that probation could do about the Pennsylvania matter.

Q. So probation would be the keeper of the Triple I.

A. Yes.

Q. And so if there's a charge pending in Pennsylvania, would that show up on the Triple I?

A. Yes.

Q. Can probation change the Triple I?

A. No.

Q. Triple I comes from Federal.

A. That's right.

Q. All right. Now, on whatever day it was, between April 5th and April 20th, Judge Joseph is sitting in Lowell, you're sitting in Lowell, and you had a conversation.

A. Yes.

Q. And you said that that conversation was in her lobby or your lobby?

A. No. In my lobby. She wouldn't have had a lobby there because she wasn't sitting there on a regular basis.

Q. How did that conversation come about?

A. I asked to talk to her over the lunch recess. So I think we, you know, sat down, the two of us, had lunch, regular chitchat about how things were going, and then I said, Shelley, Mary Beth called me about a situation in Newton, went through it with her and asked her, and I said there's a portion of it, my understanding is, it wasn't recorded, and asked her what happened, if she recalled it.

Q. And what did she say?

A. She recalled it. She told me that, again, that the defendant had been before the court for an arraignment. She told me that the defendant was charged with a drug offence, fugitive offense. There was confusion she said about the defendant's identity, and she was concerned about that and concerned about people in the audience hearing whatever confusion was about the identity, and had the parties at side bar,

and there were some conversation about how the equipment in Newton worked as opposed to other courts that she had been in. Newton was still on an old recording system. It hadn't moved to the FTR system yet. And so there was some conversation about that with specific details. Beyond that, I don't recall.

Q. Did she talk about an incident that occurred in another court that was still on an old recording system?

A. She may have. I just don't recall.

Q. Did she ever, in the course of this conversation, did she ever directly tell you that she had told the clerk to turn off the recording system?

A. No. And I didn't, I didn't ask her directly either, but she never directly told me that, no.

Q. Did she tell you anything that in your view would be an acceptable reason for going off the record?

A. No.

Q. When she talked about concern about people in the audience hearing a discussion of the defendant's identity, did she explain why that was a concern?

A. I don't recall.
Q. In your view, is a discussion of a defendant's identity something that should happen off the record?
A. Not in my view but...
Q. And is it an exception to Rule 211?
A. It is, it is not.
Q. Did she say anything about being concerned that ICE would take the wrong person?
A. No. I don't recall us getting that far into the conversation about ICE and what happened because I still was just trying to figure out why there was a portion that wasn't recorded.
Q. And you were trying to figure why there was a portion that wasn't recorded. She never said there was a portion that wasn't recorded because I told the clerk to turn the recording off.
A. No. I didn't hear that in the meeting with me.
Q. Did she say anything about ICE?
A. Not that I can recall. But again, I was focused in the first part of the why there's no recording.
Q. So you don't recall her saying anything about ICE.

A. No. I mean, obviously, in the beginning of the conversation with her, when we were talking about what happened in Newton, I think there was a preliminary conversation about it, but not into details, because, again, I was focused on...

Q. Did she say anything about wanting the attorney to have an opportunity to explain the defendant's rights to him before ICE would take him to custody?

A. I don't recall anything like that.

Q. Did she say anything about wanting to pause ICE taking the defendant into custody?

A. No.

Q. How did the meeting end?

A. I recall that I had made a copy of Rule 211 for her prior to the meeting. I also made a copy of the ICE policy. I gave her a copy. Reviewed 211 with her. Told her, Shelley, you know all courtroom proceedings have to be recorded. She said she knew that. I also believe I gave her a copy of the Trial Court ICE policy, and I think she said that she had it because she called the administrative office. And she said she understood everything, so we

went back to work.

Q. She told you she knew about Rule 211, that all things need to be recorded.

A. I don't think she said specifically I know about Rule 211. But she said I know. All court proceedings need to be recorded. Yes, I know, she said.

Q. And was that the end of the conversation?

A. Yeah. As I recall it, yes.

Q. And after that meeting with Judge Joseph, did you have any further conversation about this with anybody before you sent your e-mail to Chief Justice Dawley?

A. I, at some point I talked to Judge Heffernan. I think I called her. And I said I talked to Shelley and she did not tell me she instructed the clerk to turn off the recording, Mary Beth. And Judge Heffernan by that time I think had listened to the recording, because she said, yes, she did, Stacey. And I said, well, I talked to her, and that was it.

Q. At that point were you satisfied that it wouldn't happen again, that she wouldn't go off the record again?

A. I was satisfied that, with her answer to me,

that she knew what the Trial Court policy was.
Q. And so you then sent this e-mail to Chief Justice Dawley.
A. Yes.
Q. What was the next thing you heard about this?
A. After the e-mail from Chief Justice Dawley, I think Chief Justice Dawley asked to meet with me and Judge Joseph.
Q. Did you get any help from his assistants in setting up the meeting?
A. Yes.
Q. And did you -- in preparation for that meeting, did you send an e-mail to Joseph Jackson in Chief Justice Dawley's office --
A. Yes.
Q. -- requesting that he get a copy of the recording for Chief Justice Dawley?
A. Yes.
Q. And that is at Page 532, starting at the bottom of the page. Hi Joe, hope all is well, Chief Justice Dawley asked me to forward this to you for Newton recording, and what you were forwarding was the name of the case, Commonwealth versus Jose Medina Perez, April 2nd, 2018.

A. Yes.
Q. And you sent that to Joe Jackson. And then you sent a further e-mail. You said, Joe, as you know, there is no FTR in Newton yet. Judge Heffernan's copy of the recording is in the lobby if someone needs to pick it up for the Chief.
A. Correct.
Q. Was there then a meeting in Chief Justice Dawley's office on May 8th of 2018?
A. Off the top of my head, I don't recall the date, but I'm sure there's something referencing the date. There was a meeting in Chief Justice Dawley's office.
Q. Do you remember that meeting?
A. Yes.
Q. And who was there?
A. My memory is, Chief Justice Dawley, Judge Joseph, and I.
Q. So three people in the room.
A. That I recall.
Q. What was your role in the meeting?
A. As the Regional Administrative Judge, you have to go to a meeting with the Chief usually there as another witness to fill in anything, if

you had a prior conversation with the judge, that was my purpose, but it's the Chief's meeting.

Q. Was he running the meeting?

A. Yes.

Q. Tell us please everything you remember about that meeting, what he said, what she said.

A. Well, he -- My memory is he had notified both of us what the meeting was about, and he asked her, I think at the beginning of the meeting, did you have an opportunity to listen to the recording, and then he said there was some things that he was concerned about in the recording, I think things like lack of formality in the beginning, professionalism, and then the instruction, did she instruct the clerk to go off the record, and Judge Joseph in that meeting right away said, yes, I did, and I shouldn't have done that.

Q. And had you heard her say that at any time before?

A. No.

Q. This is the first time you heard her directly acknowledge?

A. Yes. She didn't say it to me. She said it to him,

yes.

Q. And beyond that conversation about going off the record, what else do you recall of this meeting?

A. So I remember, I remember not specifics, because it was his meeting, I remember him going through the incident with her, telling her it was a serious matter, very serious matter, making sure again that she understood the rule with regard to recording, that she understood the ICE policy. But the specifics of who said what -- beyond, you know, beyond that, I don't know.

Q. Did she explain in any way why she went off the record?

A. I don't recall.

Q. Did she say anything about ICE, that you recall?

A. Not, not that I can recall, no.

Q. So do you recall her saying anything about being concerned that ICE would take the wrong person?

A. I don't recall.

Q. Do you recall her saying anything about being concerned that ICE would take custody of the defendant before his attorney had a chance to confer with him?

A. I don't.

Q. Did she say anything about wanting to pause ICE taking him into custody?

A. No.

Q. Did she say anything about wanting his attorney to have a chance to explain his rights to him before ICE would take him into custody?

A. Not that I can recall.

Q. How did the meeting end?

A. My memory is it ended similar to the meeting with me, her being very apologetic about going off the record, saying she understood the policies, that she was apologetic for taking everyone's time, and that's the way the meeting ended.

JUDGE FABRICANT: All right. That's all I have at this point.

CROSS-EXAMATION

BY MS. MULVEY:

Q. Good afternoon, Chief Justice Fortes.

A. Good afternoon.

Q. My name is Liz Mulvey. Certainly, I've never appeared before you; is that fair?

A. That's fair.

Q. Okay. This rule against going off the record or requiring that all proceedings be recorded has

been in effect probably longer than you've been practicing?

A. I think that's probably fair to say, yeah.

Q. Is it also fair to say that over the years it's sometimes been honored in breach?

A. Not, not in my experience.

Q. I understand that. But would you be surprised if other judges had at various times gone off the record?

A. No. I mean, you know, I don't know what other judges do and, you know, do necessarily unless it's brought to my attention.

Q. Fair enough. And you don't, even as Chief, go, you know, around surveying people, do you?

A. No, no.

Q. So if other lawyers, judges, clerks testified that that, you know, happens for one reason or another, that wouldn't surprise you, would it?

A. When you say would it surprise me --

Q. You would believe that.

A. I would, I would not not believe it.

Q. Right.

A. Yes.

Q. Right. You would accept that that happens.

A. It would surprise me, but I would accept that it

happens, yes.
Q. Okay. And that rule, like other rules, for various reasons sometimes may not be honored; right?
A. Like any rule, yes.
Q. For example, the Lunn policy as issued in November of 2017 actually says that, if for somebody who came in in custody, ICE should take custody in the lockup.
A. That's correct.
Q. And that's, among other things, a security thing, right, because you don't want a scuffle in the public area of the courthouse?
A. No. That's correct.
Q. And you know, in Newton, that wasn't the policy; right?
A. I learned that after, during this incident, yes.
Q. So that's another example of, just because there's a rule, doesn't mean everybody always follows the rule.
A. That's right. That's right.
Q. And when you had this meeting with Judge Joseph, that was sort of an informal lunchtime meeting; is that right?

A. Correct. Correct.
Q. And your main purpose was to make sure she understood you really can't go off the record.
A. That's right.
Q. You weren't suggesting to her that she had something to do with this. You wanted to make sure, don't turn off the tape.
A. That's right. And she did say that that in fact happened. I wanted to first find out what happened from her. I was hearing what happened.
Q. Okay. And your understanding was, she hadn't had a chance to listen to the recording; right?
A. When she met with me.
Q. You were just sort of raising it at that point.
A. Yes. She didn't know anything about the meeting.
Q. And you didn't take any notes because this was a lunchtime --
A. Yes.
Q. -- conversation, trying to help her understand don't do this.
A. That's correct.
Q. All right. And as a RAJ and now as a chief, that's part of your role, is to help people do the right thing.

A. That's correct.
Q. All right. And you started out the meeting by saying, I understand you may have gone off the record.
A. Yes.
Q. And she didn't say, no, that's not true; right?
A. Well, I started off the meeting by saying that Mary Beth called me about this situation in Newton, and part of what she's telling me is that there was a portion of the hearing that wasn't recorded. I didn't say to her did you go -- because I didn't know and Mary Beth didn't know at that time.
Q. And you didn't ask her, did you?
A. No. I did not say, did you go off the record.
Q. All right. And you said I understand some of it was off the record?
A. Yes. Do you know what happened.
Q. And she didn't say, no, that's not true, did she?
A. No, she didn't say, no, that's not true.
Q. That was sort of the assumption everybody was working on?
A. What was?

Q. That part of it is off the record.
A. Yes.
Q. All right.
A. Yes.
Q. And if she remembers that you showed her or read her the rule, that would be accurate; right?
A. The rule on recording. 211. Yes.
Q. All right. And there was some conversation, and you don't recall it directly, about an incident in Waltham? Do you recall her telling you about something like had happened in Waltham?
A. I don't recall that.
Q. Do you remember in general some conversation about Waltham?
A. I don't know, no.
Q. So is it possible that you asked her, have you ever gone off the record before, and she started talking about something that had happened in Waltham?
A. It's possible.
Q. Do you know that now there actually was an incident in Waltham where a side bar was getting broadcast to the gallery?
A. I don't know.
Q. All right. But at that point was it Waltham and

Newton that still had JAVS instead of FDR?
A. It was definitely Newton. I don't recall Waltham as well.
Q. All right. And she, when you gave her the rule, said, I'm sorry, I won't ever do it again, basically?
A. I -- In the meeting with me, she didn't say anything about going off the record. So it wasn't directing that. It wasn't, to me, I'm sorry, I'll never do that again. That was with Chief Justice Dawley. I never heard from her or anything in the meeting with me about confirmation one way or another that there was a portion of the proceeding that wasn't recorded.
Q. Well, you had started out by saying, I understand this happened; right?
A. Right.
Q. And she didn't dispute it; right?
A. She didn't dispute it.
Q. Okay. And so given that you already knew it, did you understand that she was agreeing with you?
A. Again, I didn't already know it. Because I was hearing it, and it hadn't been confirmed from Judge Heffernan yet. So I didn't already

know it. I was telling her what I heard, and then at the end of the meeting I was saying to her, you know all courtroom proceedings have to be recorded. She didn't say to me I'm sorry because at that point I don't -- it wasn't clear to me that she was acknowledging anything about the portion of the recording not being recorded, for lack of a better word. So I heard that first with Chief Justice Dawley.

Q. Well, if you said to her I understand it was off the record and that didn't happen, wouldn't you have expected her to say, no, that didn't happen?

A. No. I didn't say to her -- I said to her, my understanding from Judge Heffernan is there's a portion of the hearing that wasn't recorded. I didn't know whether the machine wasn't working, I didn't know what happened, why there was a portion that was not recorded.

Q. Did you ask her?

A. No, I didn't say, I didn't say to her, did you turn off the recording, no.

Q. Okay. Did you say why, was it off the record?

A. Again, it wasn't clear to me, other than what I was hearing from Judge Heffernan, no one had

listened to the tape yet that there was a portion that wasn't recorded. I was telling her that when I spoke to her this is what I heard –

Q. Okay.

A. -- and do you remember this incident --

Q. All right.

A. -- and was there -- did something happen --

Q. All right.

A. And letting her talk to me about the incident.

Q. And did she say to you, no, I didn't go off the record?

A. No.

Q. Okay. Did you ask her directly, did you go off the record?

A. I did not.

Q. Okay. So you gave her the Rule 211?

A. I did.

Q. And you gave her the Lunn policy?

A. Yes.

Q. Which actually Newton wasn't follow; right?

A. Well, yes. Based on what we just talked about, yes.

Q. Okay. And then the focus of this meeting was not ICE and the defendant escaping, it was going

off the record, wasn't it?
A. The focus of the meeting was trying to figure out what happened. Mary Beth was saying one thing. Mary Beth wasn't there. So I said, let me talk to Shelley and see if I can piece together what happened.
Q. All right. And did you try to piece together what had happened with ICE?
A. I didn't get that far because, again, I was trying to figure out --
Q. The tape.
A. -- the tape.
Q. You were concerned about the tape; right?
A. Exactly.
Q. All right. And then there was this meeting with Chief Judge Dawley; right?
A. Yes.
Q. And again, he's running the show because he's the Chief.
A. That's correct.
Q. You didn't take any notes again, --
A. No.
Q. -- did you?
A. No.
Q. And she said it, yes, I did it, I'm sorry, --

A. That's right.
Q. -- I'll never do it again.
A. Exactly.
Q. All right. And there was some conversation about what had happened with the actual proceedings.
A. Yes.
Q. Okay. But again, the focus was making sure she understood don't go off the record; right?
A. In his meeting?
Q. Yes.
A. The focus for him was making sure she doesn't go off the record and making sure she understood the Trial Court policy, the ICE policy.
Q. Okay. Which -- Do you know she actually called and got a copy during the day that day?
A. During the day of the --
Q. The day of the hearing.
A. I believe so. Yeah. Because I think when I handed her a copy, she said she had gotten it from the administrative office.
Q. Right. She actually called and had them tell her about the policy; right?
A. Based on what she was saying, yes.
Q. And do you know there's actually an e-mail

showing that they sent it to her?
A. I don't dispute that.
Q. So that was a perfectly appropriate thing for her to do, try to get help.
A. Absolutely.
MS. MULVEY: I have nothing else. Thank you, Judge.
JUDGE FABRICANT: I have nothing further for this witness. Thank you.
HEARING OFFICER: Thank you very much. You're excused.
JUDGE FABRICANT: We have our next witness scheduled at 2:00. So if we could take a lunch break now, that would be great.
HEARING OFFICER: That's fine. We'll recess until 2:00. Thanks All.
(PAUSE)
Can I just confirm, do you have another witness after that or is that going to be the last one?
JUDGE FABRICANT: The witness after that will be Judge Joseph.
HEARING OFFICER: Okay. And that would be for tomorrow?
MR. HOOPES: Yes. We talked

about that yesterday.

HEARING OFFICER: Okay.

JUDGE FABRICANT: I think the next witness will not take two hours. If that's how we want to proceed, that's fine.

HEARING OFFICER: That's fine. And then if you could give thought over the break so that by the end of the day we can talk a little bit more about plans for after Judge Joseph's testimony, you can let us know what you're thinking is on that.

MR. HOOPES: Yes.

HEARING OFFICER: All right. Thanks very much.

JUDGE FABRICANT: Thank you.

(Luncheon recess taken at 12:52 p.m.

(Proceedings resumed at 2:01 p.m.)

JUDGE FABRICANT: The Commission calls former Chief Justice Paul Dawley.

HEARING OFFICER: Good afternoon.

former CHIEF JUSTICE
PAUL C. DAWLEY, SWORN
HEARING OFFICER: Thank you.
Please be seated.
DIRECT EXAMINATION
BY JUDGE FABRICANT:

Q. Good afternoon, Chief Justice Dawley.

A. Good afternoon.

JUDGE FABRICANT: Is that on?

THE WITNESS: Not sure.

JUDGE FABRICANT: I think it is.

HEARING OFFICER: No.

(PAUSE)

Q. Would you state your name, please.

A. My name is Paul Dawley. Last name is spelled D-a-w-l-e-y.

Q. Thank you.
And what do you do now?

A. Presently work as the general counsel to the University of Massachusetts Foundation.

Q. Were you -- In your previous role, were you the Chief Justice of the District Court?

A. Yes.

Q. Would you tell us, please, go back to when you

became a lawyer, and just give us a brief overview of your professional background.

A. I became an attorney in 1989. I worked for approximately 12 years as an assistant district attorney in Plymouth County. I was the Deputy First Assistant District Attorney. In 2001, I was appointed as an associate justice of the Brockton District Court. I served as the Regional Administrative Justice and the First Justice of the Court. And then in 2013 I was appointed as the Chief Justice of the District Court. In 2018, I was reappointed to additional five-year term. And then, in 2022, I retired from the bench.

Q. Can you tell us what the role is of the Chief Justice of the District Court?

A. The duties of the Chief Justice are set forth in the statute, Chapter 211B, Section 10. And essentially, it is to oversee the operation of the District Courts. There are 62 District Courts across the Commonwealth. And primarily the duties are to implement policies from the Trial Court and the Supreme Judicial Court. There are budget and personnel responsibilities. There's work, working with

probation, for example, to implement recidivism reduction program, such as specialty courts, drug courts, mental health courts, implementing training, professional development, not only for judges, but for court personnel, including clerks, implementing information technology enhancements. Case load management is a significant part of it. And there's a public outreach aspect in terms of working with the bar associations. The duties are wide ranging. Those are some of them.

Q. And does the statute authorize the Chief Justice to discipline judges of the District Court?

A. Yes, it does.

Q. Does it give you much guidance about exactly how you would go about that?

A. The statute I think is somewhat vague. The practice is, in an instance of judicial misconduct, the Chief Justice will report that to the Chief Justice of the Supreme Judicial Court, Chief Justice of the Trial Court, and then the referral to the Commission on Judicial Conduct would take place.

Q. And before you would report it, do you do some investigation?

A. Yes.
Q. Would you talk with the judge involved?
A. Typically, there would be some type of investigation. In some instances, the information is just provided to you. In other instances, it required some investigation on my part, and ultimately, a report to the court.
Q. You said that there are 62 divisions of the District Court. And does that -- Does a division refer usually to a particular courthouse?
A. Yes. There are 62 separate District Courts in the Commonwealth. Attached to those are 158 judges, 26 clerk magistrates, one clerk magistrate appointed by the governor to each court, and then this court sets approximately a thousand employees across those 62 courts.
Q. And you said 158 judges?
A. Yes.
Q. And 62 clerks.
A. Yes.
Q. And are those -- Are the divisions located everywhere except Boston?
A. That's correct.
Q. And what serves the equivalent function in

Boston?

A. The Boston Municipal Court.

Q. And what kinds of cases does the District Court hear?

A. It hears both criminal and civil cases, would be civil damage thresholds, approximately $50,000 by rule of the SJC. The criminal matters are generally matters for which a person can be incarcerated for up to two and a half years. In addition, the District Court, the subject matter jurisdiction is very wide ranging because it also includes mental health, involuntary mental health commitments, domestic abuse, 209A orders, landlord/tenant matters, and there's a whole host of administrative appeals that an individual would have a right to appear in court to challenge an administrative finding.

Q. And you refer to 209A. Is that a statute relating to restraining orders arising out of domestic abuse situations?

A. Yes.

Q. Can you talk a little about the process when a new judge is appointed to the District Court?

A. The District Court has a formal judicial orientation program. Every newly-appointed

judge for the first four weeks is assigned to sit on a daily basis with a different judge, a more senior judge, with a particular focus on a particular subject matter.

The curriculum, if you will, is established by the District Court Committee on Education. That's comprised of judges, clerks, and probation officials. And what they do is identify substantive areas of the law that we anticipate are going to require judicial decision-making.

So, for example, on the criminal side, a new judge would sit with somebody to review arraignments and bail. Bail revocation, probation violation matters, jury empanelment, sentencing, case disposition on a criminal side. On the civil side, you may sit with somebody to review landlord/tenant cases, debt collection. And then, of course, the involuntary commitments for substance abuse disorder Section 35, domestic violence 209A.

So in the first four weeks, a judge is assigned to sit with a specific other judge to review these matters and gain obviously the experience and the perspective of the more

experienced judge.

Q. Is it a different judge each day for those four weeks?

A. For the most part. Occasionally somebody will sit on a pro bono one day with another judge. But it's designed -- There's quite a bit of travel involved, because a new judge is moving around and meeting a lot of different judges.

Q. And did you also meet with the new judge when you were the Chief Justice?

A. I did. The practice is, once somebody is confirmed by the governor's council, a meeting is set up in the administrative office where a new judge would meet with me as the Chief Justice as well as the administrative office staff, the lawyers and the other staff.

Q. And did your office also provide materials for each new judge?

A. Yes. Every new judge is provided materials, frankly, a large box of books, as well as electronic materials, and the materials not only come from the administrative office of the District Court, they come, some instances, the Supreme Judicial Court, Flaschner Judicial

Institute, the administrative office of the Trial Court. So people would be inundated with materials to receive.

Q. Is one of the things that each new judge would be provided with a copy of the Massachusetts Rules of Court, this book that I'm holding up?

A. Yes, it is.

Q. And every year does Thomson Reuters come out with a new version of this?

A. I believe so.

Q. Does Flaschner send a copy of the new version to every judge every year?

A. I believe so.

Q. Did the District Court in your time as Chief Justice also have educational conferences at various times?

A. We had at least one annual conference court-wide. But after I became Chief Justice, we instituted orderly regional meetings, they were referred to, where judges would -- first would be the clerks would gather in the morning, and there'd be presentation on development in the law, circuit areas of the law, and then the afternoon we'd do that same program -- or different program but the same type of approach

to judges. So every three or four months we were meeting and it was an education program presented.

Q. And were there on occasion a special conference on a particular topic, such as race and bias?

A. Yes.

Q. And all of these various conferences and programs, if a judge couldn't attend for some reason, was there a process to make sure that whatever materials might have been handed out at a conference would be sent to the judge who couldn't attend?

A. That's correct.

Q. How --

A. We would have a process where, for varying reasons, whether they were on trial, whether there was a personal commitment they had, people couldn't make it. So they would identify the administrative staff or identify who was not present and they would send them the materials.

Q. Can you tell us what a transmittal is or was when you were Chief Justice?

A. It was a communication from me on a variety of subjects, to all judges, all clerk magistrates, all chief probation officers,

essentially all court staff. And within the transmittal, it could be about a development in the law, it could be a policy from the Trial Court or the SJC, could be personnel announcements. The announcements, for instance, of new judges or the announcements of retirements. It was a way to communicate with the whole District Court system.

Q. Did you keep track of them so each one has a number so --

A. I didn't, but somebody did.

Q. Somebody on your staff did that?

A. Yes.

Q. I'm going to ask you to look at Appendix C. And you have in front of you a binder, and we're displaying on the monitor here, so you can look at either way, whether it's in the binder or on the monitor, Appendix C. And in that binder you have all of the appendices. So if you look at the first page of Appendix C, you see the front page of it, which is what's on the monitor.

A. Yes.

Q. Is that what a transmittal coming from the District Court looks like or did look like at the time?

A. Yes.
Q. Were there also transmittals that would come from the Trial Court as well?
A. Yes.
Q. And would they look somewhat similar?
A. Yes.
Q. But would it indicate that it was coming from the executive office of the Trial Court and the name of the Chief Justice of the Trial Court and/or the court administrator?
A. It would. At the top it would be clear that it was from Chief Justice Carey, for example.
Q. So looking at this one, and this is numbered transmittal number 1222, do you see it up in the right upper part of the page? Do you see that?
A. Yes. Yup.
Q. And let me ask you to go over to Page 10 in the, Page 10 in the -- using the pages on the -- I'm sorry -- Page 13, using the page numbers at the upper right corner of the page. Do you see that?
A. Yes.
Q. Okay. And -- I'm sorry.
HEARING OFFICER: Is it 12?
Q. I told you the wrong thing.

JUDGE FABRICANT: Yes, 12.

Thank you.

Q. Page 12.

A. Yes.

Q. If you look at Paragraph 6 on Page 12, do you see that that says updated immigration bench card?

A. Yes.

Q. And do you see that it says that at the December 13th, 2017, conference? Was there a conference on December 13th, 2017, specifically on the subject of race and bias?

A. Yes. It was a court-wide conference on that subject for all District Court judges.

Q. And although specifically on that subject, were there some materials handed out on other subjects?

A. Yes.

Q. And you see it says here at the December 13th, 2017, conference, we distributed a revised information and immigration matters bench card dated 12/17 -- Does that mean December of '17?

A. Yes.

Q. -- to note the Supreme Judicial Court's holding in Lunn versus Commonwealth, that Massachusetts

court officers do not have the authority to hold an individual in custody solely on the basis of a Federal civil immigration detainer beyond the time that the individual would otherwise be entitled to a release from state custody. Do you see that?

A. Yes.

Q. And do you see that it says, consistent with District Court Transmittal 1209? Is that a past transmittal that had been issued earlier?

A. Yes.

Q. Which was issued after the Lunn decision and rescinded prior District Court transmittals on that subject, this revised bench card replaces the bench card dated 10/16 -- Does that mean October of 2016?

A. Yes.

Q. -- and should be discarded.

So is this telling the recipient that here's a new bench card on immigration matters, anything you have from before this you should discard?

A. Yes, it does.

Q. And then please contact Jackie Lawson. Is she a person in the administrative office --

A. She's an administrative assistant.

Q. If you do not receive the updated bench card. And then the electronic version, -- Was this sent electronically by e-mail?

A. Yes.

Q. -- the electronic version of the new bench card is attached so you can replace Pages 125 to 126 in your 90-day guide. What's a 90-day guide?

A. 90-day guide is put together by the Education Committee. It's a condensed version of the significant amount of materials a judge receives, and it's designed by the committee to be a quick resource for judges on the things that they're most likely to encounter in their first 90 days on the bench.

Q. So is the idea that it would be a good idea for the judges to have that with them --

A. We recommend they bring it on the bench with them.

Q. And then it says, additional guidance on responding to request from the Department of Homeland Security can be found in the Trial Court's policy and procedure regarding courthouse interactions with the Department Homeland Security issued by executive office transmittal 1713 dated November 10th,

2017.

So this is advising the recipient that's where you look to get more information on the subject?

A. Yes.

Q. And we're going to look at that in just a minute. But if you go over to Tab D. We'll pull it up here on the monitor. Is this -- At Pages 15 and 16. Is this the updated bench card?

A. Yes, it is.

Q. And if you look in the bottom right-hand corner of each page, do you see where it says AODC revised 12/17?

A. Yes.

Q. Does that tell the reader that this comes from the administrative office of the District Court and that it was revised in December of 2017?

A. Yes, it does.

Q. So it should replace anything earlier on the subject?

A. Yes.

Q. And if you look at the last box on the second page, so within the box, and if you look at the bottom paragraph, do you see where it says, for

guidance on the manner in which Trial Court employees and in particular court officers shall respond to request from Department of Homeland Security to provide information about and take custody -- And I'm just going to skip a little bit. See Executive Office Transmittal 1713 dated November 10th, 2017, which contains the Trial Court's policy and procedure regarding courthouse interactions with the Department of Homeland Security. Do you see that?

A. Yes.

Q. So what did you expect judges and other court personnel in the District Court to do when they got Transmittal 1222 and the attached electronic bench card?

A. The expectation was, this would replace the prior one and would be put in the 90-day guide or available as a resource for the judges.

Q. And did you expect them to read it?

A. Yes.

Q. And see the reference to Trial Court Transmittal 1713?

A. Correct.

Q. And let's take a look at that just so we know what it's referring to. And that is Appendix B

in your book. You will see that this is a transmittal issued by the Executive Office of the Trial Court dated November 10, 2017, Executive Office Transmittal 1713.

A. Yes.

Q. Was this document commonly referred to as the Lunn policy after the Lunn decision?

A. Yes, it was.

Q. And is that what your transmittal was telling judges they should look to for more information on the subject?

A. Yes. This was the document that was referred to in the bench card.

Q. And in your time as District Court Chief, were you familiar with District Court Special Rule 211?

A. Yes.

Q. We're going to pull that up. You were familiar with that.

A. (Witness nods head).

Q. This is Appendix K. And it's in your book behind Tab K and at Pages 122 to 123. What is your understanding of what this rule requires?

A. The Rule 211 is entitled Quarterly Court proceedings, and it sets forth the requirement

that all courtroom proceedings be recorded electronically.

Q. Are there some exceptions?

A. There are. They're listed in the first paragraph. They exclude the call of the list and similar matters of an administrative nature, proceedings that are being recorded by a court reporter appointed by the court, and proceedings conducted by a magistrate other than a judge.

Q. And if you go over to the second page of it, Page 123 in the appendix, and you look at the line right above near the bottom of the page, right above the part that's in capitals and in bold, do you see that it tells you when this rule was issued and took effect?

A. It was issued December 31st, 1987, and effective February 1st, 1988.

Q. In your experience as a sitting judge and as Chief Justice, were there any circumstances that, in your view, when it's permissible to go off the record?

A. I think there were some circumstances. And I can -- I'll only speak for myself.

Q. Please.

A. When I was a judge, there were some

circumstances that I thought it was appropriate to go off the record.

Q. And what were those?

A. When somebody clearly wanted to speak to me about a personal matter.

Q. Personal to who?

A. Personal to the lawyer. Something non-case related. In addition, I can particularly remember an area that was challenging, but when lawyers or members of law enforcement were in the courtroom, and they wished to bring to your attention that the individual who was the subject of the arraignment perhaps or the sentencing was a cooperating witness or an informant, and then it became more difficult to have that information in a public setting. There are obvious dangers attached to that. So those would be instances I can clearly remember when I sat in Brockton District Court dealing with a couple of those and being very cautious not to record those.

Q. And was there something that you would observe in the courtroom that would tip you off that that was what somebody wanted to talk about if somebody asked to go off the record?

A. Well, it was -- some instances would be, an assistant district attorney, it would sometimes be the defense lawyer, in some instances a member of the law enforcement would be there, and they informed the clerk that they wanted to talk to you.

Q. And did the presence of law enforcement give you some indication?

A. In some instances.

Q. And was there another type of proceeding that you would do, not necessarily off the record, but not on the regular record?

A. There could be an in-camera review of certain information. Particularly, I think there was a Martin proceeding which is when an individual wishes to assert constitutional right, that the SJC make sure be done, and not in a courtroom, but an in-camera setting, I also believe that that they suggest that that be recorded and the recording -- I'm not sure if it's impounded, but be kept separate and apart from the case.

Q. And you say constitutional right. So a right not to testify, for example.

A. Yes.

Q. So if someone is subpoenaed to a trial and wants

to say I have a right not to testify, and you need to rule about whether the person does in fact have that right. Is that --

A. Yes. Because sometimes you're going to inquire as to whether there's a legitimate basis on which the person is asserting the privilege. For instance, self-incrimination. That obviously has potential implications to that individual, so that's the type of proceeding you would do it in.

Q. And you call that a Martin proceeding. Is that after the name of a SJC decision?

A. Yes.

Q. Are you aware that some judges in past years used to do so-called lobby conferences off the record?

A. Yes.

Q. And what's a lobby conference?

A. It's a conference among the parties with the judge in the judge's chambers.

Q. And what would such a conference be about?

A. Most likely a disposition in the case.

Q. So a potential plea.

A. Correct.

Q. Are you aware of any SJC decisions on that

subject?
A. I am. The SJC, I'm not sure what year it was, but it was probably early 2000's, they issued a clear directive that unrecorded lobby conferences should not take place.
Q. And would that be perhaps the case of Murphy versus the Boston Herald?
A. Yes.
Q. And what do you view as the lesson of that case?
A. Perhaps the importance of ensuring that the proceedings are recorded. It's a complete and accurate record established of what is being said.
Q. In 2015, did the SJC take some action to end the practice of lobby conferences off the record? A rule change, for example?
A. I believe they may have amended -- I forget what rule it is, but I know that there was an amendment to one of criminal rules in which they emphasize that proceedings should be done in open court on the record.
Q. So let's take a look at Appendix L. So you have in front of you Rule 12 of the Rules of Criminal Procedure. Are the Rules of Criminal Procedure established by the SJC?

A. Yes.
Q. And if you look at Rule 2B, -- do you see it -- it says --
A. I'm sorry. Did you say 2B?
Q. 2. I'm sorry. It's not 2B. It's 12B2. It says, plea discussions, and then it says, the judge may participate in plea discussions at the request of one or both of the parties if the discussions are recorded and made part of the record.
A. Yes.
Q. Do you see where it says that?
A. Yes, it does.
Q. And we have the reporter's notes that tell us when that change was made. So I think we'll find that at Page 143 to 144. Do you see at the bottom of Page 143 it says reporter's notes January of 2015?
A. Yes.
Q. And then it has a whole discussion of the changes made in 2015 and has a big paragraph about 12B2 and it tells us that that's when that change was made in substance. Take your time to look at it if you have any uncertainty about it.
A. Yes. And it cites Murphy versus the

Boston Herald.

Q. In 2018, -- and I know it's nearly seven years ago -- what recording system did the District Court use?

A. The District Court was in the middle, I think the Trial Court generally was, too, in the middle of changing to the recording systems. The new version, if you will, of the recording system was something called For the Record, FTR. They, I think in 2018 they were in the process of implementing it across the state. My memory is they picked the largest courts first to implement that system. So there was some courts that had it, some courts did not.

Q. And the older system, was there -- The courts that didn't yet have FTR, was there consistency in those courts about what they did have?

A. I forget what it's called, but it's essentially a cassette recording. It was some type of recording that played. And when you wanted to listen to it, you would gather the cassette and put it in a system, put on headphones and listen to it.

Q. And did some of the courts have what they call JAVS?

A. Yes.
Q. What did you have to do to get a recording from JAVS?
A. I would have to say I don't know. Because if I needed a cassette, I would give it to the administrative staff and they would request it of the court and then I received a cassette.
Q. Was it sometimes a CD --
A. Yes.
Q. -- instead of cassette? And do you know what the Newton District Court was using at the time in April of 2018?
A. They were not -- They did not yet have the FTR system. They had the old system.
Q. Did Judge Joseph become a judge of the District Court in November of 2017?
A. Yes.
Q. And at that time had you had any previous acquaintance with her?
A. No. The first time I met Judge Joseph was after she was appointed, and she come in to meet me and administrative staff as part of the judicial orientation.
Q. And did you follow the usual practice in providing orientation with Judge Joseph as you

do with other new judges?
A. Yes.
Q. Did you have your staff send her or give her the usual materials for a new judge?
A. Yes.
Q. And did you assign her a mentor?
A. I did.
Q. Can you talk a little bit about the judicial mentor program, what that is and how it works or did work in 2018?
A. So every judge in the Trial Court, every newly-appointed judge receives a mentor for a two-year period. The mentors go through specific training, generally, the more experienced the judges have been on the bench longer. And the program is designed to provide support with guidance to newer judges, essentially a vehicle for their support that they can speak to and review matters with and gain the support.
Q. Does the Chief Justice choose the mentors?
A. Yes.
Q. And do the mentors get some training in being a mentor?
A. Yes. I think several times a year they

attend sessions and there's mentor training.
Q. Is part of the role of a mentor that they're trained to do, that they should be available to their mentee or mentees for phone consultation pretty much at any time?
A. Yes. The whole idea is to building a system where there's somebody available to provide a support to the newly-appointed judge.
Q. Now, I want to turn your attention to April 20th of 2018. Did you receive an e-mail from Judge Fortes about an incident in Newton?
A. Yes.
Q. And let's look at Appendix B. And Howard has up on the screen what I think is Page 540. The top of the page I'm showing on the monitor, is this the e-mail that you received from Judge Fortes?
A. Yes.
Q. And was Judge Fortes at the time the Regional Administer Justice for the region that included Newton?
A. Yes, she was.
Q. When you got this e-mail from Judge Fortes, was this the first you had heard about the incident that she describes in Newton?
A. Yes.

Q. And I'm just going to read it. Chief Judge Heffernan called me about this incident a couple of weeks ago. I asked her at that time to follow up with an e-mail outlining the incident below, that is the e-mail from Judge Heffernan. I also suggested she pull the tape because there was some indication the judge involved may have gone off the record prior to the defendant going down the back stairwell. I've spoken to the judge involved. I can brief you if you need additional info. Informing you about it now because Judge Heffernan called to let you know regional director for ICE, with a question mark, may bring it up at meeting supposedly scheduled with Chief Justice Carey. I didn't want you or Chief Justice Carey blind-sided by any information. Judge Heffernan can fill in anything I left out.

Did you read that e-mail when you got it?

A. Yes, I did. And attached -- Well, not attached, but I think forwarded to that e-mail was Judge Heffernan's e-mail.

Q. And did you read Judge Heffernan's e-mail?

A. Yes.

Q. Did you expect that a Regional Administrative

Justice would bring to your attention the matters that needed to come to your attention?

A. Yes.

Q. Did you also expect that a Regional Administrative Justice or a First Justice or some combination of them would handle matters that they could handle so you didn't have to handle everything?

A. That's accurate. Oftentimes the First Justice or the Regional Administrative Justice, they'll deal with things and, you know, attempt to solve problems before they reach a higher level.

Q. And was there a meeting scheduled with the regional director for ICE or somebody in some similar role?

A. There was. From time to time Chief Justice Carey would meet with different areas of law enforcement. Some of those meetings I would attend with her, whether they were with the Colonel or the state police, the attorney general. It was an attempt to reach out and engage in a discussion about different policies or different issues. So she often would set up meetings that I saw for other Chief Justices

would attend.
Q. And at around this time, do you recall that there was a meeting scheduled?
A. I do – but I'm not sure of the time, but I do remember a meeting scheduled with the, I think it was the director of the Boston office of ICE.
Q. And this being April of 2018, was there some tension in the relationship between state authorities and Federal authorities particularly related to ICE?
A. I'm not sure I'd describe it as tension, other than I think the point of the Trial Court was we were trying to -- I think we were trying to educate law enforcement about this policy and the decision that the Supreme Judicial Court had made in Lunn and what that meant for everyday activity in the courthouses. I think her intent was to collaborate with them, make them aware of the legal restrictions we faced and inform them what we were going to do about it.
Q. When you got this, did you read the attached forwarded e-mail from First Justice Heffernan?
A. Yes, I did.
Q. Was that -- Had you had any previous awareness of what she refers to as the usual practice in

Newton Court, the agent was asked to wait outside the courthouse as he did not have a warrant but a detainer? Was that something you had any previous awareness of?

A. No, not before this e-mail.

Q. What was your reaction to it?

A. Well, I responded to it by asking essentially what authority the court had to exclude an ICE agent from being in the courtroom and expressed a little bit of concern in terms of whether that was permissible.

Q. And is that the e-mail that appears at Page 539 that you sent on April 20th at 12:31 p.m.?

A. Yes.

Q. So really just 10 minutes after the e-mail from Stacey Fortes.

A. Correct.

Q. Did you ask a series of questions?

A. I did. I essentially asked four questions. The first related to what was the authority of the court to exclude a Homeland Security agent from being in the courtroom. Secondly, who was the judge who handled this matter. Third was, who was responsible for the defendant being allowed to leave the courthouse through the

non-public exit. And fourth is, what steps had we taken so that the staff understands this should never happen again.

Q. And did you get a response from --

A. Yes.

Q. -- First Justice Heffernan?

A. She gave me a detailed response to each one of them.

Q. Is that what appears starting on Page 538 and going over to Page 539?

A. Yes.

Q. And did you respond back --

A. I did.

Q. -- at the top of Page 538?

A. I did. I want to point out something.

Q. Yes.

A. Because, I think, in fairness to Judge Heffernan. As this went on -- Because my original reaction was, this is impermissible, you can't keep people out of the courtroom, there's constitutional implications to an open court. And the more I discussed this with the legal counsel both in my office and the Trial Court, particularly the people who worked on the policy, they felt that a judge had

discretion to do so if they thought that the presence could be disruptive. So I'm not sure if it was at the time or shortly thereafter, I backed off somewhat and felt that Judge Heffernan had the discretion to take that action if she felt it was warranted.

Q. And going over to your e-mail, the same day, 1:17 p.m., did you advise her to confer with Zachary Hillman?

A. Yes. Zach Hillman was the general counsel in the District Court administrative office, and I suggested that she connect with him.

Q. And is he now a judge?

A. Yes, he is.

Q. Did you hear later that she had conferred with Zach Hillman and that she had made a change in the practice?

A. That's correct.

Q. After you received the e-mail from Judge Fortes, did you get the recording from the proceeding in the Newton District Court?

A. Yes. I requested a copy of the tape recording of the, of the case in particular.

Q. And did you listen to it?

A. I did.

Q. And when you got the recording, was it in the form that the District Court produces a recording, that is, as opposed to any sort of enhancement?

A. No. I do remember this. I do remember listening to it. And what I remember about it is having to ask for a set of headphones so I could attempt to listen more closely, because there was good deal of inaudible statements. I could figure out some of it, but there was a number of inaudibles I couldn't understand.

Q. So it was hard to make sense of it.

A. Yes.

Q. And are you aware that there has ever been an enhanced version that is sent to a vendor who has expertise in enhancing a recording?

A. I think at some point somebody told me that. I'm not sure who. But ultimately, I saw a transcript. I'm not sure when it was produced. But it was clear that this was enhanced or somebody had the ability to more closely listen to it than the original tape.

Q. At that time, did you have an enhanced version?

A. No.

Q. And did you have a transcript at that time?

A. No.
Q. So you were playing the original version of the recording and listening as best you could.
A. Correct.
Q. All right. We're going to play that recording now, and we're just going to listen to it without the transcript, just so we hear what the original sounds like.
(RECORDING PLAYING)
Q. After you listen to the recording, do you have any concerns?
A. The concern I had was to the tape being shut off.
Q. Was that the only concern?
A. At that time.
Q. And what did you do?
A. I, after I listened to it, I requested to meet with Judge Joseph and Judge Fortes.
Q. And did your assistant set up a meeting for May 8th?
A. That's correct.
Q. And did you have a meeting with Judge Joseph and Joseph Fortes?
A. Yes, I did.
Q. Where was the meeting?

