REPORT OF

SPECIAL COMMITTEE TO STUDY SUPREME BENCH CASELOAD INCREASE OF DISTRICT COURT WARRANT CASES AND DE NOVO APPEALS

This Special Committee was formed by Chief Judge Robert C. Murphy on May 29, 1978 to study the underlying reasons for the caseload increase of District Court warrant cases (jury trial elections) and de novo appeals entering the Criminal Courts of the Supreme Bench of Baltimore City. As reflected in a statistical analysis of the Supreme Bench (Criminal) caseload, prepared in May 1978, over 50 percent of the then pending criminal cases were comprised of matters within the original jurisdiction of the District Court of Maryland which had been transferred to the Supreme Bench by prayer for a jury trial or on appeal de novo from conviction and sentence in the District Courts.[1] The Special Committee was further charged with the responsibility to examine existing statutes, constitutional provisions and rules of procedure and to recommend measures that might alleviate the present problems and inhibit future abuses, bearing in mind that any systematic changes designed to provide responsiveness to efficiencies of operation must not erode the quality of justice or hinder fairness to the public, to litigants, and to lawyers. While the primary focus of the Special Committee has been on the caseload increase at the Supreme Bench, this report will be

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[1] Appendix A - Supreme Bench Caseload, Growth Analysis 1975-78 prepared by George B. Riggin, Jr., Criminal Assignment Commissioner of the Supreme Bench of Baltimore City.

relevant to all Circuit Courts in Maryland that are vexed with the same problem; i.e., a disproportionate influx of "District Court cases" into their criminal case calendar.[2]

Meetings of the full Committee were convened on June 9, June 14, July 13, July 26, and September 14, 1978. The Committee heard the presentations, discussions and responses of Mr. George B. Riggin, Jr., Criminal Assignment Commissioner of the Supreme Bench; members of the staff of the State's Attorney's Office of Baltimore City who prosecute District Court warrant cases and appeals before the Supreme Bench, members of the supervisory staff of the State's Attorney's assistants who prosecute criminal cases before the District Court, members of the staff of the Pre-trial Release Division of the Supreme Bench who supervise defendants charged in warrant cases and appeals de novo, and members of the staff of the Office of the Public Defender in Baltimore City.

Members of the Committee have reviewed and discussed a variety of written materials relevant to a study of the problems presented. The material includes, "Sources and Scope of a Criminal Defendant's Right to a Jury Trial under Maryland Law"[3]; an "Analysis of Jury Trial Prayers from District I, July 1975 - December 1977"[4]; an interim report and the Final Report of the

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[2] Appendix B supplies a comparative analysis of the proportion of appeals de novo and jury trial elections from the District Court to the total criminal case filings in the Supreme Bench and Circuit Courts during fiscal year 1978. The analysis is based on annual case filing statistics provided by the Judicial Information Systems Unit of the Administrative Office of the Courts.

[3] Daniel W. Whitney, 3rd year student, University of Maryland Law School, intern assigned to Judge Robert L. Karwacki, Memorandum June 9, 1978 attached as Appendix C.

[4] John A. Davies, Jr., report to the Special Committee, 12 July 1978, supplied as Appendix D.

Special Committee on Trial De Novo (State of Massachusetts)[5]; recent opinions of the Supreme Court of the United States addressing in substance, the right to a trial by jury, appeals de novo in a two-tier trial court system, enhanced sentencing at the second tier, and juries of less than twelve members; and, pertinent recent opinions of the Courts of Appeal of Maryland.

The Special Committee agrees there are nine basic underlying factors resulting in the increase of District Court warrant cases at the Supreme Bench. The following reasons for the election of a jury trial (other than a sincere desire to exercise the right to a trial by jury)[6] have been identified by members and guests of the Committee. The Committee notes that, with the exception of item number (6), these factors are not unique to the Baltimore City court system and are operative in a greater or lesser degree in other jurisdictions throughout the State of Maryland. Further, it is apparent that these factors, to the extent they are present in individual cases, may occur individually or in combination with one or several other factors.

(1) The election of a jury trial may be made as the ultimate means of obtaining a continuance or postponement to allow additional time for case preparation or to allow the defendant to raise attorney fees.
It has been suggested to the Committee that the strict District Court "continuance policy" may precipitate the

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[5] Appendix E includes the full text of these reports. The Committee acknowledges the interest and cooperation of John M. Connors, Esq., Administrative Office of the District Courts of Massachusetts.

[6] Since less than 3% of the defendants praying jury trials are actually tried by juries in the Criminal Court of Baltimore, it is apparent that a desire for trial by jury is not the reason for praying the same in the vast majority of cases.

election of a jury trial to obtain postponement. The Committee is divided as to whether this policy and practice of the District Court is a substantial factor in this regard.

(2) A jury trial election may be made to remove a case from the jurisdiction of an individual judge whose sentencing practices are perceived as unduly severe.

(3) A jury trial may be elected to take advantage of the impression that a more lenient sentencing practice prevails at the Supreme Bench under the more flexible plea negotiating practices of the State's Attorney's Office at the Supreme Bench level.

(4) Defense counsel may wish to avoid individual prosecutors, considered unyielding or inflexible, at the District Court.

(5) Defense counsel may feel there is greater opportunity to obtain a more experienced prosecutor at the Supreme Bench, with wider discretion to negotiate a plea.

(6) In Baltimore City, an election for jury trial may be made by a defendant represented by a busy private practitioner to obtain a de facto change of venue to the more convenient, central location of the Supreme Bench Criminal Courts Building, avoiding travel by the privately retained attorney to outlying District Courts.

(7) The jury trial election effectively delays the anticipated commitment of defendants who are released on pre-trial bail or recognizance.

(8) In traffic offenses, an election for jury trial effectively delays the anticipated accumulation of points or the loss of driving privileges.

(9) The requirement or practice at the District Court of repetitively reviewing, in pre-trial proceedings, the defendant's right to trial by jury may induce the election of jury trial.

A combination of these factors resulted in a backlog of over 2,000 warrant cases at the Supreme Bench in the early months of 1978. A crisis program was consequently adopted in May of 1978 whereby the "arraignment" approach previously employed in regard to felony defendants and juvenile respondents was adapted to the misdemeaner trial courts of the Supreme Bench. One judge was assigned to "arraign" all defendants whose cases had reached the Criminal Court of Baltimore as a result of a jury trial prayer. A special team of prosecutors at this "arraignment" was prepared to conduct plea negotiations with the defendant's privately retained counsel or his assigned public defender. Frequently a further hearing was held if sufficient information to conclude the plea was not available on the original arraignment. Where a plea could not be consumated the case was assigned for trial to one of two judges for the month of May and one judge for the rest of the summer of 1978. The results of this program were immediate -- the warrant case backlog has now been reduced to less than 1,000 cases at which level it is manageable by two Criminal Court Judges assigned to continue the process described above.

Although these procedures served a short term need it is the opinion of the Committee that the adoption of long term measures to deal with the problem is desirable. The first grouping of proposals would require procedural changes; the second series of proposals would appear to require legislative approval and action.

Procedural Changes

(1) Provide by Maryland District Rule for a preliminary inquiry by the District Court Judge upon the election of jury trial. This preliminary inquiry would permit the Court to review probable cause, determine the identity and availability of State's witnesses, review the defendant's right to the assistance of counsel, review the conditions of pre-trial release, and inquire into the probability of plea negotiation or a reduction of charge. This proposal would effect the re-adoption, in amplified version, of Section 111 of Article 26, Annotated Code of Maryland, 1957 (1966 Replacement Volume) repealed by Acts 1971, ch. 423, section 5).

(2) Implement a protracted trial docket in the District Court of Maryland. This proposal postulates the probability that a certain percentage of cases, wherein the election of jury trial is presently made for the purpose of trial delay, would remain within the jurisdiction of the District Court. If a protracted trial docket were available, guidelines similar to those published in Amicus Curiarum. No. 114, 14 July 1978, at page 15, would be appropriate.

Judge Borgerding does not feel that either of these first two proposed procedural changes would be effective.

(3) Urge the Baltimore City State's Attorney to implement the rotation of more experienced prosecutors into the District Court, thus enhancing the potential for meaningful plea negotiations at that trial court level.

(4) Limit by Maryland District Rule the time within which the election for jury trial would have to be filed to 15 days after initial appearance of the Defendant before the Court. The Committee was divided as to the probable effect of such a limitation fearing that it might precipitate more jury elections than the current practice.

(5) Provide that, immediately upon election of jury trial at the District Court, a trial-date-certain shall be set at the Supreme Bench Criminal Court (or County Circuit Court). This measure is proposed on the premise that, except in cases where the right to trial by jury is truly desired, the election would be promptly withdrawn if trial were imminent. This was the original plan when a misdemeanor trial court was created at the Supreme Bench level some five years ago.

(6) Insist that a defendant who has prayed a jury trial continue his election under Maryland Rule 735 unless he withdraws the same 72 hours prior to trial as permitted by Chapter 963 of the Acts of 1978. Now that the warrant case backlog has reached a more acceptable level it is

feasible to be more strict in holding the defendant to his jury trial election. Under the recent legislation, however, the desired impact of Rule 735(e) has been largely diminished.

Legislative Changes

(1) Reduce the penalties for certain criminal and traffic offenses, bringing them within the re-definition of petty offenses. Examples of offenses discussed by the Committee, for which such a reduction of penalty might be considered, include first-offender traffic violations and first-offense possession of marijuana. An analysis of jury trials prayed at the District Court, District 1, ranked in terms of volume and incidence of specific criminal charge, is supplied in appended material (supra, note 4).

(2) Limit the right to trial by jury on appeal de novo, excluding petty offenses as re-defined to include all offenses for which the maximum penalty is not more than six months, and applying an equal standard at both levels of the Maryland two-tier trial courts. Implementation of this proposal would be predicated on legislation reversing the ruling in Hardy v. State, 279 Md. 489 (1977) and amending Section 4-302(d)(2) of the Courts Article.

(3) Provide that enhanced penalties upon conviction after trial on appeal de novo are permitted. Legislation to remove the statutory limitation of Section 12-702 (c), Courts Article, would be necessary. Cf., Colton v. Kentucky, 92 S. Ct. 1953 (1972).

(4) Require that all criminal cases within the original, exclusive jurisdiction of the District Court be tried in the District Court in the first instance, without a jury, with the right to trial by jury preserved on appeal de novo. Cf., Ludwig v. Massachusetts, 96 S. Ct. 2781 (1976), and New Hampshire v. Dickson, 355 A.2d 822, cert.denied 97 S. Ct. 35 (1976).

A thorough, illuminating discussion of the strengths and weaknesses of such a system, within a two-tier trial court, is provided in the reports of the Special Committee on Trial De Novo, District Courts of Massachusetts, supplied as appended material (supra, note 5). The majority of the Committee agree with this approach.

(5) Provide for trial by jury at the Maryland District Court. Given the enormous fiscal and logistical considerations in such a proposal, the Special Committee views this alternative as a long-range and idealistic solution. In terms of future planning, however, the establishment of a jury division within the District Court of Maryland may be the ultimate "option of choice". The availability of a trial by jury in the first instance at the District Court of Maryland, a court of record, would totally eliminate the transfer of cases on election of jury trial. Further, appeals to the Circuit Courts could be heard on the record, with an appeal following a plea of guilty limited to a challenge to the sentence. Further appeal could be allowed only by writ of certiorari.

Respectfully submitted,

Edward F. Borgerding

Robert J. Gerstung

Martin A. Kircher

James W. Murphy

Joseph E. Owens

Robert B. Watts

Robert L. Karwacki, Chairman

September 20, 1978

John A. Davies, Jr.
Circuit Administrator of the Fourth
Judicial Circuit of Maryland
Reporter to the Special Committee

SUPREME BENCH CASELOAD

GROWTH ANALYSIS

1975 - 1978

BENCH MEETING

MAY 26, 1978

The statistics reflected on the enclosed pages are intended to track the gradual growth of the Supreme Bench pending caseload. The period covered ranges from January 1975 to the present. Of particular significance is the relative proportion of our caseload comprised of felonies versus District Court Warrants. In January 1975, Warrant Cases accounted for approximately 20% of the overall pending cases. Over a period of less than three years, they have grown in number to represent over 40%. Combining Warrants with District Court Appeals reflects the fact that over 50% of the Supreme Bench caseload is made up of "District Court" business.

SUPREME BENCH CASELOAD

CASELOAD GROWTH* 1975-1978

MONTH	FELONY DOC PENDING	WARRANT DOC PENDING	APPEAL DOC PENDING	TOTAL DOC PENDING	FELONY % OF TOTAL	WARRANT % OF TOTAL	APPEAL % OF TOTAL
JAN 75	2744	814	363	3921	70%	21%	9%
JUL 75	3796	1245	491	5532	69%	22%	9%
JAN 76	2926	1861	572	5359	55%	35%	10%
JUL 76	2483	2214	713	5410	46%	41%	13%
JAN 77	3147	2944	964	7055	45%	41%	14%
JUL 77	3045	2882	672	6599	46%	44%	10%
JAN 78	3187	3254	591	7032	46%	46%	8%

MONTH	FELONY DEF PENDING	WARRANT DEF PENDING	APPEAL DEF PENDING	TOTAL DEF PENDING	FELONY % OF TOTAL	WARRANT % OF TOTAL	APPEAL % OF TOTAL
JAN 75	1490	417	236	2143	70%	19%	11%
JUL 75	1959	592	307	2858	69%	20%	11%
JAN 76	1431	921	379	2731	52%	34%	14%
JUL 76	1253	1066	454	2773	45%	38%	17%
JAN 77	1554	1400	656	3610	43%	39%	18%
JUL 77	1402	1134	439	2975	47%	38%	15%
JAN 78	1445	1217	397	3059	47%	40%	13%

*DATA TAKEN FROM MONTHLY CASELOAD INVENTORY REPORT AND ADJUSTED TO CORRECT PREVIOUS COUNTING ERRORS.

SUPREME BENCH CASELOAD

YEAR-TO-DATE FISCAL 1978 ACTIVE CASES PENDING*

TH	FELONY DOC PENDING	WARRANT DOC PENDING	APPEAL DOC PENDING	TOTAL DOC PENDING	FELONY % OF TOTAL	WARRANT % OF TOTAL	APPEAL % OF TOTAL
77	3045	2882	672	6599	46%	44%	10%
77	3194	2773	595	6562	49%	42%	9%
77	3217	2858	585	6660	49%	42%	9%
77	3297	2815	614	6726	49%	42%	9%
77	3297	2996	583	6876	48%	44%	8%
77	3253	3035	602	6890	47%	44%	9%
78	3187	3254	591	7032	45%	47%	8%
78	3159	3316	587	7062	45%	47%	8%
78	3327	3145	608	7080	47%	44%	9%
78	3374	3049	640	7063	48%	43%	9%

TH	FELONY DEF PENDING	WARRANT DEF PENDING	APPEAL DEF PENDING	TOTAL DEF PENDING	FELONY % OF TOTAL	WARRANT % OF TOTAL	APPEAL % OF TOTAL
77	1402	1134	439	2975	47%	38%	15%
77	1441	1082	395	2918	49%	37%	14%
77	1437	1128	394	2959	49%	38%	13%
77	1483	1102	399	2984	50%	37%	13%
77	1483	1121	389	2993	50%	37%	13%
77	1464	1142	407	3013	49%	38%	13%
78	1445	1217	397	3059	47%	40%	13%
78	1464	1263	379	3106	47%	41%	12%
78	1471	1195	385	3051	48%	39%	13%
78	1441	1124	396	2961	49%	38%	13%

ATA TAKEN FROM MONTHLY CASELOAD INVENTORY REPORT AND
JUSTED TO CORRECT PREVIOUS COUNTING ERRORS.

SUPREME BENCH CASELOAD

YEAR-TO-DATE FISCAL 1978 INPUT/OUTPUT OF ACTIVE CASES*

MONTH	FELONY DOC IN	FELONY DOC OUT	WARRANT DOC IN	WARRANT DOC OUT	APPEAL DOC IN	APPEAL DOC OUT
JUL 77	440	400	623	620	190	87
AUG 77	436	364	647	696	150	227
SEP 77	508	485	594	509	167	177
OCT 77	537	457	454	497	157	128
NOV 77	575	575	698	517	67	98
DEC 77	476	520	579	540	110	91
JAN 78	420	486	729	510	140	151
FEB 78	449	477	626	564	138	142
MAR 78	722	554	841	1012	157	136
APR 78	688	641	737	1018	182	150
TOTAL	5251	4959	6528	6483	1458	1387

MONTH	FELONY DEF IN	FELONY DEF OUT	WARRANT DEF IN	WARRANT DEF OUT	APPEAL DEF IN	APPEAL DEF OUT
JUL 77	197	222	288	299	129	59
AUG 77	209	170	291	343	94	138
SEP 77	227	231	276	230	113	114
OCT 77	266	220	211	237	96	91
NOV 77	254	254	267	248	46	56
DEC 77	207	226	250	229	75	57
JAN 78	195	214	294	219	79	89
FEB 78	204	185	280	234	79	97
MAR 78	282	275	337	405	98	92
APR 78	260	290	317	388	104	93
TOTAL	2301	2287	2811	2832	913	886

*DATA TAKEN FROM MONTHLY CASELOAD INVENTORY REPORT AND ADJUSTED TO CORRECT PREVIOUS COUNTING ERRORS.

SUPREME BENCH OF BALTIMORE CITY

YEAR-TO-DATE FISCAL 1978 WARRANT PRODUCTIVITY
DEFENDANTS REACHING VERDICT
(SPECIALIZED COURTS)

MONTH	PART 8*	PART 11	PART 12**	TOTAL	
JUL 77	8	276	4	288	
AUG 77	6	280	0	286	
SEP 77	0	203	158	361	
OCT 77	56	142	115	313	(Final month of old Part 11
NOV 77	68	19	154	241	
DEC 77	40	31	117	188	
JAN 78	50	28	140	218	
FEB 78	68	12	181	261	
MAR 78	96	41	226	363	
APR 78	116	36	187	339	
TOTAL	508	1068	1282	2858	
MAY 78 (5/1-5/23)	13	184	183	380	(1st month of revised Part II
GRAND TOTAL	521	1252	1465	3238	

*Part 8 - Part time court (2 days/week)
**Part 12 - Incl. misc. courts and some appeal cases. - Visiting Judge

SUPREME BENCH CASELOAD

CASELOAD GROWTH*

1975-1978

		DOC	DEF
Felony Caseload	(1975-1978)	+23%	-3%
Warrant Caseload	(1975-1978)	+275%	+169%
Appeal Caseload	(1975-1978)	+76%	+68%
Total Caseload	(1975-1978)	+80%	+38%

*DATA TAKEN FROM MONTHLY CASELOAD INVENTORY REPORT AND ADJUSTED TO CORRECT PREVIOUS COUNTING ERRORS.

CRIMINAL CASE FILINGS - IN THE CIRCUIT COURTS
FISCAL YEAR 1978

COUNTY	TOTAL FILINGS	JURY TRIAL ELECTIONS	% JTE	APPEALS DE NOVO	% JTE + APPEALS
Allegany	204	26	13%	78	51%
Anne Arundel	2,274	243	11%	281	23%
Baltimore Co.	4,103	478	12%	532	25%
Calvert	234	0	0%	17	7%
Caroline	101	25	25%	15	40%
Carroll	435	114	26%	142	59%
Cecil	435	114	26%	70	42%
Charles	480	146	30%	65	44%
Dorchester	206	70	34%	34	50%
Frederick	369	62	17%	48	30%
Garrett	89	7	8%	4	12%
Harford	578	204	35%	100	53%
Howard	602	98	16%	170	45%
Kent	120	24	20%	9	28%
Montgomery	1,566	475	30%	247	46%
Prince George's	2,734	692	25%	309	37%
Queen Anne's	124	24	19%	14	31%
St. Mary's	156	10	6%	26	23%
Somerset	86	14	16%	5	22%
Talbot	117	8	7%	9	15%
Washington	519	244	47%	68	60%
Wicomico	351	42	12%	67	31%
Worcester	334	84	25%	35	36%
Baltimore City	19,502	8,795	45%	2,250	57%
Total State	35,719	11,999	34%	4,595	46%

Comparative Grouping - Proportion of Jury Trial Elections in Total Criminal Case Filings

0 - 15%	16 - 30%	over 30%
Allegany	Caroline	Dorchester
Anne Arundel	Carroll	Harford
Baltimore Co.	Cecil	Washington
Calvert	Charles	Baltimore City
Garrett	Frederick	
St. Mary's	Howard	
Talbot	Kent	
Wicomico	Montgomery	
	Prince George's	
	Queen Anne's	
	Somerset	
	Worcester	

Comparative Grouping - Proportion of Jury Trial Elections plus Appeals De Novo in Total Criminal Case Filings

0 - 25%	26 - 50%	over 50%
Anne Arundel	Caroline	Allegany
Baltimore Co.	Cecil	Carroll
Calvert	Charles	Harford
Garrett	Dorchester	Washington
St. Mary's	Frederick	Baltimore City
Somerset	Howard	
Talbot	Kent	
	Montgomery	
	Prince George's	
	Queen Anne's	
	Wicomico	
	Worcester	

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9/1/78

The above statistics must be understood to reflect solely the amount of District Court business before the Circuit Courts. This should be compared with the attached document also prepared by John A. Davies, Jr. indicating the small percentage of District Court Defendants who pray jury trials.

COMPARATIVE PROPORTION OF DEFENDANTS PRAYING JURY TRIALS IN THE DISTRICT COURTS OF MARYLAND

FY 1975	%	FY 1976	%	FY 1977	%	FY 1978 (1st half)	%
Calvert	0.19	St. Mary's	0.08	Garrett	0.56	Calvert	0.39
Charles	0.56	Calvert	0.36	St. Mary's	0.57	St. Mary's	0.45
Allegany	1.10	Anne Arundel	1.44	Talbot	1.15	Garrett	0.80
Garrett	1.16	Allegany	2.05	Calvert	1.41	Allegany	1.30
Cecil	1.22	Garrett	2.08	Allegany	2.18	Frederick	1.81
Anne Arundel	1.30	Charles	2.34	Anne Arundel	2.62	Anne Arundel	2.10
St. Mary's	1.59	Pr. George's	2.59	Pr. George's	2.67	Somerset	2.69
Frederick	1.62	Caroline	2.61	Cecil	2.69	Montgomery	2.72
Talbot	2.08	Worcester	3.61	Frederick	3.04	Talbot	2.77
Kent	2.42	Talbot	3.79	Montgomery	3.51	Wicomico	3.01
Worcester	2.49	Frederick	3.94	Dorchester	3.87	Pr. George's	3.03
Caroline	2.64	Dorchester	4.15	Worcester	4.49	Howard	3.13
MEDIAN	2.79	MEDIAN	4.24	AVERAGE	4.60	MEDIAN	3.28
Harford	2.94	Kent	4.32	MEDIAN	4.61	Cecil	3.43
Dorchester	3.13	Montgomery	4.38	Charles	4.73	Caroline	3.66
AVERAGE	3.18	AVERAGE	4.38	Baltimore Co.	5.01	Baltimore Co.	3.70
Carroll	3.30	Carroll	4.51	Howard	5.05	AVERAGE	3.96
Pr. George's	3.30	Baltimore Co.	4.71	Carroll	5.21	Queen Anne's	4.00
Howard	3.58	Harford	5.03	Somerset	5.28	Harford	4.60
Baltimore Co.	3.85	Howard	6.14	Kent	5.93	Worcester	5.17
Montgomery	4.09	Washington	6.21	Harford	7.39	Carroll	5.77
Washington	4.47	Cecil	6.88	Washington	7.73	Charles	7.22
Somerset	5.51	Wicomico	7.18	Caroline	7.92	Washington	7.24
Wicomico	5.55	Baltimore City	7.55	Wicomico	8.29	Baltimore City	7.88
Baltimore City	6.80	Somerset	8.16	Baltimore City	9.25	Dorchester	7.89
Queen Anne's	11.46	Queen Anne's	11.11	Queen Anne's	9.80	Kent	10.19

110-76929

SUPREME BENCH OF BALTIMORE CITY

MEMORANDUM

DATE: June 9, 1978

TO: The Honorable Robert L. Karwacki

FROM: Daniel W. Whitney

SUBJECT: Sources and Scope of a Criminal Defendant's Right to a Jury Trial under Maryland Law

A. Right to Jury Trial in Prosecutions Originating in Circuit Court.

1. Sources of defendant's right to a jury trial.

a. State Common Law Right. The common law right to a jury trial applies to all offenses originating in the circuit court. Hardy v. State, 279 Md. 489, 369 A.2d 1043 (1977); Thompson v. State, 278 Md. 41, 359A.2d 203 (1976). While it may be Constitutional to do so, no Maryland statute denies an accused, charged with a "petty" crime in a circuit court[1], the right to a jury trial. 278 Md. at 52-53.

Section 4-302(d)(2) of the Courts and Judicial Proceedings Article, serves to restrict the right to a jury trial to crimes punishable by imprisonment in excess of three months. Thompson made clear that this section was inapplicable to prosecutions originating in the circuit courts.

[1]Section 4-101 of the Courts and Judicial Proceedings Article provides that " 'Circuit Court' when used with respect to a criminal case means the circuit court for a county or the Criminal Court of Baltimore."

In Thompson the defendant was charged with three motor vehicle violations arising out of the same circumstances. Only one violation carried a penalty that entitled Thompson to pray for a jury trial prior to a district court trial. Upon a demand for a jury trial the case was transferred to the Criminal Court of Baltimore, but when the case was called for trial, the state entered a nolle prosequi with respect to the offense which satisfied the requirements for entitlement to a jury trial under Section 4-302 (d)(2) of the Courts and Judicial Proceedings Article.

The Court of Appeals however, did not think that the nolle prosequi divested the criminal court of its jurisdiction over the two "petty" offenses. The Court of Appeals held that upon a timely demand in the district court for a jury trial, exclusive original jurisdiction over all three offenses became vested in the Criminal Court of Baltimore. Thompson v. State, 278 Md. 41, 47, 359A.2d 203(1976). Section 4-302 (d)(2) was construed to deal only with circumstances whereby jurisdiction attaches in the circuit courts over offenses otherwise within the district court's jurisdiction. The Court of Appeals interpreted this section to pertain only to the right to make a request for a jury trial in the district court, and that it is inapplicable to the right to a jury trial for charges pending in the Criminal Court.

b. State constitutional right. The right to trial by jury is rooted in the following provisions of Maryland's Declaration of Rights:

(i) Article 5: "the Inhabitants of Maryland are entitled to the Common Law of England, and the trial by Jury,

according to the course of that Law, ...

(ii) Article 21: "in all criminal prosecutions, every man hath a right to be informed of the accusations against him; . . . and to a speedy trial by an impartial jury, without whose unanimous consent he ought not to be found guilty."

(iii) Article 23: "no man ought to be taken or imprisoned or desiezed of his freehold, liberties or priveleges, or outlawed,or exiled, or in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the law of the land." (Judgment by one's peers has been construed as trial by jury. Grove v. Todd, 41 Md. 633(1875); Wright v. Wright, 2 Md. 429(1852).).

