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THE DOCTRINE OF HARMLESS ERROR IN CRIMINAL CASES IN MASSACHUSETTS

I. INTRODUCTION

The life of sixteen-year-old Kelsea Owens ended abruptly on a summer evening after she made plans to “hang out” with two friends.¹ Kelsea was picked up by her girlfriend, Amanda Gagne, and the two girls went to the home of Kelsea’s older male friend, twenty-year-old Joshua Whitaker.² Amanda left Kelsea at Whitaker’s house to move her car; in the forty-five minutes that Amanda was gone, Kelsea was brutally beaten, sustaining large bruises on her abdomen and numerous “extreme and very severe” fractures to her skull, causing her death.³ Kelsea’s body was found behind Whitaker’s home, lying on her back with her “face bloodied . . . [t]he ‘shimmery’ blouse she had been wearing was now around her wrists, her bra was above her breasts . . . and she wore no panties.”⁴ Whitaker was arrested, tried, and convicted of first-degree murder.⁵ After less than four hours of jury deliberation, he was sentenced to life in prison without the possibility of parole for the vicious murder of Kelsea.⁶

Twenty years earlier, another tragic event occurred when the lives of two long-time companions, twenty-three-year-old John Bottari and twenty-year-old Frank Angelo Chiuchiolo, ended on a cold February night in Boston’s North End.⁷ Their bodies were found lying twenty feet apart from one another in “bloodstained” snow after three gunmen opened fire, shooting one victim sixteen times and the other seven times.⁸ According to witness testimony, the two victims had planned to rob one of three gunmen, who had been forewarned and was able to settle the score before the

¹ See *Commonwealth v. Whitaker*, 951 N.E.2d 873, 876 (Mass. 2011) (describing factual events on evening at issue).

² *Id.*

³ *Id.* at 879 (detailing victim’s brutal injuries); see also Buffy Spencer, *Hampden Man Guilty In Brutal Teen Death*, REPUBLICAN, Oct. 19, 2007, A1, available at 2007 WLNR 20636756 (highlighting victim’s injuries). “A bloody trail of weapons, including a hammer, a log and a set of pruning shears, led investigators to her body.” Spencer, *supra*, at A1.

⁴ *Whitaker*, 951 N.E.2d at 878 (detailing crime scene).

⁵ *Id.* at 883.

⁶ See Spencer, *supra* note 3, at A1 (reporting jury findings).

⁷ See John H. Kennedy, *Two North End Slayings are Detailed for Jurors*, BOS. GLOBE, Mar. 26, 1988, at 18, available at 1988 WLNR 637813 (describing double homicide).

⁸ *Id.*

unarmed friends had the opportunity to commit the robbery.⁹ The moment that Bottari and Chiuchiolo entered the park, Paul L. Tanso and two accomplices pulled out handguns and repeatedly fired at the two victims.¹⁰ A witness said that one of Tanso's accomplices was so callous and filled with rage that he bent over one the victims' bodies and "fire[d] at least five shots into the body before fleeing."¹¹

Lives were prematurely taken in very different, but similarly brutal ways in these two homicides.¹² In both cases, the perpetrators were found, charged, and convicted of first-degree murder.¹³ In the case involving the murder of sixteen-year-old Kelsea, the Massachusetts Supreme Judicial Court ("SJC") affirmed the defendant's conviction despite the lower court's error in depriving the defendant of his constitutional right to confront witnesses under the Confrontation Clause.¹⁴ However, in the case involving the murder of the two young men in Boston's North End, the SJC reversed and remanded the defendant's conviction for the same constitutional error, reasoning that the trial court's error resulted in harm to the defendant.¹⁵ Subsequently, the jury acquitted the defendant in a second trial.¹⁶

This Note will examine the doctrine of harmless error in criminal

⁹ See *Commonwealth v. Tanso*, 583 N.E.2d 1247, 1249 (Mass. 1992) (describing witness testimony); see also Kevin Cullen, *Witness Drove Victims to N. End, Watched Shootings, Documents Say*, BOS. GLOBE, Mar. 6, 1986, at 76, available at 1986 WLNR 383806 (describing witness affidavit testimony regarding victims' plans).

¹⁰ Kennedy, *supra* note 7, at 18 (detailing key witness affidavit testimony about double homicide).

¹¹ See Cullen, *supra* note 9, at 76 (detailing eye witness testimony). This same eye witness identified Tanso's accomplice, Frank DiBenedetto, as the person who shot the body at close range. *Id.*

¹² See *Commonwealth v. Whitaker*, 951 N.E.2d 873, 875 (Mass. 2011) (recounting gruesome death of Kelsea Owens); *Tanso*, 583 N.E.2d at 1249 (describing horrific murder of John Bottari and Frank Angelo Chiuchiolo).

¹³ *Whitaker*, 951 N.E.2d at 875 (delineating procedural posture of case); *Tanso*, 583 N.E.2d at 1249 (same).

¹⁴ *Whitaker*, 951 N.E.2d at 883-84 (stating error, holding, and disposition of court). The trial judge erred in allowing a witness to offer testimonial hearsay testimony on direct examination regarding the opinions of two other non-testifying fingerprint examiners. *Id.* at 883. Because the conclusions of the non-testifying experts were made as part of the criminal investigation, their admission violated the defendant's right of confrontation. *Id.* at 883-884. Despite this error, the SJC affirmed the guilty verdict of the lower court after conducting a harmless-error analysis. *Id.* at 884.

¹⁵ See *Tanso*, 583 N.E.2d at 1256-57 (reversing and remanding judgments of Superior Court). The SJC held that the trial judge erred in admitting uncross-examined deposition testimony into evidence. *Id.* at 1254.

¹⁶ See Jonathan Saltzman, *Citing DNA, Inmate Seeks Murder Retrial Says Sneaker Evidence is Not Blood of Victim*, BOS. GLOBE, July 4, 2005, at B1, available at 2005 WLNR 10506281 (describing result of Tanso's second trial).

cases, the issues in its application, and the inconsistencies of its application throughout the Massachusetts court system.¹⁷ Part II.A describes the broad history of the doctrine from English Common Law through present United States Supreme Court rulings.¹⁸ Part II.B discusses Massachusetts's historical use of the doctrine.¹⁹ Part III.A discusses current trends of harmless-error analysis in other jurisdictions.²⁰ Part III.B discusses Massachusetts's use of the doctrine from the late 1960s and early 1970s to the present, as compared to other jurisdictions.²¹ Part IV analyzes the current application of harmless error in Massachusetts.²² Part V concludes that Massachusetts courts are inconsistent in their finding of whether an error is harmless, and inconsistent in which standard they use to analyze such an error.²³ Part V will also discuss how Massachusetts appellate courts may approach the harmless-error analysis in a more consistent manner.²⁴

II. HISTORY OF HARMLESS-ERROR DOCTRINE

The American justice system is not free from mistake or flaw; it is presumed that our process is a fair one, but does not guarantee a perfect trial or a perfect result.²⁵ During the course of a trial, courts can potentially commit any number of errors.²⁶ Appellate courts review alleged errors to correct them if found prejudicial to the defendant or dismiss them if

¹⁷ See *infra* Parts II.B, III.B-V (discussing harmless-error analysis in Massachusetts).

¹⁸ See *infra* Part II.A (delineating broad history of doctrine of harmless error).

¹⁹ See *infra* Part II.B (explaining Massachusetts's use of harmless error doctrine from late 1800s through 1960s).

²⁰ See *infra* Part III.A.

²¹ See *infra* Part III.B.

²² See *infra* Part IV.

²³ See *infra* Part V.

²⁴ See *infra* Part V (explaining necessity for more consistent method of harmless-error analysis in Massachusetts).

²⁵ See *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986) ("[T]he Constitution entitles a criminal defendant to a fair trial, not a perfect one."); *Lutwak v. United States*, 344 U.S. 604, 619 (1953) ("A defendant is entitled to a fair trial but not a perfect one."); see also Jeffrey O. Cooper, *Searching for Harmlessness: Method and Madness in the Supreme Court's Harmless Constitutional Error Doctrine*, 50 U. KAN. L. REV. 309, 309 (2002) (noting how errors in trials are unavoidable); Dennis J. Sweeney, *An Analysis of Harmless Error in Washington: A Principled Process*, 31 GONZ. L. REV. 277, 280 (1995-1996) (discussing how trials are imperfect enterprise).

²⁶ See Cooper, *supra* note 25, at 309 (listing various errors that district courts may commit). Common errors include improper jury instructions, failure to exclude evidence that should have been barred because it was obtained in violation of the defendant's constitutional rights, and improper admission of hearsay testimony. See *id.*

deemed harmless.²⁷ Due to the impracticability and high cost of retrying every case in which an error occurs, all jurisdictions have adopted the harmless-error doctrine in some fashion to allow appellate courts to affirm lower court decisions provided that the error was inconsequential or harmless.²⁸

A. Broad History of the Doctrine

The origin of the harmless-error doctrine comes from English Common Law.²⁹ The original rule, known as the “Exchequer Rule,” established the practice of automatic reversal for any error concerning the admission or exclusion of evidence.³⁰ In response to the “hypertechnicality” of the Exchequer Rule, Parliament passed the Judicature Act of 1873, decreeing that in civil cases “[a] new trial shall not be granted on the ground of misdirection or of the improper admission or rejection of evidence, unless in the opinion of the Court to which the application is made some substantial wrong or miscarriage has been

²⁷ See Charles S. Chapel, *The Irony of Harmless Error*, 51 OKLA. L. REV. 501, 530-31 (1998) (noting purpose of appellate courts). The role of appellate courts is to “review claims of trial error” and to “determine if the accused’s right to a fair trial has been violated.” *Id.* at 530. For appellate courts to serve this purpose of ensuring a fair trial, as well as their purpose of developing law, they must correct errors found on appeal. *Id.* at 514; see also Cooper, *supra* note 25, at 309 (discussing questions for appellate courts when reviewing errors). The question for appellate courts is how to cope with the inevitable mistakes that happen during trial proceedings, even if the courts are positive that the error did not affect the result in the trial proceeding. Cooper, *supra* note 25, at 309.

