STATEMENT OF THE JUSTICES OF THE SUPREME JUDICIAL COURT

November 1, 2012

Last year, after learning of an investigation being conducted by the Boston Globe Spotlight Team into the handling of jury-waived cases in the District Court and Boston Municipal Court Departments involving charges of operating vehicles under the influence of alcohol and drugs (OUI), the Justices of the Supreme Judicial Court appointed R.J. Cinquegrana of the law firm of Choate, Hall & Stewart LLP, as special counsel to conduct a confidential and independent preliminary inquiry. We asked Mr. Cinquegrana to determine the rate of acquittal in jury-waived trials (bench trials) in OUI cases, and to examine whether that rate differs from the national average. We also asked him to explore whether the acquittal rates of some judges in OUI bench trials are substantially greater than the statistical average, and if so, to identify possible reasons for the disparity. We underscored that this was to be a preliminary, fact-finding inquiry, not a disciplinary inquiry. We also acknowledged the delicate nature of even a preliminary inquiry into acquittal rates, recognizing that a judge conducting a bench trial is obligated under the law to find a defendant not guilty where the Commonwealth has failed to furnish credible evidence of guilt beyond a reasonable doubt, and that we expect judges to honor that obligation without fear or favor.

In preparing this Report, Mr. Cinquegrana and his law firm meticulously evaluated MassCourt and CourtView data from 56,966 OUI cases adjudicated in a forty-five month period between January 1, 2008 and September 30, 2011, reviewed police reports and docket sheets for hundreds of cases, and listened to the tape recordings of fifty OUI trials. They also interviewed, among others, every District Attorney in the Commonwealth, every Regional Administrative Justice in the District Court department, and eight defense attorneys who defend OUI cases, and met with eleven Boston Municipal Court judges. The Justices have received the confidential Report of his preliminary inquiry, and have carefully considered its findings and recommendations. Because the Report provides a thoughtful and careful analysis of systemic issues that affect the rate of conviction in OUI cases, and presents recommendations that warrant consideration by the

Judiciary, prosecutors, police, the Legislature, and the general public, we have decided to release the Report to the public.

The Report finds that seventy-seven per cent of OUI cases resulted in a disposition that was adverse to the OUI defendant — either a guilty plea, an admission to sufficient facts to warrant a guilty finding, or a guilty finding after trial — which the Report refers to as the "conviction rate." Thirteen per cent of OUI cases resulted in an acquittal after trial; the remaining ten per cent resulted in some other disposition, usually a dismissal for reasons not related to the merits of the case. Although comparisons with other States are difficult because of the unavailability and distinguishing characteristics of data in many states, the overall conviction rate in OUI cases of seventy-seven per cent in Massachusetts appears comparable to that in other States. Of the ten States for which conviction rates were found, the median conviction rate in OUI cases was 80.5 per cent, with Minnesota the lowest at seventy-four per cent and Michigan the highest at ninety-four per cent.

Seventy-three per cent of all OUI cases were resolved by a plea of guilty or an admission to sufficient facts. Only seventeen per cent proceeded to trial. As noted above, the remaining ten per cent were dismissed before trial. Of those defendants who proceeded to a trial by jury, fifty-eight per cent were acquitted. Of those who proceeded to a bench trial, eighty-six per cent were acquitted.

The Report identifies and carefully examines the systemic reasons that may contribute to the relatively high Statewide percentage of OUI defendants who are acquitted at trial in both bench and jury trials:

- Many OUI arrests are based, at least in part, on field test results that are rarely offered in evidence by the Commonwealth, either because they are not admissible in evidence at trial unless supported by expert testimony (e.g., the horizontal gaze nystagmus test) or because they do not comply with Massachusetts regulations (e.g. the preliminary breath test);

- An "after-the-fact" narrative description of a defendant's performance on a field sobriety test may not persuasively demonstrate a defendant's lack of sobriety. While video recording systems to memorialize a driver's performance on field sobriety tests at the time they are conducted are used by police in some other States, few if any Massachusetts police departments make such video

recordings, with the result that recordings are rarely available to be offered in evidence in OUI trials in Massachusetts.

