

HIGH COURT STUDIES

SHIPPING UP TO BOSTON: THE VOTING OF THE MASSACHUSETTS SUPREME JUDICIAL COURT IN NON-UNANIMOUS CRIMINAL CASES FROM 2001–2008

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I. INTRODUCTION

Republican appointed justices became a super majority on the Massachusetts Supreme Judicial Court in 2001.¹ During his four years in office, Governor Paul Cellucci (R) was presented with the extraordinary opportunity to completely reshape the highest tribunal of Massachusetts.² In just two years, Governor Cellucci appointed four of the seven justices of the Supreme Judicial Court.³ While not every one of Governor Cellucci's appointees was a registered Republican, all of his nominees shared a conservative judicial ideology that the governor favored.⁴ In the three years prior to Cellucci's term as the Governor of Massachusetts, Governor

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¹ See Frank Phillips, *Council Confirms Cordy for SJC*, BOSTON GLOBE, Jan. 4, 2001, at B2; *At the Statehouse—Fourth Conservative Appointed*, PROVIDENCE J. BULL., Jan. 4, 2000 [hereinafter *At the Statehouse*].

² *At the Statehouse*, *supra* note 1, at 8 (noting that Governor Cellucci was “the first governor in 30 years to name a majority of justices to the seven-member court”).

³ MASS. GEN. LAWS ANN. ch. 211, § 1 (2007) (“The supreme judicial court . . . consist[s] of six associate justices and one chief justice.”); Frank Phillips, *Cellucci Taps Cowin, Spina for SJC Posts*, BOSTON GLOBE, Sept. 3, 1999, at A1; Phillips, *supra* note 1, at B2; Michael Rezendes, *Mass. High Court Gains Female Majority*, BOSTON GLOBE, July 27, 2000, at B3.

⁴ *At the Statehouse*, *supra* note 1, at 8 (“Cellucci has pointed to his SJC choices as conservative justices who adhere to a strict reading of existing law. He’s not going to be sitting on that court making laws, Cellucci said yesterday.”); Phillips, *supra* note 3, at A1 (noting that Spina was a Democrat and Cowin was a Republican “active in party circles”).

William F. Weld (R) appointed three justices to the Massachusetts Supreme Judicial Court.⁵ Two of those justices remained on the court after Governor Cellucci's appointments, creating a Republican appointed majority of six on the seven-member court.⁶ In 1996, Democratic governors had appointed five out of the seven justices on the court.⁷ In just five years, the Massachusetts Supreme Judicial Court had apparently gone from one ideological extreme to the other.

This study is intended to demonstrate trends in how the Massachusetts Supreme Judicial Court decided non-unanimous or divided criminal cases over an eight-year period. This study aims to answer two questions about how those criminal appeals were decided. First, how frequently did the court and its justices side with the defendant in those cases? Second, how frequently did individual justices agree with their colleagues in those cases? The super majority existed during the first seven years of this study. In the last year of the study, the composition of the court changed slightly with an appointment of a justice by a Democratic governor.⁸ Accordingly, this change in membership will also be explored to determine what impact this appointment had on the way that the court decides criminal appeals when the court is divided.

The study will be organized as follows: Part II provides some background information on the Massachusetts Supreme Judicial Court, including general information regarding composition, tenure, and the appointment process. Additionally, a brief history of the membership of the court is provided. Part III describes the methodology utilized in this study. Specifically, it explains the reasoning behind examining only non-unanimous cases, how those cases were selected, and how the data from those cases was collected and analyzed. Part IV discusses how frequently the justices and court sided with the defendant in divided criminal cases. Part V discusses how successfully individual justices are in getting their colleagues to agree with their written opinions in these cases. Part VI discusses some recent developments and offers concluding remarks on the effect of the most recent appointment on

⁵ See Brian S. McNiff, *Weld Picks Ireland for Seat on SJC*, WORCESTER TELEGRAM & GAZETTE, June 3, 1997, at A1; David Nyhan, *Stakes High in Fried Vote*, BOSTON GLOBE, Aug. 30, 1995, at 21; Joanna Weiss, *Jurist's Roots Deep in Advocacy*, BOSTON GLOBE, Nov. 20, 2003, at B1.

⁶ See *infra* Part II.B.

⁷ See *infra* Part II.B.

⁸ See *infra* Part II.B.

divided criminal cases. Appendix A provides the complete findings from this study. Appendix B contains the observations and data collected from individual cases.

II. THE MASSACHUSETTS SUPREME JUDICIAL COURT

A. Generally

The Massachusetts Supreme Judicial Court “consist[s] of six associate justices and one chief justice.”⁹ Only four justices need be present for a quorum necessary to decide all matters to be heard by the court.¹⁰ The justices of the court “are appointed by the Governor [to] life terms,”¹¹ but are subject to mandatory retirement upon reaching the age of seventy.¹² The Governor’s Council must confirm appointees in order for them to take office.¹³ The Governor’s Council consists of eight members and the Lieutenant Governor.¹⁴ The eight members are elected to two-year terms from special districts.¹⁵ The legislature has no formal role in the judicial selection process, and has virtually no opportunity to influence the decisions of that process.¹⁶ Outside rare newspaper articles, the selection process receives little attention in the legislature or the media.¹⁷ Massachusetts and New Hampshire are the only two states that continue to maintain a governor’s council to appoint justices to their high courts.¹⁸

⁹ MASS. GEN. LAWS ANN. ch. 211, § 1 (2007).

¹⁰ MASS. GEN. LAWS ANN. ch. 211, § 2 (2007).

¹¹ Mark C. Miller, *A Legislative Perspective on the Ohio, Massachusetts, and Federal Courts*, 56 OHIO ST. L.J. 235, 242 (1995).

¹² MASS. CONST. pt. 2, ch. 3, art. I (“All judicial officers . . . upon attaining seventy years of age . . . shall be retired.”).

¹³ Miller, *supra* note 11, at 242. State judges at all levels are appointed this way. *Id.* Additionally, the Governor’s Council confirms quasi-judicial appointees “such as coroners, notaries public, justices of the peace, and the solicitor-general.” *Id.*; MASS. CONST. pt. 2, ch. 2, § 1, art. IX.

¹⁴ Miller, *supra* note 11, at 242.

¹⁵ *Id.*

¹⁶ *Id.* While not required to, Governors do consult with members of a joint committee on judicial appointments made of members of both the Massachusetts Bar Association and the Boston Bar Association prior to submitting the nominee to the Governor’s Council for approval. Jonathan Saltzman, *Panel Is Asked to Suggest Names for SJC: Field ‘Wide Open’ to Replace Sosman*, BOSTON GLOBE, Mar. 22, 2007, at 6B (“After the panel makes recommendations, Patrick is expected to select a potential nominee. If he follows the practice of past governors, he would also probably consult with a joint committee on judicial appointments made up of members of the Massachusetts Bar Association and the Boston Bar Association. Then he would submit his nominee to the Governor’s Council for approval.”).

¹⁷ Miller, *supra* note 11, at 243.

¹⁸ *Id.* at 242.

B. Court Membership

In 1996, the Massachusetts Supreme Judicial Court (hereinafter “SJC”) was composed of Chief Justice Liacos,¹⁹ Justice Wilkins,²⁰ Justice Abrams,²¹ Justice Lynch, Justice O’Connor,²² Justice Greaney,²³ and Justice Fried.²⁴ Five of those seven justices were appointed by Democratic governors.²⁵ Justice Liacos retired in 1996. Governor Weld appointed Justice Wilkins to the vacant chief justice post,²⁶ and appointed Justice Marshall to fill the vacancy in the court.²⁷ Governor Weld then appointed Justice Ireland in 1997 to succeed Justice O’Connor.²⁸

In 1999, Governor Cellucci appointed Justice Marshall to the post of chief justice to fill the vacancy left by Chief Justice Wilkins’s retirement. That same year, Governor Cellucci appointed Justice Spina and Justice Cowin to fill the vacancies in the court left by the retirement of Chief Justice Wilkins and Justice Fried.²⁹ In 2000, Governor Cellucci appointed Justice Sosmon to fill the vacancy left by the retirement of Justice Lynch.³⁰ In 2001, Governor Cellucci

¹⁹ Chief Justice Liacos was first appointed to the court by Governor Michael Dukakis (D) in 1976, and was appointed Chief Justice by Governor Dukakis in 1989. Brian S. McNiff, *Liacos Sworn as Chief Justice—Urges Funds*, WORCESTER TELEGRAM & GAZETTE, June 21, 1989, at A4.