²⁸ See Roger A. Fairfax, Jr., *Harmless Constitutional Error and the Institutional Significance of the Jury*, 76 FORDHAM L. REV. 2027, 2029 (2008) (describing harmless-error doctrine). The doctrine allows a criminal conviction to stand so long as the reviewing court concludes that the flaw in the initial proceeding was harmless beyond a reasonable doubt. *Id.*; see also Elizabeth Price Foley & Robert M. Filiault, *The Riddle of Harmless Error in Michigan*, 46 WAYNE L. REV. 423, 425 (2000) (describing purpose of harmless-error analysis). The harmless-error analysis is best viewed as a “quest to determine whether the trial resulted in a judgment that is manifestly just; if the judgment is deemed just, the error is deemed harmless, and the judgment will stand.” Foley & Filiault, *supra*, at 425; see also Sweeney, *supra* note 25, at 278 (describing basis for doctrine). “Harmless error is a doctrine of accommodation based upon practical considerations, one of which is that, as a matter of judicial economy, every case in which error occurs cannot be retried.” Sweeney, *supra* note 25, at 278.

²⁹ See Fairfax, *supra* note 28, at 2032 (delineating development of harmless error rule in United States). The history of the doctrine can be traced back to an English civil case from 1835 where a court refused to find the erroneous exclusion of evidence to be erroneous enough to change the lower court’s result, and held the exclusion to be a harmless error. *Id.* (citing *Crease v. Barrett*, 149 Eng. Rep. 1353, 1359 (1835)).

³⁰ See Addison K. Goff, IV, *Mixed Signals: A Look at Louisiana’s Experience with Harmless Error in Criminal Cases*, 59 LA. L. REV. 1169, 1170 (1999) (outlining origin of harmless-error rule in England). Under the Exchequer Rule, an erroneous admission or rejection of evidence was presumed to have caused prejudice, thus requiring a retrial. *Id.*

thereby occasioned in the trial. . . .”³¹ Over three decades later, Parliament expanded this rule to criminal cases by passing the Criminal Appeal Act, thus authorizing the “harmless error” rule by decreeing “that the court may, notwithstanding that they are of [the] opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they considered that no substantial miscarriage of justice has actually occurred.”³²

Adopting English common law, early American courts embraced the English judicial philosophy that all trial errors were harmful, thus necessitating a new trial.³³ Early cases across the states exemplify this judicial framework.³⁴ In 1897, the United States Supreme Court, as a matter of first impression in *Bram v. United States*,³⁵ held that once a constitutional error is discovered during a criminal trial, any conviction must be automatically reversed.³⁶ In response to public outcry regarding the vast amount of reversals, in 1919 Congress amended section 269 of the Judicial Code (as amended at 28 U.S.C. § 391) to allow appellate courts to decide cases based on the entire record “without regard to technical errors or defects” that do not “affect the substantial rights of the parties.”³⁷ In

³¹ Fairfax, *supra* note 28, at 2032 (quoting Supreme Court of Judicature Act, 1873, 36 & 37 Vict., c. 66, sched. 48 (Eng.)) (describing adoption of Judicature Act); *see also* Goff, *supra* note 30, at 1170 (describing Parliament’s response to Exchequer Rule). The Act precluded new trials unless the court of appeal opined that a substantial wrong or miscarriage had taken place. *See* Goff, *supra* note 30, at 1170.

³² Fairfax, *supra* note 28, at 2032 (quoting Criminal Appeal Act, 1907, 7 Edw. 7, c. 23, § 4 (Eng.)) (discussing Criminal Appeal Act); *see also* Chapel, *supra* note 27, at 519 (recognizing term “harmless error” is not used by English courts).

³³ *See* Foley & Filiatrault, *supra* note 28, at 426 (noting American courts followed English “Exchequer Rule”). Under this judicial philosophy, American appeal courts reversed many convictions due to minor procedural trial errors. *Id.*

³⁴ *See id.* at 426-27 (identifying reversals in early appellate court cases across country because of miscellaneous errors).

³⁵ 168 U.S. 532 (1897).

³⁶ *See Bram*, 168 U.S. at 541 (“[T]he prosecution cannot on the one hand offer evidence to prove guilt, and . . . on the other hand . . . be heard to assert that the matter offered as a confession was not prejudicial because it did not tend to prove guilt.”); *see also* Chapel, *supra* note 27, at 521 (stating *Bram* court ruling). Rejecting the government’s argument that a statement by the accused erroneously admitted into evidence was harmless, the Court ruled that automatic reversal is required in cases of constitutional error. *See* Chapel, *supra* note 26, at 521.

³⁷ 28 U.S.C. § 391 (1919) (current version at 28 U.S.C. § 2111 (2012)) (“On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.”); *see also* *Berger v. United States*, 295 U.S. 78, 81-82 (1935) (discussing congressional history of harmless error); Fairfax, *supra* note 28, at 2033-34 (discussing reason for and language of amendment). The legislation, now codified at 28 U.S.C. § 2111, was “designed ‘to insure that trial verdicts were not lightly disturbed on appeal, especially under circumstances where the grounds for appeal were mere technical errors.’” Fairfax, *supra* note 28, at 2033 (quoting

1946, the 1919 harmless-error statute was implemented in the Federal Rules of Criminal Procedure as Rule 52(a).³⁸

The Supreme Court fully considered the importance of the harmless-error statute for the first time in *Kotteakos v. United States*,³⁹ and in doing so set forth a test for harmless error.⁴⁰ Justice Rutledge's test reaffirmed that constitutional errors at trial were not subject to a harmless-error analysis.⁴¹ *Kotteakos* remained the standard for nearly twenty years, until the Supreme Court, in *Chapman v. California*,⁴² ruled that some constitutional errors could be deemed harmless.⁴³ The standard for harmless-error analysis set forth by *Chapman* declared that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt" that the

Stephen A. Saltzburg, *The Harm of Harmless Error*, 59 VA. L. REV. 988, 1006 (1973)).

³⁸ See FED. R. CRIM. P. 52(a) (adopting harmless-error rule). This rule mandates that "[a]ny error, defect, irregularity, or variance that does not affect substantial rights must be disregarded." *Id.*; see also Fairfax, *supra* note 28, at 2034 (discussing language of rule). The language of the rule does not specify how courts should conduct a harmless-error analysis. See Fairfax, *supra* note 28, at 2034; see also Harry T. Edwards, *To Err is Human, But Not Always Harmless: When Should Legal Error Be Tolerated*, 70 N.Y.U. L. REV. 1167, 1175 (1995) (noting lack of guidance within rule). The rule's broad language only refers to errors that do not affect "substantial rights" and does not offer a standard for appellate judges to decide whether an error requires reversal. See Edwards, *supra*, at 1175.

³⁹ 328 U.S. 750 (1946).

⁴⁰ See *id.* at 764-65 (laying out applicability of harmless-error rule). Justice Rutledge set forth the test that judges were to employ to analyze if an error was harmless:

If, when all is said done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.

Id.

⁴¹ See *id.*; see also Fairfax, *supra* note 28, at 2034-35 (discussing effect of *Kotteakos* ruling). "One thing was certain both before and after *Kotteakos*—the harmless error rule did not apply to constitutional errors at trial." Fairfax, *supra* note 28, at 2035; see also Chapel, *supra* note 27, at 524 (stating significance of *Kotteakos*). *Kotteakos* ended the tendency to presume that all errors were prejudicial; declined the automatic presumption of harmlessness and assigning a burden to either party; stated that each case must be considered on a case-by-case basis when applying a harmless-error analysis; and suggested that constitutional errors were not subject to the analysis. See Chapel, *supra* note 27, at 524.

⁴² 386 U.S. 18 (1967).

⁴³ See *id.* at 22 (stating holding). The Court ruled that some constitutional errors are so unimportant that they may be deemed harmless and thus do not require automatic reversal. *Id.*

error complained of did not contribute to the verdict obtained.⁴⁴

Only two years after *Chapman*, the Supreme Court complicated its definition of “harm” in *Harrington v. California*.⁴⁵ In *Harrington*, Justice Brennan’s dissent pointed out that the majority’s ruling allows a conviction to stand, despite the occurrence of a constitutional error, provided that evidence against the defendant was “overwhelming” and that the erroneously admitted evidence was merely “cumulative.”⁴⁶ The shift to an “overwhelming evidence of guilt” test after *Harrington* allowed the Court to begin sidestepping the issue of whether a constitutional error occurred by simply holding an error harmless if there was overwhelming evidence of guilt.⁴⁷ As a result, the Court has since shifted between two standards: the “effect on the verdict” standard of *Chapman* and the “overwhelming evidence of guilt” standard of *Harrington*.⁴⁸

The Court attempted to elaborate on the *Harrington* standard in *Delaware v. Van Arsdall*.⁴⁹ The *Van Arsdall* Court listed factors that courts

⁴⁴ *Id.* at 24; see also Gregory Mitchell, Comment, *Against “Overwhelming” Appellate Activism: Constraining Harmless Error Review*, 82 CALIF. L. REV. 1335, 1342-43 (1994) (describing holding of *Chapman* decision). Although the definition of harm was not specifically placed in the holding, the Court intended to state that “harmless” meant that there was no possibility that the erroneously admitted evidence could have contributed to the conviction. Mitchell, *supra*, at 1342. Without providing an explicit definition, appellate courts have repeatedly interpreted *Chapman* to mean only that constitutional errors are “harmless beyond a reasonable doubt.” *Id.*

⁴⁵ 395 U.S. 250 (1969); see also Cooper, *supra* note 25, at 319 (stating *Harrington* complicated *Chapman* standard). “The ambiguity within *Chapman* led, within two years, to a decision that, while professing to uphold *Chapman*, further muddled the waters.” Cooper, *supra* note 25, at 319.