- Under existing Massachusetts law, a defendant's refusal to take a breathalyzer, blood alcohol test, or a field sobriety test is not admissible in evidence;

- In the interest of public safety, police officers may arrest a motorist where there is probable cause that the motorist is driving under the influence of drugs or alcohol, regardless whether there is proof beyond a reasonable doubt, because allowing such a motorist to continue driving may subject the police officer's city or town to civil liability if the motorist after the stop causes injury arising from an automobile accident;

- Even a breathalyzer or blood alcohol reading of .08 per cent or above does not necessarily result in conviction under the "per se" provision of the statute where there is reasonable doubt whether the reading accurately reflected the level of intoxication at the time of operation rather than the time of the test. Prosecutors rarely offer expert evidence to rebut a defendant's contention that, based on retrograde extrapolation, there is reasonable doubt whether the defendant's blood alcohol level at the time of operation was .08 percent or higher.

- Experienced defense lawyers who specialize in OUI cases are often defending cases prosecuted by inexperienced Assistant District Attorneys with no special expertise in prosecuting these cases.

The Report also identifies systemic reasons why the bench trial acquittal rate is twenty-eight per cent higher than the jury trial acquittal rate:

- Prosecutors seldom voluntarily dismiss OUI cases and may prefer weak cases to be resolved by a not guilty finding after a bench trial.

- Evidence of intoxication is often a litany of observations by police officers (glassy, bloodshot eyes, slurred speech, strong odor of alcohol, and unsteadiness walking) that are heard so often by judges that it is difficult to evaluate credibility. As the Report notes:

> "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."

Where the average bench trial acquittal rate Statewide was eighty-six per cent, it was not a simple task for Mr. Cinquegrana to evaluate whether the acquittal rate of some judges substantially deviated from the statistical average. Through the pro bono help of Analysis Group, a consulting firm with expertise in

statistical analysis, the Report identified three factors that needed to be considered together to identify statistically significant disparities among judges and courts: the judge's bench trial acquittal rate, the percentage of cases assigned to the judge where a defendant chose to waive a jury trial and proceed with a bench trial before that judge, and the total number of OUI bench cases tried by the judge. Applying these factors, the Report identifies judges in various courts in the State and one county (Worcester County) with statistically significant disparities. The Report concluded that "[t]he 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."

The Report cautions about the use of these statistics. It declares that "[t]his 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." But it warns that "it would be a dangerous precedent to base any evaluation of individual judicial performance on these statistics," and adds, "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."

We respect the wisdom of the Report's "word of caution." Every case needs to be decided on its merits, and there is no "correct" rate of acquittal for any judge. An acquittal, as a matter of law, is always the proper verdict where there is reasonable doubt of a defendant's guilt. A judge's acquittal rate, whether it be statistically high or low, is not a proper measure of a judge's fairness; a judge is fair who impartially evaluates the evidence in each case and decides whether it meets the required standard of proof beyond a reasonable doubt.

Nothing in the Report suggests that the bench trial acquittal rate is higher than the jury trial acquittal rate because of any judicial misconduct or any corrupt personal relationship between a judge and a defense attorney. The Report states that none of the many people interviewed, including prosecutors,

defense lawyers, and judges, "reported an allegation that high acquittal rates in OUI cases are the product of corrupt relationships between lawyers and judges," or the "product of corrupt influence on judges." Nor is there any simple explanation for these disparities; certainly, the Report did not find any. The Report specifically notes:

> "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."

This preliminary inquiry was expressly not a disciplinary inquiry, and we find nothing in the Report to indicate that a disciplinary inquiry is warranted with respect to any judge's adjudication of OUI cases.

