

Audio video recording produced by the Office of the Jury Commissioner in association with the Boston Neighborhood Network Transcript produced by Approved Court Transcriber Donna Holmes Dominguez

1 | CAPTION: Jury Duty, Michael Ryan, Host

MICHAEL RYAN, BNN LIVE HOST: Hello. My name is Mike Ryan.

The name of the show is Jury Duty: You Make a Difference on

BNN, the show that should answer all your questions about the

5 one day, one trial jury system.

HOST RYAN: Our special guests today are Kelly Burgess,
Burgess, excuse me, from the Counsel of Public Counsel
Services, and Assistant District Attorney John Pappas from
Suffolk County DA's Office.

Welcome.

MS. BURGESS: Good afternoon.

HOST RYAN: Thank you --

MR. PAPPAS: Hi, Mike.

HOST RYAN: -- for being on the show.

And today, we'd like to talk about jury selection from both sides, from the prosecution and from the defense.

Kelly is a graduate of George Washington University. Then went on to work at the Miami Dade County Public Defender's Office before coming to the committee back in '04.

And John is a, been a prosecutor since 1994, graduate of the University of Massachusetts at Amherst, went to law school at New England School of Law, started at the Boston Municipal Court, then went over to East Boston, became the felony supervisor in 1997, has prosecuted cases with the gang unit, the homicide unit, and in 2011, District Attorney Dan Conley

appointed him as chief trial counsel where you counsel fellow 1 2 Superior Court prosecutors, yet maintain an active homicide 3 case log. MR. PAPPAS: I do. 4 5 HOST RYAN: So I guess first of all, what exactly does a 6 prosecutor do? 7 MR. PAPPAS: Well, we're, we're charged with prosecuting all crimes in, in Suffolk County, Boston, Chelsea, Revere, and 8 9 Winthrop. 10 HOST RYAN: And from, from your viewpoint, what does a 11 defense counsel do? 12 MS. BURGESS: Well, a defense attorney, whether public or 13 private, represents someone who is charged with a crime, whether it's a serious felony like a homicide, or something 14 15 less serious like a trespass case. HOST RYAN: And in your instance, these are people who are 16 17 indigent, people who can't afford an attorney? 18 MS. BURGESS: My role in the office is to represent anyone 19 who's been charged with a serious felony or a homicide who has 20 been deemed indigent by the Court. 21 HOST RYAN: And what leads to a case going to a, to a jury? 22 MR. PAPPAS: Well, there, there has to be someone who's, 23 who's charged, who's arraigned, formal charges have been

And I'll, I'll, answer the question in the context of

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brought.

Superior Court. 1 The case has been investigated. It's been presented to a 2 3 Grand Jury. Indictments have been returned. In the formal criminal case, has commenced in Suffolk 4 5 Superior Court. There are a number of pretrial dates, discovery's 6 7 exchanged. 8 There may or may not be discussions to try and resolve the 9 case short of trial. If that happens or doesn't happen or if 10 the, the case can't be resolved short of trial, trial date is 11 set. And, and it will commence on the trial date. HOST RYAN: What about from the defense side? What leads a 12 13 case going to a jury? MS. BURGESS: It's the ultimate decision of the client, 14 15 whether he or she wants to accept a plea bargain, try to lobby the case with the Judge to see what the outcome would be, or 16 17 if they want to go to trial either because they maintain their

So it's their ultimate decision.

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HOST RYAN: Does the prosecution always offer resolution prior to going to a jury trial?

innocence or the case is not very strong against them.

MR. PAPPAS: Not necessarily. There, there may be discussions. They, they may be initiated by the Commonwealth. They may be initiated by, by counsel for the defendant.

But I, I would say it's on a case by case basis.

HOST RYAN: Okay. Do, do a lot of cases settle just because of the benefit of a jury being in the courthouse?

MS. BURGESS: I think a lot of cases settle because the risk at least as John said, speaking in Superior Court context, my clients are facing substantial State Prison time, and so going to trial is certainly risky even under the best circumstances.

So, yes, I'd say at least 90 percent, 80 percent probably will resolve in some type of plea bargain.

HOST RYAN: Is that, you, you agree with that?

MR. PAPPAS: I, I don't know. I couldn't put a percentage on it. But the one thing I would agree on is there is that risk analysis that has to take place given the exposure on a particular case, what the potential penalties are, the strength of the case. And I think those are some of the factors, not all, that go into whether a case is resolved short of trial.

HOST RYAN: What makes a good juror?

MS. BURGESS: It's completely case dependent.

So you might have a homicide case, a rape case, a burglary, an armed robbery.

