COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

21-P-509

ADOPTION OF BRENDA (and a companion case[1]).

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

In December 2017, a judge found that Brenda, born in 2009, and Adam, born in 2010, were children in need of care and protection, but did not terminate the mother's or the father's parental rights. See G. L. c. 119, § 26 (b). The finding entered on a G. L. c. 119, § 24, petition filed by the Department of Children and Families (department) on July 31, 2015, two days after the mother said she "had been thinking about taking the lives of her children" by driving a car into a river, giving them medication, suffocating them, or hanging them, then taking her own life. The mother stated that the father was not involved in the family's life and refused to say where the children were.

Two years earlier, the department filed a similar petition because the mother (1) attempted to take her own life by

[1] Adoption of Adam. The children's names are pseudonyms.

drinking half a bottle of brandy and taking an unknown quantity of ibuprofen, and (2) intentionally lied about the father's involvement in the family when she was hospitalized for psychiatric evaluation, causing the children to be removed and placed in foster care. That petition was dismissed five months before the July 31, 2015 petition was filed because the family appeared to be stable.

The department sought review and redetermination of the December 2017 adjudication in June 2018, following chronic homelessness for the parents, chronic confusion for the department about the parents' relationship, and chronic minimization by the parents of the risks to the children posed by the mother's untreated mental health issues. See G. L. c. 119, § 26 (c). A trial took place before the same judge on nineteen nonconsecutive days between December 2018 and October 2019. The judge made 452 findings of fact and twelve conclusions of law that "are both specific and detailed, demonstrating, as we require, that close attention was given to the evidence." Adoption of Don, 435 Mass. 158, 165 (2001). Before us are the parents' appeals from decrees terminating their parental rights and dispensing with the need for their consent to the children's adoptions.

On appeal, the father claims that the department did not make reasonable efforts to help the parents find housing. The

mother challenges four findings that she alleges rely on hearsay and inadmissible information in reports prepared under G. L. c. 119, § 51B. Both parents claim error in forty-one of the judge's subsidiary findings because they are based on statements in a 2016 parental and psychological evaluation that was prepared by Clinical & Support Options (CSO) after interviews with the mother and father in 2015 and 2016 (CSO evaluation). The CSO evaluation was marked for trial as exhibit 21 and excluded on the parents' motions in limine. It later came in, however, as part of exhibit 23, the mother's CSO treatment records. We affirm.

Background.[2] The mother, born in South Africa, and the father, born in Jamaica, became a couple in 2006. The department became involved in the family's life six months after Brenda was born because the mother reported, "I almost hurt my child . . . [b]y pressing . . . her head down." Brenda was unharmed, but the department opened a case for services, which continued through Adam's birth and were expanded when Adam was diagnosed with Down Syndrome. The mother voluntarily placed the children in the department's custody in 2011 because she was feeling overwhelmed with their care, and the children went to separate foster homes. The father called the department a few

[2] We summarize the judge's pertinent findings, supplemented by evidence he explicitly or implicitly credited.

days later to find out where the children were but did not disclose his location or ask for their return.[3] After two weeks, the children were returned to the mother because she was spending all day outside their day care, upsetting the children when they saw her and making the foster parents uncomfortable. By June 2012, Brenda and Adam were receiving services including day care; "a parent educator . . . had been assigned"; and the department decided to close the case. For the entire period the case was open, the mother intentionally misrepresented that the father was not involved with the family.

Six months after the department closed the case and stopped paying for day care, the mother received a payment reminder from the day care and threatened to kill the children.[4] Four months after that, in April 2013, the mother attempted suicide; when the mother told the department the father was not available or involved in the family, the department removed the children. In fact, the father was living with the family and later stated he "didn't see any" signs the mother was in distress except "[m]aybe she was a little overwhelmed."[5] The children were

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[3] At trial, the father did not recall the children going into custody.

[4] The mother testified she had been paying a reduced rate "[b]ecause I didn't let them know that the father [wa]s working," but by December 2012 there was a "high" bill.