²⁰ Governor Francis W. Sargent (R) appointed Justice Wilkins in 1972. See John Ellement, *Also at Stake Today: The SJC’s Direction*, BOSTON GLOBE, Nov. 3, 1998, at B1; see also Richard Nangle, *After Good Confab, Will Dems Blow It Again?*, WORCESTER TELEGRAM & GAZETTE, June 5, 2006, at A8 (noting that Democrat Dukakis beat incumbent Republican Governor Francis W. Sargent in 1974).

²¹ Governor Dukakis appointed Ruth I. Abrams, the first woman on the SJC, in 1977. Frank Phillips, *Harvard Counsel Marshall is Weld’s Nominee for SJC*, BOSTON GLOBE, Sept. 4, 1996, at A1 (noting that Justice Abrams “became the first female member of the court when she was appointed by . . . Gov[ernor] Michael Dukakis”).

²² Governor Edward J. King (D) appointed Justice Lynch and Justice O’Connor in 1981. Bruce Mohl, *Appeals Judge Said to Be SJC Nominee*, BOSTON GLOBE, July 22, 1989, at 1; see also David Farrell, *King’s Court*, BOSTON GLOBE, FEB. 2, 1981 (criticizing the appointment of Justice Lynch).

²³ Governor Dukakis appointed Justice Greaney in 1989. John H. Kennedy, *Greaney Sworn in as Newest Judge of SJC, Praising US Justice System*, BOSTON GLOBE, Sept. 10, 1989, at 37.

²⁴ *Commonwealth v. Morris*, 662 N.E.2d 683, 684 (Mass. 1996). Governor William F. Weld (R) appointed Justice Fried in 1995. See Nyhan, *supra* note 5, at 21.

²⁵ See *supra* notes 19–24.

²⁶ See *SJC Chief Justice Receives Award*, BOSTON GLOBE, May 6, 1997, at C21.

²⁷ Weiss, *supra* note 5; Phillips, *supra* note 21 (noting that Marshall had “a reputation among friends and colleagues as a liberal and social activist”).

²⁸ See McNiff, *supra* note 5, at A1.

²⁹ See Phillips, *supra* note 3, at A1 (noting that both Spina and were “battle-tested former prosecutors”). Both Spina and Cowin served as Superior Court judges. *Id.* Additionally, Justice Spina was elevated to the Appeals Court in 1997 by Governor Weld. *Id.*

³⁰ Rezendes, *supra* note 3, at B3.

made his fourth appointment to the court by appointing Justice Cordy to replace the retiring Justice Abrams.³¹

At the start of 2001, the SJC was composed of Chief Justice Marshall, Justice Greaney, Justice Ireland, Justice Spina, Justice Cowin, Justice Sosmon, and Justice Cordy.³² For seven years the court's membership remained the same, until Justice Martha Sosmon passed away in March of 2007.³³ Governor Deval L. Patrick (D) appointed Superior Court Judge Margot Botsford to fill the vacancy left by Justice Sosman's death.³⁴

III. METHODOLOGY

This study examines only non-unanimous decisions in criminal cases. That means that it only examines criminal decisions issued by the SJC that contained at least one separate opinion, concurring or dissenting, in addition to the majority disposition. Limiting a study to non-unanimous opinions is believed to provide more insight into the judicial philosophy of judges or justices.³⁵ Unanimous opinions largely represent compromises between the judges or justices on a particular court.³⁶ "Divided decisions are a window into the judicial decision-making process."³⁷ Unlike unanimous decisions, divided decisions reflect the "unique values and beliefs" of individual justices and "offer an opportunity to delve into [their] individual judicial philosophies."³⁸ Even when a judge writes a concurring opinion, it can demonstrate that he feels particularly

³¹ See Phillips, *supra* note 1, at B2.

³² Commonwealth v. Watkins, 744 N.E.2d 645, 645 (Mass. 2001).

³³ Saltzman, *supra* note 16, at 6B.

³⁴ Andrea Estes, *Veteran Judge in Line for SJC: Superior Court's Gants Ruled in Many High-Profile Cases*, BOSTON GLOBE, Dec. 1, 2008, at 1. Justice Botsford was sworn in on September 4, 2007. Steve LeBlanc, *New Mass. High Court Justice Sworn In*, PROVIDENCE J. BULL., Sept. 5, 2007, at D3. Botsford served as a judge for eighteen years and served as a law clerk to Supreme Judicial Court Justice Francis Quirico in the early 1970s. *Justice Botsford Sworn in as Supreme Judicial Court Justice*, U.S. STATE NEWS, Sept. 5, 2007, available at 2009 WLNR 17379656.

³⁵ James W. Barr, *Pennsylvania Supreme Court: The More Things Change, the More They Stay the Same*, 70 ALB. L. REV. 1093, 1095 (2007) (citing Vincent Martin Bonventre & Amanda Hiller, *Public Law at the New York Court of Appeals: An Update on Developments*, 2000, 64 ALB. L. REV. 1355, 1379-80 (2001)).

³⁶ See *id.* (citing Bonventre & Hiller, *supra* note 35, at 1379).

³⁷ Bonventre & Hiller, *supra* note 35, at 1379 (citing Vincent Martin Bonventre, *New York's Chief Judge Kaye: Her Separate Opinions Bode Well for Renewed State Constitutionalism at the Court of Appeals*, 67 TEMP. L. REV. 1163, 1199-1200 (1994)).

³⁸ Bonventre & Hiller, *supra* note 35, at 1379-80 (citing Luke Bierman, *The Dynamics of State Constitutional Decision-Making: Judicial Behavior at the New York Court of Appeals*, 68 TEMP. L. REV. 1403, 1405 (1995)).

strong about the issue.³⁹ Essentially, divided decisions are worth looking at for two reasons. First, they provide an insight into how an individual judge will decide a close case or tough call, and second, they can provide an insight into how judges will align themselves with their colleagues in those cases.

The criminal decisions used in this study were gathered through the utilization of an online database of Massachusetts state cases. Specifically, a search was tailored to find all decisions from the SJC in a given year containing the word “criminal” with a concurring or dissenting opinion. All of those decisions were examined, and any decisions that dealt with a criminal defendant where any aspect of the detention, trial, conviction, or sentence was being challenged were admitted into the study. As such, some decisions were excluded from the study, because they failed to involve a criminal defendant and a challenge to some aspect of his detention, trial, conviction, or sentence.⁴⁰ Ultimately, fifty-one opinions qualified for this study between January 1, 2001 and January 1, 2009.⁴¹

³⁹ For instance, Justice Greaney wrote two concurring opinions to express his disagreement with his colleagues regarding the *Bishop-Fuller* protocol. *Commonwealth v. Oliveira*, 780 N.E.2d 453, 465 (Mass. 2002) (Greaney, J., concurring) (“I agree with the result and most of the reasoning in the court’s opinion. The precise issue is whether the records summonsed to court should be considered privileged in the absence of the assertion of a privilege or privileges. Our holding is that ‘as described in the statutes creating [the] privileges [under consideration], some action by the patient or client is necessary to “exercise” the privilege therein created. The privilege is not self-executing.’ This is as far as we have to (and should) go. I specifically reject the portions of the opinion which reach out in dicta to launch an attack on the *Bishop-Fuller* protocol. It is inappropriate to suggest in this case, without any foundation whatsoever, that the court might be inclined to modify the protocol in any material way.”) (citation omitted); *Commonwealth v. Sheehan*, 755 N.E.2d 1208, 1214 (Mass. 2001) (Greaney, J., concurring) (“I agree with the result in this procedurally unique case. I write separately to express my concern about the tone of the concurring opinion of Justice Sosman, with whom Justices Ireland and Cowin join, and also to state reservations about its substance. While the opinion stops short of stating definitively that the three Justices will vote to overrule the protocol established in *Commonwealth v. Bishop* and *Commonwealth v. Fuller*, it comes close to saying so. A Justice certainly may express an interest in receiving further comments and recommendations about the protocol, even a recommendation that the protocol be discontinued. It is quite another matter to condemn the protocol by adjectival attack in a way that is disconcerting” (citations omitted)).

