Report to the Supreme Judicial Court
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Privileged and Confidential

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I. INTRODUCTION

On October 19, 2011, the Supreme Judicial Court appointed R.J. Cinquegrana of Choate, Hall & Stewart LLP as its special counsel for the purpose of conducting a confidential and independent preliminary inquiry relating to the District Court Department.[1] On October 25, 2011, the scope of the assignment was expanded to include the Boston Municipal Court Department.[2] This report has been prepared under the supervision of the Court and is submitted pursuant to those directives.[3]

We were asked to determine the rate of acquittal in jury-waived trials on charges of operating under the influence ("OUI") of drugs or alcohol, and to examine whether that rate differs from the national average and from the rate of acquittal in other criminal cases in Massachusetts.[4] In addition, we were asked to explore whether the acquittal rates of certain judges in those departments of the Trial Court are substantially greater than the statistical average and, if so, to identify possible reasons for the disparity. The Court directed that this was to be a preliminary, fact-finding inquiry, not a disciplinary inquiry, intended to produce independent findings that the Court will consider in determining whether any further actions are appropriate.

Although the inquiry was prompted by an investigation then being conducted by the Boston Globe Spotlight Team, it has not been confined to the matters discussed in the articles published on October 30, November 6, November 16, and December 4, 2011 in the Boston Globe (hereinafter, "the Spotlight Series"). We have reviewed the Spotlight Series reports, and we took that information into consideration in conducting our analyses, but it was not our purpose to affirm or rebut the contentions in those reports.

The Court acknowledged the "delicate nature" of this inquiry when it announced this assignment:

> Our system depends on judges being able to decide a case fairly but independently, without fear or favor. A judge is obligated to find a criminal defendant not guilty if the government has not proved the case beyond a reasonable doubt; at the same time, a judge must find a defendant guilty where the

[1] A copy of the Court's October 19, 2011 letter is **Attachment 1**.

[2] A copy of the Court's October 25, 2011 letter is **Attachment 2**.

[3] This report was prepared by R.J. Cinquegrana, Diana K. Lloyd, and Joseph H. Zwicker, partners at Choate, Hall & Stewart LLP, and Ginger Hsu, a senior associate at the firm. (Mr. Zwicker left the firm in August 2012.) Mr. Cinquegrana is the Co-Chair of the firm's Litigation Department and its Government Enforcement and Compliance Practice Group. He is a former Middlesex County Assistant District Attorney, Assistant United States Attorney, and Chief Trial Counsel for the Suffolk County District Attorney. Both Ms. Lloyd and Mr. Zwicker previously served as Assistant United States Attorneys, and Ms. Lloyd and Ms. Hsu previously served as Special Assistant District Attorneys in Suffolk County. We have been assisted by six associates (Christine J. Bang, Lisa B. Flynn, Kevin J. Ma, Jacqueline K. Mantica, Ashley M. Quigless, Rebecca A. Wilsker) and paralegal Brando R. Twilley. The firm has donated over 4,000 hours to this pro bono assignment. This is a corrected version of the report first submitted to the Court in September 2012.

[4] We use the term "OUI" to refer to cases in which defendants were charged with operating under the influence of either drugs or alcohol, in violation of G. L. c. 90, § 24.

> crime has been proved beyond a reasonable doubt. Public confidence in the judiciary depends on its belief in the integrity of the judicial process, judges and their decisions. To preserve the public's trust and confidence, the courts must be, and must appear to be, fair and impartial in all cases. We have asked Mr. Cinquegrana to conduct the preliminary inquiry in a manner that respects each of these principles.[5]

We have been mindful of these principles in the course of our work. In a jury-waived trial, a judge's duty is to confine his attention to the facts in the trial record and apply the relevant law to an analysis of only those facts. The court must hold the government to its burden of proof and apply the reasonable doubt standard, which is a high bar to conviction.[6] When sitting as the trier of fact, the decision of a judge to acquit a defendant is unreviewable at law, and properly so, in order to protect individuals from being twice placed in jeopardy for the same criminal offense.[7]

While this assignment required the computation of average acquittal rates, we have not attempted to identify a "correct" rate by reviewing the record of OUI trials and imposing our own judgment. We have disagreed with the outcome of some of the cases we reviewed, but we cannot base any findings on such disagreements alone. It would be impossible to review the trial record of a sufficient sample of cases to draw meaningful conclusions about the differences between our evaluations and the outcomes reflected in the data we collected. Even if we could do so, another reviewer probably would differ in the evaluation of many of the cases.

We offer a word of caution regarding the statistics in this report. They indicate a volume and rate of *acquittals* that are higher in certain courts and before certain judges, and a volume and rate of *convictions* that are higher in other courts and before other judges. This information can be used to identify disparities in the handling of OUI cases in different settings, and it may be helpful in evaluating whether systemic changes should be made. However, it would be a dangerous precedent to base any evaluation of individual judicial performance on these statistics. First, as explained below and in **Attachment 4**, the statistics were generated from information contained in the electronic case management systems currently used by the courts. That information is entered from paper dockets, which remain the official court records. When samples of paper dockets were compared to the electronic data, data entry errors were found and corrected, but more errors certainly remain. More importantly, to hold judges accountable based on the computation of averages which may appear satisfactory to one side or the other would impair the independence of the judiciary and subvert its role as the neutral arbiter in the administration of justice according to constitutional principles.

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[5] Statement of the Supreme Judicial Court, October 31, 2011 (**Attachment 3**).

[6] See Commonwealth v. Webster, 59 Mass. 295, 320 (1850). The citations in this report conform to the Supreme Judicial Court's Official Reports Style Manual, 2012 Edition.

[7] Although the Massachusetts Constitution does not have an explicit double jeopardy clause, "this Commonwealth has long recognized a State common law and statutory prohibition against double jeopardy." Powers v. Commonwealth, 426 Mass. 534, 537 n.5 (1998); see G. L. c. 263, § 7 ("A person shall not be held to answer on a second indictment or complaint for a crime of which he has been acquitted upon the facts and merits . . . .").

II. SUMMARY OF THE INVESTIGATION

Our first task was to determine whether we could obtain reliable data on OUI dispositions in Massachusetts courts. The Spotlight Series reported statistics based on data from the Commonwealth's 11 district attorneys. Each district attorney provided data from a different time period. Some of those data sets did not include jury trials, and none included pleas. It was necessary to obtain a larger database for the same time period in as many courts as possible, in order to comply with the Court's directive to compute an average acquittal rate in bench trials; compare the acquittal rates of judges to that average; and attempt to identify possible reasons for any disparity.

This was no small task, and it required thousands of hours of work. The Spotlight Series had reported correctly that the necessary statistics were not then available from the courts. We asked whether the District Court Department ("the District Court") and the Boston Municipal Court Department ("the BMC") maintain information that could be used to generate the required statistics.[8]

We looked to the MassCourts computerized case management system, which was implemented beginning in 2006 and is still being refined. MassCourts is used in 60 of 62 courts in the District Court and seven of the eight courts in the BMC. It is a web-based system that stores electronic data concerning the scheduling and disposition of cases. It was designed to function as a case *management* system, not for the purpose of collecting and analyzing statistical data. Thus, statistics on OUI offenses are not routinely computed and maintained in MassCourts.

However, thanks to the substantial efforts of the staffs of the Trial Court and the Massachusetts Sentencing Commission, we were able to obtain MassCourts data for the District Court (except for the Brockton and Barnstable District Courts)[9] and all of the BMC courts except the Central Division (in downtown Boston) for OUI dispositions which occurred between January 1, 2008 and March 31, 2012. In addition, we were able to obtain similar data for the BMC Central Division from CourtView, a separate computerized system used by that court alone. We collected, audited, and analyzed the data using the methods that are described in detail in **Attachment 4**.

After we received this data, we asked the staff of the Sentencing Commission to assist us in analyzing it, and the staff of the Trial Court to audit it. The Sentencing Commission reviewed selected data fields from MassCourts and CourtView and converted that information into a useable format. The Trial Court staff conducted an audit by visiting each court and checking the MassCourts and CourtView entries against the paper docket sheets from about one-third of all of

[8] These are the two departments of the Massachusetts Trial Court where almost all OUI cases are heard. A small number of OUI cases are brought to the Superior Court Department, usually in connection with motor vehicle homicide cases or cases involving subsequent OUI offenders, or in the Juvenile Court Department. We did not review any Superior Court or Juvenile Court cases or data.

[9] The Brockton and Barnstable District Courts do not currently use the MassCourts system. As discussed further in **Attachment 4**, we were therefore unable to extract data from these courts and they are not included in any of our analyses.

the OUI bench trials and one-tenth of all of the OUI cases that were included in the data we collected.

Finally, in connection with the Trial Court's audit, we obtained copies of the police reports and docket sheets for 1,835 cases, representing approximately one-third of the bench trials included in the data, chosen randomly. We reviewed all of these dockets and made some adjustments to the data as a result of that review. See **Attachment 4**.

This effort resulted in the collection of data regarding 63,440 OUI cases. We divided the data into two parts for analysis. First, we segregated the data regarding dispositions between January 1, 2008 and September 30, 2011 (the "**Time Period**," during which 56,966 OUI cases, which we refer to as the "**Database**," were disposed of), and used that information to compute the majority of the statistics in this report. We selected this interval in order to collect a sufficient number of OUI dispositions to identify meaningful averages and disparities. We were advised that by January 1, 2008 most of the courts in the District Court and BMC were using MassCourts. September 30, 2011 was the latest date, prior to the start of our data collection, at which we could be confident that disposed cases had been entered into MassCourts.

Second, in an attempt to compare experience in the courts before and after the Spotlight Team's inquiry, we looked at dispositions in two six-month periods before and after that inquiry was being conducted: October 1, 2010 to March 31, 2011 (before, containing 6,858 cases within the Database); and October 1, 2011 to March 31, 2012 (after, consisting of an additional 6,474 cases).

With usable data in hand, we sought the advice of experts in the evaluation of statistics in order to analyze it. We were fortunate to obtain the pro bono services of Paul Greenberg and Marc van Audenrode of Analysis Group, a leading consulting firm that provides economic, financial, and business strategy consulting to law firms, corporations, and government agencies.[10] With the assistance of Analysis Group, we used the Database to tabulate conviction and acquittal rates in each of the Commonwealth's 14 counties. In addition, we tabulated statistics for 60 of the 62 courts in the District Court, the eight courts in the BMC, and all of the judges in those Departments who handled OUI cases during the Time Period. The results of this statistical compilation are presented in the tables that are contained in **Attachment 5**.[11]

The second part of our mandate was to identify disparities demonstrated by the statistics and, if possible, the reasons for those disparities. In order to avoid arbitrary distinctions, we relied on the expertise of Analysis Group, which used standard statistical techniques to identify disparities as explained in **Attachment 6**.

The Court has asked us to identify judges by numbers in the tables contained in this report and in **Attachments 4** and **6**, and to identify all 217 judges in the Database by name, and corresponding number, in Table A3 in **Attachment 5**.

[10] See Analysis Group, at http://www.analysisgroup.com.

[11] The OUI cases in the Database were heard by 217 judges in the District Court and BMC who handled at least one case during the Time Period. They are identified in Table A3 in **Attachment 5**.

We identified factual, legal, and procedural issues affecting the trial of OUI cases by reviewing docket sheets, police reports, and trial recordings chosen from samples of cases taken from various courts. We also reviewed the trial recordings of many of the cases discussed in the Spotlight Series. We discussed our observations with judges, prosecutors, and defense lawyers (we sometimes refer to them generally as the "participants" in the trial process), and we applied all of this learning to an assessment of the statistics generated from the data we collected. Where appropriate, we compared the law governing OUI cases in Massachusetts with the law in other states.

In keeping with our mandate that this was not to be a disciplinary inquiry, and to avoid any impact on individual defendants, we did not make inquiry about specific cases.[12] The Court did not give us the power to compel the production of documents or the testimony of witnesses, and all of the information we collected was provided voluntarily.

We appreciate the cooperation and assistance of Chief Justice Lynda Connolly of the District Court and her staff; Chief Justice Charles Johnson of the Boston Municipal Court and his staff; Craig Burlingame, Chief Information Officer, Mark Prior, Team Leader of the MassCourts Data Management Team, and William Marchant, Chief Financial Officer, and their colleagues at the Trial Court; Linda Holt, Research Director, and Lee Kavanagh, Research Analyst, of the Massachusetts Sentencing Commission; Analysis Group; each of the Commonwealth's 11 district attorneys and members of their staffs; and the judges and defense lawyers who agreed to speak with us.

III. SUMMARY OF FINDINGS

Our purpose in carrying out this assignment was to develop reliable data and a method for analyzing it that would provide meaningful insights. Our concern was that the computation of statistics regarding OUI outcomes, if taken out of context, could be misleading and lead to inaccurate conclusions. For example, a number of judges had 100% bench trial acquittal rates, but only in a small number of cases. As we explain in our findings, we ultimately determined that the bench trial acquittal rate of a court or judge should be evaluated together with the rate of jury waiver and the volume of cases heard. Thus, perhaps the first lesson learned from this assignment is that useful statistics regarding the outcomes of criminal cases are very difficult to assemble and must be interpreted with great care.

We were able to obtain data sufficient to compute the averages requested by the Court. In addition, we arrived at methods for evaluating bench trial acquittal rates beyond their face value,

[12] We note the Court's recent establishment of a judicial deliberative privilege, which protects "judges from the post hoc probing of their mental processes [ensuring] the integrity and quality of judicial decision-making." In re Enforcement of a Subpoena, 463 Mass. 162, 168 (2012). The privilege is "narrowly tailored but absolute" and applies to a "judge's mental impressions and thought processes in reaching a judicial decision, whether harbored internally or memorialized in other nonpublic materials, [as well as] confidential communications among judges and between judges and court staff made in the course of and related to their deliberative processes in particular cases." Id. at 174. The privilege does not cover a judge's memory of "nondeliberative events" from cases in which the judge participated; inquiries into whether a judge was subject to "improper 'extraneous influences' or ex parte communications during the deliberative process;" or legal proceedings in which the judge is a witness or otherwise personally involved. Id. at 174-75.

and for identifying significant disparities among courts and judges. We developed insights into the way OUI cases are administered and tried, which led us to recommend changes in governing statutes that would simplify the trial of these cases and give greater effect to the refusal of breathalyzer tests; the management of the courts, to avoid the appearance of leniency in connection with jury waivers; and the training of judges, to achieve a more uniform treatment of these offenses. Those recommendations are explained in Part IX.

We divided our findings into five parts: conviction and acquittal rates (Findings #1-3); disparities among courts and judges (Findings #4-9); comparisons to other states and other types of offenses in Massachusetts (Findings #10-11); reasons for high acquittal rates (Findings #12-14); and a specific focus on breathalyzer evidence (Findings #15-16).

A. Conviction and Acquittal Rates

The statistics in this report, which are based on almost 57,000 dispositions over 45 months, show that 77% of OUI cases were resolved against the defendant, either by plea (including admissions to sufficient facts) or trial; 13% resulted in acquittals, either before a judge or jury; and 10% resulted in some other disposition, usually a dismissal for reasons unrelated to the merits of the case. When the cases were resolved in a jury trial, 58% of the defendants were acquitted. When judges considered the merits of OUI cases in bench trials, 86% were acquitted.

It stands to reason that the overall conviction rate would not be replicated in cases that go to trial, since it is affected largely by pleas, which occurred in 73% of the cases in the Database. In addition, comparing the results in jury trials and bench trials also may not be appropriate. Most participants told us that the cases resolved in jury trials are different, often stronger cases for the Commonwealth, than those which are resolved in bench trials.

B. Disparities Among Courts and Judges

Even if the cases resolved in bench trials were among the weakest cases in our Database, this would not account for the fact that in some courts, and before some judges, the bench trial acquittal rate was significantly higher than the 86% statewide average, in a high volume of cases. This disparity in bench trial acquittal rates was generally accompanied by a similar disparity in jury trial waiver rates: that is, where judges had a high volume of bench trial acquittals, they received more jury waivers. Thus, some judges amassed a record which may have assured that they would continue to receive jury waivers, because they were perceived as more favorable to defendants, rightly or wrongly, and therefore more likely to acquit.

We found this most apparent in Worcester County, where the county-wide bench trial acquittal rate was 97%. In two courts there, East Brookfield and Fitchburg, that rate was over 97% and was accompanied by a jury trial waiver rate almost three times the statewide average. Those two courts had the lowest overall conviction rate in the state, 53% and 55% respectively.

Although we have catalogued our own observations of the factors that make some OUI cases difficult to prove, as well as the observations we heard from participants, they do not fully explain the rate of waivers and acquittals in Worcester County, and no one we met with could

offer a complete explanation. That said, no one we interviewed alleged that such high acquittal rates are the product of corrupt influence on judges.

We also found much higher conviction rates in other courts, but not because the judges there convicted defendants in high numbers in bench trials. In those courts, defendants rarely elected bench trials, choosing either a jury trial or a plea. Some judges in those courts may have had a high bench trial acquittal rate, but only in a small number of bench trials. The court with the highest conviction rate in the state was Newburyport (91%), where the jury trial waiver rate was less than 1%.

Thus, there were significant disparities in OUI outcomes among courts during the Time Period. With regard to judges, through the use of standard statistical techniques developed by Analysis Group, we identified judges associated with high waiver and acquittal rates, on the one hand, and low waiver rates on the other. Out of the 217 judges who heard at least one case in the Database, there were 33 judges in the group associated with high waiver and acquittal rates (18 of whom sat regularly in Worcester County, where the overall conviction rate was 67%, the lowest for a county in the state except Nantucket). There were 20 judges associated with low waiver rates in the second group (13 of whom sat regularly in either Essex or Middlesex County, where the overall conviction rates were 86% and 78%, respectively).

Finally, in a comparison of two six-month periods before and after the Spotlight Series investigation was conducted, the statistics show that the number of bench trials declined significantly, and the bench trial acquittal rate declined slightly.

C. Comparisons to Other States and Other Massachusetts Offenses

We did not find national averages for comparison to the statistics in this report. We did find reports on OUI conviction rates in other states, which show that the Massachusetts OUI conviction rate, based on our Database, was within a range of similar results in those states. With regard to other Massachusetts offenses, we determined that it would not be useful to repeat the extensive effort applied here to an analysis of other types of offenses, which present a variety of different factors affecting outcomes. We did find data indicating that the rate of dismissal in other Massachusetts criminal cases is significantly higher than in OUI cases, confirming what most participants told us, that prosecutors seldom dismiss OUI cases. It is reasonable to infer that this would have an impact on OUI acquittals.

D. Reasons for High Acquittal Rates

There was general agreement among the prosecutors, judges, and defense lawyers we interviewed about the factors that can make OUI cases difficult to prove. The results of field sobriety tests are difficult to interpret objectively, and they often are reported in court in a rote and repetitive manner. Breathalyzer test results can be attacked based on delay and the method of administration of the test. Prosecutors may be overburdened and sometimes less experienced than defense lawyers. Evidence of an accident or bad operation may be easily explained by other factors, and inadmissible field tests, properly used to make arrest decisions, sometimes form a major part of the evidence. Some complain that evidence of the refusal to take a breathalyzer or

field sobriety test should be admissible, although this may be more relevant to jury trials than bench trials.

Nevertheless, no one we interviewed could explain how any combination of these factors could result in the acquittal of virtually every OUI defendant who chose a bench trial, as we found in certain courts, such as those in Worcester County, and before certain judges.

E. Breathalyzer Evidence

Clearly, breathalyzer evidence is of paramount importance in OUI cases, because it is an objective measure of impairment. However, we found that breathalyzer results over the legal limit, admitted at bench trials, sometimes do not result in convictions. No one offered us a complete explanation for this finding. In cases involving delay in the administration of breathalyzer tests, we infer that judges may be applying their knowledge of scientific principles, derived from other cases, regarding extrapolation of breathalyzer results backward to the time of operation, although we found little support for this view among participants. Our analysis of the use of breathalyzer evidence led us to our first recommendation, regarding a change in the OUI statute to eliminate the issue of delay in the administration of these tests.

IV. LAW GOVERNING THE TRIAL OF OUI CASES

In order to place the analysis and findings in this report in context, we summarize the important legal principles governing the trial of OUI cases in the Commonwealth.

To establish a violation of the Massachusetts OUI statute, the Commonwealth must prove three elements beyond a reasonable doubt: (1) the defendant operated a motor vehicle; (2) the operation occurred on a "public way"; and (3) the defendant operated the vehicle while under the influence of drugs or alcohol[13] *or* while having a blood alcohol level of .08% or greater. See G. L. c. 90, § 24 (1) (a) (1).

A person operates a motor vehicle whenever he or she is in the vehicle and intentionally manipulates some mechanical or electrical part of the vehicle, like the gear shift or the ignition, which alone or in sequence, will set the vehicle in motion. See Commonwealth v. Uski, 263 Mass. 22, 24 (1928). Operation is most evident when a defendant is driving a motor vehicle, but courts have also found that a defendant is operating a vehicle when it is parked but the engine is running or the key has activated its electrical system. See Commonwealth v. Eckert, 431 Mass. 591, 599-600 (2000); Commonwealth v. Ginnetti, 400 Mass. 181, 183-184 (1987); Commonwealth v. Sudderth, 37 Mass. App. Ct. 317, 319-321 (1994).

To prove the public way element, the Commonwealth must provide evidence that the offense occurred "upon any way or in any place to which the public has the right of access, or upon any way or in any place to which members of the public have access as invitees." G. L. c. 90, § 24 (1) (a) (1). A "way" is defined as "any public highway, private way laid out under authority of statute, way dedicated to public use, or way under the control of park commissioners or body

[13] Most OUI trials involve consumption of alcohol, and in our general discussions of the offense in this report we refer to cases based on alcohol consumption as a matter of convenience.

having like powers." G. L. c. 90, § 1. In determining whether a road is a public way, a judge or jury may consider whether the road is paved, whether it is maintained by the state or town, and whether there are street lights, street signs, or fire hydrants present on the way. See Commonwealth v. Mara, 257 Mass. 198, 208-209 (1926) ("Curbings, concrete paving, electric lights and hydrants in a street are commonly the result of the expenditure of public money for the public use and convenience."); Commonwealth v. Muise, 28 Mass. App. Ct. 964, 965 (1990) ("indicia of accessibility to the public are paved roads, the absence of signs prohibiting the public access, street lights, curbing, abutting houses or businesses, crossroads, traffic, signs, signals, lighting, and hydrants."). Roads and parking lots have also been considered to be "public ways" if "members of the public have access [to them] as invitees or licensees." Commonwealth v. Kiss, 59 Mass. App. Ct. 247, 249 (2003); see Commonwealth v. Hart, 26 Mass. App. Ct. 235, 237 (1988). Some cases do turn on this element, for example, when an arrest is made on a private driveway or in a private development.

To prove the third element of the offense, a prosecutor may present evidence that the defendant operated his or her motor vehicle while under the influence of alcohol (the "under the influence" or "impairment" theory of guilt) *or* that the defendant had a blood alcohol level of .08% or higher at the time of operation (the "per se" theory of guilt). See G. L. c. 90, § 24 (1) (a) (1); Commonwealth v. Colturi, 448 Mass. 809, 811 (2007). If the Commonwealth chooses to proceed on the impairment theory of guilt, it need not supply evidence that the defendant's consumption of alcohol actually rendered his operation of the vehicle unsafe. The Commonwealth need only prove that the defendant's alcohol intake diminished his capacity to operate a motor vehicle safely. See Commonwealth v. Connolly, 394 Mass. 169, 173 (1985). Circumstantial evidence of a defendant's impairment is enough to satisfy this element. Commonwealth v. Woods, 414 Mass. 343, 354 (1993). Evidence commonly offered by the prosecution during an OUI trial to show impairment includes: (1) a police officer's testimony regarding observations of the defendant, including the defendant's statements, appearance, performance on field sobriety tests and operation of a motor vehicle; (2) witness testimony concerning the defendant's operation or sobriety; (3) video recordings of the defendant during the booking process; and (4) the results of a breathalyzer test.

Police officers often administer "field sobriety tests" before an OUI arrest to determine whether the defendant was under the influence. The most common of these tests are the nine-step walk and turn test, the one-leg stand test, recitation of the alphabet, and counting to a certain number. While lay testimony concerning these tests is admissible, Commonwealth v. Schutte, 52 Mass. App. Ct. 796, 800-801 (2001), evidence concerning another common field sobriety test, the horizontal gaze nystagmus test,[14] is inadmissible without expert scientific testimony. See

[14] Nystagmus is an involuntary jerking or bouncing of the eyeball that occurs when there is a disturbance of the vestibular (inner ear) system or the oculomotor control of the eye. Horizontal gaze nystagmus ("HGN") refers to a lateral or horizontal jerking when the eye gazes to the side. In the impaired driving context, alcohol consumption or consumption of certain other central nervous system depressants, inhalants or phencyclidine, hinders the ability of the brain to correctly control eye muscles, therefore causing the jerk or bounce associated with HGN. As the degree of impairment becomes greater, the jerking or bouncing, i.e., the nystagmus, becomes more pronounced. This is assessed in the horizontal gaze nystagmus test. American Prosecutors Research Institute, Horizontal Gaze Nystagmus--The Science & The Law: A Resource Guide for Judges, Prosecutors and Law Enforcement, Section 1, at http://www.nhtsa.gov/people/injury/enforce/nystagmus/ (last viewed Aug. 28, 2012).

Commonwealth v. Sands, 424 Mass. 184, 188 (1997). See discussion in Finding #13, infra. Preliminary breath tests, which may be given at traffic stops and road blocks, are inadmissible as well because they employ fuel cell and not infrared technology. See G. L. c. 90, § 24K (stating that breath test results shall only be valid when performed using "infrared breath-testing devices").

Evidence that a defendant refused to perform any of these field sobriety or chemical tests is inadmissible. See Commonwealth v. McGrail, 419 Mass. 774, 780 (1995) (refusal of field sobriety tests); Opinion of the Justices, 412 Mass. 1201, 1211 (1992) (refusal of chemical tests).

Where the Commonwealth proceeds under the per se theory, the prosecutor must prove that the defendant's blood alcohol level was .08% or higher at the time of operation of a motor vehicle. Commonwealth v. Rumery, 78 Mass. App. Ct. 685, 688 (2011) ("[T]he properly admitted reading of 0.08, by itself, permitted the jury to conclude that the defendant had a blood alcohol level that was above the legal limit.").

The admissibility of breathalyzer test results depends on the Commonwealth's theory of guilt. They are admissible when the Commonwealth proceeds under the per se theory, or under both theories, without expert testimony to interpret the results. However, if the Commonwealth proceeds solely under the impairment theory, the Court has ruled that expert testimony is needed to "establish[] a relationship between the test results and intoxication" before the test results can be admitted in evidence. Colturi, 448 Mass. at 818. We discuss this aspect of the law at length in Finding #16.

V. ANALYSIS OF STATISTICAL DATA

A. Data Compilations From MassCourts and CourtView

We conducted the detailed analysis of MassCourts and CourtView data that is summarized in **Attachment 4** in order to reduce that information to a useable measure of the number of pleas (including admissions to sufficient facts), bench trials, jury trials, and other dispositive events in OUI cases handled by each judge during the Time Period.[15] For our purposes, we focused on the following data fields in MassCourts: "Disposition Date," "Disposition Method," "Disposition Code," and "Disposition Judge." The "Disposition Method" describes the type of proceeding at which the case was terminated, including a bench trial, jury trial, or plea hearing. The "Disposition Code" describes the result, including guilty on a plea, a continuance without a finding ("CWOF"),[16] a guilty verdict, or a not guilty verdict. MassCourts contains many data entry options related to these and other events, and much of the necessary work involved

[15] Unless otherwise indicated, the data referred to in this discussion is for the Time Period.

[16] A CWOF requires the defendant to admit sufficient facts for an OUI conviction. The case is continued for a specified period during which the defendant is on probation. If the defendant complies with the conditions of probation, the case is dismissed. If the defendant violates the conditions, the CWOF disposition may be modified to a guilty finding. We considered a CWOF to be a disposition adverse to the defendant regardless of whether the CWOF was ultimately dismissed. See Finding #1.

devising a method for consistently grouping the options into useable categories, as described in **Attachment 4**.[17]

It should be noted that the analyses in this report pertain to the manner in which OUI cases are *disposed of*, and therefore each case in the Database was assigned to the court in which it was finally disposed, not where it *originated*. Thus, the statistics may not reflect the number of cases originating in a court where cases scheduled for a jury trial are sent to another court (even if they ultimately result in a bench trial because of a jury waiver). Throughout this report, the term "court" refers to the court *that disposed of the OUI charge*.

From this simplified data, we computed the following totals and percentages for each judge, each court and county, and statewide:

- Pleas (including subtotals for CWOFs, and guilty findings)
- Bench Trials (including subtotals for CWOFs, guilty and not guilty findings)
- Jury Trial Waiver Rate
- Bench Trial Acquittal Rate
- Jury Trials (including subtotals for CWOFs, guilty and not guilty verdicts)
- Jury Trial Acquittal Rate
- Other Dispositive Events[18]
- Total OUI Cases
- Conviction Rate (for counties and courts)

We used this information to compile the following tables:

- TABLE A1 - County Data and Statewide Totals
- TABLE A2 - Court Data
- TABLE A3 - Judge Data
- TABLE A4 - Pre- and Post-Spotlight Series Data

These tables are contained in **Attachment 5**. The data limitations explained in **Attachment 4** lead to two caveats which are noted in these tables. First, those judges who sat at any time in the Brockton or Barnstable District Courts, where we have no data, are marked with a single asterisk (*), and the totals for those judges are based on their cases only outside those two courts. Second, for those judges who sat at any time in the BMC Central Division (even if they sat more often in other courts), we have data identifying their bench and jury trials, and their pleas and other dispositions outside the Central Division, but not for their pleas and other dispositions in the Central Division itself. Therefore, those judges are designated by a double asterisk (**) and we did not compute waiver rates for those judges, because that rate depends on a comparison of bench trials to the total of trials and pleas.

[17] We followed a similar process to analyze the CourtView data for the BMC Central Division, as described in **Attachment 4**. There was no data available for the Brockton and Barnstable District Courts in MassCourts, and we did not attempt to derive data directly from those courts.

[18] Other dispositive events consist primarily of cases resolved by dismissal, nolle prosequi (a declaration that the prosecution declines to prosecute the case), or pretrial probation.

We calculated ***bench trial acquittal rates*** by dividing the number of cases tried by a judge resulting in an acquittal by the total number of cases tried by that judge, resulting in either an acquittal or a conviction. For the purpose of calculating this ratio, we considered a CWOF entered after a bench trial to be a conviction, based on the assumption that the court found sufficient facts to support a guilty finding in these cases.[19] See Finding #1. The statewide bench trial acquittal rate was 86%.[20]

We used the same method to calculate ***jury trial acquittal rates***, which averaged 58% statewide.

We calculated jury trial ***waiver rates*** by dividing the number of bench trials conducted by a judge by the total number of pleas and trials handled by that judge. Because this ratio is intended to identify the percentage of cases in which a judge was asked to evaluate the merits of a case, compared to the total number of cases disposed of on the merits, cases falling under the "Other" dispositive events category (i.e., cases resolved by dismissal, nolle prosequi, and pretrial probation) are not included in the denominator in the waiver rate calculations. The statewide average waiver rate was 12%.

We calculated ***conviction rates*** by dividing the total dispositions adverse to a defendant (guilty and CWOF, whether by plea or trial) by the total number of OUI cases. Statewide, 77% of all cases resulted in a disposition adverse to the defendant. While not separately computed in the tables, the percentage of all cases resolved statewide by pleas versus trials was: pleas, 73%; bench trials, 10%; and jury trials, 6%. Other dispositions, mostly dismissals, account for about 10%.[21]

The 10% of cases counted under the "Other" dispositions category in our tables include dismissals represented by a variety of Disposition Codes in MassCourts, which may represent dismissals on the merits or for procedural reasons, on motion of the Commonwealth or of the defense. They also include other dispositions such as pretrial probation. We are confident that the vast majority of these cases resulted in dismissals, but we did not attempt to determine the exact number of each type, which would have required a review of the docket sheet for every case.

We also undertook to determine whether there was any difference in the disposition of OUI cases before and after the Spotlight Series investigation. See Finding #7. For the pre- and post-Spotlight Series comparison, we chose two discrete intervals, from October 1, 2010 through March 31, 2011 (before) and October 1, 2011 through March 31, 2012 (after). Although the

[19] Courts are not permitted to enter CWOFs over the Commonwealth's objection after a trial has occurred. Commonwealth v. Norrell, 423 Mass. 725, 727 (1996). We do note, however, that in 63 instances, the docket sheets indicate that a CWOF was entered in connection with a bench trial, and in two instances in connection with a jury trial. We cannot determine from MassCourts or from the docket sheets in these cases whether judges entered these CWOFs after or instead of trials. For the purpose of our analysis, we took the docket sheets at face value and assumed that the CWOFs were entered after trial.

[20] Our calculation of the statewide acquittal rate does not include data from the Barnstable or Brockton District Courts, as previously noted.

[21] All of the percentages we calculated have been rounded to the neareset 1%. The percentages do not always total 100% because of rounding.

Spotlight Series articles were published between October 30 and November 13, 2011 (with follow-up articles and a Globe editorial appearing later in November), most participants we interviewed told us that the existence of the investigation was well known in the courts by mid-2011.

The Database from which these tables are derived contains 56,966 dispositions entered in MassCourts and CourtView over 45 months. We questioned whether the transfer of information from paper docket sheets to those electronic case management systems resulted in errors. For that reason, we asked the Trial Court staff to conduct the audits explained in Part II and **Attachment 4**, and we conducted our own limited audit using a random one-third sample of bench trials, as explained therein. We corrected the Database whenever possible and reviewed these issues with Analysis Group as the data compilations and statistical analyses were prepared. While our analysis of the one-third sample of bench trials indicates that some unidentified random errors likely remain, we are advised by Analysis Group that the error rate is low enough that it does not undermine the integrity of the data analysis. Therefore, we conclude that the statistical comparisons reported here are reliable and do not require any further adjustments.

B. Comparison to Data From the District Attorneys

We contacted each of Massachusetts's 11 district attorneys. They provided us with the information they had given to the Spotlight Team in response to its information requests. According to the Spotlight Series, the district attorneys' data showed the following acquittal rates after trial in each district:[22]

Table 1. District Attorney Data Given to the Boston Globe

District Attorneys' Data (by district)	Bench Trial Acquittal Rate	Jury Trial Acquittal Rate	Time Period
Berkshire	71%	60%	2005-2010
Bristol	77%	58%	2009-2011
Cape & Islands	79%	59%	2006-2011
Essex	57%	35%	2005-2011
Hampden	47% (combined)		2006-2010
Middlesex	83%	62%	2006-2011
Norfolk	86%	71%	2006-2010
Northwestern	84%	54%	2009-2011
Plymouth	86%	56%	2005-2010
Suffolk	88%	69%	2005-2010
Worcester	85%	n/a	2010

[22] Farragher, For drunk drivers, a habit of judicial leniency, The Boston Globe (Oct. 30, 2011). Note that where the term "district" is the same as the name of a county, that indicates a district attorney whose jurisdiction covers only one county. Other counties are combined into districts covered by the same prosecutor, as follows: the Cape and Islands District includes Barnstable, Dukes, and Nantucket counties; and the Northwestern District includes Franklin and Hampshire counties.

Note that the time periods covered by the data are not consistent. They range from one year (2010, for Worcester County) to over six years (2005-2011, from Essex County).

The MassCourts and CourtView data covered the time period from January 1, 2008 to September 30, 2011. This data shows acquittal rates after trial, for the Time Period, as displayed in the following table:

Table 2. Summary of MassCourts and CourtView Data by County

MassCourts/CourtView Data (by county)	Bench Trial Acquittal Rate	Jury Trial Acquittal Rate	Time Period
Berkshire	61%	63%	1/1/08-9/30/11
Bristol	84%	62%	"
Cape & Islands District:	79%	56%	"
Barnstable	78%	54%	"
Dukes	83%	0%	"
Nantucket	67%	71%	"
Essex	81%	56%	"
Hampden	85%	57%	"
Middlesex	80%	54%	"
Norfolk	80%	57%	"
Northwestern District:	83%	57%	"
Franklin	76%	63%	"
Hampshire	87%	51%	"
Plymouth	80%	42%	"
Suffolk	88%	64%	"
Worcester	97%	63%	"

Note that the bench and jury trial acquittal rates listed in Table 2 for the Cape & Islands and Plymouth County do not include data from the Barnstable and Brockton District Courts, for the reasons discussed in **Attachment 4**.[23]

[23] Where possible, we compared the data we received from the district attorneys (which was provided to the Globe) to the MassCourts data for comparable time periods. In many instances, we found discrepancies between these data sets. For example, we received data for bench trials conducted in 2010 from the Worcester County district attorney. This data consisted of 258 cases. The MassCourts data, however, showed 496 bench trials conducted during this time period in Worcester County. Moreover, according to the MassCourts data, 66 of the 258 bench trials listed in the district attorney's data were not disposed of by bench or jury trial. In 27 other cases, the district attorney's data was not consistent with the MassCourts data as follows:

- 11 cases listed by the DA as bench trials were classified as jury trials in MassCourts
- the disposition judge was different in 16 cases
- the disposition was different in 2 cases

Similarly, we received data for bench and jury trials conducted in 2008 and 2009 from the Plymouth County district attorney. This data consisted of 420 cases, including 116 cases from the Brockton District Court, which were not included in the MassCourts data. The MassCourts data showed 476 bench and jury trials conducted during the same time period. In addition, according to the MassCourts data, 49 cases included in the district attorney's data were not

VI. REVIEW OF OUI CASES

We used the Database to select cases for further review. We reviewed docket sheets and police reports, categorized them, and used them to select trial recordings. We listened to the recordings of 50 District Court trials and identified common issues apparent from those trials.

A. Bench Trial Acquittals

As discussed in **Attachment 4**, in connection with the Trial Court auditors' review of a random one-third sample of cases that were disposed of by bench trial, we asked the audit team to copy the docket sheet and police report for each of those cases. We reviewed a sample of those docket sheets and police reports for cases that resulted in an acquittal at bench trial.