[5] The father similarly did not notice any change in the mother's behavior before she reported pushing Brenda's head in 2010.

returned after the mother engaged in services and the father cut back on his work hours, but were removed for a third time on July 30, 2015, because, as the mother testified, the day before, an in-home therapist "asked [the mother] as a single mom with two kids and a child with special needs, how do I deal with stress. . . . And I said sometimes I get overwhelmed and stressed that I don't have anybody to look after my kids, so I would think of taking my kids' life and then taking mine." This was the mother's third conversation with the therapist in two months where she made statements about harming the children. On June 18, 2015, the mother said Adam's day care was going to be discontinued and "she was so upset that it was a good thing the children were in school because she would've taken their lives." On July 8, the mother told the therapist she had thought about putting a bag over Adam's head and killing herself once he was dead.[6] The mother indicated these thoughts were triggered when she was overwhelmed, frustrated, and disappointed, and said

[6] The mother also threatened suicide in February 2015, upon learning that a report was going to be filed pursuant to G. L. c. 119, § 51A, alleging neglect of the children because the mother left five year old Brenda and four year old Adam home alone for one and one-half hours. The mother did not remember this episode at trial. After the incident, the department reopened the family's case, which stayed open through June 28, 2015. The mother again misrepresented during this time that the father was not available or involved.

during the July 29 conversation that "she gets overwhelmed when she's around the children too much."

The mother went to the hospital, where she made similarly threatening statements and was admitted for psychiatric evaluation.[7] She refused to say where the children were "[b]ecause the children were with their father." The next day, July 30, the mother said that she was not currently thinking of killing herself or her children and was discharged with a diagnosis of "Adjustment disorder, mood disorder NOS." She returned to the home, whereupon the department arrived with police officers, found the children home with the father, and removed the children on an emergency basis. Neither parent packed the children's medical supplies.[8]

After the July 30 removal, neither parent expressed an understanding of the seriousness of the mother's statements or the effect her mental health and the repeated removals may have on the children, despite engaging in services like therapy and

[7] The mother said "that sometimes the stress of being a single parent was so much that she 'just wanted to blow the whole house up'" and that "being a single mother of a special needs child, being so far away from family who live in so africia [sic], [and] chronic pain" led her to have thoughts of killing the children and herself. The mother suffers from chronic hip pain after a 2010 slip and fall while pregnant with Adam. In 2013, the mother had prescriptions from six different doctors for sixteen different medications, including opioids and antidepressants, and also reported taking medications that were not prescribed to her.

[8] The pediatrician later represcribed the medications.

parenting groups.[9] The father said that the mother was "just being dramatic or it's a cultural thing"[10]; that the department had "blown [the mother's statements] out of proportion"; and "that the children were not removed due to mother's mental health because she was clear from the hospital." Both parents maintained that the mother's threats "were misinterpreted and that they were specific to her culture and that there was a misunderstanding by the Department of those statements." They told their pastor the children were removed because the mother went for a walk and left them unsupervised.

In April 2017, the mother said "that she has never been diagnosed with a mental condition or psychological disorder, and she's never been prescribed any medication for anything,"

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[9] Adam's foster mother reported that Adam was "very angry" for about one week after the July 30 removal. Brenda was "treated for general anxiety as well as eneursis" [sic]. According to their respective foster parents, both children struggled after visits with the mother and father and continued to do so throughout the pendency of the case, even though visits seemed to go well. In 2015, Brenda's foster mother reported "that Brenda is very quiet after visits with the parents and she usually wets herself." In 2017, "the foster mother reported that, for a few days following visits, Brenda soils herself, she wets the bed, she has trouble sleeping, and her behavior changes entirely." Adam was also reported to "soil himself for several days following visits with his parents." Both children stopped soiling themselves by 2018 but still had anxiety around visits.

[10] The father said the same thing about the mother -- "she was just being dramatic" -- after a visit at the department's office where security had to be called because the mother became upset, raised her voice in front of the children, rose out of her chair, and moved toward the social worker.

contradicting reports she made in 2015, that she had been diagnosed with anxiety, depression, and attention deficit hyperactivity disorder and prescribed medications for pain, allergies, asthma, and seizures.[11] When asked about the department's concerns for her mental health based on her threats to harm the children, the mother insisted "that she is often misunderstood because of her accent."[12] The mother stipulated to her unfitness in June 2017 as part of a strategy with the father to get the children back, because the parents believed the chances of reunification were better if the department thought they were separated. Following the mother's stipulation, the father's termination trial began. The judge found the father unfit but did not terminate his parental rights, instead ordering Brenda to be reunified with the father if, within thirty days, the father made a plan for her care while he worked. The judge's order was premised on the father's representation that he and the mother were not a couple and provided, among other things, that the mother shall not reside

[11] In 2016, the mother's therapist also diagnosed her with obsessive compulsive disorder (OCD), which, the therapist stated, the mother had overcome. The OCD diagnosis was based on the mother's self-reported behaviors in February 2016.