And so obviously anyone's personal experiences, their base of knowledge is going to change from case to case.

So it really is an individual, individual basis, which is why the lawyer conducted voir dire is hugely important I think for both sides to make sure we're getting the appropriate jury

1 for the case. HOST RYAN: So you've done a few of those trials, that's 2 3 correct? MS. BURGESS: I've been fortunate to do a few of them up in 4 5 Massachusetts. And in Florida they have lawyer conducted voir dire. 6 did it in District Court down there. 7 So this is a much larger scale with more serious cases. 8 9 And it's been much more helpful than I anticipated frankly. 10 HOST RYAN: You've done one with the attorney participating 11 voir dire? MR. PAPPAS: My last trial, correct. 12 13 HOST RYAN: And what was your impressions of it? 14 MR. PAPPAS: I, I thought it was a huge benefit to both 15 parties, both for the defense and for the prosecution. 16 It gave you a little bit more insight into the, the person, 17 the, the actual prospective juror that you are thinking of seating on that jury. 18 19 HOST RYAN: So in most other states, they, lawyers were 20 always allowed to ask questions of the jury, but in Mass, that 21 was pretty much the Judge who would ask the questions of the jurors, correct? 22 MS. BURGESS: The Judge, prior to this, would ask a series 23

of questions with respect to various constitutional rights,

burden of proof, and you could always ask the Judge to ask

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specific questions based on the case.

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And now, it's a more wide forum for us to actually ask the questions, which is a chance for us to kind of talk back and forth with the juror which is again helpful for both sides, I think.

HOST RYAN: Do you find that it enhances the, the voir dire process?

MS. BURGESS: It does. And it doesn't take longer than jury selection took before. So I think it's definitely a benefit to everyone.

HOST RYAN: And same thing with yourself, John? You think that it --

MR. PAPPAS: Right. You know, the Judges still ask the, the constitutional questions. But they give the, each attorney an opportunity to ask some additional follow up questions.

Usually, the parameters of what those follow up questions are set beforehand, but it, it gives the attorneys, both parties, an opportunity to interact with the jurors.

HOST RYAN: What was your longest jury trial?

MS. BURGESS: Probably three to four weeks --

HOST RYAN: Three to four.

MS. BURGESS: -- when you're talking a murder case.

HOST RYAN: Three to four weeks.

24 And you, Mr. Prosecutor?

MR. PAPPAS: Right, right about the same.

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HOST RYAN: About --
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         MR. PAPPAS: Four weeks.
         HOST RYAN: -- about the same?
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         MR. PAPPAS: Yeah.
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         HOST RYAN: That's about the longest one.
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         Have you ever gone to jury duty?
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         MS. BURGESS: I was called once, and it was a civil case,
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       and I was immediately excused.
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         HOST RYAN: But you went, that was important.
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         MS. BURGESS: Yes.
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         HOST RYAN: And, John, yourself?
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         MR. PAPPAS: I think it was right before I started law
       school. It was in Suffolk Superior Court. I was actually
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       picked, seated on the jury, civil case. Probably about two
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       witnesses in, the case settled.
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         HOST RYAN: So you, but you had --
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         MR. PAPPAS: Personal injury case.
         HOST RYAN: But you haven't sat on a trial?
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         MR. PAPPAS: No, I have not.
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         HOST RYAN: Okay. But that's great that you went. And
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       we've even had Judges, you know, sit as jurors on, on criminal
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       cases.
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         Have you ever been surprised by a jury verdict?
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         MS. BURGESS: Oh, sure.
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         HOST RYAN: And do you sort of at, when you go out to
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deliberate, do you have any feeling at all or you just flip a, 1 2 flip a coin or --MS. BURGESS: I, I think it depends. 3 HOST RYAN: Yeah. 4 5 MS. BURGESS: I mean --6 HOST RYAN: From case to --MS. BURGESS: -- the longer I do this, the more I think I 7 know, but it's really the less you know because juries, 8 they're people just like you and I, and they have their own 9 10 ideas and their own opinions. And sometimes they'll sink 11 their teeth into something neither side brought up, and 12 they'll come back with a verdict that surprises you. Even if you think it's the right verdict, you're surprised. 13 And I, I'm sure it goes the same for John. 14 MR. PAPPAS: I, I'm not sure I'd say necessarily surprised. 15 16 In the context of, of homicides, which I did for a number of 17 years, those, those cases are so well vetted, so, so well prepared by the time they go, I, I think at that point, you 18 19 have a very good idea what the strength of your case is. 20 You may be disappointed in a verdict, but I don't think I've been necessarily surprised. 21 HOST RYAN: Now, lawyers are allowed to challenge some of 22 23 the jurors, known as a preemptory challenge. 24 Is there any science to picking jurors?