We reviewed cases from the East Brookfield, Eastern Hampshire, Hingham, Lowell and Springfield District Courts. We chose those courts because they are in different counties; the volume of bench trials during the Time Period was significant in each court; and the bench trial acquittal rates in those courts ranged from the statewide average to far above.

We tracked the type of evidence contained in the police reports for 292 cases and recorded the following information for each case:

- which field sobriety tests were administered and whether the defendant passed, failed or refused each test;
- whether the defendant took a breathalyzer test and the result of that test;
- whether there was any evidence of an accident or bad operation of a motor vehicle by the defendant;
- whether the defendant made any admissions regarding consumption of alcohol; and
- whether inadmissible field sobriety tests (HGN and preliminary breath tests) were used in connection with the arrest.

We also reviewed trial recordings of cases from each of the five courts listed above. We selected cases that appeared to be particularly strong cases for the Commonwealth and requested the trial recordings for a total of 32 of them. We received 30 of these trial recordings, which we reviewed and analyzed. (We also listened to the recordings of eight of the cases discussed in the Spotlight Series, all of which resulted in acquittals.)

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disposed of by bench or jury trial. The district attorney's data was also inconsistent with the MassCourts data in 49 other cases:

- the disposition was different in 2 cases
- the disposition judge was different in 14 cases
- the disposition method was different in 35 cases

In light of the review and audit of the MassCourts and CourtView data, we did not change our results to be consistent with the district attorneys' data.

B. Bench Trial Convictions

We reviewed a sample of docket sheets and police reports for cases that resulted in a conviction at a bench trial. Because the statewide bench trial acquittal rate is approximately 86%, the number of convictions in the random one-third sample copied by the auditors was small. Thus, in order to review a larger sample of cases that resulted in a conviction at a bench trial, we made an additional request for copies of the docket sheets and police reports for all cases that resulted in a conviction at bench trial from nine courts: the East Brookfield, Eastern Hampshire, Hingham, Lowell, New Bedford, Orleans, Peabody, Springfield and Wrentham District Courts. We selected those courts for the same reasons discussed above: they are in different counties; the volume of bench trials during the Time Period was significant in each court; and the statistics in those courts cover a range of bench trial acquittal rates.

We received the requested docket sheets and police reports from all of those courts except Wrentham. We reviewed the docket sheets and police reports for 108 cases that resulted in a conviction at bench trial in the same manner described above. Our purpose was to select cases that appeared to be particularly *weak* cases for the Commonwealth. In addition, we selected 14 cases from the Eastern Hampshire, Hingham, Lowell, New Bedford, Orleans and Springfield District Courts for review of the trial record. We received the recordings of 12 of these cases, which we reviewed.[24]

C. Results of This Review

With regard to the ultimate outcome of the cases, despite our attempts to apply an objective approach to sorting and reviewing them, our work became a highly subjective analysis. Some of the cases that resulted in acquittals did, indeed, seem like good candidates for acquittal by any measure. Some could have gone either way, while it appeared to us that others should have resulted in convictions. As for the cases that resulted in convictions, some did not appear that much stronger than those resulting in acquittals.

Of course, the record of these trials revealed that the evidence presented in court was not exactly as it appeared in the police reports. Police officers were sometimes impeached, defenses not apparent in the reports were presented, and the advocacy on both sides resulted in more or less convincing evidence than what appeared in the written record.

This work contributed to our findings on the repetitive nature of non-scientific evidence in OUI cases (Finding #12); cases in which inadmissible field sobriety tests are used (Finding #13); the apparent low utility of the field sobriety tests that are admitted (Finding #14); and breathalyzer readings over .08% that do not result in conviction (Finding #15). In addition, we gained insights into the trial of these cases that, together with our interviews of judges, prosecutors and defense lawyers, informed our analysis of the statistics.

[24] We did not receive one trial recording and were told that the other was unavailable.

VII. DISCUSSIONS WITH JUDGES, PROSECUTORS, AND DEFENSE LAWYERS

We thought it important to obtain the insights of judges, prosecutors, and defense lawyers.[25] At the same time, we were conscious of our mandate not to conduct a disciplinary inquiry and wary of intruding on the settled conviction or acquittal of any individual defendant. Therefore, we did not conduct interviews about particular trials and did not interview judges about decisions in particular cases. We organized our discussions around the following topics, which were not exclusive:

1. **The Supreme Judicial Court's Appointment.** We explained the purpose of our inquiry and the specific assignment given to us by the Court.

2. **Acquittal Rates.** We informed the prosecutors generally of the statistics we found for their jurisdiction. We asked for comment on the data and any discrepancies between our data and the information the prosecutors provided to the Globe.

3. **Assignment of Cases.** We asked about procedures for the assignment of cases and acceptance of jury waivers in the relevant courts.

4. **Use of Lobby Conferences.** We asked whether judges conduct lobby conferences (see note 38), how they take place, and what information may be discussed in these conversations.

5. **Jury Waiver.** We explored the effect of possible changes in the rules and procedures governing jury waiver.

6. **Prosecutors' Policies.** We discussed the policies of district attorneys regarding dismissal of OUI cases, whether dismissal rates vary in these and other kinds of cases, and whether prosecutors drop OUI charges as part of plea bargains.

7. **Refusal Evidence.** We explored the impact of Massachusetts law regarding the inadmissibility of evidence that a defendant refused a field sobriety test or a breath test.

8. **Police Work.** We discussed issues unique to certain courts and counties, such as the volume of OUI cases and the roadways involved; the use of preliminary breath tests, HGN tests, and videotapes on the road and at bookings; and the use of field sobriety tests.

9. **Assistant District Attorneys.** We discussed the training and experience of assistant district attorneys in OUI cases; whether ADAs have discretion to dismiss OUI cases and under what circumstances; and what types of defects in a prosecutor's case may lead to acquittals.

[25] The persons we interviewed are identified in **Attachment 7**.

10. **Judges.** We asked participants whether they believe that defense lawyers engage in "judge shopping," how that can be accomplished, and whether the views of judges regarding particular kinds of evidence may become known over time. We asked the judges about the statistics we found and to comment on the challenges presented when they serve as fact finders in the trial of these cases, including the issues we identified regarding the repetitive nature of these cases and the evaluation of delay in administering breathalyzer tests.

11. **Conduct of Trials.** We asked about the most common reasons why OUI trials result in acquittals; the handling of breathalyzer evidence, including compliance with procedural requirements; retrograde extrapolation evidence; and whether judges import into a given trial the experience and expertise they learn in other trials. We asked about the level of preparation of prosecutors and police officers, and their presentation of typical evidence. We asked whether judges correctly apply the law regarding use of retrograde extrapolation and the Colturi holding, and in general about cases in which breathalyzer evidence above .08% was admitted and there was an acquittal.

12. **Administrative/Procedural Issues.** We asked whether judges should be rotated and whether changes should be made to the case assignment process. We also asked about issues created by pressure to move cases through the system.

13. **Changes in Practice Following Spotlight Series.** We asked whether any aspects of the trial process had changed following publication of the Spotlight Series.

14. **Recommendations for Changes.** We asked participants for their recommendations for changes regarding the administration and trial of OUI cases.

We used the information obtained in these discussions to inform our own review of OUI cases and our assessment of the statistics generated from the data.

VIII. FINDINGS

All of the statistics derived from the MassCourts and CourtView data are contained in the tables in **Attachment 5**. The standard statistical methods applied by Analysis Group to identify disparities in the Database are described in **Attachment 6**. The findings below present the important averages and disparities apparent from the statistics, together with a discussion of factors which may contribute to the statistics.

A. Conviction and Acquittal Rates

1. 77% Of All OUI Cases Statewide Were Resolved Against The Defendant.

The statistics in this report were computed based on the 56,966 OUI dispositions in the Database which took place during the Time Period (between January 1, 2008 and September 30, 2011).[26] When continuances without a finding (CWOFs, see note 16), guilty pleas, and all guilty verdicts (after bench or jury trial) are combined, 77% of those OUI cases were resolved against the defendant. This ***conviction rate***[27] is similar to the rates in some of the other states where we found reports of OUI data. See Finding #10. About 13% of the cases resulted in acquittals: 9% by judges in bench trials, and 4% in jury trials. The remaining 10% of the cases involved some other form of disposition, usually dismissal.[28]

We include CWOFs as a result adverse to the defendant in the computation of conviction rates. A CWOF is imposed only after a defendant admits sufficient facts to support a conviction, just as in the case of a guilty plea, and is assigned to a driver alcohol education program. The OUI statute makes this form of disposition available for first offenders, and for second offenders whose prior offense was ten years or more before their later conviction. See G. L. c. 90, §§ 24 (1) (a) (1), 24D. A CWOF operates as a prior conviction for the purpose of enhanced penalties for second and subsequent OUI offenses. See Commonwealth v. Valiton, 432 Mass. 647, 647-648 (2000) (holding that the District Court judge was correct in finding that a defendant who previously admitted to sufficient facts was subject to penalties for a second offense after his subsequent conviction); G. L. c. 90, § 24 (1) (a) (1) (allowing for heightened penalties "[i]f a defendant has been previously convicted *or assigned to an alcohol or controlled substance education treatment, or rehabilitation program by a court of the commonwealth or any other jurisdiction because of a like violation preceding the date of the commission of the offense for which he has been convicted*." [emphasis added]).[29]

With regard to dispositions not on the merits (i.e., dismissals, as opposed to decisions applying the reasonable doubt standard to the facts of the case), those fell into the "Other" category

[26] An additional 6,474 cases that were disposed of between October 1, 2011 and March 31, 2012 were used to compare the statistics before and after the Spotlight Series referenced in Finding #7, bringing the total of all OUI cases collected to 63,440 cases.

[27] We calculated the conviction rate by dividing the total number of CWOFs, guilty pleas, bench trial convictions, and jury trial convictions by the total number of OUI cases, for a given court.

[28] All of the percentages we calculated have been rounded to the nearest 1%.

[29] This is consistent with the Court's recent decision in Souza v. Registrar of Motor Vehicles, 462 Mass. 227 (2012). There, the Court held that an admission to sufficient facts does not operate as a "conviction" with respect to the portion of the OUI statute mandating increased license suspensions based on refusal of breathalyzer tests. Id. at 235. However, the Court acknowledged that the language of other parts of the statute did include CWOFs and assignments to alcohol treatment or education programs as bases for enhanced penalties. See id. at 232; see also G. L. c. 90, § 24 (1) (a) (1) (allowing for increased penalties if the defendant has already been convicted of an OUI offense or if he or she has been assigned to an alcohol treatment program, which is part of the §24D disposition that a defendant would receive after a CWOF). In response to the Souza case, the legislature, through two recent budget amendments, has amended the OUI statute to include not only prior convictions but also prior assignments to alcohol education programs as a basis for increased license suspensions for breathalyzer test refusals. G. L. c. 90, § 24 (1) (f) (1), as amended through St. 2012, c. 139, §§ 99, 100.

explained in **Attachment 4**. Most of those cases were associated with a Disposition Code indicating dismissal, but it is not possible to tell whether these dismissals were the result of a request by the Commonwealth or a judicial ruling (which could be based on the Commonwealth's inability to be ready for trial or some other reason, such as a motion to suppress eliminating most of the evidence or a ruling based on a discovery violation). In our interviews with participants, we were told that, as a matter of policy, very few OUI cases are dismissed voluntarily by the Commonwealth.

2. When OUI Cases Went To Trial, Judges Acquitted Defendants In 86% Of The Cases Statewide, While Juries Acquitted About 58% Of The Time.

When defendants waived a jury trial and chose a bench trial, on average they were acquitted 86% of the time. The ***bench trial acquittal rates***[30] for the 217 judges who heard at least one case during the Time Period ranged from 0% to 100%. In general, judges who handled more bench trials (the average was 27) had higher bench trial acquittal rates. See Finding #4. The overall average for jury acquittals was 58%.

The county with the highest rate of bench trial acquittals was Worcester (97%), and the lowest was Berkshire (61%). Jury acquittal rates in each county ranged from 42% (Plymouth) to 64% (Suffolk).[31] The participants generally agreed that cases that go before juries for trial may be different than those that go before judges. These jury cases are often stronger for the Commonwealth, but defendants nevertheless choose to try them, either because the sentence available on a plea is unacceptable or simply because they perceive the chance of success to be greater with six jurors. Although we doubt that we could confirm these reports by an empirical review of cases, we accept this logic and have not sought to analyze the difference between bench and jury trial acquittal rates in counties or courts.

3. Bench Trial Acquittal Rates In Worcester County Were Higher Than The Statewide Average, The Overall Conviction Rate Was Lower, And Two Worcester County Courts Contributed Disproportionally To These Statistics.

In Worcester County, where there were 8,747 OUI cases during the Time Period, the average bench trial acquittal rate was 97%, 11 points higher than the statewide average. All of the courts in Worcester County had bench trial acquittal rates over 90%. In four high OUI volume courts (Fitchburg, Westborough, East Brookfield, and Dudley), this rate was 97-98%.

Bench trials accounted for a larger percentage of the total dispositions in Worcester County: 19% compared to the statewide average of 10%.[32] The jury trial ***waiver rate***[33] was high as well: 21%

[30] We calculated the bench trial acquittal rate by dividing the total number of not guilty findings in bench trials by the total number of bench trials for a given court or judge.

[31] Excluding Dukes and Nantucket, which had only 2 and 14 jury trials during the Time Period, respectively.

[32] This ratio is different than the waiver rate because it takes into account all OUI cases, whereas the waiver rate excludes "Other" dispositions in order to account for only those cases where waiver was an alternative to either a plea or a jury trial.

compared to the 12% statewide average. Of the 33 judges with high bench trial acquittal rates identified in Finding #5, 18 regularly sat in this county.

Because of the high percentage of acquittals at bench trial, the conviction rate in Worcester County was only 67% during the Time Period (compared to the statewide average of 77%). The conviction rate in other counties with a similar volume of cases (Middlesex County, with 9,768 cases, and Essex County, with 8,269 cases) was 78% and 86%, respectively, and the bench trial acquittal rate in those counties was 80% and 81%, respectively.

Two courts in Worcester County stand out from the rest of the 68 courts in the District Court and BMC. In East Brookfield and Fitchburg, the waiver rates were 34% and 35%, respectively, almost three times higher than the statewide average of 12%. (The court with the next-highest waiver rate was Plymouth, at 24%.) Thus, more than one-third of *all* OUI cases in these two courts resulted in bench trials, and over 97% of those cases resulted in acquittals. The overall conviction rate in these two courts was 53% and 55%, respectively, the lowest in the state, compared to the 77% statewide average.

These courts handled a greater than average OUI caseload. On average, the 68 courts in the sample handled 838 cases during the Time Period, while these courts handled 1,112 and 1,244 cases, respectively. Together they accounted for 751 bench trials, 732 of which resulted in acquittals. Their total bench trials accounted for 13% of all the bench trials in the entire state.

East Brookfield handles the jury trials for the Dudley District Court, a non-jury court where the waiver rate also was high (23%). Dudley was busier than average (985 cases), and of the 193 bench trials conducted there, 187 (97%) were acquittals. Between Dudley and East Brookfield, 525 out of 538 bench trials resulted in acquittals. Fitchburg handles the jury trials for Leominster, Clinton, Gardner, and Winchendon. While the waiver rate in Leominster also was high (22%), the waiver rate in the others was low (6%, 8%, and 9%, respectively).

B. Disparities Among Courts and Judges

4. With Regard To Individual Judges, Bench Trial Acquittal Rates, By Themselves, Are Not Meaningful, Without Taking Into Account The Volume Of Cases And The Rate Of Jury Waiver.

88 judges out of 217 had bench trial acquittal rates higher than 86%, many of them at 100%. However, those rates are not meaningful, taken by themselves. In the Time Period, the average number of bench trials heard by a judge was 27. Given the reports of participants that a high number of weak cases are moving through the system to bench trials, a 100% acquittal rate in only five or ten bench trials is not significant based on the small data sample.

In order to identify disparities from the averages, we looked beyond bench trial acquittal rates. We used three measures to identify judges whose record during the Time Period was unusual: bench trial acquittal rate, jury trial waiver rate, and the number of bench trials. The **waiver rate**

[33] The waiver rate is the percentage of all cases handled by a judge (pleas plus trials, but not including cases that were dismissed or had a disposition included in the "Other" category in our data).

is the percentage of all cases handled by a judge (pleas plus trials, but not including cases that were dismissed or had a disposition included in the "Other" category in our data, see Part V) that were resolved in a bench trial before that judge. While not an absolute measure and dependent on a judge's particular assignments, a high waiver rate can be associated with judges who were perceived to be favorable candidates for waiver by defense lawyers. The statewide average waiver rate was 12%. Based on these three measures, Analysis Group used standard statistical techniques to identify disparities among judges, as explained in **Attachment 6**.

The dispositions in the Database reflect a correlation between high bench trial acquittal rates, high volume, and high waiver rates. For example, for judges who handled at least 100 OUI cases, increased bench trial acquittal rates were associated with higher bench trial volume and higher waiver rates:

Table 3. Bench Trial Acquittal Rates and Waiver Rates (Judges With at Least 100 OUI Cases)

Bench Trial Acquittal Rate	Number of Judges in this Rank	Average Number of Bench Trials	Average Waiver Rate
50% and below	16	7	4%
51-60%	5	17	7%
61-70%	16	24	7%
71-80%	37	28	10%
81-90%	41	39	12%
91-100%	50	50	18%
Total Number of Judges Included:	165		

It is reasonable to infer that the higher a judge's bench trial acquittal rate is perceived by the defense bar, the more waivers that will be offered to that judge, and therefore the more bench trials that judge will hear.

5. Some Courts And Some Judges Had A High Volume Of Cases, A High Waiver Rate, And A High Bench Trial Acquittal Rate.

One challenge presented by this assignment was the choice of a method for identifying statistically significant disparities in the Database. While the average bench trial acquittal rate was 86%, are rates above 90% unusual? Those above 95%? What measure of volume should be used to identify those judges who had the greatest impact on the data? While the average waiver rate was 12%, what rate sets a judge apart from others and suggests a more favorable perception among defense lawyers?

There is no precise answer to these questions. We relied on the expertise of the Analysis Group, which used two standard statistical techniques to identify significant disparities, based on judges' bench trial acquittal rates, waiver rates, and case volume. The first technique identifies judges above the upper limit of a 95% confidence interval for each of these measures. (See **Attachment 6**, Table 1). The second technique identifies judges with significantly higher bench

trial acquittal rates. (See **Attachment 6**, Table 2.) The results are combined in the following table (an "X" in the columns designated "T#1" or "T#2" indicates that judge was included by technique #1 or technique #2, as explained in **Attachment 6**):[34]

Table 4. Judges Identified Based on High Bench Trial Acquittal Rates, Waiver Rates, and Case Volume

Judge #	T #1	T #2	Total OUI Cases Handled	Waiver Rate	Bench Trials	Jury Trials	Bench Trial Acquittal Rate
2	X	X	180	26%	41	4	100%
3	X	X	183	43%	73	5	97%
13	X	X	206	40%	76	7	95%
19		X	439	9%	40	6	100%
25		X	537	8%	39	30	97%
26*	X		343	13%	42	14	90%
27	X		157	30%	42	9	88%
41**		X	147		38	7	97%
50*	X		432	22%	87	49	87%
55**	X	X	536		71	4	97%
73		X	240	15%	34	60	100%
80	X	X	330	51%	149	25	100%
82		X	450	10%	39	7	100%
85*	X	X	403	14%	52	14	98%
87	X		329	39%	116	9	89%
91	X		337	19%	52	55	92%
111	X		347	20%	60	1	92%
113	X	X	310	17%	50	13	100%
122	X	X	560	30%	158	63	99%
131	X		168	29%	45	16	93%
132*	X		500	23%	99	5	91%
134	X	X	183	61%	97	8	95%
140*	X	X	468	34%	142	9	94%
147	X	X	589	40%	212	18	98%
153*	X		429	13%	50	38	88%
158	X	X	229	31%	68	80	97%
166	X	X	401	23%	83	59	99%
201	X	X	482	20%	90	58	96%
203	X	X	573	17%	90	28	99%

[34] Note that during the Time Period (which contained approximately 938 business days), the judges marked with a single asterisk (*) were assigned to the Brockton or Barnstable District Courts (from which we have no data) for the following number of days, based on assignment sheets provided to us by the District Court: #26, 224 days; #50, 22 days; #85, 36 days; #132, 89 days; #140, 6 days; #153, 14 days; #210, 115 days; and #211, 114 days. The data in the chart is based only on the cases they handled outside those courts. In addition, the judges marked with a double asterisk (**) were assigned to the BMC Central Division, where we have information for each judge on trials but not on pleas, for the following number of days: #41, 419 days; and #55, 16 days. As to the latter two judges, Analysis Group re-ran the statistical tests excluding BMC data (thus treating those judges the same way as those who sat in Brockton or Barnstable, and using only data from courts with complete data), and found the same result.

Judge #	T #1	T #2	Total OUI Cases Handled	Waiver Rate	Bench Trials	Jury Trials	Bench Trial Acquittal Rate
208	X		378	15%	49	27	92%
210*	X		269	24%	59	5	93%
211*	X		374	13%	39	8	90%
216	X	X	381	32%	113	62	95%

20 of the 33 judges in this table had bench trial acquittal rates of 95% or more. Six were at 100%. All of them were associated with a significant number of bench trials and overall case volume. In terms of waiver rates, 28 of the 33 judges had a waiver rate above the average; 19 had waiver rates of 20% or more; and 11 had waiver rates of 30% or more.

18 of the 33 judges listed above regularly sat in the courts in Worcester County. There is no reason to infer that only lenient judges happen to be assigned in Worcester County. Some combination of the factors identified in Finding #12 must be at play in connection with these high acquittal rates. Most of the other judges had either waiver or bench trial acquittal rates much higher than the statewide averages, and three of those (#87, #134 and #140) had unusually high waiver rates (39%, 61% and 34%, respectively). Others simply handled a high percentage of bench trials where they sat, with bench trial acquittal rates somewhat higher than the statewide average, or the averages in the courts where they sat, but it is difficult to draw any inference from those differences.

Judge #25 had a large enough acquittal rate in bench trials to be included in Table 4 on the basis of the second test. However, because he handled a large number of cases and had a large number of jury trials as well, he had a low enough waiver rate that he also is included in Table 7 below.

Judges with a track record of acquittals are likely to receive more jury waiver requests from knowledgeable defense lawyers. This, in turn, would lead to a higher volume of bench trials. Compared to their colleagues listed in Finding #6, most of these judges were chosen by defense lawyers for waiver much more often.

We should note, however, that there are 18 judges in the Database who had bench trial acquittal rates below 85% (which is the lower limit of the 95% confidence interval identified by Analysis Group for that metric), and more than 37 bench trials (which is the upper limit of the confidence interval for that metric). These judges had bench trial acquittal rates ranging from 67% to 83% (12 were below 80%), and significant variation in their waiver rates. These judges are: #7*, #21, #29*, #42*, #74*, #75, #77, #79, #83*, #118, #123, #126, #137*, #141, #142, #143*, #148*, and #191. None of them sat regularly in Worcester County. The eight marked with an asterisk (*) sat at least some of the time in Barnstable or Brockton, and their data is based only on cases outside those two courts.

6. In Some Courts And Before Some Judges, Bench Trials Were Relatively Rare, And There Was A Disparity Between These Courts And Others In Both The Number Of Bench Trials And The Overall Conviction Rate.

The data also shows a striking disparity in conviction rates between certain courts, where waiver rates and bench trial acquittal rates were relatively high, and other courts where they were low. In the former, defendants had a much greater opportunity to achieve an acquittal by waiving a jury before a judge with a high track record of acquittals. In the latter, bench trials were a rare event during the Time Period, driven by the unusually low rate at which defendants waived juries despite high case volume. This was associated with a significant disparity in the outcomes of OUI cases. For example, in the East Brookfield District Court there were 1,112 OUI cases and 345 bench trials, 98% of which resulted in acquittals. The conviction rate was only 53%, the lowest in the state. Conversely, in the Newburyport District Court there were 1,570 OUI cases and *only four bench trials*, three of which resulted in acquittals. The conviction rate there was 91%, the highest in the state.

Below are five courts, with jury sessions, which handled more than 1,000 cases (the average in the Time Period was 855), at each end of the conviction rate spectrum:

Table 5. Courts with Low Conviction Rates

Courts With Low Conviction Rates[35]	Total OUI Cases	Number of Bench Trials	Bench Trial Acquittal Rate	Waiver Rate	Overall Conviction Rate
East Brookfield	1,112	345	98%	34%	53%
Fitchburg	1,244	406	97%	35%	55%
Worcester	1,998	283	95%	15%	66%
Plymouth	1,553	325	74%	24%	70%
Framingham	1,153	232	83%	22%	71%
Hingham	1,006	192	89%	21%	73%

Table 6. Courts with High Conviction Rates

Courts With High Conviction Rates	Total OUI Cases	Number of Bench Trials	Bench Trial Acquittal Rate	Waiver Rate	Overall Conviction Rate
Newburyport	1,570	4	75%	<1%	91%
Attleboro	1,546	83	84%	6%	84%
Lawrence	1,843	108	69%	6%	84%
Peabody	1,238	85	86%	7%	83%
Lynn	1,163	58	81%	6%	82%

[35] We omitted Westborough from this list, which had 1,129 cases but only had a jury session for part of the Time Period.

The courts with low conviction rates had high waiver rates. Those with high conviction rates had low waiver rates.

We also focused on judges who had significant case volume and low waiver rates. There may be many reasons why judges would have low waiver rates, sometimes dependent on what type of session assignments they had during the Time Period. For example, those who sat in assignment sessions, civil sessions, or other specialized sessions might not have been presented with many opportunities for jury waiver. However, when Analysis Group applied the same proportion test used in Finding #5 (Statistical Test #2, see **Attachment 6**) to low waiver rates, and restricted the application only to those judges who also heard more than the average number of total trials (bench plus jury, the statewide average was 44), they identified a number of judges who presumably were in a position to receive jury waivers, but whose low waiver rate indicates a perception among the defense bar that they were not favorable candidates for waiver.[36]

Table 7. Judges With Significantly Lower Than Average Waiver Rates and at Least 44 Trials (Bench or Jury)

Judge #	Total OUI Cases Handled[37]	Waiver Rate	Bench Trials	Jury Trials	Bench Trial Acquittal Rate
20	520	5%	25	33	84%
22	333	6%	17	70	71%
25	537	8%	39	30	97%
45	545	8%	41	43	85%
58	1,256	1%	7	64	100%
65	405	6%	21	29	67%
89	482	5%	20	37	85%
102	510	7%	33	133	82%
115	490	7%	29	22	93%
119*	462	6%	21	28	86%
146	474	6%	26	23	88%
149	223	5%	10	42	70%
152*	481	7%	29	21	59%
157	464	6%	27	29	81%
162*	258	5%	11	49	18%
170	402	5%	16	40	38%
171	411	2%	8	56	75%

[36] Note that during the Time Period (which contained approximately 938 business days), judges #119, #152, and #162, marked with a single asterisk (*), were assigned to the Brockton or Barnstable District Courts (from which we have no data) for 1, 4, and 33 days, respectively, based on assignment sheets provided to us by the District Court. The data in the chart is based only on the cases they handled outside those courts.

[37] This column has been substituted for the column titled "Total Pleas Plus Trials" in Table 3 of **Attachment 6**, in order to provide the same information that is contained in Table 4 above. This does not affect the validity of the statistical analysis described in **Attachment 6.**

Judge #	Total OUI Cases Handled[37]	Waiver Rate	Bench Trials	Jury Trials	Bench Trial Acquittal Rate
192	157	5%	7	43	86%
194	537	0%	2	54	50%
199	362	3%	9	68	89%

Note that most of these judges, except those highlighted, indeed had bench trial acquittal rates at or below the statewide average, and that judges #58, #171, #192, #194, and #199 had so few bench trials that their bench trial acquittal rates are not meaningful. They were among the judges with significant volume but the lowest waiver rates in the state.

In contrast to the concentration of judges in Finding #5 who sat in Worcester County (with an average 97% bench trial acquittal rate), six of the judges in Table 7 regularly sat in Essex County (where the average bench trial acquittal rate was 81%, five points lower than the statewide average). Seven sat in Middlesex County, where the rate was 80%, six points lower than the average. These were the three counties with the most OUI cases in the Database (8,747 cases in Worcester, 8,269 in Essex, and 9,768 in Middlesex).

7. There Was A Significant Difference In The Rate Of Bench Trials Before And After The Spotlight Series.

After the Spotlight Series, the number of bench trials declined. We compared data in two six-month time periods before and after mid-2011, when the Spotlight Series investigation was being conducted. The time periods were October 1, 2010 to March 31, 2011, and October 1, 2011 to March 31, 2012. See discussion in Part V. We confirmed what most participants had told us, that fewer cases are being heard by judges in bench trials after the Spotlight Series. We also found small changes in the statewide bench trial acquittal rate, the jury acquittal rate, and the conviction rate:

Table 8. Bench Trials Before and After the Spotlight Series

Statewide Measure	Before	After
Bench Trials	817	454
Waiver Rate	13%	8%
Bench Trial Acquittal Rate	86%	81%
Jury Trial Acquittal Rate	58%	60%
Conviction Rate	76%	79%

Participants reported that defense lawyers are more reluctant to offer waivers, not that judges are explicitly rejecting them. We do not know whether the changes in the acquittal and conviction rates are significant, given the low volume of the data and limited time periods used in this before and after sample.

8. The Impact Of The Present Rule On Jury Waiver.

Under Massachusetts law, the defendant has the exclusive option to request a waiver of jury trial and elect a bench trial. See discussion in Recommendation #2. This has an important effect on the statistics discussed above and may contribute to the appearance of "judge shopping" in certain settings.

Some judges receive jury waivers at two or three times the average, while others receive them significantly less than the average. Those who receive a higher percentage of waivers generally try more bench trials, and their acquittal rates generally are higher. A defendant may choose between entering a plea and requesting a bench trial based on the perceived predisposition of the trial judge. As indicated above, some courts and judges have amassed a record, perhaps only generally understood by the lawyers most familiar with them, which affects that choice.

At present, the defendant need not make the decision to waive a jury trial until the last minute, on the day of trial. During the trial assignment process, cases scheduled for trial are called, the parties appear, and there is an exchange between the judge who assigns cases to trial sessions and the parties. At that time, a judge may obtain a preview of the case, whether in a so-called "lobby conference"[38] or an open colloquy, on the record, aimed at determining how the case will be assigned. Information about the strengths and weaknesses of the case can be conveyed: how many witnesses will be called for the prosecution or defense; whether there is a breathalyzer test; whether there will be scientific challenges; whether there are defense witnesses who need to be summoned or whose availability may become a practical issue. All of these factors appropriately help a judge to schedule that day's trial work, but they also give a preview of the case.

We have heard reports from participants that judges may signal to defense lawyers, during these exchanges, that a jury trial waiver would be advisable. Judges facing pressure to resolve cases in busy courts may do so without improper motive, but the appearance created by such a practice can be troubling. We also heard reports that a lawyer may signal to the court that the case would be resolved in a bench trial in one session but by a jury trial in another, based on such a colloquy or simply on the lawyer's perception of the reputation of the judge. We were told that this practice has occurred less frequently after the publication of the Spotlight Series.

In courts where there is a high volume of OUI cases, leaving the choice of waiver in the hands of the defense up to the day of trial can operate to increase the assignment of bench trials to the

[38] A true lobby conference is an unrecorded conversation among the judge, prosecutor, and defense lawyer about the strengths and weaknesses of the case, and about the defendant's criminal history. Once prevalent in the District and Superior Courts, they are now highly disfavored. Commonwealth v. Fanelli, 412 Mass. 497, 501 (1992) ("[I]f a lobby conference is held, the better practice is to record it, and provide a copy of the recording to the defendant on request, so that the defendant may know what was said."); Commonwealth v. Bowen, 63 Mass. App. Ct. 579, 580 n.2 (2005) (citing Fanelli, 412 Mass. at 501, and pointing out failure of attorneys to raise concern regarding absence of court reporter at lobby conference); Commonwealth v. Gaumond, 14 Mass. L. Rep. 519, 10 n.2 (2002) (setting forth reasons to discourage the frequent state court practice of lobbying, including "the unavoidable fact that most lobby conferences are in essence 'back room deals' that do not involve the defendant, the victim, or the public"). Nevertheless, in busy trial sessions judges still may conduct conferences with the lawyers about each case on the day's trial list, often on the record at sidebar.

judges with a track record of acquittal after waivers, and thus a de facto reliance on those judges to dispose of the weaker cases, which prosecutors do not dismiss on their own.

9. We Did Not Receive Any Reports Of Corruption In Connection With These OUI Acquittal Rates.

We discussed with the participants the high acquittal rates published in the Spotlight Series and reflected in the statistics compiled for this report. Although we did hear of instances in which complaints had been made to the District Court about certain judges, no one we interviewed reported an allegation that high acquittal rates in OUI cases are the product of corrupt relationships between lawyers and judges.

Some participants observed that experienced defense lawyers are more familiar to judges based on professional and social interactions, and that their familiarity may give them an advantage in the trial of cases and in advocacy regarding dispositions. While that may be a matter of common sense, it does not explain the high acquittal rates we found, especially in Worcester County. Beyond the familiar list of reasons why OUI cases may be weak, as discussed in Finding #12, no one offered us a convincing reason why bench trial acquittals should occur so much more often there.

As noted previously, we have not been given subpoena power and have been directed not to conduct any disciplinary inquiry. Thus we have not investigated the relationship between any particular lawyer and any particular judge.

C. Comparisons to Other States and Other Massachusetts Offenses

10. We Found A Range Of OUI Conviction Rates In Other States, Some Of Which Were Similar To The Massachusetts Rate.

We were asked to examine whether the rate of acquittal in OUI bench trials in Massachusetts differs from the national average. However, we were unable to find comparable national averages regarding OUI bench trials. We also searched for data from other individual states. While we found reports of overall OUI conviction rates in several states, they cover differing time periods. In addition, we do not know with specificity what data was used to calculate these conviction rates or precisely how the rates were computed. Therefore, the extent to which such data can be compared to the Database we collected from MassCourts and CourtView is unclear.

With that caveat in mind, we found reports on conviction rates from the following states:[39]

[39] This chart includes only information we were able to find in official state sources. We also located unofficial reports from Alabama and Maine. In a 2008 PowerPoint presentation, the Alabama Criminal Defense Lawyers Association reported a 78% conviction rate in 2006. Mahaney, ACDLA "4 Corners Seminar" 2008 DUI Update, at http://www.1800dialdui.com/cm/40waystobeatadui/cle-dui_update_acdla_2008.ppt (last viewed Aug. 28, 2012). It should be noted that the number of convictions identified in this report based on 18,596 arrests totaled 13,647, which actually translates into a 74% conviction rate. Thus, the 78% figure provided seems to be internally inconsistent with other data included in this report. With respect to Maine, on July 23, 2012, the Portland Press Herald reported that between 2002 and 2011, conviction rates for OUI offenses in Maine have varied widely by county, ranging from a low of 37% to a high of 83%. Kim, OUI conviction rates vary widely across Maine, Portland Press Herald,

Table 9. Comparison to OUI Conviction Rates in Other States

State	Year(s)	Conviction Rate
Minnesota[40]	2010	74%
Massachusetts	***1/1/08-9/30/11***	***77%***
California[41]	2007	79%
Maryland[42]	2006	79%
Alaska[43]	2009	80%
Florida[44]	2007	81%
Kentucky[45]	2006-2010	85%
Nebraska[46]	2010	87%

Jul. 22, 2012, at http://www.pressherald.com/news/oui-convictions-vary-across-maine_2012-07-22.html (last viewed Aug. 28, 2012). According to this article, "[p]rosecutors, defense attorneys and law enforcement officers cite district attorneys' policies, case volumes and the resources of the judiciary in a particular location as some of the reasons behind the wide discrepancies." Id. For example, "[s]ome district attorneys have a policy against pleading down OUI offense to driving to endanger--a practice that is routine in other counties." Id.

[40] The Minnesota Department of Public Safety reported that the overall conviction rate in 2010 was 74.0%, compared to 73.9% in 2009 and 82.4% in 2008. 2010 Minnesota Impaired Driving Facts (2011), at https://dps.mn.gov/divisions/ots/reports-statistics/Pages/impaired-driving-facts.aspx (last viewed Aug. 28, 2012). The report noted that the 2010 conviction percentage "is understated," and predicted that "[a]s judicial outcomes are decided well into the future, the criminal conviction percentage will increase to approximately 85%." Id. at Table 1.01 n.3. Rates reported for prior years were as follows: 2007, 82.4%; 2006, 82.3%; 2005, 82.5%; 2004, 81.6%. Id.

[41] The California Department of Motor Vehicles reported that 78.8% of 2007 DUI arrests resulted in conviction. Annual Report of the California DUI Management Information System (2010), at http://www.ots.ca.gov/pdf/ publications/dui_2010_mis_ar.pdf (last viewed Aug. 28, 2012).

[42] The Maryland Highway Safety Office reported the number of DUI arrests that resulted in convictions during the 11 years from 1996 through 2006. During this time period, the conviction rate (the proportion of total DUI arrests resulting in a conviction) averaged around 81-82%, fluctuating between a high of 83.7% in 1999 and a low of 78.9% in 2006. An Assessment of Maryland's Driving Under the Influence (DUI) Laws (2008), at http:// stko.maryland.gov/LinkClick.aspx?fileticket=BzkRrUdfqTQ%3D&tabid=92&.pdf (last viewed Aug. 28, 2012).

[43] The Alaska Department of Public Safety reported a 80.4% conviction rate in 2009 and a 84.7% conviction rate in 2008. DUI Arrest Violations in Alaska, 2000-2009, at http://www.dot.state.ak.us/highwaysafety/assets/pdf/DUI ArrestViolations_2000-2009.pdf (last viewed Aug. 28, 2012). The reported 2009 conviction rate may be artificially low, as some of the 2009 arrests listed included cases that had not yet been concluded.