⁴⁰ Cases were typically excluded from the study because they did not deal with a traditional right of the accused or the proceeding was not criminal in nature. *See e.g.*, *Commonwealth v. Donohue*, 892 N.E.2d 718 (Mass. 2008) (holding that sentencing statutes permit certain inmates to participate in programs outside correctional facilities); *In re McHoul*, 833 N.E.2d 1146 (Mass. 2005) (dealing with the civil commitment of a sex offender); *Hagen v. Commonwealth*, 772 N.E.2d 32 (Mass. 2002) (finding that a victim lacks standing to challenge the sentence of a criminal); *Commonwealth v. Gavin G.*, 772 N.E.2d 1067 (Mass. 2002) (holding that a juvenile court judge has no authority to order expungement of probation records of juveniles); *Commonwealth v. Russ R.*, 744 N.E.2d 39 (Mass. 2001) (holding that a juvenile court judge has no power to grant immunity to a witness).

⁴¹ *See infra* Appendix B.

For each decision, the vote (or votes) of each justice in attendance was recorded.⁴² The author of the respective majority, concurring, or dissenting opinion was noted as well.⁴³ For each opinion in each case, it was determined whether or not the outcome favored the criminal defendant or the prosecution.⁴⁴ In cases where the outcome was mixed, i.e., the defendant won on at least one ground, but lost on the other grounds, it was determined what issue(s) the justices were concerned with in their separate opinions. If the result of that issue favored the prosecution, then the opinions were categorized as pro-prosecution, or vice versa, but none favored the defendant.⁴⁵ The analysis offered, however, does not consider the actual substance of the opinions. Accordingly, the substantive reasons underlying the voting of each justice are not explored.⁴⁶

As stated earlier, this study is concerned with tracking two aspects of divided cases: the rate opinions favored the defendant, which will be referred to as the pro-defendant rate throughout this article, and the rate at which justices agreed with their colleagues, which will be referred to as the agreement rate for short. To determine the pro-defendant rate of an individual justice, the number of votes for the defendant by the justice was tabulated and divided by the total number of non-unanimous cases the judge participated in.⁴⁷ Similarly, to determine the agreement rate of one justice to another, the number of times a justice joined an opinion was tabulated and divided by the total number of opinions by that justice authoring the opinions.⁴⁸ All results were multiplied by 100 to yield a percentage.⁴⁹ In short, simple arithmetic was used to examine the trends discovered in this study.⁵⁰

⁴² See *infra* Appendix B.

⁴³ See *infra* Appendix B.

⁴⁴ See *infra* Appendix B.

⁴⁵ This explanation is probably lengthier than need be, because only two such cases were found in the study and the issue that the court found for the defendant was the same. See *Commonwealth v. Rivera*, 833 N.E.2d 1113, 1123–24 (Mass. 2005) (vacating one felony conviction, but affirming the remaining convictions on all other grounds); *Commonwealth v. Britto*, 744 N.E.2d 1089, 1106 (Mass. 2001) (vacating one felony conviction, but affirming the remaining convictions on all other grounds).

⁴⁶ See Barr, *supra* note 35, at 1095–96 (applying a similar methodology).

⁴⁷ The rate the court as a whole sided with the defendant was determined in roughly the same way but only the outcomes of the majority opinions were utilized to arrive at the figure. See *infra* Appendix A tbls.1 & 2.

⁴⁸ Overall agreement rates were determined by adding the total number of times a justice joined the authoring justice and dividing by the total number of times the joining justices were present. See *infra* Appendix A tbls.3 & 4.

⁴⁹ For the purposes of this study the results were rounded to the nearest tenth. See *infra* Appendix A tbls.2 & 4.

⁵⁰ See Barr, *supra* note 35, at 1096 (applying a similar methodology).

IV. PRO-DEFENDANT RATES IN NON-UNANIMOUS CRIMINAL CASES

While this study did yield numerous findings regarding the pro-defendant rates, or how frequently the court or justices sided with the criminal defendant, two are of particular interest. The first finding of interest was the frequency at which the court, in deciding divided cases in favor of the criminal defendant, fluctuated over the eight years covered. The second finding that was particularly interesting was which justices voted for the defendant the most and the least frequently in those cases. Although all findings are not discussed presently, the complete findings of this study are available for review in Appendix A.

Between 2001 and 2007, the SJC sided with the defendant at a rate of 36.6%.⁵¹ Beginning in 2001, the court found for the defendant at a rate of 44.4%.⁵² That rate steadily decreased, except for a spike in 2004.⁵³ In 2007, the SJC did not decide a single divided criminal case in favor of the defendant.⁵⁴ As such, the pro-defendant rate for 2007 was zero.⁵⁵ In 2008, however, after Justice Botsford was appointed, the court decided 50% of the divided criminal cases in favor of the defendant.⁵⁶ That number is also significant when one considers 36.6% of those cases were decided in favor of the defendant between 2001 and 2007.⁵⁷ Figure 1 presents these findings in graphical form, including the contrasting prosecution rates for each time period.

⁵¹ See *infra* Appendix A tbl.2.

⁵² See *infra* Appendix A tbl.2.

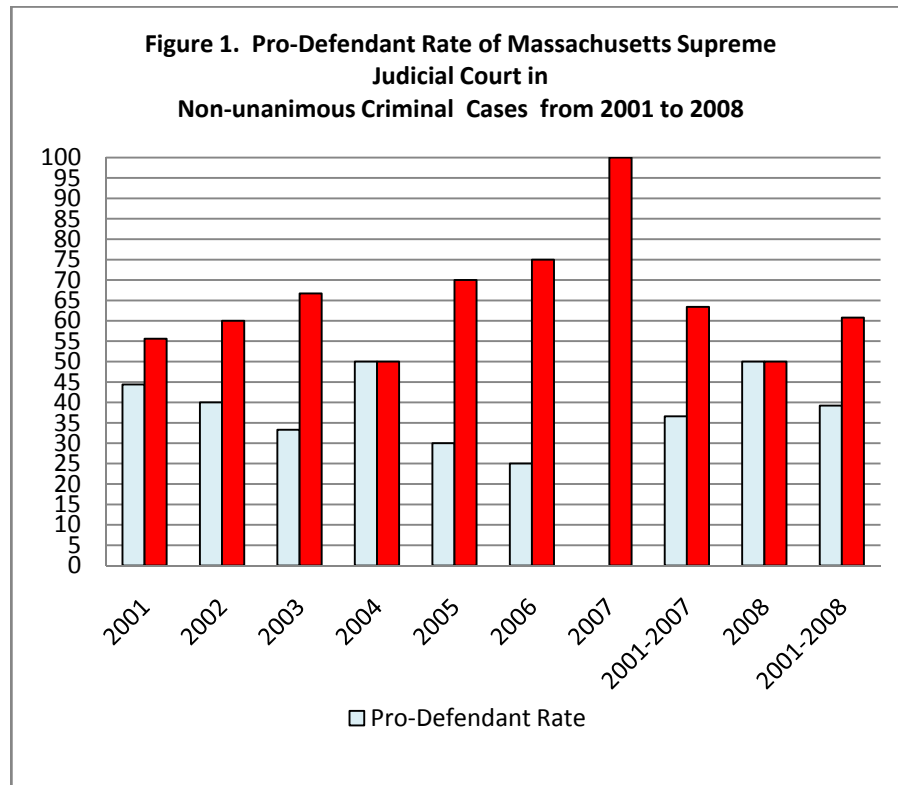
⁵³ The court sided with the defendant at a rate of 40% in 2002, 33.3% in 2003, 50% in 2004, 30% in 2005, 25% in 2006, and 0% in 2007. See *infra* Appendix A tbl.2.

