The Limits of Extraordinary Power: A Survey of First-Degree Murder Appeals under Massachusetts General Laws Chapter 278, Section 33E

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INTRODUCTION

The Supreme Judicial Court of Massachusetts ("SJC") frequently references its "extraordinary power" under Massachusetts General Laws Chapter 278, § 33E ("Section 33E") when reviewing first-degree murder convictions on appeal.\(^1\) Section 33E affords the SJC the power of plenary review of first-degree murder convictions, and includes a mandate that the court review the entire record for errors not raised on appeal.\(^2\) The broad parameters of Section 33E create the potential for a significant number of reversals on appeal under this provision.\(^3\) To test the validity of this notion, the survey ("Survey"), which is summarized in this Article, examined first-degree murder appeals in Massachusetts from January 1, 1998 through January 1, 2008.\(^4\) This Survey concludes that during the ten-year period...
timeframe, just 7.5 percent of first-degree murder appeals (a total of twenty-one cases) resulted in reversal, and not a single case resulted in reducing the conviction to a lesser offense under Section 33E.5

This Article and Survey provide both criminal practitioners and academics a practical understanding of the types of homicide-related claims most likely to succeed on appeal. Specifically, this information will help practitioners avoid errors at trial likely to result in reversal, as well as help them craft more effective appellate briefs that appropriately highlight these issues. Further, academics specializing in criminal law can benefit from a practical understanding of the issues that are most likely to result in reversal on appeal.

Part I of this Article is an overview of homicide law in Massachusetts.6 Part II explains the appellate procedure governing first-degree murder convictions in Massachusetts under Section 33E.7 Part III provides an overview of the Survey results, along with a comparison to a analogous multi-state conviction reversal study published in 1989 by the National Center for State Courts Report.8 Part IV provides the results of the Survey of first-degree murder appeals, including a summary of every case within the Survey that resulted in a reversal.9

I. THE LAW OF HOMICIDE IN MASSACHUSETTS

Given that murder is viewed as the most grave of all criminal conduct and consequently results in the longest sentences, a careful review by the appellate courts is warranted.10 Additionally, because the Massachusetts statute defining murder has remained virtually unchanged

include discussion of appeals from convictions of second-degree murder, manslaughter, or other vehicle-related homicides.

5 See infra notes 60-63 and accompanying text (describing data contained in Table 1); see also infra page 10 tbl. 1.
6 See infra notes 10-31 and accompanying text (providing reader context for understanding claims raised on appeal and varying degrees of success).
7 See infra notes 32-45 and accompanying text (setting out procedural context to help reader understand appellate process in Massachusetts).
9 See infra notes 72-236 and accompanying text (discussing cases resulting in reversal under Section 33E during timeframe of Survey).
10 See Sean J. Kealy, Hunting the Dragon: Reforming the Massachusetts Murder Statute, 10 B.U. PUB. INT. L.J. 203, 203 (2001) (noting “[m]urder is the most serious of all crimes”). Historically, “[d]eath was the punishment for ‘first-degree’ murders and [l]ife imprisonment was the punishment for all other murders.” Id. at 211.
for over 150 years, most homicide reversals on appeal presumably result from substantive or procedural issues that are not the result of changes in the statutory language.

Homicide is defined as the unjustified killing of a person by another person. Under Massachusetts law, homicide is divided into several categories, depending on the defendant’s degree of culpability. This approach to homicide prosecution is typical in most states.

A. First-Degree Murder

Massachusetts statutory law defines first-degree murder as “[m]urder committed with deliberately premeditated malice aforethought, or with extreme atrocity or cruelty, or in the commission or attempted commission of a crime punishable with death or imprisonment for life.” Thus, a defendant can be properly convicted of first-degree murder where

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11 See Kealy, supra note 10, at 204 (noting “murder statute, in fact, has effectively gone untouched by the Legislature since 1858.”). See generally MASS. GEN. LAWS ch. 265, § 1 (2008 & Supp. 2010).

12 See Kealy, supra note 10, at 258-59 (noting unfettered SJC interpretation discretion results from unchanged status of Massachusetts murder statute).

13 See Commonwealth v. Rodriguez, 352 N.E.2d 203, 206 (Mass. 1976) (noting manslaughter and murder as unlawful killings). In holding the trial court erred by failing to instruct the jury regarding the prosecution’s burden to prove the defendant did not act in self-defense, the SJC stated, “we have long recognized that self-defense negates the element of ‘unlawfulness.’ Homicide ‘may be lawful or unlawful . . . . It may also be justifiable, and of course lawful, in necessary self-defense,’” id. (quoting Commonwealth v. Webster, 5 Cush. 295, 304 (1850)); see also Colette T. Tvedt, Homicide in Massachusetts: An Introduction, in TRYING MURDER AND OTHER HOMICIDE CASES IN MASSACHUSETTS, § 1.1 (Mass. Continuing Legal Educ. 2006) (discussing definition of first-degree murder in Massachusetts).

14 See MASS. GEN. LAWS ch. 265, § 1 (2008 & Supp. 2010) (defining first-degree murder). The statute reads in pertinent part, “[m]urder which does not appear to be in the first degree is murder in the second degree. Petit treason shall be prosecuted and punished as murder. The degree of murder shall be found by the jury.” Id.; see also Kealy, supra note 10, at 249 (“The inclusion of premeditation in first-degree murder statutes indicates that a person who plans ahead is worse than is the person who kills on sudden impulse.”). “Premeditated” killings are not necessarily the worst crimes, in fact, many unpredmeditated killings shock society’s conscience more than premeditated murders.” See Kealy, supra note 10, at 248.

15 See Kealy, supra note 10, at 245-50 (stating most states define murder by statute and divide it into two degrees). “Murders perpetrated by means of poison, by lying in wait, or by any other kind of willful, deliberate and premeditated killing, or those killings committed during the perpetration of an arson, rape, robbery or burglary, are commonly deemed ‘murder in the first-degree.’” Id. at 255. Other forms of murder deemed less serious, fall under a catchall “murder in the second degree” category, which is punished less severely. Id.; see, e.g., CAL. PENAL CODE § 187, 198 (West 2010) (delineating murder by first and second degree); Fla. Stat. § 782.04 (2010) (dividing murder prosecutions into first and second degree categories); Ill. Comp. Stat. 38/9-1, 38/9-2 (2010) (categorizing murder by first and second degree).

the prosecutor has proven beyond a reasonable doubt that: (1) the defendant committed an unlawful killing; (2) with malice; and (3) with deliberate premeditation.17 This statutory language has remained fundamentally unchanged since its inception in 1858.18

Under Massachusetts common law, malice is considered to be the “essential element” of murder.19 The malice element can be established in one of three possible ways. Malice can be satisfied by proof that the defendant either intended to kill the victim or to cause grievous bodily harm.20 Additionally, “third-prong malice” can be established where the defendant’s actions created a “plain and strong likelihood that death will follow.”21

B. Second-Degree Murder

The Massachusetts statute defines second-degree murder as the catch-all category for any murder which does not fit the first-degree murder definition.22 Because second-degree murder is based on less blameworthy conduct, sentencing is substantially more lenient than for first-degree murder.23 Under Massachusetts law, second-degree murder convictions do not fall within the parameters of Section 33E and thus are not considered in this study.24