[44] The Florida National Highway Traffic Safety Administration Technical Assistance Team reported a conviction rate of 81.3% in 2007. Florida Impaired Driving Assessment (2008), at http://www.dot.state.fl.us/safety/ highwaysafetygrantprogram/hsgp/pdf/fl%20dui%20assessment%20final%20report%2010%2008.pdf. This figure may be artificially high. According to this report, the 81.3% figure reflects cases where a disposition was recorded. Id. at 66. The report goes on to say, though: "However, when convictions are compared *to all [OUI] cases filed* in 2007, a conviction rate of only 54.9 percent is computed. . . . The nature or outcome of these non-disposed cases is unclear, but some may be related to juvenile court dispositions, cases where adult defendants were allowed to plead to alcohol-related reckless driving (wet reckless) with DUI-like sanctions, and reporting lag time. . . . With these substantial numbers of non-disposed cases, it is misleading to claim conviction rates in the 80 percentile range." Id.

[45] Using data obtained from the Kentucky Administrative Office of the Courts, the Kentucky Office of Highway Safety reported a conviction rate of 84.9% from 2006 to 2010. Percentage of Drivers Convicted of DUI Filings (By County) (2006-2010), at http://transportation.ky.gov/highway-safety/ documents/dui_conv_rate_2006-2010.pdf (last viewed Aug. 28, 2012).

State	Year(s)	Conviction Rate
Mississippi[47]	2009	90%
Michigan[48]	2010	94%

According to our data, during the Time Period the overall conviction rate in Massachusetts was approximately 77%, similar to the rates reported in Minnesota, California, and Maryland, but significantly lower than Michigan, whose reported rate was the highest we found.

We found one more detailed report regarding conviction rates at bench and jury trials in Monroe County, New York. In August 2010, the Rochester Democrat and Chronicle reported:

> [O]f 1,595 non-jury trials for misdemeanor DWI held in the past four years in town and village courts and Rochester City Court, defendants were found guilty of that charge 14.8 percent of the time. . . . By comparison, in 104 jury trials conducted in the same courts over the same period, the conviction rate for misdemeanor DWI was 24 percent.[49]

The same article also concluded that "someone charged with misdemeanor DWI is 40 percent more likely to be convicted of that charge if the case is decided by a jury rather than a judge." While these statistics may not be comparable to the statistics based on the MassCourts/CourtView data, note that the Massachusetts bench trial *conviction* rate was approximately 14%, and the jury trial conviction rate was approximately 42%, during the Time Period.[50]

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[46] The Nebraska Office of Highway Safety reported conviction rates (convictions as a percentage of arrests) of 86.5% in 2010, 86.0% in 2009 and 84.2% in 2008. Nebraska Driving Under the Influence (DUI) Arrests vs. Convictions (2012), at http://www.dor.state.ne.us/nohs/pdf/al5arrests.pdf (last viewed Aug. 28, 2012).

[47] The Mississippi Department of Public Safety reported in 2010 that the DUI conviction rate in 2009 was 90.4% and that the conviction rate hovered around 91% historically. FY-2011 Highway Safety Plan & Performance Plan (2010), at http://www.nhtsa.gov/nhtsa/whatsup/safeteaweb/FY11/FY11HSPs/MS_FY11HSP.pdf (last viewed Aug. 28, 2012). This report also noted that while the 2008 conviction rate fell to 86.4%, the rate increased to 90.4% in 2009 "after additional judicial and court clerk training." Id.

[48] The Michigan Department of State Police reported a 2010 conviction rate of approximately 94% (calculated by adding the total number of conviction for driving while intoxicated and driving while impaired and dividing that total (38,278) by the total number of cases in which those offenses were charged (40,920)). 2010 Michigan Annual Drunk Driving Audit (2011), at http://www.michigan.gov/documents/msp/2010_audit_for_web_deployment_357302_7.pdf (last viewed Aug. 28, 2012).

[49] Zeigler, Judges, district attorney clash over DWI cases, Rochester Democrat and Chronicle, Aug. 15, 2010, at http://www.democratandchronicle.com/article/20100815/NEWS01/8150354/Judges-district-attorney-clash-over-DWI-cases (last viewed Aug. 28, 2012).

[50] The first part of the Globe Spotlight Series reported bench trial conviction rates of 75% in Arizona and 64% in Colorado and Hawaii. We conducted online research and spoke with representatives from the Arizona and Hawaii state judiciaries and the Colorado Department of Public Safety and were unable to confirm these statistics. Data received from the Director of Public Affairs for the Hawaii Judiciary indicates a bench trial conviction rate between 44.4% and 54.5% from 2007 through July 12, 2012, much lower than the 64% rate reported in the Globe. However, the reported data only covers a small number of cases--between 99 and 121 cases annually (excluding 2012, which was a partial year). We were unable to locate data either confirming or disputing the Globe's reported rates for Arizona and Colorado. The Court Services Division of the Arizona Supreme Court, which is responsible for

11. We Can Make Only Limited Comparisons To The Disposition Of Other Offenses In Massachusetts.

We were asked to examine whether the rate of acquittal in OUI bench trials differs from the rate of acquittal in other criminal cases in the District Court and BMC. However, the Trial Court does not track statewide acquittal or conviction rates by offense category, and we did not ask the Trial Court staff to perform the extensive work that would be required to compute reliable statistics for non-OUI offenses.

We did obtain one data extract regarding other offenses, but it has limited relevance. Before we began this assignment, the Trial Court had extracted data from MassCourts regarding all criminal charges that were resolved *at a trial event* in all courts within the District Court and BMC (except the Barnstable and Brockton District Courts and BMC Central) during the period January 2010 through June 2011 ("the Trial Court Extract," or "Extract"). See **Attachment 9**. Note that the data unit in this Extract is a *charge*, not a case. One case may have many charges, and in our Database we controlled for that fact by selecting only the OUI offense as the lead charge. In addition, the Trial Court Extract includes only charges resolved *on the date of a trial event*. It does not distinguish between charges resolved by plea or trial. More importantly, *it does not include charges resolved prior to the scheduling of a trial event.*

One set of data from the Extract provides some insight regarding a comparison of dismissal rates. In the category "Dismissed or Other Non-Conviction" dispositions, this Extract shows that on the date of a trial event OUI cases were resolved in this manner 5% of the time. (Based on the "Other" dispositions we derived from the MassCourts and CourtView data, which were not confined to dismissals on the date of a trial event, we estimated that overall OUI dismissals were 10%). In contrast, for all Chapter 265 offenses (generally, all crimes against the person) this rate was 49.1%, and for Chapter 94C offenses (generally, drug crimes) the rate was 44.4%.

The data in the Extract is based on charges, not cases, and therefore the dismissal rates may be related to charge bargaining, whereby some charges are dismissed in exchange for guilty pleas on others. Thus, while the Extract has very limited utility, given the restrictions described above, it does appear to corroborate what most participants told us about dismissals: prosecutors rarely dismiss OUI offenses compared to other offenses.

D. Reasons for High Acquittal Rates

12. There Are Identifiable Factors That Contribute To Generally High Bench Trial Acquittal Rates In OUI Cases.

While we do not have supporting data, most participants agreed that OUI offenses are tried in the District Courts more than any other. As a result, judges quickly gain experience with the

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compiling data for the state court system, indicated that statewide bench trial acquittal rates for OUI cases are not readily ascertained from the state's current case management system. Published OUI statistics in Arizona cover general data like the number of OUI charges filed and the number of case terminations (without manner of disposition). According to resources reviewed at the suggestion of the Colorado Department of Public Safety's Office of Research and Statistics, Colorado appears to track and publish only general data on OUI filings and the state's DUI probation program.

repetitive fact patterns presented by these cases, as well as scientific issues affecting proof of impairment or blood alcohol levels. There was general consensus among participants regarding the factors that make many OUI cases "triable": that is, potential candidates for acquittal.

OUI trials involve an ever-changing combination of prosecutors, defense lawyers, judges, and police departments who bring varying degrees of ability, experience, and preparation to the task of resolving a given case. The repetitive factual scenarios may be difficult for judges to distinguish when they hear large numbers of bench trials. This in turn presents familiar challenges to the advocates on both sides. Each lawyer seeks to identify and amplify any unique fact or circumstance favoring his position. At the same time, the trial judge seeks to differentiate each case from the hundreds of others he may have heard during his career, by listening for palpable evidence that is unique and therefore more satisfying in support of a finding, which must be measured by the reasonable doubt standard.

OUI cases typically present some, but not necessarily all, of the following categories of evidence:

- Operation, sometimes involving an accident, observed by a police officer as the basis for a stop;
- Observations of glassy eyes, slurred speech, odor of alcohol, and unsteadiness;
- Field sobriety tests, such as reciting the alphabet, walking a straight line, and standing on one leg;
- Breathalyzer tests, administered pursuant to state regulations at the defendant's booking;
- Statements of the defendant regarding consumption of alcohol or the cause of an accident; and
- Statements of witnesses regarding the sobriety of the defendant.

Judges hear repetitive recitation of observations regarding intoxication. Most police reports we reviewed recount deficient operation of the motor vehicle followed by the litany that the defendant's eyes were glassy or bloodshot and speech was slurred, there was a strong odor of alcohol from the defendant's breath, and the defendant was unsteady on his feet. These observations are offered in virtually every trial, often in the same way. It appears that these observations are often disregarded by judges, unless there is something unique about the description that varies from the standard. For example, where the defendant was "so unsteady he could not stand" a judge may take note. Where the odor of alcohol was only "moderate," the door is opened toward reasonable doubt.

Given the repetitive nature of this evidence, prosecutors struggle to differentiate one case from the next, and to work with police witnesses to avoid presentation of testimony in a rote manner. Judges who hear the same description of different cases may tend to discount the significance of what they hear. Meanwhile, defense lawyers take advantage of the repetition to argue that police witnesses may not be offering a genuine description of events, but rather one that has been so rehearsed in other trials that it loses the ring of truth.

While these factors may contribute to the overall high acquittal rate, the second part of our assignment was to identify reasons for *disparity* among judges. We did not listen to the recording of every OUI trial in our sample, and we found the cases so repetitive that it was difficult to create a record distinguishing one from another. We concluded that we could not explain statistical disparities by reviewing the trial recordings of samples of cases.

More importantly, even if we had attempted to do so, our division of the universe of bench trials into convictions and acquittals would not necessarily be repeated in an analysis conducted by another reviewer, and therefore we cannot question the record of a court or judge based on such an exercise. Reasonable fact finders certainly would vary in their assessment of these cases at trial, and some disparity is inevitable.

That said, it is difficult to understand how almost all of a high volume of bench trials in a busy court or before a given judge could reasonably result in acquittals. As we have said, the data in Worcester County stands out. The record of bench trial acquittals there was 97%, and a large number of the judges who stood out based on high acquittal and waiver rates regularly heard cases there. In two Worcester county courts, East Brookfield and Fitchburg, almost one-third of *all* of the cases resulted in bench trial acquittals.

While we cannot say whether the cases in such courts happen to be weaker, the prosecutors more overburdened and inexperienced, or the defense bar more skillful, some combination of these factors must be at play in these cases. In addition, judges hearing large numbers of repetitive, sometimes weak cases may become more critical of the routine evidence they hear, or they may be less discerning of the differences among triable cases and apply the reasonable doubt standard more strictly. The judges with a track record of acquittals after waivers receive still more waivers, hear more repetitive cases, and thus may become more skeptical than their colleagues of the routine evidence presented in these trials.

13. Many OUI Arrests Are Based, In Part, On Inadmissible Evidence.

In a group of 400 cases in which we reviewed the police reports and docket sheets, the reports indicate that police routinely used two tests in the field that are not admissible at trial: the horizontal gaze nystagmus ("HGN") test,[51] and so-called "preliminary breath tests" ("PBT").[52]

HGN test results are admissible only if supported by expert testimony because "the HGN test relies on an underlying scientific proposition." Sands, 424 Mass. at 188. They are rarely offered at trial by prosecutors. In our case review, we did not see a trial in which HGN test results were offered, and prosecutors uniformly reported that they seldom offer this evidence because they do not have access to appropriate experts.

PBTs are not admissible because of the type of technology they employ. General Laws c. 90, § 24K states that breathalyzer test results shall only be deemed valid when performed using

[51] See note 14, supra.

[52] Preliminary or portable breath test (PBT) devices, similar to breath test instruments, are used roadside by the investigating officer to (1) detect the presence of alcohol; and (2) provide the officer with a blood alcohol content (BAC) reading.

"infrared breath-testing devices." A PBT is not an infrared device. It utilizes fuel cell technology to detect the presence of alcohol in the breath. Fogarty & Nardone, The Massachusetts Prosecutors' Manual: Operating Under the Influence, Fourth Edition, 25 (2010).

Thus, in many cases without breathalyzer test results, the arrest determination may be made based largely on factors that are inadmissible at trial. If there is no accident (PBTs are often used at roadblocks, where the reason for the stop has nothing to do with bad operation), no defense admission, and only mixed results on administered field sobriety tests, the inadmissible tests may constitute the majority of the evidence on which the arrest is based, and, without them, proof of impairment may be very difficult. As we have said, prosecutors are reluctant to dismiss any OUI case, leaving it to judges to assess the record in such cases and enter a finding, which usually is not guilty.

We discussed the use of inadmissible tests with participants. More than one reminded us of the holding in Irwin v. Town of Ware, 392 Mass. 745 (1984), that "there is a special relationship between a police officer who negligently fails to remove an intoxicated motorist from the highway, and a member of the public who suffers injury as a result of that failure," and imposing tort liability on Ware for that resulting injury. Id. at 762. The Court noted one policy argument made by Ware, that "imposing liability on police officers for negligence in making this 'often impossible judgment task' will lead police officers to arrest drivers whenever they suspect intoxication rather than not arrest them and risk a negligence action against the public employer." Id. at 762. The Court found this consideration "speculative at best" and "not relevant to the issue whether the police have a duty." Id. Nevertheless, in light of this holding, police officers may be reluctant to decline making an arrest once a driver has failed one or both of these inadmissible tests, even if the admissible body of evidence is not robust.

14. Standard Field Sobriety Tests Are Not Highly Predictive Of Guilt Or Innocence In Cases That Go To Trial.

In the same group of 400 cases in which we reviewed police reports and docket sheets, we attempted to keep a tally of each defendant's score on the typical field sobriety tests that are admissible: the nine-step walk and turn test, standing on one leg, reciting the alphabet, and counting. We found that many police officers conclude that a defendant has failed one or more of these tests when his performance was less than optimal but not entirely deficient. For example, a defendant who stood on one foot for 20 seconds rather than the required 30 seconds was deemed to have failed the one-leg stand test. Similarly, a defendant who did not walk heel-to-toe as instructed on three steps was deemed to have failed the nine-step walk and turn test. These failing grades often can be challenged successfully at trial.

In Finding #12 we noted that the repetitive fact patterns presented in OUI cases make it difficult to evaluate each trial record on its own merits. Based on our review of trials and discussions with participants, it is particularly difficult to present a narrative summary of the results of field sobriety tests in a unique way in different trials. We discussed the use of video evidence with the participants we interviewed. While some police departments in Massachusetts preserve a video recording of the booking process, we were informed that video recordings of roadside stops are rarely available in OUI trials. We are aware that roadside video recording systems are used in a number of other states. While we have not researched the feasibility of creating video recordings

of roadside field sobriety tests here, this is an area where such evidence would provide a more objective trial record for evaluation by judges and juries.

E. Breathalyzer Evidence

15. Breathalyzer Readings Above .08% Do Not Necessarily Result In Convictions On The "Per Se" Portion Of The OUI Statute.

In light of the weaknesses often associated with testimonial evidence described above, breathalyzer evidence is critically important in OUI cases. Although participants reported that most cases with significantly high breathalyzer readings result in pleas, we found a number of cases in which trial judges entered acquittals, even on the per se portion of the statute, where the breathalyzer reading was greater than 0.08% and there was no expert testimony offered to impeach that result.

For example, out of one group of 292 cases resulting in acquittals, we reviewed police reports which indicated that a breathalyzer test of .08% or above was obtained in 57 cases (20%). The docket sheets for these cases indicate that the tests were suppressed in eight cases, leaving 49 cases (17%) in which the tests presumably were available at trial. (We could not tell from our review of the docket sheets, however, whether breath tests were discredited at trial or ultimately kept out of the trial through a motion in limine that was not recorded on the docket.) In a separate review, out of 38 acquittals at bench trials in which we reviewed the trial recordings, breathalyzer test results over .08% were admitted in 18 cases. None of those cases involved expert testimony attacking the breathalyzer evidence.

Participants told us that many defense attorneys wait to attack breathalyzer tests at trial, during argument and cross-examination, without bringing a motion to suppress prior to trial which might be more costly and would reveal a defense strategy. However, when they have not shown the test to be inadmissible based on failure to comply with regulatory requirements in the administration of the tests,[53] their tactics often focus on the impact of delay on the evaluation of the test result, seeking to convince judges to give it little weight as evidence of the defendant's blood alcohol level at the time of operation. They may rely on other evidence indicating sobriety (such as a favorable videotape of the booking process) or impeaching the Commonwealth's proof on impairment (e.g., by cross-examination of police officers regarding their training in detection of impairment).

When we interviewed participants about this finding, we asked about the hypothesis that judges may be applying scientific knowledge regarding "retrograde extrapolation" (discussed below), gained from other OUI trials, when they evaluate defense tactics aimed at the issue of delay. A few agreed but most did not. Yet they could not explain why such acquittals would occur if the test results were admitted properly. As discussed below, we did find that Massachusetts statutes and case law do not provide sufficient guidance to fact finders in evaluating delay related to breathalyzer tests.

[53] 501 Code Mass. Regs. §§ 2.00 (2010).

16. There Is Little Guidance Regarding The Evaluation Of Delay In The Administration Of Breathalyzer Tests.

In light of the apparent rejection of breathalyzer test results over .08% in some bench trials, we studied the guidance found in statutes, case law, and model jury instructions regarding the evaluation of delay in the administration of breathalyzer tests. We found a lack of clear guidance on the issue, which may lead to inconsistent evaluation of this evidence.

(a) Statutory ambiguity.

Prior to its amendment in 2003, the Massachusetts OUI statute did not include a per se provision. However, it did include a "presumption" that a defendant "was under the influence of intoxicating liquor" if the breathalyzer test reading was .08% or above. G. L. c. 90, § 24 (1) (e) (1994 ed. & Supp. 1995). While the statute used the term "presumption," the Court interpreted this language as creating a "permissible inference" that the jury could employ in determining whether a defendant was impaired. Commonwealth v. Mahoney, 400 Mass. 524, 532 (1987) (citing Commonwealth v. Moreira, 385 Mass. 792 (1982)). The Court interpreted the statute in this way in order to avoid impermissibly shifting the burden of proof to the defendant. See Moreira, 385 Mass. at 796-797.

In 2003, the Legislature deleted the "presumption" from the statute and added a clause to § 24 (1) (a) (1) making it a per se violation to operate a motor vehicle with a blood alcohol level of .08% or higher.[54] See Colturi, 448 Mass. at 811-812 (citing St. 2003, c. 28, §§ 1, 4). Thus, the statutory basis for the "permissible inference" created in Mahoney has been eliminated, and there is no statutory guidance regarding evaluation of breathalyzer test results over .08% under the new per se portion of the statute.[55]

(b) Judicial interpretation of the two-pronged statute.

In Colturi, the Commonwealth appealed a District Court's rulings that would have required expert testimony before admission of breathalyzer test results under the new per se portion of the statute, and in trials under both portions of the statute. Colturi, 448 Mass. at 810. The Court

[54] In October 2000, President Clinton signed the Department of Transportation's Appropriations Act for FY 2001, which included a provision requiring all states to enact per se drunk driving laws by 2004 or lose their federal highway construction funds. See National Highway Traffic Safety Administration, Final Report: Legislative History of .08 Per se Laws, Introduction, at http://www.nhtsa.gov/people/injury/research/pub/alcohol-laws/08History/1_introduction.htm (last viewed Aug. 28, 2012). As of May 2001, all states except Massachusetts had enacted per se laws for OUI offenses. Id. The 2003 amendments to the Massachusetts OUI statute were enacted in response to this mandate.

[55] For test results less than .08%, some statutory guidance remained intact following the amendments. See G. L. c. 90, § 24 (1) (e) ("If such evidence is that such percentage was five one-hundredths or less, there shall be a permissible inference that such defendant was not under the influence of intoxicating liquor. . . . [I]f such evidence is that such percentage was more than five one-hundredths but less than eight one hundredths there shall be no permissible inference."). As the Court noted in Colturi, "[t]he only change of substance to the statutory scheme was the elimination of the statutory 'permissible inference' in *§24 (1) (e)* that a person with a blood alcohol test result of .08 or more 'was under the influence of intoxicating liquor,' and its replacement with a per se violation for operating a motor vehicle with a blood alcohol level at that same level." Colturi, 448 Mass. at 815.

held that whether expert testimony is required depends on the Commonwealth's theory of guilt. If the Commonwealth proceeds based on the per se portion of the statute, or on both parts of the statute in the alternative, the court may admit breathalyzer test results without expert testimony, provided that the test was administered within a "reasonable time" after the defendant operated a motor vehicle. Id. at 816-817. Referring to the law in other states as a guide, the Court concluded that three hours is a presumptively reasonable period of time, but noted that "[t]he facts and circumstances in particular cases may establish that a lesser or greater time period ought to be applied." Id. at 817. The Court left this determination to the discretion of the trial judge. Id.

However, if the Commonwealth proceeds only under a theory of impaired operation, it "must present expert testimony establishing a relationship between the test results and intoxication as a foundational requirement of the admissibility of such results." Id. at 817-18. See, e.g., Commonwealth v. Hubert, 453 Mass. 1009, 1009 (2009) (reversing defendant's conviction because the trial judge improperly admitted breath test evidence without expert testimony when the defendant was only charged under the impairment portion of the statute); Commonwealth v. Belliveau, Mass. App. Ct., No. 09-P-2010, at 1 (Dec. 31, 2010) (Rule 1:28 Decision).[56]

While Colturi established a three-hour guideline for the *admissibility* of breathalyzer test results, it does not provide guidance as to how a fact finder is to *evaluate* the passage of time without expert testimony. Colturi states only that the passage of time goes to the weight of the breathalyzer evidence and not its admissibility. See Colturi, 448 Mass. at 813; see also Commonwealth v. Durning, 406 Mass. 485, 494 n.11 (1990); Commonwealth v. Marley, 396 Mass. 433, 438 (1985). In Marley, decided before Colturi, the Court held that a defendant is not entitled to a jury instruction that delay may adversely affect the results of a blood alcohol test without expert testimony to support the request. Marley, 396 Mass. at 439.[57]

Recently, in Commonwealth v. Hanuschak, Mass. App. Ct., No. 11-P-1464, at 5 (Apr. 30, 2012) (Rule 1:28 Decision), the Appeals Court reversed a District Court judge's decision to overturn a jury verdict in a case that suggests that there is still confusion regarding how breathalyzer testimony is to be evaluated. The jury had convicted the defendant under the per se portion of the statute, but the trial judge overturned the verdict, stating: "[t]here was no expert testimony

[56] Belliveau is a summary decision under Appeals Court Rule 1:28, and thus may not be cited as binding precedent.

[57] On at least three occasions since Colturi, the Appeals Court has affirmed guilty verdicts under the per se theory of liability in cases where neither party introduced retrograde extrapolation evidence to support or negate the results of defendant's chemical test. See Commonwealth v. Felton, Mass. App. Ct., No. 09-P-2124, at 3 (Feb. 14, 2011) (Rule 1:28 Decision) ("[T]he lower test result (.08) itself established a per se violation, and the defendant put forth no evidence at trial to challenge the accuracy of that reading."); Commonwealth v. Rumery, 78 Mass. App. Ct. 685, 688 (2011) ("the properly admitted reading of 0.08, by itself, permitted the jury to conclude that the defendant had blood alcohol level that was above the legal limit."); Commonwealth v. Scott, Mass. App. Ct., No. 09-P-1404, at 2 (Jul. 7, 2010) (Rule 1:28 Decision) ("Based on the 4:20 A.M. breathalyzer result of .08 blood alcohol, the jury could have concluded that the defendant's blood alcohol level was .08 at the time he was driving."). In Scott, without offering any extrapolation evidence, the defendant argued that his blood alcohol level had increased during the hour that elapsed between the time he was stopped by police and when he submitted to a breathalyzer test. Mass. App. Ct., No. 09-P-1404, at 2. The Appeals Court stated that "it was up to the jury to accept or reject the defendant's theory[.]" Id. The court then found that because the defendant did not produce any expert witness testimony, the jury reasonably rejected his theory "as was within their province to do so." Id. at 3-4.

about extrapolation between operation time and when the blood alcohol level [*sic*], and after the jury finding insufficient evidence to establish impairment, the court has significant concerns about the state of the evidence for that prong[.]" See id. at 4. The Appeals Court held that the trial judge erred in requiring the Commonwealth to present retrograde extrapolation evidence, in light of Colturi's holding that it is not required. Id. ("Such [retrograde extrapolation] testimony, however, is not required in a prosecution for operating a motor vehicle with a blood alcohol level of 0.08 or more if the breathalyzer test was administered within a reasonable amount of time after the driver's last operation of a motor vehicle.").

(c) Evaluating the passage of time requires scientific proof.

Generally, determining changes in blood alcohol levels over time depends on the science of "retrograde extrapolation"--the process whereby a scientist may infer that a person's blood alcohol level was rising or falling prior to the time of the test, and what the actual level may have been at an earlier time, taking into account factors such as body weight and the time of consumption of each drink.[58] Retrograde extrapolation evidence is admissible and can be used by the fact finder to interpret a breath test. See Commonwealth v. Smith, Fourth, 35 Mass. App. Ct. 655, 662-663 (1993) ("Contrary to the suggestion of the defense, there is no express prohibition . . . against receipt of retrograde extrapolation evidence.").[59]

However, retrograde extrapolation is not a matter of common sense or experience, and therefore it is not information of which a judge, sitting as the trier of fact, may take judicial notice. See Nantucket v. Beinecke, 379 Mass. 345, 352 (1979) ("Matters are judicially noticed only when they are indisputably true. Matters of common knowledge or observation within the community may be judicially noticed because they so qualify."); Commonwealth v. Kingsbury, 378 Mass. 751, 754-755 (1979) ("The right of a court to take judicial notice of subjects of common knowledge is substantially the same as the right of jurors to rely on their common knowledge."); Commonwealth v. Kirk, 39 Mass. App. Ct. 225, 229 (1995) ("[J]udicial notice, which is ordinarily reserved for matters of common knowledge and matters verifiable by authoritative sources, cannot be taken of material factual issues that can only be decided by the fact finder on competent evidence." [citations omitted]); Commonwealth v. Smythe, 23 Mass. App. Ct. 348, 353 (1987) ("Certainly the reliability of chemical tests and the application of scientific principles and formulae are matters outside the common knowledge of jurors, and an expert's opinion could be of assistance to them."); see also Mass. G. Evid. § 201 (b) (providing guidance that "[a] judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to resources whose accuracy cannot reasonably be questioned").

Even if judges were allowed to take judicial notice of such scientific information, they would likely be required to announce its use before doing so. See Mass. G. Evid. § 201 (d) (requiring

[58] Retrograde extrapolation is, "a mathematical calculation used to estimate a person's blood alcohol level at a particular point in time by working backward from the time the blood alcohol test was taken, taking into consideration rates of both absorption and excretion." Commonwealth v. Senior, 433 Mass. 453, 459 (2001).

[59] In fact, Colturi suggests that this type of evidence should be required on the issue of admissibility--as opposed to weight--if there is a delay of more than three hours between the defendant's operation and the administration of the chemical test. Colturi, 448 Mass. at 816.

that a party have the opportunity to be heard as to the propriety of judicial notice determination); United States v. Hoyts Cinemas Corp., 380 F.3d 558, 570-571 (1st Cir. 2004) (finding that the federal district court judge erred in taking judicial notice of a fact, in part because he did not give the parties notice or an opportunity to be heard concerning the propriety of that decision). We did not see such an announcement in any of the cases we reviewed.

In Colturi, the Court noted that if the Commonwealth were to proceed solely on the impairment portion of the statute and offer a breathalyzer reading over .08%, "without evidence of its relationship to intoxication or impairment and without the statutorily permissible inference of intoxication eliminated by the 2003 amendments, the jury would be left to guess at its meaning." Colturi, 448 Mass. at 817-818. Based on our review of cases and discussions with participants, judges may be left to perform similar guesswork under the per se portion of the statute when they attempt to weigh this evidence by relating a delayed reading to the defendant's blood alcohol level at the time of operation without the benefit of expert testimony.

Our case review and discussions with participants confirm that expert testimony is rarely offered in OUI trials. Instead, defense lawyers often cross-examine police officers based on their training on scientific principles, in an attempt to inject those concepts into the record in support of an attack on the weight to be given to breathalyzer test results. Police officers may be impeached based on their training, but they are not qualified as experts in the science of retrograde extrapolation, and such cross-examination is not a substitute for expert testimony. See discussion in Recommendation #3, infra.

The Colturi Court may have intended to allow judges and juries to use their own understanding of alcohol absorption over time when weighing this evidence. However, just as a breathalyzer test result does not support any inference about the degree of impairment without expert testimony, a breathalyzer result cannot support an inference about a blood alcohol level at the time of operation, without expert testimony, unless the two are simultaneous. It is indeed a matter of common sense that people become more sober after they stop drinking, but that would support an inference that a delayed result represents a lower, not higher, level than at the time of operation, and thus provides no explanation for the rejection of such results that we observed. It may also be a matter of common sense that a person's intoxication, and therefore blood alcohol level, rises after consumption of alcohol, supporting an inference of a lower level at an earlier time of operation.

However, the manner in which these two factors intersect to explain a given result is not a matter of common sense. If a judge were to add scientific knowledge outside the trial record to inform the court's judgment as to whether the Commonwealth has met its burden in connection with the use of this evidence, that would be error. See Care and Protection of Zita, 455 Mass. 272, 282 (2009) (finding that the trial judge erred in relying on knowledge outside of the record which she had gained from an earlier proceeding involving one of the parties, stating that "[w]hile a judge may take judicial notice of the fact that he sat on a related case and also may take judicial notice of the docket entries in the prior case, he may not judicially notice facts or evidence brought out at the prior hearing." [citations omitted]); Commonwealth v. O'Brien, 423 Mass. 841, 848 (1996) ("A judge's reliance on information that is not part of the record implicates fundamental fairness

concerns. . . . Thus, a judge may not rely on his private knowledge of particular facts that are not matters of which he can take judicial notice." [citation omitted]).[60]

(d) Without a basis in case law, the Model Jury Instructions do not provide sufficient guidance in evaluating delay in the administration of breathalyzer tests.

The applicable model jury instructions, which provide guidance for judges in bench trials, address this issue only obliquely. See Criminal Model Jury Instructions for Use in the District Court § 5.300 (ed. 2009 and 2011 supplement) (hereinafter "Jury Instructions"). Supplemental Jury Instruction 5 is the only Instruction which addresses the passage of time. It states:

> In deciding whether the test given to the defendant to measure the alcohol level in his (her) blood is reliable evidence, you may consider a number of factors, including:
>
> - *when* the test was given;
> - the qualifications of the person who gave the test, and your assessment of his (her) credibility;
> - the pre-test procedures that were employed;
> - whether the testing device was in good working order at the time the test was administered;
> - whether the test was administered properly;
> - and any other factors you believe are relevant.

(emphasis added) Jury Instructions § 5.300, Supplemental Instruction 5 at 16. Judges are advised to give this supplemental instruction when "there is a challenge whether the breath test was properly administered," but there is no additional explanation as to what kind of challenge is necessary. Id. at 11. Most of the listed factors in the instruction go to the manner of administration of the test, not to the timing. It is not clear whether the word "when" refers to the required 15-minute observation period before the administration of a breathalyzer test, which is a requirement of admissibility, or to the delay between operation and test, which goes to the weight of the test results. Nor is it clear from the advice to judges how to deal with "challenges"

[60] Additionally, judges may be erroneously accounting for a .01% margin of error for breath tests machines that does not exist. In Rumery, the Appeals Court attempted to clarify that a fact finder should not take into account this margin of error when considering a defendant's breath test results. 78 Mass. App. Ct. at 689-690. In that case, the defendant argued that the trial judge erred when he did not instruct the jury that breathalyzer machines had an "inherent margin of error of 0.01 per cent." Id. at 688. The Appeals Court held that the trial judge did not err in refusing to give the instruction because: (1) the .01 margin of error relates to the calibration standard and not to a margin of error for breathalyzer machines generally, (2) the judge was not obligated to explain the intricacies of breath test machines once the breath test results were validly entered into evidence, and (3) if an instruction on margin of error was required, "experts would be required in every OUI prosecution to provide complex testimony regarding each particular machine's statistical variance," which would be too large a burden on litigants and jurors. Id. at 689-690. Thus, judges should not take a .01% margin of error into account when interpreting a defendant's breath test results. Nevertheless, it is possible that they do so when they acquit a defendant whose reading was .08% or slightly above.

based merely on an argument made by counsel regarding the impact of delay, versus properly admitted expert testimony on retrograde extrapolation.[61]

In addition, both Colturi and the Jury Instructions may create confusion in connection with the admission of breathalyzer evidence in trials under both portions of the statute. Colturi's requirement that expert testimony is a "foundational prerequisite" for admission of breathalyzer evidence in impairment-only cases is difficult to reconcile with its allowance of such evidence *without* experts in trials under both portions of the statute. It seems that the Court anticipated, in two-pronged trials, either that the admission of breathalyzer results over .08% would lead to a conviction, or that the jury would find, based on the evidence presented at trial, that the results reflect a reading lower than .08% at the time of the offense, and therefore the statutory inferences in G. L. c. 90, § 24 (1) (e) would apply. Colturi, 448 Mass. at 817. However, the Court did not address the scenario in which there is an acquittal on the per se prong, despite admission of a reading of .08% or greater, *and* the statutory inferences are not available because of the absence of evidence in the record supporting a finding that the defendant's blood alcohol level was something less than .08% at the time of the offense. In such cases, a jury would either "be left to guess at [the breathalyzer results'] meaning," as the Court warned in impairment-only cases, id. at 818, or it would be left only with the general rule of admissibility found in the statute: i.e., that breathalyzer evidence "shall be deemed relevant and admissible" without further guidance. G. L. c. 90, § 24 (1) (e).

It appears that the Jury Instructions attempt to address this dilemma. Instruction I, for use when a defendant is charged under both prongs of the statute, provides in part:

> The use you may make of the defendant's (breath) (blood) test will differ depending upon whether you are considering evidence that he (she) operated a motor vehicle with a blood alcohol level of .08 percent or greater, or operated while under the influence of alcohol.
>
> In deciding whether the Commonwealth has proved that the defendant had a blood alcohol level of .08 percent or greater, at the time of operating the vehicle, you may consider evidence of a (breath) (blood) test of .08 or greater if you believe that evidence is reliable.
>
> In deciding whether the Commonwealth has proved that the defendant was under the influence of alcohol at the time of operating the vehicle, *you may consider whether a (breath) (blood) test showed that the defendant had consumed any*

[61] The Jury Instructions direct judges that, if there is a challenge as to whether the breath test was properly administered or a challenge as to the scientific accuracy of the test, they may give Supplemental Instructions Four or Five, respectively. However, the supplemental instruction for challenges as to whether the breath test was properly administered is Supplemental Instruction *Five* and the supplemental instruction for scientific accuracy challenges is Supplemental Instruction *Six*. Supplemental Instruction Six merely states that "[i]f the Commonwealth has failed to prove that the [breath test] that was given to the defendant is scientifically accurate, then you may not consider the test result in determining whether the defendant is guilty or not guilty." Jury Instructions § 5.300, Supplemental Instruction 6 at 18. This instruction does not provide any guidance about what kind of evidence might make the test scientifically inaccurate. It is also unclear from this instruction how this type of challenge differs from the one anticipated in Supplemental Instruction 5.

> *alcohol.* However, evidence of a positive (breath) (blood) test is not sufficient by itself to prove that the defendant was under the influence of alcohol.

(emphasis added) Jury Instructions § 5.300 at 4. Without expert testimony, use of the emphasized portion of the charge above would go beyond Colturi's requirement that expert testimony is a "foundational prerequisite" as to the impairment prong, Colturi, 448 Mass. at 818, although it is consistent with the general statutory provision that such results "shall be admissible and deemed relevant to the determination of the question of whether such defendant was at the time under the influence of intoxicating liquor." G. L. c. 90, § 24 (1) (e). In effect, this instruction seems to create a compromise that avoids the alternative of instructing the jury to consider the breathalyzer evidence on one prong but ignore it on the other.

IX. RECOMMENDATIONS

1. Revise The Per Se Offense.

Other states have created a different definition of the per se offense, which avoids trial issues regarding the passage of time. In those states, the offense is not defined as operation with the prohibited blood alcohol level, but rather as *having* the proscribed blood alcohol level *within a specified time after* operation. Under such a statute, a fact finder would not be required to evaluate the passage of time between operation and test: the test reading by itself would be sufficient. In those jurisdictions, defendants maintain the right to challenge the accuracy of the reading and the method of administration of the test.