A. That was in the administrative office in the District Court in my office.

Q. In your office. Was anyone present other than Judge Joseph and Judge Fortes and you?

A. No.

Q. And going into that meeting, did you have any information about this incident other than the recording and the e-mail from Judge Fortes with the forwarded e-mail from Judge Heffernan?

A. No.

Q. Tell us about that meeting. Who said what?

A. I set the meeting up because our concern that the tape had been shut off and Judge Joseph was a new judge. So when she come in and we met with her, I told her I had listened to the tape and I had a couple of concerns that I wanted to talk to her about. I started by discussing the tape being shut off. Shortly after I discussed that, the fact that it appears the tape was shut off, Judge Joseph said to me, she acknowledged that she had directed the clerk to do that. She apologized. She indicated to me she was not aware that there was a rule that required the tape to be on. And she essentially said it would not happen again. She had been made aware

of it, she had thought about it, and it wouldn't happen again.

Q. Did she tell you anything about why she went off the record?

A. Well, we were talking about the importance of the rule. And I asked her, I said why did you shut the tape or direct the clerk to shut the tape off, and she stated something to the effect of the defense lawyer wanted to speak to her off the record because the defense lawyer was concerned that the identity of his client was not the same individual of whom there was an out of state warrant. I think it was Pennsylvania, if I'm not mistaken. There was a warrant. And the lawyer was trying to convey to Judge Joseph it was not the same person.

Q. And did she give you any indication of why a discussion about identity with respect to the Pennsylvania warrant should be off the record?

A. No. I don't think we discussed that part of it as much as we discussed the rule, the importance of adhering to the rule, and we focused more on the rule and the importance of maintaining a full, complete record. I remember specifically speaking to her about, just by the

nature of the position I had, we get a large number of complaints about judges and clerks, and I remember telling her that it was my experience that the most favorable piece of evidence always in terms of these things is the tape itself, because there are people who make accusations about failure to get due process and then you listen to the tape and realize, well, that's not accurate. So we spent a lot of time talking about the rule, the importance of it, and then she acknowledged it, she apologized, and said wouldn't happen again.

Q. Did she tell you anything about what was said off the record?

A. My memory is that it was, it was the same. It was the issue of the defendant's identity and his warrant that was out of state.

Q. Did she say anything about any discussion about ICE?

A. No, not that I recall.

Q. When you listened to the recording, you could hear some reference to ICE, could you?

A. I think you could. But frankly, I'd want to sit once again to really listen word for word.

Q. And that, of course, if you could hear it, it

was the part that was on the record.
A. Right.
Q. Not the part that was off the record. Did she say anything about being concerned, her being concerned that ICE would take the wrong person?
A. No.
Q. Did she say that she thought she had a responsibility to determine the defendant's identity with respect to the ICE detainer?
A. No. We never got to that level of discussion, and it was more about the tape being shut off, the importance of the rule.
Q. Did she say anything about being concerned that ICE wouldn't allow an attorney/client conference?
A. No.
Q. Did she say anything about wanting to pause ICE taking the defendant into custody?
A. No.
Q. Did you ask her directly whether she had anything to do with the defendant going out back?
A. Yes. So we addressed the issue of the tape, the recording being shut off first, and then I raised with her the issue of the fact that the

defendant was let out this side entrance while ICE was waiting for him. And I asked her if she, first of all, if she was responsible for that, if she was aware of it, if she had any knowledge whatsoever of it, and she strongly denied each and every one of that. The final question, I said, did you have anything at all to do with him leaving the courthouse that way, and she very strongly and adamantly denied that.

Q. And did you accept her denial?

A. Yes, I did.

Q. And did she say that she had inadvertently or unintentionally facilitated it?

A. No.

Q. How did the meeting end?

A. The remainder of the meeting was a discussion about training and the importance -- the issues that new judges deal with, the importance of engagement, particularly with other judges who are more experienced, particularly knowing what you don't know and you can rely on other sources of support to get that knowledge. And so the first part of the meeting, if I could describe it, it was somewhat stern. It was, it was right to the point. And then the rest of the meeting

I would describe as more positive because it was a focus on how we -- where are we going to go from here and how do we get on a positive path.

Q. And when the meeting ended, what was your view of the matter of that situation at that time?

A. I viewed it, the whole meeting I viewed it as really a training issue. I certainly didn't view it based on what I knew at that time as a disciplinary matter. And I can tell you, I conducted disciplinary matters. If I had viewed it that way, I would have had legal counsel with me, we would have been memorializing everything that was said, I probably would have advised at the outset that there may be a need for counsel. None of that was present here because the circumstances that I knew about didn't warrant that.

Q. Now, speaking of training and going back to the subject of what training was provided for new judges. Was there any training specifically provided about Rule 211 and the requirement of recording?

A. I don't think there was. Because after this, I asked the District Court Committee on Education to incorporate it into the training going forward.

Q. And why wasn't there training about that requirement?

A. Well, first of all, it's somewhat a procedural method. And most of the training was really bearing on substance of law so that you put a judge in a position that they can make judicial decisions based on the substance of law. It was more procedural. And my view is that people knew about it and it was kind of self-evident. It turns out over time that was not the case.

Q. Later in, within the month of May, still within the month of May, did you change her mentor assignment so as to provide her with more focused attention?

A. Yes.

Q. After these events, sometime later on, did you receive information about any practices regarding going off the record?

A. To the court generally?

Q. Yes.

A. It was --

Q. In the District Court.

A. In the District Court, I think it was sometime in the fall, there was a, there was a

news report that essentially wrote about the Federal grand jury investigation of this matter. And in reading that, I spoke with a number of people in the Trial Court, and one of the Trial Court lawyers, somebody I have great respect for, told me, you know, there is a lot of noise out there that this isn't the only time this has happened, this is a practice.

So what I did was, I asked the Regional Administrative Justices to survey each and every one of the courts and have a discussion on two issues; one, whether people were aware of the rule and complied with it and, secondly, whether they also understood that unrecorded lobby conferences were prohibited under an SJC decision. So the RAJs did that, and in short order they reported to me that this practice is not happening. And of course, their response was based on what people were reporting to them.

Q. Were you satisfied with the response you got?

A. You know, I was glad with the response because, again, it’s important that full recordings be made.

JUDGE FABRICANT: Thank you.

That's all I have at this time.

HEARING OFFICER: Mr. Hoopes.

MR. HOOPES: Thank you, Mr. Hearing Officer. I got to mic up.

CROSS-EXAMINATION

BY MR. HOOPES:

Q. Good afternoon, Chief Dawley. I got to make sure I got your title correct.

Judge Dawley, you know that I represent Judge Joseph; correct?

A. Yes, I do.

Q. And I'd like to go back to an area first that was covered by special counsel, which is the e-mails. So if you look at the e-mails which should be in V.

MR. HOOPES: If we could pause for one second.

A. Did you say B?

Q. V as in Victor.

(PAUSE)

A. Yes.

MR. HOOPES: Give me one sec, so we got to hook up.

(PAUSE)

Q. So if you could -- It's Page 540. And I believe

you read it a little bit, but I'd like to go back to it.

A. Yes.

Q. This is an e-mail from Stacey Fortes on April 20th at about 12:21 p.m.

A. Yes.

Q. Correct?

A. Yes.

Q. Yeah. And it says, to read it again, it says, Chief. Now she's one of your Regional Administrative Justices.

A. Yes. Correct. There are six Regional Administrative Justices in the state, and she's one.

Q. And so she's one of the people you rely on being in communication with you if there was anything that's important that is happening within her region; right?

A. Yes.

Q. And you would have expected her to not only manage the judges who were under her to the benefit of the court but also keep you posted on any sort of incident that might cause a problem; correct?

A. Yes.

Q. Okay. And so here she says on April 20th, Chief Judge Heffernan called me about this incident a couple of weeks ago. I asked her at that time to follow up with an e-mail about the incident. Below. I also suggested she pull the tape because there was some indication that the judge involved may have gone off the record prior to the defendant going down the back stairwell. I've spoken with the judge involved and can brief you if you need additional information. Informing you about it now because Judge Heffernan called to let me know regional director for ICE may bring up this incident at the meeting supposedly scheduled with Chief Justice Carey, and I didn't want you or Chief Justice Carey to be blind-sided by any --

Have I read that correctly?

A. Yes.

Q. And Judge Heffernan can fill in anything I left out.

So you learned subsequently just by reading below that the date of the incident was April 2 of 2018; correct?

A. Yes.

Q. And so you received this e-mail on April 20th;

is that right?
A. That's correct.
Q. And so that's approximately two and a half weeks after the incident; --
A. Yes.
Q. -- is that right?
Now, would it be fair to say that there had been a couple of issues with ICE at the Newton District Court in the year or year and a half prior? Isn't that correct?
A. I remember at least one.
Q. Yup. And so -- And that would have involved some press on Judge Heffernan; correct?
A. Yes.
Q. And you did not take the date that you received this as an indication that Judge Fortes was in any way trying to not raise this issue so you'd be alerted to it any sooner.
A. No. I read it in terms of a delay as she knew that there was a potential meeting with the ICE officials and probably that prompted her to notify us.
Q. And she got that information from Judge Heffernan.
A. Looks like Judge Heffernan.

Q. Who Judge Heffernan apparently was concerned enough to call Judge Fortes; correct? The suggestion was, we better alert Chief Justice Dawley.

A. Yes.

Q. So that Chief Justice Dawley or Chief Justice Carey are not blind-sided at the meeting.

A. That's correct.

Q. So clearly by now, both Judge Heffernan and Judge Fortes are concerned that this might be an issue.

A. It certainly seems that way.

Q. And might have thought it was an issue prior to that; right?

A. It could.

Q. Now, you indicated that you had asked four questions on Page 539.

A. Yes.

Q. And you ran through the questions. And one was, what was the authority. And you told us that's in this e-mail that you got a response and the response was it had been my practice and eventually that practice was changed with --

A. Yes. Correct.

Q. And the second was, who was the judge that presided over the case. You got an answer to that.

A. Correct.

Q. The third one, who was responsible for allowing the defendant to exit the courthouse via a non-public entrance. Let's put a pause on that one -- put a pin in that for a second.

And fourth, in addition to the notice posted by Officer Noe, was the court staff told, and do they understand that this should not happen again?

A. Correct.

Q. Yup. And so there was a policy in place to prevent that from happening, right, which was the Lunn policy?

A. The Lunn policy.

Q. We'll come back to that.

Now, as to Number 3, who was responsible for allowing the defendant to exit the courthouse via a non-public entrance. The e-mail's sort of deafening in the silence. Nobody ever responded to Question Number 3 to you; correct?

A. Directly, that's correct.

Q. Okay. Now, eventually you set up a meeting, and

the meeting was with Judge Joseph and Judge Fortes; correct?

A. Yes.

Q. And it was in your office?

A. Correct.

Q. And the three of you sat and the three of you talked, as you just described.

A. Yes.

Q. But there was nobody writing down notes.

A. That's correct.

Q. And you explained that nobody was writing down notes as part because you viewed it as just educational, informational but educational sort of meeting; is that correct?

A. That's correct.

Q. Now, it would be fair to say that you took no notes, no one took notes on that day, and there were no notes that were created by you or Judge Fortes regarding the meeting at a later time; is that correct?

A. That's correct.

Q. So in other words, there's no notes available at this point for you to refresh your recollection.

A. That's correct.

Q. So your testimony here today and your testimony

before in any other proceeding regarding this was unaided by any notes to refresh your memory.

A. That's correct.

Q. Now, at the end of the meeting -- If you can go to Page 534, please, at the very top of the page.

A. Yes.

Q. It's two days later, on May 10th. It says from you to Judge Joseph, Shelley, Judge Joseph, I appreciate meeting with you and your consideration of the issues we discussed. As I mentioned, the best part of this job is that every day is a learning experience. I look forward to seeing you at the conference. Thanks and take care, Paul Dawley. That's the first one; correct?

A. That was in response to her e-mail to me.

Q. Okay.

A. Yeah.

Q. And below that is her e-mail to you two days before. Shelley Joseph to Judge Dawley, thank you for meeting with me today. I've learned and understand all that we've discussed. I look forward to seeing you at the conference next month if not before. That's what that says; right?

A. That's correct.
Q. And as to the sentence above that, which is, I appreciate your concern, your consideration of the issues we discussed, as mentioned, the best part of this job is that every day is a learning experience. Now, I take it that you thought that your impression was, when she left, that she had been candid with you; correct?
A. Yes.
Q. Thank you.
Now we can go to -- We talked a little bit about Rule 211, the off the record.
A. Yes.
Q. And spend a little time. So Judge Fabricant asked you some questions about training materials, books that happened, things that are provided to new judges. And you explained as sort of a predicate to that, that every judge -- every new judge is important to you, which is why you give them a mentor for up to two years.
A. Yes.
Q. And so it would be fair to say that in your mind every judge needed a mentor just to make sure that they had somebody guiding them as they went.

A. I think for the most part that's true. I mean, people have different levels of experience, they bring different qualities to the bench, but it's a very different job than, for instance, where I came from being a prosecutor or a defense lawyer. Much different role. So it requires I think support from somebody with more experience to help you navigate some of the issues.

Q. And one of the ways you also provided support was providing written materials; is that correct?

A. Correct.

Q. And so it would be the 90-day guide; is that correct?

A. Correct.

Q. And that's probably as big as that stipulation book that you got there?

A. It's actually very similar to this. It's a live binder.

Q. It's just a lot of material, be fair to say?

A. It is. They're constantly trying to condense it because we ask people to bring it on the bench with them.

Q. And in fact, is that the same as a benchbook or

is there a separate book called the benchbook that Judge Rooney --

A. Judge Rooney's Benchbook is I think a condensed version of the 90-day guide.

Q. And so new judges get two of these books, both about that size.

A. Yup.

Q. And Judge Fabricant, Special Counsel Fabricant showed you the West Publishing Company book called Rules. You've looked at that in the past.

A. Yes, I have.

Q. And you know that's about 1,500 pages of small type; right?

A. Very voluminous. Correct.

Q. And so you've been a new judge before; correct?

A. I was.

Q. And I assume that it's different being a judge than being a lawyer. You have different things that you have to pay attention to, I assume.

A. Yes.

Q. And so I assume that you must have felt, when you were a new judge, that it was a little bit like drinking from a fire hose, maybe; yes?

A. Correct.

Q. And you were trying to grasp the key concepts every day that were going to be in front of you and grow that experience; is that right?
A. Yes.
Q. So you would -- Would you agree with me that it's not reasonable to expect a new judge that's been in six months to have read every page of -- 1,500 pages of the West book?
A. That's correct.
Q. Okay. Now, it would be fair to say that, as to this Rule 211, which was passed and became effective in May 1988, that it was, for a long time it was honored more in the breach than in fact by some people; correct?
A. Correct.
Q. And over time things have slowly morphed a little bit because of the SJC decision. There's a little less of that and less of that and less of that over time.
A. I think that that's accurate.
Q. So when you were a young assistant district attorney in Plymouth County --
A. Yes.
Q. -- area, I assume that there were judges going off the record; yes?

A. That is correct. Particularly as to most of my time was Superior Court, and it was a frequent occurrence.

Q. And in fact, in Superior Court, there was no rule about going off the record until after this incident in 2018; is that correct?

A. I couldn't speak to that. But the other difference is Superior Court at that time was stenographers as opposed to a recording system.

Q. But it wouldn't be unusual for some judge to motion to the stenographer to talk with the --

A. I've seen that occur.

Q. Okay. And in fact, sometimes there were lobby conferences with the assistant district attorneys and even with private counsel over cases, for various reasons, plea discussions, what are we going to do next, all kinds of things; correct?

A. Yes. That's correct.

Q. Now, you told us that, even though the practice has been tightening up, there hadn't been an issue really until this case that caused you to put into effect after 2018 the new training; is that right?

A. Can I ask you, what do you mean by "there

hadn't been an issue?"

Q. Well, let me phrase it another way.

A. Yup.

Q. You indicated, when special counsel asked you questions, that there was nothing in the 90-day guide and nothing in the benchbook that referenced 211, be on the record all the time, nothing like that; correct?

A. Right.

Q. And so this was a wake-up call that you wanted to educate all your new judges right up front; is that right?

A. Correct.

Q. And so now, every judge, every young judge, every new judge who comes on the bench in what used to be your court, and now is Chief Justice Fortes court, is told this right up front.

A. I believe it's part of the, --

Q. The pack.

A. -- the 90-day -- Yup. Yes.

Q. Now, this Lunn case -- Before I go there, if I could just ask you one thing, which is -- I'm going to show you one document, and this is an e-mail exchange back in December 2018. One, two, three, four pages. And the bottom of the

string, going up to February 19, there's an e-mail exchange with you and Paula Carey. Just look at that. And could you just read to yourself from the bottom there.

(PAUSE)

A. Yes. I recall this.

Q. And Paula Carey was the Chief Judge of all the Trial Court at that point.

A. Correct.

Q. She was the supervising judge of all seven departments; correct?

A. That's correct.

Q. And on that last page, Judge Carey actually says, I don't know if there's a rule about going off the record in the District Court. Correct?

A. She said I do not recall a rule but my suggestion would be to look at statutes to determine whether there's anything in the law that requires recording everything. We also may want to locate rule, standards, et cetera that indicate that the judge is in charge of her courtroom. And Chief Justice Dawley would be able to tell you if there are any specific District Court standards.

Q. Okay. And so the date of this e-mail exchange

is February 4th, 2019. There's many other things in there. So --

A. Yes.

Q. -- it may not be necessary to admit the whole thing. But the content is the Chief Judge of all the courts, in the Trial Courts in Massachusetts was not at that time aware of this rule; correct?

A. Correct.

Q. Thank you.

Now, moving back to the Lunn policy. So if we can set the context here a little bit for the Lunn policy. Some part of it everybody probably knows, which is in 2017, then Chief Justice Gants wrote this decision that was called Commonwealth versus Lunn; correct?

A. Lunn versus Commonwealth.

Q. Lunn versus -- Thank you.

A. Correct.

Q. And it was a case that tried to balance the interest of the state and the Federal authorities; correct?

A. That's correct.

Q. And it was a very cutting edge case in a sense, was it not?

A. It was a very significant case.
Q. Significant.
And as you've described, striking the balance is delicate. And having it on paper is different than executing the decision; correct?
A. That's correct.
Q. And Chief Justice Carey led the committee that ended up issuing this executive office transmittal that you were shown on November 10th, 2017, probably, four or five months after the decision came down, and it's one, two, three, four pages. I mean, somebody put a lot of thought and work into what the execution was going to look like.
A. I think they had a working group, members of each department, Chief Justice Carey, and primarily it's driven by the security department.
Q. Thank you.
So the working groups would be security, would be the judiciary. Anybody else that you can recall? Maybe the clerk's office?
A. I'm sure. I'm sure they were included.
Q. And maybe probation?
A. I would think so.

Q. And so -- And this was the fruit of their labor, the product; correct?
A. Yes.
Q. And this went out from the executive office to everybody, to judges, clerks, registers -- That would be registers of probate?
A. I would think so, registers of probate. They have registers of Land Court. I don't think that would apply.
Q. Land Court. Probation, chief probation, and all staff. And it would be fair to say that at this point in time there was a nationwide issue with regard to ICE and immigration; correct?
A. Certainly -- Yes.
Q. And this was meant to provide guidance that provided the balance so nobody was going to be left guessing in the District Courts as to how they were supposed to handle these issues, this issue, ICE comes, ICE wants to take somebody in custody, what do we do, this is the guidance. Is that correct?
A. My sense is that that policy attempted to implement the SJC decision and answer questions that court personnel would deal with frequently, to try to give them direction and guidance.

Q. Thank you.
And so did you have a sense that, besides sending it out by e-mail, zing out it goes, that there was training that accompanied this in any way?
A. I'm sure. I would assume it was covered in terms of security. It was a matter that would have --
Q. For your court, meaning, you got these judges who are -- have to be intelligent to get on the bench, they can read, they can read the whole thing; right?
A. So when the decision issued, my office issued a legal bulletin that outlined this is the decision. In fact, I think we issued it the next day saying this decision was made, significant changes, and this is the holding of the court. Thereafter, it was subject to coverage in some of our trainings over the next several months.
Q. Thank you.
And you expected, I assume you expected the presiding justice at the very least to read the transmittal; correct?
A. Yes.

Q. Of each one of the -- How many District Courts?
A. 62.
Q. Of each one of the 62, which is a lot of courts for you to be controlling, and this was a means to control it; right?
A. Well, I'm not sure I'd use the word "control." But it's more to support them in implementing this. And guidance.
Q. But it wasn't meant to be, I'm going to follow it if I want to follow it. This came from the top; correct?
A. Correct.
Q. There was an expectation that the SJC was run of the show here, was through her acting and all the justices were supposed to be --
A. I should put, compliance with this is required. It's not an option. Courts are required to implement the SJC decision.
Q. Thank you.
And can I ask you to go to the third page of this policy, which would be -- and if you look at -- It's Page 7, I'm told.
A. Yes.
Q. And there's a Roman Numeral III that says, DHS officials taking custody of individuals at a

courthouse.

A. Yes.

Q. And then there's a Paragraph 1, Paragraph 2, Paragraph 3.

A. Yes.

Q. The first sentence of Paragraph 3 says, the security supervisor or designated officer shall inform the First Justice, or Regional Administrative Justice of the department with the jurisdiction over the person if DHS officials are present in the courthouse with the intent of arresting or taking anyone into custody, i.e. a party or other participant in a case before a judge or magistrate or a person intending to business in the courthouse.

So we can talk it through. So if Medina Perez, which is the name of the individual later on on April 2nd, in question here, was in the Newton District Court, and ICE was there to take custody of him, then a security supervisor or designated officer was supposed to inform either the First Justice or the Regional Administrative Justice; is that correct?

A. Right literally, yes. Now I would say

there's a lot of these courts, the First Justice is only there a couple of days a week. So whoever is sitting. I would be First Justice to me. Whatever judge is sitting should be informed.

Q. Okay. And in addition to that, you are relying on the, I assume the policy for implementation, relying on security supervisor to have knowledge of this policy.

A. Yes.

Q. And would you have expected that a presiding justice would have had some discussion with a security supervisor in each individual court so that they were sort of on the same page on this?

A. I think that would certainly be a best practice.

Q. Okay. As you sit here today, did you know whether or not the Newton District Court actually implemented the Lunn policy on or by April 2nd, 2018?

A. I couldn't -- I'd defer to the security officials over there to tell you the answer to that.

Q. Okay. And if the presiding justice testified earlier this morning that it was not in effect

on April 2nd of 2018, we'd take her word for it; right?

A. Yes.

Q. And so as you've just said, as I understood it, this is a requirement of the SJC, and failure after having noted that this policy is a violation of the expectation of the SJC; correct?

A. Well, I'll reiterate. This was not optional. The SJC made a decision courts are required to implement. One of the holding court, the holding was clear, this policy is pretty clear. It should have been implemented.

Q. As you sit here today, do you have any information that anybody has reported Judge Heffernan to the CJC because of this violation?

A. No. But I would strongly disagree if somebody made that suggestion. I would very strongly reflect at it.

Q. Okay. And why is that?

A. Because the court -- These courts, these courts are made up of joint leadership. So when you implement policies like this, it's typically the clerk magistrate, the first justice, the

chief probation officer, and the chief court officer that works as a team. And respectfully, to suggest that there's some type of misconduct by not implementing that, and I'm not sure you're suggesting that, but if you were, I would strongly disagree with it.

Q. If I were to suggest to you that it's very probable that Judge Heffernan was trying to do the best she could, the best way she could?

A. No question. That was my experience with her at all times.

Q. And it may certainly have been that Judge Joseph was doing the best she could as best she could.

A. That may well be true.

MR. HOOPES: Thank you. Just have one moment, please?

(PAUSE)

MR. HOOPES: Nothing further. Thank you.

HEARING OFFICER: Special counsel.

JUDGE FABRICANT: Very briefly.

REDIRECT EXAMINATION

BY JUDGE FABRICANT:

Q. Chief Justice Dawley, the chief of the

Trial Court, is that person appointed by the SJC among one of the judges of the seven Trial Court departments?

A. That's correct.

Q. And so is that person, while serving as chief of the Trial Court, also not sitting but also a judge of one of the seven Trial Court departments?

A. That's correct.

Q. Which of those departments was Paula Carey a judge of?

A. She was a justice of the Probate Court, Probate and Family Court.

Q. Probate and Family Court. Had she ever been a judge of the District Court?

A. No.

Q. Is Rule 211 a rule of the District Court?

A. It's a rule of the District Court and the Boston Municipal Court.

Q. Does it apply to Probate and Family Court?

A. No.

Q. Do you know whether the Probate and Family Court had or has a rule regarding recording?

A. I have no idea.

Q. The Lunn policy and the Lunn decision,

Lunn verse Commonwealth decision of the SJC, are those the same thing or two different things?

A. I'm sorry. Could you repeat.

Q. The Lunn policy –

A. Yes.

Q. -- was a document that we referred to, executive office transmittal 1713.

A. Correct.

Q. And the SJC decision in Commonwealth versus Lunn -- Lunn versus Commonwealth, are those the same thing or two different things?

A. Well, they're two distinct things. The decision of the SJC was a court issuance of a decision on the matter and the policy is the Trial Court's implementation of that.

Q. The SJC decision. Was the holding of that decision that Trial Courts, court personnel, court officers, cannot hold a person beyond the time that that person would otherwise be held in state custody for purposes related to an ICE detainer?

A. Correct. They distinguish a civil detainer.

Q. So as opposed to a judicial warrant.

A. Yes.

Q. So a judicial warrant is a different story.

A. Very different.
Q. But as to a civil detainer, the holding, if I understand correctly, was that, if you get notice of a detainer, but you're otherwise – the person is otherwise being released on personal recognizance, on bail, whatever, however they're being released, you got to release them.
A. Correct.
Q. You can't hold them. If ICE calls you up and says I'm going to be there in two hours, you can't hold them for two hours.
A. That's correct. The whole Lunn decision was the defendant was held with trial, the trial judge dismissed the case, and the court held him, Lunn, longer, until ICE got there on the civil detainer. His lawyer filed a petition, emergency petition with the SJC saying this is likely to recur. The court heard the matter, and then made it clear, you cannot hold somebody any longer than they would be held on the state charge, for example.
Q. And was that a matter of authority in the sense that state law does not give a court authority to hold somebody unless there is state law

authority --
A. It has been a while since I've read the decision. But I believe the SJC had noted that this is a matter that the legislature could address or may address, but that based on essentially Fourth Amendment precedent, the state constitution, that there was no right to hold somebody based on the civil detainer.
Q. Now, the Lunn policy, executive office of Trial Court transmittal 1713, did the SJC issue that?
A. No.
Q. Was that a policy to tell courts what they're supposed to do given that they can't hold somebody, under the SJC decision, they can't hold somebody beyond the time that the person would otherwise be held on state court charges, was it a policy to tell them, okay, now what are we supposed to do?
A. It was, as is stated, it's to provide clear guidance to judges, clerks, probation and security and all court staff on responding to DHS requests and in the presence of DHS officers in the courthouses.
Q. And what did you understand -- It may be a while

since you've read it, but what did you understand to be the essence of the Lunn policy? It's a number of pages. Was there --

A. That's a hard question. There's a lot of different aspects of this. And for instance, it deals with when ICE makes a request for information. It addresses that. It deals with situations in which a person is in custody versus not in custody. So there's a whole series of different scenarios. It also I think imposes requirements on security to record the interactions with ICE when ICE comes to the courthouse and seeks to take someone.

Q. Record not in the sense of a recording system --

A. Record in the sense as a record, a login I think it references.

Q. Was it your understanding that a judge is supposed to be neutral regarding ICE?

A. Of course.

Q. Not help, not hinder.

A. That's correct.

Q. Is that a fair summary?

A. That is correct.

Q. And also, if ICE wants to go to the lockup, supposed to allow them to go to the lockup.

A. The guidance clearly is a provision where, I believe that's the preference, if somebody's in custody, then that exchange should take place being in the lockup.

Q. Now, if ICE is going to take somebody, if the person that's in the lockup, if that person is still being held on state court charges, they haven't posted bail yet or bail hasn't been set yet or being detained without bail, and so they're going back in the sheriff's custody, the House of Corrections, jail, whatever, can ICE take the person?

A. No. The person remains in the custody of the state law enforcement where they came.

Q. So in order for ICE to take somebody, that has to be a person who is eligible for release.

A. Release. Right.

Q. But you can't hold somebody longer than somebody would otherwise be held, according to the SJC.

A. That's correct.

Q. So you got to somehow do this in a matter of seconds; right? They're in the courtroom, the judge says he's released --

A. So this Section III, I read this to essentially to try to address that issue and

talk about how the hand-off will occur, and that's where it speaks to the lockup provision.

Q. And what's your understanding of how the lockup is supposed to occur? Take your time to read whatever you want to read.

A. Section 3A, second paragraph, a DHS official is present in the courthouse and seeks admission into the courthouse's holding area in order to take custody of the individual pursuant to an immigration detainer warrant, court officers shall permit the DHS official to enter the holding cell area in order to take custody of the individual once the Trial Court security personnel finish processing an individual out of the court security personnel's custody.

Q. So the word is "permit."

A. Correct.

Q. If they want to go to lockup, you got to let them go to lockup.

Now, suppose you have a court where the normal practice -- and maybe this isn't the practice in lot of places. But suppose in a particular courthouse the normal practice is that, if somebody's being released, if the judge says, I order a release on personal recognizance, if the

normal practice is, and what happens then is, the court officer takes off the restraints and opens the door to the dock and the person walks out into the courtroom and out the door, if that's the normal practice, what do you understand the implication of that -- this policy to be?

A. It would seem to be inconsistent with the policy.

Q. That practice.

A. Correct.

Q. But if that is normal practice, what is supposed to happen in terms of ICE?

A. Now let me qualify this. I'm not security expert. A lot of times just left that to the court officers. That's their expertise. When you get involved sometimes, you make it more confusing. But I would think the ultimate goal is that there be a seamless hand-off so that there's not incidents in the public area of the courthouse.

Q. So it's a little confusing of how this is supposed to happen under this policy, isn't it?

A. Correct.

Q. If you go to that paragraph, just above the

paragraph we just talked about, there's a line that says, court security personnel shall process that individual out of lockup in the normal course regardless of whether the individual is subject to a civil immigration detainer or warrant.

Do you understand that to mean that they're supposed to do whatever is normal there, supposed to do what they normally do with regard to processing the individual --

A. I think you can make a strong argument in support of that interpretation.

Q. So there's room for interpretation here.

A. Yes. One thing is, throughout the state, there’s 62 courts, you get very different lockup sizes, you get very different situations in terms of a staffing at some of these courthouses. So there's some unique situations for every court, and you would think that, you know, the leadership of the court, the chief court officers work those issues out.

Q. So you would expect some coordination within the court among security, the first justice, the clerk, whoever else is involved in the leadership of the court.

A. No question.
Q. And as you read this, you wouldn't be expecting a uniform application of this policy exactly the same in every courthouse.
A. You would think there's got to be some flexibility, because not all these courthouses are the same.
JUDGE FABRICANT: All right. Thank you.
I have nothing further.
RECROSS-EXAMINATION
BY MR. HOOPES:
Q. So it's fair to say, I assume, that out of 62 District Courts, --
A. Correct.
Q. -- that most of them have a lockup.
A. There may be one or two out west that don't. They use the local police department.
Q. Okay. So that would mean almost 60 probably do; right?
A. I think so.
Q. And if you read the last page of this policy, labeled Page 8, it's the paragraph above B, it says, to the extent possible, court security personnel should require that DHS officials

transport any individuals taken into custody through the prisoner transport entrance and avoid taking the individual through the public areas of the courthouse. To the extent possible.

A. Correct.

Q. And so you would assume that every presiding justice would make a good faith effort to try to comply with this and only not comply to the extent it wasn't possible; correct?

A. Correct.

Q. Now, just one other small matter, if I can, which was raised by special counsel.

So in Massachusetts practice, the district attorney's office has a particular power, not in the Federal Court, they have the power to file what is called a nolle pros; correct?

A. That's correct.

Q. So the district attorney's office has the executive branch authority to prosecute or not prosecute regardless of the judge; correct?

A. Correct.

Q. On the one hand. On the other hand, if the system district attorney or prosecutor says, Your Honor, I'd like to dismiss, the judge has

the sole power to dismiss, and it's the DA's responsibility to move for dismissal; correct?

A. That's correct.

Q. And so with regard to governor's warrants, the governor's warrant is in the form of a complaint, so to speak, in the District Court; correct?

A. Yes.

Q. And the governor's warrant, the individual can be held without bail, bail can be set, or released in the unlikely circumstance on personal; correct?

A. Correct.

Q. And so that warrant is live or alive with that authority from the presiding justice until that complaint governor's warrant is actually dismissed; correct?

A. Yes.

MR. HOOPES: Thank you. No other questions.

JUDGE FABRICANT: Just one more.

REDIRECT EXAMINATION

BY JUDGE FABRICANT:

Q. Can an assistant district attorney nolle pros

the charge of fugitive from justice?
A. I think under -- this is off the top of my head -- I think Rule 17, if I'm correct -- of the Rules of Criminal Procedure, set forth the authority of a nolle pros, and I don't think there are any restrictions on the type of case that a prosecutor can file a nolle pros on. I might be wrong on 17. But I always thought the prosecutor retains the sole and exclusive decision whether or not to charge, and the nolle nolle pros authority is exclusively theirs.
Q. Rule 16. Entry of a -- And it's a latin term. Nolle prosequi. But it's usually called nolle pros. Correct? A prosecuting attorney may enter a nolle pros on pending charges at any time prior to the sentence. A nolle pros shall be accompanied by written statements from the nolle prosecuting attorney setting forth the reasons for that disposition. In practice, do people tend to use nolle pros or dismissal interchangeably?
A. It varies by county. It's an interesting legal issue. The source of some dispute in a number of counties where some judges have declined to act on motions to dismiss so they'll

utilize the nolle pros authority. It really varies across the state.

Q. And this requirement of a written statement, does that tend to be done in the form of a checkbox form?

A. It's usually a form, and a lot of times I've seen the state in which it happens determine that procedure.

JUDGE FABRICANT: All right. Thank you.

MR. HOOPES: Thank you.

HEARING OFFICER: Okay. Thank you very much, Judge. You're excused.

JUDGE FABRICANT: Can the witness be excused?

HEARING OFFICER: Yes.

JUDGE FABRICANT: Thank you.

What remains of the Commission's case is Judge Joseph. And I understand we're going to wait until tomorrow morning.

HEARING OFFICER: Yes.

MR. HOOPES: You wanted to address --

HEARING OFFICER: Yes. And so

I was hoping that we can understand what you expected after Judge Joseph's testimony.

MR. HOOPES: So I was hoping --

Can you hear me or do I need the mic?

HEARING OFFICER: I can hear you.

MR. HOOPES: So I was expecting, based on our conversation, that after her testimony, we would the begin a case for the respondent on Friday morning. With one exception. But I believe we're probably going to call anywhere up to six witnesses. But just so the court knows, I think it's probably two hours total max. I mean, these witnesses are going to hopefully flow.

There is one possible exception. One of the witnesses is a retired judge who's also a mediator. And if she can move her mediation ever so slightly on Friday morning, she'll be here at 9:00. But she may not be able to. We may have to ask your permission to have her come over after Judge Joseph testifies.

HEARING OFFICER: Meaning

tomorrow.

MR. HOOPES: Meaning tomorrow.

HEARING OFFICER: That's fine.

MR. HOOPES: And my second question would be, if that's our time slot, meaning a couple of hours, would you be looking for us -- when would you be looking for us to have briefs done?

HEARING OFFICER: Well, I was thinking about that. And from my perspective, to the extent that both counsel would appreciate the weekend to prepare for that, that's fine with me. We can discuss the issues on Monday.

MR. HOOPES: That would be wonderful. And if I can ask, could we do summations at 9:00 a.m.? Mr. Keating has an issue at 11:00.

MR. KEATING: I have a doctor's appointment, Judge, if I can possibly keep at 11:00 on Monday. I'd like to. I don't want to interrupt the proceedings if that's not possible. But if it's possible --

MR. HOOPES: I won't be an hour.

HEARING OFFICER: Okay. Is

that -- So it sounds like we could do it on Monday, the summations Monday morning.

JUDGE FABRICANT: My preference, frankly, would be to do it on Friday, but whatever you prefer is fine.

MR. HOOPES: That would be great. I appreciate it.

HEARING OFFICER: Yeah. I think giving both sides the weekend to prepare their summations is in everybody's interest, frankly. So I think we can do that. And I think we can certainly be complete by 11:00 based on everything.

JUDGE FABRICANT: And just to be clear, respondent goes first on closing.

HEARING OFFICER: Yes.

JUDGE FABRICANT: And so our expectation, then, just so we're clear about timing is, tomorrow we're going to have Judge Joseph and perhaps Judge MacLeod. On Friday, we'll have --

MR. HOOPES: Four or five. Quick, quick.

JUDGE FABRICANT: And you think that's a total of two hours.

MR. HOOPES: Yes.

JUDGE FABRICANT: And so we're probably off Friday afternoon, it sounds like.

HEARING OFFICER: Yes.

JUDGE FABRICANT: Very good. Thank you.

HEARING OFFICER: Anything else?

JUDGE FABRICANT: That's it.

HEARING OFFICER: Thanks All. We'll see you tomorrow.

(The proceedings adjourned at 3:47 p.m.)

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EXHIBIT 16

COMMONWEALTH OF MASSACHUSETTS
COMMISSION ON JUDICIAL CONDUCT

COMPLAINT NUMBER 2019-22

VOLUME IV

HEARING

~ BEFORE ~

HEARING OFFICER

DENIS J. McINERNEY, ESQ.

JUNE 12, 2025

9:00 A.M.

Boston, Massachusetts

Lisa L. Crompton, CSR (MA)(RI), RPR
(As amended by stipulation of the parties and
as approved by the Hearing Officer on October 1, 2025.)

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I N D E X

HONORABLE SHELLEY RICHMOND JOSEPH	PAGE NO.
DIRECT EXAMINATION BY JUDGE FABRICANT	655
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REDIRECT EXAMINATION BY JUDGE FABRICANT	787

E X H I B I T S

EXHIBITS	DESCRIPTION	PAGE NO.
EXHIBIT 5	E-mail chain with attached Executive Office Transmittal 17-13, 5 pages	759

HEARING OFFICER: Good morning. We're on the record.

So this is the fourth day of the hearing on the Commission on Judicial Conduct's Complaint Number 2019-22.

I'd ask that counsel please identify themselves for the record.

JUDGE FABRICANT: Judith Fabricant, special counsel for the Commission on Judicial Conduct.

MR. NEFF: Howard Neff for Commission on Judicial Conduct.

MS. MULVEY: Elizabeth Mulvey for Judge Joseph.

MR. HOOPES: Tom Hoopes for Judge Joseph.

MR. KEATING: Michael Keating for Judge Joseph.

HEARING OFFICER: Thank you.

Good morning, Everybody.

Special Counsel, call your next witness.

JUDGE FABRICANT: And I call Judge Joseph.

HONORABLE SHELLEY RICHMOND JOSEPH,
SWORN

HEARING OFFICER: Thank you. Take your seat.

DIRECT EXAMINATION
BY JUDGE FABRICANT:

Q. Good morning.
A. Good morning.
Q. Two years ago, on June 6th of 2023, you and I met in the Commission's office for an interview, I was acting on behalf of the Commission, and your three lawyers were there, and -- the same lawyers who are here now, you were under oath, and there was a court reporter, and the court reporter produced a transcript of that interview; correct?
A. Yes.
Q. And that transcript is in and stipulated appendices which are all in the book; okay?
A. Okay.
Q. So we may refer to that from time to time.

You started practicing law in 1993; correct?
A. Well, I graduated from law school in 1992. I did some work in -- I was sworn into the bar in

the end of 1992, and I started working at the end of that year or the beginning of the following year.

Q. You were at the attorney general's office, Massachusetts attorney general's office first for some period of time, and then you were with a civil law firm for a period, and then you started a private practice in 2000.

A. I did.

Q. And your office was in Newton.

A. Yes.

Q. And your work was mostly criminal defense.

A. Mostly.

Q. You spent several years as a bar advocate.

A. I did.

Q. And we've heard some testimony about what bar advocates do, and they serve as attorney for the day, from time to time in different courthouses, and getting appointed to whatever's on that day; correct?

A. Yes.

Q. And that's what you did.

A. I did.

Q. And you did that for several years, and two of those years were in the Newton District Court;

correct?
A. I don't recall how long I was a bar advocate in Newton. I think it was longer than that. I was on the bar advocate list for about seven years. And during those seven years, I was a bar advocate both in Middlesex and Suffolk County.
Q. So you think your role in Newton as a bar advocate was longer than two years.
A. I think it was longer than two years. Although, the bar advocate work that I did, I did more of it as I was beginning my law practice and little by little I --
HEARING OFFICER: Could you get just a little closer to --
THE WITNESS: Of course.
HEARING OFFICER: Thank you.
Q. Eventually your private practice picked up and you phased out the bar advocate work.
A. I did.
Q. And that happened -- You're the not the only one who followed that path; right?
A. I would expect. Right.
Q. During your private practice, sometimes you would be in Newton every day, other times there

would be a gap of some months; correct?
A. I don't think I was ever in Newton every day. There were times when I had multiple cases in Newton and I would be there every day of the week. There are other times when I had gaps in cases that I was handling and I wouldn't be in Newton for months.
Q. So let's take a look at Exhibit N, Page 243, Line 10. So you said, I had a lot of cases in Newton District Court, but they ran slow, some days I was there every week, other days it would be months until I came back. That's what you said.
A. Correct.
Q. So you had a lot of cases in Newton but it wasn't constant --
A. That's right.
Q. -- during that period of time.
And you were familiar with the courthouse.
A. I was.
Q. In 2019, the U.S. attorney brought a matter to the Federal grand jury and you were indicted on criminal charges; correct?
A. Yes.
Q. You were represented by excellent counsel;

correct?

A. Yes.

Q. Two of the same who are here -- All three of the ones who are here are excellent. Two of them represented you in the criminal case; correct?

A. That's correct.

Q. And the case was dismissed by the Federal Court based on the agreement that you entered into with the United States attorney; correct?

A. That's right.

Q. The agreement was some four pages long with the signatures on the fourth page; correct? So we're going to bring up the signature page. The agreement is Appendix M. We're going to look at Page 162, which is the signature page. And do you see your signature there?

A. I do.

Q. And see the signatures of your lawyers there?

A. I do.

Q. And now we're going to go back a couple of pages, to Page 159, which is the beginning of the agreement, and see the beginning of the agreement. And I'm going to read Paragraph 2, and you have it at Page 159on your side. I'm just going to read Paragraph 2.

Judge Joseph, -- I'm inserting the title, although it was not there -- Judge Joseph agreed that within 30 days of the effective date of this agreement she will formally refer herself to the Massachusetts Commission on Judicial Conduct and will thereafter cooperate fully in any investigation or proceeding into her conduct that has been or may be initiated or conducted by the Massachusetts Commission on Judicial Conduct until any such investigation or proceeding is closed or concluded.

Such referrals shall include, a stipulation by Judge Joseph to the accuracy of the facts set forth in the attached statement of facts. Parties agree that the attached agreed-upon statement of facts may not represent all relevant facts. Judge Joseph agrees that she will not contest the accuracy of the statement, that she does not object to the consideration or admissibility into evidence of the statement and any investigation or proceeding that has been initiated or conducted by Massachusetts Commission on Judicial Conduct, attest in writing under penalties of perjury to

compliance with the conditions of this paragraph, at the time of her submission to the Massachusetts Commission on Judicial Conduct. And then there are a couple more sentences about how the Commission reviews the Federal material and there's a sentence that makes it clear that you're entitled to --0

A. Yeah.

Q. So you did refer yourself to the Commission you did certify that you did so, and we have a statement of facts before us.