In In re Glenn, 54 Md. 572 (1880), the Court of Appeals stated that a jury trial is required for such crimes as have, "by the regular course of the law and established modes of procedure, as theretofore practiced, been subjects of jury trial." Id. at 605-06. In Danner v. State, 89 Md. 220, 42 A.965 (1899), the Court of Appeals attempted to further delineate the types of crimes which entitled a defendant to a jury trial. For many minor offenses the jury trial was seen as unavailable. In cases where a person is subject to "infamous punishment" (confinement in the penitentiary), however, a trial by jury cannot be denied. 89 Md. at 226, 42 A. 965

Prior to 1968 the constitutional right to jury trial in criminal cases was believed to flow from the various

provisions within the Declaration of Rights of the Maryland Constitution, and that the sixth amendment to the Constitution did not require the use of jury trials in state criminal proceedings. See Bristow v. State, 242 Md. 283, 289, 219A.2d 33 (1965). The Supreme Court however, then considered this issue in Duncan v. Louisiana, 391 U.S. 145 (1968), and held that the sixth amendment right to a jury trial is protected against state action. The Court's inquiry into the extent of this right under the Federal Constitution is relevant to the scope of the right under state constitutional law, because there seems to be no distinction between the substance of federal and state granted rights to a jury trial. See Smith v. State, 17 Md. App. 217, 301 A.2d 54 (1973). The court in Duncan perceived that in the past, "petty" offenses were tried without juries both in England and in the Colonies, and have always been considered to be exempt from the sixth amendment jury provisions. 391 U.S. at 160. The practice of prosecuting petty crimes without extending a right to jury trial was found not to violate the Constitution. Id. at 158. Although the court failed to formulate a clear line of demarcation between serious and petty offenses, the court did decide that no offense can be deemed "petty" where imprisonment for more than six months is authorized.

As expressed today, a defendant has a sixth amendment right to a jury trial if the maximum punishment authorized exceeds six months imprisonment or a $500 fine. Baldwin v. New York, 399 U.S. 66(1970).

2. Election of court or jury trial. Maryland Rule 735 (1977 Cum.Supp.) requires a written election by the defendant of a court or a jury trial, and it must be witnessed by counsel.

a. Election of court trial. If the defendant elects to be tried by the court, the trial of the case on its merits may not proceed until the court determines: (1) after inquiry of the defendant on the record, that (2) the defendant's election of a court trial was made with full knowledge of his right to a jury, and (3) that he has knowingly and voluntarily waived that right. See MR 735(d) (1977 Cum.Supp.) If the court determines otherwise, the defendant must be given another election.

The defendant however, has a state law right to a court trial, Zimmerman v. State, 261 Md. 11, 273 A.2d 156 (1971), and accordingly a jury trial election should not be accepted unless the judge believes it to be knowing and voluntary. See Miller v. Warden, 16 Md. App. 614, 629-31, 299 A.2d 862 (1973).

b. When no election is made. If the defendant fails or refuses to elect a court or jury trial, the court must advise him on the record that his failure or refusal will constitute a waiver of his right to trial by jury. If the court finds that the defendant is knowingly and voluntarily waiving his right with full knowledge of it, the defendant may then be tried by the court. See MR 735(c) (1977 Cum. Supp

3. Waiver by defendant of his right to jury trial.

a. State common law right. A court trial election is an adequate waiver of the defendant's right to a jury

trial under state law. Zimmerman v. State, 261 Md. 11, 273 A.2d 156 (1971); Rose v. State, 177 Md. 577, 10A.2d 617 (1940).

b. Federal constitutional right. If a defendant has a federal constitutional right to a jury trial, then he must knowingly and intelligently waive that right before he can be tried in a court trial. Miller v. Warden, 16 Md. App. 614, 624, 299 A.2d 862 (1973). MR 735 (1977 Cum. Supp.) requires the judge to make a waiver determination on the record.

4. Withdrawal of election for court or jury trial.

Maryland Rule 735(a) (1977 Cum. Supp.) requires that a defenda establish "good cause" in order to withdraw a prior valid election of a court or jury trial. State v. Jones, 270 Md. 388, 312 A.2d 281 (1973). The court shall give "due regard to the extent, if any, to which the trial would be delayed by the change." MR 735 a (1977 Cum. Supp.). The withdrawal of a jury trial waiver is generally permitted if no unreasonable trial delay would result. 270 Md. at 285. To determine whether "good cause" exists, the following factors should be considered:

> (1) the reason expressed for making the request,
> (2) when the request is made in relation to the time of the trial,
> (3) the lapse of time between the election and requested change,
> (4) whether there has been a change in counsel,
> (5) whether the motion is made in good faith and not to obtain delay, /and/ whether the granting of the motion would unreasonably delay trial, impede the cause of justice or the orderly administration of the courts, prejudice the Stat's case, or unreasonably inconvenience witnesses. Id. at 396.

B. Right to Jury Trial in District Court Prosecutions.

1. Sources of defendant's right to jury trial. Section 4-302(d) of the Courts and Judicial Proceedings Article provides that a defendant has a right to a jury trial at any time prior to trial if the offense entails a possible penalty in excess of three months imprisonment.

2. Loss of jurisdiction by district court upon a valid demand for a jury trial. If a defendant demands a jury trial under Section 4-302(d)(2), then the district court loses jurisdiction over that "offense and offenses arising from the same circumstances." 4-302(e). In such a case, the circuit court has "exclusive original jurisdiction over all the offenses." Id.

3. Advice to defendant on his right to a jury trial.

a. Minimum requirements. Maryland District Rule 751 (1977 Cum. Supp.), requires that the court "inform the defendant, when applicable,of his right to trial by jury."

b. Waiver of jury trial in two-tier systems of trial courts.

(i) For statutory description of Maryland's two-tier scheme see Courts and Judicial Proceedings Article, §4-301 (1977 Cum. Supp.), on district court exclusive jurisdiction cases; §4-302(c), on concurrent jurisdiction with the circuit courts; and §4-302(a)(b) for district court no jurisdiction cases.

(ii) A defendant does not have a federal constitutional right to trial by jury in the first tier of a two tier system if a jury trial is available on appeal in the second tier. Ludwig v. Massachusetts, 427 U. S. 618 (1976).

(iii) Under MR 1314 (1977 Repl. Vol.) a defendant waives his right to a trial de novo if the party appealing does not appear for trial in appellate court, or moved to abandon his appeal.

C. Right to Jury Trial on Appeals Tried De Novo in the Circuit Court and in District Court Prosecutions Transferred to the Circuit Court.

1. Appeals tried de novo in circuit court.

a. Defendant's election.

The defendant's failure to pray for a jury trial in the district court does not preclude election of a jury trial in the circuit court. Hardy v. State, 279 Md. 489, 369 A.2d 1043 (1977). The statutory right to elect a trial by jury prior to district court proceedings, and the statutory right to a jury trial upon a de novo appeal are considered "separate and distinct" rights. Id. at 495. "Waiver of one statutory right does not imply waiver of another right under a different statutory provision." Id.

b. Scope of defendant's right to elect a jury trial.

Prior to Hardy, it was unclear whether the defendant's common law right to a jury trial in all prosecutions

originating in the circuit court extended to de novo appeals tried in the circuit court. This question was expressly reserved in Thompson v. State, 278 Md. 41, 53-54 n.5, 359A.2d 203 (1976).

The Court of Appeals in Hardy directly addressed the issue as to whether a defendant has a right to a jury trial in the circuit court upon a de novo appeal from a district court conviction. 279 Md. at 490. Defendant Hardy was charged in district court with an offense which was punishable by a maximum eighteen months imprisonment. Although entitled, defendant did not elect to exercise her statutory right to a jury trial at this stage. Upon conviction, defendant received a $100 fine. An appeal was taken to the Circuit Court for Prince George's County, and a jury trial upon her de novo appeal was requested by the defendant, and subsequently denied by the court.

The Court of Appeals construed the words "shall be tried de novo" within Section 12-401(c) as meaning that the appeal must be considered an entirely original circuit court proceeding with the right to a jury trial. Id. at 494-95. Thus, the court in Hardy held that a criminal defendant upon appeal from a district court judgment, has a right to a jury trial in the circuit court de novo proceedings regardless of either the pettiness or seriousness of the charge, or of whether he was eligible for a jury trial under Section 4-302(d).

2. District court prosecutions transferred to the circuit court.

If a demand for a jury trial in the district court results in a transfer of the prosecution to the circuit court, the defendant may not elect a court trial in the circuit court except by leave of the court for good cause shown. MR 735(e) (1977 Cum. Supp.)

I. Courts and Judicial Proceedings Article

Title 4. District Court Jurisdiction

Title 12. Appeals

II. Maryland Rules of Procedure

III. Maryland District Rules

IV. Declaration of Maryland

TITLE 4.

DISTRICT COURT—JURISDICTION.

Subtitle 1. Definitions.

§ 4-101. In general.

(a) In this title, the following terms have the meanings indicated.

(b) *"Circuit court"* when used with respect to a criminal case means the circuit court for a county or the Criminal Court of Baltimore. When used with respect to a civil case, it means the circuit court for a county, the Superior Court of Baltimore City, Court of Common Pleas, Baltimore City Court, or any of them.

(c) *"Criminal case"* means a case within the jurisdiction of the District Court and includes a case charging a violation of motor vehicle or traffic laws and a case charging a violation of a law, rule, or regulation if a fine or imprisonment may be imposed. (1973, 1st Sp. Sess., ch. 2, § 1.)

REVISOR'S NOTE

The definitions are new, and inserted largely to avoid repetition. Subsection (c) states substantially the same definition as § 12-101 (e).

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(1976, ch. 99, § 1.)

Effect of amendment. — The 1976 amendment, effective July 1, 1976, added "criminal" following "means a" near the beginning of subsection (c).

As the other subsections were not affected by the amendment, they are not set forth above.

Applied in Thompson v. State, 278 Md. 41, 359 A.2d 203 (1976).

Quoted in Wilson v. State, 21 Md. App. 557, 321 A.2d 549 (1974).

Subtitle 2. Jurisdiction in General.

§ 4-201. Extent of jurisdiction.

The jurisdiction of the District Court extends to every case which arises within the state or is subject to the state's judicial power, and which is within the limitations imposed by this title or elsewhere by law. Exercise of this jurisdiction is subject to the restrictions of venue established by law. (An. Code 1957, art. 26, § 145; 1973, 1st Sp. Sess., ch. 2, § 1.)

REVISOR'S NOTE

This is based on Article 26, § 145 (a). The phraseology differs from § 1-501, because that section describes the powers of courts of general jurisdiction, whereas this section describes the powers of a court of limited jurisdiction. Title 6 of the Courts Article includes the venue provisions now found in Article 26, § 145 (c) (3) (i). The venue provisions now found in Article 26, § 145 (b) (5) (i) are transferred to Article 27. The only other changes made are in style.

§ 4-301. Exclusive original jurisdiction.

(a) *Violations of vehicle laws or State Boat Act.* — Except as provided in § 4-302, the District Court has exclusive original jurisdiction in a criminal case in which a person at least 16 years old or a corporation is charged with violation of the vehicle laws, or the State Boat Act, or rules and regulations adopted pursuant to it.

(b) *Other violations.* — Except as provided in § 4-302, the District Court also has exclusive original jurisdiction in a criminal case in which a person at least 18 years old or a corporation is charged with:

(1) Commission of a common-law or statutory misdemeanor regardless of the amount of money or value of the property involved;

(2) Violation of any of the following sections of Article 27 of the Code, whether a felony or a misdemeanor, if the amount of money or the value of the thing taken, stolen, received, converted, or shoplifted does not exceed $500:

Section 129 (Embezzlement)

Section 340 (Larceny)

Section 353 (Larceny After Trust)

Section 466 (Receiving Stolen Goods)

Section 551A (Shoplifting);

(3) Violation of a county, municipal, or other ordinance, if the violation is not a felony;

(4) Criminal violation of a State, county, or municipal rule or regulation, if the violation is not a felony; or

(5) Doing or omitting to do any act made punishable by a fine, imprisonment, or other penalty as provided by the particular law, ordinance, rule, or regulation defining the violation if the violation is not a felony. (An. Code 1957, art. 26, § 145; 1973, 1st Sp. Sess., ch. 2, § 1; 1974, ch. 527; 1975, ch. 307; 1976, ch. 457; 1977, ch. 108.)

Effect of amendments. — The 1974 amendment, effective July 1, 1974, corrected a punctuation error in the first paragraph.

The 1975 amendment, effective July 1, 1975, added "regardless of the amount of money or value of the property involved" to paragraph (1) in present subsection (b) and deleted the references to §§ 140, 142 and 144 in the list of violations in paragraph (2).

The 1976 amendment, effective July 1, 1976, added a comma in paragraph (4) in present subsection (b).

The 1977 amendment, effective July 1, 1977, designated the former introductory paragraph as subsection (a), eliminated "or in which a person at least 18 years old or a corporation is charged with:" at the end of that paragraph, designated the remainder of the section as subsection (b), added the introductory paragraph therein and added "Section 129 (Embezzlement)" in paragraph (2) of present subsection (b).

Legislative scheme in the creation of the District Court, as implemented by the Maryland Rules and the Maryland District Rules, was that a felony within the exclusive original jurisdiction of the District Court may be prosecuted in the District Court, and in a circuit court when it obtains jurisdiction, upon the document charging the offense filed in the District Court. This may be done without need for the State to seek action by the grand jury or to file a criminal information, and without the necessity of an affirmative waiver by the accused. Such procedure is not constitutionally proscribed, and is contemplated by statute and rule. Moaney v. State, 28 Md. App. 408, 346 A.2d 466 (1975).

As larceny, under article 27, § 340, to the value of $100 or upwards is a felony, that felony is within the exclusive original jurisdiction of the District Court where the value of the thing stolen does not exceed $500 and the accused is at least 18 years old. In such event, the felonious larceny is to be tried in the apropriate District Court, unless that Court is deprived of jurisdiction. Moaney v. State, 28 Md. App. 408, 346 A.2d 466 (1975).

Disturbing the peace. — Case charging violation of article 27, § 121, disturbing the peace, was within the exclusive original jurisdiction of the District Court because the offense charged was a statutory misdemeanor as to which the maximum penalty authorized for confinement is less than three years. Howard v. State, 32 Md. App. 75, 359 A.2d 568 (1976).

Applied in Thompson v. State, 278 Md. 41, 359 A.2d 203 (1976), rev'g 26 Md. App. 442, 338 A.2d 411 (1975).

Stated in Wilson v. State, 21 Md. App. 557, 321 A.2d 549 (1974); Kirsner v. State, 24 Md. App. 579, 332 A.2d 708 (1975); Dill v. State, 24 Md. App. 695, 332 A.2d 690 (1975); Royster v. State, 32 Md. App. 159, 359 A.2d 560 (1976); Hardy v. State, 279 Md. 489, 369 A.2d 1043 (1977).

Cited in State v. Denisio, 21 Md. App. 159, 318 A.2d 559 (1974); State's Att'y v. Mayor & City Council, 274 Md. 597, 337 A.2d 92 (1975); Barnes v. State, 31 Md. App. 25, 354 A.2d 499 (1976); Schaefer v. State, 31 Md. App. 437, 356 A.2d 617 (1976).

§ 4-302. Exceptions.

(a) *Felonies.* — Except as provided in § 4-301 (2), the District Court does not have jurisdiction to try a criminal case charging the commission of a felony.

(b) *Juvenile causes.* — Except as provided in § 4-303, the District Court does not have criminal jurisdiction to try a case in which a juvenile court has exclusive original jurisdiction.

(c) *Concurrent jurisdiction cases.* — The jurisdiction of the District Court is concurrent with that of the circuit court in a criminal case in which the penalty may be confinement for three years or more or a fine of $2,500 or more.

(d) *Jury trial.* — (1) The District Court is deprived of jurisdiction if a defendant is entitled to and demands a jury trial at any time prior to trial in the District Court.

(2) A defendant may demand a jury trial in a criminal case if the penalty for the offense with which he is charged permits imprisonment for a period in excess of three months; the state may not demand a jury trial.

(e) *Several offenses.* — Except as provided in Subtitle 5, the District Court does not have jurisdiction of an offense or offenses otherwise within the District Court's jurisdiction if a person is charged with an offense or offenses arising from the same circumstances but not within the District Court's jurisdiction. In this case, the circuit court for the county has exclusive original jurisdiction over all the offenses. (An. Code 1957, art. 26, § 145; 1973, 1st Sp. Sess., ch. 2, § 1.)

Application of subsection (d). — Subsection (d) of this section concerns only the right to make a demand, in the District Court, for a jury trial. It has no application to the right to a jury trial for charges pending in a criminal court. Thompson v. State, 278 Md. 41, 359 A.2d 263 (1976), rev'g 26 Md. App. 442, 338 A.2d 411 (1975).

When common-law principles applicable. — Once exclusive original jurisdiction over offenses becomes vested in the criminal court by operation of subsections (d) and (e) of this section, common-law principles and rules relating to the jurisdiction of the criminal court become applicable. Thompson v. State, 278 Md. 41, 359 A.2d 263 (1976), rev'g 26 Md. App. 442, 338 A.2d 411 (1975).

Consolidation of offenses. — There is no intendment in this section to permit the divesting of the exclusive original jurisdiction of the District Court over one offense because it is transferred to a circuit court by virtue of consolidation in the District Court with an offense of a codefendant which allowed that codefendant to exercise rights under subsection (d) of this section. Howard v. State, 32 Md. App. 75, 359 A.2d 568 (1976).

Nolle prosequi. — Nothing in the provisions of this section supports the contention that the criminal court's jurisdiction may be subsequently ousted by entering a nolle prosequi on the charge under subsection (e) of this section. Thompson v. State, 278 Md. 41, 359 A.2d 263 (1976), rev'g 26 Md. App. 442, 338 A.2d 411 (1975).

The right to a jury trial in criminal cases in the Circuit Court and Criminal Court of Baltimore City, as opposed to the District Court, has not been limited by subsection (d) of this section. Thompson v. State, 278 Md. 41, 359 A.2d 263 (1976), rev'g 26 Md. App. 442, 338 A.2d 411 (1975).

De novo proceedings. — A criminal defendant, appealing from a District Court judgment, has a right to a trial by jury in the circuit court de novo proceedings regardless of the seriousness of the criminal charges or whether he or she could have elected a jury trial under subsection (d) of this section. Hardy v. State, 279 Md. 489, 369 A.2d 1043 (1977).

Applied in Prince Georges Properties, Inc. v. Rogers, 275 Md. 582, 341 A.2d 894 (1975); Mooney v. State, 28 Md. App. 408, 346 A.2d 466 (1975); Royster v. State, 32 Md. App. 159, 359 A.2d 560 (1976).

Quoted in Wilson v. State, 21 Md. App. 557, 321 A.2d 549 (1974).

Stated in Dill v. State, 24 Md. App. 695, 332 A.2d 690 (1975).

Cited in Handy v. State, 23 Md. App. 239, 326 A.2d 189 (1974); Johnson v. State, 274 Md. 29, 333 A.2d 37 (1975); Pearson v. State, 28 Md. App. 464, 347 A.2d 239 (1975); Sullivan v. State, 29 Md. App. 622, 349 A.2d 663 (1976); Pinkett v. State, 30 Md. App. 458, 352 A.2d 338 (1976); Barnes v. State, 31 Md. App. 25, 354 A.2d 499 (1976); Schaefer v. State, 31 Md. App. 437, 356 A.2d 617 (1976); Hepple v. State, 31 Md. App. 525, 358 A.2d 283 (1976); Insley v. State, 32 Md. App. 46, 358 A.2d 243 (1976).

§ 12-401. Right of appeal generally.

(a) *Civil and criminal cases.* — A party in a civil case or the defendant in a criminal case may appeal from a final judgment entered in the District Court. In a criminal case, the State may appeal from a final judgment if the State alleges that the trial judge failed to impose the sentence specifically mandated by the Code. In a criminal case, the defendant may appeal even though imposition or execution of sentence has been suspended.

(b) *Time for appeal.* — (1) Except as provided in paragraph (2), an appeal shall be taken by filing an order for appeal with the clerk of the District Court within 30 days from the date of the final judgment from which appealed.

(2) If the final judgment was entered in a case filed under §§ 8-332, 8-401, 8-402, or 14-109 of the Real Property Article of the Code, the order for appeal shall be filed within the time prescribed by the particular section.

(1974, ch. 687, § 13; 1976, ch. 49, § 1.)

(c) *De novo and on record appeals.* — In a civil case in which the amount in controversy exceeds $500, and in any case in which the parties so agree, an appeal shall be heard on the record made in the District Court. In every other case, including a criminal case in which sentence has been imposed or suspended following a plea of nolo contendere or guilty, an appeal shall be tried de novo.

Effect of amendments. — The 1974 amendment, effective July 1, 1974, eliminated "8-331" in sub-subsection (2) of subsection (b), and substituted "the Real Property Article" for "Article 21" therein.

The 1976 amendment, effective July 1, 1976, added the second sentence in subsection (a). Section 2 of the act provides that it shall be construed only prospectively and may not be interpreted to have any application to any event or happening occurring prior to July 1, 1976.

As subsection (c) was not affected by the amendments, it is not set forth above.

Subsection (a) grants unqualified right to appeal. — Subsection (a) of this section grants to a criminal defendant, without qualification, the right to appeal from a final judgment in the District Court. Burch v. State, 278 Md. 426, 365 A.2d 577 (1976).

Legislative intent of subsection (c). — By providing in subsection (c) of this section that appeals from the District Court in criminal cases "shall be tried de novo," the legislature intended that the appeal be treated as an original circuit court proceeding with the right to a jury trial. Hardy v. State, 279 Md. 489, 369 A.2d 1043 (1977).

Subsection (c) does not limit right of appeal. — By its clear terms, the last sentence of subsection (c) of this section, permitting an appeal where sentence is suspended, does not purport to limit the right of appeal from a final District Court judgment. It merely authorizes an appeal at an earlier stage in the event that the defendant desires review of the guilty verdict or of the sentence announced even though the sentence is being suspended and he is being placed on probation. Burch v. State, 278 Md. 426, 365 A.2d 577 (1976).

Trial de novo in criminal case shall proceed on same charging document which was basis of original trial. — A trial de novo in a criminal case on appeal to the circuit court from a final judgment of the District Court shall proceed only on the same charging document which was the basis of the original trial. A trial of the appeal under any other charging document is void. The de novo trial washes out the trial in the District Court but not the basis for it. Thus, the requirement that the appeal be tried under the same charging document may not be obviated by agreement, nor may it be waived, either expressly or by failure to object. Pinkett v. State, 30 Md. App. 458, 352 A.2d 358 (1976).

Statutory rights to jury trial distinguished. — The statutory right to elect a jury trial at the initial stage of the District Court proceedings pursuant to § 4-302 of this article, and the statutory right to a jury trial upon a de novo appeal under subsection (c) of this section are separate and distinct statutory rights. Hardy v. State, 279 Md. 489, 369 A.2d 1043 (1977).

Right of criminal defendant to jury trial in circuit court de novo proceedings. — A criminal defendant, appealing from a District Court judgment, has a right to a trial by jury in the circuit court de novo proceedings regardless of the seriousness of the criminal charges or whether he or she could have elected a jury trial under § 4-302 (d) of this article. Hardy v. State, Md. 489, 369 A.2d 1043 (1977).

der revoking probation and reinstating a ended sentence is a final judgment from h an appeal will lie pursuant to this section. h v. State, 278 Md. 426, 365 A.2d 577 (1976). n an appeal from an order subsequent to the nal trial revoking probation and reinstating suspended sentence, appellate review is ed to any claimed error in the revocation order. Burch v. State, 278 Md. 426, 365 A.2d 577 (1976).

Applied in In re Trader, 20 Md. App. A.2d 528, rev'd on other grounds, 272 M 325 A.2d 398 (1974); Blondes v. Hayes, App. 663, 350 A.2d 163 (1976); State v. Cr Md. App. 300, 367 A.2d 61 (1976); Univ Plaza Shopping Center, Inc. v. Garcia, 2 61, 367 A.2d 957 (1977).

Stated in Kirsner v. State, 24 Md. App 332 A.2d 708 (1975).

Cited in State v. Preissman, 22 Md. App 323 A.2d 637 (1974); Chapel v. Mar Penitentiary Warden, 398 F. Supp. 1151 (D 1975), aff'd, 539 F.2d 705 (4th Cir. 1976) Abell Co. v. Sweeney, 274 Md. 715, 337 A. (1975); Moaney v. State, 28 Md. App. 46 A.2d 466 (1975); Thomas v. State, 277 Md. 353 A.2d 256 (1976); Johanna Farms, In Elliott Equip. Co., 278 Md. 437, 360 A.2d (1976).

Rule 735. Election of Court or Jury Trial.

a. *How Made.*

Subject to section e of this Rule, a defendant shall elect to be tried by a jury or by the court. The election shall be made pursuant to section b of this Rule and shall be filed within the time for filing a plea pursuant to Rule 731 (Pleas). If the defendant elects to be tried by the court, the State may not elect a jury trial. After an election has been filed, the court may not permit the defendant to change his election except upon motion made prior to trial and for good cause shown. In determining whether to allow a change in election, the court shall give due regard to the extent, if any, to which trial would be delayed by the change.

b. *Form of Election.*

An election of a court or jury trial shall be in writing, signed by the defendant, witnessed by his counsel, if any, and filed with the clerk of the court in which the case is pending. It shall be substantially in the following form:

(caption of the case)

Election of Court Trial or Jury Trial

I know that I have a right to be tried by a jury of 12 persons or by the court without a jury. I am aware that before a finding of guilty in a jury trial all 12 jurors must find that I am guilty beyond a reasonable doubt. I am aware that before a finding of guilty in a court trial the judge must find that I am guilty beyond a reasonable doubt.

I hereby elect to be tried by: ....

(insert "the court" or "a jury")

I make this election knowingly and voluntarily and with full knowledge that I may not be permited to change this election.

Witness:

....

Signature of Counsel Signature of Defendant

Date: ....

c. *When No Election Filed.*

If the election is not filed within the time provided by this Rule, the court, on its own motion or upon the motion of the State's Attorney, may require the defendant, together with his counsel, if any, to appear before the court for the purpose of making the election in open court. If the defendant fails or refuses to make an election after being advised by the court on the record that his failure or refusal will constitute a waiver of his right to a trial by jury and if the court determines that the defendant knowingly and voluntarily is waiving his right with full knowledge of it, the defendant may then be tried by the court.

d. *When Court Trial Elected.*

If the defendant files an election to be tried by the court, the trial of the case on its merits before the court may not proceed until the court determines, after inquiry of the defendant on the record, that the defendant has made his election for a court trial with full knowledge of his right to a jury trial and that he has knowingly and voluntarily waived the right. If the court determines otherwise, it shall give the defendant another election pursuant to this Rule.

e. *Causes From District Court.*

Where the defendant has a right to a jury trial and his cause has been transferred from the District Court because he has demanded a jury trial, he shall be tried by a jury and may not elect a court trial except with leave of court for good cause shown.

Cross reference. — Maryland Code (1974), § 4-302 (d), Courts Article.

If the order for appeal has not been timely filed or if the clerk of the lower court has prepared the record as required by Rule 1326 (Record on Appeal) and the appellant has neglected or omitted to pay for such record, or has failed to deposit with the clerk of the lower court the costs as required by section c of Rule 1311 (How Appeal to Be Taken), or by reason of any other neglect or omission on the part of the appellant, the record has not been transmitted to the appellate court within the time prescribed pursuant to Rule 1325 (Record — Time for Transmitting), the lower court may *sua sponte* or upon motion, strike the order for appeal and take all proceedings as if such order for appeal had not been filed.

Rule 1314. Rules Applicable to Cases Heard De Novo.

a. *Application of Appellate Court Procedure.*

Where an appeal is to be heard *de novo,* it shall be tried according to the rules of procedure governing cases instituted in the appellate court, except the rules relating to the form and sufficiency of the pleadings and except as provided in sections b, c and d of this Rule.
(Amended Dec. 17, 1975, effective Jan. 1, 1976.)

b. *Waiver of De Novo Trial — Effect.*

If the party appealing fails to appear for trial in the appellate court or moves to abandon his appeal, he waives the right to a trial *de novo.* In the event of such waiver the appellate court shall enter as its judgment the same judgment as was entered in the lower court.

c. *Motion to Vacate — Reinstatement of Appeal.*

The appellate court may vacate the judgment and reinstate the appeal for good cause shown upon motion filed by the appellant within thirty (30) days of the judgment.
(Amended June 30, 1973, effective July 1, 1973.)

d. *Small Claim Action.*

Appeals in actions tried under M.D.R. 562 (Small Claim) shall be tried *de novo* in an informal manner without the court being bound by technical rules of procedure or evidence, except those relating to privileged communications, and shall be decided so as to do substantial justice between the parties, according to substantive law.
(Added Dec. 17, 1975, effective Apr. 1, 1976.)