We have identified fifteen states with per se OUI statutes which provide that the offense is committed when the defendant is found to have a prohibited blood alcohol level within a specified time after operation. See, e.g., Alaska Stat. § 28.35.030(a)(2) (2010) (making it unlawful for a person to operate a vehicle if the result of a "chemical test taken within four hours after the alleged operating or driving . . . is 0.08 percent or more"); Ga. Code Ann. § 40-6-391(a)(5) (2009) (0.08% within 3 hours); Ariz. Rev. Stat. § 28-1381(A)(2) (2012) (0.08% within two hours).[62]

Courts in some of these states have held that retrograde extrapolation evidence is irrelevant in this context, because the defendant's blood alcohol level at the time of operation is not an

[62] In addition to the states cited above, Colorado, Delaware, Kansas, Kentucky, Minnesota, Nevada, New Mexico, North Dakota, Oklahoma, Pennsylvania, Washington, and Wyoming have this type of per se OUI statute. See Colo. Rev. Stat. § 42-4-1301(2)(a) (2011); Del. Code Ann. tit. 21, § 4177(a)(5) (2012); Kan. Stat. Ann. § 8-1567(a)(2) (2011); Ky. Rev. Stat. Ann. § 189A.010(1)(a) (2010); Minn. Stat. § 169A.20(5) (2009); Nev. Rev. Stat. Ann. § 484C.110(1)(c) (2003); N.M. Stat. Ann. § 66-8-102(C)(1) (2010); N.D. Cent. Code § 39-08-01(1)(a) (2009); Okla. Stat. tit. 47, § 11-902(A)(1) (2012); 75 Pa. Cons. Stat. § 3802(a)(2) (2006); Wash. Rev. Code Ann. § 46.61.502(1)(a) (2011); Wyo. Stat. Ann. § 31-5-233(b)(ii) (2012). While the OUI statutes in the District of Columbia and Utah do not have a specific time limit for their per se offenses, they do state that the relevant time for evaluating the results is the time at which the test is conducted. See D.C. Code § 50-2201.05(b)(1)(A)(i)(I) (2009) ("No person shall operate or be in physical control of any vehicle in the District . . . [w]hen the person's alcohol concentration at the time of testing is 0.08 grams or more[.]"); Utah Code Ann. § 41-6a-502(1)(a) (2010) ("A person may not operate or be in actual physical control of a vehicle within this state if the person . . . has sufficient alcohol in the person's body that a subsequent chemical test shows that the person has a blood or breath alcohol concentration of .08 grams or greater at the time of the test[.]").

element of the offense. See, e.g., Commonwealth v. Duda, 923 A.2d 1138, 1149 (Pa. 2007) ("As explained above, the criminal conduct is not continuing to drive until one's BAC reaches between 0.08 and 0.10 percent, but driving after drinking enough alcohol to cause one's BAC to reach that level within the specified time after driving. . . . [A]ny proofs tending to extrapolate the defendant's BAC to the time of driving would be irrelevant.").[63] Courts that have considered the question have rejected the contention that these statutes create unconstitutional mandatory presumptions or burden shifting. See Arizona v. Poshka, 109 P.3d 113, 117 (Ariz. Ct. App. 2005) ("[Defendant's] contention that the statute creates an irrational and irrebuttable presumption of guilt similarly fails because the two-hour rule is not a presumption, but, rather, a definition of the offense. The state has not been relieved from proving that the defendant's BAC was .08 or greater within two hours of driving." [citations omitted]).[64]

Other states have opted to create a rebuttable presumption of intoxication if a chemical test is .08% or higher and was completed within a certain period after defendant operated his or her vehicle. See, e.g., Cal. Veh. Code § 23152(b) (2012) ("In any prosecution under this subdivision, it is a rebuttable presumption that the person had a 0.08 percent or more, by weight, of alcohol in his or her blood at the time of driving the vehicle if the person had 0.08 percent or more, by weight, of alcohol in his or her blood at the time of the performance of a chemical test within three hours after driving.").[65] However, there is a question as to whether such a presumption would survive constitutional challenge in Massachusetts. See Moreira, 385 Mass. at 797.

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[63] See also Arizona v. Poshka, 109 P.3d 113, 117 (Ariz. Ct. App. 2005) ("Under the current statute, that a defendant's BAC at the precise time of driving may not have reached the proscribed level is irrelevant. Rather, a defendant's BAC need only have reached .08 *within two hours* of driving."); State v. Baker, Del. Super. Ct., No. 0803038600, 3 (Apr. 8, 2009) (unpublished decision) ("Before the four-hour prohibition's enactment, a defendant sometimes argued that the reason the defendant failed the blood tests was because the defendant's BAC only crossed the limit between the arrest and the test. Section 4177(a)(5) eliminated that defense."); State v. Chavez, 214 P.3d 794, 796 (N.M. Ct. App. 2009) ("Because the recent amendment to Section 66-8-102(C) renders retrograde extrapolation irrelevant in cases such as this, where test results are obtained within three hours . . . the district court properly excluded the expert's testimony to the extent that it was offered for this purpose."); State v. Manwaring, 268 P.3d 201, 210 (Utah Ct. App. 2011) ("Because, as we have explained, Defendant's BAC at the time he operated his motorcycle was irrelevant to whether Defendant had the requisite BAC for conviction under subsection (1)(a), it was not a fact in issue, and consequently, expert testimony would not have aided the jury.").

[64] See also Valentine v. Alaska, 215 P.3d 319, 323 (Alaska 2009) (noting that, in response to a previous case in which retrograde extrapolation evidence allowed defendant to escape conviction, the legislature amended its OUI law "to redefine the blood-alcohol-level theory of the DUI offense in terms of a defendant's blood alcohol at the time that the defendant took a properly administered chemical test rather than at the time of driving."); State v. Finch, 244 P.3d 673, 679 (Kan. 2011) ("The State need not prove a defendant's actual blood- or breath-alcohol concentration at the time of the test or at the time of driving, and it need not prove alcohol's actual adverse impact on a defendant's driving; but mere proof of an Intoxilyzer reading of .08 or above within 2 hours of defendant's driving does not automatically necessitate conviction. The inclusion of the 'as measured' language in 8-1567(a)(2) since the statute was amended to add it in 1990 does not inoculate the State's proof from defense challenge."); Duda, 923 A.2d at 1149 (finding that while extrapolation evidence is irrelevant, the defense may still submit evidence "to cast doubt on the accuracy of the Commonwealth's test results").

[65] See also Iowa Code § 321J.2(12)(a) (2011) ("The alcohol concentration established by the results of an analysis of a specimen of the defendant's blood, breath, or urine withdrawn within two hours after the defendant was driving or in physical control of a motor vehicle is presumed to be the alcohol concentration at the time of driving or being in physical control of the motor vehicle."); Ind. Code Ann. §§ 9-30-6-2, 9-30-6-15 (2001); Vt. Stat. Ann. tit. 23, § 1204(3) (2007).

2. Change Procedures For Accepting Jury Waivers.

Some have recommended that the current rule on jury waiver, which gives defendants the exclusive right to waive a jury and request a bench trial, should be changed to require the consent of the prosecutor. That is the federal rule and the rule in some other states. Although the current rule contributes to a perception of leniency, where judges who receive waivers in large numbers enter a high rate of acquittals, such a change may not be necessary. More strict enforcement of existing procedural rules in the District Court and BMC regarding jury waiver would address complaints of "judge shopping" in connection with the trial assignment process, while avoiding a rule change applicable to all offenses that could have unanticipated consequences.

Except in first degree murder cases, Massachusetts statutes give the defendant the exclusive right to request waiver of a jury. See G. L. c. 263, § 6;[66] G. L. c. 218, § 26A;[67] Mass. R. Crim. P. 19(a) ("A case in which the defendant has the right to be tried by a jury shall so be tried unless the defendant waives a jury trial in writing with the approval of the court[.]"); Commonwealth v. O'Brien, 371 Mass. 605, 606-607 (1976) (finding that G. L. c. 263, § 6 clearly precludes the defendant from waiving a jury in the trial of an indictment for murder in the first degree). Based on our discussions with participants, it appears that judges rarely reject proffered waivers in OUI cases. More importantly, judges generally permit waivers to be filed on the day of trial, even after there has been a colloquy between the court and counsel indicating which judge is available to try the case. We heard several reports that defense lawyers may indicate, in that setting, that the defendant would waive a jury in one session but not another. Faced with pressure to dispose of cases in a busy court, judges may acquiesce and assign the case to a session where the case will be resolved in a jury-waived trial much more quickly than in a jury trial. Thus, judges who are perceived to be more favorable to the defendant end up handling more bench trials, and in turn some of those judges establish a record which perpetuates this selection process.

In theory at least, a rule requiring prosecutorial consent to jury trial waiver would result in a more balanced selection of trial judges. However, most participants told us that this would result in clogged court dockets and greater delays in scheduling jury trials. More importantly, it is difficult to see how a rule change could be effected for only one category of offenses, or only in certain departments of the trial court. The potential impact on other courts and other offenses may outweigh any potential benefit.

Such a rule change would be constitutionally permissible. While a defendant's *right to* a jury trial cannot be impaired, we are not aware of case law guaranteeing waiver as an option to

[66] G. L. c. 263, § 6 states, in relevant part:

> Any defendant in a criminal case other than a capital case, whether begun by indictment or upon complaint, may, if he shall so elect, when called upon to plead, or later and before a jury has been impaneled to try him upon such indictment or complaint, waive his right to trial by jury by signing a written waiver thereof and filing the same with the clerk of the court.

[67] G. L. c. 218, § 26A states, in relevant part:

> Trial of criminal offenses in the Boston municipal court department and in the district court department shall be by a jury of six persons, unless the defendant files a written waiver and consent to be tried by the court without a jury.

defendants. See Commonwealth v. Francis, 450 Mass. 132, 134 (2007) ("Both the Federal and State Constitutions guarantee criminal defendants the right to be tried by a jury. However, neither the Federal nor the State Constitution provides the right to waive a jury trial." [citations omitted]); see also Singer v. United States, 380 U.S. 24, 26 (1965) ("We can find no evidence that the common law recognized that defendants had the right to choose between court and jury trial.").[68]

Many participants agreed that the current Massachusetts rule provides the defendant with a valuable safeguard, offering the opportunity to avoid a jury trial in cases where public opinion or sympathies might be unduly prejudicial, or where technical or legal issues are best left to resolution by a judge rather than a jury.[69] Although we have not located any Massachusetts cases commenting on such a situation, in a state where judges do not stand for election they should be uniquely capable of presenting such an alternative, without fear of political repercussions.

There is a less drastic alternative to requiring prosecutorial consent: a procedural requirement that jury waiver must be accomplished before the assignment of a trial date. This modification would serve to avoid the appearance of "judge shopping" on the day of trial, and it seems likely that it could be implemented as a matter of court administration without the need for legislative change. This would preserve the option for defendants to avoid a jury where public pressures or sympathies might impact a trial, or where the case turns on a purely legal issue, while depriving them of the ability to do so in order to aim for a favored judge.[70]

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[68] More than half of the other states require either the state's consent, or both the state and the court's consent, before allowing a defendant to waive a jury trial. See **Attachment 8**. Eleven states, including Massachusetts, require the court's approval of a jury waiver, and only seven states allow a jury waiver based solely on the defendant's request. Id. In Oregon and West Virginia, a defendant who does not demand a jury trial is deemed to have waived that right. ORS § 156.110 (2011); W. Va. Code Ann. § 50-5-8(a) (2012). In federal court, both the prosecutor and the court must consent in order for a defendant to waive a jury trial. See Patton v. United States, 281 U.S. 276, 312 (1930) (stating that "before any [jury] waiver can become effective, the consent of government counsel and the sanction of the court must be had, in addition to the express and intelligent consent of the defendant."); see also United States v. Leja, 448 F.3d 86, 92 (1st Cir. 2006) (quoting rule from Patton); Fed. R. Crim. P. 23(a) ("If the defendant is entitled to a jury trial, the trial must be by jury unless: (1) the defendant waives a jury trial in writing; (2) the government consents; and (3) the court approves.").

[69] Cf. Singer, 380 U.S. at 37-38 (acknowledging in dicta that even in the federal system where both parties must consent to a waiver, there may be some circumstances including "passion, prejudice [and] public feeling" where "a defendant's reasons for wanting to be tried by a judge alone are so compelling that the Government's insistence on a trial by jury would result in the denial to a defendant of an impartial trial."); United States v. Ceja, 451 F.2d 399, 401 (1st Cir. 1971) (upholding federal district court's denial of defendant's request for bench trial but also "assum[ing] without so deciding that proof of circumstances set out in Singer dicta would warrant granting the defendant a trial to the court notwithstanding prosecutor's objection."); United States v. Panteleakis, 422 F.Supp. 247, 250 (D.R.I. 1976) (allowing defendant's jury waiver over prosecutor's objection due to complex nature of evidence in case).

[70] Other states have instituted a time limitation on jury waivers. In Iowa, the defendant can waive a jury trial within 30 days of arraignment, or within 10 days after the completion of discovery, but not later than 10 days prior to trial. Iowa R. Crim. P. 2.17(1). After these deadlines, the consent of the prosecutor is required. Id. The Iowa Supreme Court has indicated that this time limitation is important for judicial economy in the trial courts and a matter of legislative prerogative. See State v. Mann, 512 N.W.2d 814, 816 (Iowa 1993) (citing State v. Lawrence, 344 N.W.2d 227, 230 (Iowa 1984); State v. Siemer, 454 N.W.2d 857, 865 (Iowa 1990)). In Louisiana, a defendant can

As we have said, it appears that the current practice is to allow waivers up to the day of trial. There is some support for this practice in relevant statutes. General Laws c. 218, § 26A precludes acceptance of a waiver until after the completion of a pretrial conference and disposition of discovery motions, while G. L. c. 263, § 6 permits waiver "before a jury has been impanelled." See Commonwealth v. Collado, 426 Mass. 675, 677 (1998) ("[A] defendant wishing to waive a jury trial must do so before the jurors are empanelled."). Rule 19 of the Massachusetts Rules of Criminal Procedure contains no reference to a time limitation, although it does contain the proviso that "[t]he court may refuse to approve such a waiver for any good and sufficient reason[.]"

However, existing rules in the District Court and BMC contemplate the receipt of waivers at an earlier time in the process. Rule 4 of the District/Municipal Courts Rules of Criminal Procedure provides that the court "shall not compel the defendant's decision on waiver of jury trial until all discovery issues have been resolved[.]" Unless discovery is not complete, at the pretrial conference the court "*shall* examine [the pretrial conference report]" and "*inquire if the defendant waives the right to jury trial*" (emphasis added). Id. Rule 5 provides that, in the event discovery is not completed at the pretrial hearing, a subsequent "compliance" hearing "shall be scheduled at the request of the party seeking discovery" and "*shall* be limited to the following court actions: . . . *obtaining defendant's decision on waiver of the right to jury and scheduling the trial date or trial assignment date*" (emphasis added). Dist./Mun. Cts. R. Crim. P. 5. In addition, G. L. c. 263, § 6 provides that "consent to . . . waiver shall not be denied [in the District Court and BMC] *if* the waiver is filed before the case is transferred for jury trial to the appropriate jury session" (emphasis added).

These rules do not explicitly require waiver prior to the trial date or trial assignment date, but G. L. c. 263, § 6 at least appears to allow rejection of a waiver if it is filed *after* the case is transferred to a session for jury trial. Thus, where defendants have not waived a jury trial after the pre-trial hearing, it would appear that a court could impose a policy of assigning cases thereafter for trial in a jury session, and declining to accept waivers thereafter, assuming such declinations fit within the Rule's requirement of "good and sufficient reason" for rejection. Mass. R. Crim. P. 19 (a). Although there are cases affirming rejection of a defendant's request for jury waiver in specific situations, such as where the judge previously heard evidence about the case or there are multiple defendants, case law does not appear to provide more general guidance about what constitutes good cause for rejecting a jury waiver. See Collado, 426 Mass. at 676-77 (a judge should reject a defendant's jury waiver request when a co-defendant did not also waive his right to a jury trial); Commonwealth v. Kope, 30 Mass. App. Ct. 944, 946 (1991) (within the judge's authority to decline to accept a jury waiver when he had previously heard the result of a plea negotiation); Commonwealth v. Collins, 11 Mass. App. Ct. 126, 141 (1981) (trial

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waive the right to a jury trial within the first 15 days after arraignment. La. C.Cr.P. Art. 521, 780(A)-(B). Thereafter, the permission of the court is required, and the waiver may not occur later than 45 days prior to the trial date. La. Const. Art. I, § 17. This 45 day time limit was the result of a 2010 Louisiana constitutional amendment. State v. Chinn, 92 So. 3d 324 (La. 2012) (citing H.B. 940, Reg. Sess., 2010). As originally introduced, a defendant's ability to waive a jury trial depended on the prosecutor's consent and approval of the court. Id. However, during legislative debate an amendment was proposed to delete this provision and substitute the language that is now found in Article I, § 17 of the Louisiana constitution. Id. at 14-15. The intention of this amendment was "to prevent last minute waivers by criminal defendants." Id. at 15.

judge properly rejected a waiver where he had heard certain evidence in pretrial proceedings that would prejudice his views during trial).

The rules also, quite properly, require that a waiver need not occur until the defendant has received all of the required discovery. However, strict enforcement of Dist./Mun. Cts. R. Crim. P. 4 and 5, together with a requirement or clarification that a waiver may not be accepted after the later of a pretrial hearing or compliance hearing (perhaps with an exception for good cause, aimed at circumstances such as late production of discovery or changes in applicable law), would serve to avoid judge shopping on the day of trial, without the necessity of a more broadly applicable rule requiring prosecutorial consent.[71]

We do not offer these suggestions lightly and recognize, based on our conversations with court personnel and other participants, that they would require extensive evaluation before being adopted, since they would apply to all offenses in the District Court and the BMC.

In addition, some participants suggested that judges should be rotated among courts more frequently, at least in those courts where high waiver and bench trial acquittal rates are found. Others caution that continuity of presence in community courts, at least by the presiding justice, is an important factor not to be overlooked. Whether increased rotation is feasible should be studied, in conjunction with consideration of changes in procedures for jury trial waivers, to make the bench trial assignment process as neutral as possible with regard to the identity of the trial judge.

3. Judicial Training Focusing On Judges' Gatekeeper Role With Respect To Scientific Evidence.

Both the District Court and the BMC engage in ongoing training of judges on OUI-related issues. We reviewed all of the OUI training sessions that the District Court and BMC have held since 2003. Most of them were organized by the Administrative Office of the Trial Court's Judicial Institute ("Institute").[72] Based on information received from the Institute, the District Court and the BMC, since 2003 the following sessions have been held.

<u>District Court Annual Judicial Conferences</u>[73]

- 2003: An elective training session at which two judges presented on handling scientific evidence in OUI cases.
- 2004 and 2005: Elective training sessions concerning scientific evidence in OUI trials.

[71] Given the language in c. 263, § 6 stating that a defendant may waive his right to jury trial "before a jury has been impanelled," there is a question whether a legislative change would be necessary in order to enforce a rule generally requiring waiver before transfer to a jury session. See G. L. c. 263, § 6.

[72] We reviewed training materials compiled by Ellen O'Connor and Victoria Lewis, Director of Judicial Education and Lead Program Manager of the Judicial Institute, respectively.

[73] District Court judges are required to attend these conferences.

- 2007: An elective OUI trial workshop focusing on the "nuts and bolts" of OUI cases.

- 2008: District Court judges received materials entitled "The Year-In-Review: Understanding How Recent Appellate Decisions Impact District Court Criminal Practice and Procedure," which included case citations to new OUI decisions.

- 2010: District Court judges heard presentations regarding how to consider the admission of an expert proffered in the field of field sobriety testing.

- 2011: An elective training session on OUI evidentiary matters. The judges were provided with a table of case citations covering the three elements of an OUI violation, the admissibility of certain types of OUI evidence (breath test results, testimony concerning field sobriety tests, etc.), and the OUI jury instructions.

Additional District Court Mandatory Training

- In September 2011, Chief Justice Connolly organized mandatory regional meetings of District Court judges to provide training on OUI case issues. A portion of these meetings was spent using hypothetical examples to review OUI jury instructions. Other areas examined included pre-trial issues, admissibility of chemical tests, and how to handle subsequent offenses and pleas.

BMC

- 2006: Mandatory training at the BMC Spring Educational Conference entitled "OUI Update: Melanie's Law and the Interlock Device".

In addition, the following training sessions have been conducted which were available to both BMC and District Court judges.

- 2003: Training entitled "Handling Impaired Driving Cases," attended by 65 District Court and BMC judges regarding alcohol absorption, the effect of alcohol on a defendant's nervous system, and alcohol testing.

- 2006: Day-long training sessions, on various dates, entitled "OUI Update for Judges." These sessions addressed various legal updates and updates regarding breathalyzer technology. They also included a panel discussion on trial issues including a defense attorney and the Massachusetts Traffic Safety Resource Prosecutor.

- 2007: Supplemental "OUI Update for Judges" following the Colturi decision, attended by 46 District Court and BMC judges.

- 2012: A training session organized in conjunction with the National Judicial College entitled "Detecting the Impaired Driver: Science and Methodology." 32 District Court and BMC judges attended this session, which examined scientific aspects of field sobriety tests and common challenges to their admissibility.

While there have been training sessions regarding scientific issues, as discussed below, it may be helpful to focus future training efforts on the limited, gatekeeper role judges are required to play in connection with scientific evidence in OUI cases.

Judges presiding over OUI trials routinely make factual findings dependent on scientific principles regarding the operation of breathalyzer devices; the evaluation of delay in the administration of breathalyzer tests, and the related scientific principle of retrograde extrapolation; and, more generally, the effect that alcohol has on a defendant's ability to operate a motor vehicle safely.

Regarding the administration of breathalyzer tests, judges are to apply explicit regulatory requirements as a condition of admissibility. General Laws c. 90, § 24K provides that the results of a chemical test are not considered valid unless "such analysis has been performed by a certified operator, using infrared breath-testing devices according to methods approved by the secretary of public safety." The regulations implementing this requirement are found at 501 Code Mass. Regs. §§ 2.00, the purpose of which is "to establish rules and regulations regarding satisfactory methods, techniques and criteria for breath tests[.]" 501 Code Mass. Regs. § 2.01.[74] Thus, there is palpable guidance on the issue of admissibility: judges can determine whether the regulations have been followed, and defense lawyers may challenge admissibility by attacking police officers' familiarity and compliance with the regulations. See Schutte, 52 Mass. App. Ct. at 801 (allowing defendant to refer to State Police Manual to impeach officer's credibility "by showing deviations between the understanding and practices of the officer and the recommended procedures in the manual").

However, evaluating the effect of delay on the weight to be given to a breathalyzer test result is a different issue. As we have said, there is little available guidance, none in the regulations governing the admissibility of the test results themselves, and little in the case law beyond Colturi's holding that three hours is presumptively a "reasonable time." Colturi, 448 Mass. at 816-817. We have seen the issue addressed in bench trials without expert testimony, through cross-examination of police or simply through argument. Defense lawyers may cross-examine police officers based on their training on scientific principles, injecting those concepts into the record in support of an attack on the issue of delay. For example, they may use information about the physiologic processes associated with alcohol consumption contained in training materials such as the DWI Detection and Standardized Field Sobriety Testing Student Manual. Massachusetts State Police, DWI Detection & Standardized Field Sobriety Testing, Student Manual, at http://www.mass.gov/eopss/images/msp/crimelab/oat/sfst-train-manuals/oat-2006-sfst-manual.pdf (last viewed Aug. 28, 2012).

It is proper to impeach an officer's qualifications and training, but police officers need not be qualified as experts in order to give a lay opinion regarding sobriety. Lay opinion is permissible

[74] The breath test device must be certified. 501 Code Mass. Regs.§ 2.13(2). The test must "consist of a multipart sequence consisting of: (a) one adequate breath sample analysis; (b) one calibration standard analysis; and (c) a second adequate breath sample analysis," and the two adequate breath samples must be within ±0.02% blood alcohol units of one another. Id. at §§ 2.14(3)-(4). The regulations further require that the breath test operator observe the arrestee "for no less than 15 minutes immediately prior to the administration of the breath test." Id. at § 2.13(3).

on this subject. See Holton v. Boston Elevated Ry. Co., 303 Mass. 242, 246 (1939) ("While it might not be easy accurately to describe each and every minute detail indicative of intoxication, yet the principal objective symptoms are so well known that witnesses have always been permitted to express their opinion as to the inebriety of a person."); Commonwealth v. DeLeon, Mass. App. Ct., No. 09-P-285, at 1-2 (Dec. 28, 2009) (Rule 1:28 Decision) (rejecting defendant's assertion that police officer must be qualified as an expert to testify as to defendant's sobriety); Sudderth, 37 Mass. App. Ct. at 321 ("The opinion testimony of police who observed the defendant may also be taken into account" when determining defendant's intoxication). Where the Commonwealth does not seek to qualify a police officer as an expert for the purpose of offering scientific opinion regarding the effects of alcohol consumption or retrograde extrapolation, information used to impeach the officer is not itself admissible to establish scientific principles that are the subject of police training. See Schutte, 52 Mass. App. Ct. at 801 (although defendant was allowed to refer to State Police Manual to impeach officer's credibility by showing deviations between the understanding and practices of the officer and the recommended procedures in the manual, the defendant was not allowed to introduce the manual itself as evidence of the proper procedures).

We have seen that judges do discount breathalyzer readings above .08% at bench trials on the per se portion of the statute, sometimes in connection with such cross-examination of police officers or in light of other evidence indicating sobriety, such as booking videos. Judges may be importing their scientific knowledge, gained either from other trials in which experts did testify, or perhaps more commonly from the type of cross-examination discussed above, into their evaluation of a test result in a given case.

In the course of ongoing training, it may be helpful for judges to focus on the limits of their role as "gatekeepers" for scientific evidence. See Commonwealth v. Lanigan, 419 Mass. 15, 26 (1994) (noting that the judge has a gatekeeper role in determining admissibility of a scientific expert's opinion). A large part of a judge's responsibility as a gatekeeper is determining whether a witness is qualified to give expert testimony. Commonwealth v. Polk, 462 Mass. 23, 31 (2012).[75] Once these foundational requirements are established, a judge also must determine if the expert's testimony is relevant to the case, and, if so, whether it will be unfairly prejudicial. Id. at 32. It is also a judge's role as gatekeeper to determine when lay witnesses have exceeded the bounds of common knowledge or observation and are attempting to testify as an expert. See Commonwealth v. Antunes, Mass. App. Ct., No. 11-P-406, at 1 (Mar. 12, 2012) (Rule 1:28 Decision) (affirming trial judge's decision to strike officer's testimony from record because it was "starting to sound like expert testimony[.]").

Based on our discussions with judges, the limits of Colturi are well understood, but it does not appear that there is frequent discussion regarding the distinction between impeachment and expert opinion noted above, or the importation of expert knowledge outside the record into a

[75] When determining whether a witness may testify as an expert, a judge must consider the following five "foundational requirements for admissibility: (1) that the expert testimony will assist the trier of fact because the information is beyond the common knowledge of jurors, (2) that the witness is qualified as an expert in the relevant area of inquiry, (3) that the expert's opinion is based on facts or data of a type reasonably relied on by experts to form opinions in the relevant field, (4) that the theory underlying the opinion is reliable, and (5) that the theory is applied to the particular facts of the case in a reliable manner." Polk, 462 Mass. at 31.

given bench trial. A judge must function only as a gatekeeper with regard to scientific evidence, limited to considering evidence properly entered into the record. See O'Brien, 423 Mass. at 848 ("A judge's reliance on information that is not part of the record implicates fundamental fairness concerns . . . Thus, a judge may not rely on his private knowledge of particular facts that are not matters of which he can take judicial notice." [citation omitted]).[76] In the design of future training sessions, it may be helpful to focus on these issues.[77]

4. Revisiting The Treatment Of Refusal Evidence.

The Spotlight Series made much of the fact that a defendant's refusal of a breathalyzer or field sobriety test is not admissible in Massachusetts, and that the penalty for refusal, a 180-day or more license suspension, may be undone by a judge if a defendant is acquitted of the OUI charge.

Massachusetts is indeed one of very few states in which evidence of defendant's refusal to take a breathalyzer test is inadmissible. See G. L. c. 90, § 24 (1) (e) ("Evidence that the defendant failed or refused to consent to such test or analysis shall not be admissible against him in a civil or criminal proceeding"); Opinion of the Justices, 412 Mass. 1201, 1211 (1992) (answering question put to Court by Senate regarding proposed legislation, and concluding that admission of refusal evidence in criminal case would violate privilege against self-incrimination contained in Massachusetts Declaration of Rights).[78] Evidence of a defendant's refusal to take field sobriety

[76] For example, in one national judicial training program we found, there was emphasis on the distinction between judges acting as gatekeepers and judges evolving into experts themselves. The Advanced Science & Technology Adjudication Resource Center ("ASTAR") operates the National Science and Technology Resource Judge Program. See ASTAR, http://www.astarcourts.net (last viewed Aug. 28, 2012). Forty-seven state and territorial and two federal jurisdictions receive federally-sponsored training scholarships. 190 judges have participated in the 2011-2012 programs. Id. The aim of the program is not to create experts, but rather, to help judges master "the terms of reference that can enable motions for admissibility or exclusion of evidence and for qualification or exclusion of experts in important cases." See "ASTAR'S Concept," http://www.astarcourts.net/services.html (last viewed Aug. 28, 2012). These training programs "always avoid recommendations about judicial decisions; and focus on the spectrum of science and technology considerations that forms the background bulwark of many complex cases." Id. One participant explained that the goal is to "help ensure that something that's not truly science doesn't get in front of the jury . . . . Our job here is to understand the science better so we can perform that duty." See Flynn, Science school for judges, at http://web.mit.edu/newsoffice/2011/science-for-judges-0920.html (last viewed Aug. 28, 2012).

[77] Less formal scientific training programs also exist in other states. The National Highway Traffic Safety Administration supplies funds for each state to have a Traffic Safety Resource Prosecutor ("TSRP"). A TSRP "provides training, education and technical support to traffic crimes prosecutors and law enforcement agencies throughout their state." TSRP Manual, http://www.nhtsa.gov/people/injury/enforce/ProsecutorsManual/pages/WhatDoesItMean.html (last viewed Aug. 28, 2012). In some states, TSRPs also work with the judicial branch to train judges about issues that are likely to emerge during OUI trials. See, e.g., "Judicial Outreach Liaison Program," http://www.centurycouncil.org/judicial-outreach-liaison-program (Florida); "Traffic Safety Resource Prosecutor," http://www.ago.state.ms.us/index.php/sections/divisions/traffic_safety_resource_prosecutor/ (Mississippi). As noted above, we have learned that the Massachusetts's TSRP did participate in OUI-specific scientific training for judges through the Judicial Institute in 2007--jointly with prosecutors and defense lawyers--but this program has not been repeated.

[78] Breath test refusal evidence is inadmissible in Rhode Island unless the defendant testifies at trial. See R.I. Gen. Laws § 31-27-2(c). In Michigan, breath test results are admissible to show that a test was given, "but not as evidence in determining the defendant's innocence or guilt." Mich. Comp. Laws § 257.625a(9). In Virginia, refusal of a breath test is admissible if the refusal is found to be unreasonable, and then only to explain the absence of the

tests is also inadmissible in Massachusetts. See McGrail, 419 Mass. at 780 (noting allowing "refusal evidence to be admissible at trial would compel defendants to choose between two equally unattractive alternatives: take the test and perhaps produce potentially incriminating real evidence; refuse and have adverse testimonial evidence used against him at trial." [citation omitted]). Finally, in Commonwealth v. Zevitas, 418 Mass. 677, 683-84 (1994), the Court struck down a statutory provision requiring that the trial judge instruct the jury in an OUI case generally about blood alcohol tests and to not speculate as to the reasons why none was offered at trial, holding that such an instruction "tended to have the same effect" as the admission of refusal evidence. Zevitas, 418 Mass. at 683; see also Commonwealth v. Downs, 53 Mass. App. Ct. 195, 199-200 (2001) (affirming that under Zevitas, judge may not inform jury of possible reasons for absence of breathalyzer, but may instruct jury "not to think about or otherwise consider" absence of the test in evidence).

We discussed this issue with judges, prosecutors and defense lawyers. There was general consensus that the impact of these holdings is felt in jury trials more than in bench trials. We heard anecdotal reports that jurors often ask why no breathalyzer evidence was offered at trial, and that they sometimes speculate that the reading must have been low or that the defendant refused the test. Most participants agreed that judges, sitting as fact finders, would not be influenced if the fact of a refusal were admissible. Judges are familiar with these cases and know that the absence of breathalyzer evidence indicates that there likely was a refusal, and they have the docket available to indicate whether, instead, breathalyzer evidence previously was suppressed by another judge. This information also may be mentioned in sidebar conferences prior to trials.

Even if refusal evidence were admissible, judges presumably would be entitled to give it only the weight they see fit. Many participants were mindful that the Massachusetts Declaration of Rights has been interpreted as more protective of defendants than the federal Constitution. It is difficult to see how a change in the law would influence judges steeped in this principle.

However, it should be noted that a current, collateral benefit connected to the refusal of breathalyzer tests is not dependent on constitutional principles and, presumably, could be changed. It is the opportunity of a defendant acquitted of OUI to obtain the return of a license which was suspended because of a breath test refusal.

In Massachusetts, an adult arrested for OUI will have his license automatically suspended for at least 180 days upon refusal to take a breathalyzer test. G. L. c. 90, § 24 (1) (f) (1).[79] General Laws c. 90, § 24 (1) (f) (1) provides that such a defendant, upon the entry of a not guilty finding or dismissal of charges, may immediately apply for and be granted a hearing before the court which "took final action on the charges for the purpose of requesting the restoration of [said

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test at trial, not as evidence of guilt. Va. Code Ann. § 18.2-268.10(C). In all other states, breath test refusal evidence is admissible. A chart comparing the law in all fifty states is attached hereto as **Attachment 8**.

[79] For persons under the age of 21 and second-time offenders, the suspension period is three years. G. L. c. 90, § 24 (1) (f) (1). The suspension period is five years for those previously convicted of two OUI violations, and for those previously convicted of three or more violations, a lifetime suspension is imposed. If a person refuses to submit to a breathalyzer test and has been convicted of motor vehicle homicide under G. L. c. 90, § 24G or vehicular manslaughter under G. L. c. 265, § 131/2, his license is revoked for life.

defendant's] license." (There must be no other alcohol-related charges pending against the defendant at the time). There is a rebuttable presumption in favor of reinstatement, unless the Commonwealth establishes by a "fair preponderance of the evidence, that [the reinstatement] would likely endanger the public safety." Id. In such a case, the court is required to issue written findings of fact with its decision. Id.

Thus, a defendant who refuses to take the test, although suffering an immediate license suspension, may obtain a double benefit thereafter: acquittal in the criminal case, made weaker without scientific evidence of alcohol consumption, and immediate license reinstatement. We looked at other states to see whether a defendant whose license was suspended for refusing to submit to chemical testing may have his license reinstated upon acquittal or dismissal of the underlying OUI charge. Like Massachusetts, Louisiana and Texas both allow for immediate or quick reinstatement of a license--suspended based on test refusal--upon proof of acquittal and/or dismissal of the underlying DUI charges. See La. Rev. Stat. Ann. § 32:667(H)(1) (allowing for "immediate" reinstatement upon acquittal or dismissal of charges); Tex. Transp. Code Ann. § 524.015(b) (prohibiting suspensions under the Transportation Code after acquittals (only) and requiring rescission and removal of reference from driving record of existing suspensions upon acquittal); 37 Tex. Admin. Code § 17.13 (prohibiting suspensions upon acquittal and requiring rescission of suspensions already in place, but noting defendant must send certified copy of judgment of acquittal to department of motor vehicles, which the department has the right to verify).

However, California and Florida specifically provide that an acquittal for the underlying offense does *not* affect the validity of an administrative suspension for refusal to submit to chemical testing. Cal. Veh. Code §13353 (governing suspension for refusal to submit to a blood alcohol test); Cal. Veh. Code § 13353.2(f) (stating disposition of suspension for driving with blood alcohol level over .08 does not affect suspension under § 13353); Cal. Veh. Code § 13353.4 (governing restoration of driving privileges); see also Burnstine v. Dep't of Motor Vehicles, 60 Cal. Rptr. 2d 89, 90 (Cal. Ct. App. 1996) (explaining that, unlike suspensions for driving with a blood alcohol level of .08 or more, there is "no statutory right to reinstatement" when a license is suspended for refusal to submit to a chemical test);[80] Fla. Stat. § 322.2615(14)(b) ("the disposition of any related criminal proceedings does not affect suspension for refusal to submit to a blood, breath, or urine test imposed under this section"); Solomon v. State, 538 So. 2d 931, 933 (Fla. 1989) (holding that despite acquittal of underlying DUI charge, administrative refusal to reinstate defendant's license was proper).

[80] The court in Burnstine distinguished between license suspension for driving with a blood alcohol level of .08 or greater and suspension for refusal to submit to a blood alcohol test. 60 Cal. Rptr. 2d at 90. The former situation is governed by Cal. Veh. Code § 13353.2, which contains a specific provision allowing for license reinstatement upon acquittal of that charge. Id. The latter is governed by § 13353, which does not contain a similar provision allowing for reinstatement. Id. Also worth noting, upon conviction for OUI in California, a court may impose enhanced penalties for "willful" refusal or "willful" failure to complete a chemical test at the time of arrest for OUI. Cal. Veh. Code § 23577 (setting forth additional penalties where willful refusal or failure to complete a chemical test is "pled and proven"); Cal. Veh. Code § 23578 (requiring courts to consider refusal as a "special factor that may justify enhancing the penalties in sentencing, in determining whether to grant probation, and . . . determining additional or enhanced terms and conditions of probation"). "Willful refusal" appears to be "intentional (or even purposeful) refusal," as opposed to when a driver simply "does not take one of the chemical tests" for other reasons, such as where his level of intoxication renders him incapable of refusing the test. Burnstine, 60 Cal. Rptr. 2d at 90.

Note that the 1992 holding in Opinion of the Justices, supra, is confined to the admissibility of refusal evidence in criminal proceedings, and none of the Massachusetts cases cited above imply that a defendant has a constitutional right to license reinstatement upon refusal. As the Appeals Court recently stated:

> The right to operate a motor vehicle in Massachusetts is a privilege that is conditioned upon obedience to the comprehensive regulatory scheme designed to keep the motorways safe. General Laws c. 90, §§ 23 & 24, were enacted for the purpose of removing drivers under the influence of alcohol from the roads. License revocation for refusal to submit to testing pursuant to G. L. c. 90, § 24(1)(f)(1), is a remedial, nonpunitive public safety measure.

Kasper v. Registrar of Motor Vehicles, 82 Mass. App. Ct. 901, 902 (2012) (citations omitted); see Wasserman v. Registrar of Motor Vehicles, 18 Mass. L. Rep. 259 (2004) (noting that individuals arrested for operating under the influence have no constitutional right to refuse a breath test, and rejecting defendant's substantive and procedural due process challenges to breathalyzer test consent procedures and administrative license suspension hearings). If the requirement that a defendant submit to a test on pain of license suspension raises no constitutional implications, then the opportunity for reinstatement after suspension, based on acquittal in a criminal case, may not be constitutionally required. See Commonwealth v. Bauer, 455 Mass. 497, 501 (2009) (finding "nothing unconstitutional about the legislative allocation of authority [to judges] over [license] restoration decisions described in Mass. Gen. Laws c. 90, § 24 (1) (*f*) (1)" and holding license reinstatement not required despite acquittal because suspension was for refusal rather than underlying OUI charge).