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18 Kealy, supra note 10, at 204 (“[T]he restatement of the law [of homicide in Massachusetts] occurred outside the legislative system and therefore, may not reflect how the public believes murder is defined and its appropriate punishment. The murder statute, in fact, has effectively gone untouched by the Legislature since 1858.”).
21 See Skinner, supra note 20, § 2.2.1 (summarizing “third prong malice” doctrine under Massachusetts law).
22 MASS. GEN. LAWS ch. 265, § 1 (2008 & Supp. 2010) (“Murder which does not appear to be in the first degree is murder in the second degree.”).
23 See Kealy, supra note 10, at 253 (discussing relative gravity of murder in first and second degrees). “In Massachusetts, the difference in penalty between first and second-degree murder is great; those convicted of second-degree murder are eligible for parole after serving fifteen years of a life sentence while those convicted of first-degree murder have no chance at parole.” Id.
C. Felony Murder

Another theory upon which first-degree murder can be established is felony murder.\(^{25}\) Under common law in Massachusetts, first-degree murder can be established by demonstrating the defendant’s intent to commit a specific enumerated felony.\(^{26}\) This intent substitutes for the malice requirement.\(^{27}\) While felony murder is unpopular among academics, it is widely employed by prosecutors.\(^{28}\) The primary criticism of the felony murder doctrine centers around the perceived disconnect between the defendant’s degree of culpability and the resulting punishment.\(^{29}\) In particular, the possibility that a defendant could be punished for first-degree murder for conduct which amounts to mere recklessness or criminally negligent conduct is the crux of the debate.\(^{30}\) In spite of this academic debate, the felony murder doctrine is commonly employed in the prosecution of homicide cases in Massachusetts.\(^{31}\)

\(^{25}\) See MASS. GEN. LAWS ch. 278, § 33E (1998 & Supp. 2010); see also Kealy, supra note 10, at 237 (discussing felony murder theory in Massachusetts). “The felony murder rule punishes all homicides committed in the perpetration of a felony whether the death is intentional, unintentional or accidental, without the necessity of proving the relation of the perpetrator’s state of mind to the homicide.” See Kealy, supra note 10, at 237.

\(^{26}\) See Skinner, supra note 20, § 2.4.1 (“At common law, murder [can] be established by proof of malice aforethought or by reliance on the common law felony murder rule that holds that the defendant’s intent to commit the underlying felony substitutes for the ‘malice’ element otherwise required for a conviction of murder.”) (emphasis in original).

\(^{27}\) See Skinner, supra note 20, § 2.4.1 (“[N]one of the ‘justifications,’ ‘excuses,’ or ‘mitigations’ that may negate ‘malice’ in a nonfelony murder prosecution are available to the defendant as a defense to felony murder.”).

\(^{28}\) Compare David Crump, Reconsidering the Felony Murder Rule in Light of Modern Criticisms: Doesn’t the Conclusion Depend Upon the Particular Rule at Issue?, 32 HARV. J.L. & PUB. POL’Y 1155, 1156 (2009) (“The felony murder doctrine has long been a target for detractors . . . . There was a time when virtually no commentator could find anything to say in favor of retaining the rule, even though it had proven extraordinarily durable over time and almost every state had chosen to retain it.”), with Leonard Birdsong, Felony Murder: A Historical Perspective by Which to Understand Today’s Modern Felony Murder Rule Statutes, 32 T. MARSHALL L. REV. 1, 3 (2006) (“A number of commentators criticize the felony murder rule and some believe that its use should be abolished in the United States. Despite such criticism, its continued use by prosecutors persists in most American states.”).

\(^{29}\) See Crump, supra note 28, at 1159 (“The chief complaint of the MPC [Model Penal Code] drafters appears to be that the felony murder doctrine results in convictions unrelated to individual blameworthiness.”).

\(^{30}\) See Birdsong, supra note 28, at 1 (discussing parameters of felony murder rule). Under the common law, if a person is killed during an act that amounts to a felony, that killing is automatically murder. Id. Intent of the individual perpetrating the killing, potentially negligent behavior or reckless disregard of human life are all irrelevant. Id.

\(^{31}\) See Skinner, supra note 20, § 2.3 (summarizing multiple Massachusetts cases prosecuted under felony murder theory). See generally Commonwealth v. Prater, 725 N.E.2d 233 (Mass. 2000); Commonwealth v. Cruz, 714 N.E.2d 813 (Mass. 1999); Commonwealth v. Doe, 648
II. APPELLATE PROCEDURE FOR HOMICIDE CASES IN MASSACHUSETTS

Although direct appeals from most criminal convictions in Massachusetts are initially brought before the Massachusetts Appeals Court ("Appeals Court"), convictions of first-degree murder are appealed directly to the SJC.32 Such direct appeals to the SJC receive a substantially more expansive review.33 Under Section 33E, the SJC must review not only those claims raised by counsel on appeal, but must also review the entire record to ensure the trial result is consistent with "justice."34 This provision allows for a two-part review, in addition to a standard review of alleged errors raised by objection at trial.35 First, the SJC reviews each case for unpreserved errors which give rise to "a substantial likelihood of a miscarriage of justice."36 Second, the court reviews the complete record for overall "fairness" in order to determine whether the conviction should be reversed to a lesser offense or a new trial should be granted.37

Another notable aspect of this appellate provision is that Section 33E allows the SJC to review the record for errors not objected to by trial counsel under a more relaxed standard of review.38 While the applicable standard of review in Massachusetts for errors not objected to at trial is a "substantial risk of the miscarriage of justice," under Section 33E, the less stringent standard of a "substantial likelihood of a miscarriage of justice"


33 See Greaney & Comerford, supra note 2, at 264 ("Where a defendant is convicted of murder in the first degree, however, G.L. c. 278, § 33E requires an automatic transfer of 'the whole case' to the Supreme Judicial Court 'for its consideration of the law and the evidence.'").

34 See MASS. GEN. LAWS ch. 278, § 33E (citing two remedies, new trial or reduced verdict, for newly discovered evidence or "any other reason that justice may require").

35 See Greaney & Comerford, supra note 2, at 264 ("Apart from reviewing alleged errors that are preserved by objection or rulings on motions, the mandate under Section 33E provides the defendant a two-part level of review.").

36 See Greaney & Comerford, supra note 2, at 264 (discussing applicable standards of review for jury instruction error).

37 See Greaney & Comerford, supra note 2, at 265 ("The court also considers generally the fairness of the verdict to see whether a reduction in the verdict is warranted or a new trial should be granted.").

38 See Meade, supra note 2, at 94 (Hoffman speaking) ("Even perhaps more remarkable, the court can raise errors or claims and review things sua sponte, things that no one had raised."); see also Greaney & Comerford, supra note 2, at 264 (citing Commonwealth v. Lennon, 504 N.E.2d 1051, 1055 n. 6 (1987) (noting difference between use of "risk" versus "likelihood" in two different standards of review)).
Finally, under Section 33E, during the direct appellate process, the SJC has exclusive jurisdiction over all motions for a new trial filed with the trial court. Although the Massachusetts trial courts also have unusually broad-reaching and verdict-reducing powers under Rule 25(b)(2) of the Massachusetts Rules of Criminal Procedure, these powers have rarely been invoked.

Section 33E empowers the SJC to review the entire trial transcript and reduce a first-degree murder conviction to a lesser offense in the interest of justice. In exercising this “extraordinary power,” the court has considered such factors as: (1) the spontaneity of the defendant’s behavior; (2) the relationship between the parties; (3) the personal characteristics of the defendant; and (4) lack of evidence of motive. However, despite its clear authority, the SJC has only invoked this power to reduce the conviction under Section 33E a total of twenty-five times in its history. Moreover, during the time of this Survey, the SJC has repeatedly declined to invoke its authority under Section 33E.