⁴⁶ See *Harrington*, 395 U.S. at 255 (Brennan, J., dissenting) (declaring majority overruled “the firm resolve” of *Chapman*). In response to the dissent’s comments, Justice Douglas stated: “We do not depart from *Chapman*; nor do we dilute it by inference. We reaffirm it.” *Id.* at 254.

⁴⁷ See *Milton v. Wainwright*, 407 U.S. 371, 372-73 (1972) (delineating Court’s conclusions and reasoning). Citing to *Harrington* and *Chapman*, the *Milton* Court stated that “the judgment under review must be affirmed without reaching the merits of petitioner’s present claim. [T]he challenged testimony should have been excluded, [and] the record clearly reveals that any error in its admission was harmless beyond a reasonable doubt.” *Id.* at 372. The Court based this conclusion on the fact that the jury heard “overwhelming evidence of petitioner’s guilt” in addition to the challenged testimony. *Id.* at 372-73; see also Mitchell, *supra* note 44, at 1345 (discussing Court’s analysis in *Milton*). The Court never ruled whether a Sixth Amendment constitutional violation occurred, or whether that error contributed to the conviction beyond a reasonable doubt. See Mitchell, *supra* note 44, at 1345.

⁴⁸ See Mitchell, *supra* note 44, at 1343-44. Because of Justice Douglas’s clear refusal to overrule *Chapman*, “*Harrington*’s new definition of harm coexisted with *Chapman*’s definition.”; see also Fairfax, *supra* note 28, at 2037 (explaining how Supreme Court continuously utilizes both standards in harmless-error analysis); Mitchell, *supra* note 44, at 1344-45 (listing various Supreme Court cases invoking *Chapman* and *Harrington* variants of harmless-error analysis).

⁴⁹ 475 U.S. 673 (1986); see also Cooper, *supra* note 25, at 320 (discussing effect of

should analyze when reviewing whether an error is harmless or not; specifically, the error of improper admission of uncross-examined testimony.⁵⁰ These factors directed appellate courts to consider both “tainted” and “untainted” evidence, thus further blending the *Chapman* and *Harrington* standards into one hybrid test for harmless error.⁵¹

In 1991, a divided Court further complicated the test of harmless error in the landmark case of *Arizona v. Fulminante*⁵² by attempting to offer a framework to determine which constitutional errors required automatic reversal, and which were subject to a harmless-error review.⁵³ The Court stated that “trial errors” are susceptible to a harmless-error analysis while “structural defects” are not.⁵⁴ Despite the distinction between these types of errors, the Court was evenly divided on how to apply the proper harmless-error analysis.⁵⁵

Delaware v. Van Arsdall).

⁵⁰ See *Van Arsdall*, 475 U.S. at 684 (listing factors of analysis).

These factors include the importance of the witness’ testimony in the prosecution’s case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution’s case.

Id.

⁵¹ See *Mitchell*, *supra* note 44, at 1345-46 (discussing effect of *Van Arsdall* ruling). “The line between the *Chapman* and *Harrington* standards is obliterated to the extent that the importance of the error simply becomes one factor in the calculation of whether overwhelming evidence of guilt exists.” *Id.* at 1346.

⁵² 499 U.S. 279 (1991).

⁵³ See *id.* at 308 (stating holding of Court). The Court held that the admission of an involuntary confession is subject to a harmless error analysis. *Id.* But see *id.* at 291 (White, J., dissenting) (disagreeing with majority). After announcing much of the majority’s opinion, Justice White opined in his dissent that, in this case, the admission of a coerced confession into evidence could not be harmless as a matter of due process. *Id.*; see also *Cooper*, *supra* note 25, at 321-22 (discussing split holding of Court).

⁵⁴ See *Fulminante*, 499 U.S. at 307-11 (distinguishing between errors that are subject to harmless error analysis). Trial errors “in matters placed before the jury” may be deemed harmless, while structural errors may not. *Cooper*, *supra* note 25, at 321; see also *Fairfax*, *supra* note 28, at 2038 (clarifying distinction between types of errors according to *Fulminante*). Only structural errors that affected the “infrastructure” within which a criminal case is tried may be reversible. *Fairfax*, *supra* note 28, at 2038.

⁵⁵ See *Chapel*, *supra* note 27, at 529 (noting *Fulminante* exemplifies confusion of Supreme Court regarding harmless-error analysis). The Court’s two majorities applied different standards: Justice Rehnquist applied the evidence of guilt standard while Justice White wrote in terms of effect on the verdict standard. *Id.*; see also *Cooper*, *supra* note 25, at 322-23 (describing reasoning employed in divided Court’s harmless-error analysis).

B. History of Harmless Error in Massachusetts Criminal Cases

The need to address errors within a trial have existed since the beginning of the American justice system.⁵⁶ Following the English practice, Massachusetts appellate courts from the early eighteenth century to the early twentieth century found most errors to be reversible; however, the idea that an error could be harmless has always existed despite the lack of a developed doctrine.⁵⁷ After Congress's passage of the first harmless-error statute, Massachusetts judges began to use the term "harmless" or simply stated that an error did not harm a defendant.⁵⁸ Despite the use of these terms, judges did not cite to the statute, nor use a standardized method of deciding whether an error was harmless; they simply stated that an error was or was not harmless (or did or did not "prejudice" the defendant) in their analyses.⁵⁹ This reluctance or simple refusal to

⁵⁶ See *supra* note 27 and accompanying text (describing need for appellate courts to correct alleged errors within trials).

⁵⁷ See generally, *Walsh v. Commonwealth*, 112 N.E. 486, 487 (Mass. 1916) (reversing Superior Court's conviction because of sentencing error); *Commonwealth v. Goldberg*, 98 N.E. 692, 693 (Mass. 1912) (sustaining erroneous exclusion exceptions in burglary case); *Commonwealth v. Keenan*, 25 N.E. 32, 33 (Mass. 1890) (vacating Superior Court's conviction based on erroneously admitted evidence); *Wilde v. Commonwealth*, 43 Mass. (2 Met.) 408, 411-12 (1841) (reversing conviction because of error in indictment). In *Walsh*, the SJC reversed the guilty finding for stealing clams "within prohibited bounds" because of a sentencing error despite proof of prior convictions that would have warranted the sentencing. *Walsh*, 112 N.E. at 487. In *Goldberg*, the SJC sustained an exception regarding erroneous exclusion of refutation evidence of evidence of guilt, even though there was subsequent testimony as to the reasons for the defendant's flight. *Goldberg*, 98 N.E. at 693. In *Keenan*, the conviction for illegally keeping intoxicating liquor in a tenement with intent to sell was vacated because of erroneously admitted evidence of someone's conduct other than the defendant, even though the jury stated that they did not consider that evidence in their decision. *Keenan*, 25 N.E. at 33. Finally, in *Wilde*, the SJC reversed the conviction for breaking and entering a dwelling house in the night because of an error in the indictment stating a higher crime when the charge should have only been for simple larceny. *Wilde*, 43 Mass. (2 Met.) at 411-12. But see *Brown v. Commonwealth*, 8 Mass. (8 Tyng.) 59, 63-72 (1811) (error in indictment was ruled harmless because of convictions on counts properly in indictment). The SJC affirmed the *Brown* conviction because the lower court only convicted the defendant on the counts that were properly in the indictment. *Id.*

⁵⁸ See sources cited *supra* note 37 and accompanying text (discussing history of statute).

⁵⁹ See *Commonwealth v. Russ*, 122 N.E. 176, 184-85 (Mass. 1919) (utilizing idea that error could be harmless). In this case, Oscar F. Russ was prosecuted and convicted of second degree murder for the killing of his wife. *Id.* at 178. Russ appealed the conviction, raising the defense of trial-court error, and requested a new trial. *Id.* After definitively stating that several alleged errors were not in fact errors, the SJC began to discuss two errors regarding admittance of evidence and how their effect was harmless, but the court was not definitive in their assessment of these errors. *Id.* at 180-86. The SJC held that any error in admitting pieces of paper found in the defendant's home—one in the handwriting of the deceased in a foreign language, which the defendant could not read, and the other, an undertaker's bill—was harmless because they did not relate to the defendant. *Id.* at 184-85. On cross-examination, the defendant's expert witness offered his opinion on whether facts gathered from personal observation provided more reliable

delineate a specified standard in analyzing harmless error continued in Massachusetts from the early 1900s through the late 1960s.⁶⁰

III. CURRENT APPLICATION OF HARMLESS ERROR

A. Trends of Analysis in Other Circuits

Appellate courts across the nation have struggled with when and how to conduct a harmless-error analysis.⁶¹ American jurisprudence has repeatedly affirmed the idea that an error-free trial is a utopian ideal, and that inconsequential or “harmless” errors should not be grounds for the

grounds for an opinion than a written description of facts. *Id.* The SJC held the error harmless because the subsequent answer to the question was harmless. *Id.* at 185.