We also note that many participants told us that license reinstatement hearings before judges are often not actively contested by prosecutors, who seem to leave the matter to the discretion of the judges after acquittal of the criminal charges, at least where the defendant is not a second-or-subsequent offender. If there is a concern about the impact of constitutional principles related to refusal evidence, perhaps attention for reform should be directed to these suspension-related provisions of the statute.

X. CONCLUSION

Bench trials alone do not have a substantial impact on the enforcement of OUI statutes in Massachusetts. Almost four out of five OUI defendants in Massachusetts admit their guilt or are found guilty after trial. Less than one defendant in ten is acquitted by a judge in a bench trial.

Many OUI cases are indeed factually weak for the Commonwealth. However, almost none are dismissed by prosecutors on that basis alone. Prosecutors may be constrained to apply limited resources to more serious crimes, and defense attorneys vigorously contest evidence which is often presented in a rote and repetitive manner. Thus, bench trial acquittals are to be expected at high rates.

Nevertheless, the record of near-100% acquittals and high waiver rates in certain courts, and before certain judges, creates an appearance of leniency. In other courts, the dearth of waivers and bench trials raises concerns about the equal administration of the law. While the cases

which "go jury-waived" may be weaker than others, it is difficult to accept that all of them should fail after trial in some courts, just as it is difficult to explain why so few should "go jury-waived" in other courts.

Where extremely high waiver and acquittal rates are found, this suggests that the bar to conviction presented by the reasonable doubt standard may be raised ever higher by judges presented with a high volume of cases involving similar evidence, offered by the same prosecutors and police, in the same manner, in support of the same charge, but against different defendants. While judges earnestly seek to apply the law and fairly hold the Commonwealth to its burden of proof--and we fully accept that this is so--they may tend to look with an increasingly skeptical eye on the repetitive evidence in these cases, as they hear more and more of them over time.

No one we interviewed contended that these statistics are the product of corrupt relationships between lawyers and judges. However, the appearance created by such patterns of acquittal should be addressed.

Concerns about "judge shopping" may be addressed by rule changes regarding jury waiver, and by rotation of the judges who hear OUI cases. Judges can and should re-examine the challenges presented when fact finding is dependent on scientific principles in the abbreviated context of these trials, where experts seldom are called in support of the prosecutor's case. The use of breathalyzer tests as evidence of impairment, or even as a surrogate for impairment under the per se portion of the statute, is essentially a scientific short cut. While regulations provide tangible rules for the admission of breath tests, no concrete guidance is offered in law or regulation to evaluate delay between a defendant's operation and the test. On this issue, the trial of the offense could be simplified by revising the per se portion of the statute.

As a matter of constitutional interpretation, refusal evidence is not admissible in criminal OUI trials in Massachusetts. However, the privilege of obtaining a driver's license can be conditioned on more strict requirements to deter refusal of breathalyzer tests, including elimination of the opportunity for return of a license, suspended for refusal, after acquittal. Yet criminalizing driving under the influence of alcohol, which is entirely appropriate, brings with it all the constitutional protections available to any criminal defendant, and properly so. The systemic concerns raised by press reports and this inquiry should indeed lead to serious reflection by judges on the manner in which these cases are administered and tried, but should in no way deter them in the exercise of their constitutional responsibility to hold the Commonwealth to its burden of proof beyond a reasonable doubt, which is the essential guarantee of our rights in the criminal justice system.

ATTACHMENT 1

SUPREME JUDICIAL COURT
JOHN ADAMS COURTHOUSE

October 19, 2011

RODERICK L. IRELAND
CHIEF JUSTICE

PERSONAL AND CONFIDENTIAL

Jack Cinquegrana, Esq.
Choate Hall & Stewart
Two International Place
Boston, MA 02110

Dear Mr. Cinquegrana:

I want to confirm in writing that the Justices of the Supreme Judicial Court have appointed you as special counsel to conduct an independent preliminary inquiry relating to the District Court Department. We ask you to explore whether the acquittal rates of certain District Court judges in jury-waived trials on charges of driving while under the influence of alcohol or drugs are substantially greater than the statistical average and, if so, to identify the reasons for the disparity. I emphasize that this is a fact-finding inquiry, not a disciplinary inquiry. Your careful and independent examination of the facts will assist the Justices and Chief Justice Lynda M. Connolly of the District Court in determining whether further action is necessary or appropriate. Chief Justice Connolly fully supports this inquiry and will assist you as needed.

I also wish to confirm that the preliminary inquiry you are conducting is confidential, as is your work product. Any documents and records that are not publicly available relating to your inquiry should be held and preserved by you, and treated as confidential by you and your staff. Any report that you prepare, with any underlying documentation, shall be submitted to this Court, at which time the Justices will determine whether it shall remain confidential.

I appreciate your willingness to take on this assignment on a pro bono basis and the willingness of Choate Hall & Stewart to allow you to do so. I know that you recognize that time is of the essence in conducting and completing this inquiry.

Please do not hesitate to ask if you need further guidance in this matter.

Sincerely,

Roderick L. Ireland

Roderick L. Ireland

cc: The Justices

ATTACHMENT 2

SUPREME JUDICIAL COURT
JOHN ADAMS COURTHOUSE

RODERICK L. IRELAND
CHIEF JUSTICE

October 25 2011

PERSONAL AND CONFIDENTIAL

Jack Cinquegrana, Esq.
Choate Hall & Stewart
Two International Place
Boston, MA 02110

Dear Mr. Cinquegrana:

On October 19, 2011, I wrote to confirm in writing that the Justices of the Supreme Judicial Court had appointed you as special counsel to conduct an independent preliminary inquiry relating to the District Court Department. I now write to confirm that the Justices of the Supreme Judicial Court have expanded the scope of your charge to include the Boston Municipal Court. Your task now is to explore whether the acquittal rates of certain District Court and Boston Municipal Court judges in jury-waived trials on charges of driving while under the influence of alcohol or drugs are substantially greater than the statistical average and, if so, to identify the reasons for the disparity. I emphasize that this is a fact-finding inquiry, not a disciplinary inquiry. Chief Justice Charles R. Johnson fully supports this inquiry and will assist you as needed.

I also wish to confirm that the preliminary inquiry you are conducting is confidential, as is your work product. Any documents and records that are not publicly available relating to your inquiry should be held and preserved by you, and treated as confidential by you and your staff. Any report that you prepare, with any underlying documentation, shall be submitted to this Court, at which time the Justices will determine whether it shall remain confidential.

I appreciate your willingness to take on this assignment on a pro bono basis and the willingness of Choate Hall & Stewart to allow you to do so. I know that you recognize that time is of the essence in conducting and completing this inquiry.

Please do not hesitate to ask if you need further guidance in this matter.

Sincerely,

Roderick L. Ireland

cc: The Justices

ATTACHMENT 3

Statement by the Justices of the Supreme Judicial Court in response to the Boston Globe Spotlight Team report

October 31, 2011

Some weeks ago, after learning of an investigation being conducted by the Boston Globe Spotlight Team into jury-waived cases in the District Court and Boston Municipal Court Departments involving charges of operating vehicles under the influence of alcohol and drugs, the Justices of the Supreme Judicial Court appointed an experienced and distinguished trial lawyer, Jack Cinquegrana, of the law firm of Choate Hall & Stewart, to conduct a confidential and independent preliminary inquiry into this matter. The appointment was made after consultation with Chief Justice for Administration & Management Robert A. Mulligan, Chief Justice Lynda M. Connolly of the District Court and Chief Justice Charles R. Johnson of the Boston Municipal Court, who have been fully supportive. The preliminary, fact-finding inquiry is currently underway.

Mr. Cinquegrana has been asked to determine the rate of acquittal in jury-waived trials on charges of operating under the influence of drugs or alcohol, and examine whether that rate differs from the national average and from the rate of acquittal in other criminal cases in District Court and Boston Municipal Court. Mr. Cinquegrana has also been asked to explore whether the acquittal rates of certain District Court and Boston Municipal Court judges are substantially greater than the statistical average, and, if so, to identify the possible reasons for the disparity. It should be underscored that this is a preliminary, fact-finding inquiry, not a disciplinary inquiry, and does not reflect any prejudgment by the Justices as to information contained in the Boston Globe article. The preliminary inquiry is intended to produce independent findings that we will review and consider in determining whether any further actions are appropriate.

As judges, we recognize the delicate nature of this preliminary inquiry. Our system depends on judges being able to decide a case fairly but independently, without fear or favor. A judge is obligated to find a criminal defendant not guilty if the government has not proved the case beyond a reasonable doubt; at the same time, a judge must find a defendant guilty where the crime has been proved beyond a reasonable doubt. Public confidence in the judiciary depends on its belief in the integrity of the judicial process, judges and their decisions. To preserve the public's trust and confidence, the courts must be, and must appear to be, fair and impartial in all cases. We have asked Mr. Cinquegrana to conduct the preliminary inquiry in a manner that respects each of these principles.

Mr. Cinquegrana is a former Assistant U.S. Attorney for the District of Massachusetts, Chief Trial Counsel in the Suffolk County District Attorney's Office and a past president of the Boston Bar Association.

ATTACHMENT 4

ATTACHMENT 4

COLLECTION OF STATISTICAL DATA – METHODS AND AUDIT

This section of our report describes the methods we used to derive useful data from the MassCourts and CourtView case management systems.

In 2006, the Commonwealth began the implementation of MassCourts in most departments and divisions of the Trial Court. MassCourts is currently used in 60 out of 62 courts of the District Court and seven of the eight courts in the BMC. MassCourts is a web-based case management system that stores electronic data concerning the scheduling and disposition of cases.[1]

In each court, court staff enters basic case information, such as the defendant's name and the charges, into MassCourts using the application for criminal complaint and statement of facts or police report. They then enter into MassCourts information about each event up to the final disposition using a paper case docket sheet, which is considered the "official" record in a criminal proceeding. Once a case is opened, case information is first recorded on the paper docket sheet, usually inside a courtroom, and that data is entered into MassCourts at some later time. When a case is concluded, court staff enters the following information from the paper docket sheet into MassCourts: the "Disposition Date," "Disposition Method,"[2] "Disposition Code,"[3] and "Disposition Judge." For the "Disposition Method," "Disposition Code," and

[1] The Trial Court staff provided us with a demonstration of MassCourts on or about November 10, 2011.

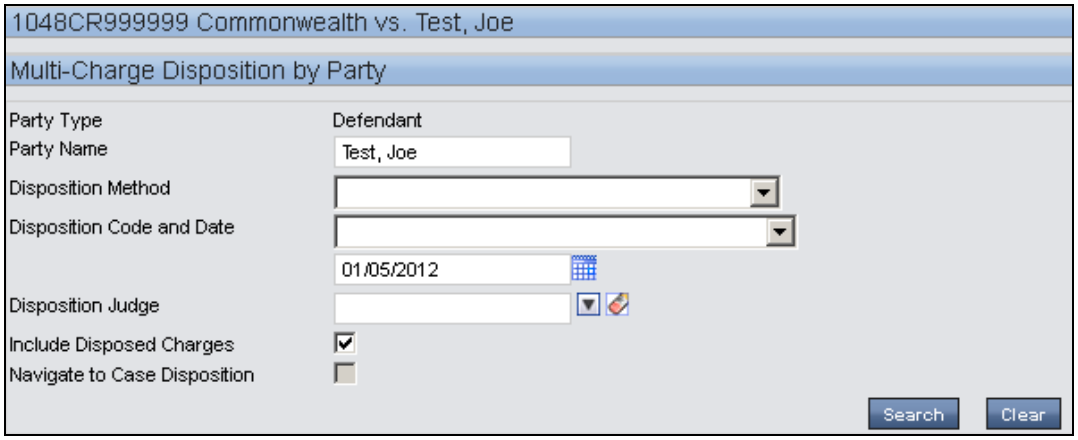
[2] The available "Disposition Methods" are:

Admission to Sufficient Facts	Nolo Plea
Disposed as Civil Infraction	Nolle Prosequi
Dismissed	Probable Cause Hearing
Filed Without a Finding	Pretrial Probation Without a Finding
Guilty Plea	Probation Violation Hearing
Hearing	Bench Trial
Jury Trial	Transferred to Another Court
Lesser Charge – Admission to Sufficient Facts	Transferred Out – For Guilty Plea
Lesser Charge – Guilty Plea	Transferred Out – For Trial

[3] The available "Disposition Codes" are:

Not Responsible After Appellate Division Review	Filed Without a Finding
Responsible After Appellate Division Review	Guilty
Continued Without a Finding	Guilty – 24D Program
Continued Without a Finding – 24D Program	Guilty; Placed on File
Dismissed – Accord & Satisfaction	Guilty of Lesser Included Offense

"Disposition Judge" entries, court staff must select the available options from a drop down menu. A screen shot reflecting those data fields appears below:



There are many options available in MassCourts for the Disposition Method (18 options) and Disposition Code (39 options)--too many for us to use in our analysis. One challenge we faced, explained in the following pages, was how to reduce the entries using these options to a useable format for our inquiry.

The BMC Central Division (in downtown Boston) uses a different case management system, CourtView, to store similar electronic data. With the assistance of Trial Court staff, we were able to derive useful data from this system as well and include it in our analyses.

Responsible Under G.L. c. 277, § 70C	Inactivated For Lack Of Service
Not Responsible Under G.L. c. 277, § 70C	Not Delinquent
Dismissed – After Continuance Without a Finding	Not Guilty
Dismissed – Defendant Deceased	Not Guilty by Reason of Insanity
Dismissed – Defendant Indicted	Nolle Prosequi
Dismissed	No Probable Cause Found
Delinquent	Not Responsible
Dismissed – Lack of Prosecution	Probable Cause Found
Dismissed – Lack of Speedy Trial	Pretrial Probation as Disposition
Dismissed – Pretrial Diversion	Responsible
Dismissed – After Pretrial Probation	Transferred to Another Court
Dismissed – Request of Commonwealth	To Be Dismissed Upon Payment
Dismissed – Request of Victim	Transferred Out for Guilty Plea (MRCrP 37 {a})
Dismissed – Substitute Complaint Issued	Transferred Out for Trial (MRCrP 37 {b})
Dismissed – Without Prejudice	

The Barnstable and Brockton District Courts use an older docket management program, the "Judicial Management System." Because of the limitations of that system, Trial Court staff was unable to extract the data necessary for our analyses of OUI cases. We are not aware of any feasible means to do so. These courts are not included in any of our analyses.

A. Extraction of Data From MassCourts

In November 2011, we contacted Craig Burlingame, Chief Information Officer of the Trial Court, to determine whether data contained in MassCourts could be extracted for our use in examining acquittal rates in OUI cases. We learned, as the Spotlight Series had reported, that the Trial Court does not routinely compile such data, nor is it readily available from MassCourts. However, with the extensive assistance of Trial Court and Sentencing Commission staff, we were able to devise a means for collecting information sufficient for our purposes.

We met with Mark Prior, Team Lead of the MassCourts Data Management Team, and asked him to devise a means for extracting data for each OUI case disposed of in the Commonwealth from January 1, 2008 to September 30, 2011 (the "Time Period"). We selected the Time Period for several reasons. Generally, we wanted to collect a sufficient number of OUI dispositions to identify meaningful trends. We selected January 1, 2008 as the start date because most of the courts in the District Court and BMC Departments were using MassCourts by then. We selected September 30, 2011 as our end date because it was the latest date, prior to the start of our work, when we could be confident that complete disposition data had been entered into MassCourts.

In addition, in order to evaluate whether the Spotlight Series did have an impact on the disposition of OUI cases, we later asked Mr. Prior to extract an additional set of data from October 1, 2011 to March 31, 2012.

1. Relevant Data Fields in MassCourts

Over a period of several weeks, Mr. Prior devised specific "queries," written in software code ("SQL"), to extract data from the database. He used the following data fields found in MassCourts:[4]

> (a) Charge. For our purposes, "Charges" alleging a violation of G. L. c. 90, § 24(1)(a)(1), Operating Under the Influence of Alcohol or Drugs or .08%, were collected. We use the term "OUI Charge" to refer to such violations.

[4] In addition, we asked Mr. Prior to extract the following data for each OUI case disposed of during the Time Period:

Defendant Name	Date of Offense
Defendant Date of Birth	Police Department
Court	Attorney BBO Number
Docket Number	

(b) Disposition Method. The "Disposition Method" is the manner of disposition of an OUI Charge. For example, a bench trial, jury trial, guilty plea, and admission to sufficient facts are Disposition Methods.

(c) Disposition Code. The "Disposition Code" is the outcome of an OUI Charge. For example, an OUI Charge may result in a guilty or not guilty finding, a "continuance without a finding" ("CWOF"),[5] or a dismissal.

(d) Disposition Judge. The "Disposition Judge" is the judge who presided over the disposition of an OUI Charge. For example, a judge who presided over a bench trial or jury trial is the Disposition Judge.

(e) Disposition Date. The "Disposition Date" is the date of disposition of an OUI Charge.

(f) Attorney. The "Attorney" is the defense attorney who represented the defendant at the time of the disposition of an OUI Charge.

(g) Event. An "Event" is the proceeding that was scheduled to occur on a given date.

(h) Event Result. The "Event Result" establishes the outcome of the Event.

2. Conversion of This Data for Our Analysis

Beginning in December 2011, Mr. Prior, at our request, provided the data extract to Ms. Linda Holt, Research Director of the Massachusetts Sentencing Commission, for quantitative analysis. The extract contained several hundred thousand data points for approximately 63,000 cases. Ms. Holt used SPSS, a computer program widely used for statistical analysis, to analyze the data.[6,7]

As noted above, MassCourts offers 18 Disposition Methods for court staff to enter in connection with an OUI Charge, and 39 Disposition Codes. In light of our objectives, we worked with Linda Holt to construct a methodology for converting and simplifying this data for our analysis. What follows is an explanation of how we worked with this data in light of these concerns.

(a) Charge

Where an OUI Charge was amended, we used the amended OUI Charge in our analysis. We excluded cases where the Commonwealth amended an OUI Charge to a non-OUI Charge. Where multiple OUI offenses were charged in a single case, we included only the OUI Charge

[5] A CWOF requires the defendant to admit sufficient facts for an OUI conviction. The case is continued for a specified period during which the defendant is on probation. If the defendant complies with the probation conditions, the case is dismissed. If the defendant violates the conditions, the CWOF disposition may be modified to a guilty finding. We considered a CWOF to be a disposition adverse to the defendant regardless of whether the CWOF was ultimately dismissed.

[6] We requested that Ms. Holt display the cases in an Excel spreadsheet format reflecting certain data for each case.

[7] Ms. Holt was assisted by Lee Kavanagh, Research Analyst at the Massachusetts Sentencing Commission.

that resulted in a conviction, if there was one. Otherwise, we used the disposition of the "lead" OUI Charge--the one listed first in MassCourts--in our analysis. For purposes of our analysis, we treated an OUI case as consisting of one OUI Charge. Thus, we use the terms "case" and "charge" interchangeably throughout the remainder of this report.

(b) Disposition Methods

There are 18 Disposition Methods available for selection in MassCourts. Of these 18 Disposition Methods, only 13 were selected by court staff in connection with the OUI cases in our data extract. We grouped these 13 Disposition Methods into four Disposition Method Categories: Plea, Bench Trial, Jury Trial, and "Other." The chart below shows that grouping:

Disposition Method Category (For Our Analysis)	**Disposition Methods (From MassCourts)**
Plea	Admission to Sufficient Facts Guilty Plea Nolo Plea Lesser Charge – Admission to Sufficient Facts Lesser Charge – Guilty Plea
Bench Trial	Bench Trial
Jury Trial	Jury Trial
Other	Hearing Dismissed Nolle Prosequi[8] Disposed as Civil Infraction Filed Without a Finding Pretrial Probation Without a Finding[9]

Our methodology for classifying Disposition Methods into one of four categories is as follows:

> ***Pleas***: Where court staff selected any of the following Disposition Methods, we classified the proceeding as a Plea: Admission to Sufficient Facts; Guilty Plea; Nolo Plea; Lesser Charge–Admission to Sufficient Facts; and Lesser Charge–Guilty Plea. Where court staff did not select a Disposition Method for a case, we classified the Disposition Method as a Plea where: (1) the "Event" in MassCourts was a Pre-Trial Hearing, Arraignment, Status Review, Probable Disposition, or Default Removal Hearing; *and* (2) the Disposition Code that was entered was either Guilty or Guilty–Section 24D Program.

[8] A nolle prosequi is a declaration by the prosecutor in a criminal case that he is declining to prosecute the case.

[9] Pretrial Probation is an agreement between the prosecutor and the defendant, approved by the court, that occurs before a trial or other final disposition. If the defendant successfully completes a probationary period, the case is dismissed. If the defendant violates any of the terms and conditions of the pretrial probation, the case proceeds to a final disposition.

We also classified a Disposition Method as a Plea where court staff did not select a Disposition Method, but selected CWOF as the Disposition, regardless of the "Event."

***Bench Trials*:** Where court staff selected Bench Trial as the Disposition Method, we classified the proceeding as a Bench Trial.[10] Where court staff did not select a Disposition Method, we used other data to infer one. We classified the proceeding as a Bench Trial where the "Event" code was Bench Trial In Progress, Bench Trial Criminal, or Judge Hearing, *and* the Disposition was Guilty, Guilty Finding, Guilty–Section 24D Program,[11] or Not Guilty.

***Jury Trials*:** Where court staff selected Jury Trial as the Disposition Method, we classified the proceeding as a "Jury Trial." Where court staff did not select a Disposition Method, we classified the proceeding as a Jury Trial where the "Event" code was Jury Trial In Progress or Jury Trial Criminal, *and* the Disposition was Guilty, Guilty Finding, Guilty–Section 24D Program, or Not Guilty.

"*Other" Disposition Methods*: We used this category to group Disposition Methods other than Bench Trial, Jury Trial, or Plea. Where court staff selected any of the following Disposition Methods, we classified them in our "Other" category: Hearing, Dismissed, Nolle Prosequi, Disposed as Civil Infraction, Filed Without a Finding, and Pretrial Probation Without a Finding. We also used this category where court staff did not identify a Disposition Method but selected one of the following Dispositions: Dismissed, Dismissed–Accord Satisfaction, Dismissed–Defendant Deceased, Dismissed–Lack of Prosecution, Dismissed–After Pretrial Probation, Dismissed–Request of Commonwealth, Dismissed–Without Prejudice, Nolle Prosequi, and To Be Dismissed Upon Payment. Where court staff did not select a Disposition Method and the "Event" was First Assignment in Trial Session, and the Disposition was Guilty, Guilty Finding, Guilty–Section 24D Program, or Not Guilty, we assigned the proceeding to the "Other" category as well.

In 34 cases for which court staff selected Bench Trial or Jury Trial as the Disposition Method, the Disposition Code indicates that the case resulted in a dismissal or pretrial probation. In those cases, we inferred that no trial actually occurred, and therefore assigned those cases to the "Other" Disposition Method Category.

In addition, the MassCourts data reflects that there were 77 Pleas that resulted in Not Guilty findings and 130 Pleas that resulted in a dismissal or pretrial probation. We did not review the docket sheet or other information to understand these classifications, and therefore we cannot say whether these dispositions reflect errors. Since the Pleas did not appear to result in findings adverse to the defendant, we assigned those cases to the "Other" Disposition Method Category.

[10] In a limited number of cases, the Event data indicated that a case was scheduled for trial, but the trial was "Not Held But Resolved." In those cases, we assigned the Charge to the Plea Disposition Method category.

[11] The 24D Program is an alcohol education program for eligible first- and second-time OUI offenders in Massachusetts pursuant to G. L. c. 90, § 24D.

(c) Disposition Codes

There are 39 Disposition Codes available for selection in MassCourts. Of these 39 Disposition Codes, only 22 were selected by court staff in connection with the OUI cases in our data extract. We grouped these 22 Disposition Codes into four categories: Guilty, Not Guilty, CWOF, and "Other." The chart below shows that grouping:

Disposition Category (For Our Analysis)	**Disposition Codes (From MassCourts)**
Continued Without a Finding ("CWOF")	Continued Without a Finding Continued Without a Finding–24D Program
Guilty	Guilty Guilty–24D Program Guilty of Lesser Included Offense Guilty; Placed on File
Not Guilty	Not Guilty Not Guilty by Reason of Insanity
Other	Dismissed Dismissed – Accord & Satisfaction Dismissed – After Pretrial Probation Dismissed – Defendant Deceased Dismissed – Lack of Prosecution Dismissed – Lack of Speedy Trial Dismissed – Request of Commonwealth Dismissed – Request of Victim Dismissed – Without Prejudice Filed Without a Finding Inactivated for Lack of Service Nolle Prosequi Pretrial Probation as Disposition To Be Dismissed Upon Payment

Our methodology for grouping Disposition Codes had two parts. First, we assigned a Disposition Method to a Charge as described above. See supra at 6-7. Second, we reviewed the MassCourts Disposition Code selected by court staff (e.g., Guilty) for that Charge and then assigned it to one of our Disposition Categories.

With regard to the CWOFs associated with Bench Trials and Jury Trials, we cannot determine from the docket sheets whether judges entered CWOFs before or after the trial occurred. [12]

[12] Courts are not permitted to enter CWOFs over the Commonwealth's objection after a trial has occurred. Commonwealth v. Norrell, 423 Mass. 725 (1996). We do note, however, that in 63 instances, courts may have entered CWOFs following bench trials and, in two instances, following jury trials. We cannot determine from the docket sheets when the court entered the CWOF.

We assigned 5,854 cases to the Other disposition category during the Time Period, representing roughly 10% of the sample.

Finally, we observed cases where court staff entered multiple Dispositions for the same Charge. When those Dispositions were entered on the same date, we selected the Disposition that occurred later in time. We assumed that the later disposition was a correction of an earlier one. When those Dispositions were entered on a different date, we selected the initial Disposition. For example, if an OUI Charge initially resulted in a CWOF, but that CWOF was subsequently dismissed or modified to a guilty finding, we included the CWOF in our analysis.[13]

(d) Disposition Judge

The data reflected a Disposition Judge for 9,472 of 9,487 Bench and Jury Trials. For eleven trials where no Disposition Judge was entered, we assigned as Disposition Judge the judge recorded in MassCourts as the "Result Judge." We did not have sufficient information to assign a Disposition Judge in the remaining four cases.

(e) Disposition Date

We accepted the date entries which appeared in MassCourts without change.

(f) Attorney

The data we extracted identified the defense lawyer for 4,916 of 5,883 Bench Trials, 3,125 of 3,604 Jury Trials, and 30,376 of 41,625 Pleas.

3. Refinements to the Data

As a result of our review of OUI cases from MassCourts, we made several refinements to the data to, among other things, eliminate double counting of cases.

***Probation Hearings*:** We excluded cases where "Probation Violation Hearing" was the Disposition Method, and where the OUI Charge was associated with the following Events: "Probation Violation–First Appearance" or "Probation Violation Hearing." These Disposition Methods and Events do not reflect an initial Disposition of an OUI Charge.

***Transferred Cases*:** The data extract included cases that were transferred from one District Court to another for disposition of an OUI Charge. The Disposition Codes and/or Disposition Methods for these cases were: Transferred Out For Guilty Plea, Transferred Out For Trial, or Transferred to Another Court. We excluded these cases from our analysis on the assumption that if any of these cases proceeded to a final disposition in another court during the Time Period, those cases would be captured in our

[13] Only initial Dispositions that occurred during the Time Period were included in our analysis. For example, if a case was disposed of by CWOF *before* the Time Period, and defendant violated probation *during* the Time Period, we excluded that case. If a case was disposed of by CWOF *during* the Time Period, and the defendant violated probation *during* or *after* the Time Period, the case appears *once* in our analysis as a CWOF.

data extract. The total number of cases excluded from our analysis for these reasons was 207.

***Duplicative cases*:** Our data included 313 cases that appeared to be duplicative of another case with a different docket number. The duplicative cases share the same defendant and police incident report number. Of the two cases, we included in our analysis only the one with the more recent docket number.

***Second and Subsequent OUI Charges*:** Where a defendant is charged with a second or subsequent OUI offense, the trial of the case is bifurcated. The court first disposes of the case arising from the new arrest. Assuming that disposition is adverse to the defendant, the court then resolves whether the defendant committed an earlier OUI offense which is the basis for the second or subsequent element.[14] The dispositions of the new offense and the second or subsequent element may result from different Disposition Methods. For example, the new offense may be tried to a judge or jury, while the second or subsequent element is then the subject of either a plea or separate trial. However, MassCourts allows court staff to enter only one Disposition Method. Therefore, instead of reflecting two Disposition Methods, one for the new offense and one for the second or subsequent element, MassCourts captures only one or the other. In light of our assignment, we concluded that the more relevant Disposition Method was the one applied to a plea or trial on the new arrest, and not the second or subsequent element.[15] We reviewed a sample of the docket sheets for these cases and identified cases where the second or subsequent element was tried to a jury or resolved by plea and the predicate offense was tried to the bench. We reclassified the Disposition Method *from* Bench Trial *to* Plea or Jury Trial, as appropriate. Since we reviewed docket sheets for only a sample of the 294 cases, there may be additional cases that should be reclassified. However, the result of any further reclassifications would be to decrease the number of cases resulting in guilty findings at Bench Trial, which would, in turn, increase the Bench Trial acquittal rate.

4. Audit of MassCourts Data

With the approval of the Supreme Judicial Court, we worked with William Marchant, Chief Financial Officer of the Trial Court, who supervised an audit of the MassCourts data extract. We focused on the data relied upon to determine the Bench Trial acquittal rate. Our audit plan was intended to evaluate the extent to which the MassCourts data accurately reflects the Disposition Method, Disposition, and Disposition Judge for an OUI Charge.

The audit did have a significant limitation. The docket sheet, not MassCourts, is the official case record in a criminal case. Any errors in a docket sheet would be transferred to MassCourts. The only certain method to assess the accuracy of the Disposition Method and Disposition is to listen to the tape recording of a proceeding. We did not do so, except for the relatively small number

[14] In the event a defendant is convicted of, or pleads guilty to, the new OUI Charge, the Commonwealth still bears the burden to prove a conviction on the earlier OUI Charge(s) beyond a reasonable doubt.

[15] Note we have not focused in this report on the manner in which the second or subsequent element in these cases was resolved. There are 294 cases in our data extract where MassCourts reported that a defendant was convicted of a second or subsequent offense after a Bench Trial.

of bench trials which we reviewed for the purpose of identifying substantive trial issues. Our audit, therefore, primarily assessed the accuracy of the transfer of information from the docket sheet to MassCourts. The audit had the following four components.

First, with respect to Bench Trials, Linda Holt provided the auditors with an Excel spreadsheet listing one-third of the OUI bench trials in our data extract as of January 24, 2012.[16] She selected the one-third sample at random. The auditors visited each of the District Courts (except the Barnstable and Brockton District Courts) and copied the docket sheet and police report for each case reviewed.[17] The auditors determined whether MassCourts correctly reflected the Disposition Method and Disposition for the OUI Charge. They memorialized the results of their analysis on an Excel spreadsheet.

Second, the auditors interviewed clerks at each of the District Courts to learn whether, over the Time Period, court staff identified the judge that presided over the Bench Trial as the Disposition Judge, or some other judge.[18] For example, in the event that court staff identified the Assigning Judge (who assigns trials to other judges for disposition) or Presiding Judge (the presiding judge of the court) as the Disposition Judge, we would ascribe trials to judges who did not preside over them.

Third, with respect to all Disposition Methods, we asked Ms. Holt to provide the auditors with an Excel spreadsheet composed of a 10% sample of all OUI cases in our data extract as of January 24, 2012. Ms. Holt selected the sample at random. On their visits to the District Courts, the auditors reviewed the docket sheet for each case in the sample that they were able to locate. For each case they located, they evaluated whether MassCourts correctly reflected the Disposition Method for the OUI Charge. The auditors were instructed to memorialize the results of their analysis on an Excel spreadsheet.

Fourth, because we noted several categories of anomalous Disposition Methods and Dispositions, we asked the auditors to check certain cases. For example, court staff assigned Hearing as the Disposition Method for 458 OUI charges. The Dispositions for these Hearings included CWOF, Not Guilty, and Guilty. We could not determine whether the Hearings were Bench Trials, Jury Trials, Pleas or some other proceeding. We also observed the following additional anomalies:

[16] In light of the refinements to the data identified above, there are 5,883 bench trials in the Database referred to in our report.

[17] The auditors were unable to locate or access some of the case files in the sample.

[18] The auditors were instructed to ask the following questions:

> (a) For the time period 1/1/08 - 9/30/11, what was the court's practice when recording on docket sheets the judge who presided over a bench trial?
>
> (b) For the time period 1/1/08 - 9/30/11, what was the court's practice when entering the "Disposition Judge" into MassCourts?
>
> (c) For the time period 1/1/08 - 9/30/11, would the presiding judge or assigning judge be designated "Disposition Judge" for bench trials?

- 50 cases where Disposition was Responsible/Not Responsible or Delinquent/Not Delinquent;

- 81 cases disposed of by trial where the Disposition was recorded as CWOF; and

- 109 cases where the Disposition was recorded as Guilty or Not Guilty, but no Disposition Method was recorded.

We directed the auditors to review the docket sheet for these anomalies to determine, among other things, whether the Disposition Method and Disposition was correct. In sum, we directed the auditors to review docket sheets for an additional 681 cases.[19]

The auditors completed their field work on or about April 25, 2012. They provided us with copies of the docket sheets and police reports for the one-third sample of Bench Trials they reviewed and for many of the anomalies they reviewed. They additionally provided us with the Excel spreadsheets reflecting their field work. We reviewed the docket sheets the auditors provided to us and the auditors' field work and identified additional errors in the data. The results of this combined effort are as follows:

***Bench Trials – One-Third Sample*:** We and the auditors reviewed 1,835 docket sheets out of the cases that we classified as Bench Trials. We collectively found 106 errors in Disposition Method, an error rate of 5.8%, and fourteen errors in Disposition, an error rate of 0.8%. We also found 96 instances where MassCourts incorrectly identified the Disposition Judge, an error rate of 5.2%. We corrected these errors in our data extract.

***Interview of Clerks*:** The auditors also interviewed clerks at each of the District Courts they visited regarding whether court staff correctly entered the Disposition Judge--the judge who presided over the Bench Trial--into MassCourts. See supra at 11. With the exception of the Haverhill District Court, clerks reported to the auditors that they did so. With respect to the Haverhill District Court, for some period, court staff incorrectly entered into MassCourts the Assigning Judge as the Disposition Judge. The Assigning Judge did not necessarily try the case. Therefore, over the Time Period, MassCourts identified judge #1, the Presiding Judge in Haverhill, as the Disposition Judge for a large number of cases disposed of in the Haverhill District Court. We did not have enough information to assign these Trials to the actual Disposition Judge.

***Review of One-Tenth of the Cases for Disposition Method*:** The auditors reviewed 5,457 docket sheets. They found 111 errors in Disposition Method, an error rate of 2.0%. We did not review the docket sheets for any of these cases, and we did not correct these errors in our data extract.

***Review of Anomalies*:** As noted above, we directed the auditors to review docket sheets for 681 anomalous cases. We reviewed a significant number of these docket sheets as well. Upon our collective review of these docket sheets, we determined that 47 cases

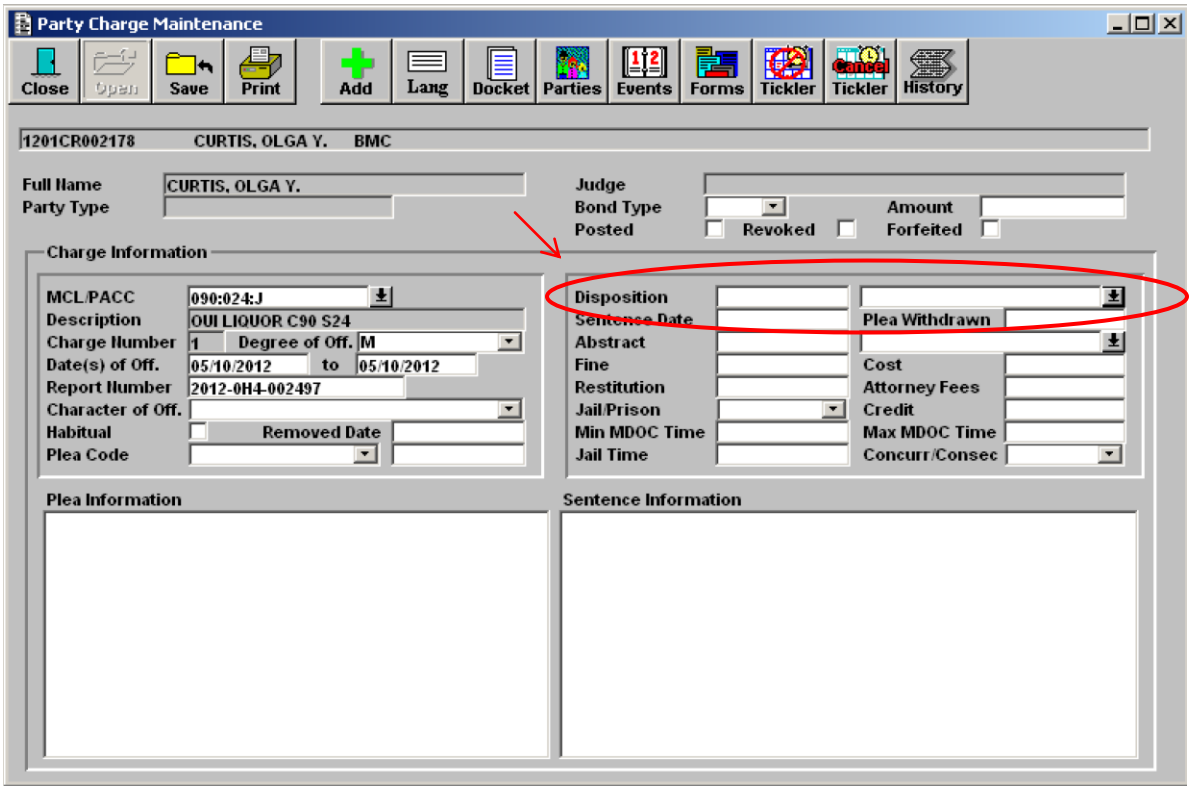
[19] The number of cases reviewed is less than the sum of the anomalous cases identified because some cases fell into more than one of the categories enumerated above.

should be reclassified. For instance, of the 458 Charges with "Hearing" as the Disposition Method, we determined that 75 should have been classified as Bench Trials, 24 as Jury Trials, and 202 as Pleas. We reclassified these cases in our data extract. We also determined from our review that the initial disposition in 15 cases occurred outside of the Time Period and four cases were duplicative of other cases in the data extract. We excluded those cases from our analysis. For the remaining 208 anomalies, there was insufficient information on the docket sheet to permit us to reclassify the cases.