[12] The mother's native language is Afrikaans. She also speaks English and Zulu. The judge made no findings about the mother's accent or the ability or inability of others to understand her. No witness testified to any difficulty understanding her communications in English.

in or visit the father's home. Later, in January 2019, the father testified that they were always a couple and he just "said a lot of things" during the previous trial. The judge revoked the order for reunification in March 2018 because the father's plan was inadequate.[13] At that time, the department considered barriers to Brenda's reunification with the father to be that "[h]e did not follow our action plan, the family therapy, therapy, the residency, . . . we were unable to verify services, and we did not know if his plan was for [the mother] to be a caretaker for the children. We did not know if they were living together." The department's confusion arose from the facts that (1) neither parent maintained stable housing after they were evicted from their apartment in 2016; (2) there were signs the mother still lived with the father; and (3) neither parent gave a clear answer about whether they were a couple.

The permanency hearing started in December 2018. In December 2018 and January 2019, the parents testified that they were living together in the Connecticut home of someone for whom the father worked as a personal care attendant. This was the

[13] Among other failings, the plan, provided more than thirty days later and after a court order, made clear that Brenda would need daily support to get to school in the mornings, and yet included no provision for that, nor for getting Brenda to her weekly therapy appointments or supervised visits with the mother.

first time the department heard this information. The mother was also working as a personal care attendant and said she was going to community college five days per week.[14] The mother did not believe she had any mental health issues, stating no one ever diagnosed her with one and they "don't have" mental illness in South Africa. The father had no concerns about the mother's mental health, though he later said he understood the problem to be that "she's not expressive enough especially if she's overwhelmed and she doesn't understand because she speaks another language." The father testified that "[t]he plan would be for me to make sure that mother is on the same page as far as feeling overwhelmed or not being expressive enough, to always make sure that I'm informed. That way we can always have a plan to move forward to . . . get services for her in place." If the mother was "feeling overwhelmed or not being expressive enough" while caring for the children and refused the help of therapists, the father said he would "have to call the authorities [and have her removed from the home] to make sure that she's complying because it's a lot of headache for me." The judge "did not credit this testimony that Father would engage in such behavior" and noted the father "did not explain

[14] The mother's testimony about when this program began and ended was inconsistent, and the record contains no matriculation records or certificates showing the mother completed the program.

what would occur if Mother were unable to communicate in a healthy manner her ongoing struggles, as it seems to have been the case in the past."

The above-quoted testimony by the father was the first time the department heard him discuss the mother's mental health, though his family action plan tasks consistently included "attend therapy on a regular basis so that he can get some insight on [mother]'s mental health issues." The father did attend six sessions of therapy but did not sign releases, so the department could not speak with the providers. He was not attending individual therapy at the time of trial but was going to the mother's therapy with her to work on "issues of communication."

Although the father's family action plans required him to cooperate with the department, he consistently failed to return calls and abruptly left a September 21, 2018 meeting to review the action plan saying, "I'm done. It looks like we're not getting anywhere." The father slammed the door behind him. He frequently left the office at the end of parent-child visits without responding to social workers' requests to schedule a home or office visit, and he "was not forthcoming to the Department about where exactly he was living, what he was doing, and what his intentions were." While he largely complied with the tasks of attending, being prepared for, and appropriately

engaging with the children at visits, the father failed to confirm or lied about confirming two visits, which were canceled, and failed to appear for a third visit that was supposed to last two hours. He also failed to provide the department "with what his plan would be for the children with regard to school, medical appointments, medical providers, [and] stuff like that" if the children were returned to the parents' care.[15]

In January 2019, the mother began seeing her individual therapist regularly in anticipation of the therapist's testimony at trial (before that time, she saw the therapist only sporadically). In May 2019, the therapist testified that she saw no signs the mother intended to harm herself or the children and that the mother's 2015 statements "didn't need to be treated or dealt with" because the therapist accepted the mother's explanation "that she didn't mean it when she said it." The judge's questions to the therapist, and his ultimate conclusions, suggest he did not credit the therapist on this point.[16]

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[15] By the time the trial ended in October 2019, the father was unemployed, the mother reported working ninety-four hours per week, and the plan was for the father to care for the children full time, though he had never done so before.