⁵⁴ See *infra* Appendix A tbl.2; see also *infra* Appendix B.

⁵⁵ See *infra* Appendix A tbl.2.

⁵⁶ See *infra* Appendix A tbl.2.

⁵⁷ See *infra* Appendix A tbl.2.



The rate at which individual justices sided with the defendant yielded some unexpected results. Over the eight years covered in this study, the justice who sided with the defendant most frequently was Justice Botsford. Her pro-defendant rate in 2008, her first year on the court, was 70%.⁵⁸ The justice with the second highest pro-defendant rate over the course of the study was Chief Justice Marshal, who sided with the defendant at a rate of 60.8%.⁵⁹ Justice Cordy had the third highest pro-defendant rate, siding with the defendant at a rate of 56.9% in divided criminal cases.⁶⁰

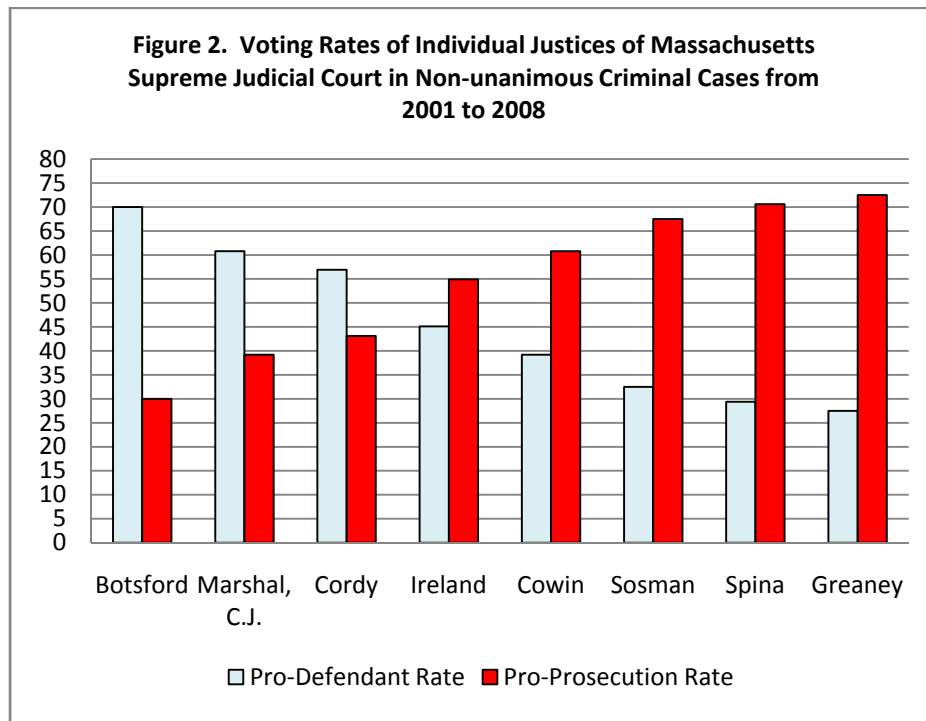
Justice Ireland had the fourth highest pro-defendant rate. He sided with the defendant at a rate of 45.1% in divided criminal

⁵⁸ See *infra* Appendix A tbl.2.

⁵⁹ See *infra* Appendix A tbl.2. Interestingly, Chief Justice Marshal sided with the defendant at a rate of 56.1% from 2001 until 2007. See *infra* Appendix A tbl.2. Justice Cordy actually had the highest pro-defendant rate at 60.5% over the same time period. See *infra* Appendix A tbl.2. Chief Justice Marshal surpassed Justice Cordy in 2008 by siding with the defendant in nine out of ten divided criminal cases that year, where Justice Cordy sided with the defendant in six of those ten divided criminal cases. See *infra* Appendix A tbl.2.

⁶⁰ See *infra* Appendix A tbl.2.

cases.⁶¹ Governor Cellucci's three remaining appointments to the court were grouped within ten points of one another, taking up the fifth, sixth, and seventh positions in terms of the frequency with which they sided with the defendant.⁶² Justice Cowin, Justice Sosman, and Justice Spina sided with the defendant at rates of 39.2%, 32.5%, and 29.4%, respectively.⁶³ Surprisingly, Justice Greaney, the only justice on the court appointed by a Democratic Governor,⁶⁴ sided with the defendant the least. He had a pro-defendant rate of 27.5% in divided criminal cases over the eight years covered in this study.⁶⁵ The other way to look at Justice Greaney's voting is that he sided with the prosecution 72.5% in those cases. The figure below graphically illustrates these findings with the contrasting pro-prosecution rates.



V. AGREEMENT RATES IN NON-UNANIMOUS CRIMINAL

⁶¹ See *infra* Appendix A tbl.2.

⁶² See *infra* Appendix A tbl.2.

⁶³ See *infra* Appendix A tbl.2.

⁶⁴ See *supra* Part II.B.

⁶⁵ See *infra* Appendix A tbl.2. Justice Greaney's pro-defendant rate for 2001 to 2007 was roughly the same at 28.2%. See *infra* Appendix A tbl.2.

CASES

The agreement rate is merely how frequently a justice joined another justice's opinion. In the present context, the agreement rate only reflects how frequently individual justices agreed with the opinion of a particular justice in the divided criminal cases from 2001 until 2008. Outside the particular context examined here, the agreement rates between justices could be completely different. Another limitation on this analysis is that it does not differentiate between majority, concurring, or dissenting opinions. Four points regarding the agreement rates in divided criminal case will be explored below. First, the overall agreement rates of the justices over the eight-year period covered in this study will be discussed. Then, the agreement rates of individual justices with the three highest overall agreements rates will be explored in relation to the remaining justices on the court. The complete finding in regard to agreement rates is available for review in Appendix A.

A. Overall Agreement Rates

The justice with the highest overall agreement rate was Justice Botsford at 47.6%.⁶⁶ Chief Justice Marshal was a close second, with an overall agreement rate of 45.2%.⁶⁷ Justice Spina, with an overall agreement rate of 40.9%, was third.⁶⁸ Justice Greaney, Justice Cordy, Justice Cowin, and Justice Sosman were closely grouped together with the fourth, fifth, sixth, and seventh highest agreement rates.⁶⁹ Justice Ireland had the lowest overall agreement rate in divided criminal cases over the eight-years examined in this study.⁷⁰ These findings are represented graphically in the figure below.

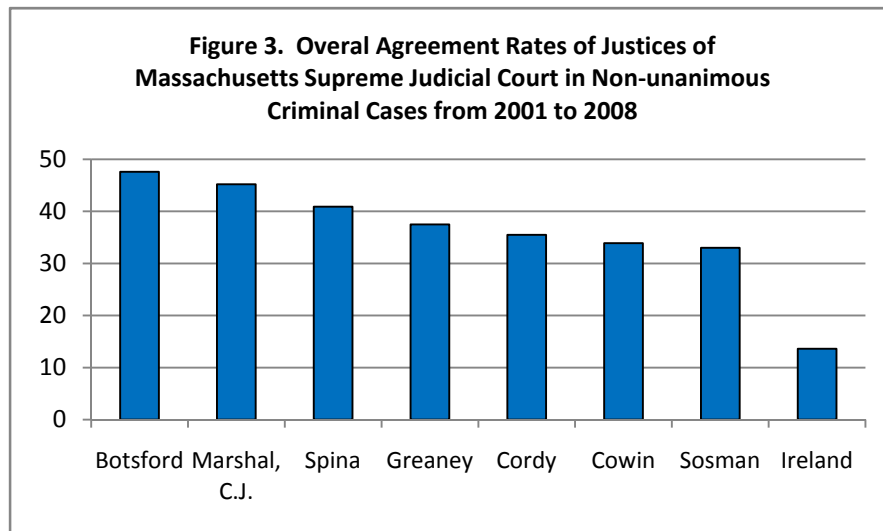
⁶⁶ See *infra* Appendix A tbl.4.

⁶⁷ See *infra* Appendix A tbl.4.

⁶⁸ See *infra* Appendix A tbl.4.