MS. BURGESS: So you have two types of challenges.

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1 You have cause challenges, and that's when there's 2 something specific about a juror that makes them inappropriate 3 for this, for a case. For example, if you're trying a case in Suffolk County, and 4 5 a perspective juror comes up, and he's a Boston Police 6 Officer, you might challenge him for cause because he's going 7 to be listening to testimony by his colleagues. And can he 8 remain impartial? 9 Or you might have a preemptory charge, and that can be 10 based on a feeling you get. 11 I mean with me, if a juror smiles at me and seems friendly, 12 they're a good juror. But sometimes, they'll scowl, they'll look at my client 13 with evil eyes, they're shaking, they're uncomfortable, and 14 15 you just get a bad feeling. 16 And so you bounce them off. 17 HOST RYAN: How about you when it comes to selecting jurors? MR. PAPPAS: Well, if there's --18 19 HOST RYAN: Do you worry about the evil eye? 20 MR. PAPPAS: I, I don't. 21 HOST RYAN: Like Kelly does? MR. PAPPAS: No. 22 23 If there's a science, I would say it's a very inexact one. 24 I think at the end of the day, at, after you've done enough

of these cases and have gone through the process a number of

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times, I, I think at the end of the day, what you're really looking for is, is the person attentive? Do they bring any biases with them into the courtroom?

And at the end of the day, can they Judge the case? Can they, can they be a fair and impartial juror and Judge the case based on the evidence that's presented in the courtroom? HOST RYAN: And in some places, they talk about getting rid of preemptory challenges. Should they? Should they still be part of the process?

MS. BURGESS: I absolutely think they should because I think, I mean John and I are, both been doing it, I mean obviously John a lot longer.

But there's certainly jurors that prosecutors want on cases and don't want on cases, and, and vice versa with the defense.

They're, we want people who are open minded, generally who are going to not just jump to conclusions and hear horrible allegations and just blindly believe whether it's police officers or civilian witnesses.

And so we're both looking for specific jurors.

It's not uncommon when I'm picking a jury that I like a juror, and I can already anticipate my opponent is going to ask them to be removed and vice versa.

So I think it is an important component.

MR. PAPPAS: I, I think the process has worked extremely well and is time proven.

I think it's very important for each party to have the same number of challenges, to exercise those challenges as they see fit so you're not left with taking, you know, the first 16 citizens who are declared fair and impartial by the Judge or, or indifferent by the Judge after the preliminary rounds of questions.

And it's, it's a process that's worked. It continues to work. And it will work for the foreseeable future.

HOST RYAN: Should anybody be upset if they're preemptory challenge? You know, when people are told they're challenged, they're told to step out of the box and maybe go back to the jury pool or they're gone for the day. But should they take it personally?

MR. PAPPAS: I don't think anyone should ever take that personally.

And I think probably, you know, the reality is if you were to poll those people who got excused, they probably would be happy that they got excused.

So no, the answer's no.

HOST RYAN: Same?

MS. BURGESS: I agree.

HOST RYAN: Okay. Are some cases in this day and age with advances in technology, are some cases too complex for jurors?

MS. BURGESS: Absolutely not. I think it's our job as attorneys to explain whether it's science or some

psychological issue that's being raised, it's our job to explain that to the jury.

I mean John and I aren't scientists, doctors, professors. We're attorneys. And so if we can digest the material and present it in a way that the jury can understand it, then they're certainly able to sit as jurors and make a decision.

HOST RYAN: Same with you?

MR. PAPPAS: Yeah. Certainly there are cases that are, are, can be complicated on two fronts. They can be complicated factually, and there can be certain aspects of the evidence in a case that can be complicated.

But like Kelly said, it's, it's an attorney's job to present the case in a way that the jury is going to understand it the first time they hear it.

HOST RYAN: So in other words, it's the attorney's job if it's complex, or as you're saying maybe it's heavy on facts and details, to bring it down to layman's terms?

MS. BURGESS: That's in a light most favorable to your side to be honest too.

HOST RYAN: Yeah. I get, I got that.

Now, do we really need Judges if we have, I mean excuse me. Do we really need, that's bad.

Do we really need jurors when we have Judges who are trained in the law? Do we need jurors to decide cases?

MR. PAPPAS: I, I think absolutely you do. This is, this is

our system. It, it's, the jury system is, is the bedrock of the criminal justice system. To go before your peers and, and to be judged, I, I can't see a different system or a better system.