Given the expansive protections available to the defendant under Section 33E, the potential exists for a significant number of first-degree murder convictions to be reduced or reversed. However, the results of the

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39 Greaney & Comerford, supra note 2, at 264.
40 See Meade, supra note 2, at 93 (Hoffman speaking) (noting trial judges’ power to order new trial in capital cases before Section 33E enactment).
42 See Greaney & Comerford, supra note 2, at 269 (highlighting 1962 amendment gave SJC duty to consider guilt degree in first-degree murder convictions).
44 See Greaney & Comerford, supra note 2, at 269-72 (finding SJC reduced verdict in 25 cases since 1962 amendment).
45 See Commonwealth v. Burton, 876 N.E.2d 411, 419 (Mass. 2007) (declining to grant relief under Section 33E). The SJC reduced the conviction from first-degree to second-degree murder outside the parameters of Section 33E because the predicate offense to felony murder did not carry possible sentence of life in prison. Id. at 413; see also Commonwealth v. Robidoux, 877 N.E.2d 232, 236 (Mass. 2007) (declining to grant relief under Section 33E); Commonwealth v. Jackson, 855 N.E.2d 1097, 1098 (Mass. 2006) (declining to “exercise [the] power to reduce the murder verdict or order a new trial”); Commonwealth v. Leahy, 838 N.E.2d 1220, 1223 (Mass. 2005) (declining to reduce verdict under Section 33E).
Survey, discussed in detail below, indicate the opposite conclusion.

III. OVERALL RESULTS: COMPARISON TO THE NCSC REPORT

Although the important function performed by the state appellate courts in correcting trial court errors is not disputed, there seems to be very little review of conviction reversal rates. Notably, there appears to be no similar recent survey in publication that analyzes appellate reversal rates of criminal convictions with a particular focus on the substantive legal issues raised on appeal. The most recent survey of this nature is the National Center for State Courts’ report titled Understanding Reversible Error in Criminal Appeals (“NCSC Report”), published in 1989. Although published over twenty years ago and substantially larger in scope than this Survey, the NCSC Report provides a helpful point of comparison, given that the appellate practices of five different state appellate courts are reviewed.

A. Parameters of the NCSC Report

The NCSC Report involved a study of five different “state appellate courts hearing first-level criminal appeals.” The five courts involved were: (1) the California Court of Appeal, Third District; (2) the Colorado Court of Appeals; (3) the Appellate Court of Illinois, Fourth District; (4) the Maryland Court of Special Appeals; and, (5) the Rhode Island Supreme Court. The NCSC Report studied appeals from all criminal convictions. Homicides and other violent crimes constituted just over 50 percent of the total appeals reviewed.

The overall affirmance rate of the five courts reviewed in the study was 70.8 percent. The NCSC Report further categorized non-affirmances

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46 See NCSC Report, supra note 8, at 13 (noting first-level appellate court decisions’ educational potential to identify difficulties for trial courts).
47 See NCSC Report, supra note 8, at 29 (“Very little is known about the business of first-level appeals courts, other than the fact that there is a lot of it and much of it is considered by judges and attorneys to be routine.”) (citations omitted).
49 See NCSC Report, supra note 8, at 3.
50 NCSC Report, supra note 8, at 3 (detailing data set of roughly 1,750 appeals in which appellate courts considered approximately 3,800 issues).
51 See NCSC Report, supra note 8, at 31.
52 See NCSC Report, supra note 8, at 31.
53 See NCSC Report, supra note 8, at 5.
as: acquittal, granting of a new trial, re-sentencing, and “other.”

Although the NCSC Report reviewed appeals from
convictions of all types of crimes, it did not find a significant statistical
difference in the affirmance rate based on the type of crime or severity of
sentence. Instead, the results of the NCSC Report indicated that the type
of issue raised on appeal is more closely related to the affirmance rate
outcome. The NCSC Report also found no statistical correlation between
success rate on appeal and representation by privately-retained counsel
versus court-appointed counsel.

B. Comparison of Massachusetts Survey Results to the NCSC Report

Although the NCSC Report is substantially broader in scope than
this Survey, a comparison of the results is notable because in spite of the
SJC’s broad powers of review under Section 33E, the Massachusetts
reversal rate is lower than the reversal rate set out in the NCSC Report.
Between January 1, 1998, and January 1, 2008, 280 first-degree murder
convictions were appealed directly to the SJC pursuant to Section 33E.
Of those appeals, twenty-one convictions (7.5 percent) were reversed.
The other 259 first-degree murder convictions from this timeframe (92.5
percent) were affirmed. The 7.5 percent reversal rate in this Survey is
one percent lower than the 8.5 percent reversal rate in the NCSC Report.

Table 1 below illustrates the overall affirmance rate for first-degree
murder appeals within this Survey.

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54 See NCSC Report, supra note 8, at 5.
55 See NCSC Report, supra note 8, at 14.
56 See NCSC Report, supra note 8, at 20 (finding relative frequency of error not strongly
related to underlying offense or severity of sentence).
57 See NCSC Report, supra note 8, at 6.
58 See NCSC Report, supra note 8, at 40 (finding overall five-court pattern indicates
“virtually no difference in outcome by counsel type”). Moreover, the NCSC Report indicates “all
are within one-half percentage point of the five-court average.” Id.
59 See NCSC Report, supra note 9, at 14 (discussing results of NCSC Report); see also infra
notes 60-74 (displaying Survey results for this Article).
60 See infra page 10 tbl. 1.
61 See infra page 10 tbl. 1.
62 See infra page 10 tbl. 1.
63 See infra page 10 tbl. 1; see also NCSC Report, supra note 8, at 14.
Table 1

Overall Affirmance Rate of MA First-degree Murder Appeals to SJC

<table>
<thead>
<tr>
<th>Appeal Outcomes</th>
<th>Total #</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Affirmed</td>
<td>259</td>
<td>92.50%</td>
</tr>
<tr>
<td>Reversed</td>
<td>21</td>
<td>7.50%</td>
</tr>
<tr>
<td>Total Cases Appealed</td>
<td>280</td>
<td></td>
</tr>
</tbody>
</table>

Table 2 breaks down each of the twenty-one reversals by issue.64 Most cases within this Survey raised multiple issues on appeal. The issues successfully raised on appeal within the scope of this Survey can be categorized as follows: jury instruction error, evidentiary error, sufficiency of evidence, ineffective assistance of counsel, prosecutorial misconduct, and discovery error.65 This Survey chronicles both the number of times each of these issues was raised and the number of times it resulted in reversal.66

Table 2

Reversible Error by Issue

<table>
<thead>
<tr>
<th>Raw Data</th>
<th>Type of Issue</th>
<th># of Times Raised</th>
<th># of Times Reversed</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Evidence</td>
<td>177</td>
<td>5</td>
</tr>
<tr>
<td></td>
<td>Jury Instruction</td>
<td>169</td>
<td>8</td>
</tr>
<tr>
<td></td>
<td>Sufficiency of Evidence</td>
<td>52</td>
<td>2</td>
</tr>
<tr>
<td></td>
<td>Ineffective Assistance of Counsel</td>
<td>99</td>
<td>4</td>
</tr>
<tr>
<td></td>
<td>Prosecutorial Misc.</td>
<td>92</td>
<td>2</td>
</tr>
<tr>
<td></td>
<td>Discovery</td>
<td>14</td>
<td>0</td>
</tr>
</tbody>
</table>

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64 See supra page 10 tbl. 2.
65 See supra page 10 tbl. 2.
66 See supra page 10 tbl. 2.
Table 3 presents the breakdown of reversible error issues by percentages.\textsuperscript{67} Specifically, this table illustrates what percentage of the total reversals was based on each particular issue.\textsuperscript{68} For example, evidentiary issues accounted for 23.8 percent of the total number of reversals within this Survey.\textsuperscript{69} Additionally, Table 3 illustrates the success rate of each type of issue raised.\textsuperscript{70} This figure was calculated by dividing the number of reversals based on a particular issue by the total number of times that issue was raised in the ten-year time frame of this Survey.\textsuperscript{71}

\begin{table}[h]
\centering
\begin{tabular}{|c|c|c|}
\hline
Type of Issue & % Error relating to this issue & Success Rate of this issue \\
\hline
Evidence & 23.8\% & 2.82\% \\
Jury Instruction & 38.09\% & 4.73\% \\
Sufficiency of Evidence & 9.52\% & 3.85\% \\
Ineffective Assistance of Counsel & 19.04\% & 4.04\% \\
Prosecutorial Misc. & 9.52\% & 2.17\% \\
Discovery & 0\% & 0\% \\
\hline
\end{tabular}
\caption{Reversible Error by Issue}
\end{table}

IV. SUMMARY OF FIRST-DEGREE MURDER REVERSALS BY ISSUE

Below is a comprehensive summary of each of the twenty cases that resulted in reversal within the scope of this Survey. These summaries are organized by issue, beginning with jury instruction error: the issue resulting in the most reversals.