⁶⁹ See *infra* Appendix A tbl.4. Those rates were 37.5%, 35.5%, 33.9%, and 33%, respectively. See *infra* Appendix A tbl.4.

⁷⁰ That overall agreement rate was 13.6%. See *infra* Appendix A tbl.4.



B. Justice Botsford

Chief Justice Marshal joined Justice Botsford's opinions the most frequently at a rate of 85.7% in divided criminal cases.⁷¹ Justice Ireland agreed with Justice Botsford the second most frequently at a rate of 71.4%.⁷² Justice Cordy joined Justice Botsford's opinions at a rate of 57.1%.⁷³ Recently retired Justice Greaney agreed with Justice Botsford's opinions at a rate of 42.9%.⁷⁴ In divided criminal cases, Justices Spina and Cowin joined Justice Botsford's opinions at exactly the same rate, which was 14.3%.⁷⁵ The chart below graphically illustrates these figures.

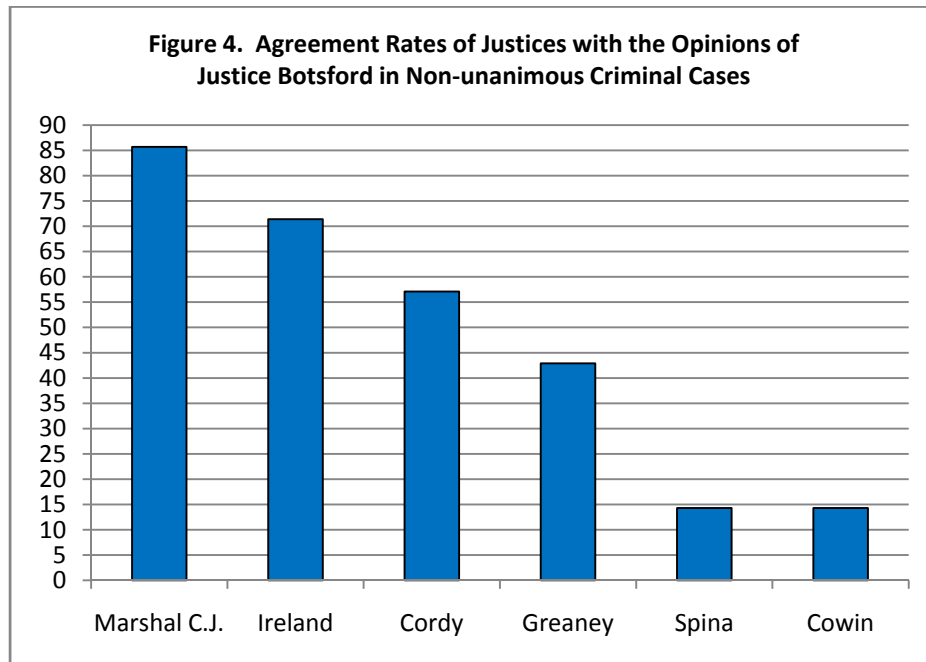
⁷¹ See *infra* Appendix A tbl.4.

⁷² See *infra* Appendix A tbl.4.

⁷³ See *infra* Appendix A tbl.4.

⁷⁴ See *infra* Appendix A tbl.4.

⁷⁵ See *infra* Appendix A tbl.4.



C. Chief Justice Marshal

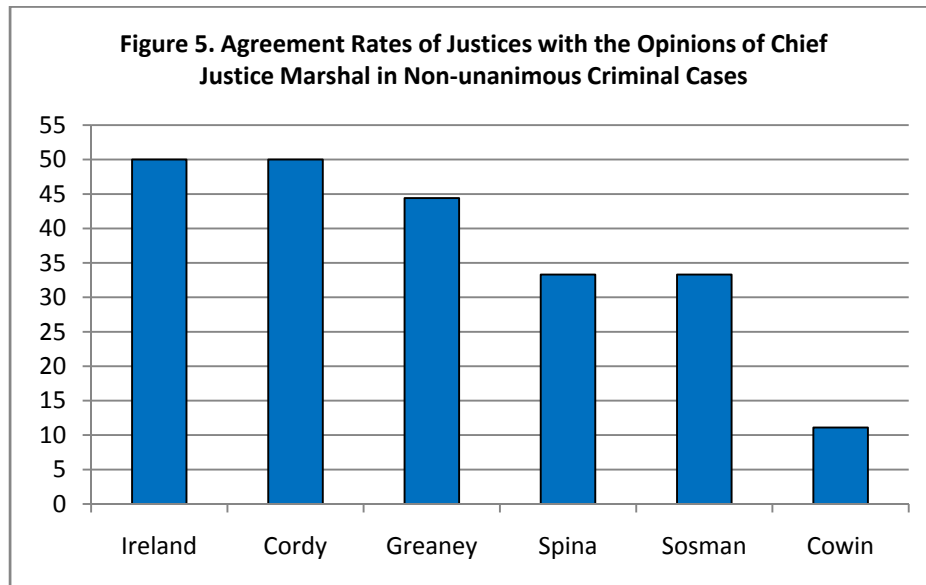
Justices Ireland and Cordy joined Chief Justice Marshal's opinions the most frequently, joining her opinions in 50% of the divided criminal cases between 2001 and 2008.⁷⁶ Justice Greaney agreed with Chief Justice Marshal's opinions in 44.4% of those cases.⁷⁷ Justices Spina and Sosman both agreed with her opinions at a rate of 33.3%.⁷⁸ Justice Cowin agreed with Chief Justice Marshal the least at a rate of 11.1%. While Chief Justice Marshal agreed with Justice Botsford at a very high rate, there were no opinions authored by Chief Justice Marshal in the divided criminal cases in 2008 that met the criteria of this study.⁷⁹ The chart below provides a visual representation of these figures.

⁷⁶ See *infra* Appendix A tbl.4.

⁷⁷ See *infra* Appendix A tbl.4.

⁷⁸ See *infra* Appendix A tbl.4.

⁷⁹ See *supra* Part III (stating that only cases where a criminal defendant was challenging his or her "detention, trial, conviction or sentence" are evaluated in this article). There is a reported case in early 2009 where Justice Botsford joined Chief Justice Marshal, which might meet the criteria of this study. See *Commonwealth v. Bernardo B.*, 900 N.E.2d 834, 837 (Mass. 2009).



D. Justice Spina

Justice Greaney joined Justice Spina's opinion the most frequently in divided criminal cases at a rate of 64.3%.⁸⁰ Justice Ireland agreed with Justice Spina the second most frequently in those cases at a rate of 50%.⁸¹ Justice Cowin and Chief Justice Marshal joined Justice Spina's opinions at rates of 46.7% and 40%, respectively.⁸² Justice Botsford joined Justice Spina's opinion at a rate of 33.3%.⁸³ Justices Sosman and Cordy agreed with opinions of Justice Spina at rates of 25% and 20%, respectively.⁸⁴ The chart below provides a graphical view of these agreement rates.

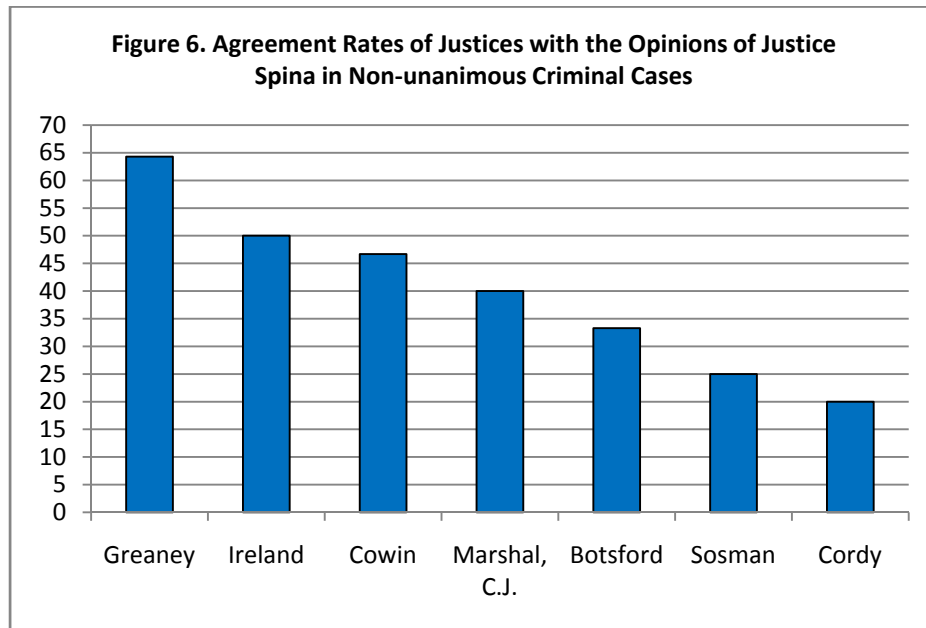
⁸⁰ See *infra* Appendix A tbl.4.