⁶⁰ See *Commonwealth v. Rawlins*, 225 N.E.2d 314, 316 (Mass. 1967) (stating erroneous admission of hearsay testimony “‘rarely constitutes prejudicial error’” (quoting *Commonwealth v. Rudnick*, 60 N.E.2d 353, 361 (Mass. 1945))); *Commonwealth v. Burke*, 182 N.E.2d 127, 130 (Mass. 1962) (declaring error harmless without any standard or thorough analysis); *Commonwealth v. Ross*, 159 N.E.2d 330, 335 (Mass. 1959) (holding erroneous admission of testimony harmless); *Commonwealth v. Rudnick*, 60 N.E.2d 353, 360 (Mass. 1945) (deeming erroneous jury instruction harmless); *Commonwealth v. Marcellino*, 171 N.E. 451, 451 (Mass. 1930) (holding erroneous exclusion of testimony harmful); *Commonwealth v. Dzewiacin*, 147 N.E. 582, 584 (Mass. 1925) (stating error was harmless with no analysis); *Commonwealth v. Kazules*, 141 N.E. 584, 585 (Mass. 1923) (stating “[errors] cannot be considered as harmless” with minimal analysis). In *Burke*, the defendant appealed from his conviction for assault and battery of his wife alleging several errors; only one of which the court discussed as being harmless, all other alleged errors were held not erroneous. *Burke*, 182 N.E.2d at 128-29. The SJC stated that although the trial judge erred in admitting evidence of the victim’s employment records as proof of her state of mind to show that she was upset about her husband’s affair, “[t]he error, however, was harmless” because it was immaterial. *Id.* at 130. In *Ross*, the testimony of a detective stating that he believed the defendant participated in the robbery was admitted into evidence, leading to the defendant’s conviction. *Ross*, 159 N.E.2d at 335. The court stated: “we do not think the possible prejudice was sufficient to call for the extraordinary action by us which the defendant requests [i]t was to a degree only cumulative that [the detective] shared the belief in the defendant’s guilt.” *Id.* In *Rudnick*, the failure of the judge to instruct the jury not to consider a witness’s acts or declarations against the defendant in the charge of conspiracy was harmless because “the evidence as to the acts and declarations of [the witness] was harmless.” *Rudnick*, 60 N.E.2d at 360. In *Marcellino*, the court concluded that the exclusion of testimony showing the bias of a witness on cross examination could not be considered harmless because “[t]he credit of a witness, upon whose testimony in part the issue is to be determined, is not merely collateral, and cannot be immaterial.” *Marcellino*, 171 N.E. at 451. The court went on to explain that jury must know if a witness has a potential bias against the defendant to properly weigh the credibility of the witness. *Id.*

⁶¹ See, e.g., Dick R. Schlegel, *The Evolution of Harmless Error in Iowa: Where Do We Go From Here?*, 43 DRAKE L. REV. 547, 591 (1995) (noting ad hoc application of various rules of harmless error in Iowa); Foley & Filiatrault, *supra* note 28, at 458 (declaring Michigan does not have uniform definition of harmless error); Goff, *supra* note 30, at 1191 (noting inconsistency in analysis of harmless error in Louisiana); Sweeney, *supra* note 25, at 286 (stating standards of review in Washington state).

automatic reversal of hard-fought verdicts, despite a lack of guidance from the United States Supreme Court on how to conduct a harmless-error analysis.⁶² For example, Washington courts generally use two standards in its harmless-error analysis: the “contribution test” and the “overwhelming evidence” standard.⁶³ In *State v. Guloy*,⁶⁴ Washington’s highest court adopted the standard that if overwhelming, untainted evidence supported the verdict, then courts should hold any constitutional evidentiary errors harmless.⁶⁵ Although the *Guloy* court favored the contribution test, Washington courts have utilized both standards, often combining them into a hybrid test, as well as utilizing other various standards of review in their determination of harmless error.⁶⁶ For example, in *State v. Bourgeois*,⁶⁷ the Supreme Court of Washington cited to various standards that it could use in its assessment of harmless error.⁶⁸ *Bourgeois* exemplifies how Washington courts attempted to define their harmless-error analysis depending on the type of error that was discovered.⁶⁹ More recent Washington appellate

⁶² See Sam Kamin, *Harmless Error and the Rights/Remedies Split*, 88 VA. L. REV. 1, 20 (2002) (discussing general support and disagreement of harmless-error analysis across American court systems). “Notwithstanding this disagreement over the application of the harmless error rule, there is near unanimity in support of harmless error as a concept.” *Id.*

⁶³ See Sweeney, *supra* note 25, at 286 (noting standards of review for harmless-error analysis). The “contribution test” focuses on whether the evidence contributed to the jury’s verdict, while the “overwhelming evidence” standard focuses on whether the untainted evidence admitted at trial was so overwhelming in proving guilt. *Id.* at 286-88.

⁶⁴ 705 P.2d 1182 (Wash. 1985).

⁶⁵ *Id.* at 1190-91 (stating which standard Washington Supreme Court would use in harmless-error analysis). The Washington Supreme Court firmly adopted the “overwhelming untainted evidence” test, proclaiming that this test provided a better analysis of harmless error than the “contribution test.” *Id.*; see Sweeney, *supra* note 25, at 286-87 (describing effect of *Guloy* decision in adopting overwhelming-evidence standard). Despite the court’s attempt at adopting one clear standard, this adoption was insufficient in providing an analytical framework for applying the doctrine of harmless error in Washington. Sweeney, *supra* note 25, at 287.

⁶⁶ See Sweeney, *supra* note 25, at 291-95 (discussing comparisons among these two, non-exclusive, standards in Washington state’s analysis).

⁶⁷ 945 P.2d 1120 (Wash. 1997).

⁶⁸ *Id.* at 1127 (citing various cases utilizing different harmless-error standards). In two cases involving constitutional error, the Supreme Court of Washington applied “the more stringent ‘harmless error beyond a reasonable doubt’ standard,” but because the second case centered on an evidentiary error, the same court instead asked whether “within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.” *Id.* (citation omitted).

⁶⁹ See *id.* (noting courts’ efforts to define harmless-error standard). The court held that an evidentiary error in allowing a witness to testify as to their fear in testifying does not result in prejudice to the defendant, and will not be grounds for reversal because it is not a constitutional error. *Id.* Therefore, the court applied “the rule that error is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred” while looking at the overwhelming evidence as a whole. *Id.* (quoting *State v. Tharp*, 637 P.2d 961, 965 (Wash. 1981)).

cases show that, despite this previous effort, the state courts still have not settled on one firm standard of analysis.⁷⁰

Similar to Washington, and despite having a statute defining harmless error in criminal cases since 1979, Michigan state courts have not yet utilized a concrete standard of analysis.⁷¹ Although there currently is not one expressed definition of harmless-error analysis, recent Michigan courts have seemingly cycled between examining the “overwhelming evidence of guilt” standard within their analysis and the effect the error had on a given verdict.⁷²

B. Current Application of Harmless Error in Massachusetts Criminal Trials

By inconsistently applying various versions of the doctrine, Massachusetts is consistent with Michigan, Washington, and the rest of the nation, including the United States Supreme Court, in not having a definitive standard of harmless error.⁷³ Starting in the late 1960s and early 1970s, Massachusetts courts began to conduct a more formalized harmless-error analysis by utilizing the various approaches promulgated by the Supreme Court.⁷⁴ Massachusetts courts began to assess harmlessness based

⁷⁰ See *State v. Scott*, 213 P.3d 71, 76 (Wash. Ct. App. 2009). In *Scott*, the court stated that “[e]videntiary error can be harmless if, within reasonable probability, it did not materially affect the verdict,” thus utilizing an effect on the verdict standard without looking at the overwhelming evidence of guilt as utilized in *Bourgeois*. *Id.*

⁷¹ See *Foley & Filiatrault*, *supra* note 28, at 457-58 (discussing harmless error factors considered in Michigan). These factors include: (1) whether the error was properly raised during trial; (2) whether the alleged error infringed upon the defendant’s constitutional rights; and (3) if the alleged error involved a violation of constitutional rights, whether the nature of the constitutional was structural or non-structural. *Id.* As of 2000, it appeared as though Michigan had yet to develop one uniform definition of harmless error. *Id.*

⁷² See *People v. Gursky*, 786 N.W.2d 579, 582 (Mich. 2010) (“The error is not so prejudicial as to require reversal because the hearsay statements were not used substantively at trial to prove guilt . . . [but] were cumulative to the victim’s testimony at trial, and there was other corroborating evidence of defendant’s guilt.”); *People v. Benton*, 817 N.W.2d 599, 605 (Mich. Ct. App. 2011) (noting how analysis of harmless error looked at outcome of trial); *People v. Seals*, 776 N.W.2d 314, 322 (Mich. Ct. App. 2009) (“[I]n light of the other evidence presented . . . any error in the admission of the testimony would have been harmless. Defendant’s investigative subpoena testimony was inconsequential to the ultimate resolution of the case.”). “Evidentiary error does not require reversal unless after an examination of the entire cause, it appears more probable than not that the error affected the outcome of the trial in light of the weight and strength of the properly admitted evidence.” *Benton*, 817 N.W.2d at 605.

⁷³ See *infra* Part IV (analyzing inconsistency of application in Massachusetts courts).