[16] Q: "In her description of [her statements] to you, did she talk about going online and looking up an incident where a mother had driven a car into the river trying to kill all of her children?"

The parents left the home in Connecticut without telling the department and were searching for housing when the evidence closed in October 2019. In December 2019, they produced a signed lease for an apartment, but the judge did not accept that lease as evidence of "actual residence or continued residence."

Discussion. The decision to terminate a parent's rights requires a two-part analysis. See Adoption of Garret, 92 Mass. App. Ct. 664, 671 (2018). "First, the judge must determine whether the parent is fit to carry out the duties and responsibilities required of a parent." Id. See Adoption of Ilona, 459 Mass. 53, 59 (2011). "Parental unfitness must be determined by taking into consideration a parent's character, temperament, conduct, and capacity to provide for the child in the same context with the child's particular needs, affections, and age" (quotation and citation omitted). Adoption of Rhona, 63 Mass. App. Ct. 117, 125 (2005). If the judge finds the parent unfit by clear and convincing evidence, and if there is no "credible evidence supporting a reasonable likelihood that the parent will become fit" in the near future, the judge then

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A: "That sounds familiar that -- I can't remember in the context of the whole story where that fits in."
Q: "And did she talk about that she had expressed that she would give them medication to kill them and then take her own life?"
A: "I can't remember that."
Q: "Yeah."

must assess whether termination of parental rights is in the child's best interests. Adoption of Ilona, supra. It is for the judge alone to decide which evidence to credit and how much weight to assign that evidence. See Adoption of Don, 435 Mass. at 166-167. "We give substantial deference to [the] judge's decision . . . and reverse only where the findings of fact are clearly erroneous or where there is a clear error of law or abuse of discretion." Adoption of Ilona, supra.

The parents claim that findings 104 through 118 and 179 through 206 are clearly erroneous because, as support, the judge cited to the CSO evaluation contained within exhibit 23. Because the procedural history is crucial, we treat it in some detail.

As at the first trial, the department sought to introduce the mother's CSO treatment records as exhibit 23 and subpoenaed the records before trial, presumably to update exhibit 23. No records were received before December 5, 2018, when the mother filed a motion in limine to exclude exhibit 23 on the grounds that the records had not been received in response to the subpoena and "[t]he records on file from the last trial [that were introduced as exhibit 23] are incomplete and redacted, and consist primarily of Exhibit 21, which is inadmissible." Exhibit 21 from the first trial was the CSO evaluation, which the department again sought to introduce as exhibit 21. The

mother also moved in limine to exclude exhibit 21, claiming it was old and contained hearsay. Echoing those arguments and further contending that the CSO evaluation contained "inadmissible opinion, judgment and speculation," and that the witness who might have testified as to its facts was not available, the father also moved in limine to exclude exhibit 21.[17] The court eventually subpoenaed the mother's CSO records, and the records were received on May 2, 2019. The next day, by margin endorsements, the judge allowed the parents' motions in limine to exclude exhibit 21.

CSO provided more records in response to the court's subpoena on May 6, 2019. On May 8, counsel for the mother reviewed all the records CSO had provided and discerned approximately ten pages of billing information. No more CSO records were received before the June 6, 2019, trial date, when the mother again objected to admission of exhibit 23, this time also citing privilege. Stating that he "need[ed] to go through and parse that . . . because certain things are admissible," the judge admitted exhibit 23 "subject to privilege" and an in camera review.

[17] The father's motion was also filed on December 5, 2018.