⁸¹ See *infra* Appendix A tbl.4.

⁸² See *infra* Appendix A tbl.4.

⁸³ See *infra* Appendix A tbl.4.

⁸⁴ See *infra* Appendix A tbl.4.



E. Significance of Agreement Rates

From a practical standpoint one may wonder, what is the point of looking at these numbers? “The theory is that some justices, when writing a main opinion, concurrence, or dissent, are more skilled at convincing other justices to join with them than others are.”⁸⁵ Those justices that are more skillful at convincing their colleagues to agree with their position would presumably have higher rates of agreement with their colleagues than other judges on the court.⁸⁶ As such, the agreement rates among the currently sitting justices might prove very useful in determining what justices to focus on when arguing criminal appeals before the SJC. Tailoring arguments to persuade justices whose colleagues agree with them more frequently might increase a party’s chance of obtaining the four votes necessary for a favorable majority disposition.

⁸⁵ Barr, *supra* note 35, at 1110.

⁸⁶ See *id.* at 1109–10 (noting that another way to determine which judges have the most influence over their benchmates “would be to call the justices and ask them,” but that it is doubtful “that any self-respecting justice would admit to being influenced in any way by other justices”).

VI. CONCLUDING REMARKS

Justice Greaney reached the mandatory retirement age in April 2009.⁸⁷ He retired in November 2008.⁸⁸ His departure is significant considering that he voted for the prosecution the most frequently in the divided criminal cases.⁸⁹ With the retirement of Justice Greaney, Governor Patrick had yet another opportunity to shape the composition of Massachusetts's highest tribunal.⁹⁰ Governor Patrick nominated Judge Ralph D. Gants to the vacancy.⁹¹ The Governor's Council confirmed Gants on January 21, 2009,⁹² and he was sworn in the following week.⁹³ The appointment of Justice Gants represents Governor Patrick's last opportunity to make an appointment to the court until 2012, assuming the remaining judges stay on the court until the mandatory retirement age of seventy and the Governor is re-elected in 2010.⁹⁴ While the impact that Justice Gants will have on the court in criminal appeals remains to be seen, public comments suggest that he may become a force on the court in the coming years.⁹⁵

Regardless of what impact the appointment of Justice Gants has on the court, it appears that Governor Patrick has already made a significant impact on how the Supreme Judicial Court decides criminal appeals in divided cases with the appointment of Justice

⁸⁷ David E. Frank, *Justice John M. Greaney Departs Mass. Supreme Judicial Court; No Replacement Named*, MASS. LAW. WKLY., Dec. 1, 2008, available at 2008 WLNR 23701681; see also MASS. CONST. pt. 2, ch. 3, art. 1 ("[U]pon attaining seventy years of age said judges shall be retired.").

⁸⁸ Frank, *supra* note 87. He is now the director of the Macaronis Institute for Trial and Appellate Advocacy at Suffolk University Law School. *Id.*

⁸⁹ See *supra* Part IV. Moreover, his departure is also significant because he agreed with Justice Spina the most frequently in divided criminal cases. See *supra* Part V.D.

⁹⁰ See *Patrick Nominates Gants to Supreme Judicial Court*, WORCESTER TELEGRAM & GAZETTE, Dec. 2, 2008, at A5 (noting that Justice Gants was Governor Patrick's second appointment to the supreme judicial court).

⁹¹ *Id.* Judge Gants was "a 54-year-old graduate of Harvard College and Harvard Law School," and had been a Superior Court judge for over ten years. *Id.*

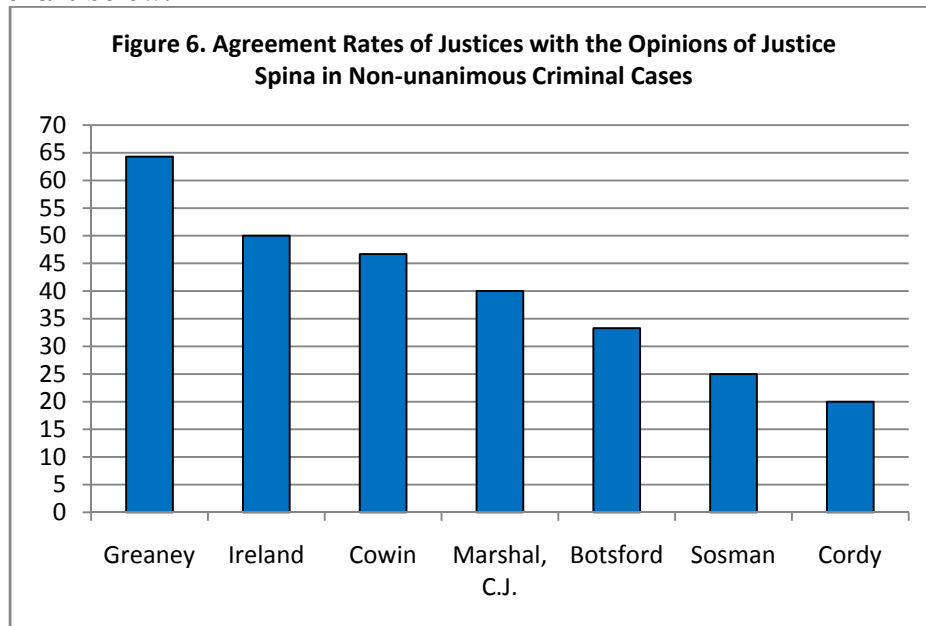
⁹² John J. Monahan, *SJC Appointment Is Confirmed 6-2: Worcester Councilor Votes Against*, WORCESTER TELEGRAM & GAZETTE, Jan. 22, 2009, at B8.

⁹³ *New Supreme Judicial Court Justice Gants Takes Oath*, U.S. STATE NEWS, Feb. 2, 2009, available at 2009 WLNR 2001538.

⁹⁴ Matt Viser, *Choice of Gants Stirs Little Controversy, Legal Observers Say*, BOSTON GLOBE, Dec. 2, 2008, at 3.

⁹⁵ See Laurel J. Sweet, *SJC Nominee Answers to Governor's Council*, BOSTON HERALD, Jan. 15, 2009, at 8 (noting Barbara J. Rouse, Chief Justice of the Superior Court, thought he would be "one of the truly great [justices]" on the SJC); Viser, *supra* note 94 ("He is frightfully smart and frightfully hard-working . . ." (quoting Harvey Silverplate)); Viser, *supra* note 94 (describing Gants as "[a] voracious reader" and noting that he "has been spotted po[ur]ing over court documents while riding the Red Line home at 10 p.m").

Botsford. There are three reasons it appears that her appointment had a significant impact on these cases. First, the actual number of divided criminal cases increased once Justice Botsford joined the court.⁹⁶ In the seven years prior to her appointment, there was an average of 5.9 such cases.⁹⁷ In her first year on the court there were a total of ten such cases.⁹⁸ This increase is even more significant when one considers that there were a total of six divided criminal cases in 2006 and 2007.⁹⁹ These figures are represented in the chart below.



Second, the court was deciding divided criminal cases in favor of the defendant more frequently once Justice Botsford joined the court.¹⁰⁰ In the seven years prior to her appointment, the court found for the defendant at a rate of 36.6% in divided criminal cases.¹⁰¹ In her first year on the court, the SJC found for the defendant in 50% of such cases.¹⁰² This number is also significant because the court found for the defendant only once in six cases in

⁹⁶ See *infra* Appendix A tbl.1.