⁷⁴ See, e.g., *Commonwealth v. Reyes*, 982 N.E.2d 504, 515-16 (Mass. 2013) (using effect-on-jury standard); *Commonwealth v. Gray*, 978 N.E.2d 543, 557 (Mass. 2012) (using “harmless beyond a reasonable doubt” language of *Chapman*); *Commonwealth v. Mendes*, 974 N.E.2d 606, 611-15 (Mass. 2012) (combining various approaches to harmless-error analysis); *Commonwealth*

on *Chapman*'s "beyond a reasonable doubt that the evidence did not contribute to the verdict obtained" standard and *Harrington*'s "overwhelming evidence of guilt" test, or variations of the two.⁷⁵

v. King, 949 N.E.2d 426, 430-32 (Mass. 2011) (utilizing effect-on-verdict standard); Commonwealth v. Nelson, 953 N.E.2d 164, 173 (Mass. 2011) (combining effect-on-verdict, harmless-beyond-reasonable-doubt, and overwhelming-evidence standards); Commonwealth v. Shea, 950 N.E.2d 393, 404 (Mass. 2011) (utilizing effect-on-jury standard while commenting on sufficiency of evidence); Commonwealth v. Smith, 951 N.E.2d 674, 684-85 (Mass. 2011) (listing different considerations in determining effect of error on verdict); Commonwealth v. Charles, 923 N.E.2d 519, 522-23 (Mass. 2010) (combining effect-on-jury-or-verdict and beyond-reasonable-doubt standard of *Chapman*); Commonwealth v. Muniz, 921 N.E.2d 981, 984-85 (Mass. 2010) (using effect-on-jury-or-verdict standard and beyond-reasonable-doubt standard of *Chapman*); Commonwealth v. Federico, 683 N.E.2d 1035, 1041 (Mass. 1997) (stating standard of analysis is effect on jury standard of *Kotteakos*); Commonwealth v. Jones, 666 N.E.2d 994, 999 (Mass. 1996) (using phrase "harmless beyond a reasonable doubt" and discussing effect on verdicts); Commonwealth v. Flebotte, 630 N.E.2d 265, 268 (Mass. 1994) (stating error is harmless if it does not affect jury); Commonwealth v. Kozec, 505 N.E.2d 519, 522 (Mass. 1987) (reasoning alludes to effect on jury; however, no standard is stated); Commonwealth v. Sinnott, 507 N.E.2d 699, 705 (Mass. 1987) (applying effect-on-jury-or-verdict test for harmless error); Commonwealth v. Reed, 492 N.E.2d 80, 82 (Mass. 1986) (discussing effect of error on jury); Commonwealth v. Elliot, 473 N.E.2d 1121, 1125 (Mass. 1985) (same); Commonwealth v. Schulze, 452 N.E.2d 216, 221-22 (Mass. 1983) (same); Commonwealth v. Caldron, 417 N.E.2d 958, 961-62 (Mass. 1981) (utilizing effect-on-jury standard and cumulative-evidence standard); Commonwealth v. Gilday, 415 N.E.2d 797, 804 (Mass. 1980) (citing to both *Chapman* and *Kotteakos* for standards of analysis); Commonwealth v. Ellison, 379 N.E.2d 560, 572 (Mass. 1978) (using effect-on-jury standard); Commonwealth v. DeChristoforo, 353 N.E.2d 769, 775-77 (Mass. 1976) (citing *Kotteakos* for harmless-error standard and discussing "great weight of evidence of guilt"); Gilday v. Commonwealth, 247 N.E.2d 396, 397 (Mass. 1969) (finding error "'harmless beyond a reasonable doubt'" because of strong evidence of guilt); Commonwealth v. Colardo, 217 N.E.2d 775, 777 (Mass. 1966) (reasoning error had substantial impact on judge without stating standard of analysis); Commonwealth v. Cokonougher, 585 N.E.2d 345, 349 (Mass. App. Ct. 1992) (using effect-on-jury standard); Commonwealth v. Cardoza, 563 N.E.2d 1384, 1387 (Mass. App. Ct. 1990) (discussing effect on jury); Commonwealth v. Horn, 502 N.E.2d 151, 153-55 (Mass. App. Ct. 1987) (discussing effect of error on jury); Commonwealth v. Seminara, 483 N.E.2d 92, 99 (Mass. App. Ct. 1985) (stating standard of analysis is effect on jury); Commonwealth v. Peruzzi, 446 N.E.2d 117, 122 (Mass. App. Ct. 1983) (citing to *Kotteakos*' effect-on-jury standard). *But see* Commonwealth v. Killelea, 351 N.E.2d 509, 515 (Mass. 1976) (stating simply that error was harmless); Commonwealth v. Sapoznik, 549 N.E.2d 116, 122 (Mass. App. Ct. 1990) (stating error not harmless without stating standard of analysis).

⁷⁵ See Commonwealth v. Barrett, 296 N.E.2d 712, 715 (Mass. App. Ct. 1973) (utilizing various harmless-error standards of Supreme Court without stating which standard relied upon). In *Barrett*, a second-degree murder case, the Massachusetts Appeals Court reversed the conviction based on a constitutionally erroneous admission of prior convictions into evidence, claiming that "evidence of guilt in this case was far from overwhelming" and that the court could not say that this evidence "'did not contribute to the verdict obtained.'" *Id.* (analyzing and quoting *Chapman*); see also Commonwealth v. Cohen, 268 N.E.2d 357, 361 (Mass. 1971) (analyzing and citing *Harrington*). The defendant in *Cohen*, who was convicted of unlawful possession of narcotics with the intent to sell, alleged that the denial of suppression of evidence, which was allegedly the result of an illegal arrest and an illegal search conducted without a warrant, was an error. *Id.* at 358. Without specifically declaring an error, the court held that admittance of the evidence in question was harmless based on other overwhelming evidence of guilt. *Id.* at 361; see also Commonwealth v. Whitaker, 951 N.E.2d 873, 884 (Mass. 2011)

In *Commonwealth v. Graves*,⁷⁶ the SJC examined standards for determining whether constitutional error in the case before it was harmless beyond a reasonable doubt by delineating the seminal Supreme Court harmless-error cases, and ultimately analyzing the error under multiple standards.⁷⁷ Following a murder conviction, the defendant in *Graves* appealed for a new trial based on the erroneous admission of one defendant's confession implicating the other codefendant during a joint

(discussing overwhelming evidence); *Commonwealth v. Depina*, 922 N.E.2d 778, 787-88 (Mass. 2010) (citing to *Chapman* for standard of analysis); *Commonwealth v. Vasquez*, 923 N.E.2d 524, 528 (Mass. 2010) (analyzing error under "harmless beyond a reasonable doubt" standard); *Commonwealth v. Vinnie*, 698 N.E.2d 896, 900-04 (Mass. 1998) (citing to *Chapman* for standard of analysis and in its reasoning); *Commonwealth v. Ghee*, 607 N.E.2d 1005, 1009-10 (Mass. 1993) (stating because there was overwhelming evidence of guilt, error was harmless beyond reasonable doubt); *Commonwealth v. Owens*, 609 N.E.2d 1208, 1214 (Mass. 1993) (citing *Chapman*); *Commonwealth v. Bryer*, 494 N.E.2d 1335, 1340 (Mass. 1986) (discussing amount of evidence presented to jury); *Commonwealth v. Cifizzari*, 492 N.E.2d 357, 366 (Mass. 1986) (discussing sufficiency of evidence to disregard error); *Commonwealth v. Ferreira*, 409 N.E.2d 188, 194 (Mass. 1980) (using "harmless beyond a reasonable doubt" verbiage without citing to *Chapman*); *Commonwealth v. Garcia*, 399 N.E.2d 460, 472-73 (Mass. 1980) (Liacos, J., dissenting) (citing to *Chapman* and discussing amount of overwhelming evidence of guilt); *Commonwealth v. Johnson*, 361 N.E.2d 212, 218 (Mass. 1977) (stating it is "clear beyond a reasonable doubt" that alleged error did not have adverse effect); *Commonwealth v. Hosey*, 334 N.E.2d 44, 49 (Mass. 1975) (citing to *Chapman* contrasting *Milton*); *Commonwealth v. Morgan*, 339 N.E.2d 723, 727 (Mass. 1975) (stating "any prejudice was insubstantial and was rendered harmless beyond any reasonable doubt" by jury instruction); *Commonwealth v. Pleasant*, 315 N.E.2d 874, 876 (Mass. 1974) (citing to *Chapman*); *Commonwealth v. Tropeano*, 306 N.E.2d 811, 812 (Mass. 1974) (stating error harmless beyond reasonable doubt, citing *Chapman*); *Commonwealth v. Nutbrown*, 968 N.E.2d 418, 425 (Mass. App. Ct. 2012) (using "harmless beyond a reasonable doubt" verbiage without citing to *Chapman*); *Commonwealth v. Velez*, 969 N.E.2d 1142, 1147 (Mass. App. Ct. 2012) (same); *Commonwealth v. Lima*, 951 N.E.2d 952, 960 (Mass. App. Ct. 2011) (discussing overwhelming evidence); *Commonwealth v. Rumery*, 940 N.E.2d 1251, 1254 (Mass. App. Ct. 2011) (noting substantial evidence of guilt); *Commonwealth v. Rosa*, 899 N.E.2d 887, 895 (Mass. App. Ct. 2009) (discussing strength of Commonwealth's case in rationale for finding error harmless); *Commonwealth v. Gardner*, 570 N.E.2d 1033, 1041 (Mass. App. Ct. 1991) (describing lack of overwhelming evidence); *Commonwealth v. Luiz*, 552 N.E.2d 577, 578 (Mass. App. Ct. 1990) (citing to *Chapman*); *Commonwealth v. Healey*, 534 N.E.2d 301, 307 (Mass. App. Ct. 1989) (discussing amount of error which made trial error harmless); *Commonwealth v. Hudson*, 525 N.E.2d 447, 449 (Mass. App. Ct. 1988) (stating this was not case with overwhelming evidence to nullify effect of trial error); *Commonwealth v. McNickles*, 491 N.E.2d 662, 666 (Mass. App. Ct. 1986) (discussing effect of overwhelming evidence on jury); *Commonwealth v. Riley*, 497 N.E.2d 651, 655 (Mass. App. Ct. 1986) (discussing sufficiency of evidence to negate error); *Commonwealth v. Benbow*, 452 N.E.2d 1164, 1166 (Mass. App. Ct. 1983) (reasoning "any error was harmless beyond a reasonable doubt in light of overwhelming evidence"); *Commonwealth v. Billups*, 432 N.E.2d 105, 106 (Mass. App. Ct. 1982) (stating error inconsequential in light of overwhelming evidence against defendant); *Commonwealth v. Grieco*, 362 N.E.2d 1204, 1209-10 (Mass. App. Ct. 1977) (citing to both *Harrington* and *Chapman*).