A. (Witness nods head).

Q. So let's -- Is all that correct?

A. Yes, it is.

Q. Let's look at the statement of facts which was attached to the agreement. And let's look at Paragraph 3. Again, certain title, even though I've -- Judge Joseph knew -- This is Page 163.

A. Give me one second. Okay. Thank you.

Q. Judge Joseph knew that criminal defendants in Newton District Court custody were kept in the lockup area in the basement of the courthouse and were brought upstairs by a court officer in the courtroom for the court appearances. The normal custom and practice in Newton District Court,

subject to certain exceptions, was that a defendant would be released from custody into the courtroom. This courtroom had only one public entry/exit which led to the courthouse lobby.

So you are not contesting that the normal custom and practice in Newton District Court, subject to certain exceptions, was that a defendant would be released from custody into the courtroom.

A. That's correct.

Q. Correct?

Now, while you were in practice, you had experience with lobby conferences off the record.

A. I did.

Q. And in 2015, you were practicing as a criminal defense lawyer.

A. Yes.

Q. And you became aware in 2015 that lobby conferences were no longer conducted off the record.

A. So I wasn't aware that there was a rule change. I am aware of that now. But I did know that practice had changed a little bit, just by

experience and being in court where lobby conferences were beginning to be recorded on the record.

Q. And you now know that that's because the SJC changed Rule 12 of the Rules of Criminal Procedure to require that lobby conferences be recorded.

A. That's correct.

Q. Correct? And then you became a judge on November 2nd of 2017.

A. I did.

Q. And as a new judge, you were provided with a lot of materials.

A. Yes.

Q. Some of them came from District Court, some of them came from the Trial Court, some of them came from the Flaschner Judicial Institute. There were a lot of materials.

A. There were a lot of materials.

Q. And among the materials was this binder of the Massachusetts Rules of Court. Correct?

A. Yes. It probably was the 2017 or '18 version, but it looked something like that.

Q. This issue is the 2021 version. But yes, it would have been the version that was current at

the time.

A. Yes.

Q. Your lawyer put it out yesterday, by the way, your lawyer said I think 1,500 pages. Actually, it's about 1,300 pages. But there is a section of District Court rules; right?

A. There are.

Q. You were familiar with this book even before you became a judge.

A. I was.

Q. You were familiar with it in practice, maybe even in law school.

A. I don't remember it in law school, but certainly in practice.

Q. Okay. And so you know that at the back of the book there's a way to find particular sets of rules because there's a list and then there are markings on the edge of the pages that help you find what's listed.

A. Yes.

Q. So if you wanted to look for District Court rules, you could do that by looking on the list and finding the marking and that would be where that marking is; right?

A. Yes. That's correct.

Q. And the District Court rules in this book amount to about 30 pages; right?
A. I, I don't know.
Q. Do you want to look at the book?
A. If you tell me it's 30 pages, I believe you.
Q. 30 pages you could read or scan in probably an hour; right?
A. Rules -- There are times -- I don't know if you can read them in an hour but...
Q. But it wouldn't take up 1,300 pages.
A. No.
Q. The rest of the book has the Rules of Civil Procedure, Rules of Criminal Procedure, Rules of Appellate Procedure, and the SJC court rules, the rules of Superior Court, the rules of the Land Court, the rules, et cetera, et cetera, et cetera, it has all kinds of things; right?
A. Yes.
Q. So if you wanted to look specifically at the District Court rules, you could do that and you'd get -- you'd find about 30 pages.
A. Yes.
Q. You never did as a new judge sit down with the rule book and review the District Court rules to make sure you were familiar with the rules of

the district court.
A. No, I was familiar with the rules from the practice. I did not sit down with the rule book and read the rule from, you know, the District Court rules from beginning to end.
Q. Did you read part of it, again, as part of your preparation for becoming a judge?
A. As part of my preparation for becoming a judge, there was a training program that the District Court initiated where I sat with judges for the first month or so, and I think over the course of the three and a half weeks I sat with 20 different judges and saw what they did on the bench. And I was what they called a baby judge, so I would sit next to a judge on the bench and watch daily with them, whoever they were, and I would go back and review the substantive matters either that I learned that day or that I didn't know that I needed to familiarize myself with.
Q. So you've anticipated my next series of questions. But there was never a time when you picked up the rule book, during a break or at night or anytime, picked up the rule book and said maybe I should be familiar with the District Court rules and look through them or

skim them or read them.
A. Well, I'm sure, if there was an issue that dealt with a rule, I would have referred to the rule book. I don't recall picking it up and just reading it from start to finish.
Q. You talked about this court orientation process. You spent about four weeks sitting with other judges so that you could see what each of them does on various substantive matters; correct?
A. Yes.
Q. And there were about 20 of them, because it's about four weeks, that's about 20 days, usually one judge each day, and so about 20 of them.
A. Correct.
Q. And you could ask those judges any questions you wanted to ask.
A. Absolutely.
Q. And during that period of orientation, you have no memory of ever seeing a judge go off the record; right?
A. I don't.
Q. And you now know that District Court Rule 211 requires that all court proceedings be recorded.
A. I do.
Q. The process for new judges also includes

assignment of a mentor; correct?
A. Yes.
Q. And initially you were assigned Judge Michael Brooks and then that changed later; correct?
A. That's correct.
Q. And part of the mentor process, as you were told, was that you could call your mentor with questions at any time; correct?
A. Yes.
Q. And in fact, you could ask questions of any judge at any time.
A. Absolutely.
Q. And were people welcoming and forthcoming and inviting you to call them at any time?
A. Oh, of course. It was such a collegial atmosphere where judges would give you their numbers, their cell phone numbers, say call me anytime if you have a question.
Q. In the orientation manuals that you got at the beginning, there was a laminated benchcard reporting each matter; correct?
A. Yes.
Q. And there was a District Court education conference on December 13th, 2017, focused on

race and bias that you were not able to attend.
A. Yes, I was not able to attend that conference.
Q. After that, you're not sure whether you received whatever materials were distributed at that conference; is that correct?
A. The only thing I remember receiving was a book by Bryan Stevenson, because he was speaking at that conference. I don't recall receiving any of the other materials. That was given to me earlier because of the family issue, emergency that I had that I was unable to attend the conference.
Q. And you didn't contact the administrative law office to say please make sure I get the materials.
A. My father had passed away, so I wasn't able to go to the conference. And I had a couple weeks off before I came back to work, and it just wasn't on my mind to call the administrative office and ask them.
Q. Okay. But you did get District Court transmittal 12-22; correct?
A. What -- Sorry. I don't recall what transmittal that was.

Q. That is in the binder at -- So it's Appendix C in the binder. You'll see that it's dated January 16, 2018.

A. Yes, I did receive that.

Q. And you'll see that it's addressed to all judges, magistrates, et cetera, and it goes out by e-mail, and you saw the practice of transmittals coming by e-mail.

A. I did. I don't have any independent memory of receiving this, but it did go to all judges. I did have a computer at that time, so I would imagine I received it, but I don't have an independent memory of receiving this.

Q. You were reading your e-mails.

A. I was.

Q. And if an e-mail came --

A. Yes, I was.

Q. And the transmittal makes reference to, in Paragraph 6, it makes reference to an updated immigration benchcard that was distributed at that conference that you weren't able to attend; correct?

A. Yes.

Q. Paragraph 6 on Page 12.

A. Yes.

Q. Is that correct?
And it tells you that, if you don't have it, if you didn't get it, you can contact Jackie Lawson to get it.
A. Yes. It does.
Q. And it also says that an electronic version, laminated version.
A. Correct.
Q. But an electronic version was attached to the transmittal; correct?
A. Yes.
Q. And that's on Tab D. So it's at Page 15 and 16 in the binder. The transmittal, -- going back for a minute -- it tells you that the new updated benchcard supersedes any previous benchcard.
A. Yes.
Q. And the benchcard itself tells you when it was issued. Right at the bottom it says District Court AODC revised December 2017; correct?
A. I see that now. I don't think I ever noticed that before. But yes, it does say that.
Q. It tells you, if you look at the very last paragraph within the box, it tells you, for

guidance about immigration matters, for guidance about requests from the DHS to take custody, you can refer to what we're calling the Lunn policy, that is Transmittal 17-13 issued by the executive office of Trial Court on November 10th, 2017; correct?

A. Yes.

Q. And when you got the transmittal and the attached benchcard, did you check to make sure you had the Lunn policy?

A. I, I don't know.

Q. Okay.

A. It's eight years ago almost, so I just, I just don't remember.

Q. So you don't know whether you found it, pulled it out, and read it to make sure you were familiar with it?

A. I have no memory of doing that.

Q. And you did later on become familiar with that policy.

A. I did.

Q. And you now know that it goes on for several pages, it has some complexity, but the essence of what it says is that all court personnel are supposed to allow ICE to do their job, not help

or hinder, allow them to go to the lockup to take custody if that's what they asked to do.

A. Right. I think the essence of the Lunn policy is you can't help or hinder and that the preferable place to take somebody in custody is from the lockup.

Q. And you now know that the Lunn decision issued by the SJC, Lunn versus Commonwealth, says that a court cannot hold a defendant in custody any longer than the person would otherwise be held for purposes of an ICE detainer.

A. Correct.

Q. On April 2nd of 2018, you were sitting in Newton District Court.

A. I was.

Q. And the First Justice was not there that day.

A. Correct.

Q. You were sitting in the first floor courtroom, the first session.

A. I was.

Q. And you had a list of cases to hear.

A. I did.

Q. You had sat in the Newton District Court about six times before.

A. I did. Although I'm not sure if I ever sat

with the docket before. I was often there on a Thursday when there was no docket.

Judge Heffernan was in Quincy that day. So, they didn't schedule that -- they would assign a judge when emergencies that came in, last minute arrests or restraining orders, something of that nature.

Q. So, again, you've anticipated some of my next questions, but that's fine.

Soon that day you did have a list. And I want to call your attention to the full day docket -- the full day transcript --

A. Okay.

Q. -- of that day, which is Appendix H. But let's look at Page 47. It is Page 5 of the docket. And it is the second page -- Page 5 of the transcript. It's the second case called. It's a case of someone called -- Take your time to find it.

A. I'm sorry. Page --

Q. It's Page 47 of the appendix.

A. Okay.

Q. Within the transcript, if that's easier, --

A. Sure.

Q. -- Page 5.

A. Okay. Thank you.

Q. And it's a case of a person by the name of Pineda -- if I'm pronouncing that correctly. What you can see here is that the clerk says, the clerk says that there is private counsel that came in on Friday and requested an 11:00 a.m. call because he just filed an appearance Friday and had to be in another court. That's what the clerk says.

A. Yes, it is.

Q. And so you said second call.

A. Yes.

Q. And the Commonwealth asked the clerk, do you have the appearance. The clerk said, I don't have that. The defendant's counsel, did you understand that to mean the counsel who had been appointed and was being replaced by private counsel who had entered an appearance?

A. Let me just read.

(PAUSE)

A. I don't know. I don't know what that refers to, that he doesn't have the appearance or he doesn't have the continuance. I don't know.

Q. If you go to where it says defendant's counsel, defendant's counsel said, -- and they're not named -- defendant's counsel said, I have

originally been appointed to represent Mr. Pineda and I understand there's been a notice of appearance, may I withdraw. See that?

A. Yes.

Q. And you said you may.

A. Yes.

Q. So this was an example of a situation, and it was the second case on the list that day, a situation where retained counsel comes in and replaces appointed counsel.

A. Yes. I mean, it looks from the transcript that an attorney had filed an appearance a few days prior to replace appointed counsel.

Q. And that's something that you see happen.

A. Sure.

Q. Not unusual.

A. This situation was not unusual, no.

Q. And maybe it's because of stereotypes up there in the world about appointed counsel or for whatever other reason, but it happens.

A. I mean, I don't feel I can comment as to the reasons it happens. It happens for a whole host of reasons, you know, including sometimes counsel got appointed for bail purposes only because they're not indigent and they're not

entitled to private counsel. I can't speculate as to what happened here.

Q. Okay. But it happens.

A. It does.

Q. Now, not long after, the case of Mr. Medina Perez was called.

A. Correct.

Q. And the case was on the docket that day for arraignment.

A. It was.

Q. The charges were fugitive from justice based on a Pennsylvania warrant and two drug misdemeanors.

A. Yes.

Q. And you appointed the bar advocate of the day Ms. Bostwick.

A. I did.

Q. The assistant district attorney's position in the morning was that she would ask him to detain Mr. Medina Perez on the fugitive from justice charge; correct?

A. That's correct.

Q. But she would not be seeking bail on the drug charges.

A. Well, I think what she said is that she

wouldn't be seeking bail on the drug charges if he was held on the fugitive from justice matter.

Q. Let's take a look at the transcript, which is Appendix G. Page 39. Appendix G. So it's toward the bottom of Page 39. And you say, Commonwealth with respect to the new charges -- I take that was a reference to the drug charges, not that the old Pennsylvania charge -- is there going to be a request. Does "request" mean bail, request for bail?

A. A bail request, yes.

Q. And she says, no, Your Honor. And then you said okay. And then she said, well, not the drug possession. And you said, the drug possession that. And she said, if they're treated separately, I'm asking that he be held without. And you said, right on the fugitive. And she said, but if he's not, I would have a bail request.

A. Yes.

Q. So did you understand that to mean she was not asking for bail on the drug charges, she was going to ask for a detention on the fugitive from justice charge, and if you did not detain on the fugitive charge – which you didn't have

to.

A. Correct.

Q. But if you did not do that, she would ask for bail on him.

A. Right. Exactly.

Q. Do you understand that?

A. Yes.

Q. So if she were to press that position, which she ultimately didn't do, but if she were to press that position, you would have to make a decision about whether to detain him on the fugitive from justice charge; correct?

A. I don't know if I'm understanding your question.

Q. If her position didn't change on the fugitive --

A. Yes. I would have to make a decision whether to hold him on the fugitive from justice charge or not or release him on bail or just release him.

Q. And in making that decision, you would have to determine whether there was sufficient evidence that he was the person wanted in Pennsylvania; correct?

A. Well, I think there's a lot of factors that go into that decision, so I don't think it's fair to what you're suggesting.

Q. That's one of the factors, --

HEARING OFFICER: Sorry. If you could be a little closer to the mic. Thank you.

Q. -- that's one of the factors that would go into it.

A. It's one of the factors.

Q. If you weren't satisfied that there was enough evidence to connect him to the Pennsylvania warrant, you wouldn't have a basis to hold him, would you?

A. Well, again, I don't think you can look at the factors individually. You really need to look at the factors as a whole. And that's one of the factors to consider, but there is a lot of factors to consider.

Q. That's one of the factors --

A. Yes.

Q. -- you would have had to consider if that decision were presented to you.

A. Of course.

Q. And Attorney Bostwick questioned whether he was the person --

A. She did. When you have a matter that's before us on the fugitive, one of the first

questions that we're trained to ask is whether or not there's a question of identification, because that really sets forth the procedure that we would follow to handle the matter for the day. So that is one of the questions that I asked at some point in the morning, and Attorney Bostwick indicated that there was a question about identification with respect to her client and the fugitive from justice matter.

Q. And she asked for time to investigate that, --

A. Yes.

Q. -- that issue. And you gave her time.

A. Of course.

Q. As the case was called multiple times over the course of the morning and she was still working on that.

A. She was. I think we called it four times. I could be wrong about that. It could have been three, it could have been five. I think it was about four times. And each time she asked for additional time to continue her investigation as to the identification of her client.

Q. And when the court was ready to recess for lunch, she was still working on it.

A. She was.

Q. And she said she had a doctor's appointment

during lunch break and asked you to not call it before 2:15 --

A. Yeah. She said she was waiting for a fax, as I recall, and she had a doctor's appointment and wouldn't be able to be back until 2:15, so she asked if we could move the session at 2:15 or at least hold this matter until 2:15.

Q. And sometime during the course of the day, maybe during the morning, maybe during the lunch break, the clerk informed you that there was an ICE officer present with a detainer for Mr. Medina Perez. Correct?

A. Yes. It was at the end of the lunch break. The first assistant clerk, who was also my session clerk that day, came in to the lobby to inform me that there was an ICE detainer for Mr. Medina Perez.

Q. And the clerk informed you that it was Judge Heffernan's practice to have the ICE officer remain outside the court.

A. He did. And he said that there was a practice in the Newton District Court that prevented ICE from coming into the courtroom proceedings, and he asked if I would follow it.

Q. And you were concerned about that.

A. I was. I had never heard of a policy like that before.

Q. And you were concerned about it because you understood that the public has a right of access to court proceedings; correct?

A. Correct.

Q. You understood that the public has a right to see and hear what's happening in court; correct?

A. That's right.

Q. And you knew, as you told me in our interview, these are public hearings open to the public.

A. That's right.

Q. And you remembered that there was a policy somewhere about ICE but you couldn't put your hands on it.

A. Correct.

Q. So you called the administrative office of the District Court and you spoke with a lawyer there.

A. I did.

Q. And the lawyer there read the Lunn policy to you.

A. Yeah. It took them a while, a short while to call -- to find it, and they had to call me back, and they read me the policy.

Q. And you concluded that you could follow Judge Heffernan's policy.

A. Yes. We talked about the policy. It was a fairly long policy. They read it to me. And I told them the concern I had and the information that I was given about this policy. And my question was two-fold. One, do I have to -- you know, is the policy consistent with the Trial Court -- is the Newton policy consistent with the Trial Court policy; and two, is it a policy, Newton policy that has to be followed, and I was given advice on that.

Q. And after that conversation, you told the clerk to make that request to the ICE officer, to step outside the court.

A. Well, I did. I told him I would follow the Newton District Court policy. And I was a new judge, a visiting judge. I was only there for the day covering for Judge Heffernan, who was not there for the day, and I didn't feel that it was my place to not follow any policies that the court had so long as they were proper policies according to the administrative office.

Q. And so the clerk told you that he would do that.

A. Yes.

Q. And in the afternoon, after the lunch break.
A. Yes.
Q. The Medina Perez case was called at 2:48:13 p.m., and Mr. Jellinek appeared, David Jellinek appeared on behalf of the defendant; correct?
A. He did.
Q. And the transcript now, again, is on Tab G. We're going to look at Page 40. And you have stipulated to the accuracy of this transcript; correct?
A. I have.
Q. So I'm going to read from the transcript and then I'm going to stop at various times and ask you some questions about it.

So at 2:48:13 Clerk Okstein says, court officer, can you bring out the next, Mr. Perez. And court Officer MacGregor says all right. Clerk Okstein says, Judge, the next case will be Commonwealth versus Jose Medina Perez, Attorney David Jellinek has filed an appearance on behalf of Mr. Perez. And you say, good afternoon.

A. I did.
Q. Attorney Jellinek says, good afternoon,

Attorney Jellinek on behalf of Mr. Perez, may we approach briefly. You say, yes, please. And Attorney Jellinek said, thank you. Clerk Okstein said, do you want to wait for your client, or do it? Attorney Jellinek said, no, side bar. And you said, we're just going to side bar.

A. That's correct.

Q. So at that point the defendant had not been brought into the court.

A. He was in the process of being brought up. And the question was whether to wait for him to actually get into the courtroom or to begin the side bar without him since he wasn't going to be part of the side bar conversation, but since you could hear the steps coming, he was coming upstairs, I said that we could go to side bar before he was physically in the courtroom.

Q. And an attorney certainly can waive his client's presence.

A. He could. That's not what happened here.

Q. But he said not to wait for him.

A. Right. But it was going to be a side bar anyway without his client present.

Q. When Mr. Jellinek asked to go to side bar, you granted that request.

A. I did.
Q. And you knew that that meant the public could see what was going on but couldn't hear what was being said.
A. Correct.
Q. You also knew that, as long as you were on the record, if anyone wanted to know what had been said, they could get a recording.
A. I hadn't thought of that at the time. But that is true, that if it's on the record, the public can get a recording of it.
Q. So there's still public access, although it's not so immediate.
A. Correct.
Q. Now, let's go back to the transcript. So you go to side bar. And you said -- It starts with something inaudible. Then you said, is dismissed. Is that a reference to the fugitive from justice charge?
A. I don't know what that is. That doesn't make a lot of sense looking at the transcript, so I'm not sure if that -- I'm not sure what that is.
Q. What is it that was dismissed?
A. Nothing at that point in time had been dismissed, so I'm not sure.

Q. Ultimately, in the course of the day, what was it that was dismissed?
A. Ultimately, the Commonwealth moved to dismiss the fugitive from justice but -- that wasn't done at side bar.
Q. Did she move to dismiss or did she nolle pros?
A. She moved to dismiss. There was no nolle pros filed in that matter.
Q. So after you said it was being dismissed, you said, so it's my understanding that ICE is here.
A. Yes.
Q. And that was the first in this call of this case, that was the first mention of ICE; correct?
A. I believe so.
Q. And then Attorney Jellinek says, so there's the fugitive. And Judge Joseph says, if there's no warrant. And the assistant district attorney says, yes. And Attorney Jellinek says, there isn't inaudible that we can tie this to him. And the assistant district attorney says, I don't think it's him. Is that, as you understood it, in reference to the Pennsylvania charge?
A. I believe so.
Q. And then you said, okay. Then Mr. Jellinek

says, ICE is convinced that this guy - I went over to ICE, they say they have a biometric match, I went through it and did the research, there's 13 FBI numbers connected to this Social, so something's bad with the inaudible, my client denies that it's him, ICE is going to pick him up if he walks out the front door, but I think the best thing for us to do is to clear the fugitive issue, release him on a personal, and hope that he can avoid ICE. Is that what was said?

A. That's what it says, yes.

Q. So you understood that what Mr. Jellinek wanted to do, what his goal was, was to have his client avoid ICE.

A. Oh, what I -- how I interpreted that is that he had concerns that his client was not the same person that ICE thought he was, just like he wasn't the same person he was arguing that Pennsylvania thought he was, and I interpreted that as him wanting more time to do the investigation to see how that pertained to both agencies.

Q. Is that what he said?

A. Well, he said, avoid ICE. And my response

was, if you need more time, we can hold him until tomorrow.

Q. And then did he accept that suggestion?

A. He didn't ultimately.

Q. So he wasn't asking for his client to be held longer so that he could work on the issue, was he?

A. Well, at that point in time I didn't know what he was asking for. I can only tell you how I interpreted it, which, as you can see from my response, is that I offered to have him held until the following day.

Q. So the assistant district attorney says, I don't think arguing ICE is really my. And Attorney Jellinek says, right. Then she says -- she's continuing but she was interrupted. She says my, my. And then you said, the other alternative is, if you need more time to figure this out, hold him until tomorrow.

A. Right.

Q. And David Jellinek says something inaudible. And then you said, then it's a different. Do you know what you were referring to?

A. I don't.

Q. Then the assistant district attorney says,

there's a detainer attached to my paperwork, but I feel like that's separate and apart from what my role is. And then Attorney Jellinek says, there is an ICE detainer, so if he's bailed out from Billerica, and then something inaudible, ICE will pick him up. Then you said, ICE is going to get him. Attorney Jellinek says something inaudible. And then you said, what if we detain him.

A. Correct.

Q. Attorney Jellinek said, are we on the record. And you said, Larry, can we go off the record for a moment. And Larry refers to the first assistant clerk who was serving as session clerk that day.

A. Correct.

Q. And the clerk said, what's that. And you had to get his attention.

A. Right. He was -- Yeah. He wasn't paying attention, so he -- I think his reference, what's that, I interpreted that as what's that, I didn't hear that.

Q. And then you said, are we off the record. And Clerk Okstein says, we're on the record. David Jellinek says, can we go off the record

for a minute.

A. Correct.

Q. And when you said -- When he asked to go off the record, he didn't give any reason and you didn't ask for any reason; correct?

A. That's right.

Q. And you granted the request by asking the clerk to go off the record.

A. I did.

Q. And you told me in our interview that there didn't seem to be any reason not to allow it.

A. Correct.

Q. You said there wasn't a lot of contemplation.

A. That's correct.

Q. And you said you didn't give it much thought.

A. I didn't.

Q. And you said there really wasn't a reason.

A. No, I didn’t. At that point in time, I didn't know that there was a rule preventing it. And so he asked, and I allowed it.

Q. And you said, when we interviewed, that you thought he might tell you something about why Attorney Bostwick hadn't come back after lunch.

A. She said she had a medical appointment. I wasn't sure. I figured in the past, when off

the record conversations were conducted, because this was something sensitive to discuss. That could have been one of the options.

Q. The medical thing.

A. Sure.

Q. But in fact, she had come back. She was sitting in the audience.

A. I didn't realize that at the time.

Q. And you knew that, if you're off the record, there's no record.

A. Correct.

Q. So there's no public access.

A. Right.

Q. But this was an arraignment, not a lobby conference, not a conference regarding a disposition; correct?

A. Correct.

Q. And you have no specific memory of ever seeing a judge go off the record.

A. I have no specific memory one way or the other. I didn't keep track of when people were on or off the record. Certainly, it could have happened. I just can't recall a specific matter or what was discussed.

Q. So no specific memory.

A. No, not one way or the other.
Q. And you then had a conversation off the record for some 52 seconds.
A. Correct.
Q. And the conversation was about the Medina Perez case.
A. It was.
Q. Not about anything else.
A. No. It was about the Medina Perez case.
Q. And you have stipulated -- Getting back to the statement of facts that you agreed to.
A. Sure.
Q. -- with the U.S. attorney that, during that off the record conversation, Mr. Jellinek asked that the defendant be allowed to go back downstairs after he was released; correct?
A. After -- That he be allowed to interview his client with the assistance of the interpreter in the lockup, I would say prior to his release. After I had released him on his own recognizance but before the court officers had physically released him in the lockup.
Q. So let's take a look at Appendix M, Page 164, Paragraph 10. So after the recorder was turned off, there was a 52-second off the record side

bar conference with Judge Joseph with defense attorney, with prosecutor present. In the course of this conference, the defense attorney asked Judge Joseph to allow -- and this refers to him as A.S. I think it was intended to mean alien subject, but we'll call him Medina Perez. -- to allow Mr. Medina Perez be escorted up to the courtroom by a court officer to go back downstairs.

A. Correct.

Q. And your position is that nothing was said off the record that wasn’t then said on the record; correct?

A. No, that's not correct. There was one thing that was different off the record than on the record, and I put that on the record as soon as we went back on the record.

Q. So maybe my question is confusing. Your position is that nothing was said off the record that wasn't then put on the record.

A. Afterwards. So there was one thing that was said off the record that was not said on the record, and that was his request to speak with his client in the lockup area with the interpreter prior to his release.

Q. And you put that on the record.
A. And I put that on the record.
Q. And other than that, your position is nothing was said off the record that wasn't said either before or after, wasn't said at some point on the record.
A. So the off the record conversation was really a continuation of the on the record conversation. The words were different, so I don't -- but there was nothing of substance that was any different than him asking to speak with his client downstairs with the assistance of the interpreter.
Q. So there was no purpose for being off the record.
A. At the time, I didn't know what the purpose was.
Q. Looking at it in retrospect, there was no purpose for being off the record according to --
A. Again, at the time, on April 2nd, I didn't know what the purpose was. I -- He asked to go off the record, and I allowed that request.
Q. And shortly before you allowed that request, Mr. Jellinek had told you that he didn't think his client was the right person for ICE and had

said that he thought the best thing to do was to clear the fugitive issue, release him on personal, and hope that he can avoid ICE.

A. Yes. That's what his response was or that's what his statement was, which is when I suggested to hold him without bail overnight.

Q. And your suggestion was to hold the defendant without bail to prevent ICE from arresting him while the attorney would investigate.

A. No. My purpose for holding him overnight was to give the attorney enough time to continue his investigation. It was already 3:00 in the afternoon. And I had afforded his morning attorney plenty of time to do her investigation, and I felt that it was only fair now that there was a new attorney, who came in after the lunch break, to give him the same courtesy that I gave her in the morning. And, --

Q. And, what she was- I'm sorry.

A. -- and in order to make sure that everybody would be back the next day, the only way I saw at the time to do that would be to detain him, hold him without bail for the night, and have everybody come back the next morning.

Q. And what she had been investigating was the

Pennsylvania warrant, whether he was the right person for the Pennsylvania warrant.

A. Yes. She was investigating his identification as it pertained to the Pennsylvania warrant.

Q. And what you thought that Mr. Jellinek would be looking to investigate was whether he was the right person for ICE; correct?

A. Well, they were working off the same biometric information and identification information. So I'm not sure that you can really separate them like that. The fugitive from justice matter hadn't been dismissed yet, and his identification was important. I mean, we need to know who's coming in and out of the courthouse.

Q. But the assistant district attorney had already said she had concluded he was not the right person for the Pennsylvania warrant and she was seeking to dismiss that.

A. I'm not sure whether or not -- Let me take a look at the transcript. Give me one moment.

Q. You might look at the top of Page 41.

A. Right. That's all part of the same conversation, yes.

Q. She said, I don't think it's him.
A. I don't think it's him, yes.
Q. Meaning the Pennsylvania warrant.
A. Correct.
Q. She wasn't saying anything about ICE.
A. Correct. But she hadn't moved to dismiss it at that point in time.
Q. But you understood that she was going to.
A. Not at that -- She said I don't think it's him, then we started talking about the, as I'm looking at the transcript, the identification as it pertained to ICE as well. So kind of talking about it all at the same time.
Q. And she said, at least once, perhaps more than once, ICE is not my role.
A. Correct.
Q. So she wasn't talking about identification for ICE. She was talking about identification for Pennsylvania and she was telling you she had concluded that she didn't think it was him.
A. Well, I'm not sure -- I think she was saying that the ICE detainer was not her issue, you know, she was concerned about the two complaints that -- the Massachusetts complaints. I think the conversation that we were having was whether

he was the same individual that Pennsylvania thought, that ICE thought he was, and all I was doing was trying to give the attorney more time to do his investigation.

Q. And you thought the suggestion to hold the defendant overnight without bail, you thought that was a good suggestion for Mr. Jellinek's client; correct?

A. I did.

Q. That's what you said in your response to the Commission --

A. I did.

Q. And Mr. Jellinek didn't like that suggestion; correct?

A. He did not.

Q. You were concerned that ICE might take the wrong person.

A. Yeah. I wasn't really concerned that ICE was going to take the wrong person. ICE was not my concern. I was concerned about giving the attorney enough time to do the investigation regarding his client's identification that I thought he wanted to do. And if he could get that information and convince ICE that it wasn't who they thought he was, that would be his job.

That's not my role. I wasn't concerned about ICE.

Q. So let's look at your response to the Commission's charges at Paragraph 23, which I'll read from here, but try --

A. Is it in the book so I can read it as well?

Q. So we don't have it in our copy in hand.

A. Okay.

Q. So maybe make it bigger.

Judge Joseph disagrees either that her statements as quoted in Paragraph 23 --

HEARING OFFICER: I'm sorry. Please speak up. Speak into the microphone.

Q. Judge Joseph disagrees that her statements as quoted in Paragraph 23 conveyed an intention to assist defense counsel in identifying a means to avoid ICE or that she subjectively had any intention. As she had tried to do throughout the day, Judge Joseph did intend to permit both of Medina Perez's counsel sufficient time to represent their client properly because she did not want ICE to take custody of Medina Perez if it was determined that he was not the person subject to the detainer. Given the preceding events, Judge Joseph's intention was to make

sure that Medina Perez's counsel, who had repeatedly insisted that the ICE detainer did not pertain to his client, had a reasonable opportunity to investigate his belief that his client was not the subject of the detainer and to present ICE with any further information he was able to obtain to establish that ICE was mistaken by his client's identity. Her suggestion was intended to explore a course of action that would cause the defendant to be held without bail in state custody until morning to permit defense counsel a reasonable opportunity to make that inquiry. And then it goes on.

So you wanted to make sure that ICE wasn't going to take the wrong person; correct?

A. Again, my concern was, allowing the defense attorney enough time to investigate and do whatever job he felt that he could do with whatever information that he got. I was just trying to hit pause, just like I had four times during the morning.

Q. And your proposal was to do that by detaining him overnight.

A. That's correct. That was the only safe, secure, practical way to do it to make sure that everybody would be back the next day.

Q. And if he were -- If the fugitive from justice charge was dismissed, you couldn't detain him overnight on that if it was dismissed.

A. That's true. But it hadn't been dismissed yet.

Q. So did you think that you would deny the motion to dismiss that charge so as to keep him overnight even though the DA was saying she didn't think it was him?

A. See, now we're speculating as to things that didn't happen. But what I was suggesting at that point in time was pause, everything stops right here, and we are going to do all of this tomorrow, we'd handle the fugitive from justice matter tomorrow, we'll handle the arraignment on the Newton charge tomorrow, he's going to get held one more day so you can do your investigation however you want to do it and get any information that you think might be helpful, if there's any helpful information, we'll all come back tomorrow.

Q. Did you consider the question of what the legal

authority would be to detain him overnight?
A. At that point in time, I don't think I got to analyze it in those terms. I was really just trying to hit pause and bring everybody back tomorrow to give him the time that I thought he was requesting to do the investigation that he wanted, and I really wanted to extend him the same courtesy that I had given prior counsel over the morning to do exactly what she had done.
Q. So the question of what legal authority there would be to keep a person at the jail overnight, you didn't think about that.
A. Well, it would have been, it was by agreement, we would have just continued the matter until the following day. And I guess, technically, if the fugitive of justice matter hadn't been dismissed, which it wasn't at that point in time, that could have been a legal way to do it as well. But I don't think I really contemplated that at the time. I think it was just really more continue all of this until tomorrow, we'll do all of this tomorrow.
Q. And didn't think through the question of authority to detain him.

A. No. You can hear in the transcript that we've played, it all happened very quickly, and I was responding to the statements that I was hearing and the questions I was being given, really, I was just trying to hit pause and say, sure, happy to give you more time.

Q. And you said it happened very quickly. You were the judge; right?

A. Sure.

Q. You were in charge.

A. I was.

Q. You could slow it down if you thought that appropriate, couldn't you?

A. Well, that's what I tried to do, by saying I'm going to give you your time, let's come back and do this tomorrow.

Q. So you could slow down the proceeding in the courtroom if you thought that appropriate, couldn't you?

A. I suppose.

Q. You could take a recess and go into your lobby and pause some more, couldn't you? Call your mentor.

A. Hypothetically.

Q. Call another judge.

A. Well, that already happened. I spent a good portion of the lunch break and then 45 minutes afterwards doing that. So we didn't get back on the bench until 2:48, which we typically get back at 2:00. I knew this case was being called at 2:15. So there was a significant delay in starting the session so that I did have an opportunity to call down to the administrative office and seek guidance.

Q. But as to this question of detaining him overnight when the assistant DA is saying it's not him for the fugitive from justice warrant, and you're -- the question of whether you could detain him overnight, whether there was legal authority to detain him overnight, you didn't think to look into that, ask someone's advice about that?

A. I wasn't analyzing it that way. I was just trying to find the solution to the problem I thought he was asking me about, which was can I please have some more time to do my investigation.

Q. And that wasn't -- He rejected that suggestion; right?

A. He rejected that, which is why he got released on his own recognizance.

Q. And you told me in an interview that you were very concerned about who is this guy, you really wanted to determine who he was.

A. Yes.

Q. And you told me that you felt that you had a responsibility to everybody involved, the defendant, the attorneys, the district attorney's office, ICE, everybody needed to know who he was.

A. Correct.

Q. And you felt that it would be an injustice to -- for ICE to take him if he was the wrong person.

A. I don't know if I -- whether or not I used the word "injustice." I was very concerned about knowing who the individual was that was being arraigned in my courtroom that day given all of the identification issues that we had been facing that day.

Q. And you didn't want an injustice to happen in the courthouse; correct?

A. You never want injustice to happen. You want fairness to happen.

Q. Even if he was the right person, you were not confident that the ICE agents would either delay their seizure of the defendant to permit an

attorney/client conference or an attorney conference to take place once they had taken him custody; correct?

A. Can you repeat that? I don't understand your question.

Q. This is your response to Commission's charges at Paragraph 24. You said that you were not confident that the ICE agents would either delay their seizure of the defendant to permit an attorney/client conference or permit an attorney/client conversation to take place once they had taken him into custody. Right?

A. Right. That's why I suggest -- That's why the attorney asked if he could just speak with his client in the lockup area prior to his release to ICE custody, and I allowed that to happen.

Q. And you wanted to pause the ICE arrest. That's what you told me in our interview.

A. Not necessarily. I just wanted his attorney to be able to speak with him.

Q. Well, let's look at your interview, Page 216. So this is Appendix M, Page 216 of the appendix. Let's look at Line 5. And you said, it would just pausing everything. Right?

A. I'm just reading the paragraph.
Q. Sure. Read as much as you feel you need to to understand the context.
(PAUSE)
A. Right, so, as I say a few lines before that, the question of why didn't you feel like you needed to put that on the record, meaning that he could speak with his client in the lockup needing the assistance of the interpreter. And my answer was -- He asked me to. I didn't feel as if I needed to. But he asked. And I was under the impression he was going to go directly into ICE custody. And it seemed as if it was important for him to be able to speak to his client before that, and I paused so that he would have the assistance of the interpreter in order to do that.
Q. And then you say, it was just pausing everything. Correct?
A. It was pausing everything because they were going to be taking him into ICE custody. Yeah. It was a place he could have a quick conversation before that happened.
Q. And then you went back on the record. And we'll go back to the transcript, Exhibit G, and we'll

go back to Page 40 -- Page 41. So when you went back on the record, there was no more discussion about whether the defendant was the right person for ICE; correct?

A. So where, -- I'm sorry -- where are we talking?

Q. Exhibit G.

A. Talking about 2:50:57?

Q. Yes.

A. Yes. Correct.

Q. So back on the record. There's no more mention of the question of whether the defendant is the right person for ICE.

A. Correct.

Q. Correct? And I'm just going to read the transcript at this point.

A. Okay.

Q. So Clerk Okstein says, Judge, we're back on the record on Mr. Jose Medina Perez, Attorney Jellinek on behalf of Medina Perez. And you say, good afternoon, Mr. Jellinek. Attorney Jellinek says, good afternoon. Attorney Jellinek then says, after some extensive research into the various FBI numbers and then something inaudible Social Security

numbers, as well as obtaining a photo from Pennsylvania, we don't believe that this gentleman is the same gentleman on the fugitive from justice warrant. Did it strike you as odd that it's the defense attorney who's saying that -- saying it first?

A. It did. But ultimately, it didn't matter.

Q. And then the assistant district attorney confirms it. She says, Your Honor, with the information that I have, I don't think that there is enough tying him to the Pennsylvania warrant, there's a great deal of other out of state records, I do believe that some of them belong to this individual, but that is not what's at issue.

A. Correct.

Q. And you said, okay. And the assistant district attorney said, so at this point I would dismiss the. And you said, the fugitive. She says, count one. And you said, okay. And then she says, there's not a bail request for counts two and three. Those are the drug counts.

A. Yes.

Q. But I would ask that for a pretrial conference date on those. And you said, okay. And then

Attorney Jellinek said, absolutely. You said, that's fine. Attorney Jellinek said, I would ask that, I believe he has some property downstairs, I'd like to speak with him downstairs with the interpreter if I may. And you said, that's fine, of course. And then he said, thank you. And the clerk said -- I'm sorry. You said, Commonwealth no bail request on counts. The District attorney said, yes. The clerk said, so do you want me to arraign him. And you said, yes, please. And then -- This is the district attorney said, yes, please. And you said, yes. Defense counsel said, yes. And then Clerk Okstein goes through the arraignment process. And defense attorney says, could we have May 29th for a pretrial. The clerk says, May 29th. Defense attorney says, please. And then you said, sir, I'm going to enter a plea of not guilty on your behalf, Attorney Jellinek has filed his appearance to represent you in this matter, are you privately retained. Jellinek says, yes. And then you said, okay, sir, you are entitled to request an examination to determine whether you're a drug-dependent person who would benefit from treatment, if you choose

to exercise this right, you must do so in writing within five days, and your attorney can further explain that to you. Mr. Jellinek says, thank you. Clerk says, all right, Judge. Attorney Jellinek says, thank you. Clerk says something inaudible. Attorney Jellinek says, all set, Mr. Clerk. And you said, wait just a second.

And then turning over to the next page. You see the clerk speaking to you. Now, the clerk is right in front of you; correct?

A. Correct.

Q. So he can turn around and speak to you in a soft voice, but it's still on the record.

A. Yes.

Q. And he said -- When we listen to the tape -- And you've heard the tape recording now multiple times --

A. Yeah.

Q. -- in this proceeding. So you can hear that it's a softer voice. He says, there was a representative from ICE here in the court to visit the lockup. Correct?

A. Correct.

Q. And you said, that's fine, I'm not going to allow them to come in here, but he's been released on this.

Now, you had already told the clerk that ICE couldn't come into the courtroom, correct, in accordance with Judge Heffernan's practice?

A. Correct.

Q. And -- so you said it again at this point.

A. Right. I felt bound by the Newton District Court policy that we were following.

Q. So then probation officer asked, are we still doing the $150 attorney fees. You said, No, he's privately retained. And then you reiterated the date, May 29. And then the clerk gives him the standard warning. And then Court Officer MacGregor asks, he's released, Mr. Clerk? Clerk says, what's that? Court Officer MacGregor, he's released? Clerk says, he is. Attorney Jellinek says, yup. And then you said, he is. Mr. Jellinek asked if the interpreter can accompany him downstairs to further interview him. And Attorney Jellinek says, yes, please. And you said, and I've allowed that to happen. And then Attorney Jellinek says, thank you.

According to this, Attorney Jellinek says again, thank you, Your Honor. And you said, you're welcome. Clerk says, thank you, Judge, that's all we have. That's all -- we're all done for now. So that ended the proceeding.

A. Yes.

Q. And during the course of that proceeding, of that on the record portion back in open court, the interpreter is interpreting for the defendant; correct?

A. Yes, he is.

Q. And in the recording, you can hear that voice in the background; correct?

A. Correct.

Q. And you knew throughout that on the record in open court, in part, you knew that the ICE officer was not in the courtroom.

A. Correct.

Q. So when you said that the defendant was released, you knew that the ICE officer was not in the courtroom.

A. Correct.

Q. And you knew that, when you said he was going downstairs with his lawyer, the ICE officer was not in the courtroom.

A. I didn't hear --
Q. That the ICE officer was not in the courtroom.
A. That's correct.
Q. And you knew that the ICE officer was out in the main lobby outside the courtroom; correct?
A. I don't know where the ICE officers were.
Q. Well, let's go back to -- First of all, let's go back to the transcript where Mr. Jellinek says -- We're back to the top of Page 41. There's a big paragraph with Mr. Jellinek talking.
A. Where are we again? Sorry.
Q. Top of page 41. Mr. Jellinek is talking. And he says, ICE is going to pick him up if he walks out the front door. Did that give you a clue about where the ICE officer was?
A. You know, I didn't know. I just assumed that -- I didn't know how many officers there were. I was under the impression there would be one officer.
Q. But where did you think they were?
A. I thought one, at least one was in the lobby. I expected that there could be more in the lobby as well.
Q. But nobody told you that; right?
A. No.

Q. And when I interviewed you, -- let's look at Appendix N, Page 218, Lines 8 and 9 -- I had asked you -- We had a conversation about how the ICE officers could get to the lobby.

A. Right.

Q. And then I asked you, they can't get there from here -- or you said, they can't get there from here, but they can certainly get there any other way they want.

A. Right.

Q. And then you said, why is that, you know, relevant, there were ICE agents waiting in the lobby. So that's where you thought they were.

A. Right. But if you actually look a couple lines down from there, I said that I assume that there was an ICE van in the back.

Q. So you said, I only know that, referring to ICE agents waiting in the lobby, I only know that because the chief court officer was standing in front of the doors in first session. I'm going to say blocking the door. Right? I'm not sure, you know, what the intention was. And then at some point later on you said you thought they might have a van in the back. Correct?