⁹⁷ See *infra* Appendix A tbl.1.

⁹⁸ See *infra* Appendix A tbl.1.

⁹⁹ See *infra* Appendix A tbl.1. There were four such cases in 2006 and two in 2007. See *infra* Appendix A tbl.1; see *infra* Appendix B.

¹⁰⁰ See *infra* Appendix A tbl.2.

¹⁰¹ See *infra* Appendix A tbl.2.

¹⁰² See *infra* Appendix A tbl.2.

2006 and 2007 combined.¹⁰³ Third, Justice Botsford has been very successful at getting her colleagues to join her opinions.¹⁰⁴ Of the ten divided criminal cases in 2008, Justice Botsford authored five of the majority opinions in those cases.¹⁰⁵ Additionally, of the three times Justice Botsford dissented, she was joined by at least one of her colleagues each time.¹⁰⁶ Finally, as noted above, she has the highest overall agreement rate of any justice during the years examined in this study.¹⁰⁷ The foregoing observations represent merely a portion of the findings gathered from the non-unanimous criminals appeals from 2001 to 2008. The full findings, as noted earlier, are available in the appendixes that follow.

¹⁰³ See *infra* Appendix A tbl.1; See *infra* Appendix B.

¹⁰⁴ See *infra* Appendix A tbls.3 & 4.

¹⁰⁵ See *infra* Appendix B. Four of those five majority opinions favored the defendant. See *infra* Appendix B.

¹⁰⁶ See *infra* Appendix B.

¹⁰⁷ See *supra* Part V; *infra* Appendix A tbl.4.

2009]

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693

APPENDIX A. FINDINGS FROM NON-UNANIMOUS CRIMINAL CASES

Table 1. Voting by Year (Raw Figures)¹⁰⁸

Voting	Year									
	2001	2002	2003	2004	2005	2006	2007	2001– 07	2008	2001– 08
Marshal, C.J.	6/9	2/5	1/3	4/8	6/10	4/4	0/2	23/41	9/10	31/51
Greaney	4/8	2/5	1/3	2/8	2/10	0/4	0/1	11/39	3/10	14/51
Ireland	3/7	2/4	1/2	5/8	5/10	2/4	0/2	18/37	5/10	23/51
Spina	4/9	2/5	1/3	3/8	3/10	0/4	0/2	13/41	2/10	15/51
Cowin	4/8	2/4	1/2	5/8	3/10	2/4	0/2	17/38	3/10	20/51
Sosman	2/8	1/5	1/3	4/8	4/10	1/4	0/2	13/40	—	13/40
Cordy	4/7	2/5	2/3	5/8	6/10	4/4	0/1	23/38	6/10	29/51
Botsford	—	—	—	—	—	—	—	—	7/10	7/10
Court	4/9	2/5	1/3	4/8	3/10	1/4	0/2	15/41	5/10	20/51

¹⁰⁸ The numerator in the fraction is the number of times the justice voted in favor of the Defendant during the specified time. The denominator in the fraction is the number of cases in which the justice was present during that time period.

Table 2. Voting by Year (Percentages)

Voting	Year									
	2001	2002	2003	2004	2005	2006	2007	2001–07	2008	2001–08
Marshal, C.J.	66.7	40	33.3	50	60	100	0	56.1	90	60.8
Greaney	50	40	33.3	25	20	0	0	28.2	30	27.5
Ireland	42.9	50	50	62.5	50	50	0	48.6	50	45.1
Spina	44.4	40	33.3	37.5	30	0	0	31.7	20	29.4
Cowin	50	50	50	62.5	30	50	0	44.7	30	39.2
Sosman	25	20	33.3	50	40	25	0	32.5	—	32.5
Cordy	57.1	40	66.7	62.5	60	100	0	60.5	60	56.9
Botsford	—	—	—	—	—	—	—	—	70	70
Court	44.4	40	33.3	50	30	25	0	36.6	50	39.2

2009]

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695

Table 3. Agreement Rates (Raw Figures)¹⁰⁹

Justice Voting	Justice Authoring Opinion							
	Marshal, C.J.	Greaney	Ireland	Spina	Cowin	Sosman	Cordy	Botsford
Marshal, C.J.	—	5/13	0/10	6/15	10/21	5/15	12/21	6/7
Greaney	4/9	—	2/9	9/14	8/19	3/15	8/21	3/7
Ireland	4/8	3/11	—	7/14	3/20	6/15	9/20	5/7
Spina	3/9	7/13	3/10	—	9/21	4/15	9/21	1/7
Cowin	1/9	3/12	1/10	7/15	—	5/14	9/18	1/7
Sosman	3/9	5/11	2/8	3/12	5/15	—	6/17	—
Cordy	4/8	3/11	0/10	3/15	6/19	6/14	—	4/7
Botsford	—	1/1	0/2	1/3	0/6	—	0/3	—
Overall	19/42	27/72	8/59	36/88	41/121	29/88	43/121	20/42

¹⁰⁹ The numerator in the fraction is the number of times the particular justice agreed with their respective colleague. The denominator in the fraction is the number of opinions the particular justice authored.

Table 4. Agreement Rates (Percentages)

Justice Voting	Justice Authoring Opinion							
	Marshal, C.J.	Greaney	Ireland	Spina	Cowin	Sosman	Cordy	Botsford
Marshal, C.J.	—	38.5	0	40	47.6	33.3	57.1	85.7
Greaney	44.4	—	22.2	64.3	42.1	20	38.1	42.9
Ireland	50	27.3	—	50	15	40	45	71.4
Spina	33.3	53.8	30	—	42.9	26.7	42.9	14.3
Cowin	11.1	25	10	46.7	—	35.7	50	14.3
Sosman	33.3	45.5	25	25	33.3	—	35.3	—
Cordy	50	27.3	0	20	31.6	42.9	—	57.1
Botsford	—	100	0	33.3	0	—	0	—
Overall	45.2	37.5	13.6	40.9	33.9	33	35.5	47.6

2009]

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697

APPENDIX B. NON-UNANIMOUS CRIMINAL CASES FROM 2001–2008¹¹⁰

Cases	Result	Marshal, C.J.	Greaney	Ireland	Spina	Cowin	Sosman	Cordy
Commw. v. Britto, 744 N.E.2d 1089 (Mass. 2001) ¹¹¹	Pros.	P	—	P	[P]	P(c)	P	—
Commw. v. Marquez, 749 N.E.2d 673 (Mass. 2001)	Pros.	D(d)	[P]	—	P	D(d)	P	P
Commw. v. Buccella, 751 N.E.2d 373 (Mass. 2001)	Pros.	P(c&d)	P	P	P	P	[P]	—
Commw. v. Hyde, 750 N.E.2d 963 (Mass. 2001)	Pros.	D(d)	[P]	—	P	P	P	D(d)
Commw. v. Quincy Q., 753 N.E.2d 781 (Mass. 2001)	Def.	D	D	P(d)	P(d)	[D]	P(d)	D
Commw. v. Barros, 755 N.E.2d 740 (Mass. 2001)	Def.	D	D	D	[D]	D	D(c)	D(c)
Commw. v. Sheehan, 755 N.E.2d 1208 (Mass. 2001)	Def.	D&D(c2)	D&D(c1)	D&D(c3)	D&D(c2)	D&D(c3)	D&D(c3)	[D]
Commw. v. Ray, 755 N.E.2d 1259 (Mass. 2001)	Pros.	P	P	P	D(d)	P	P	[P]
Commw. v. LaPage, 759 N.E.2d 300 (Mass. 2001)	Def.	D	[D]	D	D	—	—	P(d)
Commw. v. Santiago, 774 N.E.2d 143 (Mass. 2002)	Pros.	[P]	P	P	P	D(d)	P	P
Commw. v. Villalobos, 777 N.E.2d 116 (Mass. 2002)	Pros.	P	P	D(d)	P	P	[P]	P

¹¹⁰ A legend explaining the various symbols used in the cart is provided at the conclusion of this appendix.