Effect of amendments. — The 1973 amendment rewrote this Rule.

The 1975 amendment substituted "sections b, c and d" for "sections b and c" near the end of section a and added section d.

De novo is defined to mean "anew; afresh; a second time." Pinkett v. State, 30 Md. App. 458, 352 A.2d 358 (1976).

Appeal de novo must be tried on same charging document which was basis for trial in District Court. — There is plain intent from the statutes and rules that a trial de novo in a criminal case on appeal to the circuit court from a final judgment of the District Court shall proceed only on the same charging document which was the basis of the original trial. A trial of the appeal under any other charging document is void. The de novo trial washes out the trial in the District Court but not the basis for it. Thus, the requirement that the appeal be tried under the same charging document may not be obviated by agreement, nor may it be waived, either expressly or by failure to object. Pinkett v. State, 30 Md. App. 458, 352 A.2d 358 (1976).

That trial in the circuit court on appeal from the District Court must be on the same charging document is patent when the crimes charged are within the exclusive original jurisdiction of the District Court. Pinkett v. State, 30 Md. App. 458, 352 A.2d 358 (1976).

If trial in the circuit court is not upon the same charging document as was the trial in the District Court, the trial in the circuit court would be an original trial, not a trial anew, afresh or again, so as to be a trial de novo. Pinkett v. State, 30 Md. App. 458, 352 A.2d 358 (1976).

Right to jury trial. — As a statutory right (CJ, § 4-302 (d)), an accused is entitled to be tried by a jury at the de novo trial if the punishment for the offense charged permits imprisonment for a period in excess of three months, and as a constitutional right, he is entitled to be so tried if the punishment for the offense permits a fine in excess of $500. Smith v. State, 17 Md. App. 217, 301 A.2d 54 (1973).

A civil case on appeal from the District Court shall not be tried before a jury. Thompson v. Giordano, 16 Md. App. 264, 295 A.2d 881 (1972).

Cases on appeal from the District Court heard de novo are limited to those involving a claim of less than $500 and with such amount involved a jury trial is not constitutionally mandated. Thompson v. Giordano, 16 Md. App. 264, 295 A.2d 881 (1972).

Rule 751. Commencement of Trial.

At the commencement of a trial, the court shall (a) make certain the defendant has been provided a copy of the charging document; (b) inform the defendant of each offense with which he is charged; (c) inform the defendant, when applicable, of his right to trial by jury; and (d) thereafter, call upon the defendant to plead to each charge.

Article 5. Common law and statutes of England applicable; trial by jury; property derived under charter granted to Lord Baltimore.

That the Inhabitants of Maryland are entitled to the Common Law of England, and the trial by Jury, according to the course of that Law, and to the benefit of such of the English statutes as existed on the Fourth day of July, seventeen hundred and seventy-six; and which, by experience, have been found applicable to their local and other circumstances, and have been introduced, used and practiced by the Courts of Law or Equity; and also of all Acts of Assembly in force on the first day of June, eighteen hundred and sixty-seven; except such as may have since expired, or may be inconsistent with the provisions of this Constitution; subject, nevertheless, to the revision of, and amendment or repeal by, the Legislature of this State. And the Inhabitants of Maryland are also entitled to all property derived to them from, or under the Charter granted by His Majesty Charles the First to Caecilius Calvert, Baron of Baltimore.

Article 21. Rights of accused; indictment; counsel; confrontation; speedy trial; impartial and unanimous jury.

That in all criminal prosecutions, every man hath a right to be informed of the accusation against him; to have a copy of the Indictment, or charge, in due time (if required) to prepare for his defence; to be allowed counsel; to be confronted with the witnesses against him; to have process for his witnesses; to examine the witnesses for and against him on oath; and to a speedy trial by an impartial jury, without whose unanimous consent he ought not to be found guilty.

Article 23. Due process.

That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land.

Fourth Judicial Circuit of Maryland

ADMINISTRATIVE OFFICE
WASHINGTON COUNTY COURT HOUSE
HAGERSTOWN, MARYLAND 21740

JOHN A. DAVIES, JR.
CIRCUIT ADMINISTRATOR

AREA CODE 301
791-3089

MEMORANDUM TO: Special Committee to Study Caseload Increase, Honorable Robert L. Karwacki, Chairman

FROM: John A. Davies, Jr. JAD.

SUBJECT: Analysis of Jury Trial Prayers from District I, July 1975 - December 1977.

DATE: July 12, 1978
(revised September 8, 1978)

The attachments to this memorandum are an attempt to analyze the incidence of Jury Trial Prayers from the Courts of District I, July 1975 through December 1977, as recorded in the District Court statistical report, "Dispositions by Charge".

Attachment A, pages 1-12, compiles the numbers of jury trial prayers in all charges where more than fifty dispositions of this type were reported. The number of jury trial prayers in each charge is charted by sub-district for Fiscal Year 1976, Fiscal Year 1977, and July through December, 1977. Cumulative totals are supplied by report period and by sub-district.

Attachment B, pages 1-2, is a ranking of jury trials prayed in each charge by volume (B-1), and by incidence (B-2).

Following is a summary of information developed from the statistics.

There were 15,667 jury trial prayers reported during the survey period. Using the rankings in Attachment B-1, eight charges account for more than one-half the caseflow into the Supreme Bench on District Court Warrant cases.

CHARGE	# JTE
Assault/Simple	2,066
Other Drugs/Possession	1,083
Marijuana/Possession	998
Weapon/Gun	993
Shoplifting/Under $100	972
Larceny/Under $100	841
Resisting Arrest	712
Assault/Battery	687
Total:	8,352

The total number of criminal cases filed in the District I Courts from July 1975 through December 1977 was 169,180. The following charges, ranked by number of cases filed, accounted for more than one-half the District I caseload.

CHARGE	# CASES
Disorderly Conduct	22,383
Assault/Simple	18,793
Marijuana/Possession	8,691
Weapon/Gun	6,693
Assault/Battery	6,085
Shoplifting/Under $100	5,979
Larceny/Under $100	5,931
Other Drugs/Possession	5,641
Contempt	5,005
Total:	85,201

There are seven charges that are common to both these lists. Ranked in order of incidence of jury trial elections, they are:

CHARGE	% JTE
Other Drugs/Possession	19.20%
Shoplifting/Under $100	16.26%
Weapon/Gun	14.84%
Larceny/Under $100	14.18%
Marijuana/Possession	11.48%
Assault/Battery	11.29%
Assault/Simple	10.99%

The statistical average incidence of jury trial prayers for all charges within District I over the thirty-month survey period is 9.26%.

Briefly, if the Special Committee wants to consider attacking the increase of District Court Warrant cases coming into the Supreme Bench criminal caseload by modifying the caseflow management of specific offenses, these seven charges would be prime targets.

In developing the charts in Attachment A, a pattern between sub-districts seemed evident. An analysis of the incidence of jury trials prayed, comparing sub-districts, follows. In this analysis, the incidence of jury trial prayers within "Net Cases" is used, where Net Cases equals the total number of charges filed minus those cases where the defendant was held for Grand Jury action; i.e., only those cases remaining in the jurisdiction of the District Court for trial.

SUB-DISTRICT	# JTE/# NET CASES	% JTE
Housing	275/ 8,339	3.30%
Central	2,018/19,253	10.48%
Southeastern	1,614/16,340	9.88%
Eastern	1,657/14,856	11.15%
Northern	2,258/20,816	10.85%
Northwestern	1,701/13,078	13.01%
Western	1,204/17,574	6.85%
Southwestern	2,068/18,292	11.31%
Southern	2,872/20,545	13.98%
District I Total:	15,667/149,093	10.51%

Excepting the Housing sub-district as a special case, the disparity between the percentages in the Western sub-district (3.66% below the average) and the Southern sub-district (3.47% above the average) invites attention. A statistically significant distinction between these two sub-districts is found in the rates of acquittals and convictions during the thirty-month survey period.

JURISDICTION	NET CASES	GUILTY	NOT GUILTY
Western	17,574	4,941 (28.1%)	6,858 (39.0%)
Southern	20,545	7,583 (36.9%)	5,560 (27.1%)
District I	149,093	50,721 (34.0%)	43,079 (28.9%)

The relatively high acquittal rate in the Western sub-district prompts speculation that fewer jury trial elections based on "judge-shopping" are occuring there. However, the assignments of District I Judges are rotated, periodically, among the several sub-districts.

A more valid indicator of the causal factors in the disparate proportion of jury trial prayers in these two sub-districts might be the incidence in selected offenses. Within the high volume charges listed on page 2, supra, Southern sub-district has the highest number of jury trial prayers in six of the nine offenses (disorderly conduct; assault/simple; weapon/gun; assault/battery; larceny/under $100; and other drugs/possession) and the second highest in marijuana/possession. Western sub-district, in contrast, has the lowest number of jury trial prayers in five of the nine charges listed (disorderly conduct; assault/simple; marijuana/possession; assault/battery; and shoplifting/under $100).

The following is derived from caseload statistics published in the Annual Reports of the Administrative Office of the Courts, using Fiscal Year 1974 (the first year all categories were compiled) as a base, compared to Fiscal Year 1977.

	BALTIMORE	OTHER CIRCUITS
Criminal caseload	+ 91.2%	+55.3%
Jury Trials Prayed	+137.8%	+93.6%
Appeals de novo	+ 18.2%	(-)14.6%
Appeals + JTE	+ 67.5%	+16.7%
Cases - Appeals & JTE	+101.3%	+78.0%
Defendants charged, D/C	+ 21.6%	+23.6%

Obviously, the rate of caseload increase at the Supreme Bench has been considerably higher than the rate of change in the remaining jurisdictions in Maryland, during the past three years.

The rate of increase in jury trials prayed, Statewide, indicates that any resolution of the problem that will benefit the Supreme Bench will have considerable impact throughout Maryland.

jad
(revised 9/8/78)
Attachments

Exhibit E
MSLM/59

District Courts of Massachusetts

REPORT OF THE
SPECIAL COMMITTEE ON TRIAL DE NOVO
TO THE CHIEF JUSTICE OF THE DISTRICT COURTS

Special Committee on Trial de Novo

Hon. Edith W. Fine (Brookline), Chairperson
Hon. Charles R. Alberti (Great Barrington)
Hon. Lawrence L. Cameron (South Boston)
Hon. John C. Cratsley (Roxbury)
Hon. Gordon L. Doerfer (BMC)
Hon. Robert A. Welsh, Jr. (Orleans)

Judith A. Cowin, Counsel,
Administrative Office of the District Courts

January, 1976

Administrative Office
District Courts of Massachusetts
209 ESSEX STREET
SALEM MASSACHUSETTS 01970
SAMUEL E. ZOLL, Chief Justice

[illegible]
Director

June 30, 1978

John A. Davies, Jr.
Circuit Administrator
Washington County Courthouse
Hagerstown, MD. 21740

Dear Mr. Davies:

As promised, I enclose the reports we discussed the other day over the telephone. I enjoyed our conversation and wish you luck with your endeavors.

If there is any other information we might provide, do not hesitate to let us know.

Very truly yours,

John M. Connors

John M. Connors
Administrative Attorney

JMC:hga
Enclosure

Fourth Judicial Circuit of Maryland

ADMINISTRATIVE OFFICE
WASHINGTON COUNTY COURT HOUSE
HAGERSTOWN, MARYLAND 21740

JOHN A. DAVIES, JR.
CIRCUIT ADMINISTRATOR

AREA CODE 301
791-3089

MEMORANDUM TO: Special Committee on Supreme Bench Caseload Increase, Honorable Robert L. Karwacki, Chairman

FROM: John A. Davies, Jr. JAD

SUBJECT: Reports of the Special Committee on Trial De Novo, District Courts of Massachusetts.

DATE: July 17, 1978

The enclosure consolidates two reports of the Massachusetts Special Committee on Trial De Novo. The first report, dated January 1976 is 24 pages long and might be considered preliminary to the second, Final Report.

The final report of the Committee, December 31, 1976, is a more comprehensive statement of recommendations made to the Chief Justice of the (Massachusetts) District Courts. Both reports were supplied by John M. Connors, Esquire, of the AODC in Salem, Massachusetts.

Massachusetts has a two-tier court system, not unlike Maryland's in structure. They do not allow, however, a choice of jury trial in the first instance. A criminal case within the jurisdiction of their District Court must be tried, initially, by the Bench. The right to trial by jury is preserved by a trial (appeal) de novo procedure similar to that of Maryland.

In 1975, anticipating the possibility of an unfavorable decision in Ludwig v. Massachusetts invalidating the trial de novo procedure, the Special Committee was formed. Following the decision in Ludwig, the Committee continued its activities, considering alternatives to the present de novo system "as a matter of deliberate choice rather than instant necessity."

The Maryland system of allowing a choice between a non-jury trial at the District Court and a jury trial at the Superior (Circuit) Court level was considered and rejected by the Massachusetts Committee. In their words, this would "exacerbate the existing situation in the Superior (Circuit) Court since it would increase the caseload, and therefore the backlog, of an already overloaded system". (First Report, page 21.)

The Final Report of the Massachusetts Committee details the relative merits, impact and feasibility of three Options considered preferable to their present trial de novo system. Each of the three Options is seen as an acceptable method of preserving the right to trial by jury while retaining the mandatory non-jury trial in the first instance.

All three Massachusetts Options are dependent on the existence of a jury system (jury of six) already available in their District Court structure.

The Maryland parallel (within our existing system) would be dependent on preserving the trial by jury on appeal, by trial de novo, to the Circuit Court. This is exactly the process that Massachusetts hopes to eliminate.

jad

Enclosure

District Courts of Massachusetts

REPORT OF THE
SPECIAL COMMITTEE ON TRIAL DE NOVO
TO THE CHIEF JUSTICE OF THE DISTRICT COURTS

HON. EDITH W. FINE, Chairperson
HON. CHARLES R. ALBERTI
HON. LAWRENCE L. CAMERON
HON. JOHN C. CRATSLEY
HON. GORDON L. DOERFER
HON. ROBERT A. WELSH, JR.

January, 1976

Contents

Introduction

Every criminal trial in the District Courts[1] is held initially by a judge without a jury. However, it is generally assumed that all persons charged with crime in Massachusetts have a constitutional right to a trial by jury.[2] The District Court defendant exercises this right, if he chooses to do so, only after the first trial has taken place.[3] If he is dissatisfied with the decision of the District Court judge he may appeal to Superior Court where he will have the right to be retried before a jury of twelve, or in most counties he may also appeal to a jury of six session of the District Courts.[4] In either event the defendant obtains an entirely new trial. This second trial or retrial of the offense is referred to as trial de novo or appeal de novo.

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[1] References herein to the District Courts include the Boston Municipal Court unless otherwise stated.

[2] See *Jones* v. *Robbins*, 8 Gray 329 (1857); Smith, *Criminal Practice and Procedure, Massachusetts Practice*, vol. 30, at 443, and Article XII of the Declaration of Rights of the Massachusetts Constitution. With regard to the Federal Constitution, "[f]ive Members of the Court out of the eight participating . . . agreed [in *Baldwin* v. *New York*, 399 U.S. 66, 90 S. Ct. 1886 (1970)] that, at the very least, the Sixth Amendment requires a jury trial in all criminal prosecutions where the term of imprisonment authorized by statute exceeds six months." *Codispoti* v. *Pennsylvania*, ____ U.S. ____, 94 S. Ct. 2687, 2691 n. 4 (1974). Apart from constitutional provisions, G.L. c. 263, § 6, and c. 278, §§ 18 and 18A, read together, provide every criminal defendant with this right.

[3] G.L. c. 218, §§ 26, 27A; c. 278, §§ 18, 18A.

[4] In the Boston Municipal Court the appeal is to a jury of twelve. See G.L. c. 278, § 18A.

Ultimately it may not take place before a jury if the defendant pleads guilty or waives the jury.

The trial de novo procedure also applies to cases of juvenile delinquency.[5] These cases are heard in the first instance by District Court judges, except in the areas served by the Boston, Worcester, Springfield and Bristol County Juvenile Courts. All juvenile appeals are heard de novo in the Superior Court, except for the alternative availability of a similar procedure in the Boston Juvenile Court. While this report discusses the trial de novo problem in terms of adult criminal cases, the considerations have equal application to cases of juvenile delinquency.

In July, 1975, Franklin N. Flaschner, Chief Justice of the District Courts of Massachusetts, established a Special Committee to examine the trial de novo procedure in an effort to understand its effect on the quality of the judicial process in Massachusetts, particularly in the District Courts. The five District Court judges and one Boston Municipal Court judge appointed to the committee, representing diverse experience in urban, suburban and rural courts, met for several months and this report is the result of their work.[6]

The committee's report is merely a first step in an analysis of trial de novo. It presents a consideration of the strengths and weaknesses of the existing system and it discusses some alternative modifications of it, but it does not recommend a particular solution. Nor is the report intended as a comprehensive study of the problem. The committee, for example, made no attempt to deal with the constitutional issues of whether the trial de novo procedure violates the Sixth Amendment right to

[5] In juvenile cases this is not a constitutional but a statutory right. The consequences are the same, however. See *McKeiver* v. *Pennsylvania*, 403 U.S. 528, 91 S. Ct. 1976 (1971).

[6] The report expresses the views of each of the committee members individually and not as a representative of a particular court.

a trial by jury or the Fifth Amendment double jeopardy provisions.[7] Nor did the committee attempt to obtain extensive statistics with regard to the operation of the trial de novo procedure.

The committee did, however, have the advantage of some statistics for its study, including the annual statistics of the District Courts and the Superior Court. In addition, the results of two surveys were utilized in preparing the report. The first survey is referred to in the report as the "District Court Study" and consisted of a questionnaire completed by the probation officers in the courts represented by the committee members and by the probation officers of several other District Courts.[8] The second is referred to as the "BMC [Boston Municipal Court] Study" and was conducted in the BMC as part of a thesis presented by Michael S. Kaufman in March, 1975 to the Department of Government at Harvard College as partial fulfillment of the requirements for the Bachelor of Arts degree with honors.[9] To the extent that

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[7] These issues were raised in the recent United States Supreme Court case of *Costarelli* v. *Commonwealth of Massachusetts*, ____ U.S. ____, 95 S. Ct. 1534 (1974), although the Supreme Court eventually dismissed the appeal for want of jurisdiction. The same questions are raised again in *Ludwig* v. *Commonwealth of Massachusetts*, No. 75-377, in which the Supreme Court noted probable jurisdiction on November 11, 1975. See also *Whitmarsh* v. *Commonwealth*, 1974 Mass. Adv. Sh. 1403, 316 N.E. 2d 610.

[8] The following courts participated in the District Court Study: Brookline, Newton, Roxbury, Salem, South Boston, Orleans, Springfield and Great Barrington.

[9] A follow-up study of cases appealed from the Cambridge District Court was conducted by Michael S. Kaufman and Johanna Resnick, the results of which are contained in a paper written by Mr. Kaufman entitled "Trial de Novo in the Cambridge District and Middlesex Superior Courts" (hereafter referred to as the "Cambridge Study"). The paper, dated December, 1975, was made available to the committee after the preparation of its report. In the only respect in which the conclusions of the Cambridge Study vary from those in this report, that discrepancy is noted. See n. 30, *infra*.

statistics are used, the report relies more heavily upon BMC than District Court figures because the BMC Study is undoubtedly more accurate than the informal study conducted within the District Courts. However, the statistics of both studies are used only to supplement the experience and observations of the judges on the committee.

In undertaking this project the committee was aware of the movement away from trial de novo in other states and of the general trend toward change in this area.[10] For example, in the New England area Connecticut recently abolished trial de novo by statute[11] and Rhode Island modified the procedure somewhat by court decision.[12] Oregon, too, recently abolished trial de novo.[13] Only nine states retain the two-tier trial system in criminal cases.[14] The Report on Courts of the National Advisory Commission on Criminal Justice Standards

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[10] Current literature on the subject is also concerned with changes in the procedure. For example, the committee reviewed the following: Robertson and Walker, *Trial de Novo in the Superior Court: Should It Be Abolished? — Two Views*, 56 Mass. L.Q. 347 (1971); Note, *The De Novo Procedure — Assessment of its Constitutionality Under the Sixth Amendment Right to Trial by Jury and the Due Process Clause of the Fourteenth Amendment*, 55 B.U. L. Rev. 25 (1975); and *De Novo Juries, Misdemeanor Counsel and Other Problems: Changes Ahead for the Maine District Courts?* 23 Me. L. Rev. 63 (1971).

[11] See Sec. 54-82, Conn. Gen. Stat.

[12] *State* v. *Holliday*, 109 R.I. 93, 280 A.2d 333 (1971).

[13] Ch. 451, Oregon Laws, 1975.

[14] Alabama, Arkansas, Massachusetts, Minnesota, New Hampshire, Maine, North Carolina, Pennsylvania and Virginia. Note, *The De Novo Procedure — Assessment of its Constitutionality Under the Sixth Amendment Right to Trial by Jury and the Due Process Clause of the Fourteenth Amendment*, 55 B.U. L. Rev. 25, 26-7 n. 6 (1975).

and Goals recommends the abolition of trial de novo and the availability of an appeal on questions of law in all cases.[15]

Calls for reform have come from within the Massachusetts court system and legal community as well. As early as 1909 Judge Henry T. Lummus, later Associate Justice of the Supreme Judicial Court, in a report entitled "The Failure of the Appeal System," criticized the trial de novo system and called the need for reform "great and pressing."[16] On various occasions since that time the Judicial Council, committees and individual judges have called attention to the defects of the system.[17] In 1970, after thirty years of relative silence on the subject, the Lawyers Committee for Civil Rights Under Law published a provocative report[18] highly critical of the system. The Annual Report on the State of the Judiciary to the Massachusetts Bar Association delivered on June 14, 1975 by G. Joseph Tauro, Chief Justice of the Supreme Judicial Court, recommends the consideration of some changes in our two-tier system and calls for an end to the frustration of "the efforts of district court judges to render substantial justice by subjecting their decisions to de novo appeals."[19]

It is hoped that the committee's report will serve as the basis for intensified public discussion of this very important issue.

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[15] See Standard 8.1 at page 164, and the commentary at page 166.

[16] Henry T. Lummus. *The Failure of the Appeal System* (Massachusetts Prison Association, 1909), p. 29.

[17] BMC Study, 42-51.

[18] Bing and Rosenfeld, *The Quality of Justice in the Lower Criminal Courts of Metropolitan Boston* (Lawyers Committee for Civil Rights Under Law, 1970).

[19] Tauro, *The State of the Judiciary — Annual Report of the Chief Justice of the Massachusetts Supreme Judicial Court*, 60 Mass. L.Q. 241, 261 (1975).

The Impact of Trial de Novo on Law Enforcement

In analyzing the trial de novo process, a major concern is whether the public interest in law enforcement is adequately served by the present system.

Massachusetts communities face a serious problem of rising crime, particularly the type of crime that makes people insecure on the streets and in their homes. For example, from 1968 to 1973 the percentage increase in all serious crimes in Massachusetts was approximately 55 percent. The percentage increase in property crimes during the same period was approximately 74 per cent for larceny, 54 per cent for burglary and 36 per cent for auto theft.[20]

The judicial system is criticized for failing to cope effectively with this increase in criminal activity. The criticism stems from a variety of theories regarding the philosophical basis for judicial action in dealing with criminal cases. Some view the goal of the judicial system primarily as rehabilitation of the offender; others see the goal as incapacitation of the offender so that he may, temporarily at least, be prevented from committing other crimes. Some urge deterrence as the major purpose, and still others — a growing number perhaps — urge a goal of punishment or retribution. Without analyzing the relative merits of the various theories, there should be consensus on one proposition: the public interest in reducing crime is best served by the courts when they can im-

[20] These statistics are based upon the FBI's Uniform Crime Reports. Figures for 1973 are estimated because the larceny definition was changed from "larceny over $50" to "all larceny." See *Commonwealth of Massachusetts 1976 Comprehensive Criminal Justice Plan, Volume 5: Crime in Massachusetts 1973* / (Massachusetts Committee on Criminal Justice, 1975), pp. 14, 16.

pose final dispositions, promptly, after fair trials.[21] The relative value of any aspect of the organization of the court system should be measured against this standard.

At first glance the present system has appeal. It permits a resolution of ". . . the great majority of misdemeanor cases . . . and perhaps half of all felony cases within a week or two of arrest."[22] It is an effective device for screening out a large percentage of the criminal cases for prompt disposition while at the same time preserving the right to trial by jury. Upon closer analysis, however, the picture becomes more complicated and reveals that these benefits are achieved at a high cost to law enforcement.

Defaults. First, many defendants default after taking an appeal for a de novo hearing and thus may escape punishment altogether. For example, in the BMC Study 25 per cent of the defendants who appealed to Superior Court defaulted at their Superior Court hearing.

Delay. Of utmost concern, however, is the fact that those cases that are appealed are usually heard after a significant delay, a delay in many cases of more than a year.[23] In Berk-

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[21] See in this regard the address by Attorney General Edward H. Levi to the International Association of Chiefs of Police 82d Annual Convention, Second General Session, September 16, 1975.

[22] Robertson and Walker, *Trial de Novo in the Superior Court: Should It Be Abolished? — Two Views*, 56 Mass. L.Q. 347, 359 (1971).

[23] In the BMC Study the length of time from the date the case was entered in Superior Court to final disposition was considered, and only 5 percent of the cases were still pending in the Superior Court after one year. Nevertheless, the average length of time for disposition of cases appealed from the BMC to Superior Court was roughly five months. BMC Study, 63-4. Five months is a considerable period of time, especially in view of the fact that the average time it takes to complete criminal proceedings in the BMC is 2½ weeks. *Id.* at 60. Delay is considerably worse in certain counties outside of Suffolk County.

With regard to District Court cases appealed to the Superior Court during the period of the District Court Study, over one-third of such cases

shire County there were no de novo appeal sessions at all in Superior Court for almost two years, from December, 1973, until October, 1975.

The consequences of such delay are devastating from a public interest viewpoint. If deterrence is a legitimate law enforcement objective, the more delayed the final disposition of a defendant's case the less the deterrent effect. Moreover, those defendants who require incarceration for rehabilitative purposes or merely to punish them remain on the street between the District Court disposition and hearing in Superior Court. Those who could be rehabilitated in the community in drug, alcoholic or other programs remain unsupervised. They are free for months or years to commit further crimes before a final disposition of their original offense. Although the defendant must "recognize," personally or via money bail, he is not under any type of court supervision that might prevent him from committing further crimes.

It is sometimes believed that the period between taking the appeal and ultimate disposition is, in practical effect, a period of unsupervised probation with the defendant striving to stay out of trouble and change his life style, hoping for a more favorable disposition in the Superior Court. This may happen in some cases. However, more typical is the case of a defendant who commits multiple offenses while his appeal is pending

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were still pending in the Superior Court one year after the appeal had been taken. It is possible that a substantial percentage of these cases may even be pending after two years. (A definite determination of the true delay involved cannot be made because the period studied is too recent.)