⁷⁶ 299 N.E.2d 711 (Mass. 1973).

⁷⁷ *Id.* at 712-17 (examining standards for determining whether error is harmless).

trial in violation of the *Bruton* Rule.⁷⁸ The SJC concluded that the codefendant's statement was additional to the other overwhelming evidence of his involvement in the crime and that this statement could not have significantly influenced the jury, thus utilizing both the *Chapman* and *Harrington* standards.⁷⁹ As a result, courts continued to cite to *Graves*, or use both *Chapman* and *Harrington* standards, in their analysis for the next several decades.⁸⁰

In his concurring opinion in *Graves*, Justice Hennessey agreed that the admission of the codefendant's statement was harmless; however, he disagreed with the notion that there was overwhelming evidence that the defendant submitted to the arrest.⁸¹ Justice Hennessey poignantly reminded the majority of the difference between appellate courts and fact-finders at the trial level when considering the weight of the evidence in a harmless-error analysis.⁸² Additionally, when detailing this evidentiary-review

⁷⁸ See *Graves*, 299 N.E.2d at 712 (explaining procedural history of case). At trial, the judge analyzed the *Bruton* error and held that the admission of the codefendant's statement was a constitutional error. *Id.*; see also *Bruton v. United States*, 391 U.S. 123, 137 (1968) (announcing rule regarding co-defendant's testifying with respect to Confrontation Clause of Sixth Amendment). The *Bruton* Rule states that the defendant's right under the Sixth Amendment to confront and cross-examine a witness against him is violated if a confessing defendant's statement is used against a non-confessing defendant at their joint trial, and the confessing defendant does not take the stand to be cross-examined. *Bruton*, 391 U.S. at 137.

⁷⁹ See *Graves*, 299 N.E.2d at 717 (stating court's holding). "We conclude 'beyond a reasonable doubt, that the minds of an average jury would not have found the Commonwealth's case significantly less persuasive had . . . ([the] pre-trial statement) been excluded.' Nor do we think that [the] statement contributed to the verdict obtained." *Id.* (quoting *LeBlanc v. Commonwealth*, 193 N.E.2d 260, 263 (1973)).

⁸⁰ See, e.g., *Commonwealth v. Parenteau*, 948 N.E.2d 883, 891-92 (Mass. 2011) (utilizing both *Harrington* and *Chapman* standards without specifically citing to those cases); *Commonwealth v. Connolly*, 913 N.E.2d 356, 374-76 (Mass. 2009) (affirming jury's conviction based on evidence, using "harmless beyond a reasonable doubt" terminology); *Commonwealth v. Perez*, 581 N.E.2d 1010, 1017 (Mass. 1991) (citing both *Chapman* and *Harrington* as well as *Milton v. Wainwright*); *Commonwealth v. Marini*, 378 N.E.2d 51, 57-58 (Mass. 1978) (citing to and analyzing under both *Chapman* and *Milton*); *Commonwealth v. LeBlanc*, 299 N.E.2d 719, 724 (Mass. 1973) (citing *Graves* to find error harmless under "variant definitions" of harmless error); *Commonwealth v. Ramsey*, 949 N.E.2d 927, 930 (Mass. App. Ct. 2011) ("To establish harmlessness beyond a reasonable doubt, the Commonwealth must show that other properly admitted evidence of guilt is 'overwhelming' . . ."); *Commonwealth v. Sullivan*, 927 N.E.2d 519, 525-27 (Mass. App. Ct. 2010) (discussing overwhelming evidence and using "harmless beyond a reasonable doubt" language).

⁸¹ See *Graves*, 299 N.E.2d at 717-18 (Hennessey, J., concurring) (discussing different reasons for denying motion for new trial). Justice Hennessey explained that he would decide the issue of abandonment, which was not decided at the trial court, holding that "surrender as a result of arrest does not constitute the defence of abandonment . . ." *Id.* at 718.

⁸² *Id.* at 717-18 (discussing appellate and trial courts' roles in analyzing evidence).

Unlike the fact-finder (whether judge or juror), who has heard the witnesses and considers whether matters have been proved beyond a reasonable doubt,

difference, Justice Hennessey displayed the discomfort some Massachusetts judges felt in applying harmless-error analysis: “this concurrence, in a traditional appellate role, rules that evidence on an issue was insufficient for the jury’s consideration, while the majority opinion is based on an infrequently invoked appellate function of weighing and contrasting conflicting evidence as would a fact-finding judge or jury.”⁸³

In *Commonwealth v. Hanger*,⁸⁴ the SJC again took note of the variant definitions of harmless error set forth by the Supreme Court that Massachusetts courts have repeatedly followed.⁸⁵ Despite acknowledging the lack of uniformity, the SJC refused to adopt a single test for harmless error.⁸⁶ The SJC decided that the conviction for kidnapping, assault with intent to rape, assault with force and violence with intent to rob, and assault and battery with a dangerous weapon did not require reversal under either the “contribution to the verdict” standard or the “overwhelming evidence of guilt” standard.⁸⁷ The court stated that it was unnecessary to resolve the variant tests of harmless error into one streamlined and definitive approach because the error was harmless beyond a reasonable doubt under the two tests propounded by the Supreme Court.⁸⁸

Beginning in the 1980s, in a brief attempt to clearly define the harmless-error analysis, the SJC began to expand its analysis of harmless error in *Commonwealth v. Mahdi*.⁸⁹ The alleged constitutional error in this first-degree murder case occurred when the prosecution admitted the

the appellate court has at best a very limited privilege of rejecting evidence as incredible. It is also crucial that the requirements for proof beyond a reasonable doubt should not be diluted at the appellate level, lest they eventually be diluted at the trial level.

Id. at 718.

⁸³ *Id.* (noting Justice Hennessey’s disagreement over majority’s implied characterization of role of appellate courts).

⁸⁴ 386 N.E.2d 1262 (Mass. 1979).

⁸⁵ *Id.* at 1267 (describing varied approaches taken by Supreme Court). The SJC listed several Massachusetts cases throughout the years that analyzed harmless error using both the *Chapman* “effect on verdict” standard and the “overwhelming evidence” standard of *Milton v. Wainwright*. *Id.*

⁸⁶ *Id.* (stating court’s opinion). The court stated that adopting one test of harmless error was unnecessary in the case before it, thus refusing to resolve the inconsistency within Massachusetts courts’ applications of the harmless-error doctrine. *Id.*

⁸⁷ *Id.* at 1266-67 (stating court’s holding). Although the court agreed that the trial court erred in granting the prosecution’s request to require the disclosure of an alibi defense, the court deemed the error harmless, thus affirming the conviction. *Id.* at 1263.

⁸⁸ *Id.* at 1267 (delineating court’s reasoning). The SJC explained that the Commonwealth had met its burden of showing that the trial judge’s error was harmless because the evidence of guilt was overwhelming and the error did not contribute to the verdict. *Id.*

⁸⁹ 448 N.E.2d 704, 714-15 (Mass. 1983) (discussing factors of harmless-error analysis).

defendant's post-arrest and post-*Miranda* silence.⁹⁰ However, as the SJC previously decided that prosecutorial comments on post-arrest silence are unacceptable to impeach an exculpatory story, the court conducted a harmless-error analysis on the constitutional error raised in the defendant's appeal.⁹¹ In this case, however, the SJC made a point of explaining that their analysis would combine the various considerations that Massachusetts and other courts had weighed when looking at the possible prejudicial effect of improperly admitted evidence in their harmless-error analysis.⁹² The SJC decided *Mahdi* three years before the Supreme Court's *Van Arsdall* decision.⁹³ In comparing these factors to the evidence of the defendant's guilt, the *Mahdi* court concluded that the weight of the Commonwealth's evidence was insufficient to make the prosecutor's comments harmless, thus requiring reversal.⁹⁴

⁹⁰ *Id.* (discussing error under harmless-error review). The court noted that the prosecutor's questions regarding the defendant's racial origins and religious tenets constituted prosecutorial misconduct, but did not delineate a harmless-error analysis of this error, as it was immediately deemed prejudicial. *Id.* at 711-13.

⁹¹ *Id.* at 714 (citing *Commonwealth v. Cobb*, 373 N.E.2d 1145, 1149-50 (Mass. 1978)). In *Cobb*, the SJC analyzed and followed two U.S. Supreme Court decisions that held that certain instances of prosecutorial comment on post-arrest silence might constitute harmless error under the *Chapman* standard. *Cobb*, 373 N.E.2d 1149-50 (citing *United States v. Hale*, 422 U.S. 171, 177 (1975) and *Doyle v. Ohio*, 426 U.S. 610, 617-18 (1976)).