¹¹¹ The court does find in favor of the defendant by holding that one of the convictions was duplicative. Commonwealth v. Britto, 744 N.E.2d 1089, 1106 (Mass. 2001).

Cases	Result	Marshal, C.J.	Greaney	Ireland	Spina	Cowin	Sosman	Cordy
Commw. v. Hilaire, 777 N.E.2d 804 (Mass. 2002)	Def.	D	D	D(c)	D	D	[D]	D
Commw. v. Jimenez, 780 N.E.2d 2 (Mass. 2002)	Def.	D	D	—	D	—	P(d)	[D]
Commw. v. Oliveira, 780 N.E.2d 453 (Mass. 2002)	Pros.	P(c)	P(c)	P	P(c)	P	[P]	P
Commw. v. O'Connell, 783 N.E.2d 417 (Mass. 2003)	Pros.	P	P	—	[P]	—	P	D(d)
Commw. v. Montanez, 788 N.E.2d 954 (Mass. 2003)	Pros.	P	P	P	P	[P]	P(c)	P(c)
Commw. v. Maldonado, 788 N.E.2d 968 (Mass. 2003)	Def.	D(c)	D(c)	D	D	D	D	[D]
Commw. v. Catanzaro, 803 N.E.2d 287 (Mass. 2004)	Pros.	D(d2)	P	D(d1)	[P]	D(d2)	P	P
Commw. v. Zimmerman, 804 N.E.2d 336 (Mass. 2004)	Def.	[D]	D	D(c)	D	D	D	D(c)
Commw. v. Pelosi, 805 N.E.2d 1 (Mass. 2004)	Def.	D	D	D	D	D(c)	D(c)	[D]
Commw. v. Rahim, 805 N.E.2d 13 (Mass. 2004)	Def.	P(d)	P(d)	D	P(d)	D	D	[D]
Society of Jesus of N.E. v. Commw., 808 N.E.2d 272 (Mass. 2004)	Pros.	P	P	P	D(d)	D(d)	[P]	D(d)

2009]

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699

Cases	Result	Marshal, C.J.	Greaney	Ireland	Spina	Cowin	Sosman	Cordy
Commw. v. Mahar, 809 N.E.2d 989 (Mass. 2004)	Pros.	P	P	P	P	P	P(c)	[P]
Commw. v. Cruz, 812 N.E.2d 1178 (Mass. 2004)	Pros.	P(c)	[P]	P	P	P(c)	P	P
Commw. v. DiGiambattista, 813 N.E.2d 516 (Mass. 2004)	Def.	D	P(d1&d2)	D	P(d2&d1)	P(d1&d2)	[D]	D
Commw. v. Adjutant, 824 N.E.2d 1 (Mass. 2005)	Def.	D	D	D	D	P(d)	D	[D]
Commw. v. Rodriguez, 823 N.E.2d 1256 (Mass. 2005)	Pros.	P	P	P	[P]	P	P(c)	P
Commw. v. Harris, 825 N.E.2d 58 (Mass. 2005)	Def.	D(c&d)	D(c&d)	D	D	D	[D]	D
Commw. v. Rogers, 827 N.E.2d 669 (Mass. 2005)	Def.	D	P(d)	D	D	[D]	D	D
Commw. v. Lyons, 828 N.E.2d 1 (Mass. 2005)	Pros.	D(d)	P	[P]	P	D(d)	P	D(d)
Commw. v. Isabelle, 828 N.E.2d 53 (Mass. 2005)	Pros.	D(d)	P	[P]	P	P	D(d)	D(d)
Commw. v. Gonslaves, 833 N.E.2d 549 (Mass. 2005)	Pros.	P	P	P	[P]	P	P(c)	P

Cases	Result	Marshal, C.J.	Greaney	Ireland	Spina	Cowin	Sosman	Cordy
Commw. v. Feyenord, 833 N.E.2d 590 (Mass. 2005)	Pros.	D(<u>d</u>)	P(<u>c</u>)	D(d)	P	P	P	[P]
Commw. v. Rivera, 833 N.E.2d 1113 (Mass. 2005) ¹¹²	Pros.	[P]	P&P(c2)	P&P(c2)	P	P(<u>c1</u>)	P	P& P(<u>c2</u>)
Commw. v. P. Pagan, 837 N.E.2d 252 (Mass. 2005)	Pros.	P	[P]	P	P	P	P	D(<u>d</u>)
Commw. v. Angelo Todesca Corp., 842 N.E.2d 930 (Mass. 2006)	Pros.	D(d)	P	P	[P]	D(d)	P	D(<u>d</u>)
Commw. v. Durham, 843 N.E.2d 1035 (Mass. 2006)	Pros.	D(<u>d1</u> & <u>d2</u>)	[P]	D(d1& d2)	P	P	P	D(<u>d2</u>)
Commw. v. Martin, 850 N.E.2d 555 (Mass. 2006)	Pros.	D(d)	P	D(d)	P	[P]	P	D(<u>d</u>)
Commw. v. Chhim, 851 N.E.2d 422 (Mass. 2006)	Def.	D	P(d)	P(d)	P(<u>d</u>)	[D]	D	D
Commw. v. Cousin, 873 N.E.2d 742 (Mass. 2007)	Pros.	P	—	P(<u>c</u>)	P	[P]	P	—
Commw. v. Considine, 860 N.E.2d 673 (Mass. 2007)	Pros.	P	P	P(<u>c</u>)	P	[P]	P	P

¹¹² The court does find in favor of the defendant by holding that one of the convictions was duplicative. Commonwealth v. Rivera, 833 N.E.2d 1113, 1123–24 (Mass. 2005).

2009]

Shipping Up to Boston

701

Cases	Result	Marshal, C.J.	Greaney	Ireland	Spina	Cowin	Cordy	Botsford
Commw. v. Blache, 880 N.E.2d 736 (Mass. 2008)	Def.	D	D	D	D(c&d)	D(c&d)	D	[D]
Commw. v. Urban, 880 N.E.2d 753 (Mass. 2008)	Def.	D	D	D	D(c&d)	D(c&d)	D	[D]
Commw. v. Kendall, 883 N.E.2d 269 (Mass. 2008)	Def.	D(d)	P	P	[P]	D(d)	D(d)	P
Commw. v. Garden, 883 N.E.2d 905 (Mass. 2008)	Def.	D	P(d)	D	P(d)	P(d)	D	[D]
Commw. v. Brown, 884 N.E.2d 488 (Mass. 2008)	Pros.	D(d)	P	D(d)	P	[P]	P	D(d)
Commw. v. Lora, 886 N.E.2d 688 (Mass. 2008)	Pros.	P	P	P(c)	P	P	[P]	P
Commw. v. White, 891 N.E.2d 675 (Mass. 2008)	Pros.	D(d)	P	P	P	[P]	P	D(d)
Commw. v. Gonzalez, 892 N.E.2d 255 (Mass. 2008)	Pros.	D(c&d)	P	P	P	P	D(c&d)	[P]
Commw. v. Benoit, 892 N.E.2d 314 (Mass. 2008)	Def.	D	P(d)	D(c)	P(d)	P(d)	D	[D]
Commw. v. Santiago, 896 N.E.2d 622 (Mass. 2008)	Pros.	D(d)	D(d)	P	P	P(c)	[P]	D(d)

LEGEND

D = indicates that vote was favorable to the Defendant.

P = indicates that vote was favorable to the Prosecution.

[P] = bracketed underlined letters indicate the justice authored the majority opinion.

(c) = indicates a vote for a concurring opinion.¹¹³

(d) = indicates a vote for a dissenting opinion.¹¹⁴

(c&d) = indicates a vote for a concurring and dissenting opinion.

& = indicates that a justices joined a second opinion, except when used in concurring and dissenting opinions symbol above.

¹¹³ Numbers are added to identify specific concurring opinions when there is more than one. Authorship of any concurring opinion is indicated by an underline.

¹¹⁴ Numbers are added to identify specific dissenting opinions when there is more than one. Authorship of any dissenting opinion is indicated by an underline.