Although District Court criminal cases may be appealed either to the Superior Court or, in counties where they exist, to a District Court jury of six, G.L. c. 278, § 18; c. 218, § 27A, this section of this report is concerned only with those cases appealed to the Superior Court. Appeals to Superior Court represent the great majority of all criminal cases appealed from the District Courts and virtually all criminal cases involving non-motor vehicle offenses.

so that when the appeal is finally heard the original case is one of several dealt with together. Every District Court judge encounters all too frequently the situation where a defendant is arrested, tried and found guilty in the District Court at the same time that he is awaiting trial in Superior Court on an appeal — often several appeals — from previous District Court guilty findings. By dealing with these appeals together when the first one comes to hearing in Superior Court the distinctive nature of each offense is blurred and the group of offenses tends to become merged into a packaged disposition for the sake of expediency.

In addition, as time passes interest in the event declines. The diminishing public interest has two effects. It is increasingly difficult to prove a case as witnesses disappear, their memories fade or they become disillusioned or frustrated after repeated court appearances. Additionally, the public perception of justice being accomplished diminishes or is lost altogether. The criminal process eventually loses its meaning and the victim and all affected by the initial crime perceive the entire system as unresponsive and ineffectual. Delay, in short, is undesirable from the perspective of public interest in law enforcement. No valid public interest exists for delays in resolving the disposition of a criminal case.

Results on appeal. In examining the consequences of a system that rapidly and finally disposes of most of its criminal cases, those cases which are appealed and whose outcomes are substantially delayed must be scrutinized in order to determine the consequences of the delay and the relative importance of the cases involved.

Some individuals are found not guilty on appeal. The BMC Study indicated that of all defendants who appealed to Superior Court approximately one-fifth have their cases terminated favorably. But for the remaining defendants — the vast majority of the total who appeal — the sentence on appeal

generally represents a substantial *reduction* of the sentence that had been imposed in the District Court. Of those convicted on appeal from the BMC, substantially all received a lesser sentence. In fact, of the 35 defendants in the BMC Study who had received jail terms of more than 12 months in the BMC, 26, or 74 per cent, were freed from any incarceration at all upon appeal. Of the 23 defendants sentenced to over 18 months in jail in the BMC, 16, or 70 per cent, received no jail term in the Superior Court.[24]

Moreover, the defendants who do receive jail sentences in District Court, and thus comprise the bulk of appellants, are those considered by District Court judges to be the most serious offenders. Typically District Court judges try to dispose of criminal matters with dispositions not involving incarceration. A first offender, upon a determination that there are sufficient facts to warrant a finding of guilty, is likely to have his case continued without a finding, sometimes with a requirement of restitution, court costs or supervision. "Instead of imposing jail sentences District Courts tend, or should tend, to explore and utilize every sentencing alternative in the community consistent with protecting the community."[25] A jail sentence is the most severe penalty available to a District Court judge and is usually imposed only upon a repeater of serious and harmful misconduct.

Perhaps in some cases a reduction in a District Court sentence may appear to be appropriate. Yet the statistics as well as the experience of the District Court judges demonstrate that sentences are systematically and substantially reduced in Superior Court to a degree far in excess of what could be deemed

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[24] BMC Study, 71, 74.

[25] Flaschner, *The District Courts of Massachusetts: The Office of the Chief Justice and Five Precepts of Judicial Administration*, 58 Mass. L.Q. 115, 123 (1973).

reasonably necessary. Moreover, with respect to those defendants found guilty on appeal to Superior Court and placed on probation there, the relative effectiveness of Superior Court probation is probably less in comparison to District Court probation which is typically in the defendant's community, under the supervision of the local District Court judge.

The serious offender. It is the opinion of the committee that, apart from those defendants genuinely maintaining innocence or legitimately aggrieved by an unduly harsh sentence, or suffering loss of license, it is usually the "career criminal" — the recidivist — who utilizes the de novo system to avoid incarceration. He knows the advantages to him of the appeal process: long delay in the execution of the sentence imposed and, ultimately, a reduction in that sentence.[26] Other defendants who frequently appeal are those who have something to lose by accepting the District Court sentence, that is, those defendants already serving another suspended sentence or on parole. The acceptance of the District Court finding would jeopardize their freedom on the other sentences.[27] Because this is at least their second conviction, these individuals may be en route to becoming career criminals. The conclusion is inescapable that the system is used most frequently by precisely those persons from whom society most wants protection.

The fact that the system ultimately provides the opportunity for a jury trial in Superior Court cannot be used to justify the existing procedure. While defendants have the right to a jury trial[28] and the opportunity for one must exist at some level, in reality a jury trial on an appeal de novo from the District Court to the Superior Court rarely occurs. According to the BMC Study there was a jury trial in less than 4 per cent of the

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[26] See BMC Study, 133.

[27] See pp. 15-16, *infra.*

[28] See n. 2, *supra.*

cases appealed.[29] The large majority of cases appealed to the Superior Court are disposed of on guilty pleas, often to reduced charges, by prosecutors after considerable delays.[30]

In summary, because the District Court defendants presenting the most serious danger to society comprise the large majority of those who appeal to the Superior Court, and because those appeals generally produce mild dispositions after unreasonable delays, the public interest in effective law enforcement may be ill-served by the de novo system despite its function as a useful screening mechanism.

Trial de Novo and the Defendant's Rights

Another area of concern in analyzing the trial de novo process is the extent to which the present system is fair from the point of view of the defendant's rights. As mentioned in the Introduction, these rights will be considered from a pragmatic rather than a constitutional perspective.

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[29] BMC Study, 65.

[30] *Id.* at 71. If a jury trial is in fact all the defendant wants, rather than delay, a speedy jury trial is usually available in the District Court before a jury of six. Statistics indicate, however, that relatively few defendants choose to appeal to the jury of six. It should be noted that the Cambridge Study concluded that the difference in delay between the jury of six sessions and the Superior Court of Middlesex County was negligible. Cambridge Study, 11. This conclusion was inconsistent with that of the District Court Study, however.

In addition, the figures used in the Cambridge Study are from the period April through October, 1973. Although this was the same time span used in the BMC Study, it should be noted that there has been a significant decrease since 1973 in the age of cases pending for disposition at the jury of six session in Cambridge. In September, 1973 at the time of the Cambridge Study there were 176 defendants with cases over six months old awaiting disposition. In December, 1975 there were only 12 defendants with cases over six months old awaiting disposition.

Advantages to the defendant. Again, the trial de novo process superficially appears to be of great benefit to the defendant. He receives a rapid and inexpensive trial in the District Court. Absent delay at the defendant's request, the District Court proceedings frequently begin within ten days after the filing of the complaint and generally are completed, once brought to trial, in one court day.[31] Moreover, the speed and the relative informality of the District Court trial tend to minimize the costs of defending the charge.

The de novo system also offers the defendant the advantage of extended discovery of the state's case against him at the District Court level without requiring the defendant to reveal his own case. The defendant has the opportunity to expose the state's witnesses to cross-examination and to solidify their testimony for impeachment purposes at the Superior Court trial.[32]

The appeal often insures that the defendant will not suffer adverse consequences as a result of the District Court proceeding. By simply saying "I appeal" he effectively nullifies the sentence imposed by the District Court judge.[33]

The mechanics of the appeal procedure also function to the defendant's advantage. Once he claims his appeal, the defendant, in effect, assumes control of the future course of the litigation. He may obtain continuances for bona fide reasons or for self-serving reasons such as trying to select a judge who might be lenient. Up until the time of the Superior Court trial the defendant may also withdraw his appeal to the Su-

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[31] Brief for Massachusetts Defenders Committee as Amicus Curiae at 8, *Costarelli* v. *Commonwealth of Massachusetts*, ____ U.S. ____, 95 S. Ct. 1534 (1975).

[32] *Id.* at 10.

[33] See G.L. c. 278, § 18, and *Mann* v. *Commonwealth*, 359 Mass. 661, 271 N.E. 2d 331 (1971). See also St. 1975, c. 459 relative to suspended sentences.

perior Court and either elect to appeal to the jury of six in the District Court[34] or simply accept the sentence originally imposed. Coupled with the long delay that is usually available, the system is of great value to the career criminal.

But most beneficial to the defendant, perhaps excessively so, is the fact that the system offers him two chances at acquittal. At the Superior Court trial the entire proceeding starts anew with the defendant again assuming the presumption of innocence and the burden once more upon the Commonwealth to prove guilt beyond a reasonable doubt. This creates a peculiar anomaly in that defendants charged with serious felonies lack a second chance for acquittal. Their original trial is in Superior Court, with appeal only on questions of law. Thus the system provides greater rights to defendants charged with larceny, auto theft, housebreaking, assault and battery or even motor vehicle offenses than to those charged with murder or rape.

Delay of the right to jury trial. The main reason for the de novo system is to preserve the defendant's right to a trial by jury.[35] The de novo process, however, delays this right. By so doing the advantages that a jury trial offers are also delayed. It is generally agreed that a jury trial rather than a non-jury trial may be preferable to many defendants for several reasons. It is said that a jury tends to be more sympathetic. Judges may tend to become case-hardened or prosecution-minded after sitting on criminal cases in a particular community for a substantial period of time. In many District Courts the judges soon know the police by name; they see the same faces every day and there is strong pressure to begin to think of themselves as members of the "Commonwealth's team." The jury is the time-honored, fair system for impartially deciding questions of fact. It is the backbone of our

[34] See G.L. c. 218, § 27A.

[35] See n. 2, *supra*.

system of justice. Six or twelve of the defendant's peers are considered best able to determine credibility issues. Thus the de novo process, although theoretically providing the defendant with the benefits of a jury trial, merely serves to delay these benefits, with all of the disadvantages that such delay entails.

The expense of the de novo system. The right to a jury trial may be obtained only by bearing the expense and anxiety of two trials. The defendant obtains his second trial only by submitting twice to the strenuous preparation involved in defending a lawsuit: securing witnesses, consultations with an attorney, development of trial tactics and ultimately a potentially lengthy trial. If the defendant is indigent the state or county must assume the cost of defending the defendant twice. Defendants with low incomes who do not qualify for court-appointed counsel may well find the extra cost of two trials prohibitive. Defendants who have been found guilty but who strongly proclaim their innocence may, because of financial considerations or otherwise, be encouraged to accept probation or a suspended sentence rather than face an appeal. Perhaps if tried by a jury in the first instance some of the defendants accepting relatively mild dispositions would have been found innocent.

Pending the appeal, the defendant must live with the fact of conviction. Although the District Court sentence is effectively nullified when the defendant claims an appeal, severe personal and financial consequences result from the conviction. A conviction may disrupt or curtail an individual's employment, drain his financial resources, create adverse publicity, injure his reputation and create anxiety in him, his family and his friends.

The fact of conviction may also trigger other undesirable consequences. The conviction may affect a defendant's probation or sentence on an earlier charge. It is always a condi-

tion of probation that a defendant not commit another crime. If he is found guilty in the District Court of committing an additional crime, notwithstanding his having appealed he may still be subject to being surrendered for a probation violation which could lead to the imposition of the sentence in the earlier case.[36] Conviction may also hinder his right to be released on bail in the immediate case or in subsequent cases.[37] Action in these other areas is not suspended pending an appeal. In tangible terms the District Court conviction may cause the defendant to suffer severe administrative consequences, such as the loss of his driver's license.[38] He may become ineligible for a firearms identification card[39] or be subject to other unanticipated administrative consequences.[40]

Thus, upon close scrutiny, the surface appeal of the de novo system for the defendant is in many respects outweighed by the burdens the system imposes upon him, except for the career criminal who gains the most merely from the delay the process provides. To the extent that the system provides two separate trials, for the career criminal it provides excessive benefits against the public interest; for the others the burdens associated with two trials result in unfairness. The requirement of fairness would be satisfied by one opportunity for trial, before a jury if so desired, and an appeal on errors of law, if any.

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[36] See Standard on Surrender of Probationer Who has been Found Guilty and Appealed, or Been Held for the Superior Court Following Probable Cause Hearing, promulgated by the Commissioner of Probation, July 15, 1971.

[37] See G.L. c. 278, § 18.

[38] See G.L. c. 90, § 24(1)(b), and *Lowenstein* v. *McLaughlin*, 295 F. Supp. 638 (D. Mass. 1969).

[39] See G.L. c. 140, §§ 121, 122.

[40] See G.L. c. 140, § 9.

The Effect of the Trial de Novo System on the Quality of Justice

The existence of the trial de novo system has a negative impact upon the quality of justice in the District Courts.

The District Court judge is constantly aware that an appeal by the defendant will, in effect, eradicate whatever sentence the District Court imposes. This fact discourages the careful thought required in the delicate process of imposing reasoned and appropriate sentences. The District Court judge, for example, knows that an appeal will return the defendant to the street for months or years without any type of rehabilitative program, whether it be incarceration or supervised probation. In an attempt to avoid this undesirable result he may impose a sentence other than that called for by the facts of the particular case and the defendant's criminal record, if any. A lighter sentence than actually warranted may be ordered in the hope that the defendant will accept the sentence and not appeal. A sentence of incarceration may be imposed and then suspended, with probation, on the theory that because the defendant will avoid actual incarceration he will not appeal, and that if the probationary terms are violated sentence may then be imposed, from which no appeal lies.[41]

The possibility of a trial de novo may also result in a judge imposing a harsher sentence than the one actually deserved. The overly-harsh sentence may be the judge's response to community pressures, for he knows that the appeal de novo provides an escape for the defendant from the severity of the sentence. Or, because he knows that a jail sentence would be appealed, he may impose an unusually long suspended sen-

[41] Although there is no appeal, a due process hearing is required on probation revocation. See *Gagnon* v. *Scarpelli*, 411 U.S. 778, 93 S. Ct. 1756 (1973).

tence when a jail sentence of short duration is all that is warranted. This is not to say that these practices are universal. Because of the de novo system, however, they exist to some degree and result in a contorting of the District Court sentencing process.

Apart from sentencing, the absence of any review of the District Court proceeding discourages adherence to rules of practice and procedure in the District Courts. There is subtle pressure for all trial participants to treat matters of practice and procedure as being relatively unimportant because, if the defendant is unsatisfied with the conduct of his trial, he can always appeal and render the trial a nullity. Without accountability through direct appeals for error, improper applications of substantive law or procedure, or neglect of due process, go uncorrected. Direct appellate review encourages the development of uniformity of procedure. Without it the District Courts are deprived of a corrective technique normally present in the judicial process. A system with appellate review inevitably results in a closer adherence to law and due process.

Arguably, of course, some benefits flow from the informal atmosphere of the District Courts. These benefits need not be lost, however, in a one-tier system, although it will take extra effort on the part of the judge to accommodate the need for an appropriate environment with the need for strict adherence to legal requirements. Judicial accountability would increase the care, precision and conscientiousness with which decisions are made in the District Courts. Binding legal precedent rather than scattered feedback would guide judicial conduct. Discretion, innovation and community orientation, particularly with respect to criminal dispositions, could still be retained.

Finally, a lack of public respect for the District Courts is inevitable if all of its actions can be rendered meaningless by the claim of an appeal. Considering the importance of the District Courts in terms of the number of citizens appearing

before them and the critical nature in human terms of the cases dealt with, the lack of public confidence is an extremely serious problem. The cycle is a vicious one. If the courts are not held accountable for error through direct review, occasionally they will act in a way not deserving of respect.

The existence of the trial de novo process also greatly affects the business of the Superior Court. At the present time there is an enormous backlog of criminal cases in the Superior Court, and an even greater backlog of civil cases. In fact, in 1974 six of the twelve counties in the country with the worst civil backlog were in Massachusetts.[42] The total Superior Court annual criminal caseload in fiscal year 1975 consisted of 17,330 cases started by indictment, plus 17,654 appeals from the District Courts. The current *backlog* of criminal cases in the Superior Court is 38,933, of which 19,100 are appeals from the District Courts.[43] If the Superior Court were relieved of the appeals from the District Courts, the overall backlog in the Superior Court could be appreciably reduced.

Alternatives to the Present Two-Tier System

It is the committee's conclusion that the trial de novo system is responsible for major failings in our system of criminal justice. They are failings born of structural and jurisdictional weaknesses in the court system and not of inattention to duty or unconcern on the part of District Court or Superior Court judges. Indeed a number of District Court judges sit in the

[42] *Calendar Status Study — 1974* (Institute of Judicial Administration, 1974), pp. ix-x.

[43] These figures represent the number of complaints in each instance. The number of individual defendants involved is roughly one-half the number of complaints. Superior Court of Massachusetts, "Criminal Statistics in the Superior Court for Fiscal Year 1975."

Superior Court de novo appeal sessions pursuant to the provisions of G.L. c. 212, § 14B.

Possible ameliorative changes range from minor administrative adjustments to complete abolition of trial de novo, with or without other fundamental structural changes such as court unification. Various modifications of the system would improve its functioning in some respects, but only elimination of the two-tier system with assurances that manpower and facilities are sufficiently available to avoid significant backlogs would completely eliminate the present problems.

The solution of choice, absent court unification, would be the establishment of a right to trial by jury in the first instance in the District Court,[44] subject to appeal only on questions of law. The District Court judiciary now has eleven years of experience successfully presiding over jury of six sessions.[45] There is virtually no backlog of criminal cases in the District Courts, and the District Court system as a whole presently has the capacity to assume additional work, although some individual courts are presently functioning at or near capacity.[46] As soon as all courts are equipped electronically to record testi-

[44] No attempt is made herein to develop the details of a system that would establish a jury trial in the District Court in the first instance. Obviously jury sessions would have to be created in addition to those that presently exist in the District Court jury of six sessions, although jury sessions might not be necessary in all the District Courts. The number of sessions would depend upon the demand for juries and the existence of appropriate physical facilities.

[45] For the period July 1, 1974, through June 30, 1975, the thirteen authorized jury of six sessions disposed of 5,919 complaints or 3,378 defendants. District Courts of Massachusetts, "Statistics, Juries of Six, Criminal, for the period July 1, 1974 through June 30, 1975."

[46] The 1975 session of the General Court enacted legislation which assures that most of the 81 Special Justices of the District Courts will serve full-time by July 1, 1979. See St. 1975, c. 862.

mony, the mechanism for creating a record for appellate review will exist.[47]

The alternative solution of giving each defendant at arraignment a choice between a non-jury trial in the District Court and a jury trial in the Superior Court would exacerbate the existing situation in the Superior Court since it would increase the caseload, and therefore the backlog, of an already overloaded system.[48] Of course, District Court personnel and facilities could be assigned to a greater extent than at present to assist the Superior Court in disposing of these cases, but without unification of the two courts the administrative problems and confusion created would be substantial.

Careful consideration must be given to the possible consequences of abolition of trial de novo. Such a change should be made only if the resulting system functions better than the present one. Jury trials take more time than non-jury trials. A prediction would have to be made both as to the percentage of the cases now tried in the District Courts which would be claimed as jury trials and actually heard as jury trials. If either the claimed or actual jury trial rate were high and significant backlogs were to develop, the benefits inherent in the present system would be lost, plea-bargaining would be used excessively and the public interest in effective law enforcement would continue to suffer. Thus as a basis for a

[47] A bill has been filed with the 1976 legislative session to provide for the preservation of testimony in the District Courts and the Municipal Court of the City of Boston. Thirty District Courts, including the BMC, are presently equipped with electronic recording equipment. See S. 657.

[48] It is expected that such an alternative would increase the Superior Court backlog because all defendants, unaware of what the District Court disposition would be, would probably choose a Superior Court jury trial. Presently at least some defendants are satisfied with the result in District Court and therefore never claim their right to a jury trial.

realistic projection of the consequences of elimination of trial de novo a more complete study should be undertaken, including an analysis of experience in other jurisdictions as to the rate of election of jury trials.[49]

There are a number of steps that can and should be taken short of abolition of a two-tier system, pending the completion of such a study and pending a decision on the most effective procedure to replace the present one.

It might be possible to eliminate some delay by changes in case scheduling and management techniques used in the Superior Court.[50] Also administratively, a defendant placed on probation after being found guilty in a Superior Court de novo trial could be supervised by the probation department of the District Court in which he was originally tried or by the one nearest his home, rather than by the probation department of the Superior Court, distant from his home. In addition,

[49] The number of jury trials initially claimed would probably be high. Defense counsel, seeking to do the utmost for his client, would be likely to request a jury trial if for no other purpose than as an aid in plea-negotiation. The members of the committee were divided about the probable rate of actual jury trials. Those who felt the rate would be low cited the expectation and need of many defendants for speedy, efficient and inexpensive resolution of minor criminal matters (*e.g.* motor vehicle offenses and domestic problems), the familiarity of the defense bar with the present procedures for non-jury trials in the District Courts, and the likely problem for the accused of having to travel some distance from his local community to a regional courthouse to obtain a jury trial (*e.g.* cases arraigned in the Brookline court probably would go to Dedham for a jury trial). Those who believe the election rate would be high assume that a defendant will desire trial by a jury that will probably include at least one of his socio-economic peers.

[50] The Committee met with Hon. Kent Smith, Associate Justice of the Superior Court, on September 24, 1975. At that time he suggested that priority might be given to new cases, requiring them to be set for early trial in the Superior Court.

trict Courts, particularly those resulting from the absence of appellate review for error[55] or from the sense of futility which descends upon a District Court judge who recognizes the limits imposed on him by the de novo system. As a result, the elimination of trial de novo is necessary as a matter of public policy.

[55] To some extent introduction of electronic equipment for recording testimony can be expected to improve the quality of courtroom proceedings, but not as effectively as if it were combined with appellate review.

greater use could be made of the statutory authority to the effect that a defendant who defaults on appeal has waived his claim for a jury trial.[51]

By statute the right to a trial by jury could be eliminated for certain minor offenses, such as traffic violations carrying no possible jail term, as suggested in the *Proposed Criminal Code of Massachusetts* published by the Massachusetts Criminal Law Revision Commission in 1972. A number of states have taken this step. New York State, for example, has removed the trial of minor traffic violations to an administrative setting.[52] In Maine and Oregon, as a result of recent legislation, traffic violations are tried in court but they have been decriminalized and there is no right to a jury trial.[53]

By statute, all appeals from District Court convictions and Juvenile Court proceedings could be required to be heard in District Court jury sessions. Legislation to accomplish this has been under consideration for several years.[54] The District Court jury sessions are presently underutilized and have the capacity to handle expeditiously considerably more work, probably all the appeals from the District Courts.

None of these suggested interim changes, the list of which is not intended to be exhaustive, would eliminate all of the problems presently caused by the trial de novo system. None of them, for example, would affect the considerations previously mentioned regarding the quality of justice in the Dis-

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[51] G.L. c. 278, § 24.

[52] See Ch. 1074 and Ch. 1075, N.Y. Laws, 1969.

[53] Ch. 430, Maine Public Laws, 1975 and Ch. 451, Oregon Laws, 1975.

[54] See, for example, S. 831 of the 1975 legislative session. A similar bill, S. 658, has been filed in the 1976 session.

trict Courts, particularly those resulting from the absence of appellate review for error[55] or from the sense of futility which descends upon a District Court judge who recognizes the limits imposed on him by the de novo system. As a result, the elimination of trial de novo is necessary as a matter of public policy.

[55] To some extent introduction of electronic equipment for recording testimony can be expected to improve the quality of courtroom proceedings, but not as effectively as if it were combined with appellate review.

DISTRICT COURTS OF MASSACHUSETTS

FINAL REPORT OF THE SPECIAL COMMITTEE ON TRIAL DE NOVO TO THE CHIEF JUSTICE OF THE DISTRICT COURTS

ALTERNATIVES TO THE PRESENT SYSTEM OF TRIAL DE NOVO IN CRIMINAL CASES

Special Committee on Trial de Novo

Hon. Edith W. Fine (Brookline), Chairman
Hon. Charles R. Alberti (Associate Justice, Superior Court)
Hon. Lawrence L. Cameron (South Boston)
Hon. John C. Cratsley (Roxbury)
Hon. Gordon Doerfer (Boston Municipal Court)
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December 31, 1976

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APPENDICES

Introduction

In January, 1976, this committee issued a report[1] (hereinafter referred to as the "First Report") that examined the present trial de novo procedure in Massachusetts. After analyzing the effect of trial de novo on law enforcement, defendants' rights, and the quality of justice in the courts, the report concluded that the "elimination of trial de novo is necessary as a matter of public policy."[2] This conclusion was tempered, however, by the committee's recommendation that the possible consequences of abolishing trial de novo be given careful consideration. "Such a change should be made only if the resulting system functions better than the present one."[3] Thus, soon after the First Report was issued, the committee undertook a second phase, which included an identification of alternatives to the present system and an analysis of the feasibility of each. An interim report, issued in June, 1976, commented briefly on several possible alternatives,[4] but final judgment on the feasibility of each alternative was deferred to this present report.

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[1] Report of the Special Committee on Trial de Novo to the Chief Justice of the District Courts (January, 1976).

[2] Id. at 24.

[3] Id. at 21.

[4] The Preliminary Report on the Alternatives to Trial de Novo (June 24, 1976) was prepared for, and submitted to, Chief Justice Edward Hennessey specifically for the purpose of meeting the crisis arising out of a possible United States Supreme Court decision invalidating the Massachusetts system. Since that time, of course, the case involved, Ludwig v. Massachusetts, 96 S.Ct. 2781 (1976), has been decided . Since the Supreme Court held that the Federal Constitution does not require jury trials in the first instance, consideration of alternatives to the present de novo system may proceed as a matter of deliberate choice rather than instant necessity.

Three alternatives or "options"[5/] to the present de novo system are presented in this report:

Option I — Any defendant convicted in a District Court would have the right to a de novo retrial only in a District Court before a jury of six.

Option II — Any defendant charged with a crime within District Court final jurisdiction could choose an initial trial before a District Court jury of six (with appeals available only on issues of law) or an initial trial before a judge with a right to a de novo District Court retrial before a jury of six.

Option III — Any defendant charged with a crime within District Court final jurisdiction could choose a trial either before a District Court jury of six or before a judge, with appeals from either available only on issues of law.

Options I and II would maintain the technique of trial de novo. That these options are being offered for consideration reflects the committee's finding in the First Report that major failings in the present system are derived in part from the two-tier District Court-Superior Court relationship and not entirely from the de novo procedure itself. For example, high default rates, long delays, and systematic sentence reductions after appeals appear to be symptomatic of the administrative problems that come about when cases are funneled from one court to another and have little to do with the inherent nature of the right to a de novo appeal. The evaluations of Options I and II set forth in this report are aimed at determining the practicality and desirability of improving the trial de novo procedure by placing it entirely within the District

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5/ This terminology does not correspond to that used in the Preliminary Report, but is best suited to the purposes of this report.

Courts. Consideration of Option III will center on the feasibility of a total elimination of trial de novo. Theoretically, this approach is the "solution of choice,"[6] but, as will be seen, the feasibility of this option at the present time, with the existing District Court resources, is doubtful.

In its study of alternatives to the current system, the committee has analyzed the experience of other states. Detailed quantitative techniques of demonstrating the impact of various alternatives have been attempted. In addition, the committee has had the benefit of relatively precise information concerning judicial manpower that has been developed as a basis for the new judicial assignment system currently being implemented in the District Courts. To some extent the committee's analysis of the three options and the feasibility of each depends on assumptions[7] and expectations for which there are no supporting data. While precise predictions are impossible, the committee feels that the detailed analyses contained in this report are, on the whole, reasonably accurate and reliable.

Option I

Of the three proposed options, Option I would be the simplest to adopt and implement. It would mandate only that all de novo

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[6] First Report at 20.

[7] For example, the new automobile property damage legislation, St. 1976, Ch. 266, was adopted while this study was in progress. Some believe this will have a drastic effect on the workload of the District Courts, commencing after November, 1976. The analyses in this report do not reflect that possibility. If the resulting increase is substantial, some of the conclusions in this report would have to be qualified.

appeals be tried in the District Courts. Appropriate legislation has been considered for several years; a copy of one version, S. 751 and H. 1634 (filed in the 1977 session) is attached as Appendix A.