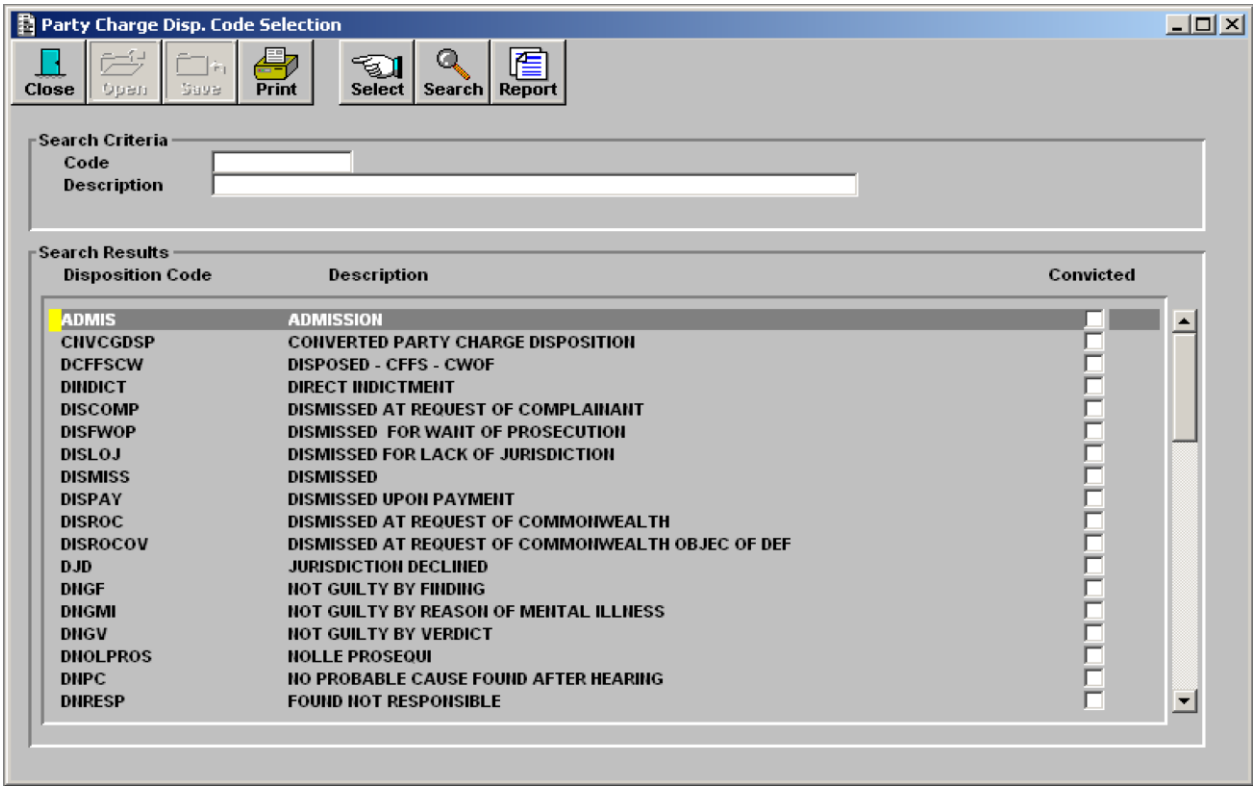
B. The CourtView Database

The Central Division of the BMC, or "BMC Central," uses CourtView, a legacy Windows-based client-server application. CourtView is maintained separately and differs from MassCourts. We were required to collect and analyze BMC Central data separately from data extracted from MassCourts.

When a criminal charge in BMC Central is resolved, court staff enters the Disposition in CourtView:



They do so by choosing a Disposition from a Disposition Code Selection menu:



Unlike MassCourts, there is no Disposition Method, Disposition Judge, or Event data in CourtView.

We asked Mark Prior to extract from CourtView data analogous to that extracted from MassCourts. The extract consisted of numerous data points for 416 cases. Mr. Prior provided this extract to Linda Holt for quantitative analysis.

We inferred a Disposition Method for these cases, and grouped the CourtView Disposition Codes, as follows:[20]

[20] The Disposition Codes in CourtView associated with the OUI cases in our data extract are:

Admission	Disposed – Admission
Disposed – CFFS – CWOF	Disposed – Amended
Direct Indictment	Disposed – Court Finds Facts Sufficient
Dismissed for Want of Prosecution	Disposed – CFFS – Found Guilty
Dismissed	Guilty by Finding
Dismissed Upon Payment	Guilty by Plea
Dismissed at Request of Commonwealth	Guilty by Verdict
Not Guilty by Finding	Pretrial Probation Ch 276 Sec 87
Not Guilty by Verdict	Case Sealed

Inferred Disposition Method (For Our Analysis)	Disposition Category (For Our Analysis)	Disposition Codes (From CourtView)
Plea	**Guilty**	Guilty by Plea Disposed – CFFS – Found Guilty
	CWOF	Disposed – CFFS – CWOF
	Other	Admission Disposed – Admission Disposed – Court Finds Facts Sufficient
Jury Trial	**Guilty**	Guilty by Verdict
	Not Guilty	Not Guilty by Verdict
Bench Trial	**Guilty**	Guilty by Finding
	Not Guilty	Not Guilty by Finding
Other	**Other**	Case Sealed Direct Indictment Dismissed Dismissed for Want of Prosecution Dismissed at Request of Commonwealth Dismissed Upon Payment Disposed – Amended Pretrial Probation Ch 276 Sec 87

As a result, we were able to integrate the BMC Central data with the MassCourts data.

We also made certain corrections and refinements. We had assigned 65 cases in BMC Central to the Jury and Bench Trial Disposition Method Categories. The auditors reviewed and copied all of the docket sheets for these cases. The auditors determined that the Disposition or Disposition Method Category was incorrect in four cases. We also reviewed the docket sheets and identified eight additional misclassified cases. We corrected these entries in our data extract for the 12 cases.

In addition, we asked the auditors specifically to determine the judge who presided over the disposition of the 65 Bench and Jury Trials cases by reviewing the docket sheets. We included that data in our analysis.

Since our primary objective was to determine the acquittal rates at trial, we did not ask the audit team to review cases designated as having been resolved by some method other than Bench Trial or Jury Trial.

ATTACHMENT 5

ATTACHMENT 5

* Denotes a judge who was assigned, at least one day, to either the Barnstable or Brockton District Court.

** Denotes a judge who was assigned, at least one day, to the BMC Central Division.

*** This judge sat in Haverhill, which was the only court to report to the auditors that there was a practice, for some period of time, which may have resulted in the inaccurate designation of the Disposition Judge and may have specifically affected this judge. See Attachment 4, at 11. Therefore, this judge has been excluded from the statistical analyses applied by Analysis Group.

TABLE A1
County Data and Statewide Totals

	PLEAS			BENCH TRIALS						JURY TRIALS					OTHER	OVERALL	
COUNTY	CWOF	GUILTY	TOTAL	CWOF	GUILTY	NOT GUILTY	TOTAL	**WAIVER RATE**	**ACQUITTAL RATE**	CWOF	GUILTY	NOT GUILTY	TOTAL	**ACQUITAL RATE**	TOTAL	TOTAL	**CONVICTION RATE**
BARNSTABLE	844	407	1,251	0	69	251	320	**19%**	**78%**	0	38	45	83	**54%**	233	1,887	**72%**
BERKSHIRE	623	533	1,156	0	12	19	31	**2%**	**61%**	0	38	65	103	**63%**	77	1,367	**88%**
BRISTOL	2,810	1,470	4,280	10	62	366	438	**9%**	**84%**	0	111	178	289	**62%**	613	5,620	**79%**
DUKES	283	116	399	0	4	20	24	**6%**	**83%**	0	2	0	2	**0%**	159	584	**69%**
ESSEX	4,389	2,423	6,812	2	66	283	351	**5%**	**81%**	0	244	314	558	**56%**	548	8,269	**86%**
FRANKLIN	695	364	1,059	4	33	115	152	**12%**	**76%**	0	29	50	79	**63%**	177	1,467	**77%**
HAMPDEN	2,520	943	3,463	0	47	261	308	**8%**	**85%**	0	67	88	155	**57%**	462	4,388	**82%**
HAMPSHIRE	1,412	402	1,814	0	34	225	259	**12%**	**87%**	0	44	45	89	**51%**	160	2,322	**81%**
MIDDLESEX	5,027	2,085	7,112	2	165	681	848	**10%**	**80%**	0	373	432	805	**54%**	1,003	9,768	**78%**
NANTUCKET	127	28	155	0	1	2	3	**2%**	**67%**	0	4	10	14	**71%**	81	253	**63%**
NORFOLK	2,655	981	3,636	22	90	451	563	**13%**	**80%**	0	116	153	269	**57%**	538	5,006	**77%**
PLYMOUTH	1,654	681	2,335	15	118	539	672	**22%**	**80%**	1	63	47	111	**42%**	381	3,499	**72%**
SUFFOLK	1,924	737	2,661	1	29	217	247	**8%**	**88%**	0	81	147	228	**64%**	653	3,789	**73%**
WORCESTER	3,831	1,661	5,492	7	41	1,619	1,667	**21%**	**97%**	1	301	517	819	**63%**	769	8,747	**67%**
Total	28,794	12,831	41,625	63	771	5,049	5,883	**12%**	**86%**	2	1,511	2,091	3,604	**58%**	5,854	56,966	**77%**

TABLE A2
Court Data

	PLEAS			BENCH TRIALS						JURY TRIALS					OTHER	OVERALL	
COURT	CWOF	GUILTY	TOTAL	CWOF	GUILTY	NOT GUILTY	TOTAL	**WAIVER RATE**	**ACQUITTAL RATE**	CWOF	GUILTY	NOT GUILTY	TOTAL	**ACQUITAL RATE**	TOTAL	TOTAL	**CONVICTION RATE**
ATTLEBORO	854	404	1,258	0	13	70	83	**6%**	**84%**	0	31	53	84	**63%**	121	1,546	**84%**
AYER	427	156	583	1	13	50	64	**8%**	**78%**	0	71	72	143	**50%**	81	871	**77%**
BMC BRIGHTON	459	92	551	0	6	90	96	**14%**	**94%**	0	9	24	33	**73%**	58	738	**77%**
BMC CENTRAL	128	98	226	0	4	38	42	**15%**	**90%**	0	4	9	13	**69%**	135	416	**56%**
BMC CHARLESTOWN	85	17	102	1	1	1	3	**3%**	**33%**	0	0	0	0	**--**	17	122	**85%**
BMC DORCHESTER	424	175	599	0	8	29	37	**5%**	**78%**	0	23	39	62	**63%**	94	792	**80%**
BMC EAST BOSTON	107	38	145	0	0	8	8	**5%**	**100%**	0	2	6	8	**75%**	26	187	**79%**
BMC ROXBURY	201	70	271	0	3	10	13	**4%**	**77%**	0	1	17	18	**94%**	87	389	**71%**
BMC SOUTH BOSTON	87	17	104	0	1	2	3	**3%**	**67%**	0	2	4	6	**67%**	20	133	**80%**
BMC WEST ROXBURY	159	81	240	0	0	17	17	**6%**	**100%**	0	24	25	49	**51%**	34	340	**78%**
BROOKLINE	117	19	136	0	3	6	9	**6%**	**67%**	0	0	0	0	**--**	17	162	**86%**
CAMBRIDGE	336	177	513	0	8	59	67	**10%**	**88%**	0	30	32	62	**52%**	99	741	**74%**
CHELSEA	274	149	423	0	6	22	28	**6%**	**79%**	0	16	23	39	**59%**	182	672	**66%**
CHICOPEE	388	118	506	0	0	27	27	**5%**	**100%**	0	6	5	11	**45%**	63	607	**84%**
CLINTON	337	78	415	0	0	26	26	**6%**	**100%**	0	0	0	0	**--**	20	461	**90%**
CONCORD	582	198	780	0	9	43	52	**6%**	**83%**	0	35	50	85	**59%**	56	973	**85%**
DEDHAM	522	220	742	0	32	104	136	**14%**	**76%**	0	45	65	110	**59%**	106	1,094	**75%**
DUDLEY	478	164	642	1	5	187	193	**23%**	**97%**	0	0	0	0	**--**	150	985	**66%**
EAST BROOKFIELD	310	226	536	3	4	338	345	**34%**	**98%**	0	45	86	131	**66%**	100	1,112	**53%**
EASTERN HAMPSHIRE	890	216	1,106	0	12	155	167	**13%**	**93%**	0	23	21	44	**48%**	112	1,429	**80%**
EDGARTOWN	283	116	399	0	4	20	24	**6%**	**83%**	0	2	0	2	**0%**	159	584	**69%**
FALL RIVER	677	363	1,040	4	15	101	120	**10%**	**84%**	0	23	53	76	**70%**	171	1,407	**77%**
FALMOUTH	400	178	578	0	36	111	147	**20%**	**76%**	0	12	10	22	**45%**	123	870	**72%**
FITCHBURG	360	227	587	0	12	394	406	**35%**	**97%**	0	80	83	163	**51%**	88	1,244	**55%**
FRAMINGHAM	515	232	747	0	39	193	232	**22%**	**83%**	0	38	49	87	**56%**	87	1,153	**71%**
GARDNER	145	42	187	0	1	16	17	**8%**	**94%**	0	1	0	1	**0%**	24	229	**83%**
GLOUCESTER	154	107	261	0	1	5	6	**2%**	**83%**	0	0	2	2	**100%**	21	290	**90%**
GREENFIELD	519	271	790	4	32	108	144	**15%**	**75%**	0	14	20	34	**59%**	135	1,103	**76%**
HAVERHILL	507	268	775	0	0	35	35	**4%**	**100%**	0	8	16	24	**67%**	53	887	**88%**
HINGHAM	507	189	696	4	17	171	192	**21%**	**89%**	1	16	11	28	**39%**	90	1,006	**73%**
HOLYOKE	176	112	288	0	12	43	55	**14%**	**78%**	0	18	24	42	**57%**	68	453	**70%**
IPSWICH	262	132	394	0	1	10	11	**3%**	**91%**	0	16	19	35	**54%**	17	457	**90%**
LAWRENCE	1,019	432	1,451	0	34	74	108	**6%**	**69%**	0	58	63	121	**52%**	163	1,843	**84%**
LEOMINSTER	213	74	287	1	0	78	79	**22%**	**99%**	0	0	1	1	**100%**	40	407	**71%**
LOWELL	727	326	1,053	0	19	118	137	**11%**	**86%**	0	40	56	96	**58%**	266	1,552	**72%**
LYNN	548	362	910	0	11	47	58	**6%**	**81%**	0	28	53	81	**65%**	114	1,163	**82%**
MALDEN	411	174	585	1	15	37	53	**8%**	**70%**	0	23	31	54	**57%**	82	774	**81%**

TABLE A2
Court Data

COURT	PLEAS			BENCH TRIALS						JURY TRIALS					OTHER	OVERALL	
	CWOF	GUILTY	TOTAL	CWOF	GUILTY	NOT GUILTY	TOTAL	WAIVER RATE	ACQUITTAL RATE	CWOF	GUILTY	NOT GUILTY	TOTAL	ACQUITAL RATE	TOTAL	TOTAL	CONVICTION RATE
MARLBORO	313	201	514	0	17	45	62	**10%**	**73%**	0	22	24	46	**52%**	26	648	**85%**
MILFORD	240	111	351	1	0	16	17	**4%**	**94%**	1	6	13	20	**65%**	52	440	**82%**
NANTUCKET	127	28	155	0	1	2	3	**2%**	**67%**	0	4	10	14	**71%**	81	253	**63%**
NATICK	143	34	177	0	3	2	5	**3%**	**40%**	0	0	0	0	**--**	12	194	**93%**
NEW BEDFORD	712	412	1,124	3	13	109	125	**9%**	**87%**	0	38	55	93	**59%**	170	1,512	**78%**
NEWBURYPORT	852	520	1,372	1	0	3	4	**0%**	**75%**	0	56	81	137	**59%**	57	1,570	**91%**
NEWTON	155	39	194	0	1	9	10	**5%**	**90%**	0	4	11	15	**73%**	26	245	**81%**
NORTHAMPTON	522	186	708	0	22	70	92	**11%**	**76%**	0	21	24	45	**53%**	48	893	**84%**
NORTHERN BERKSHIRE	128	176	304	0	3	3	6	**2%**	**50%**	0	10	18	28	**64%**	21	359	**88%**
ORANGE	176	93	269	0	1	7	8	**2%**	**88%**	0	15	30	45	**67%**	42	364	**78%**
ORLEANS	444	229	673	0	33	140	173	**19%**	**81%**	0	26	35	61	**57%**	110	1,017	**72%**
PALMER	477	163	640	0	6	24	30	**4%**	**80%**	0	9	10	19	**53%**	106	795	**82%**
PEABODY	566	387	953	1	11	73	85	**7%**	**86%**	0	64	68	132	**52%**	68	1,238	**83%**
PITTSFIELD	307	266	573	0	7	12	19	**3%**	**63%**	0	28	46	74	**62%**	36	702	**87%**
PLYMOUTH	717	264	981	6	79	240	325	**24%**	**74%**	0	28	23	51	**45%**	196	1,553	**70%**
QUINCY	1,034	371	1,405	19	39	200	258	**15%**	**78%**	0	45	42	87	**48%**	217	1,967	**77%**
SALEM	481	215	696	0	8	36	44	**6%**	**82%**	0	14	12	26	**46%**	55	821	**87%**
SOMERVILLE	282	120	402	0	11	37	48	**10%**	**77%**	0	9	10	19	**53%**	62	531	**79%**
SOUTHERN BERKSHIRE	188	91	279	0	2	4	6	**2%**	**67%**	0	0	1	1	**100%**	20	306	**92%**
SPRINGFIELD	1,021	392	1,413	0	24	153	177	**11%**	**86%**	0	27	33	60	**55%**	156	1,806	**81%**
STOUGHTON	326	87	413	1	6	46	53	**11%**	**87%**	0	0	0	0	**--**	76	542	**77%**
TAUNTON	567	291	858	3	21	86	110	**11%**	**78%**	0	19	17	36	**47%**	151	1,155	**78%**
UXBRIDGE	295	149	444	1	2	83	86	**15%**	**97%**	0	10	18	28	**64%**	35	593	**77%**
WALTHAM	444	155	599	0	9	24	33	**5%**	**73%**	0	13	20	33	**61%**	58	723	**86%**
WAREHAM	430	228	658	5	22	128	155	**18%**	**83%**	0	19	13	32	**41%**	95	940	**75%**
WESTBOROUGH	551	211	762	0	4	199	203	**20%**	**98%**	0	21	51	72	**71%**	92	1,129	**70%**
WESTFIELD	458	158	616	0	5	14	19	**3%**	**74%**	0	7	16	23	**70%**	69	727	**86%**
WINCHENDON	90	30	120	0	0	12	12	**9%**	**100%**	0	0	0	0	**--**	17	149	**81%**
WOBURN	692	273	965	0	21	64	85	**7%**	**75%**	0	88	77	165	**47%**	148	1,363	**79%**
WORCESTER	812	349	1,161	0	13	270	283	**15%**	**95%**	0	138	265	403	**66%**	151	1,998	**66%**
WRENTHAM	656	284	940	2	10	95	107	**10%**	**89%**	0	26	46	72	**64%**	122	1,241	**79%**
Total	28,794	12,831	41,625	63	771	5,049	5,883	**12%**	**86%**	2	1,511	2,091	3,604	**58%**	5,854	56,966	**77%**

TABLE A3
Judge Data

		PLEAS			BENCH TRIALS						JURY TRIALS					OTHER	OVERALL
JUDGE #	JUDGE	CWOF	GUILTY	TOTAL	CWOF	GUILTY	NOT GUILTY	TOTAL	WAIVER RATE	ACQUITTAL RATE	CWOF	GUILTY	NOT GUILTY	TOTAL	ACQUITAL RATE	TOTAL	TOTAL
1***	Abany, Stephen S***	480	245	725	0	0	24	24	3%	100%	0	7	15	22	68%	52	823
2	Abdella, Charles A	57	56	113	0	0	41	41	26%	100%	0	1	3	4	75%	22	180
3	Allard - Madaus, Michael G	61	29	90	1	1	71	73	43%	97%	0	2	3	5	60%	15	183
4*	Amrhein, Mary L*	125	37	162	0	0	11	11	6%	100%	0	2	4	6	67%	9	188
5*	Baler, Gregory R*	166	51	217	0	8	12	20	8%	60%	0	2	0	2	0%	51	290
6	Barnes, Benjamin C	86	20	106	0	0	9	9	7%	100%	0	9	10	19	53%	7	141
7*	Barrett, Thomas S*	105	103	208	7	18	119	144	38%	83%	0	11	12	23	52%	58	433
8	Barretto, James D	79	25	104	0	2	9	11	9%	82%	0	3	2	5	40%	9	129
9*	Baylor, Robert E**	69	34	103	0	1	0	1		0%	0	7	7	14	50%	9	127
10	Beattie, Phillip A	276	99	375	0	2	39	41	10%	95%	0	1	1	2	50%	35	453
11*	Bernard, Julie J*	3	0	3	0	0	0	0		--	0	0	0	0	--	0	3
12**	Bernstein, Patricia E**	36	8	44	0	0	1	1		100%	0	2	7	9	78%	3	57
13	Bibaud, Timothy M	63	46	109	2	2	72	76	40%	95%	0	5	2	7	29%	14	206
14*	Bolden, Michael C**	81	20	101	0	2	0	2		0%	0	0	0	0	--	15	118
15	Boyle, William J	220	30	250	0	0	3	3	1%	100%	0	1	0	1	0%	36	290
16*	Bradley, Heather M.S.*	31	11	42	0	0	5	5	10%	100%	0	0	4	4	100%	3	54
17	Brant, Jonathan	134	103	237	0	8	14	22	8%	64%	0	11	7	18	39%	12	289
18	Brennan, Dennis J	1	1	2	0	0	0	0		--	0	0	0	0	--	0	2
19	Brennan, Martha A	309	69	378	0	0	40	40	9%	100%	0	3	3	6	50%	15	439
20	Brennan, Robert A	269	159	428	0	4	21	25	5%	84%	0	17	16	33	48%	34	520
21	Brennan, Thomas M	225	114	339	0	17	35	52	11%	67%	0	31	33	64	52%	74	529
22	Broker, Phyllis J	146	58	204	0	5	12	17	6%	71%	0	36	34	70	49%	42	333
23	Brooks, Michael J	285	73	358	0	1	2	3	1%	67%	0	0	0	0	--	21	382
24	Brownell, Thomas F	60	22	82	0	0	1	1	1%	100%	0	0	0	0	--	13	96
25	Calagione, Robert B	282	131	413	1	0	38	39	8%	97%	0	15	15	30	50%	55	537
26*	Canavan, John A*	168	92	260	2	2	38	42	13%	90%	0	6	8	14	57%	27	343
27	Cannone, Beverly J	50	39	89	1	4	37	42	30%	88%	0	4	5	9	56%	17	157
28	Carey, Richard J	285	76	361	0	1	13	14	4%	93%	0	7	6	13	46%	31	419
29*	Carpenter, Don L*	202	98	300	0	13	34	47	13%	72%	0	9	14	23	61%	57	427
30	Carroll, Martine	67	15	82	0	2	7	9	8%	78%	0	6	10	16	63%	5	112
31**	Coffey, James W**	103	39	142	0	0	2	2		100%	0	6	6	12	50%	18	174
32**	Coffey, Kathleen E**	57	23	80	0	0	3	3		100%	0	15	15	30	50%	12	125
33	Concannon, John P	0	0	0	0	0	0	0		--	0	0	0	0	--	1	1
34	Conlon, Albert S	119	82	201	0	1	6	7	3%	86%	0	3	4	7	57%	23	238
35	Connly, Jacklyn M	60	35	95	0	0	19	19	17%	100%	0	1	0	1	0%	11	126
36	Connolly, Lynda M	1	0	1	0	0	0	0		--	0	0	0	0	--	0	1
37	Contant, Philip A	406	120	526	0	2	4	6	1%	67%	0	2	10	12	83%	52	596
38	Cornetta, Robert A	81	33	114	0	0	7	7	6%	100%	0	2	3	5	60%	8	134
39	Cote, Kenneth J	21	21	42	0	0	1	1	2%	100%	0	4	6	10	60%	3	56

TABLE A3
Judge Data

		PLEAS			BENCH TRIALS						JURY TRIALS					OTHER	OVERALL
JUDGE #	JUDGE	CWOF	GUILTY	TOTAL	CWOF	GUILTY	NOT GUILTY	TOTAL	WAIVER RATE	ACQUITTAL RATE	CWOF	GUILTY	NOT GUILTY	TOTAL	ACQUITAL RATE	TOTAL	TOTAL
40	Coven, Mark S	135	55	190	0	0	19	19	8%	100%	0	9	14	23	61%	22	254
41**	Coyne, Michael J**	67	23	90	0	1	37	38		97%	0	1	6	7	86%	12	147
42*	Creedon, Michael C*	275	113	388	0	27	103	130	25%	79%	0	5	4	9	44%	82	609
43	Cremens, J.Elizabeth	27	15	42	0	2	8	10	18%	80%	0	3	0	3	0%	7	62
44	Crimmins, Francis T	116	26	142	0	4	16	20	12%	80%	0	0	0	0	--	25	187
45	Cunis, David W	297	107	404	1	5	35	41	8%	85%	0	20	23	43	53%	57	545
46	Cunningham, Kevan J	115	57	172	0	2	11	13	7%	85%	0	3	2	5	40%	33	223
47	Curran, Dennis J	1	2	3	0	0	0	0		--	0	0	0	0	--	0	3
48	Curran, John J	72	22	94	0	0	8	8	7%	100%	0	2	3	5	60%	6	113
49	Curtin, Patricia G	107	28	135	0	3	3	6	4%	50%	0	1	1	2	50%	14	157
50*	D'Angelo, Andrew M*	164	93	257	0	11	76	87	22%	87%	0	16	33	49	67%	39	432
51**	Dashiell, Pamela M**	9	3	12	0	0	0	0		--	0	0	2	2	100%	3	17
52*	Dawley, Paul C*	3	0	3	0	0	0	0		--	0	0	0	0	--	1	4
53**	Desmond, Kenneth**	69	27	96	0	2	5	7		71%	0	2	2	4	50%	20	127
54*	Despotopulos, David P*	93	62	155	0	1	26	27	11%	96%	0	35	22	57	39%	43	282
55**	Donnelly, David T**	347	71	418	0	2	69	71		97%	0	1	3	4	75%	43	536
56**	Dougan, Raymond G**	12	3	15	0	0	10	10		100%	0	0	2	2	100%	10	37
57	Dowling, Patricia A	48	34	82	0	0	9	9	10%	100%	0	2	1	3	33%	2	96
58	Doyle, Peter F	700	442	1,142	0	0	7	7	1%	100%	0	30	34	64	53%	43	1,256
59**	Driscoll, Mary Ann**	43	32	75	0	0	5	5		100%	0	9	6	15	40%	16	111
60	Dunn, Deborah A	155	58	213	1	3	9	13	5%	69%	0	3	12	15	80%	20	261
61	Dusek-Gomez, Nancy	83	58	141	0	7	21	28	15%	75%	0	13	9	22	41%	22	213
62**	Fiandaca, Kenneth J**	37	12	49	0	0	2	2		100%	0	0	3	3	100%	4	58
63	Finnerty, Kevin J.	35	17	52	0	0	5	5	8%	100%	0	3	1	4	25%	3	64
64	Flatley, Ellen	79	67	146	0	4	21	25	12%	84%	0	11	21	32	66%	31	234
65	Flynn, Gregory C	223	88	311	0	7	14	21	6%	67%	0	12	17	29	59%	44	405
66	Flynn, Maurice R	164	80	244	0	2	15	17	6%	88%	0	1	3	4	75%	45	310
67**	Forde, Annette**	17	1	18	0	0	1	1		100%	0	1	1	2	50%	6	27
68*	Fortes-White, Stacey J*	69	50	119	0	1	3	4	3%	75%	0	7	14	21	67%	13	157
69	Fox, Patrick A	102	39	141	0	1	20	21	13%	95%	0	3	3	6	50%	16	184
70**	Frison, Shannon**	18	1	19	0	1	1	2		50%	0	0	1	1	100%	4	26
71	Gaffney, Kevin J	266	92	358	0	5	10	15	4%	67%	0	15	8	23	35%	38	434
72	Gailey, Timothy H	211	105	316	0	6	35	41	10%	85%	0	20	17	37	46%	99	493
73	Gardner, Robert W	105	32	137	0	0	34	34	15%	100%	0	22	38	60	63%	9	240
74*	Garth, Lance J*	230	94	324	0	11	42	53	14%	79%	0	7	4	11	36%	66	454
75	Gilligan, Brian F	264	97	361	0	11	53	64	15%	83%	0	5	0	5	0%	51	481
76* **	Gobourne, Franco J* **	22	7	29	0	1	0	1		0%	0	0	1	1	100%	4	35
77	Goggins, W. Michael	350	139	489	0	26	128	154	22%	83%	0	20	25	45	56%	42	730
78	Gordon, Robert A	201	81	282	0	5	29	34	11%	85%	0	2	5	7	71%	23	346

TABLE A3
Judge Data

		PLEAS			BENCH TRIALS						JURY TRIALS					OTHER	OVERALL
JUDGE #	JUDGE	CWOF	GUILTY	TOTAL	CWOF	GUILTY	NOT GUILTY	TOTAL	WAIVER RATE	ACQUITTAL RATE	CWOF	GUILTY	NOT GUILTY	TOTAL	ACQUITAL RATE	TOTAL	TOTAL
79	Greco, Robert V	202	111	313	0	17	34	51	12%	67%	0	25	33	58	57%	44	466
80	Guzman, Margaret R	87	30	117	0	0	149	149	51%	100%	0	4	21	25	84%	39	330
81	Hadley, William P	68	25	93	0	4	6	10	8%	60%	0	11	13	24	54%	11	138
82	Haley, Arthur F	266	84	350	0	0	39	39	10%	100%	0	4	3	7	43%	54	450
83*	Hand, Kathryn E*	157	79	236	0	22	52	74	22%	70%	0	10	13	23	57%	31	364
84* **	Hanlon, Sydney* **	24	12	36	0	2	1	3		33%	0	0	2	2	100%	16	57
85	Harbour, Robert G*	206	99	305	0	1	51	52	14%	98%	1	3	10	14	71%	32	403
86	Harvey, Tobin	236	72	308	0	2	6	8	3%	75%	0	1	2	3	67%	17	336
87	Healy, Paul F	107	67	174	0	13	103	116	39%	89%	0	3	6	9	67%	30	329
88	Herlihy, Kevin M	0	1	1	0	0	0	0		--	0	0	0	0	--	0	1
89	Hinkle, Marianne C	265	104	369	0	3	17	20	5%	85%	0	18	19	37	51%	56	482
90	Hodos, Herbert H	18	11	29	0	0	0	0		--	0	0	0	0	--	3	32
91	Hogan, Michele B	88	86	174	0	4	48	52	19%	92%	0	28	27	55	49%	56	337
92**	Horgan, Thomas C**	18	4	22	0	0	10	10		100%	0	0	4	4	100%	3	39
93	Howarth, Robert L	1	0	1	0	0	1	1	50%	100%	0	0	0	0	--	2	4
94	Hurley, Mary E	228	67	295	0	0	14	14	4%	100%	0	2	3	5	60%	36	350
95	Hurley, Patrick J	397	90	487	1	1	5	7	1%	71%	0	0	0	0	--	41	535
96	Jennings, Joseph W	170	123	293	0	1	7	8	3%	88%	0	7	6	13	46%	24	338
97*	Johnson Smith, Emogene*	277	105	382	1	2	5	8	2%	63%	0	11	16	27	59%	40	457
98	Johnson, Lee G	113	40	153	0	1	5	6	4%	83%	0	2	2	4	50%	22	185
99*	Julian, John M*	250	144	394	2	8	65	75	16%	87%	0	8	5	13	38%	82	564
100*	Kelley Brown, Angel*	67	31	98	0	3	8	11	9%	73%	0	7	9	16	56%	14	139
101* **	Kelly, Sally A* **	8	5	13	0	0	0	0		--	0	0	0	0	--	2	15
102	Kilmartin, Peter J	191	98	289	0	6	27	33	7%	82%	0	52	81	133	61%	55	510
103*	Kirkman, J. Thomas*	56	51	107	0	4	12	16	11%	75%	0	8	19	27	70%	37	187
104	Klein, Dyanne J	126	38	164	0	2	8	10	5%	80%	0	4	11	15	73%	25	214
105	Koenigs, Rita	74	72	146	0	3	0	3	2%	0%	0	16	12	28	43%	15	192
106	Kumor, Robert F	47	13	60	0	1	2	3	5%	67%	0	1	2	3	67%	7	73
107*	LaMothe, James L*	139	64	203	0	6	6	12	5%	50%	0	5	8	13	62%	19	247
108	Lauranzano, Michael C	261	148	409	0	2	13	15	3%	87%	0	3	8	11	73%	39	474
109**	Leary, Paul K**	6	4	10	0	0	0	0		--	0	3	1	4	25%	2	16
110	Leoney, Antoinette E. McLean	25	8	33	0	0	1	1	3%	100%	0	2	2	4	50%	0	38
111	Leroy, Jacques C	149	97	246	0	5	55	60	20%	92%	0	0	1	1	100%	42	349
112	Livingston, Dunbar D	112	64	176	0	7	18	25	11%	72%	0	18	19	37	51%	17	255
113	Locke, David B	178	50	228	0	0	50	50	17%	100%	0	7	6	13	46%	19	310
114	LoConto, Paul F	32	12	44	0	0	4	4	5%	100%	0	11	15	26	58%	8	82
115	Losapio, Paul A	264	130	394	0	2	27	29	7%	93%	0	5	17	22	77%	45	490
116*	Lynch, Joan E*	20	7	27	0	1	6	7	18%	86%	0	3	3	6	50%	4	44
117**	Lyons, Tracy Lee**	39	6	45	0	1	5	6		83%	0	5	5	10	50%	10	71

TABLE A3
Judge Data

		PLEAS			BENCH TRIALS						JURY TRIALS					OTHER	OVERALL
JUDGE #	JUDGE	CWOF	GUILTY	TOTAL	CWOF	GUILTY	NOT GUILTY	TOTAL	WAIVER RATE	ACQUITTAL RATE	CWOF	GUILTY	NOT GUILTY	TOTAL	ACQUITAL RATE	TOTAL	TOTAL
118	MacLeod, Laurie	179	75	254	1	16	50	67	20%	75%	0	10	8	18	44%	47	386
119*	Macy, Joseph I*	197	95	292	0	3	18	21	6%	86%	0	11	17	28	61%	121	462
120**	Mahoney, Paul F**	16	7	23	0	0	1	1		100%	0	0	0	0	--	5	29
121	Maldonado, Diana L	39	32	71	0	1	7	8	9%	88%	0	3	8	11	73%	93	183
122	Mandell, Andrew L	178	126	304	0	2	156	158	30%	99%	0	22	41	63	65%	35	560
123	Marini, Francis L	100	77	177	1	10	55	66	26%	83%	0	7	4	11	36%	40	294
124	Mason, Mark D	97	38	135	0	5	16	21	12%	76%	0	5	14	19	74%	24	199
125	May, Thomas J	17	3	20	0	1	0	1	5%	0%	0	0	0	0	--	4	25
126	Mazanec, William F	219	109	328	3	7	46	56	14%	82%	0	3	2	5	40%	64	453
127	McCallum, Paul J	56	28	84	0	1	9	10	10%	90%	0	1	5	6	83%	7	107
128**	McCormick, Lawrence E**	64	16	80	0	0	2	2		100%	0	2	5	7	71%	9	98
129	McDonough, William B	118	53	171	0	10	9	19	9%	47%	0	12	8	20	40%	17	227
130	McElroy, James B	135	88	223	0	2	10	12	5%	83%	0	6	7	13	54%	18	266
131	McGill, Paul L	73	23	96	0	3	42	45	29%	93%	0	9	7	16	44%	11	168
132*	McGovern, James J*	241	92	333	0	9	90	99	23%	91%	0	1	4	5	80%	63	500
133	McGuiggan, Janet J	36	19	55	0	2	3	5	6%	60%	0	10	10	20	50%	4	84
134	McGuinness, James H	36	19	55	0	5	92	97	61%	95%	0	4	4	8	50%	23	183
135**	McKenna, Robert J**	25	8	33	0	1	11	12		92%	0	0	12	12	100%	6	63
136	Melahn, William E	5	3	8	0	1	1	2	11%	50%	0	2	7	9	78%	2	21
137*	Merrick, Brian R*	231	114	345	0	22	68	90	20%	76%	0	5	13	18	72%	47	500
138**	Miller, Rosalind H**	61	38	99	0	2	5	7		71%	0	3	3	6	50%	17	129
139	Minehan, Rosemary B	171	42	213	1	3	8	12	5%	67%	0	2	2	4	50%	33	262
140*	Mooney, Toby S*	152	117	269	2	7	133	142	34%	94%	0	2	7	9	78%	48	468
141	Mori, Richard A	211	143	354	1	6	35	42	10%	83%	0	6	8	14	57%	24	434
142	Moriarty, Diane E	136	75	211	6	15	63	84	28%	75%	0	4	2	6	33%	90	391
143*	Moynahan, Ronald F*	119	43	162	0	18	64	82	31%	78%	0	10	12	22	55%	35	301
144	Mulcahy, Michael E	49	20	69	0	2	31	33	30%	94%	0	5	3	8	38%	13	123
145	Nadeau, Gilbert J	130	82	212	0	4	9	13	5%	69%	0	4	9	13	69%	59	297
146	Nestor, Matthew J	252	127	379	1	2	23	26	6%	88%	0	9	14	23	61%	46	474
147	Noonan, Mark E	195	102	297	1	4	207	212	40%	98%	0	6	12	18	67%	62	589
148*	O'Dea, Kevin J*	175	56	231	11	11	42	64	21%	66%	0	5	7	12	58%	24	331
149	O'Leary, James J	92	73	165	0	3	7	10	5%	70%	0	18	24	42	57%	6	223
150*	O'Neill, W. James*	20	12	32	0	3	6	9	20%	67%	0	2	1	3	33%	14	58
151*	Orfanello, Mary A*	231	66	297	0	4	14	18	5%	78%	0	14	8	22	36%	30	367
152*	O'Shea, Daniel J*	259	127	386	1	11	17	29	7%	59%	0	10	11	21	52%	45	481
153*	Ostrach, Stephen S*	232	80	312	0	6	44	50	13%	88%	0	19	19	38	50%	29	429
154	Packard, Geoffery C	62	32	94	0	2	6	8	8%	75%	0	1	0	1	0%	32	135
155	Paratore, Dominic J	147	63	210	0	6	19	25	10%	76%	0	12	8	20	40%	25	280
156	Payne, John M	429	112	541	0	3	18	21	4%	86%	0	8	5	13	38%	48	623