A. Just the next couple of lines. After I say,

I'm not sure that was their intention or not, you asked standing in the front of the doors inside the courtroom or outside the courtroom. I said, inside the courtroom and I assume that there was an ICE van in the back.

Q. But nobody told you that, did they.

A. No.

Q. Now, let's turn to the time period after April 2nd.

A. Okay.

Q. You were not in Newton on April 3rd.

A. I was not.

Q. On April 4th, you were in Newton again.

A. (Witness nods head).

Q. And you were in second session because Judge Heffernan was there in the first session.

A. Correct.

Q. And Judge Heffernan came up to your lobby to see you.

A. She did.

Q. And she told you that a defendant who was wanted by ICE had escaped through the sallyport; correct?

A. Yes.

Q. And your position is that that's the first you'd

heard about it.

A. It is.

Q. You did not say anything in that conversation with Judge Heffernan about going off the record.

A. I didn't. I asked her how that happened, and she said that she was trying to figure that out.

Q. And she didn't ask you about going off the record; correct?

A. No.

Q. And you told me, when we interviewed, that the issue of going off the record just didn't come to mind.

A. Correct. At that point in time, I didn't know that there was a policy preventing it.

Q. So it just didn't come to your mind.

A. It just -- No.

Q. And you did not tell her that you were concerned that ICE would take the wrong person; correct?

A. It was a very brief conversation. I don't recall the specifics of what we talked about. We talked about generally what happened, and that was it.

Q. And you didn't tell her that your intention was to pause ICE taking the defendant into custody; correct?

A. I'm not sure that we got that far into what happened, other than her trying to determine on a security basis how somebody could have been released out the sallyport and not have been apprehended by ICE.

Q. But you didn't tell her that.

A. Again, I don't recall seven years later the full substance of the conversation. I know we talked very frankly for a couple minutes and then that was it.

Q. And then sometime in the next couple of weeks you were sitting in the Lowell District Court.

A. Yes. Close to about three weeks later.

Q. I'm sorry?

A. Close to about three weeks later.

HEARING OFFICER: Get close to the mic.

Q. Sometime been April 5th and April 20; correct?

A. Yes.

Q. And Stacey Fortes was then the Regional Administrative Justice for that region and she was the First Justice for the Lowell District Court.

A. She was.

Q. She's now the Chief Justice.

A. She is now the Chief Justice.
Q. And the Regional Administrative Justice has the power, has the authority to schedule judges –
A. Correct.
Q. She asked you to come to her lobby during the lunch break.
A. Right.
Q. She didn't tell you why.
A. No.
Q. She didn't tell the topic of the conversation. But she asked you to come to the lobby.
A. Yeah. She said why don't you grab your lunch and come on into the lobby.
Q. And you sat there and ate lunch and had a conversation.
A. Yeah.
Q. And she said to you that it was her understanding that part of -- She brought your attention to the Newton event.
A. She did.
Q. And she said it was part of her understanding -- it was her understanding that part of the proceeding was not recorded, and she asked what happened. Right? She didn't accuse you. She said it was her understanding that part of the

proceeding was not recorded, and she asked what happened. Right?

A. Correct.

Q. And you told me, when I asked you about that conversation with Judge Heffernan, that you acknowledged it immediately; correct?

A. I did.

Q. You did or you told me that?

A. Well, I told you that and I did.

Q. Is it your position in response to the Commission's charges that you acknowledged it immediately? Let's look at --

A. I would have if she said that it was in -- And I recall that she showed me the rule, and that was the first that I had heard that there was a rule preventing unrecorded conversations in the courtroom.

Q. But let's look at Paragraph 37 of your response to the Commission's charges. So let's go to the -- read the part of what the Commission charges is accurate. And you said the RAJ invited Judge Joseph to her chambers during the lunch recess, and they spoke while having lunch, and Judge Joseph learned from the RAJ of the evidence, of the existence of Special Rule 211,

which prohibited off the record recordings, Judge Joseph told the RAJ that she was unaware of the rule prohibiting off the record proceedings and expressed her understanding of the rule and promised that she would observe the rule in all future proceedings.
Is that correct?
A. Correct.
Q. And then Judge Joseph denies that she was less than fully candid as she believed that the RAJ understood that Judge Joseph had directed that the conference take place off the record and that it was that understanding that prompted the meeting and the discussion about Special Rule 211 and its purpose. Right? That's what you said.
A. Yes. That's what I said.
Q. But you didn't say that you acknowledged it; correct?
A. I don't understand your question.
Q. Well, there's a difference between assuming or believing that she knew it and acknowledging it directly; correct?
A. Again, I'm not really understanding what you're saying. It made sense that I denied that

I was less than fully candid, and I believe that at the time Chief -- well, at the time, First Justice Fortes understood that I had directed the conference to take place off the record and that -- I'm just having a hard time regarding -- and it was that understanding that prompted the meeting the discussion about the rule.

Q. So you believed that she understood that you had directed the clerk to go off the record.

A. Yes. I mean, she said it when we started the meeting that she understood that part of record -- part of the conversation was off the record.

Q. She didn't say, I understand you told the clerk to go off the record; correct?

A. No. I don't remember the specific words. But it was clear that we were talking about the same thing. That's why she opened the book, read me the book, and she even printed a copy of the rule for me.

Q. But you never said to her directly, I told the clerk to go off the record.

A. Again, I don't remember. But it was clear that we were off the record. And I was the

judge, so whether the words came out or it was inferred, I can't speak as to what the exact words that was said seven years ago.

Q. You talked to her about the recording equipment in Newton; right?

A. I did.

Q. And you talked about an incident in another court; right?

A. In Waltham, yes.

Q. In Waltham. And that was an incident in which the recording system or the amplification system malfunctioned; correct?

A. The amplification system was -- We were having a side bar conference on a rather sensitive matter, concerning somebody's mental health, and I was notified by attorneys that were sitting in the audience that it was amplifying in the audience as opposed to just being at side bar.

Q. And that's not the way --

A. No.

HEARING OFFICER: Speaking of amplifying. Thank you.

Q. And so on that occasion, you turned off the record so that that wouldn't happen; correct?

A. I did. Actually, what I did, I just disconnected the microphone that was at the side bar. So the record was going on in the courtroom, but I just disconnected the microphone when the side bar conversation was occurring.

Q. And you talked about that with Judge Fortes –

A. I did.

Q. -- when she asked you about this.

A. Yes.

Q. In Newton, on April 2nd or at any other time, there was no malfunction of the recording system; correct?

A. No.

Q. It was a decision you made to direct the clerk to turn off the record; correct?

A. Right.

Q. You did not tell Judge Fortes in that conversation that you were concerned that ICE might take the wrong person.

A. Again, I don't remember the full extent of the conversation. We spoke about the case. She was worried about me having gone off the record and was really there to guide me. I was a new judge in her region. And it was a very friendly

conversation. You know, I don't -- I would have shared with her everything that was relevant as I remember it.

Q. But you didn't tell her that you were concerned that ICE would take the wrong person; right?

A. Again, I don't remember the specifics of the conversation that we had.

Q. So you don't remember telling her that ICE wouldn't allow an attorney/client conference.

A. Again, I can't recall sitting here today exactly the conversation that we had. You know, I just -- I'm sorry. I just can't say for sure.

Q. So then you don't remember telling her that you were just pausing the arrest.

A. I wasn't pausing anything. I was trying to afford the attorney the time to speak to his client before he was taken into ICE custody, which is where I presumed he was going.

Her concern was the fact that I had gone off the record, she gave me the rule, she gave me a copy of the Lunn policy, which I had had because I received it on that day, and that was really the concern and some of the conversation. It wasn't a very long conversation. We finished our lunch and went

back to session. I just don't recall the, you know, the complete dialogue of what we talked about, but we had a very open back and forth dialogue about exactly what happened that day.

Q. And the next thing you heard about this event was, I believe it was May 2nd, you got an e-mail from Chief Justice Dawley's administrative assistant inviting you to come to a meeting with Chief Justice Dawley on May 8th.

A. Correct.

Q. And you got the recording from the clerk.

A. After I received that notification -- His e-mail had indicated what he wanted to talk about, that he wanted to talk about that matter. So I actually was sitting in Newton. And while I was there, I requested a copy of the -- They were on the old system. We talked about the JAVS system. So I requested a copy of the CD so that I could listen to the hearing prior to meeting with Chief Justice Dawley.

Q. And you did listen to it.

A. I did.

Q. And so when you went into the meeting with Chief Justice Dawley, you had listened to the recording.

A. I had.
Q. And you knew that the recording showed that you had told the clerk to turn off the record.
A. Right.
Q. So when you went into that meeting, and Chief Justice Dawley asked you about going off the record, you acknowledged –
A. Of course.
Q. -- to the Chief Justice that you had gone off the record. Correct?
A. Of course I did.
Q. And you apologized for it.
A. I did.
Q. And you told him that the off the record discussion was about the defendant's identity with respect to the Pennsylvania warrant; correct?
A. And it was, yes.
Q. And -- It was? You're saying that the off the record discussion was about the issue of identity regarding the Pennsylvania warrant?
A. No. The off the record conversation was about the defendant's identity, period, and also the defendant's request to -- the defense attorney's request to speak to his client

downstairs with the assistance of the interpreter prior to his release.

Q. Before the off the record discussion, the assistant district attorney had told you that she didn't believe he was the person wanted in Pennsylvania; correct?

A. Correct.

Q. So the off the record discussion, regarding the off the record discussion, that issue was done; correct?

A. Again, it was the off the record conversation, as best as I remember, it was really a continuation of the conversation that started on the record. The only difference is that the defense attorney asked that the client to speak with his attorney in the lockup prior to his release from state custody, which I allowed. But I don't know that you can separate the identification issues. They're all part of and parcel of the same thing.

Q. But you weren't talking about Pennsylvania in that off the record discussion.

A. Again, it was a continuation of the conversation that happened on the record.

Q. The Chief Justice asked you if you had anything to do with the defendant being released out the

back; correct?

A. He did.

Q. And you denied it.

A. I did.

Q. And you did not say that you were concerned that ICE would take the wrong person.

A. Again, I don't recall the specific things that we talked about other than what happened during that matter.

Q. You did not say that you thought you should determine if defendant was the right person for the ICE detainer.

A. No, I don't believe so. I just -- I don't -- I don't know that I understand your question.

Q. Well, should we go back to your interview with me in Appendix N, Page 229, when you said, starting at Line 8, you said, I certainly felt that I had a responsibility as a judge to everybody involved, the defendant, the attorneys, whoever they may be, the district attorney's office, ICE, everybody, we needed to know who he was, it didn't matter to me whether this was on or off the record, ascertaining his identity was a huge importance to me, and I felt there was responsibility to know who he was.

So you told me that you had a responsibility to determine his identity for all purposes, including the ICE detainer; correct?

A. Well, I'm looking at it, that I wanted to know who the defendant was, period.

Q. But you didn't tell Chief Justice Dawley that you thought you had a responsibility to determine if he was the right person for the ICE detainer; correct?

A. I'm just going back to look at the transcript.

Q. Yup. Take your time.

(PAUSE)

A. So if you go back to the page before, you have the whole conversation. You know, we were just talking about the identity of defendant and as it pertained to everybody. And again, I was just trying to be fair to everybody and give everybody enough time to do whatever job they felt that they needed to do for the person that's before me.

Q. But you thought you had a responsibility to determine who he was and that included for ICE; correct?

A. No. I was affording his attorney enough time

to investigate his identity as he saw fit.

Q. So go back to that big paragraph where you're answering on Page 229. We've got a list of people who you thought you had a responsibility as to ascertaining his identity. The list includes ICE; correct?

A. It does. But I don't think that what I meant by that was that I had the responsibility to determine his identification for ICE purposes. I wasn't concerned about ICE. I was concerned about the attorney having enough time to do whatever investigation he felt necessary to help his client. The fact that ICE was there, it really didn't make a difference, other than the fact that the issue of identification was raised. And that's why I hit pause, which is the word I use here, let's come back tomorrow, let's do this tomorrow.

Q. So when you refer to ICE here in this paragraph long answer, that's what you meant, was to give the attorney an opportunity to figure out? It wasn't that you were supposed to make a determination.

A. No. I didn't need to make a determination.

Q. Well, certainly, you didn't need to make a

determination. But your answer here was not that you -- You're telling me now, you're telling the hearing officer now, that your answer did not indicate that you thought you had a responsibility to everybody, district attorney's office, ICE, everybody, we needed to know who he was.

A. Again, I felt that I needed to be fair to everybody that was before me, and I wanted to everybody to be able to do their jobs as they wanted to do their jobs.

Q. All right.

A. And that includes ICE.

Q. And in that -- So that includes ICE, that you wanted ICE to be able to do the job as they should, and part of that issue is whether it's the right person; correct?

A. Yes. But that's not my determination. That's, you know, that was for the attorney to figure out if he could --

Q. Certainly not your determination.

A. No.

Q. You know that now.

So in this conversation with Chief Justice Dawley, you did not say that you intended to

pause the ICE arrest; correct?
A. Again, I don't recall the specific words that we said, and there was no discussion about pausing any arrest.
Q. But that was part of what you told me at our interview, right, that you were just pausing? Correct?
A. Right. I was pausing to continue the matter until tomorrow so that everybody could come back and do the jobs that they needed to do.
Q. And you did not say to Chief Justice Dawley, as you have said in your response to the Commission's charges, that you had the unintended effect of assisting in what happened. Right? This is Paragraph 32 of the response.
So Judge Joseph agrees that the unintended effect of her assent to allow defense counsel and the interpreter to accompany Medina Perez to the lockup was to assist defense counsel's plan, but denies that she had any knowledge of the plan. And then it goes on. Or that she intended to assist the plan or that she intended to permit anything other than the retrieval of the defendant’s property. And it goes on.

So in response to Commission's charges, you said you agreed that you had the unintended effect of assisting defense counsel's plan. You didn't tell Chief Justice Dawley that, did you?

A. Again, I wouldn't have -- I mean, I had no intent to help the defense attorney with his plan. So that's what I would have told Chief Justice Dawley, and that's exactly what I did tell Chief Justice Dawley.

Q. But you didn't tell him you had an unintended effect of assisting; correct?

A. I don't know. Again, I don't remember the words that we used, but I can't imagine that I would have included that.

Q. And what you told Chief Justice Dawley was that you denied completely that you had anything to do --

A. I didn't have anything to do with it.

Q. But we're talking about the conversation with Chief Justice Dawley. You denied completely that you had anything to do with it.

A. Of course.

Q. And in your interview with me, I asked you, a similar question, I asked you if you had done

anything to facilitate, and at that time you did say that you wanted to pause the ICE arrest, but you did not say that you had the unintended effect of assisting or intentionally assisting; correct?

A. Right.

Q. And you deny completely that you had anything to do with it.

A. Right. I didn't.

JUDGE FABRICANT: That's all I have. Thank you.

HEARING OFFICER: Ms. Mulvey.

MS. MULVEY: Thank you.

CROSS-EXAMINATION

BY MS. MULVEY:

Q. Good morning, Judge Joseph.

A. Good morning.

Q. Okay. I just want to sort of fill in some of the gaps without repeating everything that you've already said. Fair enough?

A. Sure.

Q. Okay. Now, you've talked a little bit about your background as a defense lawyer, both as a bar advocate and private counsel.

A. I did.

Q. Did you also spend some years on the law enforcement side?

A. As a prosecutor, yes.

Q. Tell us about that, please.

A. So when I finished law school, I actually worked at the State House as legal counsel for a state senator for about six months, and then I was hired by the attorney general's office where I spent the next -- close to seven years of my career. While at the attorney general's office, I spent some time in family bureau, family community crimes bureau, where I worked with victims of violent crimes who would at that time sue the state for financial recovery as a result of being victims of violent crimes, and it was my determination whether or not to award out-of-pocket expenses or not. I then went to the criminal bureau where I spent five years as a special assistant district attorney, working as an ADA at the Suffolk County attorney's office, and in between those five years I was there for a year in District Court, and then - well, which was then District Court, now we call it the Boston Municipal Court, and then I spent three months back at the attorney general's

office in the insurance fraud bureau where I prosecuted insurance fraud cases, before coming back to the district attorney's office as a special assistant, where I spent the last four years in Superior Court, again, back in the gang unit.

Q. And as a result of working both as a prosecutor and criminal defense lawyer, how did you see your role as the judge?

A. I saw my role as kind of an intermediary between both. Having been on both sides, my role was to be fair to everybody who appeared before me. I had been a prosecutor and I had appeared before many judges. I had been a defense attorney, I tried many cases, I was in court very often. And I wanted to make sure that everybody who came before me felt fair, felt that they had an opportunity to be heard, and that I handled their matters, you know, so that they felt that, you know, that they were able to be heard.

Q. Did that include ICE?

A. It did.

Q. And if Attorney Jellinek had said, yes, let's just come back in the morning, let me see what I

can do, was it your assumption ICE would come back?

A. Absolutely.

Q. And depending on how successful David Jellinek had been, what did you think ICE would do?

A. If they were convinced that they didn't have the proper paperwork that -- or identification of the defendant, that they would have released the detainer and then not be able to serve the detainer.

Q. Did you think that continuing the proceeding for one day and having ICE come back to give David Jellinek time, if that's what he wanted, did you think that that was obstructing or impeding or hindering ICE?

A. Not at all. I thought it was giving the attorney time that he needed. It was already 3:00, a little bit later in the afternoon. You know, the court closes down at 4:30. I was just trying to give him as much time as he needed to do whatever investigation he wanted to do.

Q. Let me back up a little. We've heard that this was a Monday in the Newton District Court?

A. It was.

Q. And you said you think it was the first time you

had a docket. Can you tell us what that means?
A. Yes. So there's a docket of cases that are scheduled to be in court every day. As I had indicated a little bit earlier, Newton is a little unusual in that it's a small court. It only represent one town, the town -- or the city, the City of Newton. And on Thursdays, the First Justice doesn't sit in Newton, she sits over in Quincy to handle their recovery court. And so a visiting judge sometimes, not all the time, comes to Newton to sit in case of any emergencies. On all other days there is a judge that's assigned to Newton District Court and handles whatever cases are on the list for that day. So this being a Monday, I had all the weekend arrests plus anything that had been scheduled to be heard that day.
Q. So by Newton standards, was this a busy day?
A. It actually was a busy day, particularly for a Newton standard. Not a lot happens in Newton. I think we had about 20 cases on the list, which is very busy for Newton.
Q. And as we've heard, First Justice Heffernan was not there that day?
A. Correct.

Q. As a visiting judge, how did you see your relationship or responsibility with the First Justice or the Presiding Judge?

A. So I always like to -- The First Justices are, you know, the leader of the court, and I always like to follow how they like to do things in their court.

Q. Was that part of sort of trying to be fair or trying to respect everybody?

A. Absolutely. We're taught that we're judges, we're independent, we can make our own decisions. Particularly as a new judge who's learning and meeting my colleagues for the first, second, third time, I certainly want to be respectful and fair to judges, particularly senior judges who have practices and policies that are specific to their courts, because every court is different.

Q. At this point, by April of 2018, can you give us some idea of how many different District Courts you've sat in over five months?

A. I believe at that time there were eight District Courts in the region where I was assigned to. So, certainly, sometimes we would sit out of region if we needed to cover for

somebody else. So it was a possibility that I sat in more than eight, but I at least sat in eight courts.

Q. And if you sat down and you thought about it and made a list, would you be able to come up with something unique or perhaps even odd about every single one of them?

A. Oh, absolutely.

Q. Just the way it works.

A. It's just the way it works. Every District Court -- They're all built at different times. They're not cookie-cutter courts. They're all different.

Q. Now, during the morning, one of cases that came before you was Jose Medina Perez; is that right?

A. Correct.

Q. And this was a misdemeanor drug arrest --

A. Yes.

Q. -- over the weekend.

A. Yes.

Q. Were there, as we've heard, two additional nuances or facets or complications?

A. There were.

Q. One was the Pennsylvania warrant and one was the ICE detainer?

A. Correct.
Q. Now, you I think said to Special Counsel Fabricant on your direct exam something about the Pennsylvania warrant and the ICE detainer using the same biometric information?
A. Yes.
Q. Could you tell us what you meant by that?
A. So I was under the assumption that -- So when somebody's arrested on a criminal offense, there's a bail determination made. There was -- This individual was held without bail over the weekend between his arrest and the time of his arraignment. And it was then that they determined that -- it was during that time that they determined that he was also alleged to have been a fugitive from justice out of Pennsylvania. And it all goes into the same central computer system so all law enforcement agencies get their information off that same central system.
Q. Okay. And so when you say the same biometric information, do you, as either a prosecutor or defense lawyer, have some understanding what the police department actually does to figure out

there's a fugitive warrant and an ICE detainer?
A. I believe that they've just got to type into it the system and then up pops the information.
Q. And do they do that by name or height or eye color or fingerprint? What do they use?
A. So it's my understanding they use their name and the date of birth, and that alerts all other law enforcement agencies that an inquiry has been made.
Q. And biometric, does that mean fingerprinting?
A. I believe it means fingerprints and maybe any other information that they may have about the person.
Q. And knowing that basically Pennsylvania and ICE would be relying on the same sources, did that enter into your thinking?
A. It did.
Q. How?
A. Well, if one agency got it wrong, there's certainly a possibility that the other agency was wrong, too.
Q. And was that what the lawyers were telling you?
A. Exactly.
Q. Did you think it was fair to give them a chance to prove that to whoever?

A. I did. I mean, I had two lawyers who were questioning their client's, same client's identification based on the same, I'm going to say biographical, biometric information.

Q. And in fact, as the day evolved, did somebody, -- and maybe we'll talk about who in a minute -- did somebody convince the Commonwealth that Pennsylvania had the wrong guy?

A. They did. And what was odd about it is that in the morning the assistant district attorney was adamant that that's who Pennsylvania thought he was, and she had made a call, I believe to the department, and they said, yes, we're going to come and get him. And there was also a photograph that had been shown to me that was inconclusive to me as to whether they were the same person or not. I think the photograph was from the Pennsylvania arrest eight years prior. And I couldn't tell whether it was the same person or not. So -- And then after the lunch break, it appeared as if she didn't believe it was the same person that she was -- she received some information to convince her of that.

Q. The prosecutor.

A. The prosecutor, yes.

Q. Let's go back to the morning. We heard that there were three or four calls of Mr. Medina Perez's case?

A. Yes.

Q. Is that common in the District Court, that they'll do a second or a third call?

A. There is. Typically, when there's an interpreter involved.

Q. Why is that?

A. Because you want to give the attorney time to speak with their client. Oftentimes -- I don't know whether this was the case on this day or not -- the interpreter has multiple people that they have to the interpret for. And so oftentimes that takes some time to do that. In a case such as this and any case of this matter, you need to afford the attorney time to speak with their client so that they can determine if there are any issues, questions of identification. Again, that's the first issue, the question that we ask as judges on a fugitive matter. And then to get whatever information they need from their client.

Q. Who was representing Mr. Medina Perez in the morning?

A. So in the morning, I appointed Attorney Bostwick to represent him.
Q. And she's referred to as a bar advocate?
A. She was the bar advocate. She was our duty attorney for the day. And Newton typically only has one duty attorney, because typically the list isn't very long, so they just assign one attorney to handle the case, indigent clients that appear for arraignment.
Q. And so had somebody determined that Mr. Medina Perez was indigent?
A. Yes. I was actually told he was marginally indigent. He was afforded an opportunity to have a court-appointed attorney, but the fee for that would be little bit more. I also want to say that, if somebody does come in and doesn't have an attorney, and if there is a question of detention as opposed to release that day, a bar advocate would be appointed for bail purposes only, just to make sure that person has an advocate for arraignment.
Q. But in this case, it was because Mr. Medina Perez was marginally indigent --
A. Correct.
Q. And we've seen some mention of $150. Is that

what he'd pay?
A. Yes. That's a statutory fee for court-appointed counsel.
Q. Now, at some point in the morning did you attempt to reach First Justice Heffernan?
A. I did.
Q. Tell us about that.
A. So there was -- And I don't remember all of the detail, but there was another matter on the list where I believe I was told that it was a file she had in her office as opposed to in the clerk's office. So somehow it didn't make its way into the courtroom. And we couldn't find it. And so I called her in the morning just to find out if she knew where that file was, since the clerk's office couldn't find it and it was on the list.
Q. And how did you try to reach her?
A. I called her on her cell phone. I didn't know she was at a funeral. I just knew she wasn't at court. So I wouldn't have called. But I called her on her phone and left a message.
Q. Did you get any response?
A. I didn't.

Q. Now, did Attorney Bostwick continue to represent Mr. Medina Perez throughout the morning?

A. She did.

Q. And in fact, right up until the time court recessed for the luncheon break, --

A. That's correct.

Q. -- was she representing Mr. Medina Perez?

A. She was.

Q. And based on what you knew, did she intend to continue to represent him after the lunch break?

A. She did. In fact, she asked if she could come back a little bit late after the lunch break because she had a medical appointment which -- and she was waiting for a fax. So it was pretty clear to me that she intended to come back after the lunch break to continue to represent Mr. Medina Perez.

Q. Up until the point of the luncheon recess when Attorney Bostwick was saying can we start at 2:15 instead of 2:00, had you seen David Jellinek that morning?

A. I hadn't.

Q. Did he appear on any other matters that morning?

A. He did not.

Q. Did you see him sitting around in the back of

the courtroom?
A. I did not.
Q. Did he say anything on the record?
A. In the morning session?
Q. Yes.
A. No. He wasn't there.
Q. Now, so we saw around 12:40, 12:45 there was the luncheon recess?
A. Yes.
Q. And you know in Massachusetts we eat lunch from 1:00 to 2:00; is that right?
A. Correct.
Q. All right. Up until the time of luncheon recess, were you aware that there was an ICE officer --
A. No.
Q. -- in the courthouse?
A. I was not.
Q. How did you become aware of that?
A. So towards the end of the lunch break, when I was sitting in the lobby, assistant clerk magistrate -- First Assistant Clerk Magistrate Okstein came into my lobby and informed me of that.
Q. Do you recall what he said?

A. He said, Judge, just want to let you know that the Medina Perez matter that is coming in at the end of the afternoon, that there's an ICE agent here with a detainer, and that Newton District Court has a policy that does not permit ICE agents to sit in the courtroom during matters, would you like me to follow that policy.

Q. And had you ever heard of a policy like that before?

A. I had not.

Q. What did you think?

A. Well, I asked him -- Particularly new judges rely on our clerks. And having practiced in Newton, I knew Clerk Okstein a little bit. I'm like, you know, do we -- do you have a copy of that policy. And he informed that it was state court protocol, it was a proper practice. I'm not sure what word he used. So there wasn't -- And I said, do other judges do that, do you have to do that. Like, you're the judge. And I stated, do we have any policies around about how to handle ICE matters in the courthouse. I figured there's a policy for everything, there has to be a policy. And he didn't -- he says,

yes, I know there's a policy, you know, let me see if I can find it. I started looking for a policy. I was looking in my training materials. I looked. I couldn't find it in my materials. I started looking in Judge Heffernan's office to see if I could find anything for any guidance. When I realized I wasn't easily putting my hands on anything, I called down to the administrative office for some guidance from the legal counsel who were there for us when you have questions.

Q. Why did you spend so much time? Why didn't you just say, well, if that's Judge Heffernan's policy, we'll do it?

A. Because it seemed odd to me to have a rule to exclude anybody from the courtroom. And it just, it just made me pause and say I just want to make sure I can do this. It just didn't seem right to me.

Q. Well, why didn't you just say to Clerk Okstein, I don't care what Judge Heffernan does, I'm not doing that?

A. Because I was a four-month-old judge and sitting in somebody else's court and I wanted to be respectful to Judge Heffernan and her policies, also, and if it is part of the policy

that was proper or allowed, I certainly wanted to follow it.

Q. Did you call Downtown to the District Court office?

A. I did.

Q. Did you speak to somebody there?

A. I did.

Q. Do you recall who it was that you spoke to?

A. I believe I spoke with Ellen Shapiro and I may have also spoken with Zach Hillman. I don't remember whether I spoke with him or not. I remember speaking with Ellen Shapiro.

Q. Were there actually a couple of calls?

A. There were a couple of calls. I called -- It was during a lunch break. And I left a couple of voicemail messages for various people. I think I left one for Ellen, I left one for Zach. After getting both their voicemails, I actually called the administrative assistant to the administrative office. Her name is Sarah Adamson. And I said, Sarah, I really need some help, are there any of the legal counsels available. There is at the time. I said I don't care who you talk to, but I have this issue here in Newton and I would really like to

get some guidance. And she said, let me get back to you. And then within a few minutes, I believe Ellen Shapiro called me.

Q. Did you have a conversation with her about this situation with ICE?

A. I did.

Q. And tell us about that.

A. So I recall saying to her, I have a situation here in Newton where I've been asked to exclude ICE from the courtroom. I said, can we do that, is there any guidance that you can offer as to whether that protocol is proper, and if so, do I have to follow it, because I just have some concerns about excluding people from a courtroom. And she said, let me get back to you. And there is a policy.

HEARING OFFICER: Trying to be respectful.

Is there any way we can just do something about the noise here?

MS. MULVEY: Would it make sense, Your Honor, just to take -- I'm almost moving topics. Would it make a sense to take a break and let them do what --

HEARING OFFICER: Sure. I

didn't mean to interrupt.

MS. MULVEY: It doesn't matter.

HEARING OFFICER: Are you okay with that?

Why don't we take our 10-minute break now.

(Recess taken at 10:52 a.m.
Proceedings resumed at
11:11 a.m.)

HEARING OFFICER: Thank you, Court Officer, for taking care of that.

I hope it doesn't get too warm back there. And if it does, we'll put that back into operation.

Thank you. You may continue.

MS. MULVEY: Thank you.

Q. Judge Joseph, we were talking about your calls with the administrative office of the District Court; is that right?

A. Yes, yes.

Q. And when they called you back, what happened?

A. So when they called me back, they read me the Lunn policy and --

Q. The whole thing?
A. A lot of it. I think it was the whole thing. Certainly, the relevant parts to it. And then I asked, again, you know, is the Newton policy -- can I do this, and I was given the advice and I remember this story, that the Newton policy is not inconsistent with our policy.
Q. I'm sorry. Not?
A. Not inconsistent. Correct.
Q. All right.
A. So you can make the decision you want to make. So I'm the new judge, it's on me. I go, what should I do? She says, you're the judge. But I'm a new judge. And if I have discretion, I wouldn't have normally done that. She says, you're the judge, you make the decision that you want. And I said, you know what, I'm a visiting judge, I'm a new judge, I'm not doing anything that the First Justice in this court wouldn't want me to do so long as it's proper under our policies.
MS. MULVEY: Okay. May I approach the witness?
HEARING OFFICER: Yes.
Q. Let me show you an e-mail with a document. Do

you recognize that?
A. I do.
Q. What is it?
A. So that's an e-mail that was sent to me by Ellen Shapiro with a copy of what we refer to as the Lunn policy, the November 10th of 2017 policy.
Q. What time was that e-mail sent?
A. So the e-mail was sent to me at 3:19 --
Q. All right.
A. -- in the afternoon. But it was --
Q. I was going to say, is she forwarding to you an earlier e-mail?
A. Yes. So it was scanned in to me at 1:54 in the afternoon that day.
Q. And is that about the time you were having these conversations and getting the policy read to you?
A. Yes. That was still within that lunch period and prior to -- like I said, I delayed coming back on the bench because I was trying to understand this policy and that was during that time period.
HEARING OFFICER: I'm sorry. Can you just clarify for me, when you say that

it was scanned in to you, what does that mean?
A. So it looks like Ms. Shapiro scanned, it looks like she scanned the policy at 1:54 in the afternoon, which is around the time that I had called for some advice. I had called earlier, and she got the policy and scanned it in. It looks like it was e-mailed to me at 3:19 in the afternoon. So I received the physical copy of the policy after the hearing, but she read me the policy around 1:54 prior to the hearing.

HEARING OFFICER: Got it.

Q. Actually, if we look at it, does it look like some serial number for a scanner sent it to Ellen Shapiro at 1:54?

A. Yes.

MS. MULVEY: I'd offer this as the next exhibit. I think it's 4, maybe.

HEARING OFFICER: 5. Exhibit 5 is received.

EXHIBIT 5

(DOCUMENT MARKED AS EXHIBIT 5)

Q. Now, attached to this is four pages of what we've been calling the Lunn policy; is that right?

A. That's correct. I don't have a copy here

anymore but...

Q. Oh, I apologize.

A. Yes. I saw that that was attached.

Thank you.

Q. And do you remember Ellen Shapiro reading to you the part about people who were in custody and being released?

A. I do.

Q. Is that in Section A on the bottom of Page 3?

A. Yes.

Q. And it says, Individuals over whom the Trial Court has custody.

A. Correct.

Q. And then it talks about an individual who was brought into court in custody and is subject to release after his or her court proceeding.

A. Yes.

Q. Right? Now, at the point this was being read to you, the prosecutor had not yet told you she'd changed her mind on the Pennsylvania warrant; is that true?

A. That's correct.

Q. So at the time this was being read to you, did you know what was going to happen?

A. I didn't.

Q. All right. And did she read the part about how people -- Well, strike it. If he wasn't released, was ICE going to get him?
A. No.
Q. All right. So if you were, for example, were to hold him for Pennsylvania, --
A. Correct.
Q. -- what would happen?
A. I believe that in the hierarchy of what would happen, because we had him on state charges in Newton, which included the fugitive from justice matter, if I held him without bail on the fugitive from justice matter or the Newton matter, which wasn't an issue at that time, then we would have kept custody of him until Pennsylvania made the determination whether or not to come in and take him, so to speak. So Massachusetts on behalf of Pennsylvania would have had control of the body, for lack of a better word.
Q. Okay. And does that mean that ICE would or would not take custody of him?
A. ICE would not have been able to take custody of him.
Q. All right. And so ICE would be an issue if for

some reason the Pennsylvania warrant wasn't an issue?

A. Correct.

Q. And during the lunch hour, did you have an understanding that that was sort of a live issue, what's the story on Pennsylvania?

A. Yes. And that's when we continued matter until the end of the lunch break, a little further than the lunch break, so that the attorney could continue to do her investigation on whether he was the same person that was subject to the Pennsylvania warrant.

Q. All right. Now, I assume, since your issue was ICE in the courtroom, you and Ms. Shapiro were sort of looking very carefully at what it said about where ICE could and couldn't go?

A. Exactly.

Q. All right. And if we -- I guess we don't need to read the whole thing. But did you read through or did you have it read for you -- to you Section A to see if it said anything about ICE in the courtroom?

A. Yes, we did. And I know that -- We actually read the sections a couple different times, because I didn't physically have a copy, and we

were going back and forth, and she was having to repeat reading it to me. We were both together trying to make whatever determination we needed to make.

Q. All right. And after that process was done, did the two of you decide it didn't say you couldn't keep ICE out of the courtroom?

A. Yes. And again, her word was it's not inconsistent.

Q. And did she read to you parts about where ICE was permitted to go?

A. Yes.

Q. And what was your understanding about that after she read the policy to you?

A. So after she read the policy and indicated that having ICE remain outside the courtroom during the proceeding was not inconsistent, she also told me that they are permitted to go to the lockup and that that's a preferred place to take custody of somebody because it's the most secure and safest place to do that.

Q. Did that make sense to you?

A. Made complete sense.

Q. All right. Had you ever, either as a judge or a defense lawyer, been in a lockup at the

Newton District Court?

A. Only as a defense lawyer.

Q. How did you come to be in the lockup as a defense lawyer?

A. If I had clients who were in the lockup area. If I was the bar advocate, and I needed to interview a client, I would interview a client in lockup, you know, for arraignment purposes or whatever needed to happen. And if I had a client in the lockup that was being transported elsewhere after a case, then I would go to the lockup to interview my client or talk to my clients, is probably a better word, before being released to wherever they were going next. So, yeah, to interview clients.

Q. And did you know how custodies got in and out of the lockup?

A. So from my experience, if you came in custody, you came in through the sallyport. If you left in custody, you left through the sallyport.

Q. And the sallyport is that secure door leading into the fenced area that we --

A. Yeah. It's secure. That black fence area we saw at the view.

Q. And so somebody, a sheriff or ICE or whoever, could pull up a vehicle and it would be a very short distance?
A. Yes.
Q. To transport the prisoner?
A. Yes. So the vans would pull right in, they'd come out the doorway, and go in. I never witnessed that, but that's what we knew happened.
Q. After your last conversation with Ellen Shapiro, did you speak with Clerk Okstein again?
A. I did.
Q. What did you tell him?
A. I told Clerk Okstein that I had tracked down the policy and that I would follow Chief Justice -- chief Justice -- First Justice Heffernan's policy.
Q. Did you ever actually talk to any of the ICE agents yourself?
A. No. I never saw any of the ICE agents that day.
Q. Never laid eyes on them?
A. No.
Q. Did you know how many were there?
A. I did not.
Q. Now, after your conversation with

Attorney Shapiro, did the session start up again?

A. At some point, yes. I don't recall how much after that, but yes.

Q. And who showed up for Mr. Medina Perez?

A. Mr. Jellinek.

Q. How did you learn that that was happening?

A. The case was called, and then there he was. And I was told by the clerk, as we saw in the transcript, that Mr. Jellinek had filed an appearance of counsel.

Q. Was that the first time you saw David Jellinek that day?

A. It was.

Q. Was he somebody you knew from court business?

A. He was. I didn't know him well. But I knew him because he was a defense attorney, and we would oftentimes -- often -- a handful of times were in the same court at the same time, so I knew his face and I knew enough to say hello to him.

Q. Now, if we look at the transcript --

A. I'm sorry. He also appeared before me when I was a judge. I sat in the Waltham court, also, and he used to take bar advocate cases in

Waltham, and I do recall he appeared before me once when I was on the bench as well.

Q. Now, do you have the transcript there?

A. I do. Can you just tell me what section it is, please?

Q. It's Section G. And I think we're somewhere around App 40.

A. Okay.

Q. And I'm looking at the part that starts at 2:48:48. Do you see that?

A. I see 2:48. Yes, I do.

Q. Okay. And is this when you first got to side bar or they first got to side bar?

A. Yes. Yes.

Q. Okay.

A. I was looking above, the paragraph above that says 2:48:13, but that's just when the case was called. So the side bar began at 2:48:48.

Q. And we've heard you would sort of roll your chair over to the side where the lawyers were?

A. Yes.

Q. And was David Jellinek there?

A. He was.

Q. Was Assistant District Attorney Jurgens there?

A. Yes.

Q. Standing side by side?
A. Standing side by side.
Q. And if we go to the next page.
Attorney Jellinek had been pressing his point that this wasn't the fellow that ICE was looking for?
A. Right.
Q. Was he consistent about that?
A. He was.
Q. All right. And he said, I think the best thing to do is to clear the fugitive issue, release him on a personal, and hope that he can avoid ICE. Did you think that that meant he was going out the back door?
A. Oh, God, no.
Q. Did you think that by "avoid ICE" he meant in any improper way?
A. No.
Q. Is there any way you would have been a party to that?
A. No. Absolutely not.
Q. If we look down at the next thing you said, does that help you figure out how you interpreted what he was saying?
A. Well, it does. Because as soon as he said

that, my response is, if you need more time to figure this out, we could -- I said hold until tomorrow. I think hold him until tomorrow is probably what I said, but it just probably didn't get picked up in the transcript. Same sentiment.

Q. And when you said, if you need more time to figure this out, what was in your mind?

A. That if he wanted time to investigate his client's identity and time to convince ICE that it wasn't who they thought he was, if he wasn't who they thought he was either, that I'd be happy to give him time to do that.

Q. We've heard this is almost 3:00 in the afternoon?

A. It was.

Q. All right. Why didn't you say, I'll give you another hour?

A. It was getting to be late in the day. I'm very sensitive to custodies and -- as a judge, as a lawyer. I just know the court officers always like to get the custodies out as soon as possible. I didn't know that he'd be able to get that information in an hour or so, so I thought the best thing to do was to give him as

much time as he needed, I had given the attorney hours in the morning, I'd give him the same courtesy, done with court by then, so everybody just come back tomorrow.

Q. Now, I think you said on direct that ultimately Attorney Jellinek said, no, that's not what I want; right?

A. Correct.

Q. Was that on the record?

A. I don't remember.

Q. Well, if we read through, do you see any place on the record where Attorney Jellinek says, no, I don't want more time, I don't want to come back tomorrow?

A. I don't.

Q. Did he ultimately tell you, no, that's not what I want?

A. He did.

Q. Is it fair to assume, then, that that must have been part of the continuation off the record?

A. That must have been -- Yes, that must have been off the record.

Q. Do you actually remember that?

A. I don't.

Q. But do you remember he didn't want more time?

A. Yes.
Q. Once he told you, no, I don't want to come back tomorrow, did you drop the issue of holding him?
A. I did.
Q. When you were talking about holding him tomorrow, did you see that as any different from holding him from first call to second call or holding him over the lunch break?
A. I didn't.
Q. Why not?
A. Because I had given the attorney in the morning enough time to do her investigation. I wanted to give him the same amount of time to do his investigation. And given the time of the day, I just thought holding him until the following day would be the best way to give him enough time to do that. Plus, I wasn't coming back the next day and thought maybe another judge would handle it.
Q. Would it have broken your heart?
A. It would not have broken my heart.
Q. Okay. When you said, hold him until tomorrow, did you think that would allow him to escape ICE if he was the right guy?
A. No, no. To hold him, meaning detain him,

keep him in custody for the evening with no opportunity to post a bail. No. He was coming back to Newton District Court the following day. And the attorney would come back, the assistant district attorney would be there, ICE would certainly be, everybody would just come right back the following day. The only question would be whether or not I would be there. I may come back to handle the matter or who -- they may have swapped us or maybe I would have been off to wherever I was going the next day.

Q. And certainly, if his lawyer said, yes, that's what I want, I want to come back tomorrow, did you think it would be all right for you to do that?

A. Of course.

Q. And over his lawyer's objection, did you make any attempt to hold him?

A. No.

Q. You also said that the thing you do remember that was different was that he asked to speak to his client downstairs with the interpreter.

A. Yes.

Q. Did that strike you as crazy or an unusual request?

A. Not at all.
Q. Why not?
A. I thought it was a completely appropriate request. I was under the impression that he was going to go back downstairs, pick up his property, and go right into ICE custody through the sallyport, and in order for him to have an opportunity to speak with his lawyer, that would be the -- I mean, his client, that would be the only place to securely do that.
Q. Did you have any role in how ICE would actually get him, where they would actually get him?
A. No, no.
Q. And so were you actually thinking, well, okay, he can go downstairs or he could go to the sallyport or go out the front, was that, as a judge, was that your responsibility?
A. No. That's a security issue. And I was familiar with the Lunn policy where, as far as I knew, it was all going to happen in the lockup.
Q. And in fact, once you went back on the record, you arraigned Mr. Medina Perez.
A. I did.
Q. And you gave him some required statutory drug warnings?

A. I did.
Q. And just as things were winding down, you had ordered him released; is that right?
A. I did.
Q. And that was released from state custody?
A. Released from state custody. I did not set a bail on the state charges. And the fugitive matter at that point I dismissed.
Q. Once you had ordered him released, did you think you had any further say or responsibility in what would happen to him?
A. No.
Q. Did Clerk Okstein then tell you to just wait a second?
A. He did.
Q. And he said there was a representative from ICE here in the court inaudible to, to visit the lockup?
A. Yes.
Q. And you said, that's fine, I'm not going to allow them to come in here, but he's been released on this.
A. Yes.
Q. What did you mean by that?
A. What I meant is that that's fine, they can go

to the lockup, but in compliance with Newton District Court policy, they can't come into the courtroom to access the lockup, but they can use any of the other entrances and opportunities to get to the lockup that they're able to.