Removing District Court appeals from the Superior Court would strengthen both levels of courts. For the Superior Court, the major advantage would be the elimination of a caseload which is heavy and ill-suited to basic Superior Court jurisdiction. More than half of the criminal matters entered in the Superior Court are appeals from District Court convictions[8/] and about one-fourth of the criminal sessions of that court are devoted to the trial or disposition of such cases.[9/] Eliminating appeals from the Superior Court caseload would allow that court to concentrate on the more serious offenses for which indictments had been obtained; no longer would the court have the burden of hearing offenses for which state prison sentences are not warranted. In addition, this approach might eliminate the need for District Court judges to sit in Superior Court.

For the District Courts, the major advantage of Option I would be caseload control. Under proposed legislation, the Chief Justice of the District Courts would be granted the power to transfer any case appealed from one District Court to another in the same county, "whenever in his judgment the availability of judicial manpower or court facilities or the caseloads of the individual courts or any

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8/ In the year 1974-1975, 17,654 appeals and 17,330 new indictments entered into Superior Court. Judicial Council of Massachusetts, 51st Report, 1975, at 23.

9/ See, e.g., Superior Court Assignments for November, 1976, 5 Mass. Lawyers Weekly 8 (Nov. 1, 1976).

other consideration of the efficient administration of justice so requires."[10] Control of the flow of appeals in relation to other District Court business would be centralized, a vast improvement over the current two-level structure. Better scheduling would eliminate long delays before the hearing of an appeal. Improved procedures would reduce default rates. With the trial of an appeal promptly following initial conviction, there would be a greater likelihood that, if the defendant were convicted again, the original District Court sentence would be reimposed. Several implications follow: The substantial sentence reductions in Superior Court, documented in the committee's First Report, would no longer occur.[11] Appellants who currently seek only delay and potential sentence reduction would be discouraged.[12] The frustration of District Court judges would be reduced if sentences on appeal bore a closer relationship to the sentence imposed at the original trial.[13] In addition, if delays were reduced, the burdens on the defendant having to live with a finding of guilty until his appeal is heard would also be reduced.[14] Therefore, implementation of Option I would satisfy many of the objections raised in the committee's First Report. In addition, the respective administrative coordination and jurisdictional powers of the District Courts and the Superior Court

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[10] See Copy of S. 751 and H. 1634, filed during 1977 legislative session, Appendix A at 4.

[11] See First Report at 10-11 .

[12] Id. at 7-8.

[13] Id. at 17-18.

[14] Id. at 13-14.

would be clarified and strengthened.

Consideration of the practical feasibility of Option I (as well as the other two options) involves two central aspects: (1) What addition to the present District Court workload could be expected under this new system? (2) Are there enough physical facilities and sufficient judicial manpower available to meet such an increase?

District Court business would be increased under Option I to the extent that de novo appeals would have been filed in the Superior Court misdemeanor and regular criminal sessions. The only major difference between Option I and the present system would be the courts to which these appeals were made. As discussed above, it is likely that there would be improvements in the quality of the system under Option I, such as the reduction of delay and default rates. With this improvement, it is safe to assume that under Option I the number of de novo appeals would not exceed that under the present system.[15/] Appendix B, therefore, makes use of recent District Court statistics to obtain the number of de novo appeals within each county of the Commonwealth. As indicated in Appendix B, conservative estimates can then be made of the amount of judge time (in District Court jury sessions) that would be required to handle the appeals. The Appendix concludes that, given the estimates and assumptions on which the computations are based, Option I would produce a total of 10.4 additional judge-years of work. This is a measure of the amount of new business that could be expected under Option I; the

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15/ Most observers would agree that a more efficient system would produce fewer appeals, since the benefits to the convicted defendant of long delays and sentence reduction would no longer be available.

sufficiency of resources to meet that demand must now be considered.

Availability of resources involves two primary factors, physical facilities and judicial manpower. The former is explored in Appendix C. As indicated in that Appendix, certain criteria are applied to the physical facilities of each of the District Courts. Within each county, the most suitable courts to accommodate jury sessions are selected. After comparing the expected demand (Appendix B) and the available facilities (Appendix C) on a county-by-county basis, there would appear to be no problem in providing the required number of courtrooms, deliberation rooms, and jury pool rooms for doing the work under Option I. This is true even if more than half of the courtrooms which are available in a physical sense were unavailable because they had to be used for other business. See App. B-3, last para. In fact, in each county, jury sessions could be assigned to District Courts that are in the same building as or nearby a Superior Court. This regional approach would reduce costs in the provision of jurors and would allow more centralized administrative control of the county's jury session caseload.[16/] Thus, there are sufficient physical facilities to handle the additional workload that Option I would produce.

Appendix E presents a detailed discussion of the present and future availability of judicial manpower in the District Courts. It concludes that if District Court judges now sitting in the Superior Court were returned to the District Courts and the Boston Municipal Court, if Special Justice positions were filled rather than eliminated upon retirement, resignation or death, and if District Court business does not increase markedly for any other

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[16/] A discussion of the provision of jurors to the District Courts is contained in Appendix D.

reason, then approximately 26 judge-years (as defined in that Appendix) would be available for District Court and Boston Municipal Court jury sessions. Given the demand as discussed above, i.e. 10.4 judge-years of new business, using the most reasonable assumptions, it is apparent that under the circumstances just mentioned there would be ample judicial manpower to ensure the feasibility of Option I.

Given the assumptions noted in the analyses of jury session demand and the availability of judicial manpower, we conclude that Option I is feasible. If enacted and implemented, we recommend that jury sessions be assigned on a regional basis within each county. The approach that should be taken is to utilize the court best equipped and most centrally located in each county as the jury trial court for that county. If this single court is not adequate, the court next best equipped and located should be designated a jury court, and so forth. This approach has obvious advantages in terms of administrative efficiency and control over an attempt to make virtually every court a jury court. Since a regional approach is now in effect with de novo appeals to Superior Court, the burden on defendants cannot be viewed as excessive. In the long run, regionalization, to the extent possible, would work to reduce delay, particularly since the jury sessions could be operated year round.[17/]

Other aspects of the feasibility of Option I (as well as

17/ The District Court judicial assignment plan, mentioned in Appendix E at footnote e, is designed so that rotation of judges into the regional jury courts could be equitable, efficient and planned well in advance.

Options II and II) are the need for prosecutors,[18] the added burden on the appellate process,[19] and the possible need for additional non-judicial court personnel.[20] The committee feels that none of these factors can be seen as jeopardizing the feasibility of the plan.[21]

Although feasible, Option I cannot be considered a fully

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[18] It is obvious that the increased need for prosecutors in the District Courts under Options I, II and III would be offset by the number no longer needed in Superior Court to try de novo appeals there.

Since Option I merely shifts de novo appeals to the District Courts, no significant net increase of prosecutor hours should result. Whether the number of prosecutor hours "released" by the termination of de novo appeals in Superior Court will be sufficient to handle the corresponding increases in District Court workloads under Options II and III is unclear, just as are the dimensions of those increases. However, the committee feels that full-time status for Assistant District Attorneys substantially eliminates the availability of prosecutors as a serious problem regarding the feasibility of either of these Options. Chapter 542 of the Acts of 1976 prohibits the private practice of law by Assistant District Attorneys after December 31, 1978. Apparently, most Assistant District Attorneys are being required to go "full-time" well before that deadline. See 5 Mass. Lawyers Weekly 1 (Nov. 15, 1976).

[19] See Appendix F.

[20] The present District Court jury-of-six system has resulted in administrative experience in the handling of de novo appeals. This is particularly relevant since, in the regional approach advocated, the same courts would be trial courts under Option I. While the pattern is set in these courts, the increased volume of appeals under Option I may well require additional clerical personnel and court officers. However, this need could well be minimized by streamlined procedures. Recently a comprehensive study of District Court jury-of-six administration and procedure was completed. Included in the resulting report are detailed recommendations for streamlining the system. These recommended improvements, it is believed, could significantly reduce the administrative workload which would otherwise result under Option I.

[21] It should be kept in mind that any additional administrative burden assumed by the District Courts under Option I represents administrative relief for the Superior Courts.

an initial choice. He could select a first-instance jury trial in a District Court jury session, with an appeal available only on issues of law. Or, a defendant could proceed along the more traditional route, through an initial trial before a judge with the right, if convicted, to be retried in a District Court jury session (as under Option I).[23/] In anticipation of a holding by the Supreme Court of the United States in Ludwig v. Massachusetts, 96 S.Ct. 2781 (1976), that could have required Massachusetts to provide defendants with the option of a first-instance jury trial, serious consideration was given to the possible implementation of Option II. (Appropriate legislation was drafted by the Governor's Select Committee on Judicial Needs.)[24/] Since the Court held otherwise, there is no constitutional necessity for implementing Option II. Instead, its merits must be evaluated in terms of feasibility and desirability.

Two states which have a trial de novo system with a right to a first-instance jury trial have had substantially different experiences. In Maryland, roughly 8% of the defendants claim an initial jury trial, while in Rhode Island, only about 1% of the defendants do so.

Within each state, various interrelated factors come together to produce these respective initial jury claim rates. For example, Maryland's high rate reflects the continuance policy in its District Court. This policy is to minimize the number of continuances after

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[23/] As with Option I, Option II envisions continuance of the present statutory provision allowing waiver of District Court jurisdiction and possible bind-over in any case at the court's discretion.

[24/] See Appendix G.

arraignment. As this policy is enforced and defendants are required to stand trial without the further delay they would prefer, a late-filed claim of trial by jury is asserted to gain that further delay. Thus, claim of initial jury trial is attractive to some defendants because it is a way of maximizing delay without suffering any of the collateral losses that might accompany a conviction in an initial trial before a judge.[25/]

On the other hand, factors such as this are not at work in the Rhode Island District Court, where only 1% of the defendants claim a first-instance jury trial. The comparatively low jurisdictional limits of the Rhode Island District Court may contribute to this result.[26/]

In Massachusetts, the factors that will determine the number of defendants who will claim a first-instance jury trial will interact in a highly unpredictable way. Initial jury claims will depend on such factors as the extent of delay in the processing of cases, plea-negotiation policies, continuance policies, adequacy of procedure for discovery, and sufficiency of judges and prosecu-

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25/ This analysis was discussed in a day-long meeting with the Honorable Edward F. Borgerding, Administrative Judge of the District Court, Baltimore, Maryland, May 25, 1976.

26/ The criminal jurisdiction of the Maryland District Court includes misdemeanors which are violations of county or municipal ordinances for which the penalty is less than 3 years or under $2,500 and all other misdemeanors or felonies if the value of the thing stolen, received, converted or shoplifted does not exceed $500. Maryland Ann. Code c. 26, s. 145 (b)(2). The jurisdiction of the Rhode Island District Court includes all criminal offenses punishable by not more than a $500 fine or a one year prison sentence or both. R.I.G.L. Ann. s. 12-3-1.

It stands to reason that, in general, the less serious the cases involved, the less likely it is that immediate jury trial will be claimed.

tors. Whether the Massachusetts system will resemble Maryland or Rhode Island or neither is uncertain; all possibilities must be considered.

In general, Option II satisfies almost all of the criticisms of the present de novo system discussed in the committee's First Report. Unlike Option I, it eliminates the defendant's burden of having to proceed through one trial and suffer a conviction before reaching a jury. And, as with Option I, a successful and efficient implementation of Option II will improve the system substantially. Delay, high default rates, and sentence reduction upon appeal could all be reduced. The key question, however, is how Option II would operate in fact. The extra burden which would be produced by Option I is predictable. It is not under Option II, since the number of initial jury trials depends on those highly unpredictable factors discussed above. If jury sessions were to become overloaded under Option II, virtually all of the theoretical improvements Option II offers over the current system would no longer exist. To illustrate this, the feasibility of Option II will be calculated in two ways: first, as if Massachusetts' initial jury trial claim rate resembled Maryland's, and second, as if it resembled Rhode Island's.

As mentioned previously, criminal defendants in Maryland and Rhode Island exercise their right to claim a jury trial in the first instance at rates of 8% and 1%, respectively.[27/] Appendix H projects the effect of these initial jury trial claim rates

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[27/] These are percentages of total criminal complaints coming into these courts and are taken from official statistical data compiled by these courts.

using the caseloads of the District Courts. The analysis set forth in this Appendix concludes that Option II would produce the following new judge-years of work in the District Courts (including the Boston Municipal Court): 31.8 judge-years assuming an 8% initial jury trial claim rate, and 12.9 judge-years assuming a 1% initial jury trial claim rate. Based on the conclusion reached in Appendix E that 26 judge-years are currently available in the District Courts and Boston Municipal Court to handle new business,[28] it is probable that, should Option II be implemented in the District Courts and an initial jury trial claim rate of 8% occur, there would be insufficient judicial resources to keep pace with the resulting workload. On the other hand, an Option II system with an initial jury trial claim rate of 1% would not overload the system. In fact, as indicated in the last paragraph of Appendix H, the District Courts could accommodate an Option II system with up to a 5.5% initial jury trial claim rate.[29]

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[28] It must be kept in mind that this "surplus" of 26 judge-years assumes the eventual filling of all Special Justice positions which become vacant and the return of judge positions now committed to Superior Court. As mentioned before, without these assumptions, no increase in District Court business is feasible.

[29] As with Option I, feasibility here is dealt with primarily in terms of sufficient judge time for the increase in work which would be produced. A county-by-county comparison of demand under Option II (Appendix H) with physical resources (Appendix C) would indicate that Option II is feasible in this respect as well, assuming that the initial jury trial claim rate is 5.5% or less. For example, Appendix H indicates that at this rate of initial jury trial claims, roughly two judge-years would be required in Region I to dispose of jury session business. Appendix C shows that in Region I there are 16 courtrooms with jury facilities. The other aspects of feasibility, namely, the added burden on the appellate courts, the need for prosecutors, and the need for additional court personnel, are not considered to present insurmountable problems for the successful implementation of Option II, for the reasons set forth in Appendix F and footnotes 18 and 20, supra, respectively.

In summary, Option II exceeds Option I in desirability in that it would encompass all the improvements available under Option I and would go further. Not only would the problems related to the present District Court-Superior Court de novo system be resolved, but for those who chose to take advantage of it, the de novo procedure could be avoided entirely. In terms of predicting demand and determining feasibility, it appears that with an initial jury trial demand of 5.5% or less, the system would work. It is not totally unreasonable to expect that the demand would be that low since some delay, excellent discovery, and the possibility of an acquittal or other acceptable disposition could be gained by use of the de novo route. The central problem in comparing the relative merits of Options I and II is the difficulty of predicting with reasonable assurance just what this rate will be, and as a result, whether Option II would be feasible. Analysis indicates that if initial jury trial demand were greater than 5.5%, the caseload would begin to outstrip capacity and the resulting backlogs would destroy most of the advantages Option II would otherwise entail.

Option III

Option III is the alternative to the present de novo system which the committee in its First Report described as the "solution of choice."[30/] As set forth in the introduction to this report, Option III consists of a system whereby a defendant coming before

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30/ First Report at 20.

a District Court, charged with a crime or crimes over which that court could exercise final jurisdiction, would have a choice between a jury trial and a non-jury trial.[31] A judgment rendered after either type of trial would be final, that is, subject only to an appeal on questions of law. Trial de novo would be completely abolished.[32]

As a matter of principle, few could deny the desirability of Option III.[33] Whereas Options I and II would go a long way towards curing the ills associated with the present system and identified in the First Report, Option III would effect a complete cure. Under Option III, all District Court criminal trials would be "real" trials, not subject to being rendered meaningless by claim of de novo appeal. No longer would the District Court sentencing process be distorted by the possibility of a complete retrial. District Courts would function as traditional trial

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[31] As with Options I and II, it is envisioned that the District Courts' existing authority to waive jurisdiction, examine for probable cause, and possibly bind over any defendant would be maintained under Option III.

[32] This report, of course, does not deal with the de novo system for civil matters with respect to which altogether different considerations apply.

[33] Perhaps the strongest arguments for the abolition of the de novo system, particularly the "two tier" approach, can be found in Mr. Justice Stevens's dissenting opinion in the case of Ludwig v. Massachusetts, 96 S.Ct. 2781 (1976), an opinion in which Justices Brennan, Stewart and Marshall joined. The litany of evils associated with the de novo technique and documented in the committee's First Report are forcefully set forth in this dissent, particularly the problems relating to the negative impact on the quality of justice and the unacceptable burden placed on the defendant (pp. 2790-91). It must be kept in mind that the Court's ruling in Ludwig did not find the de novo system desirable. Rather, the 5-to-4 decision found it not unconstitutional.

courts with appellate review to assure that guilt or innocence will be determined according to rules of law. The expense and delay inherent in any system of complete retrial would be avoided and a defendant would not have to suffer a bench trial and conviction before having an opportunity for trial by jury.

On the other hand, the question must be asked: What physical and personnel resources would be required to accommodate such a system? Certainly, if it is determined that the resources required to operate such a system in a proper and acceptable way exceed any reasonable estimate of what can ever be obtained, such a system cannot be recommended notwithstanding all its obvious benefits. Needless to say, finding an answer to this question is a complex matter, but any analysis of Option III that went no further than a review of its theoretical virtues would be of no value.

Investigation of the practical feasibility of Option III begins with an attempt to envision what would happen in the District Courts under such a system. Since the system would be fundamentally dissimilar to present procedures, such a prediction is difficult. However, several things are clear.

First, under a non-de novo system the District Courts could not be expected to act in a manner markedly different from other trial courts which receive and dispose of large numbers of criminal cases. Thus, it is reasonable to expect that the District Courts would dispose of a large percentage of cases by guilty plea--trial would not be the predominant method of disposition

and jury trials would be even more infrequent.[34/]

Second, trials would consume more time in a non-de novo system. Not only would jury trials consume much greater periods

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[34/] Unfortunately, it is difficult to make exact comparisons of state court statistics. Jurisdiction, definition of terms, and method of analysis all differ from state to state. However, the following statistics are offered to support the general point made above regarding the proportions of major types of dispositions in non-de novo court systems. The court systems cited are from the nine states with no form of de novo procedure. They are comparable to the Massachusetts District Courts in subject matter jurisdiction.

	Percentages of Total Criminal Dispositions		
	Pleas of Guilty	Non-Jury Trials	Jury Trials
Cal. Mun. Cts.* (1974-75)	INA	INA	.2%
Conn. Ct. of Common Pleas* (1974-75)	INA	.6%	.07%
Hawaii Dist. Cts.**(1974-75)	INA	INA	1.8%
Ill. Circuit Cts.*** (1974)	40%	3.0%	3.0%
Mich. Dist. Cts. (1974-75)	INA	4.07%*	.3%*
		10.4%	.9%
N.Y. Dist. Cts. & Cts. outside City of N.Y. (1973-74)	83%		2.0%*(Jury/Non-Jury
	50%		3.0% (breakdown not
S.C. Mun. & Mag. Cts.	INA	INA	INA avail.
S.D. Dist. Cts.* (1974)	97%	INA	.4%
Ver. Dist. Cts.* (1974)	88%	.8%	.3%

Also of interest are the following courts:

D.C. Superior Ct.(1975)	72%	9.1%	10.8%
U.S. Dist. Ct. (1974-75)	64%	4.0%	10.0%
Alaska Dist. Ct.* (First nine mos., 1976) (Plea bargaining prohibited by law; note the high percentage of dispositions by guilty plea and low percentage of trials despite this law.)	58%	2.2%	3.6%

INA - Information not available.
* - Includes traffic offenses; Mich., N.Y. with and without these.
** - Initial jury trial available only in next higher level of courts.
*** - Includes felony dispositions only.

All statistics taken from the official annual judicial statistical reports from the respective jurisdictions for the years indicated.

of time than do present District Court bench trials, but bench trials themselves might, in some cases, lengthen.[35/]

Third, the defendant before a District Court faced with the choice of whether to plead guilty and accept sentence or plead not guilty and request trial, would to a large extent base his decision on the tactical advantages of the latter alternative. He would tend to plead not guilty if the trial list, especially the jury trial list, were long. In doing so he would obtain all the advantages of delay with the option of a negotiated plea at any time prior to trial. Plea negotiation would assume considerably more importance than it has at the District Court level at the present time.

Since it is the number of jury trials which determines needed judicial resources, it is best to begin a quantitative analysis of feasibility with this factor. Generally speaking, in virtually all court systems in this country the number of jury trials is relatively low compared with other methods of disposition. Expressed as a percentage of total dispositions, the rate of jury trials in jurisdictions roughly comparable to the District Courts is commonly 1% or less.[36/] The highest jury trial rate discovered by the committee was in the Superior Court in Washington, D.C.

[35/] One obvious factor likely to increase the length of trial would be efforts of counsel to preserve issues for appeal.

[36/] See footnote 34, page 18, *supra*.

That court had an overall jury trial rate of 10.8%.[37] As shown in Appendix I, maintenance of a non-de novo District Court system, assuming a 10% jury trial rate, deemed by the committee to be the optimal figure for conservative planning, would produce roughly 201 judge-years of work annually. Even assuming 90% efficiency with improved trial list management techniques,[38] the total actual judge time necessary to accomplish this work could be as high as 221 judge-years. In other words, at a 10% rate of actual jury trials, up to 35 new District Court judicial positions would have to be created and filled, a 33% increase over the present number of authorized positions, 166, as defined in Appendix E. The Boston Municipal Court could be expected to require a similar increase in judicial positions, specifically, three more to add to its present nine.

Appendix I further indicates that an actual jury trial rate of 1% would appear to be the maximum that the present system could handle with present judicial resources without serious backlogs, and this too would have to assume 90% efficiency in the use of

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[37] Id. Note that this rate is a percentage of all dispositions including felonies and major traffic violations. The jury trial rate excluding felonies is 6%. Thus, the rate of 10.8% is somewhat high in terms of an equivalent District Court rate because it is weighted with serious felony cases which generally are more likely to go to a jury.

The District of Columbia's unique status of being financed by the Federal Government accounts for the generally accepted fact that relative to state court systems it is generously provided with judicial and prosecutorial resources.

[38] A more realistic, conservative estimate of present "judge-use efficiency" is used in determining the feasibility of Options I and II, namely, 80%. See Appendix B-3, para.10 and Appendix H-5.

judge time.[39/]

The committee feels that a system capable of providing jury trials in only 1% of the cases is unacceptable and as a result, cannot recommend the implementation of Option III, given present District Court judicial manpower. Such a system presupposes a rate of plea bargaining which is excessive and under which the public interest and defendants' rights would be bound to suffer.

It is the committee's opinion that 5% would be the lowest acceptable level of actual jury trials in a non-de novo system.[40/] As indicated in Appendix I, this rate of actual jury trials could be expected to produce up to 175 judge-years of work annually. At 90% efficiency, the actual judge time required to dispose of this business would be 192 judge-years. Again taking a present authorized strength of 166 judges in the District Courts (as defined in Appendix E), this means that a minimally acceptable non-de novo District Court system would require the creation of roughly 26 new judicial positions in the District Courts. A similar need in the Boston Municipal Court would mean the creation

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[39/] Appendix I shows that at a 1% rate of actual jury trials, the District Courts would produce a total of 155 judge-years of work, which, at 90% efficiency, would require 170 actual judge-years to accomplish. This compares to a full strength roster of 166 District Court judges, as defined in Appendix E.

[40/] It is believed that this rate of actual jury trials is high relative to all other similarly situated courts of limited jurisdiction in the country. See, for example, footnote 34, page 18, supra. It is particularly noteworthy that the actual jury trial rate in Alaska, where no plea bargaining is allowed, is only 3.6%. Id.

of one new position there.[41/]

The eventual implementation of an acceptably functioning non-de novo District Court system would not depend exclusively on the creation of new District Court judicial positions. Procedural rules would be required covering such matters as a rational system for managing the flow of cases, time limits for jury trial election, motions and trial, pretrial discovery and plea negotiation. Secondly, fundamental, programmatic changes such as decriminalization, prosecutorial screening and pre-trial diversion would be possible and would have the effect of reducing the number of cases which could be placed on a jury trial list. Successful implementation of such programs not only could be beneficial in itself, but would have the effect of reducing the need for new judicial positions

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41/ Feasibility of Option III in terms of physical facilities is difficult to determine with precision on a county-by-county basis. While a 5% actual jury trial rate may be attributed to each court, it is the jury trial demand, as opposed to the actual number of jury trials, which determines how many jury sessions each court, or each county, must provide. While actual jury trials could be as low as 5%, the number of cases transferred from a court without jury facilities, that is, the number of cases in which a claim for jury trial were made, could easily be as high as 50%.

However, the number of courtrooms with jury facilities which now exist is 105 (see Appendix C). As is shown in Appendix I, at 5% actual jury trials, 139 actual judge-years (127 judge-years adjusted for 90% efficiency) of work on criminal cases would be required. Thus, even if 75% of all criminal business in terms of judge time had to be handled by jury-sessions, the physical facilities would be available. In addition, it is believed that overloading of particular jury-session courts could be avoided by a flexible system of case transfer from courts without jury facilities. Also, heavily burdened jury-session courts could be relieved of civil business, which could be transferred to courts with no jury sessions. In short, at an actual jury trial rate of 5%, it would appear that Option III would be feasible in terms of physical facilities. Nor are the other major considerations, appeals, prosecutors, and court personnel, believed to pose serious threats to the feasibility of Option III. See Appendix F and footnotes 18 and 20, supra, respectively.

necessary for an acceptable Option III system. Each of these approaches and the way in which it could contribute to an Option III system is discussed briefly below.

Decriminalization. Among the more substantial modifications that could affect the functioning of a non-de novo District Court system is "decriminalization." This term is used in its broadest sense to include the elimination, consistent with constitutional requirements, of the present statutory right to jury trial for a variety of offenses. The most obvious area where such an approach would be appropriate would be motor vehicle violations. Parking offenses and virtually all "minor motor vehicle offenses" (defined as all motor vehicle offenses except driving under the influence of intoxicating liquor, operating under the influence of drugs, operating so as to endanger, using without authority and larceny of a motor vehicle) could be adjudicated outside the judicial system as is presently done in other states. More realistically, the statutes defining these offenses could be amended so that, while they would still be disposed of by the court, the right to jury trial would be eliminated, with maximum penalties reduced where necessary to accomplish this end.[42/] The obvious impact of such an approach on a District Court non-de novo system would be fewer

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[42/] For example, the offense of driving an uninsured motor vehicle, G.L. c. 90, s. 34J, currently carries a potential penalty of one year imprisonment, in addition to fine. Reduction to a maximum of six months probably would eliminate the necessity of right to trial by jury under the United States Constitution. See Duncan v. Louisiana, 391 U.S. 145 (1968) and Baldwin v. New York, 399 U.S. 66 (1970). Whether such a reduction in maximum sentence would eliminate the right to jury trial under the Massachusetts Constitution, however, is an open question. See Mass. Const. Part I, Art. XII.

demands for jury trial. The degree to which the demand for jury trials could be reduced would be reflected not only in a reduced need for judicial resources but also in the extent of plea bargaining that the non-de novo system would require.

Prosecutorial screening. Presently there exists no formal mechanism by which criminal cases can be screened before they actually come into the District Courts. The role of the prosecution in deciding which cases should go through the criminal justice process is not well-defined or structured at the District Court level. This problem probably relates back to earlier days when the District Courts were "police courts," with cases invariably prosecuted by arresting officers on the morning after the arrest. At least in theory, the prosecutor's office, as representative of the Commonwealth's interest, is well situated to make the determination of whether or not criminal charges should be pursued in a given case. As full-time public officials, prosecutors would, of course, be accountable to the electorate for the way in which they handled this responsibility. This approach has been implemented successfully in other jurisdictions and, at least in the context of the caseflow of a non-de novo system, prosecutorial screening clearly would be desirable.[43/] Simply put, all of the cases which would be screened out by such a system would never reach a jury trial list and thus could never be the subject of disposition by plea negotiation. Of course, aside from the

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43/ A federally-funded screening project is currently being operated at the Dorchester District Court. It allows for certain common types of cases--domestic matters, neighborhood disputes--to be "mediated" with the resolution, if any, approved by the court.

practical benefits for Option III, this concept involves major policy questions that would have to be fully explored.