\textsuperscript{67} See supra page 11 tbl. 3.
\textsuperscript{68} See supra page 11 tbl. 3.
\textsuperscript{69} See supra page 11 tbl. 3.
\textsuperscript{70} See supra page 11 tbl. 3.
\textsuperscript{71} See supra page 11 tbl. 3.
A. Jury Instruction Error

Jury instruction errors account for the largest number of reversals within this Survey, and are also the type of error most likely to result in reversal, with a 4.73 percent success rate.\textsuperscript{72} Among the cases reversed on appeal within the scope of this Survey, 38.09 percent were based on jury instruction error.\textsuperscript{71} In total, jury instruction error was raised 169 times, with eight of these cases resulting in reversal on appeal during the ten-year time frame of this Survey.\textsuperscript{74}

Notably, in 1999, early in the time frame of this Survey, the SJC developed the Model Jury Instructions on Homicide for Massachusetts trial courts, which specifically focuses on homicide cases.\textsuperscript{75} The purpose of these instructions is to aid both criminal practitioners and the trial courts in crafting proper jury instructions for each given case.\textsuperscript{76}

1. Standard of Review for Jury Instruction Error

Under Massachusetts common law, the failure to object to a jury instruction at trial substantially alters the applicable standard of review on appeal.\textsuperscript{77} Where defense counsel fails to adequately preserve the issue at trial,\textsuperscript{78} even under the broader parameters of Section 33E, the SJC will review for only those errors resulting in a “substantial likelihood of a miscarriage of justice.”\textsuperscript{79} However, where a jury instruction error is

\textsuperscript{72} See supra page 11 tbl. 3.

\textsuperscript{73} See supra page 11 tbl. 3.

\textsuperscript{74} See supra page 10 tbl. 2.


\textsuperscript{76} See MASSACHUSETTS SUPERIOR COURT CRIMINAL PRACTICE JURY INSTRUCTIONS § 2.1.1 (Mass. Continuing Legal Educ. 1999 & Supp. 2003) (“The Model Instructions are not intended to be a comprehensive statement of the law but rather to provide guidance on those instructions that are frequently given at trials of homicide cases.”).

\textsuperscript{77} See Tynan, supra note 75 (noting differing standard of review depending on whether counsel objected to jury instructions at trial).

\textsuperscript{78} See Tynan, supra note 75 (noting counsel must object to preserve jury instruction error). There are three opportunities for counsel to object and preserve jury instruction error for appellate review: (1) at the charge conference when the court indicates that a requested instruction will not be given; (2) at the close of the jury charge; and (3) again at the end of any supplemental instructions. Id.

properly preserved at trial, the SJC determines if the instructions were erroneous, and if so, whether the error was “harmless.”

This harmlessness standard is substantially lower and presumably would result in a significantly higher number of reversals. Massachusetts’ criminal defense practitioners are strongly advised to give substantial thought and consideration to jury instructions in a murder trial and to object when the trial judge is unwilling to give the requested jury instructions. In spite of the emphasis on jury instruction-related reversals within this Survey, not a single one involved an objection to the erroneous instruction at the trial level.

2. Cases Resulting in Reversal Based on Jury Instruction Error

Of the eight reversals based on jury instruction error, there were only three underlying substantive issues that gave rise to the erroneous instructions: (1) third-prong malice, (2) provocation as a defense to first-degree murder, and (3) expert testimony and burden of proof. Four of the eight jury instruction reversal cases involved third-prong malice. Three of the eight cases involved erroneous instructions relating to provocation as a defense to first-degree murder. The single remaining jury instruction reversal case involved expert testimony and the applicable burden of


81 See Skinner, supra note 20, § 2.1 (noting importance and difficulty of jury instruction in trial practice). “The significance of this stage of trial preparation is amplified in murder cases because the stakes are so high, but also because the law itself can be so complex.”


83 See cases cited supra note 82 and accompanying text (listing cases where improper jury instruction resulted in reversal).

84 See Azar, 760 N.E.2d at 1236; Johnson, 754 N.E.2d at 692; Vizcarrondo, 693 N.E.2d at 682; Williams, 701 N.E.2d at 946.

85 See Lapage, 759 N.E.2d at 307-08; Little, 730 N.E.2d at 306; Carlino, 710 N.E.2d at 971.
proof.\(^{86}\)

\section*{a. Third-Prong Malice Instruction Errors}

It is striking that fully half of the jury instruction reversals within this Survey stemmed from erroneous instructions on third-prong malice.\(^{87}\) In particular, these cases involved an instruction in the Superior Court advising “[m]alice aforethought may be inferred if from the circumstances known to the Defendant, a reasonably prudent person would have known that according to common experience there was a plain and strong likelihood that death or grievous bodily harm would follow the contemplated act.”\(^{88}\)

The SJC has repeatedly held that the inclusion of the “grievous bodily harm” language in this instruction is reversible error.\(^{89}\) The SJC has reasoned that this instruction improperly lessens the burden of proof, resulting in the possibility of a defendant being convicted of first-degree murder without proof of the requisite intent.\(^{90}\) Below is a summary of each case reversed on appeal within this Survey for jury instruction error relating to third-prong malice.

\subsection*{i. Commonwealth v. Vizcarrondo\(^{91}\)}

The defendant was convicted of first-degree murder based upon the death of a ten-month-old child.\(^{92}\) The defendant was alone with the victim at the time of her death, and subsequently claimed she had rolled off the bed and begun to cry before losing consciousness.\(^{93}\) Medical testimony at trial established the cause of death to be severe blunt force trauma resulting from four or more blows to the body, and not consistent with a fall.\(^{94}\)

The erroneous jury instruction suggested jurors could infer malice

\begin{footnotesize}
\begin{itemize}
\item[\(^{86}\)] See Hinds, 875 N.E.2d at 497.
\item[\(^{87}\)] See cases cited supra note 84 (listing cases involving third-prong malice).
\item[\(^{88}\)] Vizcarrondo, 693 N.E.2d at 680 n.4 (emphasis in original) (internal quotations omitted).
\item[\(^{89}\)] See cases cited supra note 84.
\item[\(^{90}\)] See Vizcarrondo, 693 N.E.2d at 681 (stating due process violated if murder conviction rests upon state of mind sufficient only for manslaughter).
\item[\(^{91}\)] 693 N.E.2d 677 (Mass. 1999).
\item[\(^{92}\)] See id. at 679.
\item[\(^{93}\)] See id. at 679-80 (reviewing relevant facts of case).
\item[\(^{94}\)] See id. at 679. In addition to the blows, human bite marks were present on several places of the baby’s body. \textit{Id}. Medical testimony also noted the baby’s injuries were not consistent with “falling to the ground with an adult, being hit in the abdomen by an adult’s elbow as the adult tripped, or being dropped from an adult’s arms.” \textit{Id}.
\end{itemize}
\end{footnotesize}
aforethought if “from the circumstances known to the Defendant, a reasonably prudent person would have known that according to common experience there was a plain and strong likelihood that death or grievous bodily harm would follow the contemplated act.” In finding reversible error, the SJC noted the inclusion of the “grievous bodily harm” language effectively resulted in equating the requirements of third-prong malice with “wanton and reckless conduct” for purposes of involuntary manslaughter. The court further reasoned that such a lessening of the burden of proof would violate due process.