Q. Did you think that the ICE agents had walked or taken the T to the Newton District Court?

A. No. I assume they drove.

Q. All right. And would you assume that they would be placing Mr. Medina Perez into a vehicle?

A. Yes.

Q. Is there a place at the courthouse where that happens?

A. Typically in the sallyport.

Q. Did you actually think about that or concern yourself with the logistics?

A. I didn't. That's really a security issue. But you know, I just had the policy read to me, and it makes complete sense to take custody of somebody in the lockup where they're already there anyway and it's the most secure place. I mean, I wouldn't want -- It's just the most secure place to do it.

Q. Now, the court recessed as Mr. Jellinek and the

interpreter and Mr. Medina Perez were going downstairs; is that right?

A. Yes, yes.

Q. And having seen the transcript, did you actually handle two more short matters afterwards?

A. I did.

Q. Do you recall what time you left the courthouse that day?

A. Sometime around 4:30.

Q. As of that time, had anybody told you what had happened with Mr. Medina Perez?

A. No.

Q. What did you think happened?

A. I figured he went into ICE custody and that was the end of it.

Q. The next day, did you sit in the Newton District Court?

A. I didn't.

Q. When were you next there?

A. I was in Newton two days later. So on the 4th, on that Wednesday.

Q. On the 3rd, on Tuesday, did anybody call you up and say, let me tell you about Mr. Medina Perez?

A. No.

Q. Did anybody call you up and say, what happened,

what did you do?

A. No.

Q. What happened on Wednesday, April 4th?

A. So on Wednesday, April 4th, I got to the courthouse, I went in and checked in with Judge Heffernan, and she gave me my assignment for the day. She asked if I would handle the jury session upstairs. So I went up to the second floor lobby. I handled the matters that were on that day. Some were jury matters, some were not jury matters. There was some overflow from the first session. And then when the session was down on a break, either I went down to her lobby or she came up to my lobby, I can't remember, and we talked about the Medina Perez case. That's when she notified me that, she said that he had been released out the back and had not been apprehended by ICE.

Q. Was that the first you were hearing it?

A. That was the first I heard of it.

Q. What did you say to her?

A. I said, how did that happen.

Q. What did she say?

A. She said, that's what I'm trying to find out.

Q. Do you recall exactly what she said and what you

said?
A. I don't recall everything that she said. She did tell me she had talked to Attorney Jellinek by then and that either she was going to or she had, I don't recall, talked to the chief court officer and other court officers who were there, and she wanted to find out from me what happened, so we briefly discussed what happened.
Q. Did you tell her that you had gone off the record?
A. No.
Q. Did she ask you?
A. No.
Q. At that point did you know that it was against the rule?
A. I didn't. I didn't know until Judge Fortes told me a couple of weeks later.
Q. If you had known it was against the rule, would you have done it?
A. Oh, God, no.
Q. Have you done it since?
A. No.
Q. Did you also talk about another case with First Judge Heffernan during that conversation?
A. We did. And that's actually how the

conversation started. Up in the second session, there was a matter that had some public attention, and there were cameras in the courtroom, and the clerk had asked me whether that would be okay or not. When there's cameras in the courtroom, you need permission in order to record. And I said, I'm fine. And so she had said, you know, I just want you to know, I'm the First Justice, and I like to know when there's cameras in a courtroom. So I apologized and said, I'm so sorry, I would have thought the clerk told you that, when the question came to me, I assume you know, and thanks for letting me know, and then she said, let me ask you about a case on Monday. So that's how it came up. Yup.

Q. After that conversation on Wednesday, did you have a different -- a second conversation with First Judge Heffernan about the Medina Perez case?

A. I did. During our conversation on Wednesday, she was very concerned about the identity of Mr. Medina Perez saying that now we don't know where -- who he is or where he is and, you know, we don't know what warrants he may have or what can we do. You know, so we talked with that.

And that really upset me, so I called her on Thursday, sometime late in the day, I left her a voicemail message. She called me back on Friday morning, and we talked about it a little bit, really just on the public safety concern. I had asked if he had been arrested on the warrant yet. She said no. And I said, I'm really concerned that we don't know who he is, I don't want him to be --. So she said, don't worry about it, you know, it happens and, you know, that's -- We just talked about it for a few minutes.

Q. Is that the last time you talked about Mr. Medina Perez with first Justice Heffernan?

A. I believe so.

Q. Let's move then to RAJ Fortes. Did there come a time when you were sitting the Lowell District Court?

A. Yes. I believe I was scheduled -- We get our schedules a month in advance. I believe I was scheduled to sit there. If not, I was switched to sit there, which oftentimes happens, also. But regardless, I was sitting there on a day when she was sitting as well.

Q. Is that a bigger, busier court than Newton?

A. A much busier court.
Q. And is there usually more than one judge there?
A. There's usually about five judges there.
Q. What happened at lunchtime?
A. At lunchtime, she came into the lobby. I was in the visiting judge's lobby, where I was sitting. And said, why don't you grab your lunch and come in and talk to me.
Q. Did you do that?
A. Of course.
Q. What happened?
A. So I went into her office, we sat at a round table, we talked about our kids. We've known each other for a little bit of time. We weren't friends outside of work, but I've known her for a number of years. She was asking how things were going. I was a new judge in her region, so she just wanted to get a check in to see how things were going since I was sitting there. And then she said she wanted to talk to me about a matter I had handled in Newton a few weeks prior.
Q. Did you know that was on the agenda?
A. I did not.
Q. What did she say?

A. Again, I don't recall how she identified that case. I hadn't thought about it in a few weeks. But she said something that made me understand that that was the case that she wanted to talk about.

Q. And what can you recall about that conversation?

A. I don't recall the specifics of the conversation, other than at some point she either asked or I told her or she said that she knew, but we started talking about how did that conversation part of the hearing end up being off the record.

Q. As you understood it, was the reason she was raising it because she knew you'd been off the record?

A. At that point, yes.

Q. Did you try to hide it or deflect or anything?

A. No, no.

Q. Did you say, no, I didn't do that?

A. Not at all.

Q. What happened?

A. She says there's a rule that prevents that. She had a copy of the rule. I think she opened up the book and took a xerox copy that she had made of the rule and handed it to me, and we

talked about that, and that was it. And she was wicked nice. She's like, listen, you're not in trouble, I just want you to know that I'm here to help you, like I just want to make sure that you're doing all that you need to be doing, and I thanked her for the rule, and that was it.

Q. Do you remember her also giving you a copy of the Lunn policy?

A. I do. I remember she said, and I have a copy of the Lunn policy. As you all know, I got a copy e-mailed to me that day when I requested it.

Q. When you got that Lunn policy in Newton, what did you do with it?

A. I read it again and then I put it in my binder.

Q. Did you give it to anybody else?

A. I did. I made a copy of it for the clerk's office. Actually, I made two copies. I gave one to the clerk magistrate and one to Assistant Clerk Okstein, because they couldn't put their hands on it either, and I left one actually on Judge Heffernan's desk, also.

Q. When you spoke with Judge Heffernan, did you attempt to answer her questions and be honest

and candid?

A. Of course.

Q. And when you spoke to RAJ Fortes, did you attempt to answer her questions and be honest and candid?

A. Yes.

Q. Did each of them have slightly different focuses?

A. They did. So Judge Heffernan was concerned with the security issue, for lack of a better word, you know, how did he get out the back door without ICE having apprehended him. That really seemed to be the focus of her concern.

Judge Fortes was, the focus of her concern was part of the matter had been conducted off the record, and that was really her focus.

Q. Now, we've also heard that you were asked to meet with Chief Justice Dawley; is that right?

A. I was.

Q. Do you remember that meeting?

A. I do.

Q. What do you remember about that?

A. So I remember, you know, going to his office and he -- And I knew, as I said earlier, that that's the case that he wanted to talk about, so

the next time I sat in Newton, I got a copy of the CD. At that point, I knew that part of the record -- part of the hearing had been conducted off the record, and so I assumed that that's what he wanted to talk about. So I wanted to hear it before I got there. So I listened to the recording. I went to his office. It was Judge Fortes, Judge Dawley, myself in his office. He said, do you understand why you're here, and I said, yes, to talk about the case. I don't think I remembered the name of it at that point, but the case in Newton where the defendant had been released out the back door and avoided ICE. He said, well, that's the case I want to talk to you about, what I want to talk to you about is having gone off the record. And that's what we spent a lot of time talking about again.

Q. And what did he tell you about that?

A. He told me a number of things, you know, the record is your friend, this isn't old times when it happened a lot. He said you should always -- The record is your best protector, it's your friend, and there's a rule, and you now know about the rule, so don't do it again, and use

this as a learning experience, go to the judges.
Q. How did the meeting end?
A. It ended on a very positive note. He thanked me for coming in, and I thanked him for the opportunity to come in, and that was it.
Q. And did you send him an e-mail afterward?
A. I did. I followed up with an e-mail either that day or the next day thanking him and reassuring him that I heard, I listened, and it won't happen again.
Q. Did you get a response from him?
A. I did.
Q. What was that?
A. Essentially, thanks for meeting with me and, you know, looking forward to seeing me at the upcoming judicial conference that we have every year.
Q. At the time you left Chief Justice Dawley's office, did you think that that would be the end and it should be moving forward?
A. I did. Each time I have a conversation about this case, I think it's over and then it comes back.
Q. Okay. Chief Justice Dawley told you that the record is your friend?

A. He did.
Q. Do you believe that?
A. I absolutely believe that.
Q. Do you wish you had a record of what happened --
A. I do.
Q. -- during those 52 seconds?
A. No question.
MS. MULVEY: May I have a moment?
(PAUSE)
MS. MULVEY: I have nothing else. Thank you.
JUDGE FABRICANT: Very briefly.
THE WITNESS: Sure.
REDIRECT EXAMINATION
BY JUDGE FABRICANT:
Q. When you proposed -- Well, let me put this a little differently. I think I just heard you say in response to Ms. Mulvey's question that you viewed detaining the defendant overnight, sending him back to the jail, that he would stay overnight, and come back to the courthouse, you viewed that as essentially the equivalent of putting it on for further call. Is that right?
A. I mean, at the time I'm not sure that I

really analyzed it in that way. But yes. I was just trying to give him more time, and that seemed to be the proper way to do it or a way to do it.

Q. And the way that you had in mind that you would do that was you would use the fugitive from justice charge, which authorizes detention without bail if the underlying offense is violent, you would use that charge even though the assistant DA said, I don't think it's him, you would use that charge to send him back to the jail and have him detained overnight.

A. No, no, no. So what I was thinking is that there would be agreement to do this, and the attorney would agree, everybody would be on the same page, he would be detained overnight and come back the next day.

Q. So with agreement of his attorney, your idea was, you send him back to jail and he'd be detained overnight, even though the law says you can do that only if it's a violent offense underlying and even though the assistant DA says I don't think it's the same person.

A. Well, that's if you analyze it under the fugitive of justice matter. I mean, I guess, if

you want to get technical, you could do the arraignment. Pause it there. I haven't arraigned him yet. All come back tomorrow, do this tomorrow. That's all I was trying to do.

Q. Send him back to the jail to do it.

A. Yes. With the agreement of his attorney.

Q. Okay. And you thought, if the attorney agrees with that, then you can do it even though there wasn't a legal basis for it.

A. No. I thought, under the circumstances, that is the solution that I was offering his attorney to give him more time to do what I thought he was asking me to do.

Q. And you said, if I heard you correctly, that you thought he would go right into ICE custody; correct?

A. Well, I figured he would go down to the lockup and that ICE would take custody of him in the lockup.

Q. And Mr. Jellinek had argued quite vociferously that he was the wrong person, and he had said I think the best thing for us to do is clear the fugitive issue, release him on the personal, and hope he can avoid ICE. And what you thought was, that he was abandoning that argument; right?

A. No, no. I thought that he didn't want his client held overnight and he would deal with the identification issues in the -- in another forum.

Q. So you thought that he was acquiescing in the idea that his client was going to go down to lockup, ICE was going to go to lockup, he was going to be handed over from the lockup to ICE, even though Mr. Jellinek was arguing quite vociferously that he was the wrong guy.

A. No. What I thought would happen, is that I offered a solution, if you want more time to investigate his identification, I'm going to give you more time. And the best way, in my opinion then, to do that would have been to hold his client overnight without any possibility of bail so that everybody that had any involvement in the case would come back the next day, period.

Q. But he didn't accept that.

A. He didn't accept it. That's why I released him on his own recognizance. Done.

Q. And your expectation, releasing him on his own recognizance, was that his lawyer was basically acquiescing that ICE was going to take him.

A. I didn't make any judgment about what his lawyer was thinking.

JUDGE FABRICANT: All right. That's all I have. Thank you.

MS. MULVEY: Nothing else. Thank you.

HEARING OFFICER: Thank you very much.

JUDGE FABRICANT: And that completes the Commission's case at this time.

HEARING OFFICER: Okay. So do you have a witness?

MR. HOOPES: Our witness moved her schedule, so she'll be here tomorrow morning at 9:00.

HEARING OFFICER: Okay.

MR. HOOPES: And we'll be -- Within the two hours, we'll have our witnesses. We'll be done.

HEARING OFFICER: Tomorrow morning.

MR. HOOPES: Yes.

HEARING OFFICER: So with that, I think we're recessed for the day.

(The proceedings adjourned at 11:48 a.m.)

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EXHIBIT 17

COMMONWEALTH OF MASSACHUSETTS
COMMISSION ON JUDICIAL CONDUCT

COMPLAINT NUMBER 2019-22

VOLUME V

HEARING

~ BEFORE ~

HEARING OFFICER

DENIS J. McINERNEY, ESQ.

JUNE 13, 2025

9:00 A.M.

Boston, Massachusetts

Lisa L. Crompton, CSR (MA)(RI), RPR
(As amended by stipulation of the parties and
as approved by the Hearing Officer on October 1, 2025.)

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HEARING OFFICER: Good morning. This is the continuation on the hearing of the Commission on Judicial Conduct's Complaint Number 2019-22.

Counsel, would you please identify yourselves for the record.

JUDGE FABRICANT: Judith Fabricant, Special Counsel for the Commission on Judicial Conduct.

MR. NEFF: Howard Neff, Commission on Judicial Conduct.

MS. MULVEY: Elizabeth Mulvey for Judge Joseph.

MR. HOOPES: Tom Hoopes for Judge Joseph.

MR. HOOPES: Michael Keating for Judge Joseph.

HEARING OFFICER: Thank you.

MR. SULLIVAN: And excuse me. My name is Daniel Sullivan. I'm the general counsel for the Trial Court.

And we have two trial court officials testifying this morning. I'm just here in the instance if there's any question you ask as well.

Thank you.

HEARING OFFICER: Great. Thank you very much.

Ms. Mulvey.

MS. MULVEY: Judge Joseph calls upon Bonnie MacLeod.

HEARING OFFICER: Good morning.

HONORABLE BONNIE H. MACLEOD,

SWORN

HEARING OFFICER: Thank you. Please be seated.

DIRECT EXAMINATION

BY MS. MULVEY:

Q. Good morning. Would you tell us your name, please.

A. Good morning. My name is Bonnie Hilly MacLeod.

Q. Are you a retired judge?

A. I am.

Q. How long have you been retired?

A. I retired from this building in June of 2016.

Q. What courts did you sit on?

A. All told, this is the court I left.

Q. The whole thing.

A. The whole thing. I was appointed to the

District Court in 1989. I sat in a variety of District Courts, usually long stints, until I was appointed to the Superior Court in November of 2002.

Q. So you spent about 13 or 14 years on each of them?

A. Right. Exactly. 13 years in Hingham on the District Court, and then I stayed later than that just so that I could stay with -- my longer, my longer presence was on the Superior Court.

Q. Can I take you back? Can you tell us about your professional background before you were appointed to District Court?

A. Certainly. I was admitted to the bar in 1972. For those of you who can't count, it's 52 plus years now, which amazes me. My first legal job -- I left -- I was -- While I was in law school and for about six months thereafter, I was the head law librarian at a law firm called Hill and Barlow. I left Hill and Barlow when I was appointed as assistant district attorney in Middlesex County, and that would have been in September of 2023.

Q. 2023?

A. Sorry. 1973. And I was in the appellate division of the district attorney's office and I tried felony cases, and then eventually I was appointed chief of the appeals division in the district attorney's office, and my very first case that I've argued was in this very courtroom before the full bench of the Supreme Judicial Court.

Q. All right.

A. Thereafter, I left the district attorney's office in September of 1976. I had been asked by one of the justices of this court, of the Supreme Judicial Court to consider moving to an office called the Office of Bar Counsel, about which I knew nothing whatsoever. But apparently they were looking for trial lawyers. And so I ended up becoming the first assistant bar counsel in the bar counsel's office. I was elevated to first assistant bar counsel thereafter. And I was chief of the litigation division, which is, basically, I was the person litigating bar discipline cases and presenting the evidence. And I stayed there until I was appointed to the District Court in May of 1989.

Q. When you were on the District Court, did you sit

in a number of different District Courts?
A. I did. I sat -- Oh, I'm sorry. With my, with my career. I also taught for 42 years at four of the Boston law schools, professional ethics.
Q. All right.
A. I stopped that in 2018.
Q. Okay.
A. Because I got too busy at JAMS.
Yes. When I sat in -- I was named to the Cambridge District Court, but I never sat there, not one day in 13 and a half years. For some reason they wanted to put me in the so-called higher crime courts. So I ended up in Lynn, and I spent five years with Salem and Lynn, situation where I was in Lynn three days and Salem two days and back and forth, and I did that until July of 1994. And then after that, I went to Chelsea District Court, which for those of you who don't remember where Chelsea was in those days, it was in Cambridge. And it was in Cambridge for seven years, I believe. I kind of ended up in Cambridge. Just across the room -- across the yard from where I was supposed to be sitting. I was there for a substantial period of

time. I think 1994 to at least 1999. And then I went back to Salem and Lynn for a little bit. And then my son was playing football for Whitman High School, and I asked if I could go to Malden. So I sat in Malden District Court until I was appointed to the Superior Court in 2002.

Q. And in the course of your time in the District Court, did you run into different practices and customs in the various courts?

A. The District Court is like -- well, in my view, each court has its own culture. And every time you went to a new District Court, you had to figure out kind of who rules the roost, is it probation, is it the clerk's office.

I can remember, one day, people came to the District Court because nobody could figure out whose job it was to carry the restraining order into the courtroom. Because they had to be vetted by probation first, and probation said it wasn't their job to bring -- And this was the culture of the court. It was always this kind of testimony.

So you really had to meet with the chief court officer for that court, the

clerk, and the district attorney and whomever to figure out what's the culture of this court. And, you know, basically, I hate to say it, but who do you want me to be, I mean, what control do I have over the gathering. And each court is really like sui generis.

Q. Did you also run into lots of different judges in the various courts?

A. Certainly, I did.

Q. Now, we've heard that, in November of 1989, Special Rule 211 was implemented in the District Court.

A. Yes.

Q. Is that right?

A. I do. I'd been on the bench maybe about five months when it was enacted. Not so much fanfare --

Q. I was just going to ask you, would you tell us about the fanfare and the training that accompanied that rule.

A. In terms of training, I really don't remember any. We were told that you had to ensure that the tape was on and that things were being recorded, that proceedings were being recorded.

And then, of course, I remember

sitting in Williamstown with a bunch of my colleagues from different courts and we're arguing about what's a proceeding and what's administrative, what does this mean, and that we kind of all concluded, it meant that it was kind of what we decided it would be. I mean, in other words, given the heft of whatever was going on. Obviously, a hearing was a proceeding, an arraignment was a proceeding. But things that might have pertained to that may not be part of a proceeding.

So again, that likewise I think was somewhat sui generis in the type that it was being decided by an individual judge at an individual time as to what was on the record and what was not. And I know I'm going back a little bit historically, maybe, and things certainly felt likely to have changed since I left the court in 2002, but it was really kind of up to --

Oftentimes, we didn't have anybody even to run the machine. And when I would stay after 6:00 to 8:00 doing matters, because we didn't have a Juvenile Court and they're doing juvenile, I was it. I was taking

the record with my -- I was writing, filling out the docket sheet, I was running the recorder, I was -- I mean, it was all there in front of me. I mean, again, it was -- necessity is the mother of invention.

Please remember, in my courts, we did over 100 cases a day, and that's why, when I came to the Superior Court for a while, I thought it was naptime.

Q. Vacation?

A. Yeah.

Q. Both in District Court and in Superior Court, did you as a judge go off the record on occasion?

A. I did.

Q. Did your colleagues do likewise?

A. Oh, yes.

Q. If you consider the entirety of your career from 1989 to 2016, did the frequency of off the record proceedings or discussions decrease over the years?

A. I think it did, only because of the nature of the Superior Court. But the reasons -- I still obviously did them. And I think I had the instincts and the judgment to decide when to do

them and when they made sense. I know, I know in this very courthouse -- thank God the statute of limitations -- I know I probably did it at least once a week.

Q. And can you just give us a couple of examples of when a judge might go off the record?

A. Well, I tried in my mind to categorize them when I understood, you know, the subject matter about which I'd be speaking, like when did I do it, for what reasons. And I think sometimes -- I mean, the obvious one I think to a lot of people has to do with safety, the safety of either a litigant or a party or whatever. So something, some concern. For example, it was not uncommon in any court I ever was, all of the District Courts and here in the Superior Court, for a district attorney, an assistant DA, and defense counsel ask if they could come up and go off the record, and it was always something like, well, judge we're not asking, you can see we're not asking for very high bail and it's because defense counsel's client is a cooperating witness and is going to lead us to X, Y, and Z, and so we don't want you to think we're crackers by not asking for higher bail,

there's good reasons and obviously reasons we do not want to put on the record but would just -- that's what we're going to do. So that would be one. And that was, that was pretty routine -- not routine, but would happen. That would be the number one I remember, both in the -- all of the District Courts I sat in and certainly a couple of times in the Superior Court.

Q. Okay.

A. And another would be privacy issues, where somebody -- the lawyers would ask to approach the bench. Once, I remember one of my court officers here came to me one day and said, Judge, the juror upstairs, she is just overwrought, she's crying and she won't tell me why, but she's telling me she can't sit, and you know. And I remember the jury selection and, ironically, she was one of the people I was kind of thinking about for the eventual foreperson on the jury. Oh, what's that about. And I said why don't you bring her down. And she was overwrought and she was crying. And the lawyers came up to the side bar with me, and I said off the record, and I asked her what was going on. She had just learned the day before that her husband had been

diagnosed with a terminal illness and that she couldn't get it out of her head. Now I don't believe that is something that needs to be on the record. I then went on the record and said this juror is excused for good cause shown. And to me, that's enough. I don't need to make a record that she had to make that private disclosure.

That happened lots of little times, people making private disclosures about things that they would rather not see the light of day. And again, it's a matter of judgment as to whether or not you make a record of that kind of thing.

Q. When lawyers asked -- Were there occasions when lawyers asked you to get off the record?

A. Oh, yes. Most of -- Yeah. A lot of the time I would do that is, you know, when the lawyers would ask.

Q. Would you necessarily know what it was they wanted to say?

A. No.

Q. You just said a minute ago that you could put it on the record after the fact or something like that?

A. It was something that was a matter of -- again, it would not be probably intimate details. It would just be, no, thank you, everyone, this juror has done whatever. And in some cases it would be something I would never put on the record. I would just tell the lawyers thank you and back off, particularly when you have a cooperating witness, a confidential informant, somebody who didn't want their address known because whatever, those types of things I would necessarily go back on the record in any way.

Q. And if something untoward happened at an off the record conversation, did you as the judge have a way to kind of fix that?

A. Oh, yes. In fact, if somebody came up -- I think if the lawyers came up and they started talking about something that -- I would say this isn't an off the record conversation, or if it came out, then go back and I would say counsel has explained to me that there are good and whatever reasons, blah, blah, blah, and I would put that on the record. But sometimes -- I don't think I ever got snookered, for want of a better word. I trust lawyers. I think lawyers

trusted me. So I was really careful, you know, as I said, not to get snookered. And I don't remember it ever happening. And I know they trusted me.

One of the other instances, for example, when I would do something with the lawyers is, I mentioned to you all Chelsea was actually in Cambridge. And for someone like me, who doesn't drive, it was really interesting in the morning to take the commuter rail to the Green Line, walk to -- you know, and get off at Lechmere and then try to find out where the Chelsea District Court was.

But imagine, if you will, how it would be for someone who is arrested overnight in Chelsea, went in a van the next morning and brought to Cambridge where they had never been in their entire lives, and then the Commonwealth doesn't ask for bail, so it's time for them to go home, how do they get home from Cambridge.

So the first thing, I would ask the lawyers to come up and say off the record, and I would say to the DA -- I would say to the defense attorney, does your client have a way to

get home, does he know how to get home, well, is there anyone here for him today to bring him home. And if he would -- if he said no, then what do you do. I said, well, so we'll just have to give him directions. And then I had this drawer in my bench, and it was full of $10 bills that I had put there, and I would give a $10 bill to the court officer, and the court officer would then take the guy out, give him directions, how to get to the Green Line, and tell him to get off at Haymarket, then take the bus to Bellingham Square. I mean, this happened every day. And the people were being dumped into Cambridge and never given any thought about what might happen on the other end.

And so we had -- It became a matter of where DA was sneaking money into my drawer, the court officers in my drawer, I went in the drawer one day and it's full of $10 bills, I mean, because everybody was now contributing to the transportation for the -- the defendant. That's the District Court.

Q. In terms of cases and litigants and just the management of a day, is there a difference between the District and the Superior Court?

A. Oh, for sure.
Q. Tell us about that.
A. Well, the management was such that -- Again, in the District Court, you never really know -- I never sat in Newton. Oh, I did. I sat one day in Newton. But that, too, was in Cambridge at the time, for a very short period of time.
Again, you've got a sense of the culture. Some courts are much busier than the others. I tend to, fortunately or unfortunately, end up in the busier ones. So you never knew on a given day how to manage. And I will say, this is probably not the great way to do things, but if you heard there were some 20 changes of plea, they would round up all the people who are going to plead guilty in the back and you would then tell them all their rights and then you do it individually and say did you hear everything I said to all those 12 other people in the room. That's how you did, again, if you had 50 or a hundred cases a day as a District Court judge, you do not -- you know, you try not to rush that over what's required. But you certainly try to do what Jim Dolan used to say, gets the donuts made, and the donuts is getting

those hundred people's cases done on that given day.

So the culture would depend on the court. I really -- And there was a very strong symbiosis between the court officer, the judge, the probation -- the head of probation or whoever was there, the assistant district attorney, you kind of all had -- you worked the same session, you knew what was, you know, what was going on and what needed to be done on a given day.

Q. And when you would come into a District Court, would you rely on those people to sort of show you the ropes in that court?

A. Totally.

Q. Do you think your experience was different from that of your colleagues?

A. I do not.

Q. Do you know Judge Shelley Joseph?

A. I do not. I know of her. I know I've seen her in passing. I want -- I haven't -- I kind of avoided her since you and Attorney Hoopes and I spoke the first time, because I just forgot that we actually were in the Montgomery Summit together. I didn't even say hello to her. My

companion, my friend Andrea Kramer, who was with me, said, oh, I see Judge Joseph, let's go see her. I said, you know what, why don't you go say hi and give her our best. I just didn't want to -- And likewise, we're on the same Inn of Court and it turned out that she's on my team. And when I learned she was on my team, I haven't been to a meeting since I learned it. Because, again, I didn't want it to appear -- because you know how rumors and stuff fly, that the two of us were having a, you know, glass of Pinot Grigio together, and God knows I can be had for a glass of Pinot Grigio.

MS. MULVEY: Thank you, Judge MacLeod. I have nothing else.

CROSS-EXAMINATION

BY JUDGE FABRICANT:

Q. Good morning, Judge MacLeod.

A. Good morning, Judge Fabricant.

Q. For this purpose, I'm special counsel.

A. Sorry, Counsel.

Q. We have an adjudicator on the bench, and that's not me.

Judge MacLeod, you said that, when you were sitting as a judge, you would go

off the record at times and you knew when to do it and when not to do it.

A. Yes.

Q. And when not to do it was when you were dealing with something that was a matter of particular public attention or controversy that the public was particularly going to want access to, that was the, no, I'm not going to do it; right?

A. I don't necessarily agree with that. I can't say that. Because the public can be a very nosy group of people. And I remember a case where there was a family feud and there was a 19-year-old married to an 18-year-old. It was a mixed race couple. The parties were fighting. And the couple wanted to tell me privately what they wanted to do. And believe me, there was this many people in the courtroom to see what was going to happen with that case. And I let them come over to the side bar and I went off the record.

Q. There is a right of public access to the courts; right?

A. There is. I wish I trusted the public as much as other people.

Q. We may debate how much any of us trust the

public and we may debate how much any of us trust the media and how fair the media can be.

A. True.

Q. But the constitution, --

A. Yes.

Q. -- the Federal constitution, the state constitution, case law provides a right of public access to the court.

A. Absolutely.

Q. And you know that if you go off the record in a case that involves a kind of subject matter that is getting particular public attention, the fact that you go off the record there is going to catch public attention; right? You know that.

A. I guess. I think that's well said. But, again, the public always has an itch to know, but that doesn't mean that at a particular time they're entitled to know.

Q. The SJC has said, --

A. Yes.

Q. -- the U.S. Supreme Court has said the public is entitled to know what goes on in the courts.

A. Right. But even the District Court rule talks about the fact that matters might be administrative, and if, as a judge, I deem

something to be an administrative matter, as to, you know, whether they -- for example, the things I used to do in Malden was I would say to the court officer, I would say it was before lunch, the person was about to be let go, and I said, you know, this person probably hasn't eaten since he was arrested at 6:00 yesterday morning, could you, you know, maybe bring him back downstairs -- when you bring him back downstairs to get his stuff, would you make sure he gets a sandwich before you put him out the sallyport.

Q. And that would be a good example of the kinds of things that would be administrative. Doesn't have to do with the substance of the case, doesn't have to do with whether somebody's going to be released or not released, doesn't have to do with whether somebody's going to be detained or not detained. It's a side issue that doesn't involve the substance of the case.

A. I would say yes to that.

Q. Okay. When you started practicing law in 1972, the District Court had no recording at all; correct?

A. I believe that's correct.

Q. It was referred to, as some courts around the

country have referred to as, not a court of record; right?

A. (Witness nods head).

Q. And anything that was adjudicated in the District Court in that period of time was subject to trial de novo in Superior Court.

A. Correct.

Q. There were no jury trials in District Court.

A. Correct.

Q. Anybody didn't like what happened in District Court, they could go to the Superior Court.

A. Yes.

Q. They could have a jury trial or they could have another bench proceeding and do it all over again, and maybe that was one of the justifications for not having a record; right?

A. (Witness nods head).

Q. And that changed over the years. District Court came to have jury trials, the trial de novo system in a gradual way was eliminated eventually --

A. Correct.

Q. Now, you were last in the District Court in 2002; correct?

A. Correct.
Q. And then you moved to Superior Court.
A. Yes.
Q. And over the years, both when you were in the District Court and when you were in the Superior Court, you did lobby conferences off the record.
A. Yes.
Q. Some judges did and some judges didn't. And in the Superior Court at least, it was a topic of some controversy --
A. It was.
Q. -- among the judges.
You were the sort of judge who read the decisions coming out of the SJC.
A. I sure was.
Q. And you know that over those years there were a series of comments in SJC decisions about the practice of lobby conferences off the record.
A. Correct.
Q. You know that in 1992, when you were on the District Court, the SJC issued Commonwealth versus Fanelli, that's F-a-n-e-l-l-i, and they said, note that if lobby conference is held, the better practice is to record it. Do you

remember that?
A. I do. And that's why I did not do -- actually, I did not do lobby conferences. I would go off the record while I was on the bench, but I was -- I didn't do -- I don't remember anything about any lobby conferences on the Superior Court.
Q. On the Superior Court.
A. On Superior Court.
Q. So from 2002 --
A. Right.
Q. -- forward, --
A. Yes.
Q. -- you did not do any conferences off the record -- I want to make sure we're clear about what -- about the use of the term "lobby conference."
A. Right. Because I don't -- I mean, bringing people into my lobby and doing conferences, I did not do that.
Q. But you also didn't go off the record in any conference with the lawyers in Superior Court when you were talking about the substance of the case.
A. I did. But I did it when the lawyers would

ask to approach. I can give you a quick example. And that is this: I had a civil case where two of the -- two very well-known lawyers, very fine trial lawyers came in front of me involving the death of an individual who had been hit by a car. And the contention was, by the defendant, that the individual who hit the person in the crosswalk was not in the course of his employment. And so I said, well, I guess, looking at the docket, we ought to make some room for a motion for summary judgment, and the two lawyers looked at each other and said can we do a side -- said can we go off the record, Judge. They came over and they explained to me that they were trying to work out a settlement and that -- which they would prefer if the adjuster, who was sitting in the back of the courtroom, was not aware of.

Q. That was a civil case.

HEARING OFFICER: And that was --

A. That was an off the record conference about the case. And it's certainly substantive in nature.

Q. That was a civil case.

A. That was a civil case.
Q. And in the Superior Court in those days, a lot of stuff happened off the record in civil cases; right?
A. (Witness nod head).
Q. Civil cases were very different from criminal cases.
A. Right. But this was probably in 2014 this happened. But yes. Still the same.
Q. So in 2014, in the Superior Court, --
A. Right.
Q. -- there were court reporters.
A. Right.
Q. It was maybe the beginning of the time --
A. You could kind of do this. (Demonstrating).
Q. Well, if the -- more than that --
HEARING OFFICER: If I may, can, can the record reflect what the witness just did, --
THE WITNESS: I'm sorry.
HEARING OFFICER: -- when she said you could kind of do this, you put your right hand to the side.
THE WITNESS: Right.
HEARING OFFICER: I just want to make sure the record's clear.

A. That would be -- Yeah. Just gestured to the court reporter that it wasn't on the record.

Q. But more than that, in a civil case in the Superior Court in the days when the court had court reporters and not electronic recording, what would often happen in Superior Court was that you'd have a court reporter in the courtroom in the morning when you were doing trials, and then in the afternoon when you were doing non-evidentiary proceeding, such as the kind of case conference that you're referring to, the court reporter would be back in her office making a transcript, and unless there was a pro se, you would do it off the record.

A. That's correct.

Q. But that was in civil cases; right? You couldn't do that --

A. Absolutely.

Q. -- in criminal cases. Criminal cases were a whole different story.

A. Exactly.

Q. When you were on the Superior Court, having in mind what the SJC had said, when you had a conference about the substance of a case, you would not go off the record.

A. That is correct.
Q. And the SJC reiterated, in 2002, in Commonwealth versus Serino, S-e-r-i-n-o, we again recommend that unrecorded lobby conferences be avoided. Do you remember that?
A. I do.
Q. Then, in 2007, they got more emphatic. Do you remember this? Murphy versus the Boston Herald.
A. Yes.
Q. Do you remember the Murphy case?
A. I remember it well.
Q. He was a colleague on the Superior Court.
A. Yes, I do remember.
Q. And he had done a lobby conference off the record in a case involving an allegation of rape of a teenager.
A. Yes.
Q. Do you remember that?
And the Boston Herald ran -- and then of course it took off on other media. But it started with the Boston Herald. They ran a series of articles in which they attributed to Judge Murphy some language in an off the record lobby conference that a judge would not want to have attributed to him.

A. Exactly.
Q. Correct? And he sued the Boston Herald for defamation. Do you remember that?
A. I do.
Q. Much to the amazement of judges in general, he won. Do you remember that? He won a judgment. And it went to the SJC, and the SJC affirms the judgment, and they dropped a footnote. The footnote said, if you remember, if there ever was a case that demonstrates the need for lobby conferences where cases or other court matters are discussed to be recorded, this is the case. This litigation, with all its unfortunate consequences for those involved, might not have occurred if the critical lobby conference had been transcribed. We trust that the lesson learned here will be applied by trial judges to prevent unnecessary problems that often arise from unrecorded lobby conferences. Do you remember that?
A. I do.
Q. And that got a lot of attention across the courts -- do you remember that -- and across the bar?
A. It did.

Q. And then, going back a little bit – District Court Rule 11 doesn't apply to Superior Court.

A. Correct.

Q. Or didn't at the time that you were on the Superior Court. And in the time that you were on Superior Court at least, there was no rule about recording, there was a practice.

A. (Witness nods head).

Q. And as we talked about, over the years there were many discussions amongst Superior Court judges, some of them still did it, until 2015 when the SJC prohibited lobby conferences off the record in the revision of Rule of Criminal Procedure 12(b). Do you remember that?

A. I do.

JUDGE FABRICANT: That's all I have. Thank you.

REDIRECT EXAMINATION

BY MS. MULVEY:

Q. I just want to be clear, Judge MacLeod. We heard a lot of talk about a lobby conference.

A. Right.

Q. Is that different than a minute or two at the side bar?

A. Totally. It's not the same thing.
Q. Why not?
A. Well, usually a lobby conferences, as I remember it when I was an assistant DA, I was in the lobby with the defense attorney and the judge, and we would be kind of hashing around what the recommendation was versus what was and what the Commonwealth wanted to do, and we would, we would have that whole substantive conversation in the lobby with the judge, and then we would go out on the record and do whatever it was as the judge would say something, well, I don't need to hear from the victim. All of that would get hashed out in the lobby conference, which usually was not on the record back in those days, and we'd go out and do whatever we were going to.

But it's very different as opposed to, again, District Court, in District Court, you know, I used to say to people, you know, this is McJustice. We are McDonald's of the justice world, because we do not have the time or the capability to necessarily engage in a perfect courtroom atmosphere, but we do what we do to get the work

done every single day.

Q. And do people in the District Court do the best they can to be fair to everybody?

A. No question in my mind.

MS. MULVEY: Thank you.

JUDGE FABRICANT: Very brief follow up, if I may.

RECROSS-EXAMINATION

BY JUDGE FABRICANT:

Q. Judge MacLeod, the difference between what you describe as a lobby conference and something off the record at side bar very brief is that it's brief.

A. Right.

Q. And that may or may not be the only difference depending on what it's about; correct?

A. It may.

Q. That series of SJC decisions in which they commented about lobby conference, the message, as you understand it and as it was broadly understood, was going off the record is a big risk; correct?

A. That's correct. But they never say don't do it.

Q. Until 2015, when they said it's --

A. Exactly.
Q. -- part of the plea conference -- They did say in 2007, --
A. Should be avoided, yes.
Q. -- this wouldn't have happened, --
A. Yes.
Q. -- and we wouldn't be here, all of the unfortunate consequences of this case would not have happened if we had a record so that we knew exactly what was said off the record.
A. No question. That's exactly what it says.

JUDGE FABRICANT: Thank you.

THE WITNESS: Good?

MS. MULVEY: I have nothing else. Thank you.

HEARING OFFICER: Thank you.

MS. MULVEY: Judge Joseph calls Elizabeth Bostwick.

ELIZABETH BOSTWICK, SWORN

HEARING OFFICER: Thank you.

DIRECT EXAMINATION

BY MS. MULVEY:

Q. Good morning, Attorney Bostwick. Would you just tell us your name for the record, please.

A. Good morning. My name is Elizabeth Bostwick.
Q. And we've heard, in 2018, you were a bar advocate in, among others, the Newton District Court?
A. Yes.
Q. Can you tell us a little bit about your professional background up until 2018?
A. So I became a lawyer in January of 2000. I'm a graduate of Northeastern Law School. I worked for a small firm for a while, and then I went to corporation counsel's office, City of Boston, and then I did private practice for a period of time, and went back to corporation counsel's office for a short while, and then I returned to private practice again, solo practitioner.
Q. And at the time we're here about, were you involved in representing criminal defendants?
A. I was. I was a member of the Middlesex Defense Attorneys, which is the agency or non-profit that handles bar advocates who work for Middlesex County.
Q. We've heard that term "bar advocate." When you're a bar advocate, what do you do?
A. You represent people who are determined indigent by the probation department. It's

typical that you work in a couple different courts and you make quote-unquote a duty day where you're the attorney helping the court handle any matters that, you know, you have indigent defendants or a variety of things, Section 35 or whatever, helping the court representing those folks.

Q. You said you might have a duty day. What would you do on a duty day?

A. I mean, it really depended on the court's needs. Right? So you were basically making the commitment to being the lawyer of the day and stay, you know, for whatever the court needed, so you could represent a variety of people on a variety of issues.

Q. So would you essentially spend your day at that court in case somebody needed a court-appointed lawyer?

A. You would, yes.

Q. Were you the bar advocate or the duty attorney on April 2nd, 2018, in Newton?

A. I believe that's accurate. I have no memory of the specific day, but yes.

Q. That sounds like something you probably would have been doing at that time?

A. In 2018, yes.
Q. Were you assigned on April 2nd, 2018, to represent a defendant named Jose Medina Perez?
A. Yes.
Q. Do you have some memory of the case and the proceedings?
A. I have some memory, but it was a while. I also was undergoing cancer treatment at the time; so...
Q. A time to forget.
A. No. But it was just -- I mean, I was physically undergoing cancer treatment; so...
Q. Was that the only day you had any involvement with Mr. Medina Perez?
A. Yes.
Q. Do you remember that it was a Monday morning?
A. No.
Q. Do you recall that he had been arrested and was being detained when he showed up for his arraignment?
A. I recall that he was detained.
Q. Do you recall what the charges were?
A. I recall that, I recall that what was at issue was the fugitive of justice warrant. Right? From Pennsylvania. That's what I

recall.
Q. Do you recall that he had been arrested on state misdemeanor drug charges?
A. I believe so. I don't have specific memory of that but..
Q. You do remember something about a fugitive warrant?
A. I do.
Q. And had you dealt with those before?
A. Yes.
Q. Can you tell us from the perspective of a defense lawyer what you needed to do if they had someone with a fugitive warrant?
A. Ideally, I mean, ideally, you can, you try to figure out if that is the person. And, you know, there's a lot of ways to try to do that. Obviously, as a lawyer on duty, you know, I have, I have somewhat limited access. I don't have a computer, you know. I may have a phone on me. Certainly, the phones are much different now than they used to be. So I have a little -- somewhat of a computer. But you try to determine if that is in fact the person.
Q. When you say "that is in fact the person," can you just explain what you mean by that?

A. Sure. You try to determine whether the individual that is being held on the fugitive from justice warrant is in fact the person on the warrant from the other state.

Q. How does the fugitive of justice warrant get hooked up with the person in the first place when they're arrested?

A. I think they match them, I think they match them on name and perhaps date of birth.

Q. And are there sometimes questions about whether this is truly the person who's the subject of the warrant?

A. Yes.

Q. Was that true for Mr. Medina Perez?

A. I don't have a specific memory of that. I mean, I do recall, I do recall being struck by the photo. Right? So they had a photo of him in the booking process and then there was a photo that came with a warrant, I believe.

Q. And when you looked at those, did you have some impression about whether this was the right guy?

A. My recollection was it was a different looking individual, different looking man.

Q. Do you have a general recollection that there was an issue about his identity while you

represented him?
A. I believe that I was trying to convey that I did not think it was him.
Q. To whom were you trying to convey that?
A. To the court and the Commonwealth.
Q. Who was representing the Commonwealth?
A. Shannon Jurgens.
Q. Was she somebody that you knew?
A. I knew her from the court.
Q. And what was your impression of her?
A. I mean, I also had some good experiences with Shannon.
Q. As a reasonable, fair prosecutor?
A. I thought that she was a very fair and just prosecutor.
Q. Back in 2018, did you know an attorney named David Jellinek?
A. I did.
Q. How did you know him?
A. I knew him -- He was actually employed in City of Boston for a while as well.
Q. When you worked or overlapping?
A. I think, yeah, I think it was somewhat of an overlap. I mean, he worked in the police department. I worked in corporation counsel's

office.
Q. Did you also know him from the criminal defense work or bar advocate work?
A. Yes.
Q. Do you remember seeing David Jellinek that morning in the Newton District Court?
A. I have no memory of that.
Q. In the course of representing Mr. Medina Perez, did you ask for second and third call?
A. I believe I did, yes.
Q. Is that a common practice in District Court?
A. Yeah. I mean, I could be doing multiple things, you know, getting pulled in different directions, you know. I don't think that was my only case that day. I mean, Newton wasn't a terribly busy court, but I don't think it was the only thing that happened that day.
Q. And what was the purpose of asking for a second or a third or more calls?
A. I think I was trying to gather additional information. I think I was probably dealing with another issue as well, another client.
Q. Was it common to, in District Court to ask a judge for a little more time to do something?
A. Sure.