Diversion. Increased availability of diversionary procedures similarly would tend to reduce the volume of trials, and, just as importantly, demands for trial. In essence, diversion reflects the fundamental thinking behind prosecutional screening, insofar as the latter screens out cases based on "the interest of justice." The difference, of course, is that the diversionary process comes into play after a case is before the court, and it calls for judicial decision-making. Perhaps more importantly, diversion, unlike prosecutorial screening, presupposes resources, governmental and/or private, to which defendants can be diverted. Thus, in a practical sense, improvements in the feasibility of a non-de novo system to be gained from increased use of diversion are dependent on the increase in the resources made available for funding the required programs. In any event, the impact of an increased use of diversionary techniques could only improve the feasibility of a non-de novo District Court system.[44/]

Summary

Resources in the form of judge availability are insufficient to allow for the creation of a system of first-instance jury trials

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[44/] The present diversion statute, G.L. c. 276A, is limited to persons between the ages of 17 and 21 who have no prior conviction other than for a traffic violation for which no terms of imprisonment may have been imposed and who do not have any outstanding warrants, continuances, appeals or criminal cases pending in any court. Obviously these limitations provide areas for possible expansion.

in the District Court system at the present time, at least in a form which is acceptable. An effort has been made to investigate what additional judicial resources and procedural changes would be necessary for such a system.

We do not view the three options as necessarily inconsistent with each other, and we do not believe we must, at this time, irrevocably choose one of the options. Rather we see a logical step-by-step approach as appropriate, with the District Court system moving from the present system to Option I, then to Option II and to Option III over the course of the coming years. Each step would require an expansion of the existing jury-of-six capacity. Each step would provide experience as a basis for moving to the next. No change would be made under Option I that would not also be required for Option II, and no change would be made under Option II which would not be required for the eventual implementation of Option III. Thus, at this time the committee recommends adoption of Option I. As analyzed in this report, this system is feasible with present resources, keeping in mind the previously-stated assumptions regarding judicial manpower and caseload.

As the second logical step towards eventual elimination of trial de novo, Option I can and should be modified after a reasonable period of time, perhaps one or two years, to maintain the de novo system but to allow each defendant the option of a jury trial in the first instance in the District Courts under the procedure described herein as Option II. The only reason Option II is not recommended as an immediate step relates to the lack of certainty as to whether the demand it would create would outstrip present

District Court judicial resources. The experience gained under Option I would be valuable in eliminating some of this uncertainty.

Given the increased crime rate over the years, the general public's frustration with the ineffectiveness of the court system in dealing with that increase, and the important considerations of public policy pointed out in the committee's First Report, we see no reason why judicial manpower and other resources required to provide a minimally adequate criminal justice system at the District Court level should not be provided by the Legislature. We believe Option III to be such a minimally adequate system. To the extent that some minor offenses are decriminalized, systematic prosecutorial screening is instituted and greater use is made of pre-trial diversion, the resources required may not be as extensive as indicated in Appendix J.

In summary, the committee's recommendation remains the total elimination of trial de novo. Because the resources are not presently sufficient for such a system, as a temporary measure Option I should be implemented, followed as soon as possible by Option II. This approach will in effect phase out the present system and expand the use of juries in the District Courts so that, with the eventual increase in judicial resources, trial de novo finally can be eliminated.

SPECIAL COMMITTEE ON TRIAL DE NOVO

Hon. Edith W. Fine, Chairman
Hon. Charles R. Alberti
Hon. Lawrence L. Cameron
Hon. John C. Cratsley
Hon. Gordon Doerfer
Hon. Robert A. Welsh, Jr.

APPENDIX A

BILL REQUIRING DE NOVO RETRIALS TO BE HEARD IN THE DISTRICT COURTS

The Commonwealth of Massachusetts

IN THE YEAR ONE THOUSAND NINE HUNDRED AND SEVENTY- SEVEN

AN ACT REQUIRING APPEALS IN DISTRICT COURT CRIMINAL CASES AND IN JUVENILE CASES TO BE TAKEN TO JURIES OF SIX IN THE DISTRICT AND JUVENILE COURTS.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. Section 26 of chapter 218 of the General Laws, as most recently amended by chapter 585 of the acts of 1973, is hereby amended by inserting after the first sentence of said section the following sentence:-- They shall have exclusive appellate jurisdiction of all crimes, and all proceedings brought under sections fifty-two to sixty-three, inclusive, of chapter one hundred and nineteen heard in the first instance before a district court. The municipal court of the city of Boston and all district courts shall have exclusive jurisdiction of the de novo trial of crimes tried before a district court in the first instance.

SECTION 2. Section 27A of chapter 218 of the General Laws, as inserted by chapter 620 of the acts of 1972, is hereby amended by striking out said section and inserting in place thereof the following sections:

Section 27A. Every district court is authorized to hold jury of six sessions for the purpose of hearing appeals by defendants found guilty in said courts of an offense or crime over which the district courts have original jurisdiction under the provisions of section twenty-six of chapter two hundred and eighteen and for the purpose of hearing appeals by children found to be delinquent children in said courts. The municipal court of the city of Boston is authorized to hold jury of six sessions for the purpose of hearing appeals by defendants found guilty in the municipal court of the city of Boston and in any district court within the county of Suffolk of an offense or crime over which said courts have original jurisdiction under the provisions of section twenty-six of chapter two hundred and eighteen. The Bristol County, Springfield and Worcester juvenile courts are authorized to hold jury of six sessions for the purpose of hearing appeals by children found to be delinquent children in said courts. The Boston juvenile court is authorized to hold jury of six sessions for the purpose of hearing appeals by children found to be delinquent children in said court or in any district court in Suffolk County.

The chief justice of the district courts shall designate at least one court in each county, other than Suffolk, for the purpose of hearing cases appealed to a jury of six, and in the county of Suffolk said chief justice may designate one or more district courts for the purpose of hearing cases appealed to a jury of six, provided that all of the courts authorized to hold jury of six sessions as of the effective date of this act shall continue to hold such sessions. The juries of six in the municipal court of the city of Boston and in

the Boston, Bristol County, Springfield and Worcester juvenile courts shall be operative as of the effective date of this act.

A defendant found guilty in any district court or a child adjudged a delinquent child in a district court outside of Suffolk county, may appeal to a jury of six session in the same district court if a jury of six procedure has been established in such district court at the time the appeal is taken. If a jury of six procedure has not been established in such district court at the time the appeal is taken, the defendant or the child may appeal to that district court in the same county designated by the chief justice as the district court for hearing appeals from the original district court; provided that, in the county of Suffolk, if a jury of six procedure has not been established in such district court at the time the appeal is taken, the defendant may appeal to that district court in the county of Suffolk designated by the chief justice as the district court for hearing appeals from the original district court or to the municipal court of the city of Boston if said court has been designated by the chief justice of the district courts and the chief justice of the municipal court of the city of Boston as the court for hearing appeals from the original district court; and provided further that a defendant found guilty in the municipal court of the city of Boston may appeal to the jury of six session of the municipal court of the city of Boston. A child adjudged a delinquent child in any district court within Suffolk county or in the Boston juvenile court may appeal to the jury of six session of the Boston juvenile court. A child adjudged a delinquent child in the Worcester, Springfield or Bristol

county juvenile court may appeal to the jury of six session in the same juvenile court. If a jury of six procedure has not been established in the Bristol County, Springfield or Worcester juvenile court at the time the appeal is taken, at the request of the justice of the respective juvenile court to the chief justice of the district courts, arrangements shall be made for the trial of the appeal at a jury of six session in a district court reasonably proximate to the respective juvenile court.

A defendant shall be notified of his right to take such appeal at the time of conviction. The appellant shall not be required to advance any fees upon claiming his appeal or prosecuting the same.

The chief justice of the district courts may transfer any case appealed to a jury of six in a district court, except a case appealed to the municipal court of the city of Boston, or the Boston, Bristol County, Springfield or Worcester juvenile courts, to a jury of six session in another district court in the same county, whenever in his judgment the availability of judicial manpower or court facilities or the caseloads of the individual courts or any other consideration of the efficient administration of justice so requires. The chief justice of the district courts and the chief justice of the municipal court of the city of Boston, acting jointly, may transfer any case appealed to the municipal court of the city of Boston from any district court in the county of Suffolk other than the municipal court of the city of Boston to a jury of six session in any district court in the county of Suffolk, and may so transfer any case appealed to any jury of six session in any district court in the county of Suffolk other than the municipal court of the city of Boston to the

jury of six session of the municipal court of the city of Boston, whenever in their judgment the availability of judicial manpower or court facilities or the caseloads of the individual courts or any other consideration of the efficient administration of justice so requires. The chief justice of the district courts may transfer any case appealed to a jury of six in the district courts of Dukes county or Nantucket county to a jury of six session in Barnstable or Bristol county. At the request of the justice of any juvenile court other than the Boston juvenile court the chief justice of the district courts shall receive any claims of appeal and assign the same for trial by a jury of six in a district court reasonably proximate to the juvenile court.

In any case heard in a jury of six session where the defendant is found guilty and placed on probation, he shall thereafter be deemed to be on probation in the original district or juvenile court and that court shall have jurisdiction to extend, continue, terminate or revoke probation or the suspension of a sentence.

The judge presiding over a jury of six session shall have and exercise all the powers and duties which a justice of the superior court has and may exercise in the trial and disposition of criminal cases, but in no case may he impose a sentence to the state prison. No judge so sitting shall act in a case in which he has sat or held an inquest or otherwise taken part in any proceeding therein.

Trials by juries of six in a district or juvenile court shall be held in the facilities of said court or in a place designated by the chief justice of the district courts, the chief justice of the municipal court of the city of Boston, or the justices of the Boston,

Bristol County, Springfield or Worcester juvenile courts, respectively, including with the approval of the chief justice of the superior court, facilities of the superior court, and shall proceed in accordance with the provisions of law applicable to trials by jury in the superior court, except that the number of peremptory challenges shall be limited to two to each defendant. The commonwealth shall be entitled to as many challenges as equal the whole number to which all of the defendants in the case are entitled.

For the jury of six sessions, the superior court shall make available jurors from the pool of jurors for the jury sessions in either civil or criminal sessions in the superior court. The chief justice of the district courts shall cooperate with the superior court by providing reasonable notice to the chief justice of the superior court of the needs for such juries of six. The chief justice of the Boston municipal court, and the justices of the Boston, Bristol County, Springfield and Worcester courts shall also cooperate with the superior court by providing reasonable notice to the chief justice of the superior court of the needs for such juries of six.

The district attorney for the district in which the alleged offense or offenses occurred shall appear for the commonwealth in all cases. The chief justice of the district courts shall arrange for the sittings of the jury sessions of the district courts and shall assign justices and special justices thereto, to the end that speedy trials may be provided for such appeals, and the chief justice of the municipal court of the city of Boston and the justices of the Boston, Bristol County, Springfield and Worcester juvenile courts shall likewise arrange for the jury sessions in their respective

courts. In the event of a trial by jury in a district or juvenile court, review may be had directly by the appeals court, by a bill of exceptions, appeal, report or otherwise in the same manner provided for trials by jury in the superior court. The defendant may elect to waive a jury of six in the manner provided by section six of chapter two hundred and sixty-three.

The chief justice of the district courts, the chief justice of the municipal court of the city of Boston, and the justices of the Boston, Bristol County, Springfield and Worcester juvenile courts shall arrange for the preservation of testimony at jury of six proceedings by such means as each of them deems appropriate. When a stenographer is used at a trial or hearing in a jury of six session the stenographer shall provide the parties thereto with a transcript of his notes or any parts thereof for which he shall be paid by the party requesting it at the rate fixed by the said chief justice or justices, as the case may be; provided, however, that such rate shall not exceed the rate provided by section eighty-eight of chapter two hundred and twenty-one. The compensation and expenses of any such stenographers shall be paid by the county.

Section 27B. Upon such appeal, the district and juvenile courts shall have the like power to bind witnesses in the case by recognizance as they have by chapter two hundred and seventy-six when a prisoner is admitted to bail or committed.

Section 27C. Upon such appeal, the clerk of the district or juvenile court shall transmit to the clerk of the jury of six session of the district or juvenile court a copy of the complaint and of the record of conviction, the original recognizances, a list of the

witnesses, the appearance of the attorney for the defendant, if any is entered, and a statement of the expenses; and no other papers need be transmitted.

Section 27D. Upon such appeal, the copies and records sent to the jury of six session shall contain the details of all fees and expenses allowed or paid in the district or juvenile court.

Section 27E. If the appellant fails to enter and prosecute his appeal, he shall be defaulted on his recognizance and the judge presiding in the jury of six session may impose sentence upon him for the crime of which he was convicted as if he has been convicted in said session, and, if he is not there in custody, may issue process to bring him into court to receive sentence.

Section 27F. The appellant may, at any time before action has been taken on the appeal by the jury of six session except continuance, come personally before the court from whose judgment the appeal was taken and withdraw his appeal. If the appellant has been committed, the officer in charge of the jail, within forty-eight hours after his commitment, shall notify him of his right to withdraw his appeal and shall furnish him with a blank form of withdrawal, which, if signed by him shall be witnessed by said officer; thereupon, or if prior to said notice the appellant notifies the said officer of his desire to withdraw his appeal, the said officer shall forward the defendant, with the signed form of withdrawal, to the court before whom the appeal was taken. In such case the court may order the appellant to comply with the sentence appealed from, in the same manner as if it were then first imposed, or may revise or revoke the same if satisfied that cause for such revision or revocation exists; provided,

that the court shall not increase the sentence first imposed, and if sureties had recognized with the appellant to prosecute his appeal they shall be discharged. In such case, compensation shall be allowed and paid by the town where the crime was committed to the jailer for his expenses in the conveyance and custody of the appellant, at the same rate as is allowed to officers serving a mittimus. If the appeal was from a sentence to pay a fine, the fees of the jailer shall be paid by the appellant if, after the appeal is withdrawn, he pays the fine.

SECTION 3. Section 31 of chapter 218 of the General Laws, as appearing in the Tercentenary Edition, is hereby amended by striking out said section and inserting in place thereof the following section:--

Section 31. No order shall be made for the commitment of a person to a jail or house of correction upon a sentence of more than six months imposed by a district court except in a jury of six session, until at least one day after the imposition of such sentence. Before such order is made, he shall be notified of his right to appeal to a jury of six session in the district court, and he may exercise such right, as provided by law, until such order is made. This section shall not apply to sentences the execution of which is suspended.

SECTION 4. The General Laws are hereby amended by inserting after section 57 of chapter 218, the following section:--

Section 57A. The Boston juvenile court shall have exclusive appellate jurisdiction of all crimes and all proceedings brought under sections fifty-two to sixty-three, inclusive, of chapter one hundred and nineteen heard in the first instance before said juvenile court or before any district court in Suffolk county. The Worcester,

Springfield and Bristol County juvenile courts respectively shall have exclusive jurisdiction of all crimes and all proceedings brought under sections fifty-two to sixty-three, inclusive, of chapter one hundred and nineteen and heard in the first instance before each of said courts respectively.

SECTION 5. Chapter 119 of the General Laws is hereby amended by striking out section 56, as most recently amended by chapter 262 of the acts of 1976, and inserting in place thereof the following section:--

Section 56. Hearings upon cases arising under sections fifty-two to sixty-three, inclusive, may be adjourned from time to time. A child adjudged a delinquent child may appeal to a jury of six session authorized to hear such appeals upon adjudication, and also may appeal at the time of the order of commitment or sentence, and such child shall, at the time of such order of commitment or sentence, be notified of his right to appeal. The appeal, if taken, shall be tried and determined in like manner as appeals in criminal cases, except that, in district courts, the trial of said appeals shall not be in conjunction with the other business of the court, but shall be held in a session set apart and devoted for the time being exclusively to the trial of juvenile cases. In any appealed case, if the allegations with respect to such child are proven, the court shall not commit such child to any correctional institution, jail or house of correction, but may adjudicate such child to be a delinquent child and may make such disposition as may be made by a court under section fifty-eight. Before making such disposition, the justice shall be supplied with a report of any investigation regarding the child made

by the probation officer. Section thirty-five of chapter two hundred and seventy-six relative to recognizances in cases continued or appealed, shall apply to cases arising under sections fifty-two to sixty-three, inclusive.

SECTION 6. Section 58 of chapter 119 of the General Laws, as most recently amended by chapter 1073 of the acts of 1973, is hereby amended by striking out the third paragraph of said section.

SECTION 7. Section 66 of chapter 119 of the General Laws as most recently amended by section 2 of chapter 353 of the acts of 1960, is hereby amended by striking out in the second sentence of said section the words: "to the superior court."

SECTION 8. Section 68 of chapter 119 of the General Laws, as most recently amended by section 12 of chapter 731 of the acts of 1972, is hereby amended by striking out in the first paragraph, in the second sentence of the third paragraph, and in the fourth paragraph the words: "to the superior court."

SECTION 9. Section 68 of chapter 119 of the General Laws as most recently amended by section 12 of chapter 731 of the acts of 1972 is hereby amended by striking out in the first sentence of the third paragraph of said section the words: "the Boston juvenile court, the Worcester juvenile court, the Springfield juvenile court, a district court or the superior court" and inserting in place thereof the words:-- a juvenile court or a district court.

SECTION 10. Section 68A of chapter 119 of the General Laws, as amended by section 19 of chapter 838 of the acts of 1969, is hereby amended by striking out in the first sentence the words: "to the

superior court."

SECTION 11. Section 72 of chapter 119 of the General Laws, as most recently amended by section 23 of chapter 838 of the acts of 1969, is hereby amended by striking out in the first sentence the words: "Courts, including the superior court on appeal" and inserting in place thereof the following word:-- Courts.

SECTION 12. Section 6 of chapter 212 of the General Laws, as most recently amended by section 24 of chapter 319 of the acts of 1953, is hereby amended by striking out the first sentence of said section and inserting in place thereof the following sentence:-- The court shall have original jurisdiction of all crimes.

SECTION 13. Section 4 of chapter 275 of the General Laws, as appearing in the Tercentenary Edition, is hereby amended by striking out in the second sentence the words "section twenty-four of chapter two hundred and seventy-eight" and inserting in place thereof the following words: section twenty-seven E of chapter two hundred and eighteen.

SECTION 14. Section 58 of chapter 276 of the General Laws, as most recently amended by section 1 of chapter 473 of the acts of 1971, is hereby amended by inserting after the word "appealed" in the fifth paragraph of said section the following words:-- to a jury of six session of a district court.

SECTION 15. Section 65 of chapter 276 of the General Laws, as most recently amended by section 2 of chapter 473 of the acts of 1971, is hereby amended by striking out the second sentence of said section and inserting in place thereof the following sentence:-- The condition

of a recognizance of a person held to answer to a charge before a district court shall be further so framed as to bind him to appear before the district court to answer to the charge and before a jury of six session in any district court to prosecute an appeal on said charge or before the superior court to answer to any indictment which may be returned against him.

SECTION 16. Section 47A of chapter 277 of the General Laws, as amended by section 1 of chapter 756 of the acts of 1965, is hereby amended by striking out the second sentence of the fourth paragraph of said section and inserting in place thereof the following sentence:-- Upon an appeal to a jury of six session in a district or juvenile court, any motion permitted under this section may be filed within ten days after the taking of the appeal, or within such reasonable further time as may be allowed by special order or court rule.

SECTION 17. Chapter 278 of the General Laws is hereby amended by striking out section 23 as appearing in the Tercentenary Edition and inserting in place thereof the following section:--

Section 23. At the trial of a criminal case in the superior court upon indictment or in a district or juvenile court upon appeal the fact that the defendant did not testify at the preliminary hearing or trial in the first instance or that at such hearing or trial he waived examination or did not offer any evidence of his own defense, shall not be used in evidence against him, nor be referred to or commented on by the prosecuting officer.

SECTION 18. Section 27 of chapter 278 of the General Laws, as most recently amended by chapter 480 of the acts of 1962 is hereby amended by striking out the word "or" in said section and inserting

in place thereof the following words:-- and decisions of a district or juvenile court in a jury of six session upon questions raised upon a plea in abatement to a.

SECTION 19. Section 28 of chapter 278 of the General Laws, as appearing in the Tercentenary Edition, is hereby amended by adding after the words "superior court" in the first line thereof the words:-- or of a district or juvenile court in a jury of six session.

SECTION 20. Section 28E of chapter 278 of the General Laws, as most recently amended by section 16 of chapter 740 of the acts of 1972, is hereby amended by inserting in the first and second sentences of said section after the words: "superior court" in each sentence the following words:-- or a jury of six session in a district or juvenile court.

SECTION 21. Section 29 of chapter 278 of the General Laws, as most recently amended by chapter 301 of the acts of 1966 is hereby amended by inserting after the words "superior court" in said section the following words:-- or a judge in a jury of six session in a district or juvenile court.

SECTION 22. Section 29C of chapter 278 of the General Laws, as inserted by section 2 of chapter 310 of the acts of 1962, is hereby amended by inserting after the words "superior court" in said section the following words:-- or to a district or juvenile court in a jury of six session.

SECTION 23. Section 30 of chapter 278 of the General Laws, as appearing in the Tercentenary Edition, is hereby amended by inserting after the words "superior court" the following words:-- or in a jury

of six session, in a district or juvenile court.

SECTION 24. Section 30A of chapter 278 of the General Laws, as inserted by chapter 528 of the acts of 1954, is hereby amended by inserting after the words "superior court" in said section the following words:-- or in a jury of six session in a district or juvenile court.

SECTION 25. Sections 18, 18A, 19, 20, 22, 24, 25 and 26 of chapter 278 of the General Laws are hereby repealed.

SECTION 26. Section 2 of chapter 280 of the General Laws, as most recently amended by chapter 843 of the acts of 1975, is hereby amended by striking out the first sentence of said section and inserting in place thereof the following sentence:-- A fine or forfeiture imposed by the superior court shall, except as otherwise provided, be paid over to the treasurer of the county where the proceeding in which the fine or forfeiture was imposed was tried, or in Suffolk county to the collector of Boston.

SECTION 27. This act shall take effect on July the first nineteen hundred and seventy-eight. Any case appealed to the superior court from a district court, the municipal court of the city of Boston or a juvenile court, which case is pending in the superior court at the effective date of this act, shall not be affected by the provisions of this act, except as follows:--

A. Any defendant or any juvenile in such a case may, at any time before trial on such appeal, claim a trial by a jury of six session in the appropriate court as set forth in section 2 of this act. By so doing, said defendant or juvenile shall be deemed to have waived any right to a trial by jury in the superior court or other

disposition in said superior court. When a claim for a trial by a jury of six session in a district or juvenile court has been made under the provisions of this paragraph, the clerk of the superior court shall forthwith forward to the clerk of said district or juvenile court all the papers in the case which have been filed in the superior court; or

B. Any defendant or juvenile in such a case may come personally before the court from whose judgment the appeal was taken and withdraw his appeal, pursuant to the provisions of section 27F of chapter 218, as inserted by section 2 of this act.

APPENDIX B

ANALYSIS OF THE FEASIBILITY OF OPTION I

APPENDIX B

ANALYSIS OF THE FEASIBILITY OF OPTION I

Region	County	1 Complaints Appealed De Novo	2 Judge-Years Required for Disposition Low	Medium	High
I	Barnstable	590	.12	.30	.63
	Dukes	14	.003	.007	.015
	Nantucket	13	.002	.006	.014
	Bristol	1,001	.21	.51	1.08
	Plymouth	1,452	.31	.74	1.57
		3,070	.65	1.56	3.31
II	Essex	2,187	.46	1.12	2.36
	Suffolk	2,663	.57	1.36	2.87
		4,850	1.03	2.48	5.23
III	Middlesex	3,370	.72	1.72	3.63
		3,370	.72	1.72	3.63
IV	Norfolk	1,252	.27	.64	1.35
	Worcester	2,326	.49	1.19	2.51
		3,578	.76	1.83	3.86
V	Hampden	1,247	.27	.64	1.35
	Franklin	102	.02	.05	.11
	Hampshire	461	.10	.24	.50
	Berkshire	258	.05	.13	.28
		2,068	.44	1.06	2.24
	TOTAL:	16,936	3.60	8.65	18.27
	"Actual" judge-years needed (see App. B-3, para. 10, infra.):		4.32	10.38	21.92

- Estimates of percentage of jury trials and time requirements used in computation

DISCUSSION

Column 1 lists, by county, the total number of complaints appealed de novo under the present system. These data are taken from the statistics for the District Courts of Massachusetts for the year ending June 30, 1975, compiled and published by the Administrative Office of the District Courts. BMC appeals are included.

Column 2 lists, by county, a range of judge-years necessary to dispose of the corresponding number of complaints appealed de novo. This range reflects three different sets of assumptions regarding the time estimates used in the computation. The method of calculation by which the de novo complaints are equated with judge-time necessary for their disposition is as follows:

1. From the total number of complaints appealed de novo, subtract 12% to reflect withdrawals of appeal. This figure is taken from three sources on file at the Administrative Office of the District Courts: Uniform Reports on Activities of Juries-of-Six; Michael S. Kaufman, Massachusetts Trial de Novo: Systematic Dysfunction, unpublished manuscript, 1975; Michael S. Kaufman, Trial de Novo in the Cambridge District and Middlesex Superior Courts, unpublished manuscript, 1975.

2. From the remaining complaints, subtract 10% to account for defaults. This figure is obtained from the same sources listed above, in 1.

3. Divide the remaining complaints by 1.5 to reflect an average complaint/defendant ratio--this determines the number of "cases" which must be disposed of. For the basis of this 1.5 figure, see Appendix I-2, footnote b. At this point in the calculation the total number of cases for disposition by the District Court de novo session has been determined. Now estimates of the type of disposition, by percentage, and the time required for disposition must be made.

4. Allow 10-20-30 minutes for each case for such administrative functions as the calling of the list, the granting of continuances, etc. These figures represent the committee's low, medium and high estimates for the average time attributable to the work involved. This approach also accounts for the estimates in paragraphs 5 and 6, below.

5. For 5%-10%-20% of the cases allow 4-5-7 hours for a jury trial.

6. For 95%-90%-80% of the cases allow 10-30-60 minutes for disposition other than by jury trial, i.e., by plea of guilty, jury-waived trial, dismissal.

7. Add the time requirements computed in paragraphs 4, 5, and 6 above for each type of estimate--low, medium, and high.

8. Divide the resulting totals of hours needed for disposition by one judge-year, defined as 1,320 hours of judge-time. This definition is arrived at as follows: 220 days per year multiplied by six hours per day; 220 days is determined as follows: 365 minus 104 Saturdays and Sundays, minus five holidays, minus 30 days vacation, minus six sick days (20% of the maximum possible); six hours per day is computed as follows: 9:00 a.m. to 12:00 p.m.; 1:00 p.m. to 4:00 p.m.

9. The resulting range of judge-years varies according to the estimates that are used. The committee feels that the mid-range figures are the most reasonable because they are based on the most reasonable estimates, namely, 20 minutes for each case for administrative functions, 10% actual jury trials at five hours each, and 30 minutes for all other dispositions. The low and high judge-year estimates are set forth to indicate the effect on the final figure which occurs with a relatively slight change in the underlying assumptions regarding the time necessary for disposition and the percentage of jury trials.

10. These computations presume perfect efficiency in the use of judge-time. That is, each judge-day said to be required is presumed to be totally occupied with work on the disposition of de novo appeals. Realistically, of course, a judge sitting to hear de novo appeals, or any other business, is not likely to be in a position to spend his entire day disposing of cases; lists break down, delays occur, etc. Therefore, in estimating judge time "actually" needed, a factor of 20% is added. In other words, 3.60-8.65-18.27 judge-years of work will take 4.32-10.38-21.92 "actual" judge-years to accomplish. This efficiency factor of 80% is felt by the committee to be a reasonable one at the present time, although it is believed that it can be improved upon significantly.