ii. Commonwealth v. Williams

The defendant was convicted of first-degree murder after beating the victim to death with his fists. The defendant believed the victim, a cab driver, was responsible for the recent rape of his sister, and engaged in the beating as an act of vengeance. The SJC found the trial court’s inclusion of the “grievous bodily harm” language in the jury instruction improperly lowered the Commonwealth’s burden of establishing malice aforethought beyond a reasonable doubt. In arriving at this conclusion, the court reasoned that in spite of the prolonged nature of the attack, the instruction was misleading because a jury could reasonably find that beating with fists is not an act which creates “a plain and strong likelihood of death.”

iii. Commonwealth v. Johnson

The inebriated defendant killed one person after firing multiple gunshots into a group of people following a verbal altercation. Again,
the court focused on the trial judge’s inclusion of the phrase “grievous bodily harm” in the jury instruction relating to malice. The court acknowledged that under certain circumstances, a complete and accurate instruction on deliberate premeditation can cure an erroneous malice instruction, however, it found no such clarification occurred here. In reversing the conviction, the SJC noted that because “mental impairment was a live issue,” the inaccurate jury instructions left open the possibility that the jury convicted the defendant for first-degree murder based on something less than either an intent to kill, or on one of the other permissible prongs of malice.

iv. Commonwealth v. Azar

The defendant was convicted in the death of his four-month-old daughter, who he was alone with at the time of her death. There was contradictory evidence submitted at trial as to the severity and cause of the victim’s injuries. The defendant testified he found the victim “limp” in her crib, picked her up and inadvertently dropped her while trying to call his wife. The autopsy report indicated fresh bruising all over her body, along with multiple fractured ribs and leg bones, none of which appeared to have caused her death. The autopsy also revealed severe head injuries and other physical evidence consistent with the victim being swung by her ankles and slammed against a wall or other hard surface. The defense’s medical experts disputed the evidence supporting this theory.

In finding reversible error, the SJC cited to the trial court’s
improper inclusion of the “grievous bodily harm” language in the definition of third-prong malice.115 Further, the trial court never properly instructed the jury that third-prong malice permits an inference of malice only where a reasonable jury would recognize that the defendant’s acts created a “plain and strong likelihood of death.”116 Again, the court reasoned that this type of erroneous instruction improperly blurred the line between the requirements of first-degree murder and involuntary manslaughter.117

b. Provocation Instruction Error

The next most common type of jury instruction error involves provocation and burden of proof. As discussed above, three of the eight cases where jury instruction errors resulted in reversal within the parameters of this Survey were based upon improper jury instructions as to provocation, and the applicable burden of proof in establishing this defense.118 A correct statement of the provocation rule is “where the evidence raises the possibility that the defendant may have acted on reasonable provocation the Commonwealth must prove . . . beyond a reasonable doubt that the defendant did not act on reasonable provocation.”119 Below is a summary of each of the three cases reversed on appeal for jury instruction error based on provocation.

i. Commonwealth v. Lapage120

In this case, the defendant argued self-defense at trial.121 The evidence established that the defendant was under the influence of alcohol and cocaine when he and his girlfriend (the victim) became involved in a verbal and physical altercation.122 Both the defendant and victim had knives, and the altercation ended with the defendant stabbing the victim in

115 Id. at 1230-31 (discussing trial court’s frequent use of “grievous bodily harm” reference in jury instruction).
116 Id. at 1231. Additionally, the trial court judge neglected to provide the jury with instructions on the subjective component of third prong malice. Id. at 1231 n.4.
117 See Azar, 760 N.E.2d at 1232 (calling judge’s instructions deficient).
118 See cases cited supra note 85 and accompanying text (listing cases reversing first-degree murder conviction due to incorrect jury instruction on provocation).
120 759 N.E.2d 300 (Mass. 2001).
121 See id. at 302.
122 See id. at 302-03 (discussing defendant’s significant drug use as catalyst for argument between defendant and victim).
the neck, resulting in her death. At trial the defense advanced a theory of voluntary manslaughter based on provocation because the defendant had either “acted on reasonable provocation or had used excessive force in self-defense.” The SJC found the trial court incorrectly instructed as to the burden of proof on provocation. In particular, the trial court improperly stated “to prove the defendant guilty of voluntary manslaughter, the Commonwealth must prove ... beyond a reasonable doubt ... that the defendant injured [the victim] as a result of sudden combat or in the heat of passion.” The court cited its decision in Commonwealth v. Acevedo in highlight the improper burden-shifting caused by this instruction.

ii. Commonwealth v. Little

At trial, there was no dispute that the defendant shot and killed the victim during the course of an argument, rather, the central issue before the jury was whether the defendant acted in self-defense. The defendant believed the victim was reaching for a gun in his waistband just before the defendant shot him. On appeal, the Commonwealth conceded that the jury instructions regarding voluntary manslaughter were erroneous, but maintained the defendant was not entitled to the instruction at all based upon the facts presented at trial. The SJC concluded, based upon the evidence, that the judge should have instructed the jury “if the Commonwealth had not proved the absence of provocation beyond a reasonable doubt, there could be no finding of malice and hence no conviction of murder.” The SJC further noted that the trial court had

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123 See id. at 303-04 (recounting details of altercation between defendant and victim).
124 Lapage, 759 N.E.2d at 302.
126 Id. at 304 (alterations in original) (citations omitted).
128 See Lapage, 759 N.E.2d at 305 (construing Commonwealth v. Acevedo, 695 N.E.2d 1065, 1066 (Mass. 1998)).
129 730 N.E.2d 304 (Mass 2000).
130 See id. at 306 (noting critical issues at trial). The key questions were whether the defendant committed murder, acted in self-defense, or, “if the killing was unlawful, whether the defendant was guilty only of manslaughter.” Id.
131 See id. at 307-08 (detailing facts leading up to shooting incident).
132 See Little, 730 N.E.2d at 306 (“The Commonwealth ... maintains [the instruction errors] are of no legal significance because the defendant was not entitled to instructions on the disputed points, and, even if he was so entitled, the instructions, considered as a whole, could not have misled the jury.”).
133 Id. at 308.
misplaced the burden of proof, in direct violation of Acevedo.\textsuperscript{134}

iii. \textit{Commonwealth v. Carlino}\textsuperscript{135}

The SJC reversed this conviction of first-degree murder, finding the jury instructions relating to provocation, self-defense, and defense of another were “either erroneous or misleading and posed a substantial likelihood of a miscarriage of justice.”\textsuperscript{136} At trial, both sides acknowledged that the defendant killed the victim, a homeless man whom the defendant had allowed to temporarily camp on his property.\textsuperscript{137} The defendant subsequently stabbed the victim to death after observing the victim engage in a physical altercation with the defendant’s son.\textsuperscript{138} The SJC held that the trial court erroneously placed the burden of proof on the defense by its provocation instruction, in direct violation of Acevedo.\textsuperscript{139}

c. Expert Testimony Instruction Error

Below is a summary of the one case within this Survey resulting in reversal based upon jury instruction error relating to expert testimony.