Q. And was that generally granted?
A. Sure. Absolutely.
Q. Do you recall who the judge was that day?
A. I do.
Q. Who was that?
A. Judge Joseph.
Q. Had you had experience with Judge Joseph before?
A. No.
Q. She was a relatively new judge?
A. I don't know that. I don't think I appeared before her before.
Q. In the course of the morning, do you recall an ICE agent being in the Newton District Court?
A. Yes.
Q. What do you recall about that?
A. I just recall that he was in the courtroom all morning. I did speak with him. I think, you know, he was there for Mr. Pena.
Q. Mr.?
A. Oh, Perez.
Q. Right. Okay. So in addition to the fugitive warrant, did you know there was an ICE issue as well?
A. I knew there was a detainer.
Q. And were you representing him with respect to

that ICE issue as well?
A. I was representing him in terms of the criminal charges in the District Court, and certainly, to the extent, you know, that I could be helpful on the detainer issue, I would be helpful.
Q. Did you spend time that morning at intervals investigating Mr. Medina Perez's case?
A. I remember -- Yes, yes.
Q. Do you remember whether he spoke English?
A. He did not speak English.
Q. How would you communicate with him?
A. There was an interpreter.
Q. Were you able to even have a basic conversation with him in English?
A. I don't remember that. I do know Spanish, but I don't remember that.
Q. Was there anybody there connected with Mr. Medina Perez?
A. He had, I remember he had some friends there for a while.
Q. Do you remember how many friends?
A. I don't.
Q. Do you remember speaking with them at all?
A. I did speak with them.

Q. And was that in -- don't tell us about it, but in connection with this situation?
A. Yes.
Q. Did you continue to represent Mr. Medina Perez through the lunch hour?
A. My understanding was I did.
Q. And do you have a big book of tabbed exhibits in front of you?
A. I do.
Q. Can I ask you, if you would, to take a look at Exhibit H, please? H, like Harry.
A. Yes.
Q. And if you would, would you turn to Page 147. And I'm talking about transcript pages, not physical pages.
A. I believe I'm there.
Q. Do you have that?
A. Yes.
Q. All right. And up at the top the clerk is saying, so, ma'am, Ms. Bostwick has been appointed to represent you. Was that what you meant, there were other clients besides Mr. Medina Perez you were being appointed for?
A. That's what the transcript says.
Q. Okay. And if we scoot down to Line 16, the

clerk says, Judge, that leaves us with Mr. Perez, and Attorney Bostwick, are we still -- and you said I just sent a fax.

A. That's what it says.

Q. Do you have a recollection of sending a fax?

A. I think, I think I did send a fax to his employer.

Q. Okay. Was that part of your investigation about his identity?

A. Yes.

Q. Okay. And then the clerk says, so that just leaves, and there's a conversation with Judge Joseph and another lawyer named Mr. Harrington?

A. Yes. That's what the transcript shows.

Q. And then if we go over to Page 149, at Line 18, are you speaking again?

A. That's what the transcript indicates, yes.

Q. And you said, I think, Your Honor, I have an appointment this afternoon, and I wanted to ask if we could have a -- and I understand that the interpreter has to be somewhere as well, if maybe we could have Mr. Medina's case called at 2:15 or so, so that would just give me time and then we're not just waiting. Do you remember

needing a little time for a medical appointment?
A. I do.
Q. And did Judge Joseph give you that time?
A. Yes.
Q. Again, is that something most judges would do if you said can I come back at 2:15?
A. Yes.
Q. Did you leave the courthouse anticipating that you would come back and continue to represent Mr. Medina Perez?
A. That was my understanding.
Q. Up until that point, had Attorney Jellinek approached you and told you he had been retained?
A. Nobody contacted me telling me that he had secured private counsel.
Q. Do you remember seeing Mr. Jellinek before you left for lunch?
A. I don't remember that.
Q. Do you remember giving him any documents?
A. I don't remember that.
Q. Okay. You went off to lunch and your medical appointment?
A. Yes.
Q. While you were away from the courthouse, did

anybody contact you to tell you that you would no longer be representing Mr. Medina Perez?

A. No.

Q. Did you show up thinking you still represented him?

A. I did.

Q. What do you remember about coming back in the afternoon?

A. I remember I came back probably pretty close to 2:00, 2:15. I remember that I ran into Attorney Jellinek. He indicated to me that he had been retained.

Q. Was that the first you were hearing of it?

A. Yes.

Q. Did you have a conference with him about Mr. Medina Perez's case?

A. I'm sure I must have said something, something to him. I don't remember what specifically.

Q. Do you remember giving him any documents or any of your file?

A. I don't.

Q. What did you do after that?

A. I stayed in the courtroom, you know. I didn't know if, you know, I was going to be

relieved for the afternoon, so I stayed.
Q. As part of being the duty attorney, would you normally stay until the court proceedings conclude for the day?
A. I mean, it would be common -- Sometimes. Right? If the clerk called me and said we don't need you to come back and -- you know, I would probably have gone home.
Q. Okay. But you were back first to represent Mr. Medina Perez and then you continued to stay in case anybody needed you?
A. I -- My memory is I continued to stay because I came back for Mr. Medina. I didn't know if [inaudible] -- That's what I remember.
Q. Where did you sit?
A. My memory is that I sat to the right side -- if you're facing the bench, I sat to the right side.
Q. Okay. Is that the side where side bars would be held?
A. Yes.
Q. Did you see a side bar take place in Mr. Medina Perez's case?
A. Yes.
Q. Were you sitting in the gallery looking at it?

A. I wasn't sitting in the gallery. I was sitting behind the bar.
Q. So, actually, within the bar enclosure?
A. Yes.
Q. And were you able to hear the side bar?
A. No.
Q. Was there white noise that went on?
A. I'm sure there was. I don't know.
Q. But even from within the bar you weren't able to hear what they were saying?
A. No.
Q. Do you know whether parts of it were on or off the record?
A. I mean, my memory is that I did know that we went off the record at some point, but I couldn't tell you when that was.
Q. And could you hear anything at all from either the on or off the record part?
A. No.
Q. Did you see Judge Joseph speaking with David Jellinek and Shannon Jurgens?
A. Yes.
Q. Did anything appear unusual or out of the ordinary to you as you watched it happen?
A. I have no memory of anything unusual.

Q. Just sort of another day, another side bar?
A. I just know that they were at side bar addressing the court.
Q. After that finished, do you recall that Mr. Medina Perez was arraigned?
A. I don't remember when that occurred. I think he would have been arraigned earlier.
Q. In any event, there was some sort of continued proceeding and he was then released? Do you recall that?
A. Yes.
Q. Do you recall some discussion in open court about Attorney Jellinek going downstairs to speak with Mr. Medina Perez?
A. Yes.
Q. And the lockup would be downstairs?
A. Yes.
Q. Had you had experience in the Newton District Court speaking with clients in the lockup?
A. Yes.
Q. Was that unusual?
A. No.
Q. If you -- or if the client needed an interpreter, would the interpreter go to the lockup?

A. Sure.
Q. Was that again pretty routine?
A. No. I mean, it wasn't unusual. No, it was not unusual.
Q. If you needed it, it happened.
A. Of course. I'm sorry.
Q. Once they went downstairs, do you remember what you did next?
A. I don't.
Q. Do you remember seeing either Attorney Jurgens or Attorney Jellinek later that day?
A. Yes.
Q. What do you recall about that?
A. I remember leaving the courthouse. I believe I ran into them on the outside area of the courthouse.
Q. Physically outside the building?
A. Yes.
Q. What do you recall about that?
A. I recall being there and Attorney Jurgens is there and I think David Jellinek came out.
Q. Do you recall either having or overhearing any conversation about Mr. Medina Perez?
A. I don't recall specific conversation, no.
Q. Do you remember saying to Attorney Jellinek, I

know what you did and you obstructed justice?
A. I don't have a memory of that.
Q. Did you at that point know that Mr. Medina Perez had gone out the back door?
A. He didn't come upstairs with Attorney Jellinek.
Q. Did you expect that that's what would be happening?
A. That's what I thought would have happened, yes.
Q. And did you have an understanding at that point about why that didn't happen?
A. I didn't know.
Q. Did you understand what had happened with the Pennsylvania warrant?
A. In terms of --
Q. Of why he wasn't being held on the warrant?
A. My understanding, I think that the DA agreed that it wasn't him.
Q. Did that surprise you?
A. I had tried to make that argument earlier. I thought it wasn't him, and so I think she agreed.
Q. Okay. But not while you were representing him.
A. No.

Q. Do you recall anything else about your interaction with either Attorney Jurgens or David Jellinek?

A. No.

Q. Did you ever get contacted or interviewed by the Federal U.S. attorney or anybody investigating this case?

A. No.

Q. Were we the first ones who came looking for you?

A. Yes.

Q. And was that probably December of this year -- last year, 2024?

A. I believe that's correct, yes.

MS. MULVEY: I have nothing else. Thank you, Attorney Bostwick.

JUDGE FABRICANT: I'll be very brief.

CROSS-EXAMINATION

BY JUDGE FABRICANT:

Q. Good morning, Attorney Bostwick.

A. Good morning.

Q. You were appointed to represent Mr. Medina Perez, and you worked hard for him; right?

A. Certainly.

Q. And you worked right up until the lunch break, and then court recessed, and you thought you were going to come back and continue to represent him.

A. Absolutely.

Q. And then Mr. Jellinek came in and took over.

A. Yes. I think -- Yes.

Q. And that happens sometimes; right?

A. Of course.

Q. It's not an unusual event.

A. No.

Q. And we can all speculate about why it happens. Maybe there are some unfair stereotypes out there in the world about appointed counsel. But in any event, it happens; right?

A. Sure.

Q. And when you came back and you sat in the courtroom, you said you sat inside the bar. So from the perspective of the bench, you'd be visible, wouldn't you?

A. Yes.

Q. You were not at side bar.

A. No.

Q. And you couldn't hear what was said at side bar.

A. No.

JUDGE FABRICANT: I have nothing further. Thank you.

MS. MULVEY: I have nothing else. Thank you.

HEARING OFFICER: Thank you very much.

MR. HOOPES: Judge Joseph would call judge, retired Judge Carol Ball.

HEARING OFFICER: Good morning.

Former HONORABLE CAROL S. BALL,

SWORN

DIRECT EXAMINATION

BY MR. HOOPES:

Q. Good morning.

A. Good morning.

Q. Again, would you state your name and spell your name for the record.

A. Yes. My name is Carol Ball. C-a-r-o-l, middle initial S, and last name B-a-l-l.

Q. And I'm stopping but I'm going to call you Judge Ball or Attorney Ball.

A. Yeah.

Q. Whatever you want.

A. Yeah. When you and I worked at the DA's office only like 80 years ago; so...

Q. 45. So you were a judge, --

A. Yes.

Q. -- and now you're retired; is that correct?

A. Yes.

Q. Could you share with the hearing officer your education, training, experience both as a lawyer and as a judge.

A. Okay. I went to Northeastern Law School -- we have a reunion of Northeastern Law group here -- in Boston. I clerked for the Superior Court in this building. And then I was an assistant DA in Middlesex County across the river for eight years. Tried a lot of cases. We were all very lucky because the -- there had been -- the full-time bill was passed right before we started. Up until that point, lawyers from the Commonwealth of Massachusetts who were DA's would try cases in the morning, criminal cases in the morning, and then they all had civil practices in the afternoon.

So I can't remember the year was, but as of right after we got out of law school, that law was passed that DA's would be full-time. And therefore, there were a whole bunch of senior DA's who were making their

living off their practice in the afternoon. So they had quit and run off and run their practice. And young people like me, Tom, got a chance -- I tried my first murder a year into the job. So in my eight years, I was trying murder, rape, the usual felony stuff. Quite fun.

Q. Then after you left, did you enter private practice?

A. Yes. After that, I wanted to learn to try civil cases. I went to an insurance defense firm and was there for four or five years, and then for the next five or six years I was variously on my own or working in sharing expenses in conjunction with another lawyer or two. I had a trial practice, trying civil cases and also defense. And I did a lot of criminal -- not a lot, but a fair amount of criminal defense work.

Q. And was that criminal defense work in both the District Court and Superior Court?

A. It was. And Federal. Little bit in Federal Court.

Q. And at some point were you appointed to the bench?

A. Yes. 1996. Lightning struck and I was appointed to the Superior Court.

Q. And you were in the Superior Court for how long?

A. 19 and a half years. I retired on May 31st, 2015.

Q. Thank you.

Now, during the course of your practice, private practice, did you have occasion to experience judges going off the record?

A. Left, right, and center. I mean, I -- Yes.

Q. In both the District Court and in the Superior Court.

A. Yes.

Q. Could you explain that in more detail.

A. Yes. Back -- The whole on and off the record thing was a progression. And back when I was a law clerk and assistant DA, we spent hours in judges' lobbies with the lawyers in the lobby. Mostly -- I was in Superior Court mostly, as a law clerk entirely. Lobby was the traditional -- you heard it described here, with both sides going, the judge saying what would you like me to do, so defense counsel would take it down to their client. So lobby conferences.

In addition, there was a fair

amount of side bar stuff when you were in assignment sessions, like the first session here. People actually refer -- I'm not going to beat a dead horse about that. People would go on and off the record for various reasons. It became, it became -- Popular sounds correct, but I don't mean that. People became aware that this balance of lobby conferencing and doing stuff in the public was a problem for reasons we've all discussed. And the courts pushed us towards going, towards going on the record and definitely not doing stuff in the lobby because it looked like there were accusations -- You didn't want people to think when we're at the lobby laughing and joking and cutting a deal. You know, that was not -- They want people to see we're doing serious business. And so there was definitely -- The move was to go to side bar and do it in full sight of the public even if not in the hearing of the public.

There was, there was resistance all along the way of this progression. Because it was a very popular practice with lawyers on both sides, with judges, because everybody felt people were, and

they were, it's human nature, were much more -- you'd get the real scoop if you're off the record, that people are much more willing to give a judge the full information for any, you know, any number of reasons, privacy reasons, office politics reasons, witness problems, and so we all felt that we were --

I mean, the goal here was to do justice in the individual case, you know. And to do that, you, as a judge, you want as much information as you possibly can.

And there is just -- to this day I -- you know, I know that I retired in 2015. I would have been in tears about the fact that this rule was not probably -- finally passed -- She's laughing. She's right. -- to go on the record, you know, to be all on the record all the time. Because I really meant that it allowed us to do justice to have the opportunity to get the real scoop on some things, if you will. And that is -- I understood that that's what it was.

Q. So when you were on the bench as a Superior Court judge, did you go off the record?

A. Yup.

Q. And could you describe that progression and how you conducted those when you were on the Superior Court?

A. Well, when you're saying off the record, you mean in lobby conferences and in addition to all the other stuff.

Q. Well, if we could separate the two.

A. Yeah.

Q. First describe the actual lobby conference and then what you would do when you're out on the bench.

A. Right. Well, the lobby conference increasingly became not in the lobby anymore but out on the record. We're out at side bar, as you've all discussed, and the conversation would be off the record initially when the transition was made out into the courtroom. And then increasingly it became on the record. For lobby conferences. And it was the same -- basically, I have to say, I found it less intrusive than I thought it would be, would still be able to -- in open court you would still be able to, even though side bar off the record even, there still was clearly the appearance to the public that we were doing our job, that it was, you know, a

real, a real -- like you see justice work without having to know how the sausage was actually made, which one judge says, public doesn't need to know how the sausage is made. That's literally an old thought. Words not to live by anymore. But anyway.

Q. And when you --

A. Oh, sidebar. Other stuff.

And the other was, both the same. I sat in -- As the years go by in the Superior Court, you get seniority, you get a lot more choice of our courts you sit in and what sessions you sit in. And I became, I became someone who sat in this building on the sixth or seventh -- seven, I think, seventh floor. And I did a lot of -- It wasn't just lobbies. It was also -- It was case management session, so you're going out to trial, what motions do need to be filed here, have they been filed, discovery, you know, years of stuff, discovery turned over.

And there were lots of side bars on that. And mostly counsel saying, Judge, can we approach and someone saying can we go off the record. And it would often be things like,

listen, I got a doctor's appointment at lunch, can I come back at 2:15, look, my guy wants to go pro se and it's really not in his interest, Judge, can you give me a second call so I can try to talk with him, his wife, you know. Lord knows judges don't want lawyers -- defendants to go pro se. So you know, there would be that kind of stuff. So there was all kinds of just getting business done. And I didn't -- Well, anyway.

Q. Did you require counsel to provide the reason before they came up to --

A. No. You know, I really like lawyers. And I trusted lawyers. I really felt that -- I always trusted that lawyers were doing the right job, were helping counsel and doing the right job for their clients. So I err -- We all have different attitudes about it. But I err on the side assume that counsel's asking to go off the record or approach or go off the record, they were doing it for reasons that were consistent with their representing their client effectively. And if there was a problem, then you deal with it at the time.

Q. Were you aware of other judges in the

Superior Court?
A. Oh, yes.
Q. And when you were in the District Court, private practice, were you aware that it was not just one judge, that it was multiple judges --
A. Yes.
Q. -- going off the record?
Did Judge Joseph ever appear before you in the Superior Court?
A. She did.
Q. And would that have been occasions when you would have gone off the record?
A. Absolutely. She was in the AG's office across the street. They bring all their cases in Suffolk, so she was in front of me all the time at first.
Q. Now, you were present yesterday when there was a question about pausing the proceeding; correct?
A. Uh-huh. Yes.
Q. And can you share with us any custom and practice that you had with pausing the proceeding without requiring an analysis mentally about all the justifications and reasons for doing that?
A. Well, I'm assuming that we're talking -- What

I heard yesterday was the conversation about Judge Joseph's proposal to hold the defendant overnight on the out of state warrant and put it over until people have had a chance to figure out all the identity of Mr. -- blanking on...

Q. Medina Perez.

A. -- Medina Perez. And that -- Yes, I'm aware of hearing that. It is -- It was interesting -- Well, anyway. It is true that instead of a bar analysis, bar exam kind of analysis of that, where spot the ethical problem, you could see that since -- I mean, in effect, the Pennsylvania warrant at that point was sort a nullity, whether it was a de jure nullity or what, but it was de facto a nullity, it's kind of like -- But the defense attorney here -- I mean, you would never do that without the defense attorney running along and you're assuming that the defense attorney, by him saying that's a great idea, let’s do it, has his client's authority to basically in effect waive his right to a bail hearing that day. So that it didn't -- to be honest, it didn't occur to me that if that's what counsel wanted, I'm trying to get justice on an individual case, for everybody involved, and it

just wouldn't occur to me -- I mean, I would have to worry about the paper to hold him on, you know, what do we hold him on here. But just wouldn't occur to me that that's not properly done. Probably a good thing I'm not a judge anymore.

Q. And have you done that in the past --

A. Oh, yes.

Q. Are you aware of other judges in this courtroom -- in this courthouse who have done that in the past?

A. I think, yeah. Yes, some. You know, as my former chief said, there was lots talking about at lobby conference. There was definitely a group of us that thought strongly that going off the record assisted in the job and the group that said, hey, the SJC's not happy with this, it's not a good idea anyway. There were definitely people that did it and people that didn't do it.

Q. Lastly, in your experience both as a prosecutor and as a private counsel and as a judge, has it been a custom and practice of almost every judge to be concerned at the end of the day about pushing custodies out and getting it done so that the court officers and the court staff

don't have to remain?
A. Oh, yeah. There were a few vans here in this court, there's a van that comes by at noon, they drop them all off in the morning. Vans from Middlesex, from Essex, from Norfolk. They're all in here dropping the bodies off. They would bring -- We all referred to them as the bodies in the lockup. And drop the defendants off. And then they make circuit at lunchtime. So there's a huge push to get the defendants who are custodies out the door by lunch so that they can go. Because once the vans start coming back in the afternoon, they stop at a particular time. And if you have custodies that aren't ready to go, that van's got to come back, but it's got to come back after stopping in Brockton, in Dedham, and you're going to have court officers, like our friend Vance here, sitting on the eighth floor at 7:30 or 8:00 at night before the defendant is picked up and go back. And the defendants don't like it either because they miss dinner. You know what I mean? So the idea is to get the custodies out the door, get the business done properly, but get the custodies out the door as soon as you can. It's only fair

to courthouse staff.

MR. HOOPES: Thank you very much.

CROSS-EXAMINATION

BY JUDGE FABRICANT:

Q. Good morning, Judge Ball.

A. Good morning, Judge Fabricant.

Q. Very nice to see you.

A. You, too.

Q. You talked about needing some paper to hold somebody on.

A. Yup.

Q. Right? It's called a mittimus.

A. Yeah.

Q. And the mittimus goes with the person who is in custody from the court security or from the court to whoever's going to be the custodian, the jails or whoever else; right?

A. Yup.

Q. And it needs to say what he's being held on.

A. Yes.

Q. Right? So you need to come up with something that he's being held on?

A. Yup. Right.

Q. Did you ever -- You never sat on the

District Court; correct?

A. No.

Q. You became a Superior Court judge in 1996.

A. Correct.

Q. You retired you said 2015; is that right?

A. Yup.

Q. Somehow I was under the impression it was '16. But it was '15.

A. It was '15.

Q. You spent a lot of time in your years on the Superior Court in this building.

A. Yup.

Q. This building is really, really busy; right?

A. Oh, yes.

Q. It's the busiest. The Superior Court.

A. It's great. It's a great place to sit. It's moving.

Q. And the other place where you spent a lot of time was Brockton Superior Court.

A. Correct.

Q. And that is also a very busy court.

A. Yup, yup.

Q. So the process you described with the vans coming and going, and if it's not ready, they have to come back later and court officers

having to stay late, and missed their dinner, that happens in this building; right?
A. Oh, yeah.
Q. And it probably happens in Brockton, too.
A. Oh, yes.
Q. Newton District Court, do you think it happens there?
A. Well, I think they probably don't stop by as often. But it does matter if there's a body -- sorry, That sounds horrible. -- if there's a defendant there to pick up. It does. They have to come back. But you're absolutely right, it's not as busy.
Q. A much less busy court, --
A. Yes.
Q. -- as far as you know.
A. Yes.
Q. When you started practicing law in 1977, you were assistant district attorney, and you said you were very lucky.
A. Yeah.
Q. The way the district attorney's office is usually started, you start at the District Court.
A. Yes.

Q. And then if you do a good job, you move to Superior Court.
A. Yes.
Q. And in your case, it happened quickly.
A. Yeah. Because there was a lot of transition.
Q. When you started practicing at the District Court in 1977, recording was a new thing; right? It probably wasn't in all the District Courts.
A. Sure. Absolutely.
Q. Just being installed. District Court judges weren't used to it. District Court practitioners weren't used to it.
A. Yeah. Nobody particularly liked it.
Q. Nobody liked it. And many of the judges who were on the District Court in 1977 were still there in 10 or 12 or 15, 20 years later; correct?
A. Yes. Until they hit 70 and they had to...
Q. In Massachusetts, just to be clear, --
A. Yeah.
Q. -- judges have mandatory retirement at age 70; correct?
A. Yes.

Q. By constitutional amendment enacted in 1974, maybe?

A. Good.

Q. Some judges like that and some don't. Some chiefs like it and some don't.

A. Exactly.

Q. You were appointed to the Superior Court in 1996.

A. Correct.

Q. It was actually February of 1996 --

A. Yes.

Q. -- that you joined the Superior Court.

A. Valentine's Day.

Q. So the last time you would have appeared at the District Court -- Let me just step back a minute. You were doing -- You were trying serious cases; correct?

A. Yes.

Q. As a lawyer.

A. Yes.

Q. But you still might from time to time appear in District Court.

A. Bread and butter. OUIs.

Q. OUIs?

A. Definitely bread and butter in private

practice.

Q. Because that actually -- that sort of high volume practice works better for earning a living -

A. Yes.

Q. -- than the more serious cases than in Superior Court.

A. Yes.

Q. Now, the last time you would have appeared in the District Court would have been late 1995.

A. Yes.

JUDGE FABRICANT: Okay. That's all I have. Thank you very much.

THE WITNESS: Don't you want me to walk me through -- I.

MR. HOOPES: Thank you very much.

HEARING OFFICER: Thank you, Judge.

MR. HOOPES: Judge Joseph calls Allison Koury. I believe she's right outside.

HEARING OFFICER: Good morning.

ALLISON KOURY, ESQ., SWORN

DIRECT EXAMINATION

BY MR. HOOPES:

Q. Ms. Koury, could you just say your name again and spell it, please, for the --

A. Sure. Allison, A-l-l-i-s-o-n, K-o-u-r-y.

HEARING OFFICER: Could I ask if you could stay as close to the microphone as possible.

THE WITNESS: Sure.

HEARING OFFICER: You can move it closer to you if that would be better.

THE WITNESS: Very good.

HEARING OFFICER: Thank you.

Q. And you're an attorney.

A. I am.

Q. And could you share with the hearing officer your education, training, and experience.

A. I received my bachelor's from Providence College, my JD from Suffolk, and my LLM from BU.

Q. And you graduated and got your JD. What did you do next?

A. I started working as a tax lawyer, and did that for couple of years, maybe three years,

while I got my LLM. And then I realized that is not what I wanted to do, and I was very unhappy at the time. At the time I was young and had nobody to worry about but myself, so I knew I should change fields before I got too used to making a lot of money, so to speak, so I became a bar advocate.

Q. And what year would that have been? When would that have been?

A. That would have been the early 1990's.

Q. And how long were you a bar advocate before you went to something else?

A. So I was a bar advocate until 2001 when I got married, had a baby, and switched to appeals, so that I could stay home and have a more flexible schedule, and I stayed in appeals until my baby got his license, and then I went back to Trial Court.

Q. And what year would that have been?

A. 2017.

Q. And during your first stint as a bar advocate, what courts were you bar advocate?

A. Just Lowell District Court.

Q. And so, again, that would have been Lowell District Court in what years, from when

to when roughly?
A. Roughly in the 1990's.
Q. And so when you became a bar advocate again in 2017, which courts did you act as bar advocate for?
A. I was assigned to Waltham and Newton and eventually Superior.
Q. And so can you tell the hearing officer, how many days a week do you think you were in Newton?
A. I was in court four times a week, and it could be Newton, it could be Waltham. It just -- Whenever I had cases. But it was many times a week.
Q. So if we look at the transcript, you were actually in court in the Newton District Court on a case on April 2nd of 2018. Do you have a memory of that?
A. I do not. I have been told I was there.
Q. Aside from that, did you have experience with regard to custodies coming in, custody defendants or defendants in custody, coming into the Newton District Court and then being taken out of the Newton District Court?
A. Yes.

Q. And did you also have experience with people who came in in custody and then being released from custody?

A. Yes.

Q. And based on your observations and your experience with regard to the Newton District Court, when an individual was being released from custody in the Newton District Court, where were they released to?

A. They would go back downstairs. If they had come up in shackles, they would be brought back downstairs to remove the shackles. Even if they weren't in cuffs or shackles, they would go back downstairs to retrieve their property.

Q. Now, if you had a client who was released, would you see it as being unusual at all to be going downstairs to speak to him before he left?

A. Not at all. There are a number of reasons why I might go downstairs. Like --

Q. What would they be?

A. If something maybe confusing had taken place, I would want to go downstairs and make sure I was able to talk to the defendant before they actually left the building, or I might have a question for them, and especially when there was

an interpreter involved, and either of those things, I wanted to answer the defendant's questions or ask a question, I would want to make sure that I did that right away before -- while I still had both people in the building.

Q. Going back to your time in Lowell. That was in the mid to late '90's, if I understood it correctly?

A. Uh-huh. Yes.

Q. Did you observe the practice up there with judges going off the record?

A. Yes.

Q. I'm sorry. Go ahead.

A. It was a different era back then.

Q. Okay. And one particular judge up there went off the record.

A. Yes.

MR. HOOPES: Thank you. That's all I have. Thank you.

JUDGE FABRICANT: Very brief.

CROSS-EXAMINATION

BY JUDGE FABRICANT:

Q. Good morning, Ms. Koury.

A. Good morning.

Q. On April 2nd of 2018, you were in the

Newton District Court because you had been appointed to represent a person by the name of Pineda, if I'm pronouncing that correctly.

A. That doesn't ring a bell.

Q. So let me show you the docket. Let me see if that refreshes your memory.

JUDGE FABRICANT: If I may approach.

HEARING OFFICER: Yes.

Q. Take your time to read as much of it as you need to.

(PAUSE)

A. Okay. Yes.

Q. And take a look at -- Look at behind Tab H in that binder that you have in front of you. You have a binder in front of you.

A. Oh, yes.

Q. Turn to -- Looking at the numbers up in the upper right-hand corner, turn to APP 047, please. And then this is a minicript, so look at Page 5 in the transcript. Do you have that in front of you?

A. I see that, yes.

Q. And you can see that the clerk says, going down about -- to Line 10, the clerk says, calling the

matter of Commonwealth versus Pineda, and then the Commonwealth, the assistant district attorney who's not named here, says there is a private counsel that came in on Friday and requested an 11:00 a.m. call because he just filed an appearance Friday and had to be in another court, I believe I do have the request. And then the judge, again, not named here, says second call. And then the assistant district attorney says, okay, you have that. And then the clerk says, I have that. And then defendant's counsel -- So that would be you at that point; right?

A. Yes.

Q. It says, I had originally been appointed to represent Mr. Pineda, and I understand there's been a notice of appearance, may I withdraw.

A. I see that, yes.

Q. And the judge -- the court says, okay, you may.

A. (Witness nods head).

Q. So that was a situation where you had been appointed, and then the defendant or somebody on his behalf retained counsel, and retained counsel came in and replaced you.

A. Yes.

Q. And that just happens sometimes.
A. Yes.
Q. It probably still happens sometimes. And there are lots of reasons why it might happen. But it happens. It's not a surprising thing when it does happen; correct?
A. It can still be surprising for me. But yes, I see what you're saying.
Q. But it's not a rarity; correct?
A. No.

JUDGE FABRICANT: All right. Thank you. That's all I have.

MR. HOOPES: Thank you. Thank you very much.

HEARING OFFICER: Thank you very much.

Judge Joseph calls retired Judge Sevelin Singleton.

former HONORABLE SEVELIN B. SINGLETON, III,
SWORN

HEARING OFFICER: Thank you. Please be seated.

DIRECT EXAMINATION

BY MR. HOOPES:

A. Mr. Hoopes.

Q. Good morning, sir.

A. Good morning.

Q. Judge, would you state your name again for the record and spell it.

A. Sevelin B. Singleton, III. Sevelin is spelled S-e-v-e-l-i-n.

Q. Thank you.

So you were a lawyer, then a judge; correct?

A. Correct.

Q. Would you please share your education, training, and experience to the hearing officer.

A. Undergraduate degree, Bachelor of Science, business administration, Northeastern University Law School, JD. And from there, Mass Commission Against Discrimination. I think I stayed there one year. Then I left there and went to the Middlesex district attorney's office. I believe I was there for two years. I had taken a leave of absence from that office to run for city council in the City of Cambridge. I did not win. Thank goodness. From there, I became legal counsel for the City of Cambridge and

opened my own private practice.
Q. And for how long a period of time were you in private practice?
A. Again, maybe two to three years.
Q. In what year did you get appointed to the bench?
A. 1989.
Q. And to which court were you appointed?
A. The court I grew up in, Cambridge District Court. The neighborhood.
Q. And how long a period of time were you at the Cambridge District Court?
A. Actually sitting?
Q. When did you retire?
A. 2014.
Q. And during the course of time that you were sitting on the bench as a judge of the Cambridge District Court, did you engage -- have experience with the custom of going off the record?
A. Yes.
Q. Could you explain that to the court, please.
A. Even though I frowned upon it when asked for a lobby conference or to go off the record, I would press the attorney, usually the defense attorney, as to its reason, and often, of

course, they did not want to put that reason on the record, I said at least give me a hint. If the hint was a good hint which required something off the record, a brief off the record moment, then I would grant that request if there was no objection from the district attorney.

Q. And did you continue that practice up until the time you retired?

A. I did.

MR. HOOPES: No other questions. Thank you.

JUDGE FABRICANT: If I may have just a minute.

(PAUSE)

JUDGE FABRICANT: I have no questions for this witness. Thank you.

HEARING OFFICER: Thank you.

THE WITNESS: At least a good morning to you.

JUDGE FABRICANT: Good morning, Judge Singleton.

MR. HOOPES: Judge Joseph calls Mr. Gerrity.

MARK GERRITY, SWORN

HEARING OFFICER: Please be

seated.

DIRECT EXAMINATION

BY MR. HOOPES:

Q. Good morning, sir.

A. Good morning.

Q. Could you state your name again for the record and spell it for the court reporter.

A. Absolutely. It's Mark Gerrity, spelled M-a-r-k G-e-r-r-i-t-y.

Q. And sir, can you tell the hearing officer where you're employed, by whom?

A. I'm employed by the Massachusetts Trial Court as a deputy chief information officer in charge of security infrastructure.

JUDGE FABRICANT: I'm sorry. I couldn't hear all of that answer.

A. I'm sorry. Yeah. Deputy chief information officer with the Massachusetts Trial Court and I'm responsible for the security infrastructure in the court.

JUDGE FABRICANT: Security infrastructure?

A. Correct. Infrastructure.

HEARING OFFICER: And if you could just move the microphone as close to you

as possible, that would be very helpful.

THE WITNESS: Yup.

HEARING OFFICER: Thank you.

Q. Now, could you just briefly describe what your title means. What do you do?

A. So what my title is, I manage a team within the Trial Court that is responsible for the installation, the maintenance, service, and repair of all the electronic security systems within the Trial Court, and that includes CCTV, access control system, meaning card swipes, x-ray machines that you see out the entry into the courts, walk-through metal detectors, and also the two-way radio communications.

Q. And so those are all the courts. That would include the Newton District Court.

A. That is correct. Yup.

Q. And so if I were to show you what's been entitled a history report that's in as Exhibit 3, you're familiar with the concept of the exhibit history?

A. Absolutely. Yup.

Q. Okay. So if I could show you at this time that exhibit but with several lines in it.

MR. HOOPES: And I'd ask to

admit this version because it's got a couple of lines to make it a little easier for you to follow. And I don't know how you'd like to mark it. I was going to suggest as 3-A.

HEARING OFFICER: 3-A sounds fine.

Any objection?

JUDGE FABRICANT: No objection.

HEARING OFFICER: 3-A is received.

EXHIBIT 3-A

(DOCUMENT MARKED AS EXHIBIT 3-A)

Q. Looking at that, can you identify that as an electronic access document for the Newton District Court for April 2nd of 2018?

A. Yes, I can.

Q. And at my request, did you go back out to the Newton District Court and make observations to confirm that everything seemed to be in order and was in order on this day?

A. That is correct, yes.

Q. And so if you could -- I'm going to point you to Page 3 of 5. And on the third line, there are categories going across the top. There's a

location, group, Trial Court, but there's a start and date time, start time, and other information, but there's also a time event, device name, and code; correct?

A. That is correct. Yup.

Q. And so looking at entry labeled 110 on the left-hand side, that -- if you go under the device, indicates that it was utilized by one Wesley MacGregor, and it indicates that it's 5 and then 228 and then B, capital B, and then lockup, and then arrow sallyport area.

A. That's correct.

Q. So does that mean that the access was from the lockup area to the sallyport in the back?

A. That is correct. So the individual would be standing inside of the lockup with a card reader, presented a card at the reader, and would open the door and allow you access into the sallyport.

Q. Go down two levels to 113. It's the same entry, again by Wesley MacGregor. That's going out, correct, from the lockup into the sallyport area?

A. That is correct.

Q. And going to the next page. Beginning at the

top, there are entries for 167 at 12:54, and that indicates, again, lockup arrow sallyport area Wesley MacGregor, then that's Mr. MacGregor going out; correct?

A. That is correct.

Q. And below that in 168. That's B sallyport area going into the lockup.

A. Correct. Correct. So that would be from the exterior of the building sallyport into the lockup.

Q. And so the next area entry below that is B lockup arrow sallyport area at 12:56. So he'd be going back out at that point.

A. That's correct. Yup.

Q. So we've got him going out at 12:54, in at 12:55, and out again at 12:56; is that correct?

A. Yes.

Q. And then the next time we see Mr. MacGregor is in 177, we see lockup exit to staff; correct?

A. That's correct.

Q. And then the next entry we see is 186, which is 1:51, which is lockup out to the sallyport area; correct?

A. That's correct. Yup.

Q. And that's, again, Mr. MacGregor.

A. That is correct.
Q. And then at 188 at 1:53 we see sallyport area lockup. So he's coming back into the courthouse; is that correct?
A. Yes.
Q. And then the next entry regarding the lockup with Mr. MacGregor, because there's other entries with regard to him, but with regard to the lockup, is 211, it's an exit at 3:01 point 03, or seconds, B lockup area, out to the sallyport area, by Mr. MacGregor.
A. That's correct.
Q. So again, that entry with him at 3:01 in the afternoon is him opening that back door; correct?
A. 3:01 denotes that is from the lockup out to the sallyport area.
Q. Thank you.
Now, when you were out at the Newton District Court, did you observe whether or not there were keycard access from the dock down to the lockup?
A. So there is a door in the lockup on the same level as the lockup that goes -- leads to a set of stairs that goes to the dock in the courtroom.

Q. And so if we don't see any keycard access regarding that, which goes down the stairs to the lockup area, being used, what would be the explanation?

A. The general explanation would normally mean that the door's potentially propped.

MR. HOOPES: Okay. Thank you. That's all I have.

CROSS-EXAMINATION

BY JUDGE FABRICANT:

Q. In 2018, were the doors that went from the dock -- or do you know whether the doors that went from the dock into the courtroom and the other door inside the dock from the stairway to the dock or from the dock to the stairway, do you know whether those used electronic key cards or whether they used physical keys?

A. So the door I've been referring to is actually on the ground, the basement level, inside the lockup area into a set of stairs. That system has been in place for I would say quite some time. It was before my tenure with the Trial Court. So I would say, yes, to the best of my knowledge.

JUDGE FABRICANT: So let's

bring up that photograph so we can show the door of the lockup.

Q. I want to preface, the question I'm asking about has to do with the door of the dock. If I said lockup, I misspoke. So the door that goes from the stairway into the dock or from the dock back to the stairway, and the door that goes from the dock out to the courtroom or from the courtroom back to the dock. Those are the doors I'm asking about.

A. So I can preface that by -- the court was in session, and I wasn't able to get up the stairwell into that area.

Q. So when you went out to look --

A. I could not access that area.

Q. And you went out to look recently; correct?

A. That's correct.

Q. Not in 2018.

A. No.

Q. Were you in this role in 2018?

A. I was the security systems administrator in 2018.

Q. So here's a picture of the dock. We actually have another picture that shows the door a little bit ajar. Let's see if we can find it.

Yeah. Well... Okay. So we're now looking at Page 513, I think, Page 513. The door that is in the foreground there, --

A. Yup.

Q. -- does that have an electronic card reader as far as you can tell?

A. I do not see one.

Q. What do you see there?

A. I see the key lock on the door. Yup.

Q. Okay. And then the other door that's inside the dock, can you tell --

A. From what I can see sitting here, it is the same setup as the door in the foreground. It's a key lock, it appears to be.

Q. And in that door at the bottom of the stairs, --

A. Correct.

Q. -- that one would have to go through to get from --

JUDGE FABRICANT: Thank you.

Q. So we're now looking at Photograph Number 316, I think.

MR. NEFF: 515.

Q. 515. I'm sorry. So that door that you can see there that you have to go through to get from the lockup into the stairway or from the

stairway into the lockup, is that the door you referred to earlier?

A. That is correct, yes.

Q. And that does have an electronic key lock.

A. It does. And you can actually see it actually sticking off the door slightly.

Q. And you said that, in some cases, if there isn't an entry on this document, that might mean that the door was propped.

A. That's correct. Yes.

Q. And that sometimes happens; correct?

A. It does.

Q. Shouldn't happen, but it sometimes does.

A. Too much.

JUDGE FABRICANT: All right. Thank you.

Oh, one more question, if I may. I'm sorry.

Q. As we look through this list, as we look under the column that says Device, --

A. Yup.

Q. -- in some places you see a name as opposed to a location description; correct?

A. That is correct.

Q. So, for example, near the bottom on the first

page, at the second line from the bottom, you see Judge Klein's office. Do you know that as of -- Do you know who Judge Klein was?

A. I do not.

Q. Do you understand that to refer to the office or lobby being used by the First Justice?

A. I wouldn't -- Yes, I would guess without actually knowing. It would be a guess.

Q. Okay. We don't want you to guess.

A. Yeah.

Q. But from your experience in dealing with these kinds of documents --

A. So I can -- If I could. A lot of times space allocations change within a courthouse, and we never know about it. It might just be a local thing within the courthouse. There -- Before my tenure, there was a lot of locations that refer to a location based on maybe the First Justice and they use their names. We, as we get into, moving forward, doing upgrades in buildings, we correct that. So the person may have retired many years ago, and the staff knows the location, but we are not familiar.

Q. So if you look at the rest of that line, it says that the person who used the key card to access

wasn't Judge Klein, it was Judge Joseph; correct?

A. Yes.

Q. So would you take that to mean that that office that this document refers to as Judge Klein's was being used at least that day by Judge Joseph?

A. Yes.

JUDGE FABRICANT: All right. Thank you.

MR. HOOPES: Thank you.

HEARING OFFICER: Thank you very much.

MR. HOOPES: So in the evidence at this point are two memorandum by ICE officers. We'd ask permission to have those read for the record. I know they're part of the record, but there's a public nature of this. If that's acceptable, we will call a witness to do the reading.

HEARING OFFICER: That's acceptable.

JUDGE FABRICANT: This witness shouldn't be sworn; right? Or should he be sworn --

MR. HOOPES: I think he should be sworn the same --

HEARING OFFICER: I'll take a stab at this.

Do you solemnly swear that the reading you will be providing us today shall be fully accurate?

THE WITNESS: I do.

DOUGLAS BROOKS, ESQ., SWORN

DIRECT EXAMINATION

BY MR. HOOPES:

Q. Sir, would you state your name again for the record, please.

A. Douglas Brooks.

Q. And can you spell it, please?

A. D-o-u-g-l-a-s, last name B-r-o-o-k-s.

Q. And you're an attorney?

A. I am.

Q. And I have here with us in the record as a report a memorandum that was written by an ICE officer that's entitled Appendix O DHS ICE memorandum investigation, Officer Richard Simmons, dated April 18th, 2018.

I'm going to show you this,

sir, and I'm going to ask you if you would kindly read it, beginning with the first line, which is April 2nd of 2018.

A. (Reading) On April 2nd, 2018, I, Deportation Officer, DO, Richard Simmons, responded to a Secure Communities, SC, hit based on arrest by Newton police. The subject, A079677654, Oscar Pegeuro, March 2nd, 1979, a/k/a Jose Medina Perez, August 15th, 1981, of the Dominican Republic, was arrested by Newton police and charged with possession of Class B, cocaine. Subject has no other known criminal history. I arrived at the District -- Newton District Courthouse at approximately 09:30 hours. At security, I identified myself and asked for the chief court officer. The security officer stated he was not around but the other court officers on duty were in the courtroom. I entered the courtroom and sat in the designated area of police directly next to a court officer and a Newton police officer. A Newton police officer -- I believe his first name is Jason -- greeted me by asking if I was here for this guy, Perez. I said, yes, I have a detainer and warrant. He said that he had the paperwork

already.