⁹² See *Mahdi*, 448 N.E.2d at 714-15 (listing factors determining prejudicial effect of erroneously admitted evidence). These factors included: "(1) the relationship between the evidence and the premise of the defense; (2) who introduced the issue at trial; (3) the weight or quantum of evidence of guilt; (4) the frequency of the reference; and (5) the availability or effect of curative instructions." *Id.*; see also *Commonwealth v. Mendes*, 974 N.E.2d 606, 611-15 (Mass. 2012) (using multiple factors and standards of analysis). In *Mendes*, the court analyzed "whether the error was harmless beyond a reasonable doubt" by using "overwhelming evidence of guilt," "effect on the jury's verdicts," and the *Mahdi* factors. *Mendes*, 974 N.E.2d 611-15. Massachusetts courts continue to employ various standards for harmless error analyses. See, e.g., *Commonwealth v. Tyree*, 919 N.E.2d 660, 683 (Mass. 2010) (listing factors of analysis, citing to *Mahdi*); *Commonwealth v. Dagraca*, 854 N.E.2d 1249, 1255 (Mass. 2006) (citing *Mahdi* factors to see if error affected jury or verdict); *Commonwealth v. Molina*, 786 N.E.2d 1191, 1197 (Mass. 2003) (listing factors of analysis); *Commonwealth v. Peixoto*, 722 N.E.2d 470, 475 (Mass. 2000) (citing *Mahdi* factors); *Commonwealth v. DiBenedetto*, 605 N.E.2d 811, 814 (Mass. 1992) (citing *Van Arsdall* factors); *Commonwealth v. Perrot*, 554 N.E.2d 1205, 1211 (Mass. 1990) (citing *Chapman*'s beyond-reasonable-doubt standard and *Van Arsdall* factors); *Commonwealth v. Westbrook*, 947 N.E.2d 51, 56 (Mass. App. Ct. 2011) (utilizing various factors of analysis, including effect-on-jury-or-verdict and overwhelming-evidence standards); *Commonwealth v. Morales*, 925 N.E.2d 551, 554-56 (Mass. App. Ct. 2010) (citing *Chapman* and *Mahdi* factors to see if error effected jury or verdict); *Commonwealth v. Hollister*, 916 N.E.2d 768, 770 (Mass. App. Ct. 2009) (same).

⁹³ Compare *Commonwealth v. Mahdi*, 448 N.E.2d 704 (Mass. 1983), with *Delaware v. Van Arsdall*, 475 U.S. 673 (1986) (noting three-year difference between cases).

⁹⁴ *Mahdi*, 448 N.E.2d at 715 (stating court's holding).

IV. ANALYSIS

Mahdi was the last attempt that Massachusetts courts made at developing their harmless error analysis.⁹⁵ Following *Mahdi*, appellate courts utilized the various standards of analysis previously explored with the use of factors developed in *Mahdi*.⁹⁶ Massachusetts courts are cognizant of the fact that they utilize various tests for harmless error, as promulgated by the Supreme Court, but the SJC has yet to choose between these standards or to define its own test for harmless error.⁹⁷

Due to the Supreme Court's failure in firmly defining one rule for harmless error, Massachusetts courts are consistent with national trends in utilizing various forms of analysis in conjunction with one another on an ad-hoc basis.⁹⁸ Massachusetts courts change standards that they use on a case-by-case basis regardless of the error.⁹⁹ This allows courts to choose

⁹⁵ See cases cited *supra* notes 89-94 and accompanying text (discussing SJC's expansion of harmless-error analysis).

⁹⁶ See cases cited *supra* note 92 and accompanying text (discussing two decades of combining analysis standards with *Van Arsdall* and *Mahdi* factors).

⁹⁷ See *Commonwealth v. Hanger*, 386 N.E.2d 1262, 1267 (Mass. 1979) (noting how SJC circumvented need to define one test of harmless error); see also *Commonwealth v. Connolly*, 913 N.E.2d 356, 375 (Mass. 2009) (refusing to define "appropriate" analysis of harmless error). The SJC stated that it "need not resolve the question of the appropriate standard [of harmless error] because . . . we conclude that the error [in this case] was harmless beyond a reasonable doubt." *Connolly*, 913 N.E.2d at 375.

⁹⁸ See *Commonwealth v. Nelson*, 953 N.E.2d 164, 173 (Mass. 2011) (combining effect-on-verdict, harmless-beyond-reasonable-doubt, and overwhelming-evidence standards). The court stated that the issue is:

[Whether the erroneous admission of drug certificates in violation of the Confrontation Clause] was harmless beyond a reasonable doubt; that is, the court must be satisfied that the Commonwealth proved beyond a reasonable doubt that the certificate had "little or no effect on the verdicts." The inquiry is whether the Commonwealth's circumstantial evidence is so "overwhelming" as to "nullify any effect" that the admission of the certificate might have had on the verdict.

Id. (internal citations omitted).

⁹⁹ See cases cited *supra* notes 14-15 and accompanying text (regarding reversal and affirmation of two murder cases with same constitutional error). In *Whitaker*, the court affirmed the conviction for the murder of a teenage girl, despite the trial court's error in depriving the defendant of his Sixth Amendment right to confront witnesses against him. *Commonwealth v. Whitaker*, 951 N.E.2d 873, 883 (Mass. 2011). The SJC conducted a harmless-error analysis combining the effect-on-the-fact-finder and overwhelming-evidence standards. *Id.* at 884. The court stated that:

"As an appellate court, we ask whether 'on the totality of the record before us, weighing the properly admitted and the improperly admitted evidence

the result they desire by utilizing the standard that justifies the result.¹⁰⁰

Additionally, if this inconsistency continues, courts will cite to as many of the standards as they can within their analysis to decide if an error is harmless.¹⁰¹ Following the lead of the SJC, intermediate appellate courts in Massachusetts also frequently apply and combine various harmless-error standards.¹⁰² At times, a court may cite to one standard in its analysis but

together, we are satisfied beyond a reasonable doubt that the tainted evidence did not have an effect on the [fact finder] and did not contribute to the [fact finder's findings].”

Id. (quoting *Commonwealth v. Vasquez*, 923 N.E.2d 524, 533 (Mass. 2010)). The court went on to examine the evidence presented before the trial court, concluding that there was “overwhelming” evidence to render the error “harmless beyond a reasonable doubt.” *Id.* In *Tanso*, the SJC did not conduct a harmless-error analysis on the trial court’s error of violating the defendant’s Sixth Amendment right to confront witnesses against him. *Commonwealth v. Tanso*, 583 N.E.2d 1247, 1253 (Mass. 1992). The SJC made a point of stating that the “belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country’s constitutional goal.” *Id.* (quoting *Pointer v. Texas*, 380 U.S. 400, 404-05 (1965)). Subsequently, the court reversed the defendant’s double-homicide conviction because of this Sixth Amendment violation and other trial court errors. *Tanso*, 583 N.E.2d at 1257. In two other SJC cases, the harmless-error analysis diverged when deciding whether the defendant’s admission testimony regarding the nature of the substances possessed could be used in the harmless error analysis in conjunction with other evidence about the nature of the substance. Compare *Commonwealth v. Westbrook*, 947 N.E.2d 51, 59 (Mass. App. Ct. 2011) (finding that erroneous admission of certificates of drug analysis was harmless error), with *Commonwealth v. Ramsey*, 949 N.E.2d 927, 930-33 (Mass. App. Ct. 2011) (Grasso, J., concurring in part and dissenting in part) (finding that erroneous admission of certificates of drug analysis reversible error).

¹⁰⁰ See *Commonwealth v. Gilday*, 415 N.E.2d 797, 805 (Mass. 1980) (noting SJC’s determination not to overturn guilty conviction for murder of police officer). After acknowledging that the principle of harmless error should be applied with restraint, the court stated that the error in suppressing exculpatory information was “harmless beyond a reasonable doubt.” *Id.* at 804. The court further explained that because of the nature of the crime, it would not overturn the guilty verdict: “[t]his case concerns the cold-blooded killing of a police officer. There was overwhelming evidence that Gilday committed the murder, including his extraordinary statements on the witness stand. The granting of a new trial here would be a miscarriage of justice.” *Id.* at 805; see also cases cited *supra* note 99 and accompanying text (discussing cases with same errors, but different resolutions of harmless-error analysis).

¹⁰¹ See *Westbrook*, 947 N.E.2d at 56 (utilizing various factors-of-analysis, effect-on-jury-or-verdict, and overwhelming-evidence standards); see also *Commonwealth v. Perez*, 581 N.E.2d 1010, 1017 (Mass. 1991) (citing to *Chapman*, *Milton*, and *Harrington* for standards of harmless error); *Commonwealth v. Marini*, 378 N.E.2d 51, 57-58 (Mass. 1978) (conducting analysis under both *Chapman* and *Milton* individually).

¹⁰² See, e.g., *Commonwealth v. Reyes*, 982 N.E.2d 504, 515-16 (Mass. 2013) (using effect-on-jury standard, but never explicitly stating standard of analysis nor citing *Chapman*); *Commonwealth v. Gray*, 978 N.E.2d 543, 557-59 (Mass. 2012) (using *Chapman*’s “harmless beyond a reasonable doubt” standard and discussing “impact on the jury”); *Commonwealth v. Nutbrown*, 968 N.E.2d 418, 425-26 (Mass. App. Ct. 2012) (neglecting to specify analysis standard, using *Chapman* verbiage, while citing *Harrington*’s overwhelming-evidence standard); see also cases cited *supra* notes 74, 75, 79, and 80 and accompanying text (noting various cases

then use a different standard in its reasoning than previously stated in its holding.¹⁰³

Massachusetts cases repeatedly fail to state a standard of analysis, instead only stating that the error is or is not harmless.¹⁰⁴ Some courts have developed the tendency of not explaining their reasoning for determining why an alleged error was or was not harmless; they simply declare an error to be or not to be harmless (or did or did not prejudice the outcome of the trial).¹⁰⁵

Further exacerbating the problem, some Massachusetts courts have completely abandoned error analysis altogether, using the rule to avoid deciding difficult issues.¹⁰⁶ Appellate courts have simply declared that if an error occurred, it was harmless.¹⁰⁷ This practice of reviewing for error, but ignoring the question of whether an error even occurred, has been the

with combination of standards cited throughout history).