\textit{Commonwealth v. Hinds}\textsuperscript{140}

No dispute existed at trial regarding the fact that the defendant shot and wounded his sister, as well as shot and killed his half-brother and half-brother’s wife.\textsuperscript{141} The defense focused on the defendant’s mental state at

\begin{itemize}
  \item \textsuperscript{134} See Commonwealth v. Little, 730 N.E.2d 304, 309 (Mass 2000). “In Acevedo, we observed that the difference between a correct instruction on provocation and the incorrect one given here is ‘substantial.’" \textit{Id.} at 309.
  \item \textsuperscript{135} 710 N.E.2d 967 (Mass. 1999).
  \item \textsuperscript{136} \textit{Id.} at 968.
  \item \textsuperscript{137} See \textit{id.} at 969 (reviewing relevant facts of case).
  \item \textsuperscript{138} See \textit{id.} at 969 (detailing struggle between defendant and victim). The victim hit the defendant’s son with a baseball bat, as well as held a knife to his throat and threatened to kill him. \textit{Id.} The intoxicated defendant then appeared outside with a shot gun, attempted to disable the victim by firing at his leg, and finally wrestled on the ground with the victim—he ultimately gained control of the knife and stabbed the victim. \textit{Id.}
  \item \textsuperscript{139} See \textit{id.} at 970 (“On the issue of provocation, the judge gave, virtually word for word, the instruction which we concluded was erroneous in Acevedo . . .”).
  \item \textsuperscript{140} 875 N.E.2d 488 (Mass. 2007).
  \item \textsuperscript{141} See \textit{id.} at 489 (providing brief history of lower court case). The shootings arose out of a family dispute over care for the defendant’s mother, as well as access to property. \textit{Id.} at 489-90. The defendant testified to being afraid of his half brother, and the same day as the shootings a judge vacated a restraining order the defendant had obtained against him. \textit{Id.} at 492-93.
\end{itemize}
the time of the shooting, specifically his inability to “premeditate deliberately with malice aforethought,” as required for a murder conviction. The Commonwealth and the defense presented conflicting expert psychiatric testimony. The trial court’s jury instruction said the facts on which the expert forms an opinion must be proved by the Commonwealth beyond a reasonable doubt. In assigning error to this instruction, the SJC reasoned that the jury was led to believe it was not permitted to accept the defense expert’s testimony unless the underlying facts were proven by the Commonwealth, thus undermining any potential validity of the defense expert testimony.

B. Sufficiency of Evidence

During the ten-year time frame of this Survey, just two of the twenty reversals were rooted in sufficiency of evidence concerns. Notably, both of these cases involved joint venture liability issues. What follows is a summary of each case.

1. Commonwealth v. Cannon

The defendant was convicted of first-degree murder under a felony murder theory for the armed robbery and shooting death of the victim, who routinely sold the defendant marijuana. The victim’s girlfriend, present at the time of the shooting, testified that she saw the defendant and another man leave the scene. She overheard some conversation, but did not see who fired the gun, and testified the defendant looked “surprised and scared” after the shooting. The SJC held that sufficient evidence existed

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142 Id. at 493. Defense experts testified the defendant experienced “acute anxiety” related to his family. Id. The defense argued this anxious state of mind “interfered with the defendant’s mental processes to the point that he was rendered incapable of forming a specific intent to shoot [the victims].” Id.
143 See id. at 494 (detailing conflicting experts’ testimony at trial).
144 See id. at 494-95.
147 869 N.E.2d 594 (Mass. 2007).
148 See id. at 597 (discussing facts of case).
149 See id. at 598.
150 See id. (discussing role of victim’s girlfriend as witness to robbery and subsequent shooting).
to support finding the defendant was a joint venturer in the attempted armed robbery resulting in the victim’s death, but insufficient evidence existed to support concluding the defendant was the shooter. Because the jury did not specify under which theory of felony murder it found the defendant guilty (joint venturer or principle liability for the shooting), the SJC reversed the conviction and set it aside.

2. Commonwealth v. Swafford

Two co-defendants appealed their convictions of first-degree murder, but the SJC reversed only one defendant’s (“Gittens”) conviction. The Commonwealth alleged that Gittens was the driver at the time of a gang-related shooting, but the only evidence supporting that theory was that Gittens was the owner of the car used in the shooting; and Gittens was present when the victim assaulted his friend. In reversing the conviction, the SJC reasoned this evidence was simply not enough to support a finding of guilt beyond a reasonable doubt.

C. Denial of Effectiveness of Counsel

Claims of ineffective assistance of counsel account for four of the twenty reversals within the scope of this Survey. This type of claim had a 4.04 percent success rate. Procedurally, the cases discussed below are slightly different from other direct appeals under Section 33E, and involve an appeal from a denial of a motion for a new trial.

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151 See id. at 597.
152 See Commonwealth v. Cannon, 869 N.E.2d 594, 597 (Mass. 2007) (“We cannot know whether any juror based the verdict on a legally unsupported theory.”).
154 See id. at 933 (discussing court’s consideration of both claims on appeal). The two defendants were members of a local gang in Mattapan, where the shooting took place. Id.
155 Id. at 939 n.11 (highlighting limited facts jury had when deliberating on Gittens’s involvement in shooting).
156 Id. at 939–41 (reasoning Commonwealth’s failure to demonstrate Gittens as driver during shooting). “Taken as a whole, the evidence does not support Gittens’s convictions beyond a reasonable doubt . . . [the inferential leaps that the Commonwealth asks are too great.” Id. at 941.
158 See supra page 11 tbl. 3 (illustrating success rate of ineffectiveness of counsel challenge).
159 See MASS. GEN. LAWS ch. 278, § 33E; see also Greaney & Comerford, supra note 2, at 263 (discussing procedure for filing motion for new trial).
assistance of counsel are reviewed under a more favorable standard under Section 33E, allowing the court to consider whether an error was committed during trial, and if so, whether it was “likely to have influenced the jury’s conclusion.” This favorable, non-constitutional standard potentially allows for reversal, even where the conduct of counsel did not otherwise constitute conduct “falling measurably below [that] which might be expected from an ordinary fallible lawyer.” As such, the SJC considers evidence outside the parameters of the trial transcript in its consideration of effectiveness of counsel.

Denial of effective assistance of counsel accounted for 20 percent of all reversals within this Survey (a total of four cases), and had a 4.04 percent success rate. Below is a discussion of the four cases within this Survey resulting in reversal based on denial of effectiveness of counsel.

1. Commonwealth v. Farley

At trial, the central defense was that a third party stabbed the victim to death, and the defendant subsequently found the body. Further, the female defendant testified to this effect at trial, claiming a drug dealer named “Rafael” killed the victim. There was some physical support for this theory, including semen found at the crime scene. In finding ineffective assistance of counsel, the SJC focused on trial counsel’s lack of preparation, failure to investigate the facts in order to provide support for the defense theory, and “pointless and rambling” cross-examination of a key prosecution witness. The court ultimately held that defense counsel “failed to advance the defendant’s case effectively through the use of evidence, testimony, and argument at trial.”