There is no evidence in the record before us of what review, if any, was done of exhibit 23,[18] or that, after June 6, 2019, CSO produced more records in response to the subpoena. As admitted, exhibit 23 contains some redacted names and the full CSO evaluation. Exhibit 23 also contains billing records for the mother and Brenda. Accordingly, we conclude that the judge admitted in this trial the same version of exhibit 23 -- including the objected-to, and excluded, exhibit 21 -- that was admitted at the first trial, with newly updated CSO billing records.

On appeal, the mother claims that the CSO evaluation contains hearsay and its admission deprived her of due process of law. The department counters that the mother failed to preserve this claim by not renewing her objection to admission of the CSO evaluation once she saw it was included in exhibit 23. The department's contention is not persuasive. For one thing, the mother never received notice of the judge's conclusions following in camera review of exhibit 23, so she had no opportunity to renew her objection. More importantly, however, the judge allowed the mother's motion to exclude the

[18] By contrast, the mother's hospital records, admitted over the mother's privilege objection, were redacted and marked with the date of in camera review. The judge also stated on the record that he went through the hospital records and acted on those portions the mother had marked.

CSO evaluation. She was entitled to rely on that ruling, whether the evaluation was marked as exhibit 21 or 23. There is no challenge to the timeliness or adequacy of the father's objection to admission of the CSO evaluation, which the father asserts was stale, unreliable, and "d[id] not support a finding of current unfitness."

We agree with the parents that the judge should have redacted the CSO evaluation from exhibit 23 consistent with his rulings on the motions in limine. Since findings 179 and 195, 192 through 194, and 198 through 200 are supported only by the CSO evaluation, we also agree with the parents that they are clearly erroneous.[19] See Adoption of Larry, 434 Mass. 456, 482 (2001) (finding clearly erroneous when no evidence to support it). Reviewing for prejudicial error because the parents raised the issue by motions in limine, see Commonwealth v. Bohigian, 486 Mass. 209, 219 (2020), we conclude that reversal is not required for two reasons.[20]

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[19] Findings 179 and 195 state that the mother and father underwent the CSO evaluation in 2015 and 2016. Findings 192 through 194 and 198 through 200 discuss tests administered to the parents, their body language during the testing, and the mother's concerns over lice.

[20] To the extent the parents sought exclusion of the CSO evaluation on staleness as well as confrontation grounds, the judge did not separate the claims in his margin endorsements, but we see no abuse of discretion in his implicit agreement that the information was stale. See Adoption of Carla, 416 Mass. 510, 516-517 (1993).

First, the eight erroneous findings were not essential to the judge's conclusions and thus are unlikely to have contributed to his decision. See Adoption of Luc, 484 Mass. 139, 148 (2020). The parents also challenge findings 104 through 118, 180 through 187, 189 through 191, 196 through 198, and 201 through 206 -- relating to statements by the parents about their relationship and the mother's threats, mental health, and opioid use -- because the judge cited to exhibit 23 for support, but these findings are not clearly erroneous. The same information appears in (1) reports prepared by the department pursuant to G. L. c. 119, §§ 51A and 51B, admissible to set the stage; (2) the department's family assessments, "admitted for primary fact and statement[s] of the parties"; (3) the mother's medical records, admitted without objection as redacted; (4) independently admissible reports of investigators appointed under G. L. c. 119, § 21A; and (5) the admissible portions of exhibit 23. See Adoption of Luc, supra at 149-154. The judge also could have relied on the testimony of the witnesses. The mother's challenges to findings 16, 22, 24, and 36 fail for these same reasons.

Second, the evidence of unfitness was overwhelming. The mother repeatedly threatened to take her life and the lives of the children when she became overwhelmed with their care, despite having what the judge characterized as "a litany of