The chart which results from these computations indicates, for example, that in Region I, Option I would produce an additional volume of business which would require 1.56 judge-years of work, or 1.9 "actual" judge-years (i.e., adjusting for the 80% efficiency factor). Thus, one court operating with two simultaneous jury-of-six sessions year round would be sufficient to handle the additional workload produced by Option I in this Region. Or two courts, each with one year round jury-of-six session, could be operated. In short, the required judge-years of work could be accomplished with any possible combination of available courts and year round or less than year round sessions, so long as these sessions ran for a total of 1.9 judge-years. Comparison of the judge-time required in each region and the courts available for jury-of-six business in each region (Appendix C) shows that physical facilities are presently adequate to accommodate Option I.

APPENDIX C

DISTRICT COURT JURY FACILITIES - 1976

DISTRICT COURT JURY FACILITIES - 1976
COMPILED BY THE OFFICE OF THE CHIEF JUSTICE OF THE DISTRICT COURTS

Region	County	Court	Present Jury-of-Six Session	Courtrooms: Near Superior Court	Courtrooms: TOTAL	Courtrooms: With Jury Facilities	Jury Deliberation Rooms	Jury pool rooms
I	Barnstable	Barnstable (1st Barnstable)	No	Yes	4	3	3	2
		Orleans (2nd Barnstable)	No	No	3	1	1	2
	Dukes	-						
	Nantucket	-						
	Bristol	Fall River (2nd Bristol)	Yes	Yes	2	2*	1	1
		Taunton (1st Bristol)	No	Yes	2	2*	1	1
	Plymouth	Brockton	Yes	Yes	3	3*	1	1
		Plymouth (3rd Plymouth)	No	Yes	2	1	2	1
		Hingham (2nd Plymouth)	No	No	4/20	4/16	2/11	1/9
II	Essex	Lawrence	No	Yes	4	3*	2	1**
		Salem***	Yes	Yes	3	3*	4	1
		Lynn	No	No	4	4*	3	3
	Suffolk#	BMC	Yes (Jury of 12)	Yes	9	4*	2	1**
		E. Boston	No	No	3	3*	1	2
		Roxbury	No	No	6	1*	1	1

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Region	County	Court	Present Jury-of-Six Session	Courtrooms: Near Superior Court?	Courtrooms: TOTAL	Courtrooms: With Jury Facilities	Jury Deliberation Rooms	Jury pool rooms
II	Suffolk (cont'd.)	Chelsea	No	No	2/31	2/20	2/15	1/10
III	Middlesex	Cambridge (3rd E.Middlesex)	Yes	Yes	7	7	5	1**
		Lowell	Yes	Yes	4	3*	4	1
		Framingham (1st E.Middlesex)	Yes	No	4	2	2	1
		Marlborough	No	No	5	3*	2	1
		Somerville	No	No	4	3*	4	3
		Concord (Central Middlesex)	No	No	3	3*	6	1
		Ayer (1st No.Middlesex)	No	No	3/30	2/23	3/26	1/9
IV	Norfolk	Dedham (No. Norfolk)	Yes	Yes	3	3	1	1**
		Quincy (E. Norfolk)	Yes	No	7	5*	7	1
		Stoughton (So. Norfolk)	No	No	3	2*	2	2
	Worcester	Worcester (Central)	Yes	Yes	8	6*	7	2
		Fitchburg##	No	Yes	2	2	2	1**
		Dudley (1st So.Worcester)	No	No	3	3*	3	3

egion	County	Court	Present Jury-of-Six Session	Courtrooms: Near Superior Court?	Courtrooms: TOTAL	Courtrooms: With Jury Facilities	Jury Deliberation Rooms	Jury pool rooms
IV	Worcester (cont'd.)	Clinton (2nd E.Worcester)	No	No	3	3*	2	1
		Uxbridge (2nd So.Worcester)	No	No	3	2*	4	1
					32	26	28	12
V	Hampden	Springfield	Yes	Yes	10	10	6	1
		Holyoke	No	No	1	1	1	1
	Franklin	Greenfield	No	Yes	2	2*	3	3
	Hampshire	Northampton	No	Yes	4	4*	4	1
	Berkshire	Pittsfield	Yes	Yes	2	2	2	1**
		Adams (4th Berkshire)	No	No	1	1	1	1
					20	20	17	8

* One or more of the courtrooms will require minor modifications; typically, a set of folding chairs, a platform, and a velvetine rope might be needed.

** The Superior Court jury pool room is used.

*** The listed facilities are for the new courthouse in Salem, to be completed by August, 1977.

For Options I and II, the text of the legislation (see Appendices A and H, respectively) must make it possible for appeals to be sent to courts in Suffolk County other than the Boston Municipal Court. The bill that would implement Option I (S. 751, H. 1634) has such a provision. See Appendix A-3.

The listed facilities are for the new courthouse in Fitchburg, to be completed by August, 1977.

DISCUSSION

Several criteria were used to determine which courts are best suited to accommodate jury sessions. To reduce administrative costs and for general convenience in the provision of jurors, the most important consideration is the proximity of a District Court to the Superior Court. Other major criteria included the number of courtrooms that, with minimal expense, can handle juries, the number of jury deliberation rooms (with appropriate restroom facilities), the availability of a jury pool room, geographical location within a county, and whether the court is presently used for jury-of-six sessions. Minor criteria included availability of public parking and transportation.

APPENDIX D

PROVISION OF JURORS TO DISTRICT COURT JURY SESSIONS

APPENDIX D

PROVISION OF JURORS TO DISTRICT COURT JURY SESSIONS

The present system for providing jurors to Superior Court could be used to provide jurors to the District Courts for jury trials under Options I, II and III, just as that system currently is used to provide jurors to the District Courts for jury-of-six de novo appeals. The procedure currently followed consists of each District Court with jury-of-six business communicating its projected need for jurors to the Superior Court which issues venires for the county, and the venire being increased to accommodate the added need. The jurors come first to the Superior Court and are assigned or chosen to sit in District Court. They either are assigned for the entire District Court jury session, reporting each day thereafter directly to the District Court, or, if the District Court is nearby, they are "sent over" each day.

It would appear that relatively minor statutory change would be required to allow prospective jurors summoned by Superior Court venire to report directly to the appropriate District Court. An even greater improvement consists of the approach embodied in the recent bill to reform the jury provision system in Suffolk County, S. 608, as filed in the 1977 session. This system essentially would allow each court to obtain its own jurors. This approach, if ultimately put into effect with application to the District Courts as well as Superior Court, would allow maximum efficiency and flexibility in the provision of jurors.

APPENDIX E

DISTRICT COURT JUDICIAL MANPOWER

APPENDIX E

JUDICIAL MANPOWER

The crucial element in evaluating the feasibility of any of the options suggested in this report is the availability of sufficient judicial manpower. Unfortunately, in a large, non-centralized court system there is no easy way of determining accurately optimal workloads or distributions of judges. In fact, even predicting the approximate number of judges who will be available to sit in the District Court system over the next five years is difficult.

There are at present 175 judicial positions at the District Court level. This includes judges from the Municipal Court of the City of Boston,[a] District Court Justices,[b] District Court full-time Special Justices,[c] and District Court part-time Special Justices.[d]

In conjunction with the study, planning and development of a judicial assignment plan for the District Courts (not including the Boston Municipal Court),[e] it has been determined that 135 full-time judges is probably the minimum number necessary for the disposition of current District Court business, and that 145 is

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[a] These nine judges cannot sit outside of the Boston Municipal Court although they will hear appeals from District Courts in Suffolk County other than the Boston Municipal Court.

[b] 85 positions, including five present vacancies. Of this total, six are "part-time" Justices; however, these positions become full-time on July 1, 1977.

[c] At the present time, 34 Special Justices have "certified" and become full-time. This includes two positions which have become and remain vacant, but may be filled under current law. In addition, there exist five Special Justice positions which may not be filled under current law. These are also included in the overall total of 175 judicial positions.

[d] At the present time, 42 Special Justices have not certified. It is anticipated that at least 28 of the remaining will eventually become full-time; 14 have indicated that they either will not certify or are not sure. The deadline for full-time certification is June 30, 1979. St. 1975, Ch. 862.

[e] Developed by Touche Ross & Co., the Administrative Committee of the District Courts, and the Administrative Office of the District Courts, the system began phasing into operation during September, October and November of 1976.

a more reasonable figure.[f/]

Presently, with the total authorized strength of 166 District Court judges depleted by assignments to Superior Court (20)[g/] by fillable vacancies (seven; five Justice positions and two full-time Special Justice positions), and by unfillable vacancies (5), that minimum has been approached, especially since 45 of the judges now sitting in the District Courts still are available on only a part-time basis (42 part-time Special Justices and three part-time Justices who are not sitting in Superior Court). Without return of judge-time currently committed to Superior Court and without the filling of vacancies as they occur, particularly vacancies in all Special Justice positions,[h/] it is clear that no amount of additional work can be assumed by the District Courts without backlogs developing. Therefore, analysis of judge-time available to accommodate Options I, II, and III must start with the assumptions that Superior Court assignments will terminate as planned and that legislation will be enacted authorizing the filling of Special Justice positions as they become vacant.

With these assumptions in mind, one can begin to determine judge availability for Options I, II, and III in the District Courts by using the estimate of the minimum number of judges needed for present business, mentioned above. This figure of 145 can be reduced by three, because this is the total number of judge-years currently devoted to jury-of-six business,[i/] and this business would be eclipsed by Options I, II, and III. This leaves a need for 142 full-time judges in the District Courts and a full-strength roster (assumed for the reasons given above) of 166 full-time judges. Thus calculated, it can be said that a "surplus" of 24 judges exists (or would exist) which could be devoted to new business in the District Courts.

As for the Boston Municipal Court, two of its nine judges

[f/] This includes judicial manpower necessary to dispose of current jury-of-six business, viz., three judge-years, based on statistical reports filed with the Administrative Office of the District Courts for the year ending June 30, 1976.

[g/] St. 1976, Ch. 303. This statute, which authorizes assignment of District Court judges to sit in Superior Court, is set to expire by its own terms on June 30, 1978.

[h/] St. 1975, Ch. 266, which allows for the "phase-out" of part-time Special Justices, mandates that vacancies occurring in all Special Justice positions will not be filled; in essence these positions will be eliminated. This, of course, means that eventually the District Courts will lose all 81 Special Justice positions.

[i/] See note f, supra.

currently are sitting in Superior Court. Although this situation has existed for only a limited period of time, it appears that no backlogs are developing as a result of this reduction in judicial manpower. On this basis, it can be said that the Boston Municipal Court has two judge-years of "surplus" judge-time. Together with the 24 judge-years determined as "available" in the District Courts, this gives a total of 26 judge-years which could be devoted to any increase in work produced by Options I, II, or III. Return of judicial manpower from Superior Court, filling of judicial vacancies, and no increase in caseload for other reasons are prerequisites to this conclusion.

APPENDIX F

ANTICIPATED EFFECT ON RATES OF APPEAL TO THE APPEALS COURT AND THE SUPREME JUDICIAL COURT

APPENDIX F

ANTICIPATED EFFECT ON RATES OF APPEAL TO THE APPEALS COURT AND THE SUPREME JUDICIAL COURT

One question presented by a change from the present de novo system to Options I, II or III is whether such a change would cause an increase in appeals on issues of law.[a] If the potential for a huge increase in appeals to the Supreme Judicial Court or the Appeals Court attended any or all of the optional systems suggested by this report, the feasibility of the option or options involved could be jeopardized.

However, it appears that if the present statutory procedures for appeal of issues of law in criminal cases are maintained no marked increase in the number of such appeals need be expected. This is because the reasons for the current low rate of appeals would continue. Perhaps the most important of these reasons is that the procedure specifically designed to provide a convenient and simplified system of appeal, namely appeal under G.L. c. 278, ss. 33A-33G, applies only in cases which involve at least one felony charge. This obviously excludes the vast majority of cases tried in the District Courts. It seems clear that the Legislature limited application of G.L. c. 278, ss. 33A-33G to felony cases because the heart of this procedure is the preparation of a stenographic record, the expense of which is justified only in more serious cases.

The procedures for review which <u>are</u> available to defendants charged with and convicted of only one or more misdemeanors are writ of error under G.L. c. 250, ss. 1-2 and 9-12, appeal under G.L. c. 278, s. 28, and bill of exception under G.L. c. 278, s. 31. The limitation of the scope of these procedures and the burdens which they place on counsel would be the same under Options I, II or III as they are under the present system. With these same procedures available there is no reason to expect more appeals just because the forum of de novo conviction has shifted from Superior Court to a District Court (as it would under Option I and the de novo component of Option II) or because the District Court conviction is final with no de novo retrial (as it would be under the initial trial component of Option II and under Option III). Neither change could be expected to produce a sudden increase in purported errors of law, particularly since almost all de novo retrials under the present system are conducted by District Court judges.

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[a] Though no accumulated data exists regarding the number of these appeals under the current system it is generally agreed that the number is low. For example, a rough estimate of the number of such appeals from Suffolk County Superior Court, obtained from the office of the Clerk of Court, is 20 to 30 per year.

Moreover, interlocutory appeals of motions to suppress which could be expected to increase where a non-de novo route were chosen or required are available only in felony cases.

APPENDIX G

BILL REQUIRING DE NOVO RETRIALS TO BE HEARD IN THE DISTRICT COURTS AND ALLOWING FIRST INSTANCE JURY TRIALS IN THE DISTRICT COURTS

DRAFT - LUDWIG EMERGENCY ADAPTATION OF S. 658

AN ACT ABOLISHING THE REQUIREMENT THAT DEFENDANTS IN DISTRICT COURT CRIMINAL CASES AND IN JUVENILE CASES BE TRIED BY THE COURT WITHOUT JURY PRIOR TO THE EXERCISE OF THEIR RIGHT TO TRIAL BY JURY, MAKING PROVISION FOR SPEEDY TRIAL BY JURY IN THE FIRST INSTANCE IN DISTRICT AND JUVENILE COURTS, AND REQUIRING APPEALS FOR TRIAL DE NOVO IN SUCH CASES TO BE TAKEN TO JURIES OF SIX IN SUCH COURTS.

Whereas, the deferred operation of this Act would tend to defeat its purpose, which is the conforming of the law of this Commonwealth relative to trial de novo in criminal cases to the requirements of the Sixth Amendment to the United States Constitution as stated by the United States Supreme Court in sustaining the appeal of Richard I. Ludwig from a decision of the Supreme Judicial Court of this Commonwealth, and the making of provision for the holding of speedy trial by jury in the first instance where said trial by jury in the first instance is not waived by the defendant, it is hereby declared to be an emergency law, necessary for the immediate preservation of the public convenience,

Be it enacted by the Senate and House of Representatives in General Court assembled and by the authority of the same, as follows:

SECTION 1. Section 26 of chapter 218 of the General Laws, as most recently amended by chapter 585 of the acts of 1973, is hereby amended by inserting after the first sentence of said section the following sentence: — Except in Suffolk county, they shall have exclusive appellate jurisdiction of all crimes, and all proceedings brought under sections fifty-two to sixty-three, inclusive, of chapter one hundred and nineteen heard in the first instance before a district court. The municipal court of the city of Boston and all district courts outside of Suffolk county shall have exclusive appellate jurisdiction of crimes tried before a district court.

SECTION 1A. The General Laws are hereby amended by inserting after section 26 of chapter 218, the following section:

Section 26A. Trial of an offense in the district court shall be by a jury of six, unless the defendant files a written waiver and consent to be tried by the court without a jury, subject to his right of appeal therefrom for trial by a jury of six pursuant to section twenty-seven A. Such waiver shall not be received unless the defendant is represented by counsel or has filed a written waiver of counsel. Such trials by jury in the first instance shall be in the district court jury session designated by said section twenty-seven A for the hearing of such appeals. All provisions of law and rules of court relative to the hearing and trial of such appeals shall apply also to jury trials in the first instance.

SECTION 2. Section 27A of chapter 218 of the General Laws, as inserted by chapter 620 of the acts of 1972, is hereby amended by striking out said section and inserting in place thereof the following sections:

Section 27A. Whoever is convicted of a crime before a district court except in a jury of six session thereof may appeal the finding of guilty or the sentence imposed thereon to a district court jury of six session, and claim a jury of six therein, in accordance with this section and at the time of conviction shall be notified of his right to take such appeal. The case shall be entered in the district court jury of six session on the return day next after the appeal is taken, and the appellant shall be released on personal recognizance or committed, in accordance with the procedures set forth in section fifty-eight of chapter two hundred seventy-six, until he recognizes to the commonwealth, in such sum and with such surety or sureties as the court requires, with condition to appear at the district court jury of six session on said return day and at any subsequent time to which the case may be continued, if not previously surrendered and discharged, and so from time to

time until the final sentence, order or decree, and not depart without leave, and in the meantime to keep the peace and be of good behavior. If the appellant is not released on personal recognizance and is committed for failure to recognize, the district court jury of six session shall thereupon have jurisdiction of the case for the purpose of revising the amount of bail required as aforesaid. The appellant shall not be required to advance any fees upon claiming his appeal or in prosecuting the same. Notwithstanding any other provision of law, a defendant, after a finding of guilty in a district court except in a jury of six session thereof, may appeal therefrom and shall thereafter be entitled to a trial de novo in the district court jury of six session in accordance with this section.

~~Section 3½A~~. Every district court outside of Suffolk county is authorized to hold jury of six sessions for the purpose of hearing appeals by defendants found guilty in said courts of an offense or crime over which the district courts have original jurisdiction under the provisions of section twenty-six of chapter two hundred and eighteen and for the purpose of hearing appeals by children found to be delinquent children in said courts. The municipal court of the city of Boston is authorized to hold jury of six sessions for the purpose of hearing appeals by defendants found guilty in any district court, including the municipal court of the city of Boston, within the county of Suffolk of an offense or crime over which said courts have original jurisdiction under the provisions of section twenty-six of chapter two hundred and eighteen. The Bristol County, Springfield and Worcester juvenile courts are authorized to hold jury of six sessions for the purpose of hearing appeals by children found to be delinquent children in said courts. The Boston juvenile court is authorized to hold jury of six sessions for the purpose of hearing appeals by children found to be delinquent children in said court or in any district court in Suffolk county.

The chief justice of the district courts shall designate at least one court in each county, other than Suffolk, for the purpose of hearing cases appealed to a jury of six, provided that all of the courts authorized to hold jury of six sessions as of the effective date of this act shall continue to operate. The juries of six in the municipal court of the city of Boston and in the Boston, Bristol County, Springfield and Worcester juvenile courts shall be operative as of the effective date of this act.

A defendant found guilty in any district court outside of Suffolk county, or a child adjudged a delinquent child in a district court outside of Suffolk county, may appeal to a jury of six session in the same district court if a jury of six procedure has been established in such district court at the time the appeal is taken. If a jury of six procedure has not been established in such district court at the time the appeal is taken, the defendant or the child may appeal to that district court in the same county designated by the chief justice as the district court for hearing appeals from the original district court; provided that a defendant found guilty in any district court within Suffolk county may appeal to the jury of six session of the municipal court of the city of Boston. A child adjudged a delinquent child in any district court within Suffolk county or in the Boston juvenile court may appeal to the jury of six session of the Boston juvenile court. A child adjudged a delinquent child in the Worcester, Springfield or Bristol county juvenile court may appeal to the jury of six session in the same juvenile court. If a jury of six procedure has not been established in the Bristol County, Springfield or Worcester juvenile court at the time the appeal is taken, at the request of the justice of the respective juvenile court to the chief justice of the district courts, arrangements shall be made for the trial of the appeal at a jury of six session in a district court reasonably proximate to the respective juvenile court.

A defendant shall be notified of his right to take such appeal at the time of conviction. The appellant shall not be required to advance any fees upon claiming his appeal or prosecuting the same.

The chief justice of the district courts may transfer any case appealed to a jury of six in a district court, except a case appealed to the municipal court of the city of Boston, or the Boston, Bristol County, Springfield or Worcester juvenile courts, to a jury of six session in another district court in the same county, whenever in his judgment the availability of judicial manpower or court facilities or the caseloads of the individual courts or any other consideration of the efficient administration of justice so requires. The chief justice of the district courts may transfer any case appealed to a jury of six in the district courts of Dukes county or Nantucket county to a jury of six session in Barnstable or Bristol county. At the request of the justice of any juventile court other than the Boston juvenile court the chief justice of the district courts shall receive any claims of appeal and assign the same for trial by a jury of six in a district court reasonably proximate to the juvenile court.

In any case heard in a jury of six session where the defendant is found guilty and placed on probation, he shall thereafter be deemed to be on probation in the original district or juvenile court and that court shall have jurisdiction to extend, continue, terminate or revoke probation or the suspension of a sentence.

The judge presiding over a jury of six session shall have and exercise all the powers and duties which a justice of the superior court has and may exercise in the trial and disposition of criminal cases, but in no case may he impose a sentence to the state prison. No judge so sitting shall act in a case in which he has sat or held an inquest or otherwise taken part in any proceeding therein.

Trials by juries of six in a district or juvenile court shall be held in the facilities of said court or in a place designated by the chief justice of the district courts, the chief justice of the municipal court of the city of Boston, or the justices of the Boston, Bristol County, Springfield or Worcester juvenile courts, respectively, including with the approval of the chief justice of the superior court, facilities of the superior court, and shall proceed in accordance with the provisions of law applicable to trials by jury in the superior court, except that the number of peremptory challenges shall be limited to two to each defendant. The commonwealth shall be entitled to as many challenges as equal the whole number to which all of the defendants in the case are entitled.

For the jury of six sessions, the superior court shall make available jurors from the pool of jurors for the jury sessions in either civil or criminal sessions in the superior court. The chief justice of the district courts shall cooperate with the superior court by providing reasonable notice to the chief justice of the superior court of the needs for such juries of six. The chief justice of the Boston municipal court, and the justices of the Boston, Bristol County, Springfield and Worcester courts shall also cooperate with the superior court by providing reasonable notice to the chief justice of the superior court of the needs for such juries of six.

The district attorney for the district in which the alleged offense or offenses occurred shall appear for the commonwealth in all cases. The chief justice of the district courts shall arrange for the sittings of the jury sessions of the district courts and shall assign justices and special justices thereto, to the end that speedy trials may be provided for such appeals, and the chief justice of the municipal court of the city of Boston and the justices of the Boston, Bristol County, Springfield and Worcester juvenile courts shall likewise arrange for the jury sessions in their respective courts. In the event of a

trial by a jury in a district or juvenile court, review may be had directly by the appeals court, by a bill of exceptions, appeal, report or otherwise in the same manner provided for trials by jury in the superior court. The defendant may elect to waive a jury of six in the manner provided by section six of chapter two hundred and sixty-three.

The chief justice of the district courts, the chief justice of the municipal court of the city of Boston, and the justices of the Boston, Bristol County, Springfield and Worecster juvenile courts shall arrange for the preservation of testimony at jury of six proceedings by such means as each of them deems appropriate. When a stenographer is used at a trial or hearing in a jury of six session the stenographer shall provide the parties thereto with a transcript of his notes or any parts thereof for which he shall be paid by the party requesting it at the rate fixed by the said chief justice or justices, as the case may be; provided, however, that such rate shall not exceed the rate provided by section eighty-eight of chapter two hundred and twenty-one. The compensation and expenses of any such stenographers shall be paid by the county.

Section 27B. Upon such appeal, the district and juvenile courts shall have the like power to bind witnesses in the case by recognizance as they have by chapter two hundred and seventy-six when a prisoner is admitted to bail or committed.

Section 27C. Upon such appeal, the clerk of the district or juvenile court shall transmit to the clerk of the jury of six session of the district or juvenile court a copy of the complaint and of the record of conviction, the original recognizances, a list of the witnesses, the appearance of the attorney for the defendant, if any is entered, and a statement of the expenses; and no other papers need be transmitted.

Section 27D. Upon such appeal, the copies and records sent to the jury of six session shall contain the details of all fees and expenses allowed or paid in the district or juvenile court.

Section 27E. If the appellant fails to enter and prosecute his appeal, he shall be defaulted on his recognizance and the judge presiding in the jury of six session may impose sentence upon him for the crime of which he was convicted as if he has been convicted in said session, and, if he is not there in

custody, may issue process to bring him into court to receive sentence.

Section 27F. The appellant may, at any time before action has been taken on the appeal by the jury of six session except continuance, come personally before the court from whose judgment the appeal was taken and withdraw his appeal. If the appellant has been committed, the officer in charge of the jail, within forty-eight hours after his commitment, shall notify him of his right to withdraw his appeal and shall furnish him with a blank form of withdrawal, which, if signed by him shall be witnessed by said officer; thereupon, or if prior to said notice the appellant notifies the said officer of his desire to withdraw his appeal, the said officer shall forward the defendant, with the signed form of withdrawal, to the court before whom the appeal was taken. In such case the court may order the appellant to comply with the sentence appealed from, in the same manner as if it were then first imposed, or may revise or revoke the same if satisfied that cause for such revision or revocation exists; provided, that the court shall not increase the sentence first imposed, and if sureties had recognized with the appellant to prosecute his appeal they shall be discharged. In such case, compensation shall be allowed and paid by the town where the crime was committed to the jailer for his expenses in the conveyance and custody of the appellant, at the same rate as is allowed to officers serving a mittimus. If the appeal was from a sentence to pay a fine, the fees of the jailer shall be paid by the appellant if, after the appeal is withdrawn, he pays the fine.

SECTION 3. Section 31 of chapter 218 of the General Laws, as appearing in the Tercentenary Edition, is hereby amended by striking out said section and inserting in place thereof the following section: —

Section 31. No order shall be made for the commitment of a person to a jail or house of correction upon a sentence of more than six months imposed by a district court except in a jury of six session, until at least one day after the imposition of such sentence. Before such order is made, he shall be notified of his right to appeal to a jury of six session in the district court, and he may exercise such right, as provided by

trial by a jury in a district or juvenile court, review may be had directly by the appeals court, by a bill of exceptions, appeal, report or otherwise in the same manner provided for trials by jury in the superior court. The defendant may elect to waive a jury of six in the manner provided by section six of chapter two hundred and sixty-three.

The chief justice of the district courts, the chief justice of the municipal court of the city of Boston, and the justices of the Boston, Bristol County, Springfield and Worecster juvenile courts shall arrange for the preservation of testimony at jury of six proceedings by such means as each of them deems appropriate. When a stenographer is used at a trial or hearing in a jury of six session the stenographer shall provide the parties thereto with a transcript of his notes or any parts thereof for which he shall be paid by the party requesting it at the rate fixed by the said chief justice or justices, as the case may be; provided, however, that such rate shall not exceed the rate provided by section eighty-eight of chapter two hundred and twenty-one. The compensation and expenses of any such stenographers shall be paid by the county.

Section 27B. Upon such appeal, the district and juvenile courts shall have the like power to bind witnesses in the case by recognizance as they have by chapter two hundred and seventy-six when a prisoner is admitted to bail or committed.

Section 27C. Upon such appeal, the clerk of the district or juvenile court shall transmit to the clerk of the jury of six session of the district or juvenile court a copy of the complaint and of the record of conviction, the original recognizances, a list of the witnesses, the appearance of the attorney for the defendant, if any is entered, and a statement of the expenses; and no other papers need be transmitted.

Section 27D. Upon such appeal, the copies and records sent to the jury of six session shall contain the details of all fees and expenses allowed or paid in the district or juvenile court.