MS. BURGESS: I agree. I couldn't say it better. go to just a Judge, it shouldn't be one person. It should be a group of your peers that makes the decision.

HOST RYAN: What about, you hear about jury consultants. mean is there, is there a science to picking people to sit on a jury?

MR. PAPPAS: I, I've, I've heard about them. I know our office has made use of them on a couple of cases.

I've never had the experience or had a case where, where we employed a jury consultant. So I, I'm probably not, you know, a good authority to ask on that particular subject.

But I, I imagine they do have a certain utility, that they're useful in some way.

My understanding is that they may hear portions of a case, and you'll get, you'll get feedback from what's known as a focus group and how they receive certain pieces of evidence, or what they feel about certain parts of a case.

HOST RYAN: What do you think about jury consultants?

MS. BURGESS: Along with John --

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MS. BURGESS: -- we haven't had the opportunity to use them.

I know private attorneys who have done full jury trials in 1 front of jury consultants, and I know they find it helpful. 2

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But I think it's more helpful just by them vetting out different issues that you didn't think of, where it is more like a focus group.

But I think we can do that with colleagues and friends and families and --

HOST RYAN: So there is no exact science to picking, nobody's an expert on picking a jury?

MS. BURGESS: I don't, I think the more you do it, the more experience you get, but just being a human being and talking to people every day makes you a good person to pick a jury I think because it is just getting to know someone.

And, again, John and I probably want very different people on different juries, so we might have differences of opinion on that, but just someone who has an open mind who's going to listen.

HOST RYAN: Is serving on a jury a good way to learn about the Court system?

MR. PAPPAS: Oh, I, I absolutely think it is.

I mean we have so many different Law and Order shows and, and legal shows that, that flood the airways on cable.

And in, in the criminal context, you have the incident, investigation, and trial, and it takes place probably taking out the commercials in about 50 minutes.

Very few people have an understanding of the mechanics of a, of a full blown jury trial. And I think it's, you know, an absolutely, it's, it's an educational thing for a juror to go through it.

I, I can recall on a number of occasions where the Judge has gone up to speak to perspective jurors, or, or jurors, deliberating jurors, after a case has concluded, and their, I wouldn't call it fascination, but their appreciation for all the hard work that goes into putting on a case, not just by the prosecution but by the defense, by the, by the, by the Judges, the staff of the courtroom, by all the parties who come in.

And I think it's, it's a real eye opener for people who get to sit and, and deliberate on a criminal case.

HOST RYAN: Do you feel the same way? This is a great learning experience for the average citizen?

MS. BURGESS: Oh, I definitely agree. I think what always amazes me is juries really listen to the jury instructions, and I think presumption of innocence and reasonable doubt and your right against self-incrimination, I think it becomes very powerful, and you can see their faces when they listen to it. And so I think they hear about it or have history class growing up, but they really learn what it, what it is like and that these rights are important and the system should work, and that they feel a really, they feel like a really important

part of the system, and they take their job very serious.

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And again, that always surprise, surprises me, how they really want to look at all the evidence and take their time and not just jump to conclusions.

HOST RYAN: Now, you've worked in the District Courts. And when people, jurors are checked in, they pass in their confidential questionnaire, they're welcomed by a Judge, they watch a movie. A lot of times they're waiting.

So while they're waiting, you know, sometimes they get a little impatient.

But what goes on in the courtroom while they're down in the jury pool?

MR. PAPPAS: Well, it, it depends. A lot of times what can be taking place upstairs in the courtroom are, are the final preliminary matters.

In, in any criminal case, there are usually motions in limine that have to be addressed before jury selection begins. You might be fine tuning, or the Court might be fine tuning the final questions that are going to be posed to the jurors when they come in.

So there are all those little housekeeping matters that are taking place right before the jurors are actually brought up.

HOST RYAN: And is, you find it the same way, that the jurors, while they're waiting, there's things going on in the courtroom that they have no, no knowledge about, no access

about?

MS. BURGESS: Exactly, and we promise you, we're not, you know, having coffee and donuts and hanging out.

It really is we're just, we want to make sure that when we do bring them into the courtroom that we're ready to pick them and start the trial.

And so there are housekeeping issues that need to be addressed, and we definitely do that.

HOST RYAN: And so like in the BMC or the District Court, usually there's a first call of the list?

MR. PAPPAS: Well, way back when, when I was at the Boston Municipal Court, there, there'd be the call of the list and, in the trial assignment session.

And those cases that were ready for trial would get sent out to the trial sessions. And I think back then there were, there were two trial sessions where, you know, the, the Judges would be waiting. There'd be a prosecutor, defense counsel.