As I observed the court proceedings throughout the morning, during a brief recess I introduced myself to a court officer situated near me. I asked him if I would be able to take custody of the subject in lockup at the conclusion of his arraignment. He said that I could and that it would be better for him and the other court officer in the court, as they were the only two court officers around. I said that would be great, as I was alone currently, and for officer safety reasons, it would be best.

The subject's arraignment took some time and was not called until after lunchtime. Throughout the day, as circumstances permitted, the court officers, the assistant district attorney, ADA, the clerk magistrate, and the defense attorney were all made aware of my presence and intent to arrest for Peguero upon his release from state custody. In addition, I could see that both the ADA and defense attorney were in physical possession of the immigration detainer.

Just before the lunch break,

approximately 1230 hours, the female defense attorney approached me and asked if I was with ICE. I stated yes, how can I help you. She was explaining to me her reservations about her client being a wanted person out of Pennsylvania and the subject that I was in court for based on the information in the detainer. I assured her that her client was subject of an ICE detainer, confirmed through biometrics. Ultimately, at approximately 1310 hours, the case was held over to the afternoon session.

I re-entered the courtroom at approximately 1400 hours. As I sat in the courtroom waiting for the session to begin, a male attorney, not present in the courtroom earlier in the day, introduced himself as the subject's defense counsel and asked if I was with ICE. I stated yes, how can I help you. He went on to say that he believed there was -- there to be a case of mistaken identity with his client. I told him that I knew his client's identity. He proceeded to read and to point out differences in his client's height and weight compared to the subject cited in the detainer. I told him that I was not concerned with those

discrepancies. I further told him that I was only concerned with this client's biometric match. I explained that his client had been previously removed from the U.S. and that his presence is evidence of his illegal entrance into the U.S.

After the conversation with the defense attorney, I spoke with the ADA in greater detail about the subject's immigration history. I explained his previous deportations and that he would be presented for prosecution to the U.S. attorney's office for re-entry after deportation when he comes into ICE custody.

At approximately 1410 hours, the clerk had entered the courtroom and asked if I was with ICE. I stated yes. He asked if I had a warrant, and I, again, stated yes, I have it right here. I asked if he wanted it or wanted to see it, and he said no. The clerk went on to say that the judge wants me to tell you to leave the courtroom. I said, leave the courtroom? The clerk said yes. I said, why am I being told to leave the courtroom? He stated that the judge didn't want her courtroom being intimidated by the presence of ICE. It should

be noted that I was in plain clothes, with all my branding and gear covered by a shirt and jacket. I asked again if he was telling me to leave the courtroom, and he said the judge doesn't want anyone being intimidated by ICE.

I left the courtroom, and the clerk followed me out to the front lobby/security area. He explained to me that he would let me know as soon as a decision on the case had been rendered. The clerk returned to the courtroom, and shortly thereafter the clerk returned to speak to me again and stated that if the subject is released, he will be released either through the courtroom or brought back down to the lockup and released into the courthouse. I asked, so he will come up the stairs over there and into the lobby to use the main exit? He stated yes.

At that time I expressed to him the serious matter of officer safety. I pointed out that I was currently alone and there are three males that have waited all day for the subject. The subject's defense attorney has been meeting with them off and on throughout the afternoon. I asked the clerk if it was at all

possible if it would be better for officer safety reasons for me to take the subject into custody in lockup. He said, no, I'm sorry, and returned to the courtroom.

It should be noted that it is Massachusetts Trial Court policy to allow ICE officers into the lockup to take aliens into custody. However, I was refused this opportunity.

At this time, I waited outside the courtroom for a decision at approximately 1421 hours and contacted my team to see if there was anyone available for backup. Deportation Officer, DO, Domenico Federico responded and arrived at the court approximately 30 minutes later. I never left the front lobby. The clerk came out of the court at approximately a 1450 and said the subject was being released. The clerk went on to say that the subject would be brought back down to lockup and then escorted by a court officer to the lobby/security area where I was waiting.

The ADA came out sometime later, I would estimate no more than 10 minutes, and stated to me that she had a bad feeling that

the subject was released out of the back of the building. She based her feeling on a, quote, look that she got from the subject's defense attorney. We told her that we were just waiting for the court officer to bring the subject upstairs, and she commented on why it was taking so long. The clerk met us in the lobby and stated that the subject should be coming up any minute and went back to the courtroom. The ADA asked the victim witness advocate, VWA, to inquire about the subject, then went downstairs. Within a few minutes, the VWA returned and informed that he did not see the subject in lockup and that the only other way to leave the building is from lockup, but he doubted that the court officers would have allowed that to happen. The ADA also made a similar statement that she couldn't believe that would happen.

We increasingly became suspicious that the suspect was not in lockup, and Deportation Officer Federico stated he would go to the sallyport at lockup. He exited the front entrance and went around to the back of the courthouse on foot. Deportation Officer Federico reported that he noticed a court

officer outside talking to correctional officers that were inside the transport van. DO Federico explained to the court officer that we were waiting for our subject to be brought upstairs in the lobby so we could take him into custody. The officers stated the name of the subject before DO Federico and very sarcastically said that he released him out the back door. DO Federico asked why did he do so, knowing that we were in the building with a detainer and warrant of arrest. The officer responded to DO Federico in an arrogant tone, that he just let him go from the back.

Ultimately, late in the afternoon, the chief court officer was suddenly available. He advised that the subject was released out the back of the building but couldn't explain why. It was explained to us by multiple court personnel that it required the assistance of someone with a security pass, court personnel.

Q. Thank you.

I'm going to show you next what's been marked as Appendix P, DHS ICE Memorandum of Investigation, Officer Domenico Federico, dated

April 18th, 2018, and ask you to read that as well.

A. (Reading) On April 2nd, 2018, at about 2:15 p.m., I, Deportation Officer Domenico Federico, received a phone call from Supervisory Detention and Deportation Officer, SDDO, Stephen Wells, requesting that I would assist Deportation Officer, DO, Richard Simmons at the Newton District Court located at 1309 Washington Street, West Newton, Massachusetts. I grabbed my duty gear and proceeded to that address in order to assist DO Simmons.

I arrived at about 2:51 p.m. and parked my government issued vehicle in the front of the building. I contacted my colleague via cell phone about his location in the building and then entered the main entrance. I was greeted by a court security officer at the checkpoint and identified myself as deportation officer and showed my credentials. I explained to the officer that I was there on official business and looking for DO Simmons.

Once passed through the security, I noticed DO Simmons was just outside

the courtroom. DO Simmons stated that the clerk had informed him just a few minutes ago that the subject was going to be released. The clerk also stated that the subject was going to be brought back down to lockup and escorted by a court officer to the lobby where we were.

Within a few minutes, a female Assistant District Attorney, ADA, greeted us and seemed to be aware about the subject's case. We told her that we were just waiting for the court officer to bring the subject upstairs, and she commented on why it was taking so long. The clerk met us in the lobby and stated that the subject should be coming up any minute and went back to the courtroom. The ADA asked the victim witness advocate, VWA, to inquire about the subjects, and he went downstairs. Within a few minutes, the VWA returned and informed that he did not see the subject in lockup, and that the only way to leave the building is from lockup, but he doubted that the court officers would have allowed for that to happen. The ADA also made a similar statement that she couldn't believe that would happen.

I became increasingly

suspicious that the subject was not in lockup, and I informed DO Simmons that I would go to the sallyport near the lockup and exited the courthouse through the front entrance. I walked to the rear of the building and noticed a court officer outside talking to correctional officers that were inside their transport van. I identified myself as a deportation officer to the court officer and showed him my credentials. I explained to the court officer that we were waiting for our subject to be brought upstairs in the lobby so that we could take him into custody. The officer stated the name of the subject before I did, Peguero, and very sarcastically said that he released him from the back door. I asked him why he had – why, he had done so, knowing that we were in the building with a detainer and a warrant of arrest. The officer responded with an arrogant tone, that he just let him go from the back. I informed DO Simmons and returned to our office.

MR. HOOPES: Thank you very much. That's all I have. You can step down.

(PAUSE)

MR. HOOPES: Judge Joseph would

call Michael McPherson. He may be outside.
There he is. Thank you.
HEARING OFFICER: Good morning.
MICHAEL McPHERSON, SWORN
DIRECT EXAMINATION
BY MR. HOOPES:

Q. Good morning, sir.
A. Good morning.
Q. I'm going to ask you to keep your voice up and tell the hearing officer and court reporter your name again. Spell your name.
A. Michael McPherson, M-c-P-h-e-r-s-o-n.
Q. Sir, are you employed today?
A. Yes.
Q. And by whom?
A. The Trial Court, Massachusetts Trial Court.
Q. And what's your position?
A. Director of security.
Q. And director of security for the entire Trial Court?
A. Yes, sir.
Q. And so we've addressed this a little bit prior to your testimony, but can you again describe what the Trial Court is made up of, how many departments?

A. Trial Court is made up of seven departments, the -- Do you want me to list all seven?
Q. Sure.
A. Housing, juvenile, land, appeals, probate, and Supreme. Not Supreme. I'm missing one.
Q. That's okay. BMC?
A. The BMC.
Q. Yeah. Thank you.
So there are courthouse facilities within each one of those departments, I take it?
A. There is. There's 94 courthouses within the state.
Q. And do you have -- At this point under your command you have roughly how many court officers?
A. 1,035.
Q. I'm sorry?
A. 1,035.
Q. Now, back on April 2 of 2018, did you have a position within the Trial Court?
A. I was the regional director of security. With 1,035, approximately 955 are court officers, the rest are administrative.
Q. Thank you.
And so back on April 2, 2018, you were in a

supervisory capacity?
A. I was the regional director of Middlesex and Essex County.
Q. And so would that region include the Newton District Court?
A. Yes.
Q. And did you become aware of the incident that brings us here today --
A. Yes.
Q. -- on that day of April 2nd, 2018?
A. Yes, I believe so.
Q. And did that cause you to conduct an investigation yourself?
A. Yes.
Q. And did you come to learn that there was a practice in the Newton District Court of releasing individuals out the front of the first session courtroom?
A. I was made aware of it through the investigation, yes.
Q. And did you have an opinion as to whether that was proper or not?
A. It was not proper. Our policy is to release people from the lockup.
Q. And is that based on the Court Officer Manual?

A. Correct.
Q. And was that based at the time on the Lunn policy as well?
A. Yes.
Q. And when the Lunn policy came out in November of 2017, as the supervisor, did you take any action to disseminate that to your staff?
A. Yes. I believe through e-mails and also I have chiefs meetings. So when I have the chiefs meetings, it's brought up at chiefs meetings and again through e-mails and maybe a possible memo.
Q. And in evidence is a, is a -- Exhibit 2 is a revised policy for the Newton District Court issued on April 4th, 2018. I'll show you the policy. And have you seen that policy before?
A. I have.
Q. When did you first see that policy?
A. I believe maybe on 4/5. Somewhere around the time it was written by Chief Noe.
Q. And did you find that policy acceptable?
A. Absolutely not. I told him that policy, take it down, and that's not the policy we'd be following.
Q. And what policy did you put in place?
A. The policy that's in the Court Officer's

Manual.

Q. Which is all custodies come in, all custodies go back out the back door?

A. Everyone's released out the back door.

Q. And ICE individuals -- Would individuals be swept by ICE with a detainer would be taken from the lockup?

A. We allow the ICE to come to the lockup themselves in custody for safety precautions for everybody involved.

MR. HOOPES: Thank you. I have no other questions.

CROSS-EXAMINATION

BY JUDGE FABRICANT:

Q Good morning, Director McPherson.

A. Good morning.

Q. The last time we spoke you were regional director; correct?

A. Yes, I believe so.

Q. Congratulations on your promotion.

A. Thank you.

Q. You learned on April 2nd of 2018 that the practice in the Newton District Court was that people were released through the courtroom and out the front; correct?

A. Correct.
Q. And that was not proper in your view.
A. Absolutely not.
Q. But that was the practice that you learned.
A. I learned that, yes.
Q. And there are 94 courthouses and 62 District Courts, and as much as you try to make things uniform, it doesn't always work.
A. It doesn't.
Q. And after this happened, Chief Noe issued this policy -- Oh, it is dated -- dated April 4th under Chief Noe's signature. And you said, no, that's not proper; correct?
A. Correct.
Q. And then you had some back and forth with Chief Noe about that; correct?
A. Correct.
Q. He said, well, if we release people out the back, that's the -- that's where the police officers park and that's a problem; right?
A. Correct.
Q. So his view was, it wasn't a good idea to release people out the back; correct?
A. Correct.
Q. And did you end up with some middle ground?

A. There was no middle ground. The policy is the policy. And unfortunately, for the Newton police officers' vehicles. The safest way to release someone is through the sallyport.

Q. So your view is, whatever, whatever the local chief might say or do, your view was the policy is the policy.

A. Correct.

JUDGE FABRICANT: Okay. Thank you.

MR. HOOPES: Just one.

REDIRECT EXAMINATION

BY MR. HOOPES:

Q. So you were aware of what the policy was in Newton. Did that have same application when the individual prisoner had property? In other words, would they go downstairs or would they go out the front?

A. We release them through the sallyport because we have to do a check on every individual, see if they have any warrant, see if there's any hold on them, we call the sheriff's department and check with probation and, yeah, to return over their property and sign for their property, and then we release them.

Q. So your understanding at the time of April 2nd, 2018, was that, if no property, they went out the front, if they had property, they went downstairs; correct?

A. I'm confused. They shouldn't be going out the front.

Q. But they were.

A. Yes.

Q. Which you weren't happy about.

A. Yes.

Q. But at the same time, if they had property, they went back downstairs.

A. Correct.

MR. HOOPES: Thank you.

JUDGE FABRICANT: Just one more.

RECROSS-EXAMINATION

BY JUDGE FABRICANT:

Q. In that process of discussion about what was actually happening, which made it different than what should have been happening, did you learn that court officers bring the property up to the courtroom with the person or run down and get it for the person?

A. I'm not sure if I understood that. I just

know that the policies weren't being followed.
Q. So you don't know either way whether that was something that would happen.
A. At that court, I do not know that.
JUDGE FABRICANT: Thank you.
MR. HOOPES: Thank you.
HEARING OFFICER: Thank you very much.
MR. HOOPES: I was going to say Your Honor. Mr. Hearing Officer, there's one photo that we referenced earlier on. It's of the left side -- of the right side -- It's of the left side. I don't believe it was... Yeah. We didn't -- I promised that I'd bring it. I'm bringing it. I'm going to offer this as the next and last exhibit.
HEARING OFFICER: And what --
MR. HOOPES: This is a photograph of the left side of the gallery.
HEARING OFFICER: And what number is this?
MR. HOOPES: This would be, number 6, I believe.
JUDGE FABRICANT: Just to be clear, this is what we have here in the blowup;

correct?

MR. HOOPES: Yeah. We blew it up. This is for the record.

HEARING OFFICER: Great.

I assume no objection.

JUDGE FABRICANT: No objection.

HEARING OFFICER: Exhibit 6 is received.

EXHIBIT 6

(DOCUMENT MARKED AS EXHIBIT 6)

MR. HOOPES: That's the case for Judge Joseph.

HEARING OFFICER: Thank you very much. Anything further from you, Special Counsel?

JUDGE FABRICANT: Nothing further. Thank you.

HEARING OFFICER: Terrific.

So with that, the evidence is closed at this point. And what remains is the summations on Monday morning and then the post hearing briefing.

So I just want to note a couple of matters that I'm hoping counsel will address either in your summations or your post hearing

briefing or both. I expect you're planning -- I'm not sure my mic is working anymore, so I apologize. Just let me know if you can't hear me. I've got it turned on.

JUDGE FABRICANT: Just a little -- It may be the batteries.

HEARING OFFICER: Yeah. So it’s -- I believe it's on. I'll just speak up.

I expect you're planning to do this in any event, but I just wanted to make sure I flag this for you now so that we're all on the same page in this regard.

The CJC charges that Judge Joseph engaged in misconduct in violation of Massachusetts General Law Chapter 211C, Section 2(5), and a number of rules of the Code of Judicial Conduct.

Special Counsel, if you could please make clear what specific conduct you allege violates each particular rule or statutory provision, what specific subsections of Massachusetts General Law Chapter 211C, Section 2(5), you allege Judge Joseph violated, and what conduct you allege was willful.

And counsel for Judge Joseph,

I'd like you to note if there are any -- if there's any specific rule or statutory provision that you agree was violated as well as your arguments for why the specific rule and statutory provisions cited in the CJC formal charges were not violated.

I would also ask that you both include in your summation and/or your post hearing briefing what you believe are the relevant mitigating or aggregating factors that you think I should take into consideration.

And finally, I would also like to make sure that you address what sanctions, if any, are appropriate given the evidence presented during this hearing.

JUDGE FABRICANT: May I just ask, do you want us to do that in closing argument or do you want us to do that in the --

HEARING OFFICER: I leave that to you. I leave that to you. I just wanted to make sure that, before we complete everything, the summations and the post hearing briefing, that I've heard from both sides on all of those issues.

MS. MULVEY: Our issue is, it

sounds like you're looking for a degree of specificity from the CJC that isn't in the petition. Could we have -- I understand we had initially contemplated simultaneous filings. But given that there's going to be that we say these acts violated these rules or sections, could we have even just a couple of days extra to respond to that since right now we don't really know exactly the answers to those questions?

HEARING OFFICER: Well, my perspective was, but I'm willing to be persuaded otherwise, that both sides exchange their briefs, and I would like to confirm what we're all agreeing makes sense in terms of the schedule, but I was hoping that -- We're going to get the final transcripts from this proceeding by Thursday of next week, June 19th, so it would be two weeks after that that I would get from each side their initial post hearing briefing, and then one week after that I would get your responses to the other side's filing.

MS. MULVEY: That's fine. As long as we get a chance to respond to the specifics.

HEARING OFFICER: Yes. You will absolutely get that chance through the response.

MS. MULVEY: That's fine.

HEARING OFFICER: And that's why I thought having simultaneous exchange through the first initial period, two weeks after we get the transcripts, and then one week after that I'll get your responses to each other's briefing. And then with that, the hearing will be officially closed, and then that will start my 30-day clock in terms of my issuing my report and my recommendation.

JUDGE FABRICANT: If I may, what I have in mind, although I can certainly change it, is that, in closing, I would spell out very specifically exactly what conduct violates exactly what rule and what provision of the statute. I have not contemplated at this stage, the closing stage making recommendations about sanctions, but I have contemplated putting that in the post hearing briefing, but I'll do it as you prefer.

HEARING OFFICER: I'm fine with you doing it that way, whatever you would prefer

in that regard. I just want to know your position on that before the hearing is officially closed and then I start working on my report and recommendation.

JUDGE FABRICANT: Thank you.

MR. HOOPES: Thank you.

HEARING OFFICER: Anything further?

MR. HOOPES: Not from respondent.

HEARING OFFICER: Okay. With that, we are recessed for today. Thank you very much. 9:00 a.m. on Monday for summations.

(The proceeding adjourned at 11:14 a.m.)

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EXHIBIT 18

COMMONWEALTH OF MASSACHUSETTS
COMMISSION ON JUDICIAL CONDUCT

COMPLAINT NUMBER 2019-22

VOLUME VI

HEARING

~ BEFORE ~

HEARING OFFICER

DENIS J. McINERNEY, ESQ.

JUNE 16, 2025

9:00 A.M.

Boston, Massachusetts

Lisa L. Crompton, CSR (MA)(RI), RPR
(As amended by stipulation of the parties and
as approved by the Hearing Officer on October 1, 2025.)

APPEARANCES:

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HEARING OFFICER: Good morning.

This is obviously the sixth day of our hearing on the Commission on Judicial Conduct's Complaint Number 2019--22. And this morning we're going to have closing statements by both parties, and we will be starting this morning with Mr. Hoopes, on behalf of Judge Joseph.

MR. HOOPES: Good morning. It's been a long seven years, a long seven years. And when you know someone, and when you know that they're not capable of what's described in the indictment, and when you know that they're not capable of the conduct that's charged here, then you can defend on the burden of proof or you can do it differently. You can simply search for the truth. And in this case, that's what we've done, for seven years, until we arrived here with you which, frankly, has been as eye-opening as anything preceding it.

Now, the truth, though, was shredded beneath the clouds that in the front of the grand jury for a long time, and then the truth was hidden for a long time behind the Jencks Act, and then initially it was still

hidden when it came to the CJC. But Special Counsel joined with us, with that then administration, and we finally got many of the documents we were hoping for and looking for and, frankly, thrilled to see.

But what we got for documents wasn't nearly enough. It was just the beginning. There were things to do, people to see, people to talk to, interviews, but the one simple thing that we learned at the end of that was this: David Jellinek is a liar.

Now, David Jellinek is just not any liar. David Jellinek is a criminal who, for some reason, is still practicing his trade, not just as a lawyer, though, but as a liar. Now, lawyers go to school to get a JD, to learn how to argue inferences. David Jellinek went to school to get a JD, but he may also have attended some school somewhere for liars. But David Jellinek must have cut some classes, not read the material, gotten kicked out of school, because he is a very bad lawyer and a very, very bad liar.

So if you look simply and carefully enough the lies are obvious. He is

not the mastermind that he thinks he is and in a sense he's not the mastermind of this case, because what he did here was sort of mindless, beyond the pale, committing his crimes in plain sight, so to speak, in many ways, in front of people that he knew, who would instantly wonder what happened. But David Jellinek has a PhD in manipulation. He could teach the school, run the academy, and hire the faculty. He has out-manipulated court officers and clerks, lawyers and prosecutors, and many judges along the road of this case, in the Newton District Court, in the Federal Court, and here before you, and before that, the CJC.

Now, like most bad liars, though, the manipulation takes an added light from the lies, and his bad lies in the clear light here tell it all. Now, he seemed to like to lie first in the morning chronologically, which is what he did here. He said what? He said he was at the Newton District Court on the morning of April 2nd of 2018. He got there mid morning, is what he claimed. But he said that he arrived, and he told you why he was hired, he told you what he supposedly heard from ICE, to

be out in the courtroom, kicked out of the courtroom into the hallway, he talked about when he spoke to ICE, he claimed that he saw his client, he claimed that he thought about a fee agreement, he talked about a conversation with Ms. Bostwick, he said he received documents from Ms. Bostwick, all in the morning. Well... And he talked a little bit about check and cash, and we'll talk about that a little bit later.

What is the simple proof of the lies? ICE, the transcript, the interpreter, Ms. Bostwick, Judge Joseph. He said he was there in the morning. The ICE agent, Simmons, who you heard from through his own report, said one thing; he didn't see him that morning. Ms. Bostwick said she didn't see him that morning, she didn't talk to him that morning, she didn't give him any documents that morning. Judge Joseph said that she didn't see him that morning, which is why she said hello in the afternoon session on the tape. The interpreter, Mendoza, thought he was the prosecutor because of all the talking he did in the afternoon. How could he have interpreted for him in the morning if he thought he was the district attorney?

So if you go back through his lies, he could not have arrived in the morning, he could not have been hired as he said because they saw him and they liked his performance. There was no performance. There's not a word in the transcript that says David Jellinek, appearing, Your Honor, for anything in the morning, let alone putting on a masterful performance.

Supposedly he said that he heard ICE asked out of the courtroom. If you look at the transcript, there's not one word about any of that happening on the record, and it couldn't have, because it happened in the afternoon, and it was never on the record.

Seeing his client? He couldn't have seen his client. If he had seen his client, Mendoza could talk about it, tell about it, explain about it, not what was said, but that there was actual contact. He didn't remember any.

Now, that's about 10 lies. And if you remember, when I was asking him questions, who's telling the truth, you or the ICE agent, and if it was the ICE agent, then we

have half a dozen lies. I underestimated. We're already at 10, and we haven't even gotten to the afternoon. He exceeded expectations in lying. But his manipulations are countless, without being able to be numbered, innumerable.

So as court goes, there are different forms of manipulating and lying. There are untruths, there are half truths, and there are expectations that you would be truthful in a particular situation you are not, all arising to the level of false statements or perjury, depending on the circumstances.

He manipulated the assistant district attorney before the case was called, he never said a word about his plan. He manipulated the ICE agent before the case was called, never said anything about his conversation with MacGregor. He manipulated the clerk, never said a word, the other court officers besides MacGregor. That's just before the case was called. While the case was called, never raised his hand and said, oh, Judge, I've talked to Mr. MacGregor and this is what we've agreed to do, never said that so that the DA could hear it, never said that so that the clerk

could hear it. After the case was done, the same manipulations.

Now, manipulations come easy to him. It's almost unfathomable to imagine, if you are a practicing lawyer with any sense of ethics, that the next morning you would knock on the door of the presiding justice of the Newton District Court, have an ex parte conversation to tell her about a little incident about somebody going out the back and only tell a thumbnail of the story and not tell the First Justice what was really important, which was that he had a conversation with MacGregor and out Medina Perez went because of that conversation. From that morning on, she didn't know for days and months any such thing happened. Didn't say anything to the clerk, didn't say anything to the chief court officer Noe. Didn't come over to the ADA the next day and say, you were right, this is what I did.

So if you counted all of these lies, out and out, half truths, failures to disclose, David Jellinek must have been setting a one-man record for liars, by a lawyer, lies by a lawyer, or a lawyer's lies, not only in the

Newton District Court, but for any court in the Commonwealth of Massachusetts ever.

Now, he's not done, though, in some ways. Because from April 3rd on, he said nothing. He was hiding in plain sight every day, going to work, nobody saying anything. Bizarre. But at the same time, he was keeping track of what was happening. He knew about the subpoena to MacGregor and that MacGregor was going to the grand jury.

So he claimed that he didn't talk to him between April 3rd and that date when he found out about the subpoena. Can we believe that? Do you believe that? His co-conspirator? Now, the co-conspirator was doing one huge favor, the biggest favor that a co-conspirator could do for David Jellinek. When I asked Noe, and Noe was asked, Officer Noe, Court Officer Noe, when you interviewed MacGregor, did he say anything about David Jellinek, the answer was no.

Now, for whatever reason, and we'll get to that, MacGregor was keeping his mouth shut. Jellinek was keeping track of MacGregor, because if MacGregor was keeping his

mouth shut, Jellinek still had options. And he sat on it and sat on through May, through June, through July, through August, through September, through October, until he got a call from Clerk Okstein's lawyer, oh, the grand jury's in action and they're coming for you, you are a target. Now, he called the lawyer. And when he heard that word "t-a-r-g-e-t," he must have known bad things can happen.

Now, he claimed he wasn't afraid of going to jail. I know no one who is not afraid of going to jail. 20 years, five years, 36 months. If most people, who are made as human beings, get sweaty palms when they see the blue light behind them and wonder if it's for him, for you, for somebody you're with, then he clearly had sweaty palms at the very least. But he said to you, oh, he was just worried about his livelihood and providing a family and professional career. That is not the case. He was worried about everything.

Now, he went in to see the U.S attorney's office, after his lawyer had made contact, and we can presume he did the usual thing, which is, he called, said I'm going to

talk to you, give you the attorney proffer, and I'm going to bring him in, and in he went, and he cooperated for a number of months.

And the reason we know that he was keeping track of MacGregor to see what his options were is because MacGregor had a retirement party in the spring, after Jellinek had been in to see the U.S. attorney's office no less than five times, and who showed up at the party for MacGregor, four court officers and one other person, Jellinek. And while Jellinek had been throwing MacGregor under the bus and causing him to be indicted and him alone, along with Judge Joseph, he walked over to shake his hand.

Now, what kind of a person would do something like that? A master manipulator, who has probably did a fellowship in manipulation. So he knew what his cards looked like exactly.

And when I asked him, I said, so it was a trade. What did he say? It was a trade. I said it was a trade for what you were going to be able to tell him about the 52 seconds. And he said, yeah, it was. He said,

he said that was the core of it. I said they had everything in front of it, everything in back of it, it was what was said in those 52 seconds off the record, and he agreed. He knew that's what it was about, and they knew that was what it was about. And so he got immunity.

Now, you know better than anyone in this courtroom that giving complete immunity to the mastermind of a plot with no corroboration is beyond unusual, and it's tantamount to prosecutorial suicide, because you always, always, always, as a prosecutor, particularly in white collar cases, either need more corroboration or you need a piece out of them, because if you don't take a piece out of them, no jury will believe them, because they know what anybody on the street knows, you can make anything up. And these people made that deal. And that either means that they didn't care about a conviction, they cared about just an indictment, whatever happened after that, or they were fools, and they are not fools. You know and I know and they know one thing: Ties lie. People with ties lie. In the white collar

world of prosecution, people who wear ties are the bread and butter of making cases. So you have to do the other things, the actual work.

Now, Jellinek gave them two things that they were looking for in the 52 seconds, one, what he said to her, and of course, there's variations on that, got infinitely longer, if you could put his nose next to the timeline, you would watch Pinocchio grow. On November 8th, he said, I requested that the judge release Medina Perez through the lockup area. That's all he said. By the time he got to the grand jury, he added, oh, he said that he thought Medina Perez could be released out the back door. That's -- Sounds like two words. Small thing. That's the case. He said one other thing. What was in her mind, he was asked, February of 2019. What did he say? He said he didn't know what was in her mind. He wasn't a mindreader. So that was 2019, 2020, '21, '22, '23, '24, he came and spoke, sat down or did the Zoom, as we understand it, with the special prosecutor in December 2024. She asked him the same question. You said you didn't know. He said not true. She said she

understood his plan and, yeah, that's what we'll do. That's the core of the case. That's the core that they traded for. That's the core that they didn't care about. Once he made the trade, he just made it better.

Now, it's useful to look at the things I would suggest that the Federal authorities did not do, because it had spill-over effect into this proceeding. If you look at the document they produced, they ignored the Lunn policy as the governing factor, they ignored the Lunn policy and the court officer manual, governing factor for where the exit would be, they focused on this mirage that some people are calling the common practice of the point of release in Newton, but they papered their way through that. They ignored the statements that they had in the front of their nose, the interpreter statement that we've discussed. They ignored the ICE statement that they had. They had. We didn't see it for months and years. They had it before they pulled the trigger on this case. They didn't do any of the work that would have seemed to them the collection of small lies all gathered up

into one whopper, for the morning, and we've been over it, they would have known he wasn't there in the morning. They didn't accurately state a time he arrived, because he never arrived, why he was hired, all the litany that we talked about earlier.

More telling than that, there was an attorney general in Massachusetts named Frank Bellotti, he used to say, if you're going to indict in a case like this, you better be careful, because sloppiness takes you nowhere and it hurts everyone. And in here, they never ordered the transcript of the day. We did that. He had an iPad. They never asked to get the iPad, to go through it, to see what the schedule was, the things that were missing for Special Counsel. They never saw it. They never followed up on his calendar.

But the most telling thing, the eagerness to just pull the trigger to ruin somebody was the fact that they never spoke to Ms. Bostwick. You heard her here. We asked her, Ms. Mulvey asked her, the vital question, did the Federal authorities, the FBI, the assistant U.S. attorney ever speak to you. The

answer was no. Really? In a case of this magnitude, the woman who was there in the morning, who could tell you whether he was lying or not, you never knocked on her door, you never made a call, you never interviewed her? There's only one explanation for that. And it's not that they're sloppy. Because I assure you, -- I've been in cases with these people -- they are not stupid. The only possible explanation is, they didn't want to hear, it might get in the way of their project.

Now, probably the most mysterious thing is this whole notion that check versus cash. Now, Mr. Jellinek told the prosecutors and told the grand jury, do you solemnly swear to tell the truth, the whole truth and nothing, but the truth so help you God. I do. And how were you paid. I was paid by check. You were in a proffer session. You know you have an obligation to tell the truth. If you don't, it's a thousand and one violation. You know that. Yes, I do. How were you paid. I was paid by check. Did they ever ask for the check? No. If they had, we'd have it. Did they ever look for the bank account? No. If

they had, we'd have it. Did they ask for his tax record? No. We would have it. Did they ever ask for his accounting records? No.

Now, if you were supervising these people, and they did something like that, they would be demoted to going forfeiture cases. There's no explanation for this other than they didn't want to do it. Because they are not sloppy. They know what they're doing. And then he walks in six years later to the office of Special Counsel by Zoom and confessed. It was cash. Now, nobody forgets whether it was check or cash. And he didn't.

And Special Counsel is much quicker about these things, trying to pay attention to the truth, than her predecessors, and she followed up and asked, where are the bank accounts, let's go back and check, that's what you said, you said check, now you're saying cash. Which is it? And he said, oh, I'll go look for it. You heard him. I asked him. You said you'll go look for it. And we don't have it today. If we don't have it today, that means Special Counsel didn't get it today. Really?

Why is that important? It's

not just important, it's critical. Because the important question before you is, why the lies, why all the morning lies, why this 10, not six, 10 lies that have a destructive weight of a piece of cement on their case. Why? Well, if you weren't there in the morning, why are you lying about it? So talking it through with you, it could have only been because somehow he got there at a time when was different than the morning. And why is that important? Because it goes to how he got to these people. How did they find him, if they didn't see him perform, if he didn't smile at them as he went by, how did he get introduced to them.

Well, it seems like the only natural candidate for that would be Wesley MacGregor, who was the court officer at that point. We don't know for sure, but there's nobody else really around. And if Wesley MacGregor made the introduction, and there's no check and they're supposedly only a thousand dollars in cash, could have been more, could have been much more, we don't know, into whose pocket did that cash go. All one? Split? Who knows?

But going to back to not asking the questions, I would suggest, I would suggest and I know you know what I'm talking about, what person would ever risk immunity in a case like this to lie? Because as soon as you lie, you get caught and you have no immunity. You're dead. You're going to jail. And so why would he lie about something like check versus cash? If you front that at the very beginning, they'll give you a pass. You know that. I know that. They'll give you a pass, as long as you front it. The only possible explanation, we can't say for sure, but we don't have to, is that something untoward happened between those two, and MacGregor was smart enough to not name Jellinek. Because he can explain, oh, I let him out the back door. You can't explain as a court officer beyond the tape. If you're Jellinek, you can't explain handing cash to a court officer in return for a referral. Maybe there's another explanation. That's as good as I can do. But I would suggest to you something at a crisis level, more important in their minds than letting somebody out the back, is driving this host of lies about the morning. It's too wild a

whopper to take a risk otherwise.

Now, without trying to be critical of anybody here, because the CJC has its process, CJC filed these charges, then they talked to Jellinek, then they talked to the interpreter, then they talked to the ADA. They never talked to Bostwick. They never looked into any of the things in the transcript. But, by then, it was too late. We were on this path. And in the end, thank God we were. But we were on this path, a path that David Jellinek excused because he said, oh, I was just, what, I was just advocating for my client.

Now, there's a preliminary section to the Massachusetts bar rules that says that in a section, Preamble 5 that says that an attorney's conduct is -- has to conform with the requirements of the law. And he knew this didn't conform to the requirements of the law, and Federal authorities knew it didn't conform to the requirements of the law, because they named him in there as the mastermind and co-conspirator.

Now, even the Bible, in the Torah and the revelation says that you need two

witnesses. What did Federal authorities have? What does Special Counsel have? They have a liar. So maybe we can update, if that's humanly possible, the Torah and the new testament and say you need two credible witnesses. That means for thousands of years, for thousands of years things that were important to human kind where you were going to have a penalty of any kind needed corroboration. They understood that. Somehow that's gotten lost here. Is there any good reason for it? I would suggest not.

And if Special Counsel suggests that Mr. Mendoza is that credible second person, he shot himself in the foot. Because whatever his impressions were, he was clear that it had been seven years, clear that he had memory issues, couldn't remember the correct locations of things as simple as where the side bar took place, recognized there was white noise, distance. Even Ms. Bostwick, who was sitting in the front row, right inside the rail, with the rail to her back, said I couldn't hear, I didn't hear a thing. Didn't hear off the record, didn't hear on the record. And he didn't know what the Lunn policy was. So clearly, he could

misinterpret many things. But the most critical thing is that he thought David Jellinek was the prosecutor.

Now, the assistant district attorney is not their second witness. The assistant district attorney is our second witness, Judge Joseph's second witness. Was anybody more credible than the woman who stood before you and sat before you and testified? She said that, as far as she was concerned, the off the record was just a continuation of the on the record. She was right there. Nothing was said that gave her the impression that Medina Perez was doing anything other than going out the side door -- excuse me -- going out the front door. Although she may have used the word "misguided," she didn't think that Medina Perez was going out the back door. She said nothing was said in that regard. She thought Judge Joseph was just offering Jellinek time. She didn't know about the Lunn policy either, she knows it now, and she thought that Judge Joseph was complying with it. She also agreed that it was not a good thing for ICE to take the wrong person. If they were looking for

help for their second person, they got none, and we got everything we needed.

Now, the next witnesses from Special Counsel are the three Newton District Court witnesses that really told us what really happened. And that's what this hearing, and in some respects, if not all respects, is really about. What actually happened that day? And Court Officer Noe said to you three things: ICE isn't there very often, so they don't deal with this often, he had his interaction with ICE, and he claimed to have offered them the opportunity to go down or to stay up and wait at the front door. But Noe didn't know about the conversation ICE had had with Clerk Okstein. And he may or may not ever heard about the Lunn policy. Because he was doing things the old way. That's what he said. In very good faith and very honestly.

But the two witnesses that you heard from the Newton District Court that were most critical I would suggest were, one, Clerk Okstein and, two, Judge Mary Beth Heffernan. Now, Clerk Okstein told you that going off the record was nothing to get excited

about as far as he was concerned. He told you that people go downstairs in custody for their property. He said that when he spoke to Judge Joseph about ICE in the lobby, she didn't ever say anything to him about them not being able to access through the lockup. All she talked about was whether they could be in the courtroom or not.

But he showed, I would suggest, great courage in answering your questions, questions that had never been asked before. He interpreted the order by Judge Joseph to also include that ICE couldn't go anywhere into the lockup, they had to wait out front. He interpreted that as Judge Heffernan's policy. Some seven years later, for the very first time, we heard that out of his lips.

And then we heard from Judge Heffernan. Now, Judge Heffernan said that she only knew about Rule 211 anecdotally. Anecdotally is a cute word for I've never read it before. She thought custodies could go down to get property. She told us that Jellinek, when he saw her the morning of April 3rd, never told her this agreement with MacGregor, never

told her his involvement with Medina Perez going out the back door, or that Judge Joseph had blessed it.

She talked about her e-mail policy discussion with Judge Dawley, and she acknowledged that she had this policy in effect, we've learned that nobody else in the Commonwealth of Massachusetts had it, and she got rid of it. But the critical thing that she said to you were that she claimed that she knew about Lunn, that's what she claimed, she claimed and said that she had acknowledged that she hadn't implemented it. She admitted that the Lunn policy says that, when ICE is present, they're supposed to be able to take the individual from the lockup. But she went on with questioning from Special Counsel to say that, oh, the policy was a little confusing and her policy was not inconsistent with Lunn. Really? Seriously?

Now, she acknowledged that it was important to give the defense attorney time. She acknowledged that no one would want ICE to take the wrong person. And critically, she was asked the following questions: Did you feel

like she, meaning Judge Joseph, told you what she thought was important as far as you can remember? Answer, yes. You didn't feel like she was holding anything back. Not that I could tell. And that you would have been the one to tell Judge Joseph that Medina Perez went out the back door when you talked that morning. Yes. Mary Beth Heffernan was not trying to reprimand Judge Joseph. She was trying to find out what happened.

Now, that same bell, you know the line of bells, and they have the bells that play the same sort of sound, you know, depth and quality. We heard from the other two judges, the senior judges, from Judge Fortes. And Fortes called her in. The conversation was about Newton and it was precisely because they both understood that she had gone off the record. Though Judge Fortes never asked her, that was the focus of the meeting. They didn't get into ICE. Judge Fortes at this point seven years later has no memory of any conversation about Waltham, but you have the documents that support it. As far as Judge Fortes was concerned, it was an educational meeting,

permission, permission was accomplished. She never said a word about half truths, part truths, anything other than the truth from Judge Joseph.

Probably another of the most important witnesses was judge Dawley. He acknowledged that he hadn't offered any training in the manuals, separate training, whatever on the issue of off the record. He thought being a new judge was like drinking from a fire hose. He acknowledged that Judge Carey, who is the judge of all judges in the Trial Court, had in an e-mail acknowledged that she didn't know about this Rule 211. He, himself, had been off the record on certain circumstances. He laid out what the criteria was for the governor's warrant, and he explained that Lunn was clear and mandated, but the most important thing he said for our purposes here was, I asked him, did you think she was candid, and he said yes.

Now, Judge Joseph testified, and you heard her testimony, she worked so hard that morning and afternoon to find out about this policy. But Judge Heffernan was excluding people, ICE, who had a perfect right to be

there. She asked Okstein about it. She called down to the office of the administrator of the District Court, they talked her through it, they e-mailed it to her, she followed.

When she was speaking, she was asked to go off the record. Before that, Jellinek said, best thing we could do is release him and see if he can dodge ICE, and she interpreted that as, he was asking for more time. And the reason we know that that is a more than reasonable interpretation is the person in this courtroom testifying before you who had the least axe to grind ever interpreted it the same way, the assistant district attorney, because she never heard anything, on or off the record, inconsistent with that, and said she thought one was just a continuation of the other.

And at the end of the case, Clerk Okstein turns around and says what? ICE is here, they want to take him. And what does Judge Joseph say? She says, they can't come in here, but he's released. And there are four other ways, three at least, for them to get downstairs. Who knows where ICE is? But ICE

can come in the back, ICE can go down the stairs, ICE can take the car around the back, ICE can go down the other set of stairs.

Now, there's not one whip of evidence showing, not one scintilla, as Ms. Mulvey said to you at the very beginning, showing that Judge Joseph had any other thought in her mind, any improper, impure thought or motivation. But in addition to that, we put on a case, and we put on the case of involving first Ms. Bostwick.

Now, besides Ms. Bostwick, putting a pin in the balloon of the morning that David Jellinek was trying to float, she said one other thing that was telling about the state of mind of David Jellinek. Remember, he said, when he was asked questions by Special Counsel, I saw Ms. Bostwick afterwards, and Ms. Bostwick said to me, oh, I think you obstructed justice. Ms. Bostwick said I have no memory of saying anything like that. David Jellinek, like the central figure in crime and punishment was hearing voices of his crime, and he knew from April 2nd on that he was in deep trouble.

Ms. Khoury, the attorney, said

going downstairs to get your property was the thing to do here. Judge Heffernan had agreed with that. Clerk Okstein had agreed with that. And she would have wanted to talk to her client, too.

But, you know, one of the most powerful things I would suggest, hope, were the three judges, experienced judges, of the Massachusetts court, who said to you three things: They had been off the record many times, in the District Court, in the Superior Court, throughout their careers, and they had seen other judges do exactly the same thing. And it was not for some bad purpose. It was forgetting the business of the court done.

Judge Ball, who you heard from, Judge Ball sat in this courthouse six months out of the year, six months in Brockton. Why did they have her here? Because she could move cases. She knew how sausage was made. So other people who are prim could do the trials. And without her -- And they were very happy to have her year after year after year working that hard. She used every tool in her kit to get things done so that the wheels of justice in

Suffolk County and Plymouth County did not come to a screeching halt. And even the people sitting here today, we're happy to bless the fact that she used those tools. So to say 2025, oh, some things changed and it's a bad thing, is beyond ridiculous.

Judge MacLeod said she did the same thing, and she also told us that justice was a little bit like McCourt, McJustice, you know when you have to move things fast. But the most important thing I would suggest to you was, she talked about the fact that how necessary it was to facilitate people being open and honest, and that was the purpose that she used off the record for.

But the most important thing came from the lips of Judge Ball. She said, I trust lawyers, I like lawyers, if somebody asked to go off the record, she believed presumptively that they were there for a good purpose. And if she had done that, as she did for all those years, her trust was never betrayed. What does that mean? That means that she never ran into a David Jellinek. Nor would anybody ever reasonably think that they'd run into a

David Jellinek.