¹⁰³ See *Gilday*, 415 N.E.2d at 804 (citing to *Chapman* and *Kotteakos* for standard of analysis, but discussing overwhelming evidence of guilt).

¹⁰⁴ See *Commonwealth v. Killelea*, 351 N.E.2d 509, 515 (Mass. 1976) (stating simply that error was harmless); *Commonwealth v. Billups*, 432 N.E.2d 105, 106 (Mass. App. Ct. 1982) (stating “if [the alleged error] was error, it was clearly harmless in its impact on the jury”). Despite mentioning a potential impact on the jury and discussing the “generally overwhelming nature of the evidence against the defendant,” the *Billups* court neither stated a standard for the harmless-error analysis nor cited to any harmless-error cases. See *Billups*, 432 N.E.2d at 106; see also *Commonwealth v. Ferreira*, 409 N.E.2d 188, 194 (Mass. 1980) (concluding error harmless while failing to name standard of analysis). In *Ferreira*, a first-degree murder case, the SJC discussed the trial judge’s limitation on one of the witnesses regarding the witness’s alleged intent on the night of the crime, which the defendant alleged was an error. *Ferreira*, 409 N.E.2d at 194. The SJC stated that if this was an error, it was harmless beyond a reasonable doubt, while failing to state a standard of analysis or cite to any harmless-error standards in its reasoning. *Id.* The court simply justified its conclusion by looking at other testimony in the case, and stating:

[I]n the face of direct testimony by two witnesses to the murder that the defendant did the actual shooting, the limitation on testimony regarding the alleged intent of another person earlier that night, albeit one of the witnesses, to do the shooting was, if error, harmless beyond a reasonable doubt.

Id.

¹⁰⁵ See cases cited *supra* note 104 and accompanying text (noting habit of declining to conduct error analysis).

¹⁰⁶ See *Commonwealth v. LeBlanc*, 299 N.E.2d 719, 724 (Mass. 1973) (avoiding declaration of alleged *Bruton* violation as error). In this first-degree murder case, the defendant alleged that it was an error to admit a co-conspirator’s confession that implicated the defendant without the co-conspirator ever testifying. *Id.* at 722. The court discussed how the testimony of the co-conspirator could have been interpreted, but never officially stated whether it was an actual error to admit the testimony. *Id.* at 722-24. The court simply concluded that the “alleged errors were harmless beyond a reasonable doubt . . .” *Id.* at 724.

¹⁰⁷ See cases cited *supra* notes 104-106 and accompanying text (discussing various cases where courts stated that if error occurred, it was harmless).

practice of courts all over the country, including the United States Supreme Court.¹⁰⁸

All of these proclivities that Massachusetts appellate courts have developed over the years convey the fact that Massachusetts struggles with the harmless-error analysis.¹⁰⁹ Currently, the courts appear to oscillate between an “effect on the jury/verdict” standard and the “overwhelming evidence of guilt” standard, while still playing homage to *Chapman*’s “harmless beyond a reasonable doubt” terminology.¹¹⁰ The courts’ analyses rely heavily on the facts of a particular case instead of a strict review of the error.¹¹¹ This fact-driven approach to harmless error only leads to inconsistencies within the doctrine because every case will have different facts and circumstances surrounding the error.¹¹²

The harmless-error doctrine in Massachusetts is inconsistent.¹¹³ The doctrine, as promulgated in the Supreme Court, has no strict rule of application.¹¹⁴ Judges do a disservice not only to defendants, but to

¹⁰⁸ See *Milton v. Wainwright*, 407 U.S. 371, 372-73 (1972) (discussing seminal Supreme Court case where Court never ruled whether error occurred).

¹⁰⁹ See cases cited *supra* notes 99-107 and accompanying text (listing cases with varying combinations and results under doctrine showing courts discomfort with doctrine); see also *Commonwealth v. Sinnott*, 507 N.E.2d 699, 705 (Mass. 1987) (“We recognize, however, that ‘if the concept of harmless error is loosely applied, it can serve too readily as a bridge for a procession of mistakes and injustices.’” (quoting *Commonwealth v. Marini*, 378 N.E.2d 51, 58 (Mass. 1978))); *Commonwealth v. Peruzzi*, 446 N.E.2d 117, 122 (Mass. App. Ct. 1983) (commenting on how judgment of guilt is jury’s responsibility). In reversing and setting aside the guilty finding in *Peruzzi*, Justice Greaney commented on the role of appellate courts, stating that:

“[Appellate courts] are not authorized to look at the printed record, resolve conflicting evidence, and reach the conclusion that the error was harmless because we think the defendant was guilty. That would be to substitute our judgment for that of the jury and, under our system of justice, juries alone have been entrusted with that responsibility.”

Peruzzi, 446 N.E.2d at 122 (quoting *Weiler v. United States*, 323 U.S. 606, 611 (1945)).

¹¹⁰ See *Commonwealth v. Nelson*, 953 N.E.2d 164, 175 (Mass. 2011) (noting SJC’s use of all three standards in its analysis).

¹¹¹ See cases cited *supra* note 75 and accompanying text (discussing amount of overwhelming evidence of guilt in regards to alleged error).

¹¹² See cases cited *supra* note 99 and accompanying text (noting various cases with same error but different results under harmless-error analysis).

¹¹³ See *supra* Part III.B (discussing current application of harmless error in Massachusetts criminal trials); see also cases cited *supra* notes 95-112 and accompanying text (noting various uses, applications, and results of harmless-error analysis within Massachusetts appellate jurisprudence).

¹¹⁴ See *supra* notes 52-52, 54 and accompanying text (discussing last seminal Supreme Court case further complicating harmless-error analysis); see also *Chapel*, *supra* note 27, at 529 (noting Supreme Court’s confusion about harmless-error rule).

Massachusetts jurisprudence when they randomly apply harmless-error analysis without any apparent consistency.¹¹⁵ Without further guidance from the Supreme Court, Massachusetts appellate courts, as well as appellate courts across the nation, will continue to be inconsistent in their harmless-error analysis.¹¹⁶

Despite the need to look at cases on an individual basis, the courts should use a uniform standard of analysis of harmless error to apply to each individual case.¹¹⁷ Massachusetts should take the lead in creating a concrete standard of harmless-error review.¹¹⁸ Appellate courts should first consider each type of error and decide its severity.¹¹⁹ The court should then conduct a harmless-error analysis and remand the case if the error is found to be harmful, possibly violating the accused's right to a fair trial.¹²⁰ Alternatively, if the error is not so significant to require reversal, then the error should be analyzed in conjunction with the facts of the case.¹²¹ If there is overwhelming evidence of guilt, apart from the error, then the error should be deemed harmless and the conviction affirmed.¹²²

¹¹⁵ See Edwards, *supra* note 38, at 1169-70 (discussing the convenience that harmless-error doctrine affords appellate courts).

The harmless-error doctrine offers us a way to deal with . . . aggravation. Under this doctrine, when an appellate court's review of trial proceedings uncovers a legal error that might produce a disfavored result . . . the court may simply call the error "harmless," and the potential aggravation is removed.

Id.

¹¹⁶ See Foley & Filiatrault, *supra* note 28, at 457-59 (noting lack of uniform definition of harmless error and different factors of analysis in Michigan); see also Cooper, *supra* note 25, at 309-10 (noting difficulty in harmless-error jurisprudence); Sweeney, *supra* note 25, at 286 (discussing varying standards of harmless-error analysis in Washington). "This seemingly simple concept . . . has caused a great deal of difficulty in practice . . . caus[ing] considerable confusion among the courts of appeals." Cooper, *supra* note 25, at 309-10.

¹¹⁷ See Chapel, *supra* note 27, at 539 (noting division of Supreme Court on application of harmless-error rule); see also Cooper, *supra* note 25, at 322-23 (discussing reasoning used in divided Supreme Court's harmless-error analysis).

¹¹⁸ See, e.g., Chapel, *supra* note 27, at 539 (discussing varying rules of harmless error in other jurisdictions, including Supreme Court); Cooper, *supra* note 25, at 309-10, 322-23 (same); Foley & Filiatrault, *supra* note 28, at 457-58 (same); Sweeney, *supra* note 25, at 286 (same).

¹¹⁹ See sources cited *supra* note 27 and accompanying text (noting role of appellate courts in reviewing trial error).

¹²⁰ See sources cited *supra* note 27 and accompanying text (stating appellate courts review alleged errors and correct them, if found, unless harmless).

¹²¹ See sources cited *supra* note 37 and accompanying text (discussing harmless-error analysis must be done with examination of entire record).

¹²² See sources cited *supra* notes 47-48, 75 and accompanying text (discussing overwhelming-evidence-of-guilt standard used by Supreme Court and Massachusetts appellate

V. CONCLUSION

Without a clear harmless-error standard of analysis, prosecutors, who bear the burden of proving that an error is harmless, will be unable to defend hard-won convictions. Similarly, defense counsel will have no assurance as to what should happen if an error is committed during trial. Without a clearly-defined standard and method of application of the harmless-error doctrine, Massachusetts will continue to have series of cases like *Whitaker* and *Tanso*, where justice will only be appropriately served half the time. The citizens of Massachusetts deserve to know that justice will be asserted more even-handedly.

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courts); *see also* Commonwealth v. Peruzzi, 446 N.E.2d 117, 122 (Mass. App. Ct. 1983) (discussing need to remove error from record as a whole in harmless-error analysis). “But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected.” *Peruzzi*, 446 N.E.2d at 122 (internal citations omitted).