Actually, they might start in the assignment session but then head down to the trial sessions.

And from that point, they'd bring up jurors, after they decided which cases were actually going to go because there would probably still be some discussion potentially on resolving the case short of trial.

If that couldn't happen and there were enough jurors, they'd bring up the jurors and the trial would get underway.

HOST RYAN: And sometimes there's a second call of the list as well and then they weed out some of the cases at, during the first call, and then later there might be a second call to see what's happening with the rest of them?

MR. PAPPAS: Sure. Back, back then, you know, in the, in the District Court context, there, there could be multiple calls, and you know multiple cases could, could get sent down to a trial session.

Obviously you can only accommodate one trial, so the cases that, that couldn't get resolved that day, the one would go.

They'd bring up jurors for that particular case.

And the other ones, if they didn't resolve, would get back, sent back to the trial assignment session to get a new trial date.

HOST RYAN: Sometimes jurors, when they're finished their service and they have not gone into a courtroom and they're willing to sit on a trial, they feel that their time is wasted.

Should they ever feel that way?

MS. BURGESS: I can completely understand that feeling. I mean they're taken away from their job, from their children, from commitments, and some trials can go up to a month if not longer, and so it is a huge responsibility, and it's one that myself as an attorney and as a citizen appreciate. And I think Judges do a nice job at reminding them that it is

important and how if you or a family or friend was ever in this position on either side of the fence, that you would want a juror who was going to be respectful and pay attention and really be invested in their role.

So we completely understand their time and we try to give them a really good estimate of how long we think the trial's going to be.

Courts have always been good about vacations, family vacations, even work vacations. We don't want anyone to lose out on some experience like that.

But everyone does have a responsibility, and we certainly appreciate them sitting there.

HOST RYAN: So the same thing, some jurors are mad because they actually wanted to sit on a case but because of what transpired in the courtroom, that case may have settled?

going long, I can say this. The Judges are so conscientious, in their preliminary questions. You know, without exception, it's been asked in every case I've ever handled that's gone to trial.

MR. PAPPAS: Yeah. And as far as, as far as a case going,

The Judges always are, are pretty tough on the attorneys asking them how long do you anticipate the trial is going to go. And the attorneys usually who are very experienced doing those types of cases have a very good sense. It's going to be, you know, four to five trial days, or, or five to six,

five to seven, after impanelment. That's the actual trial.

So that doesn't include impanelment. That doesn't include deliberation.

So the Judges always in their preliminary questions to the jurors tell them that what they estimate the length of the trial to be. And after they put out that estimate, they ask if that's going to pose a hardship to anyone.

So anyone who's really going to have a hardship, they have an opportunity to raise their hand, go up to the Judge and explain why this would be a hardship to them.

If the Judge, excuse me. If the Judge is satisfied, they'll excuse the juror.

And what you have left is people who have heard the approximate length of the trial are still willing to stay, and I, I think you eliminate a lot of problems that way.

HOST RYAN: So you encourage everybody to go to jury duty?

MS. BURGESS: Absolutely. I'm sure it's maybe more

fascinating or exciting for someone like John or I because

this is our passion --

HOST RYAN: Sure.

MS. BURGESS: -- our love, what we do, and so it's interesting to us.

But it is, as much as it's a responsibility, I think it's also a privilege to be part of history. This is your constitutional rights, your, it's, it's your right to be

1 there. It's, you have a right to hear this evidence, to make a decision because it's your community. 2 3 And so I think if you're not going to participate and go to jury duty, then you can't complain about what's going on 4 5 around you or the system because, again, we know that even one day out of your life is hard. One day out of my life or 6 John's I'm sure is hard. 7 8 But if anything, people who are designated as alternates 9 seem to be very upset because they've sat through the trial, 10 they've become invested, and then they're not allowed to 11 participate in the decision making process. 12 So if anything, that's where I've seen frustration. 13 Once a juror gets sat, they've kind of just been like, okay, they've resolved to it, and then they get invested. 14 HOST RYAN: So jury duty, as you mentioned, the bedrock of 15 16 democracy? MR. PAPPAS: It is. It's once every three years. 17 miss it. 18 19 MS. BURGESS: Right.

HOST RYAN: Well, we've run out of time.

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         You do make a difference. Please serve when called. It's
       important to all of us.
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         Thank you, Kelly.
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         MS. BURGESS: Thank you.
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         HOST RYAN: Thank you, John.
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         MR. PAPPAS: Thanks, Mike.
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         HOST RYAN: And thank you at home.
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