Now, you heard from the ICE agents through their testimony they needed to be heard. That was their testimony. And they said one key thing, beyond the fact that Jellinek wasn't there. They basically begged to be allowed to go into the lockup, because they knew that the policy, the Lunn policy, and they knew about Lunn, was there for the public's protection and for their protection. And you heard from the chief, now of security, supervising at that time, and he said, when asked about the policies at the Newton District Court, were they, -- I think I was trying to be careful about it -- were they consistent with the Lunn policy, court officer policy, and to be gentle about it. His answer was, no.

Now, on April 2nd of 2018, there was one person in that courtroom who knew about the Lunn policy, which is the key in court to the case. Not the 52 seconds. The Lunn policy. That was a policy, as Judge Heffernan described, that Judge Dawley really described, was put together in response to the Lunn decision, recognizing that it was a delicate

balance, committees put months of work into it, they worked very hard to put that together, they distributed it widely, they had every expectation that all of judiciary would read it, that court officers, supervisors would get to read it, that everybody would know about it.

Judge Joseph, if you read that transcript, did everything right on every case that day, which she particularly did everything right on this case, on the Medina Perez case, because she was the only person in the courtroom who knew about the Lunn policy. She called for it, it was read to her, she wanted to implement it, she got copies. And what did she do with it when she left for the day? She took the policy -- we have it here -- and she dropped a copy on the clerk's desk, she dropped a copy on the first assistant's desk, and she also dropped a copy on Mary Beth Heffernan's desk. Right here.

How would you feel if you were the Chief Justice, the Presiding Justice, and you walked in, and your rookie, your baby judge who was filling in for you that day dropped that piece of paper on your desk? I think you would

know that there was a policy that nobody in your courthouse seemed to be aware of, not the clerk, not the court officer, not the assistant district attorney. Is it sort of crazy that these people all along have wanted to penalize the only person who made the judiciary look good that day?

So I have to say, in closing, when I finally got the chance, when we finally got the chance, and I read the Clerk Okstein's grand jury, I said to myself, oh, my word, this is what really happened. And then I watched you ask him a question that neither counsel asked, which is, did you tell ICE that they could go other ways? And he said no. Why? Because he misinterpreted the policy in Newton and thought that's what Judge Joseph was ordering, even though she hadn't said it. He confessed. And when you ask that question, you got that answer, I thought, oh, that's what really happened.

But then Judge Heffernan got on the stand. And she said, I knew about Lunn, whether she did or didn't, but I never implemented. And I thought, oh, my God, oh, my God, that's what happened. Now, you heard her

say at the beginning of her testimony, my job as the presiding Justice is getting everybody together, make sure we're on the same page.

You heard Judge Bonnie MacLeod say my job is to gather everybody together and make sure that they're on the same page.

So if one says it's their responsibility as the Presiding Justice no matter how they divided up authority in the courthouse, and the person who is the Presiding Justice says that's my responsibility, how did the Lunn policy fall through the cracks all these years.

Now, it doesn't matter that she claimed that she met Jellinek in the afternoon. It was a little of an ex parte conversation. Because you know that of course Jellinek had his hair on fire and went in in the morning, and there's no way Noe didn't go see her right away, and there's no way that Okstein didn't go see her right away. But who cares? What's really important is that, when she confessed, she added, oh, confusing time, it was, my policy was consistent with Lunn.

In what parallel universe is

her policy consistent with Lunn? Lunn was there, mandating into the lockup, if at all possible. There was no impossibility that day, mandating that for the protection of the of the public that there weren't – [inaudible] -- any scuffles in the courtroom. And most important, for the protection of our law enforcement people in the lockup. And but for her policy that ICE couldn't go downstairs and but for that, we wouldn't be here today.

Now, having said that, I asked the question of Judge Dawley. I said, well, do you think that, you know, she should be complained to the CJC. And I said that simply to make a point. And the point is that her policies were just the contributing cause. She was trying to do the best she could every day, just like everybody else, except one person, David Jellinek.

No judge in this courthouse today or before or hopefully in the future has ever met someone like David Jellinek, Judge Ball, who did cases with hundreds of people, Judge MacLeod, who done cases with thousands of people, lawyers from within the Commonwealth,

out the Commonwealth, nobody has ever met a liar and a manipulator and a scammer like that. And if there was no David Jellinek, the imperfect policies of Judge Heffernan would probably still be there today. Because he was the stress point that no one anticipated.

It's a little bit like, Judge Joseph was walking down the sidewalk, and some scaffold fell on her head, and somebody's blaming her for walking down the sidewalk. Who dropped the scaffolding? Who hoisted the rope? It doesn't do us any good here to cast blame. Because I would suggest to you you're going to take all this in, you're going to write findings, I think that without question the SJC is going to be dying to hear what you have to say and take any kind of remedial measure.

But in the end, I would ask you that it's enough. We don't need to throw anybody to the wolves, you don't need to throw another person to the wolves, we don't need to throw other people to the wolves. Other people have been doing the best they can in the judiciary. Only David Jellinek is the criminal here. And if we throw someone to the wolves,

the wolves are insatiable, insatiable, and we won't gain anything. We need to be better than them and end this now.

Thank you.

HEARING OFFICER: Thank you, Mr. Hoopes.

JUDGE FABRICANT: Good morning, Judith Fabricant, Special Counsel for the Commission on Judicial Conduct.

I need to make a couple of comments about Mr. Hoopes' argument. I have no doubt that you will make findings based on the evidence and nothing that isn't in the evidence, but we heard quite a bit here in this closing argument that wasn't in the evidence, starting with what was essentially a character reference by Mr. Hoopes when there was no character evidence in the witness -- among the witnesses in the evidence.

We heard a speculative theory about Mr. Jellinek paying off Officer MacGregor. There was no evidence of that. In fact, Mr. Hoopes asked Mr. Jellinek a question about that, and Mr. Jellinek said absolutely not. If Mr. Hoopes wanted to bring in Officer MacGregor,

perhaps he could have. He didn't. There is simply no evidence of that.

Mr. Hoopes said that the assistant district attorney said that what Judge Joseph was doing was to give Mr. Jellinek more time. She didn't say that. She said something different, which we'll talk about, but she didn't say that. So we've had a lot here. And there was some argument about Judge Ball and her role and how the court viewed it. There's been some argument about how U.S. attorneys operate, how the justice department operates. None of that is in evidence. And I know that you will make findings based on the evidence.

I also think it's important to note that the Commission is not the U.S. attorney, the Commission's charges are not the indictment, and this hearing is not the trial of the indictment. This is an entirely different matter. The U.S. attorney may or may not have done some things that they would otherwise do, may or may not have had whatever motivation they had, may have not done some things that Mr. Hoopes thinks they should have done. That is not what this hearing is about.

This hearing is about the charges made by the Commission on Judicial conduct whose responsibility it is to monitor judges' compliance with the Code of Judicial Conduct and with the provisions of Chapter 211C, and to take action when it has reason to believe that there has been a violation by a judge of those requirements. So that's what this hearing is about, and I know that you will make your findings and your ruling about those issues.

Now, as I said when we started, there's one central factual dispute, and that is what was said in the 52 seconds off the record. And we've spent five days of evidence to resolve that one disputed fact. Some of the evidence that's been presented actually bears on that dispute, a lot of it has been peripheral. I'm going to keep my focus on that central issue, on the facts that I ask you to find based on what was said in those 52 seconds, on what Joseph said, Judge Joseph said afterward, and on the undisputed facts.

So how do you resolve the one disputed issue. We're all thoroughly familiar with the factors that a fact-finder can

consider. You consider whether the witnesses have a bias or motive to tell you anything other than the whole truth, you consider the demeanor of the witnesses, as I know you have and will, you consider whether their testimony is consistent in itself and with their previous statements and with the other evidence, and most important in this case, I suggest is to consider the plausibility of the conflicting versions in light of what was said on the record and in light of the surrounding circumstances.

Two most conflicting witnesses obviously are Judge Joseph and Attorney David Jellinek. Judge Joseph is the responding party, her judicial career is at stake, her reputation is at stake. She's biased by definition.

What about David Jellinek. He's a practicing lawyer. And you heard a lot about him from Mr. Hoopes. But he's a practicing lawyer who appears in the Newton District Court almost daily and in other courts regularly and has for 25 years and he continues to have positive professional relationships with court personnel.

You've heard a lot about his proffer and grant of immunity. Counsel relies heavily on that to suggest that he had reason to make a false accusation. But David Jellinek was fully aware that he could assert a Fifth Amendment privilege, refuse to speak and refuse to testify. He knew what might follow from that, but he also knew that he would defend himself vigorously and he would have had a lot of ground for defense. His duty was to his client, not to ICE. And as Officer MacGregor told him and Chief Court Officer Noe confirmed here, there was no rule at the time against releasing someone out the back.

And as respondent has emphasized, the official Trial Court policy favored bringing ICE to the lockup, which was entirely outside Mr. Jellinek's control. So if Mr. Jellinek had asserted his privilege and been prosecuted, he would have had plenty of room for defense.

And Attorney Jellinek fully understood that waiving his privilege and accepting immunity was a two-edged sword. He could not be prosecuted if the U.S. attorney

believed he told the full truth, but he would lose his immunity and would be prosecuted for perjury at least if the U.S. attorney believed that he told any material untruth.

You have the proffer letter and the immunity letter in evidence as AA, and you may be familiar with these types of letters. The phrasing has a certain in terrorem effect, the witness is warned in no uncertain terms that he is at the mercy of the U.S. attorney's unreviewable evaluation of the truth of his statements. Surely, a lawyer with an active and successful practice would not risk his career and his freedom with a fabricated accusation.

What about demeanor. Mr. Hoopes has said a lot about demeanor. And you will evaluate demeanor, and I have no doubt you observed the witnesses, and you don't need much comment from me on that topic. But I will make a couple of comments. David Jellinek answered the questions from both sides directly, even when the answers would hardly make him look good. He acknowledged that what he did for his client was on the edge of ethical. Mr. Hoopes characterizes it as criminal, Mr. Jellinek

disagrees, but he admits this was borderline. He acknowledged what he doesn't remember and he acknowledged that in some respects, particularly when and why he came to Newton that day and when he spoke with various people, his memory after seven years differs from what appears in the full day transcript. He didn't dance around those questions. He answered them directly.

What about Judge Joseph's demeanor. She did dance around, as you saw. And I'll mention a couple of examples, and I know you'll review the transcripts and I know you have your own recollection, but I'll mention a couple of examples.

The first on a point that was hardly worth quibbling about, but she did quibble. I asked her about the case of Mr. Pineda, second on the list that day, when retained counsel had filed an appearance and appointed counsel, who turned out to be Allison Khoury, a witness here, withdrew. The only significance of this fact is that substitution of retained counsel for appointed counsel is a frequent occurrence. It happened twice that day. It's not a reason to be

puzzled, as Judge Joseph said she was in Paragraph 13 of her response to the charges.

But instead of just answering yes to my question, she talked around it and she talked about cases when a defendant who's not indigent, but has no counsel on arraignment, so the court appoints counsel just for bail and that lawyer doesn't come back and retained counsel comes in. That might happen. But the transcript was right in front of her, and it shows that that's not what happened in the Pineda case. Attorney Khoury was there on April 2nd because she had been appointed previously. She came back and she was replaced by retained counsel. Nothing significant, nothing unusual, except that judge Joseph didn't want to acknowledge it.

A similar example more significant to the issues here is when I asked her whether detention on the fugitive from justice charge would require a determination that the evidence was sufficient to connect the defendant to the warrant, and she talked at length about the factors as if the other factors would somehow justify holding someone without

evidence that he was the person named in the underlying warrant.

A little later I read from the transcript where Mr. Jellinek said, the best thing for us to do is to clear the fugitive issue, release him on a personal, and hope he can avoid ICE. I asked her whether she understood that Mr. Jellinek's goal was to have his client avoid ICE, exactly as he said, and she would not acknowledge that she understood he meant exactly what he said. She insisted that she interpreted that as that he wanted more time to investigate, to see how it pertained to both agencies. That's the theory she's putting forward now, and that the lawyers have argued, but it's not what Mr. Jellinek had just said to her on the record.

And then, when she was answering her lawyer's questions, she said that she thought that detaining the defendant overnight, sending him to the jail, was analogous to putting a matter on for further call during the court day. And when I asked her if that was really what she meant, she insisted it was. After a career as a criminal defense

lawyer, could she really be so cavalier about sending a defendant to the jail overnight with no legal basis. That's preposterous. But once she had said it, in response to her lawyer's questions, she insisted on sticking to it.

The way she answered my questions was reminiscent of Chief Justice Fortes' description of the conversation in Lowell, when Judge Fortes was the Regional Administrative Justice. Chief Justice Fortes' testimony was very precise. She told you that she asked Judge Joseph an open-ended question without any accusation, that she had been told that part of the proceeding was not recorded. But she didn't assume that that meant that the judge had told the clerk to turn off the recording. She knew there were other possibilities. The clerk could have forgotten to turn it on after the lunch break or the equipment might have malfunctioned or otherwise.

So she said to Judge Joseph, I understand that part of the proceeding was not recorded. What happened. And Judge Joseph did not say I told the clerk to turn off the recording or the defense lawyer asked to go off

the record and I did. The first time Judge Fortes heard Judge Joseph say directly that she went off the record was in Chief Justice Dawley's office on May 8.

Instead, in her conversation with Judge Fortes, Judge Joseph danced around, as she did here, she asked questions about how the recording system worked in Newton and how that system was different from the newer system in other courts and she talked about a time when she turned off the record in Waltham because of a malfunction there. And Judge Fortes didn't remember it, but Judge Joseph talked about it here and in my interview with her, which is Exhibit N. But she never directly answered Judge Fortes' question what happened.

While we're talking about that conversation, there's another point to mention. Chief Justice Fortes testified that, when she told Judge Joseph that everything has to be recorded, Judge Joseph said she knew that. Chief Justice Fortes did not testify that Judge Joseph said she knew about Rule 211. And I'm not suggesting that you should find from that statement that she did know about Rule 211

before Chief Justice Fortes showed it to her, although she should have known about it. What I do suggest is that her position changes with the context and the audience, as it did in her testimony here.

Let's turn to consistency as a factor in evaluating credibility. Respondent's counsel has been very thorough and has found some inconsistencies in Mr. Jellinek's statements on periphery points, which Mr. Jellinek has acknowledged. But his account of the material facts has not changed, from the time of his first interview with the U.S. attorney in November of 2018 through his testimony here.

Counsel has emphasized that Mr. Jellinek did not go around the courthouse before the afternoon call, before the afternoon call telling people that he had a plan to get his client out the back. Why would he do that? That would destroy the plan. And he didn't go around afterward saying that he had the judge's blessing. Well, why would he do that? He had no reason to want to cause trouble to the judge. To the contrary, he preferred to talk with the

judge off the record to protect both himself and her and to keep it as private as possible afterward.

Judge Joseph, on the other hand, has taken a series of shifting positions. The most glaring inconsistency is her effort to backtrack on the statement of facts that she agreed to with the U.S. attorney and that she's agreed not to contest before the Commission in return for dismissal of criminal charges in September of 2022.

She stipulated that the normal custom and practice in Newton was that a defendant released from custody would be released into the courtroom. We heard from security director McPherson that that should not have been the practice, and we heard from some lawyers that that was not always what happened. But Judge Joseph stipulated that that was the normal custom and practice, and the chief court officer as well as the assistant district attorney, the clerk, and the First Justice have confirmed that it was. And it didn't depend on whether somebody had property. The assistant district attorney and the chief court officer

said the court officer would run down and get the property, or would bring it up if the court officer had reason, as in this case, to believe that the person was going to be released on personal recognizance.

Judge Joseph started backtracking on her stipulation during her interview under oath in June of 2023, and you can see this in Appendix N, Pages 190 to 192. Her positions on what she knew and didn't know, what she intended, and what she did and didn't do have also shifted. She told Chief Justice Dawley that the off the record conversation was about the Pennsylvania warrant. She told him nothing about any discussion about ICE. He could hear a reference to ICE on the recording, but not more than that. And of course he did not know and could not know, aside from what she told him, anything that was said off the record.

And when Chief Justice Dawley asked her whether she had anything to do with the defendant being released out the back or any responsibility for it or any knowledge of it, she denied it. Emphatically and adamantly.

In her interview with me under

oath on behalf of the Commission, she gave the same emphatic denial. But she also said that she thought she had a responsibility to determine whether the defendant was the right person for ICE, she thought she had that responsibility to ICE, and she intended to pause the ICE arrest to allow for an attorney/client conference. She resisted acknowledging that in her testimony here, but you will see that in the transcript of her interview which is in evidence.

In her response to the Commission's charges, Paragraph 32, she says that her conduct had the unintended effect of assisting in the defendant's avoidance of ICE. She did not say that in her interview with me and she did not say any of these things in her meeting with the Chief Justice Dawley. These are all material inconsistencies.

Whose version of what happened is more plausible? Which version finds support in the recorded part of the proceeding and in the testimony of other witnesses? The recording has no bias. It cannot lie or spin or misremember. David Jellinek's version is

consistent with what both he and Judge Joseph said on the record and with the other witnesses on the record.

Judge Joseph was the first to mention ICE as soon as they were at side bar. David Jellinek did not open that topic. She said it's my understanding that ICE is here. What did this communicate to Mr. Jellinek? It conveyed that she was concerned about ICE, she understood that he would be concerned, and she was inviting him to discuss how to deal with that concern.

And what does it tell us? She had said that she didn't know why he asked to go to side bar. But this tells us she did know or at least she inferred ICE was there, and that was the topic to be discussed at side bar.

David Jellinek heard this as an invitation to do exactly what he hoped to do, he made his argument about identity and then he told the judge clearly and directly what he wanted to accomplish, release on personal and try to avoid ICE.

Her statements gave him reason to think she was open to helping him and she now

acknowledges that she was trying to help him. She says so in Paragraph 12 of her response to the charges. She says she made what she thought was a good suggestion for his client, keeping the defendant in state not Federal custody.

What remained for David Jellinek was to tell Judge Joseph how he had proposed to accomplish his goal and what he needed from her to make it possible. He needed his client to go back downstairs, contrary to what she has stipulated was the normal practice in that court. If the defendant went back downstairs, he thought he could get him released out the back. That's why he asked to go off the record and that's what he told her off the record. Her response as he remembers it was, that's what we'll do, we'll proceed that way, or something like that. This version makes sense, it's plausible and consistent with the record and with what happened.

Mr. Jellinek acknowledges that his conduct was skirting the edge of ethical. Would an attorney characterize his own conduct that way if he were fabricating? If there were a more favorable version for himself, wouldn't

he offer it? And would he do what he did if he didn't think he had the judge's permission? Mr. Jellinek had too much to lose without the judge's permission. He was and still is a regular in the Newton District Court, he cultivates relationships with court personnel, and he benefits from those relationships. Would he jeopardize all of what he had gone through?

David Jellinek felt the need for the judge's blessing. He came in to the side bar discussion knowing what he needed from the judge and looking to gauge whether he had that opportunity. Her statements on the record signaled to him that he did have the opportunity he needed, her suggestion to hold the defendant overnight, ICE is going to get him, what if we detain him. He listened carefully, and he saw the opportunity he was looking for. That's when he asked to go off the record in that context. He had a specific purpose to tell her how he would accomplish what he was trying to do and what he needed from her to make it possible. He tells her exactly why he needed to go off the record, what he wanted to say to her, and did say to her.

Her version is implausible, it doesn't make sense. She would have you believe that Mr. Jellinek asked to go off the record for no reason with no purpose, not to say anything secret or private, not to say anything other than exactly what was said later on the record. Would a lawyer ask to go off the record with no purpose for no reason with no intention to say anything private?

There's been evidence that some judges did go off the record in the years when she was practicing, and that may be so. But context is key. She knew what came immediately before the request to go off the record. She knew that ICE was the topic and Attorney Jellinek's hope that his client could avoid ICE. And she was the first to mention ICE. There was no room for doubt that that was what he wanted to talk about. It was with that knowledge that she immediately granted his request to go off the record.

What about the other witnesses to this conversation? Assistant District Attorney Jurgens, Shannon Jurgens McDermott and Interpreter Eric Mendoza have different memories

of what they heard, but the general sense of what they heard both on and off the record and the impression that they both gleaned is consistent, the judge was trying to help the defendant avoid ICE.

Eric Mendoza is a bit rough around the edges, but he has no bias and no reason to want to incriminate anyone. He doesn't remember much about the morning, when he served on a number of cases and nothing unusual happened. He doesn't remember whether the defense attorney on this case in the morning was male or female. It didn't matter to him. He couldn't hear everything at side bar and he doesn't claim that he could and he can't quote specific words or phrases. But he heard enough to get an impression, the impression that the judge was unhappy about ICE being there and she was suggesting that this particular person be let go out the back, and that a decision was made for him to be let go out the back.

He remembers that because it bothered him. He felt disappointed in the court. As he said it, you kind of lose faith in the system a little. He's spent a lot of time

in courtrooms. He may not understand the fine points, but he has a sense of what is supposed to happen and what is not supposed to happen, and he knew this was not supposed to happen. That's why he remembered it.

What about Shannon McDermott? Her testimony was clear and precise and consistent with her previous statements. She fully understood her role. She said right away that ICE was outside her role, she would take no position regarding ICE. She was there at the side bar, and she listened. But having said she would take no position, her focus was not on the discussion about ICE. Her focus was the criminal charges that she was there to prosecute.

Her memory of the conversation at side bar was limited and does not fully match David Jellinek's testimony or Eric Mendoza's. She does not remember anyone saying anything about going out the back. Although, Chief Court Officer Noe testified that she -- and he testified to this on cross-examination, that she told him later that she had a sense that that might happen, that she couldn't believe a court

officer would do that.

She heard and understood enough of the conversation between Attorney Jellinek and Judge Joseph to make her uncomfortable with the judge and the defense attorney talking about how the defendant could avoid ICE. She described the conversation as sketchy. That was in her grand jury testimony. She acknowledged it in her testimony, she's a few years older and a little more professional and maybe that's not a word she would use today, but that was the word she used and she acknowledged it. She remembers the judge saying, what should we do. Well, what should we do about what? It had to be about ICE. There was nothing else left for the court to do in that case that day. The fugitive from justice charge was dismissed and there would be no bail request on the misdemeanor charge.

Counsel pointed out, and we had some discussion with Ms. McDermott on this topic, that a judge can set bail even if the DA doesn't request it, especially if there is reason to think the defendant won’t come back to court. And if ICE takes him, they might not

bring him back to court, whether he's the right person or the wrong person. So that might prevent him from appearing.

There was some suggestion that maybe Judge Joseph would have set bail to keep him in state custody so that he would appear in court. But if that were the purpose, then it would have been necessary to keep him detained until the case was resolved, unless she thought ICE was going to forget about it, which is extremely unlikely. Maybe a judge would do that on a charge of rape or robbery or drug trafficking that might lead to a sentence of incarceration with credit for the period in detention. But these were misdemeanor charges with no criminal record. The docket is in evidence and you can see that the case was ultimately disposed by pretrial probation, not by incarceration. Unless the motive were to keep the defendant away from ICE, this would not be a case where a judge would set bail without a request from the DA.

Respondent puts a lot of emphasis on Ms. McDermott going out to the main lobby after the proceeding ended and waiting

with the ICE officer, telling him that the defendant would come out from the public doorway. Ms. McDermott told us why she did that. She knew there was a sallyport downstairs, although she didn't use the office, she didn't go downstairs, but she knew it was there. But she didn't believe a court officer would release a defendant that way, knowing that ICE was waiting upstairs, and she knew that the normal practice was that a defendant would come out through the courtroom as indeed Judge Joseph has stipulated.

Let's talk about what happened after the matter went back on the record and back to open court. There was no more discussion of the defendant's identity for ICE, no more mention of whether he was the right person for ICE. Why not? Because it was no longer a concern. There was a plan. The judge and the defense attorney knew what was about to happen.

You heard from Judge MacLeod, -- and this was interesting -- she had a long judicial career first on the District Court and then on the Superior Court.

She said, and I think this is not what she was brought in for, I think she was brought in to testify that judges go off the record, but she said that, when she would go off the record, she would then put a sanitized version of that discussion on the record.

That was exactly what happened here. Judge Joseph and Mr. Jellinek engaged in a little performance for the benefit of everyone in the courtroom, especially the court officers who had control of the secure doors. The attorneys established that the defendant was not the right person for the Pennsylvania warrant, so the fugitive from justice charge would be dismissed, there would be no bail on the drug charges, and the defendant would be released on personal recognizance.

Then Mr. Jellinek made public his request that the defendant go back downstairs. He said I think he has some property downstairs and I'd like to speak with him downstairs with the interpreter, if I may. Judge Joseph said, that's fine, of course. So at this point, everyone in the courtroom knows he's going downstairs, and the arraignment

proceeds.

And there's been a lot of talk about whether it was common for a lawyer to go down to the lockup with a client after the client had been ordered released with the interpreter if necessary. And maybe it was. Although Judge Joseph has stipulated again that the normal practice was to release a defendant into the courtroom and out the front door, and you've heard from various witnesses, that a court officer would go down and get the property if he hadn't already brought it back up with the defendant.

But whether it was common to go downstairs or not, Judge Joseph clearly thought that she needed to give permission for them to go downstairs, and she said on the record that she did give permission. When Officer MacGregor asked if the defendant was released, she responded, he is. And then she said, Mr. Jellinek asked if the interpreter can accompany him downstairs to further interview him and I've allowed that to happen.

The clerk then reminded her that ICE was present to visit the lockup. She

responded, fine, I'm not going to let them come in here, but he's released on this. Why say that at that moment? She had already told the clerk to follow the First Justice's practice of excluding ICE from the courtroom, and there was no request to change that at this point.

In context, her saying that might seem to be a kind of nonsequitur, but it was not a nonsequitur. It expressed her awareness of the effect of excluding the ICE officer from the courtroom. ICE was not there to see and hear what was happening and when, to know that she had ordered the defendant released and had allowed the defendant to go down to lockup. She knew ICE wasn't in the courtroom to hear it and she made sure it would stay that way long enough for Attorney Jellinek to put his plan into effect.

Both the clerk and Attorney Jellinek interpreted her response as indicating that she would not allow ICE to go to the lockup. She rejects that interpretation and emphasizes that there were other ways to get there. Indeed there were. Only there were obstacles. If they were to go through the

building, they need to be escorted by someone with a security pass and to get there before the defendant left. And if they were to go around outside to the back and into the fenced area where a sheriff's van was waiting for another detainee, and then knock on the door to seek entry to the lockup, they would have to know exactly when he was going downstairs and when he was going to be released and maybe they'd also have to have someone wait upstairs in case he changed the plan and went back that way. Not being in the courtroom to see and hear, they could hardly accomplish any of this.

I want to be clear. In excluding ICE from the courtroom, Judge Joseph was following the practice of the First Justice, and the Commission does not fault her for that. She was new, she was not in charge of that courthouse, and that was the First Justice's practice. But in announcing at that moment that I'm not going to let them come in here, she was acknowledging that she knew the effect in this case. ICE is waiting outside the courtroom, expecting him to go out through the courtroom, according to the normal practice, having no way

to know that he's going another way and no way to do anything about it.

So why would she do this?

Excuse me just a moment.

(PAUSE)

Why would she do it? There's been no suggestion that she was a political activist or a zealot of some kind, and the Commission doesn't contend that she was. The contention, rather, is that she stepped out of the judicial role. She was trying to help. She saw a problem, a potential injustice. ICE might arrest the wrong person. She wanted to prevent that. But that was not her role as a Massachusetts District Court judge. Her role was to address the state charges before her.

Regarding ICE. Her obligation was to be neutral, both in reality and in appearance, to do nothing to help or hinder, as Chief Justice Fortes said and as Judge Joseph repeated. The assistant district attorney understood that. She was neutral regarding ICE. That's exactly what Judge Joseph should have done. The assistant district attorney was three years out of school, but she knew that that's

what she was supposed to do and that's what Judge Joseph should have done.

Instead, as Ms. McDermott said, the judge's conduct on that day was a misguided effort to do what she thought was right, to help the defense attorney get his client out of a difficult situation. Having stepped out of her role then, instead of acknowledging error and taking responsibility for it -- if she had done that, I don't think we'd be here, but instead of acknowledging her error and taking responsibility for it, Judge Joseph has continued to claim that she did have some proper role regarding ICE.

In response to the charges in Paragraph 23, filed in December of 2024, six and a half years, more than six and a half years after the fact, says she was trying to help, she wanted to resolve the issue of whether the defendant was the person ICE wanted. She thought it was her responsibility.

Her further response in Paragraph 12 says that David Jellinek resisted what I thought was a good suggestion for his client.

Paragraph 15 says that she wanted to ensure that defendant's conference with his attorney would happen before he was taken into ICE custody, not that she wanted to give him more time to investigate. That's a theory that she's presented here. But that's not what's in her response to the charges. None of this was within her role.

And now, in this hearing, instead of acknowledging that she did facilitate what happened, she has this new theory she was just trying to give the defense attorney more time, even though he never asked for more time, and even if it would mean sending the defendant to jail overnight with no legal basis to do that.

Let's turn to what happened after April 2nd. On April 4, she had a conversation with Judge Heffernan. There was no falsehood. But she did not volunteer relevant information. She was not candid. If what she says now is true, that this conversation was when she first learned that defendant was released out the back -- And I'm not suggesting she learned the outcome earlier, but that she

learned what was going to happen.

But if this was the first time she had heard about it, wouldn't it have dawned on her in this conversation that she had unwittingly facilitated, that she had allowed it to happen? As she said in her response to the charges, that she unintentionally facilitated, although she did not say it in her testimony here. Wouldn't she have wanted to share that new recognition with the First Justice? Wouldn't she have wanted to ask what should I do, how do I keep this from blowing up? Or if she didn't feel comfortable with the First Justice enough to do that, wouldn't she have called someone else to talk it through and think about what to do? Her mentor? A judge friend?

Then sometime within the next couple of weeks she had a conversation with the regional administrative justice. Again, there was no falsehood, but no acknowledgment in response to Judge Fortes' question, what happened. There was a lot of talking around it, but she never said I told the clerk to turn off the record. She was not candid and she was not

honest about that conversation after in her interview under oath with me on behalf of the Commission. In that interview, she said she acknowledged going off the record immediately. That's in Appendix N, Page 240, Line 13.

And in her testimony here she said she did acknowledge it. That's not so. Chief Justice Fortes testified that that was not so. And in Judge Joseph's response to the charges at Paragraph 37, she said she assumed that the Regional Administrative Justice knew. Judge Fortes didn't assume anything, but she now says she assumed.

If it had happened the way she says now, then by the time of her conversation with the Regional Administrative Justice, she knew that the defendant avoided ICE, she knew what she had said and what Attorney Jellinek had said on the record, and now she knew she had violated the rule. Wouldn't it have dawned on her then, if it hadn't already, how it would look to others? Wouldn't she have realized what she says in her response that she unintentionally facilitated and that others would think she facilitated intentionally,

wouldn't she have wanted to explain to the Regional Administrative Justice what happened, again, to ask what should I do, how do I keep it from blowing up, do I have to tell the chief? But she didn't do that. She talked about the recording equipment, the Waltham incident, the issue of the defendant's identification for Pennsylvania. Again, if she didn't feel comfortable enough with the Regional Administrative Justice, wouldn't she have wanted to call her mentor or a judge friend to talk it through?

Then comes May 8th, the meeting with Chief Justice Dawley. At this point she had listened to the recording. She knew that the recording showed she went off the record and she knew that that violated Rule 211. There was no way to deny it. She had to acknowledge it and show remorse for it. So she did. She also knew what the recording would reveal about what was said on the record.

Now, you heard the original recording. It actually doesn't reveal a whole lot, but she knew what it could reveal. Surely she could perceive how it would look and surely

she understood by this point that she had facilitated what happened, even if, as she claims, her involvement was unintentional.

But in response to the Chief's direct questions regarding her involvement in the release of the defendant from the lockup, she adamantly denied having anything to do with it. She didn't say she was concerned about ICE taking the wrong person, she didn't say, as she told me under oath, that she thought she had the responsibility to determine his identity for ICE, she didn't say, as she told me under oath, that she intended to pause the ICE arrest to make sure his attorney could have a conference with him first, and she didn't say, as she is now, that she was trying to give his attorney more time to investigate. Even she has now acknowledged that her denial of having anything to do with this release out the back was not fully accurate. Her position in response is that she did facilitate unintentionally, that by allowing the defendant to go downstairs, she allowed it to happen. But she didn't tell the Chief Justice that. She tried to protect herself rather than to participate candidly and

honestly in a discussion of what was now a problem for the court and how the court would have to deal with it.

Again, the issue is role. She wasn't a school child called to the principal's office, she wasn't a criminal suspect with a right to remain silent, or even a civil deponent who's best advised to answer the questions and volunteer nothing. She's a judge in a position of high honor and great -- and high authority and great responsibility, including the duty to be candid and honest with court leadership.

And even now, after all this time and opportunity to think about what happened and to think about the role of a judge, and after all of what she has suffered, and there's no doubt she has suffered, she still doesn't acknowledge what it means to be a judge.

Paragraph 22 of her further response compares her suspension from the bench during her indictment with the immunity granted to the defense attorney as if there were some unfairness in their different treatment. But a judge is held to a higher standard than an attorney, indeed a higher standard than almost

anyone. Apparently she still doesn't accept that higher standard.

I submit that Judge Joseph facilitated what happened not inadvertently, not unintentionally, but knowingly, understanding that by allowing the defendant and his attorney to go downstairs after she ordered the defendant released, she was providing an opportunity to the defendant to be released out the back while ICE waited in front.

She didn't know there was an arranged plan. She didn't know about the conversation between Mr. Jellinek and Court Officer MacGregor, but she knew what Attorney Jellinek hoped would happen and she did what she could to make it possible. She did it not out of any political motive and not out of any ill intention. To the contrary, she did it in an effort to prevent what she thought was an imminent injustice. But in doing so, she violated her obligation as a judge to serve the rule of law, to uphold both the reality and appearance of integrity, impartiality, and independence of the judiciary.

When she realized that her

conduct was coming to light, she tried to protect herself. She was not candid and honest with the Chief Justice as the code required her to be. What she told the Chief Justice was false.

In her interview with me on behalf of the Commission under oath, she gave the same falsehood. She offered various explanations, as she has here, but she still did not acknowledge, as she did in her response to the charges, that she even unintentionally facilitated what happened, and she repeated her denial to you here in this courtroom, without acknowledging that she facilitated what happened even unintentionally.

Judge Joseph has garnered sympathy in some quarters, and indeed she is in a sympathetic position. The United States attorney went after her in a way that came as a shock to the judiciary and the bar and surely came as a shock to her, based on conduct when she had been a judge for only five months. She was indeed new as a judge when she encountered the Medina Perez case. The relationship between the Massachusetts judiciary and Federal

officials was tense and the atmosphere around ICE in courthouses was fraught.

A more experienced judge might have recognized that this was the time to be as careful as one could ever be, to be completely transparent, not just to stay on the record, but to stay in open court so that there could be no question about what was happening. She was not experienced, and perhaps she could be excused for not recognizing how dangerous the situation was.

But it doesn't take experience to be honest, to tell the truth, the whole truth. What it takes to do that is courage, especially when what you're going to tell doesn't make you look great. Judge Joseph did what she did and she said what she said when she was asked about it, and what she did and said undermined public trust and confidence in the Massachusetts judiciary and brought the judicial office into disrepute. Sympathy cannot protect her and cannot protect the public from the consequences of her conduct.

Excuse me for just a minute.

(PAUSE)

Turning to the violations. General Laws Chapter 211C authorizes the Commission on Judicial Conduct to discipline judges for violations of the Code of Judicial Conduct as well as for willful misconduct under Section 2(5)(B) and conduct prejudicial to the administration of justice for unbecoming the judicial office that brings the judicial office into disrepute.

I will address the code violations and explain which ones the Commission contends also violate these statutory sections, starting with the least serious and ending with the most serious.

First, Judge Joseph violated District Court Rule 211 by going off the record. She concedes that she did that. She said she didn't know about the rule, but it was her obligation to know. She says others did the same. That doesn't change the violation.

The definition section of the Code of Judicial Conduct, which is on the screen there, -- I'm sorry that it's not big enough, but it's on the screen -- the definition says, defines law to include court rule. Rule 2.2 of

the Code of Judicial Conduct requires a judge to uphold and apply the law.

So the violation of District Court Rule 211 was a violation of Rule 2.2 of the Code of Judicial Conduct. The violation of District Court Rule 211 was also a violation of Rule 1.2 of the Code of Judicial Conduct, also on the screen, which requires that a judge act at all times in a manner that promotes public confidence and independence, integrity, and impartiality of the judiciary and avoid impropriety and the appearance of impropriety.

Comment 5 to Rule 1.2 teaches that violations of law violate Rule 1.2. The violation of District Court Rule 211, if she didn't know about Rule 211, is also a violation of Rule 2.5 of the Code of Judicial Conduct, which requires the judge to perform judicial duties and administrative duties competently. The judge has to know the law and the rules that apply to the court she sits on and has to apply the law and the rules.

Accepting that she did not know about the rule, I do not argue that this violation was willful. If she did know about

the rule then, I would suggest it was willful. Either way, it was prejudicial to the administration of justice and unbecoming a judicial officer and has brought the judicial office into disrepute in violation on General Law 211C, Section 2(5)(B).

The second more serious violation is that Judge Joseph demonstrated bias and gave the appearance of bias as between the defendant and ICE by what she did in assisting defense counsel in implementing his plan and by what she said on the record and by going off the record in this context.

On the record she introduced the topic of ICE, which was not within her proper concern. She said ICE is going to get him. First, she said, I understand ICE is here. Then she said, ICE is going to get him, what if we detain him. Then she went off the record right after the defense attorney had told her that his goal was to avoid ICE. Her comments and going off the record in that context gave the appearance that she was trying to help the defendant avoid ICE, as indeed she was. All the witnesses who heard some or all of the

discussion, David Jellinek, the assistant district attorney, and the interpreter got that impression.

Her demonstration of bias as between the defendant and ICE and the appearance of bias was a violation of Rule 2.2 of the Code of Judicial Conduct which requires a judge to perform all duties of the judicial office fairly and impartially. It was also another violation of Rule 1.2 of the Code of Judicial Conduct which requires a judge to act at all times in a manner that promotes public confidence in the independence and integrity and impartiality of the judiciary and avoid impropriety and the appearance of impropriety.

The demonstration of bias I suggest was willful in violation of Chapter 211C, Section 2(5)(B). She knew that she was supposed to be neutral toward ICE and to appear neutral, but she chose to do otherwise. It was also prejudicial to the administration of justice and unbecoming a judicial officer, and there can be no question that it has brought the judicial office into disrepute in violation of Chapter 211C, Section 2(5)(B).

Third and most serious, lack of candor and honesty. In her meeting with Chief Justice Dawley and in her interview under oath with me on behalf of the Commission, as well as with you as hearing officer in this proceeding. This is a violation of Rule 2.16 of the Code of Judicial Conduct which says a judge shall cooperate and be candid and honest with judicial disciplinary authorities.

The First Justice and the RAJ are not disciplinary authorities, so her lack of candor with them did not in itself violate Rule 2.16. But part of their roles was to pass on information that the Chief Justice should have in fulfilling his duties, so that a lack of candor with them was effectively a lack of candor with the Chief Justice as well.

With Chief Justice Dawley and in her interview with me and here in this courtroom, she was more than just not candid, she was dishonest. This I submit was willful misconduct prejudicial to the administration of justice and unbecoming a judicial officer, that brought the judicial office into disrepute, in violation of General Laws Chapter 211C, both sections 2(5)(B)

and (D).

The violation of Rule 2.16, and particularly a willful violation, goes to the essence of the judicial rule. Honesty of every judge is essential to public trust and confidence in the judiciary which in turn is essential to rule of law.

I'm going to turn to mitigating and aggravating factors and recommended sanctions.

There are two mitigating factors, and I've already mentioned both. First, she was very new as a judge. And second, she's already suffered quite a lot. There's no question about that. I suggest there is one aggregating factor. It is essentially the flip side of what I said a few moments ago. The aggravating factor is the context of the controversy in which this event occurred.

Judge Joseph was new as a judge, but she was not new as a lawyer, and she could not have been living in a bubble. She had to know that anything involving ICE would trigger scrutiny and she had to know that the way a judge handled it would affect public trust and confidence in the judiciary. That context

and her failure to recognize it and respond to it appropriately was an aggravating factor.

As for sanctions, I'll address the three categories of misconduct from least to most serious.

First, going off the record in violation of District Court Rule 211, and based on that District Court rule violation, in violation of Rules 2.2, 1.2, and 2.5 of the Code of Judicial Conduct. Now, I've recited a list of rules. But this is the least serious of the violations. If it stood alone, it would warrant minimal discipline. But where a matter has become as public as this matter has, the resulting discipline has to be public, because the public has a right to know the result. Any private discipline would fail to promote public confidence in the judiciary as the Commission is mandated to do.

Lowest level of public discipline authorized by law is a public reprimand, and so that is the recommendation I make to you, a public reprimand with conditions of monitoring for a period of time.

The next more serious violation

is actual bias and the appearance of bias in violation of Rules 2.2 and 1.2 of the Code of Judicial Conduct. Here it is necessary to differentiate between actual and apparent. I urge you to find both. Based on both, the appropriate sanction is a public censure, which is the higher level of public condemnation above public reprimand. Again, with a period of monitoring.

If the violation were the appearance of bias without actual bias, that is, if she had created the appearance of bias by what she said on the record and by going off the record, but did not actually assist in the defendant's avoidance of ICE, then I would suggest that the appropriate sanction would be public reprimand, again, with a period of monitoring.

Finally, the third violation is the lack of candor and honesty with disciplinary authorities, in violation of Rule 2.16 of the Code of Judicial Conduct, including under oath in this courtroom and in her interview with me and on behalf of the Commission as well as with Chief Justice Dawley.

As has been the case in so many other contexts, the attempt to cover up, to deny, and obfuscate, her refusal to accept responsibility is more serious than the underlying violations and warrants the most severe sanctions.

In past cases, when a judge has violated Rule 2.16, the SJC has concluded that the judge can no longer command respect and authority essential to the performance of a judicial function and on that basis can no longer serve as a judge. That is all the more necessary where, as here, this violation occurs in the context of other violations.

The SJC does not in itself have authority to remove a judge from office. That authority rests with the legislature and governor. The highest level of discipline the SJC can impose and what it has done in past cases when a judge has violated Rule 2.16 is indefinite suspension without pay and referral to the legislature and the governor. That I suggest is the appropriate sanction for this violation.

I know you have listened

carefully to all of the evidence and that you have reviewed and will further review all of the materials before you and will make findings and rulings based on all of the evidence. That is all the Commission asks for.

Thank you for your attention throughout this matter of great importance to the Massachusetts judiciary.

HEARING OFFICER: Thank you, Special Counsel, and thank you, Mr. Hoopes.

It's been extremely helpful to hear your arguments today, and I want to commend all counsel for the quality of your arguments and the presentation of the evidence during this hearing.

As we've discussed on Friday, it's my understanding that we will have final transcripts from the hearing by this Thursday. Counsel will then submit your initial post hearing briefs with your proposed findings of fact and conclusions of law by Thursday, July 3rd, and your responses to each other's initial briefs by the following Thursday, July 10th. At that point the hearing will be closed, and I will then issue my report and

recommendation within 30 days.

I also want to express my deep appreciation for your exemplary professionalism throughout this matter, including your commitment to working so cooperatively with each other throughout this process. That is very much appreciated.

I look forward to reviewing your upcoming submissions.

And with that, I believe we're done for today, unless there's anything else either of you have.

MR. HOOPES: Thank you.

JUDGE FABRICANT: Thank you.

HEARING OFFICER: Thank you very much.

We're adjourned.

(The proceedings adjourned at 11:00 a.m.)