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161 Commonwealth v. Saferian, 315 N.E.2d 878, 883 (Mass. 1974); see also Greaney & Comerford, supra note 2, at 282 (discussing applicable standard of review for ineffective assistance of counsel claims under Section 33E).
162 See Greaney & Comerford, supra note 2, at 282.
163 See supra page 11 tbl. 3.
165 See id. at 894-95 (recapping relevant facts of case).
166 Id. at 895 (discussing defendant’s version of events).
167 See id. at 895.
168 Id. at 896.
2. Commonwealth v. Patterson

Here the SJC’s reversal based upon denial of effectiveness of counsel stemmed from a conflict of interest involving trial counsel. A jury convicted the defendant of first-degree murder for the shooting death of a Boston police detective. During the investigation of this crime, defense counsel attended a police interview with the defendant, at which the Commonwealth later claimed the defendant made an incriminating statement. The substance of this interview was introduced at trial. In finding ineffectiveness of counsel, the SJC focused on the fact that defense counsel was the only potential witness who could have refuted the officer’s version of the police interview, and that as trial counsel, she was prohibited from doing so. The court cited to ethical rules dictating an attorney needs to withdraw as counsel once it becomes clear he or she may be called as a witness.

3. Commonwealth v. Martin

The defendant’s conviction was based upon evidence that he had put LSD in the victim’s food, causing his death. Defense counsel failed to challenge the scientific evidence concerning the presence of LSD in the victim’s body, and the prosecution failed to produce medical reports that conflicted with the Commonwealth’s theory. The SJC reversed the conviction based on defense counsel’s failure to cross-examine witnesses or otherwise challenge the LSD evidence at trial.

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171 See id. at 685 (reviewing facts of case).
172 See id. A witness discovered the detective’s body, who was off duty and working a security detail for a Roslindale drugstore, inside his personal vehicle in the drugstore parking lot. Id.
173 Id. at 687 (providing details of interview session with defendant). The attorney later received a copy of an affidavit submitted in support of a search warrant application recounting an incorrect version of the interview session. Id. The attorney informed the assistant district attorney the affidavit was not accurate, but subsequently did not withdraw as counsel. Id.
174 See id. at 687.
176 See id. at 692 (noting trial counsel’s obligation to withdraw); see also MASS. R. PROF. C. 3.7 (prohibiting lawyer from acting as trial counsel when “likely to be a necessary witness”).
177 696 N.E.2d 904 (Mass. 1998).
178 See id. at 905 (recapping procedural history and relevant facts).
179 See id.
180 See id. at 908 (stressing defense counsel’s poor performance fell below acceptable constitutional standards).
4. Commonwealth v. Roberto\(^\text{181}\)

The SJC reversed the defendant’s conviction of first-degree murder for the beating death and robbery of an elderly victim.\(^\text{182}\) Although the defendant had a history of mental illness, defense counsel failed to investigate this issue or to raise it at trial, instead relying on his own conversation with the defendant to determine his mental health.\(^\text{183}\) The SJC found there was ineffectiveness of counsel, reasoning that because the defense expert (who testified at the motion for a new trial), if believed by the jury, could have altered the verdict, trial counsel’s failure to pursue this issue at trial fell measurably below a level of reasonable competency.\(^\text{184}\)

D. Evidentiary Issues

Evidentiary errors accounted for 23.8 percent of the total number of reversals in this Survey, and maintained a success rate of 2.82 percent.\(^\text{185}\) The nature of evidentiary rulings in the context of a criminal trial increases the likelihood that trial courts will commit error.\(^\text{186}\) Specifically, trial courts are often called upon to interpret the applicable rules of evidence in a fast-paced jury trial setting, where there is little time for research or reflection.\(^\text{187}\) Additionally, given that the evidence laws in Massachusetts are governed by common law, and are not codified in a single statute, the potential for error becomes even greater.\(^\text{188}\) Finally, where a recent change

\(^{181}\) 700 N.E.2d 830 (Mass. 1998).
\(^{182}\) See id. at 831 (providing overview of facts at trial). The defendant and an accomplice entered the trailer of the victim, presumably to rob him of cash. Id. The victim was discovered the next day, beaten with a blunt object and strangled with his pillowcase. Id.
\(^{183}\) Id. at 831 (reviewing steps defense counsel took in conducting evaluation without support from mental health experts).
\(^{184}\) Id. at 832.
\(^{185}\) See supra page 11 tbl. 3.
\(^{186}\) See NCSC Report, supra note 8, at 21 (discussing relationship between evidentiary rulings and trial error).
\(^{187}\) See NCSC Report, supra note 8, at 21.
\(^{188}\) See Honorable Peter W. Agnes, *Guided Discretion in Massachusetts Evidence Law*:
in the law regarding admissibility of a particular kind of evidence exists, there is an even greater likelihood of trial court error.\textsuperscript{189} Below is a discussion of the four cases that were reversed based on or due to evidentiary error.

1. \textit{Commonwealth v. Seng}\textsuperscript{190}

The SJC reversed the defendant’s first-degree murder conviction for the shooting death of three of his ex-girlfriend’s children.\textsuperscript{191} Because the trial court denied the defendant’s motion to suppress, his statements came in as evidence.\textsuperscript{192} The SJC improperly concluded that reading Miranda warnings in the defendant’s native Khmer language was not corrected by a subsequent reading of the warnings in English.\textsuperscript{193} In particular, the court reasoned the Khmer version of the warnings significantly differed from those required under \textit{Miranda v. Arizona},\textsuperscript{194} as they did not include the defendant’s right to remain silent or his right to have counsel appointed to him if he could not afford his own lawyer.\textsuperscript{195}


In a common law jurisdiction such as Massachusetts, in which the law of evidence is scattered throughout the decisions of our appellate courts, in a number of different chapters of our general laws, and in a myriad of court rules, the task of identifying the controlling principles of law—including the critical areas in which the decision whether to admit or exclude evidence is committed to the judge’s discretion—is a formidable one.

\textit{Id.} at 10.

\textsuperscript{189} See Andrew G. Scott, Note, \textit{Exclusive Admissibility of Specific Act Evidence in Initial-Aggressor Self-Defense Cases: Ensuring Equity within the Adjutant Framework}, 40 SUFFOLK U. L. REV. 237, 238 (2006) (noting court’s decision in \textit{Adjutant “lacked complete instructions to trial courts as to the application of the new rule”). “As a result . . . the majority’s decision will result in unfair prejudice to victims with violent pasts, jury distraction, confusion, delay, and inconsistency within the jurisdiction’s case law.” \textit{Id. See generally Commonwealth v. Adjutant, 824 N.E.2d 1 (Mass. 2005) (reversing conviction because trial court improperly failed to exclude victim’s prior violence in self-defense case).}

\textsuperscript{190} 766 N.E.2d 492 (Mass. 2002).

\textsuperscript{191} \textit{Id.} at 495-96.

\textsuperscript{192} \textit{Id.} at 496 (noting defendant’s appeal claim of Fourth and Fifth Amendment violations). The defendant argued his statements to police during a custodial interrogation violated his constitutional rights because police did not correctly provide Miranda rights in his native language. \textit{Id.}

\textsuperscript{193} See \textit{id.} at 496.

\textsuperscript{194} 384 U.S. 436 (1966).

\textsuperscript{195} See \textit{Commonwealth v. Seng, 766 N.E.2d 492, 498-99 (Mass. 2002) (“T}he Commonwealth did not meet its ‘heavy burden’ . . . of demonstrating that the defendant was
The court further reasoned that the subsequent contradictory warnings given in English did not cure this constitutional deficiency.\(^\text{196}\)

2. *Commonwealth v. DePace*\(^\text{197}\)

The SJC reversed the defendant’s first-degree murder conviction for the strangulation death of his estranged wife.\(^\text{198}\) Following the victim’s death, the defendant invoked his right to counsel in the course of a police interview.\(^\text{199}\) The prosecution introduced evidence of the defendant’s invocation of this right at trial without objection and without a curative instruction.\(^\text{200}\) In reversing the conviction, the SJC noted “the nature of *Doyle*\(^\text{201}\) error is so egregious that reversal is the norm, not the exception.”\(^\text{202}\)

3. *Commonwealth v. Mavredakis*\(^\text{203}\)

The SJC reversed the defendant’s first-degree murder conviction due to an erroneous admission of the defendant’s post-arrest statements to police.\(^\text{204}\) The defendant was convicted on a felony-murder theory in the shooting death of a fast-food restaurant manager during the course of an armed robbery.\(^\text{205}\) The defendant’s confession, which was obtained in the course of a police interrogation, was admitted at trial.\(^\text{206}\) The SJC reversed the conviction, holding that the failure of the police to notify the defendant of the presence of legal counsel at the station at the time of his confession advised of his rights in a meaningful way that he could comprehend.”\(^\text{207}\).