The Report makes four recommendations. Two of them may only be acted on by the Legislature. The first such recommendation is to amend the definition of the "per se" offense so that it criminalizes a proscribed blood alcohol level within a specific time period after operation, rather than at the time of operation. Such an amendment would eliminate or reduce the reasonable doubt that may arise where a judge or jury concludes that the blood alcohol level at the time of operation of the vehicle may have been lower than at the time of the test because of the need for retrograde extrapolation. The second such recommendation is to amend G. L. c. 90, § 24 (1) (f) (1), to deny the restoration of a driver's license that is automatically suspended on refusal to take a breathalyzer test after dismissal or entry of a not guilty verdict on an OUI charge. While the first recommendation may diminish the rate of acquittals, this second recommendation would not affect the rate but would diminish the consequence of an acquittal by requiring an automatic suspension to remain despite an acquittal. Because the Report makes these recommendations for legislative action, we have forwarded a copy of the Report to the Governor, the Speaker of the House, the Senate President, and the Chairs of the Judiciary Committee for their review and consideration.

Two other recommendations may be acted on by the Judiciary: changing the procedures for jury waiver, and judicial training focused on the judge's role as gatekeeper for scientific evidence. In deciding

how to proceed as to these recommendations, we have consulted with Chief Justice of the Trial Court Robert Mulligan, Chief Justice Lynda Connolly of the District Court Department, and Chief Justice Charles Johnson of the Boston Municipal Court.

The first recommendation calls for changes as to jury waiver to diminish the opportunity for what is popularly referred to as "judge shopping." The Report suggests that the interests of justice and the perception of fairness would be served by changes to the practice of allowing a defendant's decision as to jury waiver to be postponed until the eve of trial. We agree that this issue, which concerns more than OUI cases, merits careful consideration and therefore, in conjunction with Chief Justices Mulligan, Connolly, and Johnson, the Justices shall promptly establish a joint working group to make recommendations to the Supreme Judicial Court no later than March 30, 2013, as to whether the existing procedures regarding jury waiver in the District Court and Boston Municipal Court should be revised and, if so, what changes would be appropriate.

The second recommendation that may be acted on by the Judiciary relates to the need for judicial training on a judge's gatekeeper role with respect to scientific evidence. This recommendation also concerns more than OUI cases, and more than the issue raised in the Report regarding retrograde extrapolation. Not only must judges make difficult decisions as to the reliability of scientific evidence when the admission of such expert evidence is challenged, but they must also determine whether they may consider scientific information they may have learned outside the trial from other sources, including expert testimony from other trials, in making judicial decisions. We have asked our Judicial Institute to initiate efforts to provide judicial training on this subject for all judges in our trial and appellate courts.

Apart from its specific recommendations, the Report has highlighted the need to consider whether the interests of justice and the perception of fairness would be enhanced if judges in criminal bench trials, after reaching their verdict, were to devote a brief period of time to explain orally on the record their reasons for reaching that verdict. We shall ask the Standing Advisory Committee on the Rules of Criminal

Procedure to confer with the Chief Justice of the Trial Court and the Chief Justices of the relevant Trial Court departments, and examine whether a judicial rule should be promulgated that would require a brief oral explanation of a criminal bench verdict on the record.

The Justices are grateful to Mr. Cinquegrana and the law firm of Choate, Hall & Stewart, LLP, and the statistical experts working with them, for a thoughtful and thorough report on a difficult and complex subject. In keeping with the great pro bono tradition of the Massachusetts bar, they have devoted more than 4,000 hours to the preparation of the Report, without any compensation, to explore the systemic concerns initially raised by the Globe's Spotlight Team. There are lessons to be learned from this Report by judges, legislators, prosecutors, defense counsel, and police officers as to how OUI crimes should be defined, investigated, prosecuted, defended, and tried. The Justices intend to ensure that the lessons relevant to the Judiciary are well-learned and that appropriate steps are taken to ensure the fair and impartial administration of justice in OUI cases.