TABLE A3
Judge Data

		PLEAS			BENCH TRIALS						JURY TRIALS					OTHER	OVERALL
JUDGE #	JUDGE	CWOF	GUILTY	TOTAL	CWOF	GUILTY	NOT GUILTY	TOTAL	WAIVER RATE	ACQUITTAL RATE	CWOF	GUILTY	NOT GUILTY	TOTAL	ACQUITAL RATE	TOTAL	TOTAL
157	Pearson, Barbara S	264	123	387	0	5	22	27	6%	81%	0	10	19	29	66%	21	464
158	Philbin, Austin T	47	25	72	1	1	66	68	31%	97%	0	9	71	80	89%	9	229
159*	Phillips, Gregory L*	173	86	259	0	1	1	2	1%	50%	0	8	18	26	69%	43	330
160	Pierce, Laurence D	117	47	164	0	8	9	17	8%	53%	0	14	15	29	52%	14	224
161	Poehler, Patricia T	379	100	479	0	1	3	4	1%	75%	0	2	2	4	50%	70	557
162*	Pomarole, Michael J*	130	51	181	0	9	2	11	5%	18%	0	19	30	49	61%	17	258
163**	Poole, David B**	34	12	46	0	2	2	4		50%	0	0	1	1	100%	16	67
164	Powers, Warren A	181	75	256	1	1	18	20	7%	90%	0	0	0	0	--	34	310
165**	Redd, Edward R**	20	10	30	0	0	1	1		100%	0	0	0	0	--	7	38
166	Ricciardone, David	130	88	218	1	0	82	83	23%	99%	0	16	43	59	73%	41	401
167*	Riley, William J*	24	14	38	1	2	12	15	28%	80%	0	1	0	1	0%	6	60
168	Ripps, Michael J	124	141	265	0	1	2	3	1%	67%	0	5	11	16	69%	18	302
169**	Ronquillo, Roberto**	65	22	87	0	0	4	4		100%	0	0	0	0	--	16	107
170	Rooney, Lynn C	179	97	276	0	10	6	16	5%	38%	0	19	21	40	53%	70	402
171	Ross, David S	221	81	302	0	2	6	8	2%	75%	0	17	39	56	70%	45	411
172	Rowe, Brian	1	0	1	0	0	0	0		--	0	0	0	0	--	0	1
173	Ruma, Santo J	0	1	1	0	0	0	0		--	0	0	0	0	--	0	1
174	Rutberg, Fredric D	212	145	357	0	4	2	6	2%	33%	0	10	18	28	64%	23	414
175	Ryan, Michael W	39	19	58	0	4	18	22	27%	82%	0	1	2	3	67%	3	86
176	Sabra, Bernadette L	162	79	241	2	0	7	9	4%	78%	0	1	1	2	50%	23	275
177**	Sarason, Ernest L**	49	20	69	0	0	2	2		100%	0	2	4	6	67%	5	82
178*	Savignano, Richard D*	232	89	321	0	1	3	4	1%	75%	0	4	14	18	78%	22	365
179	Schubert, John M	63	33	96	0	4	29	33	26%	88%	0	0	0	0	--	14	143
180	Shopteese, Deborah	33	20	53	0	2	5	7	11%	71%	0	4	1	5	20%	5	70
181	Singer, Sarah B	171	62	233	0	5	1	6	2%	17%	0	3	5	8	63%	12	259
182	Singh, Sabita	85	21	106	0	4	1	5	4%	20%	0	7	7	14	50%	6	131
183	Singleton, Severlin B	69	26	95	0	2	7	9	9%	78%	0	0	0	0	--	19	123
184**	Sinnott, Eleanor**	25	2	27	1	0	1	2		50%	0	1	2	3	67%	7	39
185	Snider, Neil G	311	82	393	0	2	42	44	10%	95%	0	0	1	1	100%	79	517
186	Sragow, Roanne	150	69	219	0	0	1	1	0%	100%	0	1	3	4	75%	14	238
187	Stoddart, Douglas W	255	70	325	0	9	57	66	16%	86%	0	13	14	27	52%	19	437
188	Sullivan, Anthony P	80	33	113	0	1	3	4	3%	75%	0	10	4	14	29%	11	142
189*	Sullivan, James M*	154	57	211	0	1	17	18	7%	94%	0	9	13	22	59%	30	281
190	Sullivan, Mark A	153	60	213	0	5	4	9	4%	44%	0	8	12	20	60%	23	265
191	Sullivan, Mary Hogan	164	71	235	0	19	54	73	23%	74%	0	9	4	13	31%	38	359
192	Sullivan, Thomas F	57	27	84	0	1	6	7	5%	86%	0	16	27	43	63%	23	157
193**	Summerville, Mark H**	4	2	6	0	1	5	6		83%	0	2	0	2	0%	2	16
194	Swan, Allen G	308	153	461	1	0	1	2		50%	0	23	31	54	57%	20	537
195	Teahan, William W	6	7	13	0	0	1	1	7%	100%	0	0	0	0	--	2	16

TABLE A3
Judge Data

		PLEAS			BENCH TRIALS						JURY TRIALS					OTHER	OVERALL
JUDGE #	**JUDGE**	CWOF	GUILTY	TOTAL	CWOF	GUILTY	NOT GUILTY	TOTAL	**WAIVER RATE**	**ACQUITTAL RATE**	CWOF	GUILTY	NOT GUILTY	TOTAL	**ACQUITAL RATE**	TOTAL	TOTAL
196	**Thomas, Steven E**	35	17	52	0	6	6	12	**12%**	**50%**	0	15	24	39	**62%**	7	110
197**	**Tochka, Robert N****	41	18	59	0	1	1	2		**50%**	0	5	9	14	**64%**	20	95
198*	**Turcotte, David T***	279	109	388	0	4	7	11	**3%**	**64%**	0	0	1	1	**100%**	43	443
199	**Uhlarik, Michael A**	191	73	264	0	1	8	9	**3%**	**89%**	0	25	43	68	**63%**	21	362
200	**Vega, Bethzaida**	33	17	50	0	0	6	6	**10%**	**100%**	0	3	2	5	**40%**	16	77
201	**Virzi, Vito A**	210	92	302	0	4	86	90	**20%**	**96%**	0	13	45	58	**78%**	32	482
202	**Vrabel, Paul S**	168	139	307	0	2	2	4	**1%**	**50%**	0	6	24	30	**80%**	20	361
203	**Waickowski, Paul S**	297	110	407	0	1	89	90	**17%**	**99%**	0	9	19	28	**68%**	48	573
204	**Walker, Neil J**	255	108	363	0	7	21	28	**7%**	**75%**	0	1	0	1	**0%**	104	496
205	**Walsh, Maureen E**	164	69	233	0	7	46	53	**17%**	**87%**	0	7	14	21	**67%**	44	351
206**	**Weingarten, David****	56	18	74	0	3	8	11		**73%**	0	1	10	11	**91%**	7	103
207*	**Welch, Christopher D***	133	61	194	1	8	28	37	**14%**	**76%**	1	8	19	28	**68%**	28	287
208	**Welsh, Robert A**	155	100	255	3	1	45	49	**15%**	**92%**	0	15	12	27	**44%**	47	378
209	**Wexler, James H**	109	47	156	0	1	4	5	**3%**	**80%**	0	5	5	10	**50%**	23	194
210*	**White, Mary Dacey E***	141	41	182	2	2	55	59	**24%**	**93%**	0	2	3	5	**60%**	23	269
211*	**Williams, Gregory H***	172	82	254	0	4	35	39	**13%**	**90%**	0	5	3	8	**38%**	73	374
212**	**Wright, Milton L****	24	7	31	0	0	0	0		**--**	0	0	0	0	**--**	3	34
213*	**Wright, Therese M***	155	84	239	0	8	24	32	**10%**	**75%**	0	17	18	35	**51%**	38	344
214	**Yee, Paul M**	92	39	131	0	4	5	9	**6%**	**56%**	0	8	8	16	**50%**	17	173
215	**Zaleski, Margaret**	76	24	100	0	1	7	8	**7%**	**88%**	0	2	2	4	**50%**	8	120
216	**Zide, Elliott L**	115	66	181	0	6	107	113	**32%**	**95%**	0	38	24	62	**39%**	25	381
217* **	**Ziemian, Robert P* ****	137	62	199	0	7	18	25		**72%**	0	26	31	57	**54%**	39	320
Unassigned	**Unassigned**	128	91	219	0	1	1	2			0	1	1	2		135	358
Total		28,794	12,831	41,625	63	771	5,049	5,883	**12%**	**86%**	2	1,511	2,091	3,604	**58%**	5,854	56,966

TABLE A4

Pre- and Post-Spotlight Series Data

	PLEAS			BENCH TRIALS						JURY TRIALS					OTHER	OVERALL	
	CWOF	GUILTY	TOTAL	CWOF	GUILTY	NOT GUILTY	TOTAL	**WAIVER RATE**	**ACQUITTAL RATE**	CWOF	GUILTY	NOT GUILTY	TOTAL	**ACQUITAL RATE**	TOTAL	TOTAL	**CONVICTION RATE**
OCT. 1, 2010 - MAR. 31, 2011*	3,407	1,496	4,903	9	102	706	817	**13%**	**86%**	0	169	232	401	**58%**	737	6,858	**76%**
OCT. 1, 2011 - MAR. 31, 2012*	3,291	1,497	4,788	8	79	367	454	**8%**	**81%**	3	224	341	568	**60%**	664	6,474	**79%**

* Note: These numbers do not include data from the Central Division of the BMC.

ATTACHMENT 6

ATTACHMENT 6

REPORT TO THE SUPREME JUDICIAL COURT
STATISTICAL APPENDIX

This statistical appendix describes the methodologies used to identify judges who are out of the ordinary from a statistical standpoint in terms of three different quantitative measures:

- *Acquittal Rate*: the proportion of a judge's bench trials that results in acquittal. Formally, the acquittal rate for a given judge is:

$$\text{Acquittal Rate}_j = \frac{\text{Number of Bench Trials with Not-Guilty Verdict}_j}{\text{Number of Bench Trials}_j}$$

  where *j* refers to the particular judge.

- *Waiver Rate*: the proportion of OUI cases overseen by a judge that ends up in a bench trial. Formally, the waiver rate for a given judge is:

$$\text{Waiver Rate}_j = \frac{\text{Number of Bench Trials}_j}{\text{Number of Cases Heard}_j}$$

  where the Number of Cases Heard is equal to:

  Number of Bench Trials + Number of Jury Trials + Number of Pleas (CWOFs and Guilty Pleas)

- *Number of Bench Trials*: the Number of Bench Trials presided over by a given judge. Given the definition of the waiver rate, the number of bench trials presided over by a judge is equal to the total number of cases heard by that judge multiplied by his/her waiver rate. Formally, this can be described as follows:

$$\text{Number of Bench Trials}_j = \text{Number of Cases Heard}_j \text{ x Waiver Rate}_j$$

  This implies that the Acquittal Rate defined above is based, in part, on both the Waiver Rate and the Number of Bench Trials for that judge.

Standard Statistical Techniques

To identify judges on any of these three metrics, we used two different statistical techniques: (1) bootstrapping; and (2) binomial proportion tests.

(1) Bootstrapping

Statistical bootstrapping involves applying resampling methods to create confidence intervals[1] around the mean Acquittal Rate, the Waiver Rate, and the Number of Bench Trials observed in the data. The methodological steps are as follows:

- The overall Acquittal Rate is 85.8% (5,049 not guilty verdicts for 5,883 trials), and the overall Waiver Rate is 11.5% (5,883 bench trials out of 51,112 non-dismissed cases). These reported overall percentages are equivalent to weighted averages across all judges statewide.
- Because judges can have very different assignments and therefore different OUI caseloads, statistical analysis of the distribution of judges on various performance metrics can be used to evaluate differences in the raw data. For example, a judge who heard more OUI cases should be more heavily weighted than one who presided over very few when trying to characterize overall tendencies across judges.
- We therefore create an alternative sample of Massachusetts District Court judges and Boston Municipal Court judges by drawing with replacement 216 times out of the pool of 217 judges.[2] In performing this exercise, each judge has a probability to be drawn that is proportional to the total number of non-dismissed OUI cases heard over the sampling period. The weighting scheme allows the alternative sample created to be more representative of the distribution of judges' experiences than would be the case if all judges counted equally regardless of their cumulative OUI caseload over time.
- Once the sample is created, we compute the overall Acquittal Rate and Waiver Rate for the alternative sample.
- We repeat this operation 1,000 times, creating 1,000 different computations of the overall Acquittal Rate and Waiver Rate for the different samples.
- We rank the 1,000 overall Acquittal Rates from smallest to largest. The 25^{th} value corresponds to the lower limit of the 95% confidence interval, while the 975^{th} corresponds to the upper limit of this confidence interval. Thus, 2.5% of the sample can be found below and 2.5% above the limits of the confidence interval.
- We then repeat the same sequence of steps in calculating the distribution of overall Waiver Rates.
- Finally, we follow an identical process to measure the 95% confidence interval around the average Number of Bench Trials heard by a judge.

[1] A confidence interval measures a range around a statistic that defines the level of precision with which that statistic is measured. For example, if an individual has an acquittal rate that falls outside the 95% confidence interval, there is a 95% likelihood that this individual's acquittal rate is truly different from the average.

[2] The original dataset includes 217 judges. However, judge #33 had zero non-dismissed cases and is therefore excluded from the analyses.

The idea behind the bootstrapping technique is that the 217 judges who handled the 56,966 cases in the database are drawn from an unobserved larger distribution of judges and cases. By resampling amongst the judges using statistical bootstrapping, one can assess the stability of the observed metrics of interest, and calculate the extent to which small changes in the composition in the sample of judges could lead to large changes in these metrics. Once the 95% confidence intervals for each of these overall measures is known, it becomes easy to flag judges who fall outside these intervals for any one--or for combinations--of metrics.

(2) Binomial Proportion Tests

The second statistical technique is used to evaluate whether an individual judge's Acquittal Rate and Waiver Rate is significantly different from the mean value. The idea behind this test is fairly simple. If one throws a coin three times and gets three heads, this is probably not sufficient evidence to conclude that the coin is not fair. On the other hand, if one throws that coin 100 times and gets 100 heads, chances are very high that the coin is actually not fair.

For instance, one proportion test looks at each judge's Acquittal Rate, and computes whether it is statistically significantly higher or lower than the observed average of 85.8%. A similar proportion test is implemented with respect to each judge's Waiver Rate in comparison with the overall average of 11.5%. This type of test does not allow a disentangling, as neatly as with the bootstrap approach, of the respective influence of the Acquittal Rate, the Waiver Rate, and the overall Number of Cases Heard by the judge. Instead, it implicitly blends the three metrics together.

The result of the test is summarized in a "Z-score," which measures the likelihood that the observed gap between a judge's Acquittal Rate, for example, and the overall average is due to chance alone. To illustrate this point, if a particular judge has a 91% Acquittal Rate with a Z-score of 1%, this would imply that there is only a 1% chance that the judge's Acquittal Rate is actually higher than the 85.8% average by mere chance. Note that the generally accepted cutoff for significance is 2.5% on either side of the mean (i.e., consistent with a 95% level of confidence). More generally, any judge whose Acquittal Rate is above the overall 85.8% average, with an accompanying proportion test that returns a Z-score below 2.5%, would be considered an outlier on this particular metric.

Results

Using the bootstrapping technique, the derived 95% confidence intervals are as follows:

- Acquittal Rate – between 85.0% and 87.2% (weighted mean = 85.8%)
- Waiver Rate – between 10.7% and 12.4% (weighted mean = 11.5%)

- Number of Bench Trials – between 33 and 39 (weighted mean = 36[3])

Table 1 presents the list of 28 judges who are above the 95% confidence interval threshold on all three of these metrics (i.e., Acquittal Rate > 87.2%, Waiver Rate > 12.4% and Number of Bench Trials > 39).

Table 1: Judges above the Upper Limit of the 95% Confidence Interval for Acquittal Rate (87.2%), Bench Trial Waiver Rate (12.4%), and Number of Bench Trials (39)

Judge #	Total OUI Cases	Waiver Rate	Bench Trials	Bench Trial Acquittal Rate
2	180	26%	41	100%
3	183	43%	73	97%
13	206	40%	76	95%
26	343	13%	42	90%
27	157	30%	42	88%
50	432	22%	87	87%
55[4]	536		71	97%
80	330	51%	149	100%
85	403	14%	52	98%
87	329	39%	116	89%
91	337	19%	52	92%
111	347	20%	60	92%
113	310	17%	50	100%
122	560	30%	158	99%
131	168	29%	45	93%
132	500	23%	99	91%
134	183	61%	97	95%
140	468	34%	142	94%
147	589	40%	212	98%
153	429	13%	50	88%
158	229	31%	68	97%
166	401	23%	83	99%

[3] Note that the weighted mean number of bench trials per judge is 36, while the unweighted mean is 27.
[4] Since this judge sat in the BMC Central Division (and other courts as well), we do not have data for his pleas and other dispositions for the Central Division. Therefore, a waiver rate was not computed, as that rate is dependent upon a comparison of bench trials to the total of trials and pleas.

Judge #	Total OUI Cases	Waiver Rate	Bench Trials	Bench Trial Acquittal Rate
201	482	20%	90	96%
203	573	17%	90	99%
208	378	15%	49	92%
210	254	23%	54	93%
211	374	13%	39	90%
216	381	32%	113	95%

As noted above, the Acquittal Rate incorporates attention to the Number of Bench Trials (the denominator of this ratio), which is itself a function of the Waiver Rate. Therefore, using the proportion test of the Acquittal Rate captures, either directly or indirectly, attention to all three of these influences. Table 2 lists the 21 judges whose Acquittal Rates are statistically above average, based on the criterion of a Z-score below 2.5%.

Table 2: Judges with Significantly Higher than Average Acquittal Rate (85.8%) based on a Proportion Test

Judge #	Bench Trials	Bench Trial Acquittal Rate	Z-Score
2	41	100%	0.002
3	73	97%	0.001
13	76	95%	0.012
19	40	100%	0.002
25	39	97%	0.019
41	38	97%	0.022
55	71	97%	0.002
73	34	100%	0.005
80	149	100%	0.000
82	39	100%	0.003
85	52	98%	0.003
113	50	100%	0.000
122	158	99%	0.000
134	97	95%	0.004
140	142	94%	0.003

Judge #	Bench Trials	Bench Trial Acquittal Rate	Z-Score
147	212	98%	0.000
158	68	97%	0.002
166	83	99%	0.000
201	90	96%	0.003
203	90	99%	0.000
216	113	95%	0.002

There is considerable overlap between the two tables:

- Five judges appear in Table 2, but were excluded from Table 1. They are: 19, 25 and 82 (their waiver rates are too low to qualify them for Table 1) and 41 and 73 (who had less than 39 bench trials);
- Twelve judges appear in Table 1, but not in Table 2. These judges have acquittal rates that are above average, but not by much, and have presided over enough trials for the difference to be statistically significant.

Table 3 presents the results of the proportional binomial tests on Waiver Rates. The test is restricted to judges who presided over a larger than average number of trials (44 trials, bench or jury). As for the test on acquittal rate, the Table identifies judges whose Waiver Rates are statistically below average, based on the criterion of a Z-score below 2.5%.

Table 3: Judges with Significantly Lower than Average Waiver Rates and at least 44 Trials (Bench or Jury)

Judge #	Total Pleas Plus Trials	Waiver Rate	Bench Trials	Jury Trials	Bench Trial Acquittal Rate
20	486	5%	25	33	84%
22	291	6%	17	70	71%
25	482	8%	39	30	97%
45	488	8%	41	43	85%
58	1213	1%	7	64	100%

Judge #	Total Pleas Plus Trials	Waiver Rate	Bench Trials	Jury Trials	Bench Trial Acquittal Rate
65	361	6%	21	29	67%
89	426	5%	20	37	85%
102	455	7%	33	133	82%
115	445	7%	29	22	93%
119	341	6%	21	28	86%
146	428	6%	26	23	88%
149	217	5%	10	42	70%
152	436	7%	29	21	59%
157	443	6%	27	29	81%
162	241	5%	11	49	18%
170	332	5%	16	40	38%
171	366	2%	8	56	75%
192	134	5%	7	43	86%
194	517	0%	2	54	50%
199	341	3%	9	68	89%

ATTACHMENT 7

ATTACHMENT 7

INTERVIEWS CONDUCTED

A. Judges We Interviewed

We met with the Administrative Committee of the District Court, which includes Lynda M. Connolly, Chief Justice of the District Court, Ellen Shapiro, Director of District Court Operations, Peter J. Kilmartin, Presiding Judge of the Ayer and Concord District Courts, and six Regional Administrative Judges ("RAJs"). We then met individually with each of the six RAJs. Thereafter we had additional conversations with some of them. The RAJs and the Regions that they oversee are identified below:

	REGION 1	**REGION 2**	**REGION 3**
RAJ:	Rosemary Minehan	Paul Dawley	Robert Brennan
Courts:	Barnstable Edgartown Fall River Falmouth Hingham Nantucket New Bedford Orleans Plymouth Wareham	Attleboro Brockton Brookline Dedham Quincy Stoughton Taunton Wrentham	Cambridge Chelsea Gloucester Haverhill Ipswich Lynn Malden Newburyport Peabody Salem Somerville

	REGION 4	**REGION 5**	**REGION 6**
RAJ:	Michael Brooks	Paul LoConto	Maureen Walsh
Courts:	Ayer Concord Framingham Lawrence Lowell Marlborough Natick Newton Waltham Woburn	Clinton Dudley East Brookfield Fitchburg Gardner Leominster Milford Uxbridge Westborough Winchendon Worcester	Chicopee Eastern Hampshire Greenfield Holyoke Northampton Northern Berkshire Orange Palmer Pittsfield Southern Berkshire Springfield Westfield

We met with the following justices of the Boston Municipal Court:

JUDGE	TITLE
Charles Johnson	Chief Justice of the BMC
Raymond Dougan	First Justice, BMC Central
Robert Ronquillo	First Justice, East Boston Division
David Weingarten	First Justice, Roxbury Division
Michael Coyne	Justice, BMC Central
Thomas Horgan	Justice, BMC Central
James Coffee	Associate Justice, Dorchester Division
Kenneth Desmond	Associate Justice, East Boston Division
Kenneth Fiandaca	Associate Justice, Roxbury Division
Annette Ford	Associate Justice
Tracy-Lee Lyons	Associate Justice

In addition, the following administrators participated in our meetings with the BMC justices: Michael O'Laughlin, Administrative Attorney; Lisa Yee, Administrative Attorney; Christopher Connolly, Chief, BMC's Administrative Office.

We also requested interviews with four judges who sat regularly in courts in Worcester County: We interviewed Justices Timothy Bibaud, Margaret Guzman, and Andrew Mandell. Justice Mark Noonan declined our request for an interview.

B. Prosecutors We Interviewed

In addition to obtaining the data provided to the Globe by the District Attorneys, we interviewed each of Massachusetts's 11 District Attorneys and other members of their offices. Specifically, we interviewed the following individuals from each office:

District Attorney's Office	Individual(s) Interviewed
Berkshire County	David Capeless, District Attorney Kelly Kemp, Assistant District Attorney
Bristol County	Samuel Sutter, District Attorney Derrick Coyne, District Court Supervisor Paul Machado, Assistant District Attorney
Cape & Islands	Michael O'Keefe, District Attorney Tara Meltmore, Assistant District Attorney
Essex County	Jonathan Blodgett, District Attorney Mary Doyle, District Court Supervisor William Melkonian, Assistant District Attorney

District Attorney's Office	Individual(s) Interviewed
Hampden County	Mark Mastroianni, District Attorney
Middlesex County	Gerard Leone, Jr., District Attorney Sarah Ellis, District Court Supervisor
Norfolk County	Michael Morrissey, District Attorney Michael Connolly, District Court Chief
Northwestern District	David Sullivan, District Attorney
Plymouth County	Timothy Cruz, District Attorney Bridget Middleton, Assistant District Attorney Timothy Shyne, Assistant District Attorney
Suffolk County	Daniel Conley, District Attorney Christina Miller, District Court Chief
Worcester County	Joseph Early, Jr., District Attorney Daniel Bennett, First Assistant Marc Dupuis, Assistant District Attorney John Hartmayer, Assistant District Attorney

C. Defense Lawyers We Interviewed

Based on the MassCourts data we collected, we identified defense lawyers who appeared most often in the database. (Note that the name of the defense attorney is included in MassCourts for each case only about 75% of the time.) Ultimately we interviewed the following defense attorneys:

ATTORNEY
Steven Panagiotes
Jack Diamond
James Milligan
James Geraghty
Anthony Salerno
Stephen Jones
Daniel O'Malley
Terrence Kennedy

D. Other Individuals We Interviewed

To gain additional information concerning judicial training we spoke with the following individuals:

INDIVIDUALS INTERVIEWED
Andrea Nardone, Esq., Massachusetts Traffic Safety Resource Prosecutor
Ellen O'Connor, Esq., Director of Judicial Education at the Judicial Institute
Victoria Lewis, Esq., Lead Program Manager at the Judicial Institute

ATTACHMENT 8

ATTACHMENT 8

TABLE OF OUI LAWS IN OTHER STATES

* References to statutes, rules, and cases are summaries, and are not verbatim quotations of these respective sources.

STATE	STATUTE	JURY WAIVER	BT REFUSAL
Alabama	Code of Ala. § 32-5A-191	*Consent of court required.* *Consent of prosecution required.* Ala. R. Crim. P. 18.1(b) • In all cases, the defendant may waive his right to trial by jury, with the consent of the prosecutor and the court.	*Admissible.* Code of Ala. § 32-5A-194(c) • If a person under arrest refuses to submit to a chemical test under the provisions of Section 32-5-192, evidence of refusal shall be admissible in any civil, criminal or quasi-criminal action or proceeding arising out of acts alleged to have been committed while the person was driving or in actual physical control of a motor vehicle while under the influence of alcohol or controlled substance. Hill v. State, 366 So. 2d 318 (Ala. 1979) • Admission of refusal to submit to breathalyzer test not violation of defendant's 5A right against self-incrimination. Evidence admissible to show consciousness of guilt.
Alaska	Alaska Stat. § 28.35.030	*Consent of court required.* *Consent of prosecution required.* Alaska R. Crim. Proc. 23(a) • Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the state.	*Admissible.* Alaska Stat. § 28.35.032(e) • The refusal of a person to submit to a chemical test authorized under AS 28.33.031(a) or AS 28.35.031(a) or (g) is admissible evidence in a civil or criminal action or proceeding arising out of an act alleged to have been committed by the person while operating or driving a motor vehicle or operating an aircraft or watercraft while under the influence of an alcoholic beverage, inhalant, or controlled substance.
Arizona	Ariz. Rev. Stat. § 28-1381,	*Consent of court required.*	*Admissible.*

STATE	STATUTE	JURY WAIVER	BT REFUSAL
	1382, 1383	*Consent of prosecution required.* Ariz. R. Crim. P. 18.1(b) • The defendant may waive the right to trial by jury with consent of the prosecution and the court.	State v. Lee, 908 P.2d 44 (Ariz. Ct. App. 1995) • Refusal to take chemical breath test is physical evidence only, not testimonial, and thus admissible at a criminal trial for DUI.
Arkansas	Ark. Code Ann § 5-65-103	*Consent of prosecution required.* Ark. Code Ann. § 16-89-108(a) • In all criminal cases, except where a sentence of death may be imposed, trial by a jury may be waived by the defendant, provided the prosecuting attorney gives his or her assent to the waiver.	*Admissible.* Medlock v. State, 964 S.W.2d 196 (Ark. 1998) • Refusal bears on consciousness of guilt and is probative on the issue of intoxication.
California	Cal. Veh. Code § 23152	*Consent of prosecution required.* Cal. Const., Art. I § 16 • A jury may be waived in a criminal cause by the consent of both parties expressed in open court by the defendant and the defendant's counsel. People v. Whitmore, 251 Cal. App. 2d 359 (Cal. Ct. App. 1967) • While a defendant has a constitutional right to a jury trial, he does not have the correlative right to a trial without a jury. Consent by the prosecuting attorney is	*Admissible.* People v. Municipal Court, 137 Cal. App. 3d 114 (Cal. Ct. App. 1982) • Admission into evidence of refusal to submit to testing does not violate defendant's 5th Amendment privileges because refusal is circumstantial evidence of consciousness of guilt rather than testimonial evidence.

STATE	STATUTE	JURY WAIVER	BT REFUSAL
		necessary notwithstanding that defendant insists on a trial by judge alone. People v. Terry, 466 P.2d 961 (Cal. 1970) • The judge does not have to consent to a nonjury trial nor can he overrule the consent of defendant and the prosecutor. Under the Constitution, this determination is left to the consent of both parties, the defendant and the prosecutor, and the concurrence of the court is not required.	
Colorado	Colo. Rev. Stat. §42-4-1301	*Consent of prosecution required.* Colo. Crim. P. 23(a)(5) • The person accused of a felony or misdemeanor may, with the consent of the prosecution, waive a trial by jury in writing or orally in court. Trial shall then be to the court.	*Admissible.* Colo. Rev. Stat. §42-4-1301(6)(d) • If a person refuses to take or to complete, or to cooperate with the completing of, any test or tests as provided in section 42-4-1301.1 and such person subsequently stands trial for DUI or DWAI, the refusal to take or to complete, or to cooperate with the completing of, any test or tests shall be admissible into evidence at the trial, and a person may not claim the privilege against self-incrimination with regard to admission of refusal to take or to complete, or to cooperate with the completing of, any test or tests. Cox v. People, 735 P.2d 153 (Colo. 1987) • Defendants' refusals to take a blood or breath test after lawful requests did not constitute compelled testimony entitled to protection under Colo. Const. art. II, § 18.
Connecticut	Conn. Gen. Stat. § 14-227a	*At the sole option of defendant.*	*Admissible.*

STATE	STATUTE	JURY WAIVER	BT REFUSAL
		Conn. Gen. Stat. § 54-82(a) • In any criminal case, prosecution or proceeding, the party accused may, if he so elects when called upon to plead, be tried by the court instead of by the jury; and, in such case, the court shall have jurisdiction to hear and try such case and render judgment and sentence thereon.	Conn. Gen. Stat. § 14-227a(e) • In any criminal prosecution for a violation of subsection (a) of this section, evidence that the defendant refused to submit to a blood, breath or urine test shall be admissible. If a case involving a violation of subsection (a) of this section is tried to a jury, the court shall instruct the jury as to any inference that may or may not be drawn from the defendant's refusal to submit to a blood, breath or urine test. State v. Seekins, 1 A.3d 1089 (Conn. App. Ct. 2010) • Four inferences must be drawn regarding consciousness of guilt: (1) an inference from the conduct of the defendant to his denial to the prosecution of Breathalyzer evidence of his blood alcohol level, (2) from that denial to an inference of consciousness of guilt, (3) from that consciousness of guilt to an inference of consciousness of guilt as to having operated a motor vehicle while under the influence of alcohol and (4) therefrom to an inference of guilt of that offense.
Delaware	21 Del. C. § 4177	*Consent of court required.* *Consent of prosecution required.* Del. Super. Ct. Crim. R. 23 • Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the state.	*Admissible.* 21 Del. Code § 2749 • Upon the trial of any action or proceeding arising out of the acts alleged to have been committed by any person while in violation of § 4177 or § 4177L of this title or local ordinance substantially conforming thereto, the court may admit evidence of the refusal of such person to submit to a chemical test of breath, blood or urine under this subchapter. State v. Lynch, 274 A.2d 443 (Del. Super. Ct. 1971) • Supporting admissibility of refusal because (1) the statute was obviously intended to broaden the police arsenal in the fight against persons who drive while under the influence and so no inference of statutory restrictions on evidence should be drawn; (2) even without the statute, the court has held refusal may be considered by the jury; (3) the defendant's conduct and demeanor are vital evidence and refusal is an integral part of the circumstances surrounding the arrest; and (4) the statute is

STATE	STATUTE	JURY WAIVER	BT REFUSAL
			confirmatory of common law principles.
D.C.	D.C. Code § 50-2201.05	*Consent of court required.* *Consent of prosecution required.* D.C. Code § 16-705 • The defendant is entitled to a jury trial, the trial shall be by jury, unless the defendant in open court expressly waives trial by jury and requests trial by the court, and the court and the prosecuting officer consent thereto.	*Admissible.* Stevenson v. District of Columbia, 562 A.2d 622 (D.C. 1989) • Appellant's refusal to take a blood alcohol test could properly be considered against him as evincing consciousness of guilt.
Florida	Fla. Stat. § 316.193	*Consent of prosecution required.* Fla. R. Crim. P. 3.260 • A defendant may in writing waive a jury trial with the consent of the state. State v. Thorup, 659 So. 2d 1116, 1117 (Fla. Dist. Ct. App. 2d Dist. 1995) • Rules relating to waiver of a jury trial are procedural rather than substantive in nature, and the supreme court has established the procedural rule governing this waiver without abrogating or modifying the substantive right to a trial by jury.	*Admissible.* State v. Pagach, 442 So. 2d 331 (Fla. Dist. Ct. App. 2d Dist. 1983) • The legislature acted clearly within its prerogative when it added the section providing that refusal to submit to a chemical test is admissible evidence in any criminal proceeding. • Admission of the refusal evidence at trial without previously advising the driver that his refusal could be introduced against him is not violative of either federal or state constitutional rights.
Georgia	O.C.G.A. § 40-6-391	*Consent of prosecution required.*	*Admissible.*

STATE	STATUTE	JURY WAIVER	BT REFUSAL
		Zigan v. State, 638 S.E.2d 322 (Ga. 2006). • Although appellants' waiver of the right to trial by jury appears adequate, the refusal of the prosecution to consent left the trial court with no choice but to deny the demand.	O.C.G.A. § 40-6-392(d) • In any criminal trial, the refusal of the defendant to permit a chemical analysis to be made of his blood, breath, urine, or other bodily substance at the time of his arrest shall be admissible in evidence against him. Keenan v. State, 436 S.E.2d 475 (Ga. 1993) • Although the legislature has granted a driver the right to refuse to take a State-administered test, it has nevertheless mandated that evidence of the exercise of that right shall be admissible in the driver's criminal trial.
Hawaii	HRS § 291E-61	*Consent of court required.* HRS § 806-61 • The defendant in any criminal case may, with the consent of the court, waive the right to a trial by jury either by written consent filed in court or by oral consent in open court entered on the minutes.	*Admissible.* State v. Ferm, 7 P.3d 193 (Haw. Ct. App. 2000) • Because defendant's refusal to take the field sobriety test was neither testimonial nor compelled, the fifth amendment and article I, section 10 were not offended.
Idaho	Idaho Code § 18-8004	*Consent of prosecution required.* I.C.R. Rule 23(a) • In felony cases issues of fact must be tried by a jury, unless a trial by jury is waived by a written waiver executed by the defendant in open court with the consent of the prosecutor expressed in open court and entered in the minutes. I.C.R. Rule 23(b) • In criminal cases not amounting	*Admissible.* State v. Bock, 328 P.2d 1065 (Idaho 1958) • Evidence of appellant's refusal to submit to a blood test was competent and admissible. Like any other act or statement voluntarily made by him, it was competent for the jury to consider and weigh, with the other evidence, and to draw from it whatever inference as to guilt or innocence may be justified thereby.