Section 27E. If the appellant fails to enter and prosecute his appeal, he shall be defaulted on his recognizance and the judge presiding in the jury of six session may impose sentence upon him for the crime of which he was convicted as if he has been convicted in said session, and, if he is not there in

law, until such order is made. This section shall not apply to sentences the execution of which is suspended.

SECTION 4. The General Laws are hereby amended by inserting after section 57 of chapter 218, the following section: —

Section 57A. The Boston juvenile court shall have exclusive appellate jurisdiction of all crimes and all proceedings brought under sections fifty-two to sixty-three, inclusive, of chapter one hundred and nineteen heard in the first instance before said juvenile court or before any district court in Suffolk county. The Worcester, Springfield and Bristol County juvenile courts respectively shall have exclusive jurisdiction of all crimes and all proceedings brought under sections fifty-two to sixty-three, inclusive, of chapter one hundred and nineteen and heard in the first instance before each of said courts respectively.

SECTION 5. Chapter 119 of the General Laws is hereby amended by striking out section 56, as most recently amended by chapter 1073 of the acts of 1973, and inserting in place thereof the following section: —

Section 56. Hearings upon cases arising under sections fifty-two to sixty-three, inclusive, may be adjourned from time to time. A child adjudged a delinquent child may appeal to a jury of six session authorized to hear such appeals upon adjudication, and also may appeal at the time of the order of commitment or sentence, and such child shall, at the time of such order of commitment or sentence, be notified of his right to appeal. The appeal, if taken, shall be tried and determined in like manner as appeals in criminal cases, except that, in district courts, the trial of said appeals shall not be in conjunction with the other business of the court, but shall be held in a session set apart and devoted for the time being exclusively to the trial of juvenile cases. In any appealed case, if the allegations with respect to such child are proven, the court shall not commit such child to any correctional institution, jail or house of correction, but may adjudicate such child to be a delinquent child and may make such disposition as may be made by a court under section fifty-eight.

Before making such disposition, the justice shall be supplied with a report of any investigation regarding the child made by the probation officer. Section thirty-five of chapter two hundred and seventy-six relative to recognizances in cases continued or appealed, shall apply to cases arising under sections fifty-two to sixty-three, inclusive.

SECTION 6. Section 58 of chapter 119 of the General Laws, as most recently amended by chapter 1073 of the acts of 1973, is hereby amended by striking out the third paragraph of said section.

SECTION 6A. Section 61 of chapter 119 of the General Laws, as most recently amended by section 1 of chapter 840 of the acts of 1975, is hereby amended by inserting after the third paragraph the following paragraph: - Trial of a delinquency complaint against a child shall be by a jury of six, unless the child files a written waiver and consent to be tried by the court without a jury, subject to his right of appeal therefrom for trial by a jury of six pursuant to section fifty-six. Such waiver shall not be received unless the child is represented by counsel or has filed a written waiver of counsel. Such trials by jury in the first instance shall be in the jury session of the district court or juvenile court designated by section twenty-seven A of chapter two hundred and eighteen for the hearing of such appeals. All provisions of law and rules of court relative to the hearing and trials of such appeals shall apply also to jury trials in the first instance.

SECTION 7. Section 66 of chapter 119 of the General Laws as most recently amended by section 2 of chapter 353 of the acts of 1960, is hereby amended by striking out in the second sentence of said section the words: "to the superior court".

SECTION 8. Section 68 of chapter 119 of the General Laws, as most recently amended by section 12 of chapter 731 of the acts of 1972, is hereby amended by striking out in the first paragraph, in the second sentence of the third paragraph, and in the fourth paragraph the words: "to the superior court".

SECTION 9. Section 68 of chapter 119 of the General Laws as most recently amended by section 12 of chapter 731 of the acts of 1972 is hereby amended by striking out in the first sentence of the third paragraph of said section the words: "the Boston juvenile court, the Worcester juvenile court, the Springfield juvenile court, a district court or the superior court" and inserting in place thereof the words: juvenile

SECTION 10. Section 68A of chapter 119 of the General Laws, as amended by section 19 of chapter 838 of the acts of 1969, is hereby amended by striking out in the first sentence the words: "to the superior court".

SECTION 11. Section 72 of chapter 119 of the General Laws, as most recently amended by section 23 of chapter 838 of the acts of 1969, is hereby amended by striking out in the first sentence the words: "Courts, including the superior court on appeal." and inserting in place thereof the following word: — Courts.

SECTION 12. Section 6 of chapter 212 of the General Laws, as most recently amended by section 24 of chapter 319 of the acts of 1953, is hereby amended by striking out the first sentence of said section and inserting in place thereof the following sentence: — The court shall have original jurisdiction of all crimes.

SECTION 13. Section 4 of chapter 275 of the General Laws, as appearing in the Tercentenary Edition, is hereby amended by striking out in the second sentence the words "section twenty-four of chapter two hundred and seventy-eight" and inserting in place thereof the following words: section twenty-seven E of chapter two hundred and eighteen.

SECTION 14. Section 58 of chapter 276 of the General Laws, as most recently amended by section 1 of chapter 473 of the acts of 1971, is hereby amended by inserting after the word "appealed" in the fifth paragraph of said section the following words: — to a jury of six session of a district court.

SECTION 15. Section 65 of chapter 276 of the General Laws, as most recently amended by section 2 of chapter 473 of the acts of 1971, is hereby amended by striking out the second sentence of said section and inserting in place thereof the following sentence: — The condition of a recognizance of a person held to answer to a charge before a district court shall be further so framed as to bind him to appear before the district court to answer to the charge and before a jury of six session in any district court to prosecute an appeal on said charge or before the superior court to answer to any indictment which may be returned against him.

SECTION 16. Section 47A of chapter 277 of the General Laws, as amended by section 1 of chapter 756 of the acts of 1965, is hereby amended by striking out the second sentence of the fourth paragraph of said section and inserting in place thereof the following sentence: — Upon an appeal to a jury of six session in a district or juvenile court, any motion per-

mitted under this section may be filed within ten days after the taking of the appeal, or within such reasonable further time as may be allowed by special order or court rule.

SECTION 17. Chapter 278 of the General Laws is hereby amended by striking out section 23 as appearing in the Tercentenary Edition and inserting in place thereof the following section: —

Section 23. At the trial of a criminal case in the superior court upon indictment or in a district or juvenile court upon appeal the fact that the defendant did not testify at the preliminary hearing or trial in the first instance or that at such hearing or trial he waived examination or did not offer any evidence of his own defense, shall not be used in evidence against him, nor be referred to or commented on by the prosecuting officer.

SECTION 18. Section 27 of chapter 278 of the General Laws, as most recently amended by chapter 480 of the acts of 1962 is hereby amended by striking out the word "or" in said section and inserting in place thereof the following words: — and decisions of a district or juvenile court in a jury of six session upon questions raised upon a plea in abatement to a.

SECTION 19. Section 28 of chapter 278 of the General Laws, as appearing in the Tercentenary Edition, is hereby amended by adding after the words "superior court" in the first line thereof the words: — or of a district or juvenile court in a jury of of six session.

SECTION 20. Section 28E of chapter 278 of the General Laws, as most recently amended by section 16 of chapter 740 of the acts of 1972, is hereby amended by inserting in the first and second sentences of said section after the words: "superior court" in each sentence the following words: — or a jury of six session in a district or juvenile court.

SECTION 21. Section 29 of chapter 278 of the General Laws, as most recently amended by chapter 301 of the acts of 1966 is hereby amended by inserting after the words "superior court" in said section the following words: — or a judge in

a jury of six session in a district or juvenile court.

SECTION 22. Section 29C of chapter 278 of the General Laws, as inserted by section 2 of chapter 310 of the acts of 1962, is hereby amended by inserting after the words "superior court" in said section the following words: — or to a district or juvenile court in a jury of six session.

SECTION 23. Section 30 of chapter 278 of the General Laws, as appearing in the Tercentenary Edition, is hereby amended by inserting after the words "superior court" the following words: — or in a jury of six session, in a district or juvenile court.

SECTION 24. Section 30A of chapter 278 of the General Laws, as inserted by chapter 528 of the acts of 1954, is hereby amended by inserting after the words "superior court" in said section the following words: — or in a jury of six session in a district or juvenile court.

SECTION 25. Sections 18, 18A, 19, 20, 22, 24, 25 and 26 of chapter 278 of the General Laws are hereby repealed.

SECTION 26. Section 2 of chapter 280 of the General Laws, as most recently amended by section 37 of chapter 319 of the acts of 1953, is hereby amended by striking out the first sentence of said section and inserting in place thereof the following sentence: — A fine or forfeiture imposed by the superior court shall, except as otherwise provided, be paid over to the treasurer of the county where the proceeding in which the fine or forfeiture was imposed was tried, or in Suffolk county to the collector of Boston.

SECTION 27. This act shall take effect upon its passage. ~~on July the first nineteen hundred and seventy seven.~~ Any case appealed to the superior court from a district court, the municipal court of the city of Boston or a juvenile court, which case is pending in the superior court at the effective date of this act, shall not be affected by the provisions of this act, except as follows: —

A. Any defendant or any juvenile in such a case may, at any time before trial on such appeal, claim a trial by a jury of

six session in the appropriate court as set forth in section 2 of this act. By so doing, said defendant or juvenile shall be deemed to have waived any right to a trial by jury in the superior court or other disposition in said superior court. When a claim for a trial by a jury of six session in a district or juvenile court has been made under the provisions of this paragraph, the clerk of the superior court shall forthwith forward to the clerk of said district or juvenile court all the papers in the case which have been filed in the superior court; or

B. Any defendant or juvenile in such a case may come personally before the court from whose judgment the appeal was taken and withdraw his appeal, pursuant to the provisions of section 27F of chapter 218, as inserted by section 2 of this act.

APPENDIX H

ANALYSIS OF THE FEASIBILITY OF OPTION II

APPENDIX H

ANALYSIS OF THE FEASIBILITY OF OPTION II

As with Option I, the new burden which would be imposed on the District Courts under Option II is best measured in terms of the additional judge time which would be required to make the system work. Feasibility then, can be measured in terms of whether the District Courts have judicial manpower sufficient to handle this increased workload. It must be recognized that the new burden under Option II would have two components:

1. The time required to dispose of de novo appeals. (This is the extent of the new burden under Option I.)

2. The time necessary to dispose of all cases for which the initial jury trial was claimed.

The following two charts deal with these components with two alternative assumptions. Both Chart A, which calculates necessary judge time to dispose of cases for which a first-instance jury trial claim is made, and Chart B, which calculates necessary judge time to dispose of de novo appeals--both of these charts calculate necessary judge time assuming first an 8% and then a 1% rate of initial jury trial demand.

CHART A

Region	County	1 Criminal Complaints for which Claims of First Instance Jury Trials are Made		2 Judge-Years Required for Initial Jury Trial Component of Option II	
		8%	1%		
I	Barnstable	1,311	164	.80	.10
	Dukes	93	12	.09	(
	Nantucket	42	5	.02	(.01
	Bristol	2,502	313	1.53	.19
	Plymouth	2,371	296	1.45	.18
		6,319	790	3.89	.48
II	Essex	2,822	353	1.73	.21
	Suffolk	3,492	437	2.14	.27
		6,314	790	3.87	.48
III	Middlesex	6,419	802	3,94	.49
IV	Norfolk	2,946	368	1.81	.22
	Worcester	4,539	567	2.78	.35
		7,485	935	4.59	.57

Region	County	1 Criminal Complaints for which Claims of First Instance Jury Trials are Made		2 Judge-Years Required for Initial Jury Trial Component of Option II	
		8%	1%		
V	Hampden	2,122	265	1.30	.16
	Franklin	314	39	.19	.02
	Hampshire	550	69	.33	.02
	Berkshire	794	99	.49	.06
		3,780	472	2.31	.28
	TOTALS	30,317	3,789	18.6	2.3

CHART B

Region	County	1 Criminal Complaints Subject to De Novo Appeals		2 Current Rate of De Novo Appeal	3 Complaints to be Disposed of at De Novo Session		4 Judge-Years Required for De Novo Component of Option II	
		92%	99%					
I	Barnstable	15,076	16,224	3.6%	542	584	.27	.29
	Dukes	1,072	1,154	1.2	13	14	.01	.01
	Nantucket	478	514	2.5	12	12		
	Bristol	28,778	30,968	3.2	921	991	.47	.50
	Plymouth	27,261	29,335	4.9	1,336	1,437	.68	.73
		72,665	78,195	3.9	2,824	3,039	1.43	1.53
II	Essex	32,452	34,921	6.2	2,012	2,165	1.03	1.10
	Suffolk	40,162	43,218	6.1	2,450	2,636	1.25	1.34
		72,614	78,139	6.1	4,462	4,801	2.28	2.44
III	Middlesex	73,818	79,435	4.2	3,100	3,336	1.58	1.70
IV	Norfolk	33,877	36,454	3.4	1,151	1,239	.58	.63
	Worcester	52,192	56,163	4.1	2,140	2,302	1.09	1.17
		86,069	92,617	3.8	3,291	3,541	1.67	1.80
V	Hampden	24,408	26,265	4.7	1,147	1,234	.58	.63
	Franklin	3,609	3,883	2.6	94	101	.04	.05
	Hampshire	6,329	6,811	6.7	424	456	.21	.23
	Berkshire	9,129	9,823	2.6	237	255	.12	.13
		43,475	46,782	4.4	1,902	2,046	.95	1.04
	TOTALS	348,641	375,168	4.5	15,579	16,763	7.9	8.5

DISCUSSION

CHART A

Column 1 lists the number of complaints, by county, for which defendants would claim an initial trial by jury assuming that the rate of such claims were first 8% and then 1% of "total criminal complaints." The base figure of total criminal complaints is taken from statistics for the District Courts of Massachusetts for the year ending June 30, 1975, compiled and published by the Administrative Office of the District Courts. It includes neither motor vehicle complaints paid by mail (obviously these cannot be claimed for initial trial by jury) nor criminal parking complaints (the probable number of initial jury trial claims coming from this category is so low as to distort the total claims should they be included in the base and an overall percentage of 8% or 1% applied). The number of motor vehicle complaints paid by mail is taken from statistical reports from each District Court for the year ending June 30, 1975. For the Municipal Court of the City of Boston, this figure was unavailable; the number used was extrapolated on the basis of the average for the rest of the courts in Suffolk County.

Column 2 lists the judge-years, by county, necessary to dispose of the corresponding number of complaints for which initial jury trial was claimed. The calculation is as follows:

1. Subtract 5% of the complaints to reflect defaults. (See footnote i, App. I-3, infra.)

2. Divide by 1.5 to reflect an average complaints/defendant ratio of 1.5--this determines the number of possible trials. (See App. I-2, footnote b.)

3. Allow 20 minutes total for each of the cases for such functions as motions, granting of continuances, and the calling of the list. This is the amount of time determined by the committee to be the most reasonable average.

4. For 10% of the cases, allow five hours for a jury trial. This percentage of actual jury trials for initial jury trial claims is considered acceptable in light of the levels of actual jury trials provided by court systems generally. (See footnote 34, page 18 , infra.) The estimate of five hours for an average jury trial is based on the opinion of the committee members, considering such factors as the nature and complexity of the cases which would be involved and experience with current District Court jury-of-six sessions.

5. For 90% of the cases, allow 30 minutes for disposition. This category obviously includes all dispositions other than those by jury trial, i.e. jury-waived trials, pleas of guilty, and

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		3,780	472	2.31	.28
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CHART B

Region	County	1 Criminal Complaints Subject to De Novo Appeals 92%	99%	2 Current Rate of De Novo Appeal	3 Complaints to be Disposed of at De Novo Session		4 Judge-Years Required for De Novo Component of Option II	
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DISCUSSION

CHART A

Column 1 lists the number of complaints, by county, for which defendants would claim an initial trial by jury assuming that the rate of such claims were first 8% and then 1% of "total criminal complaints." The base figure of total criminal complaints is taken from statistics for the District Courts of Massachusetts for the year ending June 30, 1975, compiled and published by the Administrative Office of the District Courts. It includes neither motor vehicle complaints paid by mail (obviously these cannot be claimed for initial trial by jury) nor criminal parking complaints (the probable number of initial jury trial claims coming from this category is so low as to distort the total claims should they be included in the base and an overall percentage of 8% or 1% applied). The number of motor vehicle complaints paid by mail is taken from statistical reports from each District Court for the year ending June 30, 1975. For the Municipal Court of the City of Boston, this figure was unavailable; the number used was extrapolated on the basis of the average for the rest of the courts in Suffolk County.

Column 2 lists the judge-years, by county, necessary to dispose of the corresponding number of complaints for which initial jury trial was claimed. The calculation is as follows:

1. Subtract 5% of the complaints to reflect defaults. (See footnote i, App. I-3, infra.)

2. Divide by 1.5 to reflect an average complaints/defendant ratio of 1.5--this determines the number of possible trials. (See App. I-2, footnote b.)

3. Allow 20 minutes total for each of the cases for such functions as motions, granting of continuances, and the calling of the list. This is the amount of time determined by the committee to be the most reasonable average.

4. For 10% of the cases, allow five hours for a jury trial. This percentage of actual jury trials for initial jury trial claims is considered acceptable in light of the levels of actual jury trials provided by court systems generally. (See footnote 34, page 18 , infra.) The estimate of five hours for an average jury trial is based on the opinion of the committee members, considering such factors as the nature and complexity of the cases which would be involved and experience with current District Court jury-of-six sessions.

5. For 90% of the cases, allow 30 minutes for disposition. This category obviously includes all dispositions other than those by jury trial, i.e. jury-waived trials, pleas of guilty, and

dismissals. Again, the average time assigned to these events, 30 minutes, is based on the committee's considered opinion.

6. The time requirements computed above for miscellaneous, for jury trials, and for other dispositions are then added.

7. The total time requirement is divided by one judge-year, defined as 1,320 hours of judge-time. (For the basis of this estimate see Appendix B-3, para. 8).

8. The resulting figures for necessary judge-years, system-wide, to dispose of the initial jury trial component of Option II are as follows: 17.6 judge-years (at an 8% rate of initial jury trial claims) and 2.2 judge-years (at a 1% rate of initial jury trial claims).

It should be noted that these judge-year requirements are conservative (that is, if anything, they are above actual need) not only because of the estimates used in the computations, but also because the time needed to dispose of these first-instance jury trial claims has not been offset by the time which would be required to dispose of these matters if no initial jury trial claim were possible. That is, the time requirement has not been expressed as a net increase, which would be justified.

CHART B

Column 1 lists, by county, the criminal complaints which would be subject to de novo appeal assuming first an 8% and then a 1% initial jury trial claim rate. That is, of total criminal complaints (as defined for Chart A) 92% and then 99% is computed.

Column 2 lists, by county, the rate at which cases are appealed de novo. These percentages are based on statistics for the District Courts of Massachusetts for the year ending June 30, 1975, compiled and published by the Administrative Office of the District Courts.

Column 3 merely lists the results of applying the percentage listed in Column 2 to the complaints listed in Column 1. The resulting figures are the numbers of complaints which must be disposed of at the de novo session in each county, under the alternative assumptions of an 8% and a 1% rate of initial jury trial claims.

Column 4 lists the judge-years, by county, necessary to dispose of the corresponding number of complaints in Column 3. The calculation is the same as that performed for Chart A, except that 10% rather than 5% is subtracted from total criminal complaints to reflect defaults (see footnote i, App. I-3, infra) and another 12% is subtracted from total criminal complaints to reflect withdrawal of appeals (see App. B-2, para. 1). The resulting figures for necessary judge-years, system-wide, to dispose of the de novo component of Option II are as follows: 7.9 judge-years

(assuming an 8% rate of initial jury trial claims) and 8.5 judge-years (assuming a 1% rate of initial jury trial claims).

In summary, the total judge-years required for the new burden which Option II would create are as follows:

Rate of claims for initial jury trial	8%	1%	5.5%
Judge-years - for initial jury trial claims (Chart A)	18.6	2.3	12.8
Judge-years - for de novo claims (Chart B)	7.9	8.5	8.2
Total judge-years	26.5	10.8	21.0

Applying the "efficiency factor" of 80% (as described in Appendix B-3, para. 10) the actual judge-years needed are as follows: 31.8, assuming 8% initial jury trial claim rate; 12.9, assuming 1% initial jury trial claim rate.

By substituting increasingly higher percentages it can be determined that the rate which would come the closest to producing the maximum increase in new work is 5.5%. That is, an Option II system with a 5.5% rate of initial jury trial claims would produce 25.2 judge-years of work, just shy of the existing "surplus" of 26 judge-years defined as available in Appendix E.

APPENDIX I

ANALYSIS OF THE FEASIBILITY OF OPTION III

APPENDIX I

ANALYSIS OF THE FEASIBILITY OF OPTION III

The fact that Option III would fundamentally alter District Court caseflow and procedure necessitates a system-wide analysis. Options I and II allowed for county-by-county analyses because the basic component of each of those systems, the de novo procedure, is predictable in terms of known data on the type and volume of cases it would produce and, consequently, the judge time required for dispositions in each court. Options I and II would create only a new, fairly predictable "add on" burden for each District Court, whereas Option III would cause a much less predictable, net increase in District Court business.

Because of the lack in many instances of direct reliable data several estimates are made as part of the analysis. In each such instance, the estimate has been deliberately conservative so that the computation of the need for judge time is not unrealistically low.

Thus the basic approach to determining the feasibility of Option III in terms of required judge time is as follows: first, total District Court criminal cases are tabulated. The aim here is to establish the total number of cases which, theoretically, could be tried by a jury in a non-de novo District Court system. Next, total judge time required to dispose of this volume of cases is computed, "weighting" the various types of dispositions appropriately in terms of an average judge time necessary for each type. Three computations are made, one assuming 10% of total dispositions are by jury trial, the second and third assuming a 2% and a 5% jury trial rate, respectively.

The computations are as follows:[a]

CASELOAD ANALYSIS

Total criminal cases[b] (Excluding criminal parking cases)[c]		409,168
Cases disposed of before arraignment[d] ("Paid-by-mail")	241,936	
Cases set for probable cause hearings[e]	17,000	
	258,936	
		-258,936
TOTAL CRIMINAL DISPOSITIONS (Cases which could be tried by jury)		150,232

JUDGE TIME ANALYSIS

Criminal Business			
Jury trials 10% (1%) (5%)[f] (at five hours each)	75,115	(7,511)	(37,558)
All other dispositions[g] except criminal parking cases (at .5 hours each)	67,604	(74,365)	(71,360)
Probable cause hearings[h] (at .75 hours each)	12,750		
All other criminal business[i]	46,766		
Total Judge Hours	202,235	(141,392)	(168,434)
Total judge years necessary to dispose of all criminal business[j]	153	(107)	(127)
Civil Business			
Total judge years necessary to dispose of all civil business[k]	48		
TOTAL judge years necessary	201	(155)	(175)

FOOTNOTES

[a] Data used, unless otherwise stated, are from the statistics for the District Courts of Massachusetts for the year ending June 30, 1975, compiled by the Office of the Chief Justice of the District Courts. This analysis does not include the Boston Municipal Court. Rather, the results of the analysis are applied to the Boston Municipal Court to determine the judge time required there by Option III. See page 20, supra.

[b] Total criminal complaints (613,753) divided by 1.5 to reflect the average number of complaints per defendant, i.e., the number of "cases." The figure 1.5 was established by several means. First, Department of Corrections figures for defendants entering the District Courts were compared to the number of complaints received during the same period, the year ending June 30, 1975. Second, jury-of-six data regarding defendants and complaints that are directly available from statistical reports compiled by the Administrative Office of the District Courts were tabulated for a defendant/complaint ratio. Third, the defendant/complaint ratio was determined for comparable jurisdictions that publish such information. Though each of these approaches is not completely satisfactory, the figure of 1.5 (±.2) invariably was obtained and

was considered sufficiently reliable for the purposes of this analysis.

c/ Since the number of jury trials that would result from criminal parking complaints would, in all probability, be negligible, criminal parking complaints are not included here. To do so would give an inflated figure. Applying an assumed rate of jury trials to this inflated figure would, in turn, give an unreasonably high estimate of the overall number of jury trials. Also, the jury trial rates of other jurisdictions to which the rates being computed here may be compared (see footnote 26, page 12) do not include parking cases. An appropriate estimate of judge time necessary to dispose of criminal parking cases is figured into the final judge time analysis. See note i, infra.

d/ From unpublished data reported by each District Court to the Administrative Office of the District Courts. Again, of course, criminal parking cases are excluded. This number represents complaints, but here each "case" is deemed to include only one complaint.

e/ From the Eighteenth Annual Report to the Justices of the Supreme Judicial Court by the Executive Secretary, for the year ending June 30, 1974, page 64. While this figure is taken from the year preceding the year of the other data used, and while a rough estimate of 500 direct indictments had to be made to get the 17,000 case figure, it is believed that the figure is a reasonable one and even a 10% error either way would amount to no more than 2.5 judge years (allowing an average of 45 minutes for each)--a margin of error acceptable for the purposes of this analysis.

f/ That is, time consumed by jury trials assuming 10% (and 1% and 5%) of the total criminal dispositions are by jury trial, and that such trials take an average of five hours of court time.

g/ This figure is the counterpart to dispositions by jury trial; that is, where 10% of total dispositions are by jury trial, 90% are by "other" (similarly, where 1% and 5% are by jury trial, 99% and 95%, respectively, are by "other" forms of disposition). "Other" dispositions are by plea of guilty, by jury-waived trial and by dismissal. These are lumped together for the purposes of this analysis because, conservatively speaking, it would take 30 minutes on the average to make each of these types of disposition, keeping in mind the legal requirements for the acceptance of a plea of guilty and the kind of hearing involved when a case is continued without a finding to be dismissed later upon satisfactory termination of the continuance period. Even voluntary dismissals are usually preceded by fact-finding by the court.

h/ The average time of 45 minutes is the figure determined to be most reasonable in the experience of the committee members.

i/ This category includes arraignments for all cases which

reach court, i.e., 409,168 criminal cases, minus 241,936 cases paid by mail (see footnote d, supra). Of this total of 167,232 cases, 5% are subtracted to account for defaults. A 5% default rate was considered the most reasonable conservative estimate; no hard data exists. (A 10% default rate was used in computing workloads that would be produced by Option I and the de novo component of Option II. This is based on existing data. See Appendices B-3 and H-8, respectively. Default rates in a non-de novo system, that is, both here for Option III and for the initial jury trial component of Option II, are likely to be lower. Moreover, since no data exists, the relatively low rate of 5% is justified in terms of conservative planning.) To the resulting total of 158,870 arraignments is added 28,194, to account for the percentage (5%) of criminal parking cases (563,880) which will not be paid-by-mail. Again, a 95% pay-by-mail percentage was felt to be the most reasonable conservative estimate (no hard data exists). Finally, the net figure, 187,064, is weighted at 15 minutes each based on the considered judgment of the committee members. This is considered the average time for the average arraignment, taking into account all "types" of arraignments and all of the procedures that may or may not occur at arraignment.

j/ One judge year = 1,320 judge hours, figured by assuming 220 days per judge per year, at six hours per day (see App. B-3, para. 8).

k/ This category includes all non-criminal District Court business including juvenile proceedings, all civil hearings and trials, and civil commitment hearings. No attempt is made to itemize the average judge time requirements for each type of proceeding. Rather, the overall estimated time requirement is based on a questionnaire sent to all District Court judges. The questionnaires returned indicate that roughly one-third of District Court judge time is spent on civil business. Using the estimate of the professional consultants who have reviewed the subject (see Appendix E) that approximately 145 judges are needed to dispose of District Court business presently, and assuming no significant increase in civil business, a figure of 48 judge years can be calculated. This means that if used with efficiency, 48 judge years of work could dispose of all civil cases (as defined above) received in one year. It is interesting to note that this volume of judge years breaks down to an average of roughly three judge-days (as defined above) per court per week.