\(^\text{196}\) See id. at 499-501 (Mass. 2002) (noting reading in English served only to further confuse defendant regarding his rights).

\(^\text{197}\) 742 N.E.2d 1054 (Mass. 2001).

\(^\text{198}\) Id. at 1056.

\(^\text{199}\) Id. at 1057.

\(^\text{200}\) Id. at 1060 (noting lack of instruction permitted jury to infer guilt based upon defendant’s request for counsel).


\(^\text{203}\) 725 N.E.2d 169 (Mass. 2000).

\(^\text{204}\) Id. at 172.

\(^\text{205}\) Id. at 172-73 (summarizing relevant facts of robbery and subsequent shooting).

\(^\text{206}\) Id. at 173 (discussing trial court’s denial of motion to suppress evidence). The SJC also called attention to the fact that the defendant was not apprised of counsel’s presence at police station. *Id.*
rendered his Miranda waiver involuntary. In reaching its conclusion, the SJC distinguished Moran v. Burbine, reasoning that Article 12 should be more broadly interpreted than the Fifth Amendment.

4. Commonwealth v. Crawford

The SJC reversed the defendant’s conviction for the shooting death of her boyfriend. The Commonwealth prosecuted the defendant on a joint venture theory, and it did not allege her to be the shooter. Prior to trial, the defense moved to suppress statements made in the course of a police interrogation, and sought to introduce expert testimony on Battered Woman’s Syndrome in support of the motion. The trial court excluded the expert testimony at the motion hearing and at trial, noting that it was unnecessary to determine voluntariness.

In reversing the conviction, the SJC found the trial court erroneously excluded the proffered expert testimony because such testimony could have informed both the court and the jury about the defendant’s mental state—as someone repeatedly traumatized by domestic violence and drug abuse.

5. Commonwealth v. Conkey

The SJC reversed the defendant’s conviction of first-degree murder for the strangulation death and sexual assault of the victim. Physical

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207 Id. at 179 (determining defendant’s knowledge of legal counsel offer of assistance likely to affect Miranda waiver decision).
208 475 U.S. 412, 413 (1986) (holding no Miranda violation wherein police fail to inform defendant of counsel).
211 Id. at 291.
212 Id. at 290. “Crawford told [police] that her brother had shot the victim because he beat her, . . . her brother had seen the defendant’s bruises from the victim’s assault on her that morning and ‘got mad and did what he did.’” Id. at 292.
213 See id. at 292-93.
214 See id. at 293 (summarizing trial court judge’s refusal to allow expert testimony).
217 See id. at 180-81 (reviewing relevant facts of the assault and murder). The victim was found in her own apartment, which the defendant admitted to illegally entering on the night of the murder. Id.
evidence connected the defendant to the crime scene, but the defendant claimed to have found the victim’s body after the murder.\textsuperscript{218} At trial, the defense was that another person, the victim’s landlord, was the actual assailant.\textsuperscript{219} In furtherance of this theory, the defense sought to introduce evidence to establish the landlord’s pattern of sexually aggressive behavior.\textsuperscript{220} The SJC reversed his conviction, finding the trial court erred in excluding this evidence and the error was not harmless beyond a reasonable doubt.\textsuperscript{221}

E. Prosecutorial Misconduct

Prosecutorial misconduct accounted for 10 percent of the convictions resulting in reversal under this Survey (a total of two cases) and had a success rate of 2.17 percent.\textsuperscript{222} These two cases are summarized below:

1. \textit{Commonwealth v. Coren}\textsuperscript{221}

The SJC reversed the defendant’s first-degree murder conviction for the shooting death of his friend.\textsuperscript{224} At trial, the Commonwealth pursued the theory that the defendant intentionally shot the victim in the abdomen following a verbal dispute.\textsuperscript{225} The defendant provided an alternate version of the events in a Mirandized statement, which was admitted at trial.\textsuperscript{226} In his statement, the defendant said the victim was involved in an altercation with another man regarding an unpaid debt and this man must have shot the victim.\textsuperscript{227} In his closing argument, the prosecutor re-enacted the shooting, using language overheard by witnesses, but also added possible victim statements including “don’t” and “don’t shoot,” which were not supported

\textsuperscript{218} See id. at 181.
\textsuperscript{219} See id. at 182 (detailing evidence related to landlord’s potential involvement in murder).
\textsuperscript{220} See id. at 183-84 (discussing exclusion of prior rape allegation against landlord and sexually explicit items in landlord’s apartment).
\textsuperscript{222} See supra page 11 tbl. 3 (illustrating success rate of ineffectiveness of counsel challenge).
\textsuperscript{223} 774 N.E.2d 623 (Mass. 2002).
\textsuperscript{224} See id. at 625.
\textsuperscript{225} Id. The defendant and victim engaged in an argument over missing drugs in a bedroom.
\textsuperscript{226} Id. at 626. A witness observed the defendant holding a gun to the victim’s stomach, and subsequently heard a loud noise “like a firecracker.” Id.
\textsuperscript{227} See id. at 627.
\textsuperscript{228} Id.
by the evidence. In reversing the conviction, the SJC reasoned the prosecutor’s closing argument misstated the evidence in ways that went to “the heart of the case” and thus, likely improperly influenced the jury.

2. Commonwealth v. Farley

The SJC reversed the defendant’s first-degree murder conviction for the stabbing death of her friend. At trial, the defense argued that a third party stabbed the victim to death and that the defendant subsequently found the body. The female defendant testified to this effect at trial, claiming that a drug dealer named “Rafael” killed the victim. During cross-examination of the defendant, the prosecutor repeatedly asked her about invoking her right to counsel during a police interrogation. While defense counsel objected, and the judge eventually stopped the questioning, no curative instruction was given. The SJC reversed the conviction, finding the prosecutor improperly questioned the defendant about this post-arrest silence.

CONCLUSION

In spite of the “extraordinary powers” afforded to the SJC to review first-degree murder appeals, this Survey supports a finding that surprisingly few such convictions result in reversal. Legal academics specializing in criminal law, along with criminal practitioners, can benefit from a practical understanding of how legal issues relating to homicide law are addressed at the appellate level. This Survey of first-degree murder appeals in Massachusetts illustrates that while the SJC rarely invokes the “extraordinary power” it is afforded under Section 33E, a review of the cases resulting in reversal is helpful in understanding homicide law.

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229 Id. at 629-30.
230 2000 Mass. LEXIS 178. This case was previously reversed in Commonwealth v. Farley, 732 N.E.2d 893 (Mass. 2000), and for purposes of this Survey these cases are considered as two separate reversals because each was based on a different trial and different appellate issues. See supra notes 164-169 and accompanying text.
232 Id. at *5.
233 Id.
234 See id. at *6 (detailing cross-examination of defendant).
235 See Commonwealth v. Farley, 2000 Mass. LEXIS 178 at *7. “The judge did not instruct the jury that they could not infer guilt from the defendant’s exercise of her right to silence after being advised of the Miranda warnings.” Id.
236 Id. at *7-*11.