STATE	STATUTE	JURY WAIVER	BT REFUSAL
		to a felony, issues of fact must be tried by a jury, unless a trial by jury is waived by the consent of both parties expressed in open court and entered in the minutes.	
Illinois	625 ILCS 5/11-501	*At the sole option of defendant.* 725 ILCS 5/103-6 • Every person accused of an offense shall have the right to a trial by jury unless (i) understandingly waived by defendant in open court or (ii) the offense is an ordinance violation punishable by fine only and the defendant either fails to file a demand for a trial by jury at the time of entering his or her plea of not guilty or fails to pay to the clerk of the circuit court at the time of entering his or her plea of not guilty any jury fee required to be paid to the clerk. State v. Reed, 319 N.E.2d 557 (Ill. App. Ct. 4th Dist. 1974) • It was reversible error for the trial court not to accept defendant's waiver of a jury trial even though the state objected to that waiver.	*Admissible.* 625 ILCS 5/11-501.2(c)(1) • Evidence of refusal shall be admissible in any civil or criminal action or proceeding arising out of acts alleged to have been committed while the person under the influence of alcohol, other drug or drugs, or intoxicating compound or compounds, or any combination thereof was driving or in actual physical control of a motor vehicle.
Indiana	Indiana Code § 9-30-5-1	*Consent of court required.* *Consent of prosecution required.*	*Admissible.*

STATE	STATUTE	JURY WAIVER	BT REFUSAL
		Indiana Code § 35-37-1-2 • The defendant and prosecuting attorney, with the assent of the court, may submit the trial to the court. Arnold v. State, 460 N.E.2d 494 (Ind. 1984) • Statute clearly states that a defendant may not waive a jury trial without the assent of the prosecutor *and* the trial court.	Indiana Code § 9-30-6-3(b). • At any proceeding under this chapter, a person's refusal to submit to a chemical test is admissible into evidence.
Iowa	Iowa Code § 321J.2	*At the sole option of defendant only during a specified period of time.* *Otherwise, consent of prosecution required.* Iowa R. Crim. P. 2.17 • Cases required to be tried by jury shall be so tried unless the defendant voluntarily and intelligently waives a jury trial in writing and on the record within 30 days after arraignment, or if no waiver is made within 30 days after arraignment the defendant may waive within ten days after the completion of discovery, but not later than ten days prior to the date set for trial, as provided in these rules for good cause shown, and after such times only with the consent of the prosecuting attorney. The	*Admissible.* Iowa Code § 321J.16 • If a person refuses to submit to a chemical test, proof of refusal is admissible in any civil or criminal action or proceeding arising out of acts alleged to have been committed while the person was operating a motor vehicle.

STATE	STATUTE	JURY WAIVER	BT REFUSAL
		defendant may not withdraw a voluntary and knowing waiver of trial by jury as a matter of right, but the court, in its discretion, may permit withdrawal of the waiver prior to the commencement of the trial.	
Kansas	K.S.A. § 8-1567	*Consent of court required.* *Consent of prosecution required.* K.S.A. 22-3403(1) • The defendant and prosecuting attorney, with the consent of the court, may submit the trial of any felony to the court. State v. Irving, 533 P.2d 1225 (Kan. 1975) • It is provided by statute in this state that a jury trial may be waived in any criminal trial where the defendant, the state, and the trial court assent to such waiver.	*Admissible.* K.S.A. § 8-1001(n) • The person's refusal to submit to a chemical test shall be admissible in evidence against the person at any trial on a charge arising out of the alleged operation or attempted operation of a vehicle while under the influence of alcohol or drugs, or both.
Kentucky	KRS § 189A.010	*Consent of court required.* *Consent of prosecution required.* Ky. RCr Rule 9.26(1) • Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the Commonwealth.	*Admissible.* KRS § 189A.105(2)(a)(1) • If the person refuses to submit to such tests, the fact of this refusal may be used against him in court. Hoppenjans v. Commonwealth, 299 S.W.3d 290 (Ky. Ct. App. 2009) • The jury heard testimony that Hoppenjans refused to submit to a breath test. Such a refusal is admissible pursuant to KRS 189A.105(2)(a)(1).

STATE	STATUTE	JURY WAIVER	BT REFUSAL
Louisiana	La. R.S. 14:98	*At the sole option of defendant only during a specified period of time.* *Otherwise, consent of the court is required.* *In any event, waiver can occur no later than 45 days prior to trial.* La. Const. Art. I, § 17 • Except in capital cases, a defendant may knowingly and intelligently waive his right to a trial by jury but no later than forty-five days prior to the trial date and the waiver shall be irrevocable.	*Admissible.* La. R.S. 32:666 • Evidence of an offender's refusal shall be admissible in any criminal action or proceeding arising out of acts alleged to have been committed while the person was driving or in actual physical control of a motor vehicle upon the public highways of this state while under the influence of alcoholic beverages or any abused substance or controlled dangerous substance. State v. Shoupe, 71 So. 3d 508 (La. Ct. App. 2011) • A defendant's refusal to take the breath test is admissible at a DWI prosecution; the weight of the evidence is left to the trier of fact.
Maine	29 M.R.S. § 2401 29 M.R.S. § 2411	*Consent of court required.* Me. R. Crim. P. 23(a) • The defendant with the approval of the court may waive a jury trial.	*Admissible (if proper warnings of consequences are given).* 29-A M.R.S. § 2521 • Neither a refusal to submit to a test nor a failure to complete a test may be admissible in court unless the person has first been told that the refusal or failure will: result in suspension of that person's driver's license for a period up to 6 years; be admissible in evidence at a trial for operating under the influence of intoxicants; and be considered an aggravating factor at sentencing if the person is convicted of operating under the influence of intoxicants that, in addition to other penalties, will subject the person to a mandatory minimum period of incarceration.
Maryland	Md. TRANSPORTATION Code Ann. § 21-902	*At the sole option of defendant unless the court determines the defendant lacks the knowledge necessary to make that selection.* Md. Rule 4-246	*Admissible.* Md. COURTS AND JUDICIAL PROCEEDINGS Code Ann. § 10-309(a)(2) • The fact of refusal to submit is admissible in evidence at the trial.

STATE	STATUTE	JURY WAIVER	BT REFUSAL
		• In the circuit court, a defendant having a right to trial by jury shall be tried by a jury unless the right is waived. The State does not have the right to elect a trial by jury. Thomas v. State, 598 A.2d 789 (Md. Ct. Spec. App. 1991) • When a defendant or his counsel informs the court that the defendant desires to be tried by the court, a court may not deny the defendant his right to select a court trial unless, after a sufficient inquiry of the defendant, the trial court finds that because of his inability to understand, he lacks the knowledge necessary to make that selection.	Wyatt v. State, 817 A.2d 901 (Md. Ct. Spec. App. 2003) • Legislature amended the drunk driving statute to explicitly provide that an accused's refusal to take a breathalyzer test could be admitted in evidence. The appellate court found the amended statute did not violate defendant's guarantee against self-incrimination.
Massachusetts	G. L. c. 90, § 24	*Consent of court required.* G. L. c. 218 § 26A • Trial of criminal offenses in the Boston municipal court department and in the district court department shall be by a jury of six persons, unless the defendant files a written waiver and consent to be tried by the court without a jury. Mass. R. Crim. P. Rule 19(a) • A case in which the defendant has the right to be tried by a jury shall be so tried unless the	*Inadmissible.* G. L. c. 90, § 24 (1) (e) • Evidence that the defendant failed or refused to consent to such test or analysis shall not be admissible against him in a civil or criminal proceeding. Opinion of Justices to Senate, 412 Mass. 1201 (1992) • Holding that a proposed statute, which would have permitted a defendant's failure or refusal to submit to a chemical test or analysis of his breath to be admissible as evidence in a criminal proceeding, would have violated the self-incrimination clause, Mass. Const. Declaration of Rights art. 12, in that the defendant would have been compelled to furnish evidence against himself.

STATE	STATUTE	JURY WAIVER	BT REFUSAL
		defendant waives a jury trial in writing with the approval of the court and files the waiver with the clerk, in which instance he shall be tried by the court instead of by a jury.	
Michigan	MCL § 257.625	*Consent of court required.* *Consent of prosecution required.* MCL § 763.3 • In all criminal cases arising in the courts of this state the defendant may, with the consent of the prosecutor and approval by the court, waive a determination of the facts by a jury and elect to be tried before the court without a jury. Michigan Court Rule 6.401 • The defendant has the right to be tried by a jury, or may, with the consent of the prosecutor and approval by the court, elect to waive that right and be tried before the court without a jury. People v. Kirby, 487 N.W.2d 404 (Mich. 1992) • While defendants' right to trial by jury was guaranteed by the Michigan and federal constitutions, there was no corresponding constitutional right to waive a jury, and any rights a defendant might have to	*Admissible (only to show that a test was administered, not to show guilt).* MCL § 257.625a(9) • A person's refusal to submit to a chemical test is admissible in a criminal prosecution only to show that a test was offered to the defendant, but not as evidence in determining the defendant's innocence or guilt. The jury shall be instructed accordingly. People v. Keskinen, 441 N.W.2d 79 (Mich. Ct. App. 1989) • Generally, evidence of a defendant's refusal to take a Breathalyzer test should not be admitted in the prosecutor's case in chief because it constitutes neither evidence of guilt or innocence nor evidence regarding an essential element of the crime. However, refusal to take a Breathalyzer test may be admitted at trial in situations where the defendant opens the controversy by a showing of lack of credibility or competence of the police officer and it is necessary to rebut defendant's evidence.

STATE	STATUTE	JURY WAIVER	BT REFUSAL
		waive a jury were solely those granted by the legislature. Therefore, the trial court could not hold unconstitutional the requirement of prosecutorial consent to a waiver of jury trial where the right to waive a jury trial was not a constitutionally protected right.	
Minnesota	Minn. Stat. 169A.20	*Consent of court required.* Minn. R. Crim. P. 26.01(2)(a) • The defendant, with the approval of the court, may waive a jury trial on the issue of guilt provided the defendant does so personally, in writing or on the record in open court, after being advised by the court of the right to trial by jury, and after having had an opportunity to consult with counsel. State v. Lessley, 779 N.W.2d 825 (Minn. 2010) • The State argued that Minn. Const. art. I, § 4 should be read to require the State's consent before a criminal defendant could waive a jury trial and be tried by a judge of the district court. The supreme court disagreed. Minn. Const. art. I, § 4 did not require the State's consent before a defendant sought to waive a jury trial.	*Admissible.* Minn. Stat. § 169A.45(3) • Evidence of the refusal to take a test is admissible into evidence in a prosecution under section 169A.20 (driving while impaired). State v. Berge, 464 N.W.2d 595 (Minn. Ct. App. 1990) • Evidence of the refusal to take the test was admissible; statute passed constitutional muster under the federal constitution; and since the federal and state constitutions protecting compelled self-incrimination were coextensive, statute was not unconstitutional under the state constitution.

STATE	STATUTE	JURY WAIVER	BT REFUSAL
		State v. Kilburn, 231 N.W.2d 61 (Minn. 1975) • Restrictions on waiver of a jury trial does not violate the United States Constitution or the Minnesota Constitution. Minn. Stat. § 631.01 does not create an absolute right to waive a jury trial. The right is subject to the approval of the trial court.	
Mississippi	Miss. Code Ann. § 63-11-30	*Consent of prosecution required.* Robinson v. State, 345 So. 2d 1044 (Miss. 1977) • It has been settled in Mississippi that trial by jury in criminal cases may be waived by the agreement of the defendant and the prosecution. (citing Prueitt v. State, 261 So.2d 119, 121-22 (Miss. 1972)).	*Admissible.* Miss. Code Ann. § 63-11-41 • If a person under arrest refuses to submit to a chemical test under the provisions of this chapter, evidence of refusal shall be admissible in any criminal action under this chapter. Ricks v. State, 611 So. 2d 212 (Miss. 1992) • Evidence of defendant's refusal to take a blood alcohol test could be admitted into evidence against him without violating the Fifth Amendment. Defendant's refusal was physical instead of testimonial; thus, its introduction into evidence violated neither the Fifth Amendment or Mississippi Constitution.
Missouri	R.S.Mo. §§ 577.010, 577.012	*Consent of court required.* Mo. Sup. Ct. R. 27.01(b) • The defendant may, with the assent of the court, waive a trial by jury and submit the trial of any criminal case to the court, whose findings shall have the force and effect of the verdict of	*Admissible.* R.S.Mo. § 577.041 • If a person refuses upon the request of the officer to submit to any test allowed pursuant to section 577.020, then evidence of the refusal shall be admissible in a proceeding pursuant to section 565.024, 565.060, or 565.082, or section 577.010 or 577.012.

STATE	STATUTE	JURY WAIVER	BT REFUSAL
		a jury. In felony cases such waiver by the defendant shall be made in open court and entered of record. State v. Taylor, 391 S.W.2d 835 (Mo. 1965) • Missouri requires that a waiver of the right to trial by jury has to be agreed to by the trial court. Defendant had no absolute right, either by constitution, statute, or court rule, to elect that he would be tried by the court without a jury. State v. Goree, 762 S.W.2d 20 (Mo. 1988) • Defendant had no absolute right to waive jury trial, and, in view of unambiguous language of state constitution conditioning waiver right on assent of court, trial court's failure to sustain defendant's waiver motion was not abuse of discretion.	
Montana	Mont. Code Anno. § 61-8-401	*Consent of prosecution required.* Mont. Code Anno. § 46-16-110(3) • Upon written consent of the parties, a trial by jury may be waived. State ex rel. Long v. Justice Court, 156 P.3d 5 (Mont. 2007) • Art. II, sec. 26, Mont. Const., provides a right of a jury trial to	*Admissible.* Mont. Code Anno., § 61-8-404(2) • If the person under arrest refused to submit to one or more tests, proof of refusal is admissible in any criminal action or proceeding arising out of acts alleged to have been committed while the person was driving or in actual physical control of a vehicle upon the ways of this state open to the public, while under the influence of alcohol, drugs, or a combination of alcohol and drugs. The trier of fact may infer from the refusal that the person was under the influence. The inference is rebuttable.

STATE	STATUTE	JURY WAIVER	BT REFUSAL
		the state and both parties in a criminal trial must consent to waiver.	State v. Slade, 194 P.3d 677 (Mont. 2008) • If a person under arrest for the offense of operating a motor vehicle while under the influence of alcohol and/or drugs refuses to submit to a test which detects the presence of alcohol, drugs or a combination of alcohol and drugs, proof of that refusal is admissible in a trial of that offense; jury may infer from the refusal that the person was under the influence, and that inference is rebuttable. MCA 61-8-404(2).
Nebraska	R.R.S. Neb. § 60-6,196	*Consent of court required.* State v. Godfrey, 155 N.W.2d 438 (Neb. 1968) • The right to a jury trial is personal to the defendant, and the state is without power to require one if the defendant wishes to waive it. • We hold that the court may reasonably require that a motion to waive a jury trial be made or filed within a reasonable time prior to trial as a condition to the consent of the court.	*Admissible.* R.R.S. Neb. § 60-6,197(6) • Refusal to submit to a chemical blood, breath, or urine test or tests pursuant to this section shall be admissible evidence in any action for a violation of section 60-6,196 or a city or village ordinance enacted in conformance with such section. State v. Meints, 202 N.W.2d 202 (Neb. 1972) • The refusal to give the chemical test should be admissible in evidence against the defendant.
Nevada	Nev. Rev. Stat. Ann. § 484C.110	*Consent of court required.* *Consent of prosecution required.* Nev. Rev. Stat. Ann. § 175.011. • In a district court, cases required to be tried by jury must be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the state. Rains v. State, 422 P.2d 541(Nev.	*Admissible.* Nev. Rev. Stat. Ann. § 484C.240 • If a person refuses to submit to a required chemical test, evidence of that refusal is admissible in any criminal or administrative action arising out of acts alleged to have been committed.

STATE	STATUTE	JURY WAIVER	BT REFUSAL
		1967) • Requiring the consent of the prosecutor or court, or both, before a waiver of a jury trial becomes effective is a reasonable protective condition.	
New Hampshire	RSA 265-A:2	*At the sole option of defendant.* RSA 606:7 • Any defendant in the superior court in a criminal case other than a capital case may, if he shall so elect, when called upon to plead, or later and before a jury has been impanelled to try him, waive his right to trial by jury by signing a written waiver thereof and filing the same with the clerk of the court, whereupon he shall be tried by the court instead of by a jury.	*Admissible.* RSA 265-A:10 • If a person refuses to submit to a test, such refusal may be admissible into evidence in a civil or criminal action or proceeding. State v. Denney, 536 A.2d 1242 (N.H. 1987) • Refusal cannot be accomplished with impunity. The legislature has attached two strings to a refusal. First, refusal to submit to a blood alcohol test results in a possible maximum one-year administrative revocation of the arrestee's driver's license, and, second, the statute provides for the admission of a refusal as evidence in court.
New Jersey	N.J. Stat. §39:4-50	*Consent of court required.* N.J. Court Rules, Rule 1:8-1(a) • Criminal actions required to be tried by a jury shall be so tried unless the defendant, in writing and with the approval of the court, after notice to the prosecuting attorney and an opportunity to be heard, waives a jury trial. State v. Belton, 286 A.2d 78 (N.J. 1972) • The restriction against a	*Admissible.* State v. Stever, 527 A.2d 408 (N.J. 1987) • Admission into evidence of defendant's refusal to submit to a breathalyzer test did not violate his common-law privilege against self-incrimination, nor did it infringe on his due process rights under the New Jersey Constitution. State v. Tabisz, 322 A.2d 453 (N.J. Super. Ct. App. Div. 1974) • Defendant argued that the county court committed reversible error to admit evidence of his refusal to take the breathalyzer test. The court reviewed applicable law and noted that New Jersey had eliminated any requirement that an accused give his express consent to submit to a breathalyzer test, so an accused no longer had a right to refuse to take the test. The failure of an accused to

STATE	STATUTE	JURY WAIVER	BT REFUSAL
		unilateral waiver of jury trial by the accused presents no constitutional infirmity. State v. Fiorilla, 543 A.2d 958 (N.J. Super. Ct. App. Div. 1988) • New Jersey has already determined to delete the requirement for consent of the prosecutor.	submit to the test was therefore properly admitted into evidence. As defendant had no right to refuse to submit to breathalyzer test, his refusal to do so was admissible in evidence and could be the basis of an inference of guilt.
New Mexico	N.M. Stat. Ann. § 66-8-102 *et seq*	*Consent of court required. Consent of prosecution required*. N.M. Dist. Ct. R.Cr.P. 5-605 • Defendant may waive a jury, but waiver requires the approval of the court and the consent of the State.	*Admissible.* McKay v. Davis, 653 P.2d 860 (N.M. 1982) • Driver's refusal to take the breath test is admissible under the Implied Consent Act, under U.S. Const. Amend. V, and under N.M. R. Evid. 401. There is no constitutional right to refuse and any testimony about the refusal to submit does not burden the Fifth Amendment. The introduction of and comment on the driver's refusal to take a breath test does not violate the U.S. Const. Amend. V. Driver's refusal to take a chemical test was relevant to show his consciousness of guilt and fear of the test results.
New York	NY CLS Veh & Tr § 1192	*Consent of court required.* NY CLS CPL § 320.10 • Except where the indictment charges the crime of murder in the first degree, the defendant, subject to the provisions of subdivision two, may at any time before trial waive a jury trial and consent to a trial without a jury in the superior court in which the indictment is pending. • Such waiver must be in writing and must be signed by the	*Admissible.* NY CLS Veh & Tr § 1194(2)(f) • Evidence of a refusal to submit to such chemical test or any portion thereof shall be admissible in any trial, proceeding or hearing based upon a violation of the provisions of section eleven hundred ninety-two of this article but only upon a showing that the person was given sufficient warning, in clear and unequivocal language, of the effect of such refusal and that the person persisted in the refusal.

STATE	STATUTE	JURY WAIVER	BT REFUSAL
		defendant in person in open court in the presence of the court, and with the approval of the court.	
North Carolina	N.C. Gen. Stat. § 20-138.1	*Jury waiver NOT permitted.* State v. Newkirk, 2010 N.C. App. LEXIS 2333 (N.C. Ct. App. Dec. 7, 2010) • In North Carolina, the Sixth Amendment right to plead not guilty is buttressed by a state constitutional right to a jury trial which further provides that any criminal defendant who pleads not guilty cannot waive a jury trial (citing N.C. Const. art. I, § 24).	*Admissible.* N.C. Gen. Stat. § 20-139.1(f) • If any person charged with an implied-consent offense refuses to submit to a chemical analysis or to perform field sobriety tests at the request of an officer, evidence of that refusal is admissible in any criminal, civil, or administrative action against the person.
North Dakota	N.D. Cent. Code, § 39-08-01 *et seq.*	*Consent of prosecution required.* N.D. Cent. Code, § 29-16-02 • A trial jury may be waived by the consent of the defendant and the state's attorney expressed in open court and entered on the minutes of the court. Otherwise, the issues of fact must be tried by the jury.	*Admissible.* N.D. Cent. Code, § 39-20-08 • If the person under arrest refuses to submit to the test or tests, proof of refusal is admissible in any civil or criminal action or proceeding arising out of acts alleged to have been committed while the person was driving or in actual physical control of a vehicle upon the public highways while under the influence of intoxicating liquor, drugs, or a combination thereof.
Ohio	ORC Ann. 4511.19	*At the sole option of defendant.* *Consent of prosecution required if waiver during trial.* Ohio Crim. R 23 • In serious offense cases the	*Admissible.* City of Maumee v. Anistik, 632 N.E.2d 497 (Ohio 1994) • Under certain circumstances, evidence of a refusal to submit to a chemical test can be used against a defendant at trial. State v. Frangella, 2012 Ohio App. LEXIS 1654 (Ohio Ct. App. 2012)

STATE	STATUTE	JURY WAIVER	BT REFUSAL
		defendant before commencement of the trial may knowingly, intelligently and voluntarily waive in writing his right to trial by jury. Such waiver may also be made during trial with the approval of the court and the consent of the prosecuting attorney.	• Evidence regarding a refusal to submit to a breath or blood test is admissible at trial.
Oklahoma	47 Okl. St. § 11-902	*Consent of prosecution required.* Morrison v. State, 236 P. 901 (Okla. Crim. App. 1925) • The state is entitled to a jury, although the defendant may expressly waive a jury. The Constitution (section 20, art. 7) contemplates that in order for a waiver to be effective both parties should waive the right to have the issues of fact determined by a jury.	*Admissible.* 47 Okl. St. § 756 • Evidence that the person has refused to submit to either of said analyses is also admissible. State v. Neasbitt, 735 P.2d 337 (Okla. Crim. App. 1987) • Oklahoma's constitutional provision does not grant any broader protections than the Fifth Amendment does, and we hold it is not offended by allowing use of evidence that a driver refused to take a sobriety test.
Oregon	ORS § 813.010	*Consent of court required.* ORS § 136.001 • (1) The defendant and the state in all criminal prosecutions have the right to public trial by an impartial jury. • (2) Both the defendant and the state may elect to waive trial by jury and consent to a trial by the judge of the court alone, provided that the election of the defendant is in writing and with the consent of the trial judge.	*Admissible.* ORS § 813.310 • If a person refuses to submit to a chemical test under ORS 813.100 or refuses to consent to chemical tests under ORS 813.140, evidence of the person's refusal is admissible in any civil or criminal action, suit or proceeding arising out of acts alleged to have been committed while the person was driving a motor vehicle on premises open to the public or the highways while under the influence of intoxicants. State v. Cabanilla, 273 P.3d 125 (Or. 2012) • Evidence of a DUII defendant's refusal to take a breath test is admissible against that defendant even if the state does not establish that the defendant understood the information given

STATE	STATUTE	JURY WAIVER	BT REFUSAL
		State v. Baker, 976 P.2d 1132 (Ore. 1999) • The constitution grants to only one person, the trial judge, the discretionary choice to deny a criminal defendant in a noncapital criminal case the right to waive trial by jury. The legislature's choice to provide such a right to the district attorney in ORS 136.001(1) infringes on the right granted by Article I, section 11, of the Oregon Constitution.	about the rights and consequences of refusing to take the breath test.
Pennsylvania	75 Pa.C.S. § 3802 *et seq*.	*Consent of court required.* *Consent of prosecution required.* Pa. R. Crim. P. 620 • In all cases, the defendant and the attorney for the Commonwealth may waive a jury trial with approval by a judge of the court in which the case is pending, and elect to have the judge try the case without a jury. Commonwealth v. Hargraves, 883 A.2d 616 (Pa. Super. Ct. 2005) • Aside from the right to a jury trial guaranteed by Article 1, § 6, Pa.R.Crim.P. 620, "Waiver of Jury Trial", also ensures the right by requiring that the Commonwealth join a defendant's waiver of a jury trial.	*Admissible.* 75 Pa.C.S. § 1547(e) • In any summary proceeding or criminal proceeding in which the defendant is charged with a violation of section 3802 or any other violation of this title arising out of the same action, the fact that the defendant refused to submit to chemical testing may be introduced in evidence along with other testimony concerning the circumstances of the refusal. Commonwealth v. Dougherty, 393 A.2d 730 (Pa. Super. Ct. 1978) • The oral refusal to take the breathalyzer was non testimonial in nature and therefore not a violation of appellant's privilege against self incrimination.

STATE	STATUTE	JURY WAIVER	BT REFUSAL
Rhode Island	R.I. Gen. Laws § 31-27-2	*Consent of court required.* R.I. Gen. Laws § 12-17-3 • In all criminal cases the accused may, if he or she shall so elect and with the leave of the court, waive a trial by jury, and in those cases the court shall have jurisdiction to hear and try the cause without a jury and render judgment and pass sentence.	*Inadmissible (unless defendant elects to testify).* R.I. Gen. Laws § 31-27-2(c)(1) • Evidence that the defendant had refused to submit to the test shall not be admissible unless the defendant elects to testify.
South Carolina	S.C. Code Ann. § 56-5-2930 *et seq*.	*Consent of court required.* *Consent of prosecution required.* Rule 14(b), SCRCrimP • A defendant may waive his right to a jury trial only with the approval of the solicitor and the trial judge.	*Admissible.* S.C. Code Ann. § 56-5-2950(B)(1) • A person must be informed that he does not have to take the test or give the samples, but that his privilege to drive must be suspended or denied for at least six months if he refuses to submit to the test and that his refusal may be used against him in court. State v. Jansen, 408 S.E.2d 235 (S.C. 1991) • It is well established in this State that one who is arrested for DUI impliedly consents to a breathalyzer test, and that the revocation of that consent is constitutionally admissible as prosecutorial evidence at the trial pursuant to that arrest.
South Dakota	S.D. Codified Laws § 32-23-1	*Consent of court required.* *Consent of prosecution required.* S.D. Codified Laws § 23A-18-1 • Cases required to be tried by a jury shall be so tried unless the defendant waives a jury trial in writing or orally on the record	*Admissible.* S.D. Codified Laws § 32-23-10.1 • If a person refuses to submit to chemical analysis of the person's blood, urine, breath, or other bodily substance, or allow the withdrawal of blood or other bodily substance for chemical analysis as provided in § 32-23-10, and that person subsequently stands trial for violation of § 32-23-1 or § 32-23-21, such refusal

STATE	STATUTE	JURY WAIVER	BT REFUSAL
		with the approval of the court and the consent of the prosecuting attorney. State v. Van Roekel, 472 N.W.2d 919 (S.D. 1991). • Absent an inability to obtain a fair and impartial jury, the trial court properly accepted the prosecutor's refusal to consent, and accordingly was required to deny defendant's waiver of his right to a jury trial.	may be admissible into evidence at the trial.
Tennessee	Tenn. Code Ann. § 55-10-401	*Consent of prosecution required.* Tenn. R. Crim. P. 5(c)(2)(C) • If the defendant offers to waive in writing the right to a grand jury investigation and a trial by jury, and to submit the case to the general sessions court-and the district attorney general or the district attorney general's representative does not object-the magistrate may accept the defendant's written waiver and hear the misdemeanor case on the not guilty plea. State v. Brackett, 869 S.W.2d 936 (Tenn. Crim. App. 1993) • There is no guarantee that the accused may elect whether to waive the right to indictment or presentment and trial by jury. Tenn. R. Crim. P. 5 has the effect of granting the State a	*Admissible.* State v. Frasier, 914 S.W.2d 467 (Tenn. 1996) • The admission into evidence of defendant's refusal to submit to the breath test did not violate defendant's rights under the Fifth Amendment.

STATE	STATUTE	JURY WAIVER	BT REFUSAL
		right to a trial by jury. That, in the court's view, is an equally meritorious basis for the rule. Rule 5 must be given its ordinary and natural construction. For many of the reasons the defendant is guaranteed the right to trial by jury in the criminal case, there exists a basis for the State, on behalf of its people, to exercise the same entitlement.	
Texas	Tex. Penal Code Ann. § 49.01; § 49.04	*Consent of court required.* *Consent of prosecution required.* Tex. Code Crim. Proc. art. 1.13(a) • The waiver must be made in person by the defendant in writing in open court with the consent and approval of the court, and the attorney representing the state. In re State ex rel. O'Connell, 976 S.W.2d 902 (Tex. App. 1998) • The right to waive a jury is not a constitutional right. It is a statutory right, and it is not absolute; instead, it is subject to the procedural conditions provided in article 1.13(a).	*Admissible.* Tex. Transp. Code § 724.061 • A person's refusal of a request by an officer to submit to the taking of a specimen of breath or blood, whether the refusal was express or the result of an intentional failure to give the specimen, may be introduced into evidence at the person's trial. Griffith v. State, 55 S.W.3d 598 (Tex. Crim. App. 2001) • Also relevant as evidence of intoxication is a refusal to take a blood-alcohol test.
Utah	Utah Code Ann. § 41-6a-502	*If felony:* *Consent of court required.* *Consent of prosecution required.* Utah R. Crim. P. Rule 17(c)	*Admissible.* Sandy City v. Larson, 733 P.2d 137 (Utah 1985) • Evidence of the refusal to take the test was admissible in evidence and did not offend the art. I, § 12 privilege against self-incrimination or the right to due process.

STATE	STATUTE	JURY WAIVER	BT REFUSAL
		• All felony cases shall be tried by jury unless the defendant waives a jury in open court with the approval of the court and the consent of the prosecution. *If non-felony:* *Defendant must demand a jury trial.* Utah R. Crim. P. Rule 17(d) • All other cases shall be tried without a jury unless the defendant makes written demand at least ten days prior to trial, or the court orders otherwise. No jury shall be allowed in the trial of an infraction.	
Vermont	23 V.S.A. § 1201	*Consent of court required.* *Consent of prosecution required.* V.R.Cr.P. Rule 23(a) • The defendant may in a signed writing or in open court, with the consent of the prosecuting attorney and the court entered of record, waive a jury trial in offenses not punishable by death.	*Admissible.* 23 V.S.A. § 1202(b) • If the person refuses to submit to an evidentiary test it shall not be given, except as provided in subsection (f) of this section, but the refusal may be introduced as evidence in a criminal proceeding.
Virginia	Va. Code Ann. § 18.2-266	*Consent of prosecution required.* Va. Sup. Ct. R. 3A:13(b) • If an accused who has pleaded not guilty in a circuit court	*Admissible (if refusal found to be unreasonable under § 18.2-268.3, and then only to explain the absence of test at trial).* Va. Code Ann. § 18.2-268.10(B) • The failure of an accused to permit a blood or breath sample to be

STATE	STATUTE	JURY WAIVER	BT REFUSAL
		consents to trial without a jury, the court may, with the concurrence of the Commonwealth's attorney, try the case without a jury.	taken to determine the alcohol or drug content of his blood is not evidence and shall not be subject to comment by the Commonwealth at the trial of the case, except in rebuttal; nor shall the fact that a blood or breath test had been offered the accused be evidence or the subject of comment by the Commonwealth, except in rebuttal. Va. Code Ann. § 18.2-268.10(C) • Evidence of a finding against the defendant under § 18.2-268.3 for his unreasonable refusal to permit a blood or breath sample to be taken to determine the alcohol or drug content of his blood shall be admissible into evidence, upon the motion of the Commonwealth or the defendant, for the sole purpose of explaining the absence at trial of a chemical test of such sample. When admitted pursuant to this subsection such evidence shall not be considered evidence of the accused's guilt.
Washington	Rev. Code Wash. § 46.61.502; § 46.61.504	*Consent of court required.* Wash. CRR 6.1(a) • Cases required to be tried by jury shall be so tried unless the defendant files a written waiver of a jury trial, and has consent of the court. State v. Newsome, 515 P.2d 741 (Wash. Ct. App. 1974) • Waiver of a jury trial in a criminal case is not a matter of right. Rather, it is discretionary with the trial court.	*Admissible.* Rev. Code Wash. § 46.61.517 • The refusal of a person to submit to a test of the alcohol or drug concentration in the person's blood or breath is admissible into evidence at a subsequent criminal trial.
West Virginia	W. Va. Code Ann. § 17C-5-2	*If required to be tried by a jury:* *Consent of court required.* *Consent of prosecution required.*	*Admissible.* State v. Cozart, 352 S.E.2d 152 (W. Va. 1986) • The admission into evidence at a criminal trial of the fact that a

STATE	STATUTE	JURY WAIVER	BT REFUSAL
		W. Va. R.Cr.P., Rule 23 • Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the state. *If misdemeanor:* *Defendant must demand jury trial.* W. Va. Code Ann. § 50-5-8 • A defendant in any criminal trial for a misdemeanor offense triable before a magistrate has the right to demand that the matter be tried with a jury, and the defendant shall be advised of the right to trial by jury in writing. • Failure to demand within such time constitutes a waiver of the right to trial by jury.	defendant arrested for driving under the influence of alcohol refused to take a breathalyzer test offered to him does not violate the defendant's right against self-incrimination guaranteed under the Fifth Amendment to the United States Constitution and Article III, Section 5 of the West Virginia Constitution.
Wisconsin	Wis. Stat. Ann. § 346.63	*Consent of court required.* *Consent of prosecution required.* Wis. Stat. Ann. § 972.02(1) • Except as otherwise provided in this chapter, criminal cases shall be tried by a jury, unless the defendant waives a jury in writing or by statement in open court, on the record, with the approval of the court and the	*Admissible.* State v. Albright, 298 N.W.2d 196 (Wis. Ct. App. 1980) • Testimony of a police officer that the defendant refused to take any chemical tests for intoxication was admissible evidence.

STATE	STATUTE	JURY WAIVER	BT REFUSAL
		consent of the state.	
Wyoming	Wyo. Stat. Ann. § 31-5-233	*Consent of court required.* *Consent of prosecution required.* W.R.Cr.P. Rule 23 • Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial with the approval of the court and the consent of the state.	*Admissible.* City of Laramie v. Mengel, 671 P.2d 340 (Wyo. 1983) • Admission, in prosecution for driving under the influence, of evidence that a person who had been arrested for driving under influence of intoxicant had refused to submit to a chemical blood alcohol test was not unconstitutional.

ATTACHMENT 9

ATTACHMENT 9

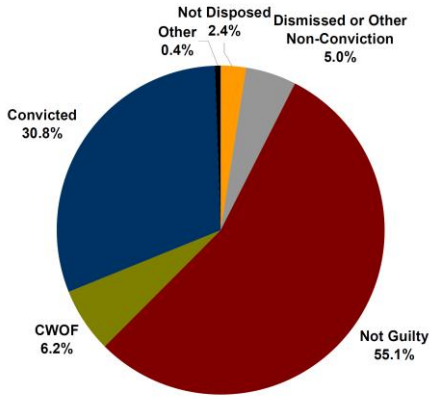
TRIAL COURT DATA ON OTHER OFFENSES

We were asked to examine whether the rate of acquittal in jury-waived OUI trials differs from the rate of acquittal in other criminal cases in the District Court and BMC. However, the Trial Court does not track statewide acquittal or conviction rates by offense category, and we did not ask the Trial Court staff to perform the extensive work that would be required to compute such statistics for non-OUI offenses.

The Trial Court recently extracted data from MassCourts regarding all criminal charges that were resolved at a trial event in all courts within the District Court and BMC (except the Barnstable and Brockton District Courts and BMC Central) during the period January 2010 through June 2011. Note that the data unit in this analysis is a *charge*, not a case. One case may have many charges, and in our Database we controlled for that fact by selecting only the OUI offense as the lead charge. In addition, in the Trial Court statistics, the endpoint is simply resolution of the charges *on the date of a trial event*, regardless of whether the charges actually were resolved by plea or trial, and regardless of whether the disposition occurred on a non-trial event.

With respect to OUI offenses, this data shows that 30.8% of charges scheduled for a trial event resulted in a conviction, 6.2% resulted in a CWOF, 55.1% resulted in a not guilty finding, and 5.0% resulted in a dismissal or other non-conviction.

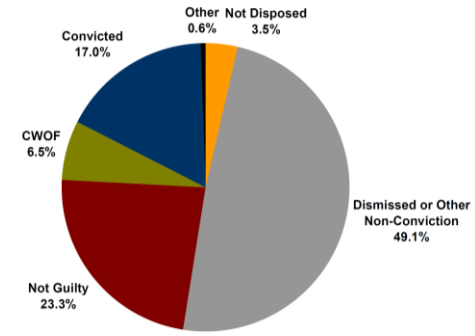
Figure 1. Trial Court Data for All OUI Offenses



Chapter 90 OUI Offenses

In contrast, with respect to Chapter 265 offenses (crimes against the person), the data shows that 17.0% of charges scheduled for a trial event resulted in a conviction, 6.5% resulted in a CWOF, 23.3% resulted in a not guilty finding, and 49.1% resulted in a dismissal or other non-conviction result.

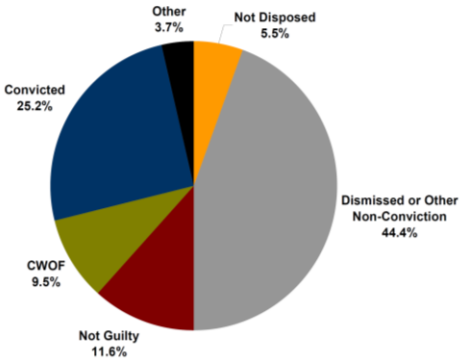
Figure 2. Trial Court Data for Chapter 265 Offenses



Chapter 265 Offenses against the Person

With respect to Chapter 94C drug offenses, the data shows that 25.2% of charges scheduled for a trial event resulted in a conviction, 9.5% resulted in a CWOF, 11.6% resulted in a not guilty finding, and 44.4% resulted in a dismissal or other non-conviction.

Figure 3. Trial Court Data for Chapter 94C Offenses



Chapter 94C Controlled Substance Act

According to this data, acquittals for OUI offenses were higher than for the other two categories of offenses, and convictions (including CWOFs) also were higher. How can both be true? Note the significantly higher percentage of dismissals in Chapter 265 and Chapter 94C cases (49.1% and 44.4% respectively) than in OUI cases (5.0%), which accounts for the fact that both acquittals and convictions (guilty plus CWOF) for OUI cases are higher than for the other offenses.

This data has very limited utility, given the restrictions listed above. However, it does confirm what most participants told us about dismissals: prosecutors rarely dismiss OUI offenses

compared to other offenses. For example, many participants told us that the Commonwealth often is forced to seek dismissal in domestic violence cases, due to the reluctance of witnesses to testify. Also, since this data is based on charges, not cases, the dismissal rates may be related to charge bargaining, whereby some charges are dismissed in exchange for guilty pleas on others.