services in place." See Adoption of Gwendolyn, 29 Mass. App. Ct. 130, 134 (1990) (termination appropriate where parent "overwhelmed with her own problems"). If "[t]hreatening suicide can be a risk factor for future violence," Constance C. v. Raymond R., 101 Mass. App. Ct. 390, 396 (2022), so can concrete actions like pressing the head of an infant or suicidal actions like ingesting excessive alcohol and ibuprofen. The mother correctly understands that "mental illness doesn't prevent you to be a parent," as "[c]ountless children have thrived while in the care of parents facing mental health challenges." Adoption of Luc, 484 Mass. at 146 n.17. Here though, as in Adoption of Luc, supra, "the concern for the child[ren] is not that the mother has mental health challenges, but that those challenges remained largely unaddressed, and even unacknowledged, to [the children]'s [potentially] severe detriment." At trial in December 2018, the mother "wasn't too sure" whether she agreed "that having suicidal thoughts is not a healthy situation." After five months of regular therapy, there was no evidence her thinking "changed in any meaningful way," Adoption of Edgar, 67 Mass. App. Ct. 368, 373 (2006), because it was not a subject of treatment. The judge was not required to follow the therapist's conclusion that the mother "didn't mean" what she said about harming the children and herself, return the children, and hope for the best. See Adoption of Inez, 428 Mass. 717, 721 (1999);

Custody of a Minor (No. 2), 378 Mass. 712, 714 (1979); Adoption of Katharine, 42 Mass. App. Ct. 25, 32 (1997).

The father, in turn, was not active enough in the lives of the mother and children to (1) clarify for the department his role in the family, (2) support more specific findings by the judge about the father's ability or inability to care for the children, (3) prevent the mother from becoming so overwhelmed that she made threatening statements, or (4) prevent the children from being removed and placed in foster care three times in four years. See Adoption of Thea, 78 Mass. App. Ct. 818, 824 (2011) ("Supreme Judicial Court has emphasized the importance of achieving stability and permanency in children's lives and in decrees dispensing with parental rights"). Nor, when given the opportunity, did he complete the tasks that would have allowed for Brenda's reunification with him. See Petitions of the Dep't of Social Servs. to Dispense with Consent to Adoption, 399 Mass. 279, 289 (1987) (failure to keep stable home environment and maintain service plans and counseling programs designed to strengthen family unit relevant to determination of unfitness). Instead, the father was largely uncooperative with the department and, the judge could infer, intentionally misled the department about his relationship with the mother. This was relevant to his fitness. See Adoption of Rhona, 63 Mass. App. Ct. at 126. There was no "evidence of appreciable improvement"

in the father's understanding of the reasons for the children's removals despite his engagement in services, Adoption of Ulrich, 94 Mass. App. Ct. 668, 677 (2019), quoting Adoption of Terrence, 57 Mass. App. Ct. 832, 835-836 (2003); the judge's finding that the father "routinely minimized the danger [the mother's statements and actions] presented" is fully supported by the record. We defer to the judge's credibility assessments and his conclusion "that Father would not be able to determine when Mother would be in the midst of a mental health crisis." See Adoption of Rhona, supra at 125.

The judge considered the parents' past conduct, present events, and the mother's mental health. See Care & Protection of Bruce, 44 Mass. App. Ct. 758, 761 (1998). He found to a near certitude that neither parent had or in the future would gain the emotional or financial independence required to meet these children's substantial needs requiring extraordinary attentiveness. See Adoption of Don, 435 Mass. at 166; Adoption of Oliver, 28 Mass. App. Ct. 620, 625-626 (1990). Based on all that is before us, the judge did not abuse his discretion or commit an error of law. In the two years the trial was pending, neither parent "acknowledge[d] any damage to the children resulting from" being repeatedly threatened by the mother and removed from the parents' care. Adoption of Don, supra. By the time trial ended, ten year old Brenda and nine year old Adam

were doing well in separate, preadoptive homes; their position on appeal is that termination of parental rights is in their best interests. See Adoption of Nicole, 40 Mass. App. Ct. 259, 262-263 (1996) ("Although the bonding of a child with foster or adoptive parents is not a dispositive consideration, it is a factor that has weight in the ultimate balance").

The parents' remaining arguments, including as to the judge's findings about reasonable efforts, "amount to no more than a disagreement with the judge's weighing of the evidence and credibility determinations regarding witnesses." Adoption of Don, 435 Mass. at 166. "We see no basis for disturbing the

judge's view of the evidence." Adoption of Quentin, 424 Mass. 882, 886 n.3 (1997).

Decrees affirmed.

By the Court (Desmond, Englander & Hershfang, JJ.[21]),

Joseph F. Stanton

Clerk

Entered: September 7, 2022.

[21] The panelists are listed in order of seniority.