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Considerations Concerning Harmless Error in Louisiana Criminal Cases

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I. INTRODUCTION

Some time ago, I was approached by several esteemed members of the faculty of the Paul M. Hebert Law Center who asked me to consider preparing an article for publication in the *Louisiana Law Review*. When they informed me that the topic of the article was to be harmless error, as considered from the "prosecutor's perspective," my initial reaction was one of reticence to undertake such a daunting task. At the time I was a prosecutor with the Louisiana Attorney General's Office, and thus was familiar with the core issues that such an article would have to examine. I was also generally familiar, from my time as a judicial clerk, with the variegated treatment given this topic nationwide by published opinions and articles. In my personal practice, I had often heard the cynical view of the defense bar regarding judicial application of the doctrine. And I knew first-hand the prosecutor's feeling when briefing harmless error issues, a feeling much akin, I think, to that which must arise during a game of Russian roulette.

Despite my initial reservations, I undertook to attempt a concise discussion of the issue. My goal is to present a statement that is sufficiently academic to be worthy of consideration, yet not so prolix or turgid as to prove elusive or impracticable. I hope I have succeeded, and that something worthwhile, even if only further discussion, will come from this.

Additionally, while this article is indeed written from a "prosecutor's perspective," further elucidation of that perspective is appropriate. During my time as a prosecutor, I, like most prosecutors, was often stirred by the great responsibilities that were the natural concomitant of the power inherent in my position. Indeed, now that I am again in private practice I often miss the purity,

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if not the clarity, of having as my first and only client the people of this state, and perhaps in a larger sense the elusive concept of "justice." I therefore believe that an ethical prosecutor cannot simply assume a counterpoint to the position of the defense, as would an adversary in civil litigation, because to do so would comprise an elevation of the prosecutor's own interests, or those of some other interested party, above the interests of justice. Thus, while I believe whole-heartedly in the dialectic process, this article is not simply an adversarial exercise *vis-à-vis* any similar presentation of the defense bar, and I trust it will not be read in that light.

II. NARROWING THE QUESTION

In federal court, the universe of errors in a criminal case is susceptible to division between those errors that merely violate a statutory rule or maxim, and those errors violative of constitutional protections. This analytical divide, while determinative of the applicable standard of review in federal court, is essentially irrelevant to Louisiana appellate courts. This is because, at least for the time being, the Louisiana Supreme Court appears to have adopted a single harmless error methodology to be applied uniformly to all manners of error, whatever their dimension.[1]

The Louisiana Supreme Court has also apparently adopted the distinction, first articulated by Chief Justice Rehnquist in one of the two majority opinions in *Arizona v. Fulminante*,[2] between "structural" and "trial" errors.[3] A "structural" error is one that so undermines the fundamental principles that govern the course of American criminal prosecutions that the error is considered per se prejudicial, and no harmless error review is possible.[4] When structural error occurs, there has been no cognizable prosecution, conviction, or sentence in the eyes of the law. As one might infer, the range of "structural" error is narrow[5] and exclusive; all errors not qualified as "structural" are considered "trial" errors subject to harmless error review.

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1. *See* State v. Johnson, 664 So. 2d 94, 100 (La. 1995); State v. Gibson, 391 So. 2d 421, 427–28 (La. 1980). This statement applies only to issues arising under Louisiana statutory or constitutional law, since federal law governs appellate review of errors involving the denial of federal constitutional rights. Chapman v. California, 386 U.S. 18, 21, 87 S. Ct. 824, 826–27 (1967). Thus, to the extent that this article is construed as promoting a change in the way that harmless error analysis is performed by the appellate courts of this state, any such change is only applicable to errors arising under Louisiana law.

2. 499 U.S. 279, 111 S. Ct. 1246 (1991).

3. State v. Cage, 583 So. 2d 1125 (La. 1991), *cert. denied*, 502 U.S. 874, 112 S. Ct. 211 (1991).

4. *Fulminante*, 499 U.S. at 307–11, 111 S.Ct. at 1264–65.

5. *See Johnson*, 664 So. 2d at 101(citations omitted).

This article takes no position regarding the structural/trial error dichotomy. First, all "structural" errors recognized to date are of a federal constitutional dimension,[6] and are therefore governed by issues of federal law beyond the scope of this article. Second, the criticisms of this dichotomy have been pointed and poignant, and the courts' difficulties in effectively applying it have been the subject of much learned comment.[7] Finally, echoing a point made by several courts, if "structural" errors are indeed so flagrant and injurious to the integrity of our legal system, then such errors cannot and will not be found harmless by any reasonably constructed mode of harmless error review.

To further narrow the focus, however, it is helpful to separate at the threshold instances of potentially reversible error into five separate categories. These categories are defined by both the stage of the prosecution wherein they may be expected to occur, and the nature of the error (and analysis) they engender. These categories include: 1) errors that occur in the course of pretrial proceedings;[8] 2) errors that occur in the course of voir dire; 3) errors in the taking of evidence or "evidentiary" error; 4) improper argument or comment by counsel; and 5) erroneous jury instructions.[9] While there are certainly particular species of error that do not fall neatly within these five categories, e.g., trial by a biased judge, these five categories provide a functional framework within to consider the gamut of reversible error.

Addressing these five categories of error, it is safe to say that our current harmless error rule has been formulated, articulated, and refined with the category of evidentiary error in mind. As will be explained in greater detail in the following section, Louisiana's generic harmless error rule focuses upon the effect of the subject error upon a particular jury's verdict. Obviously, the first two categories (errors occurring during pre-trial procedures and voir dire) involve error occurring prior to the selection and empanelling of a petit jury. As might be expected, therefore, these categories of error

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6. *Id.*

7. *See, e.g.*, David McCord, *The "Trial"/"Structural" Error Dichotomy: Erroneous, and Not Harmless*, 45 U. Kan. L. Rev. 1401 (1997); Charles J. Ogletree, Jr., Arizona v. Fulminante*: The Harm of Applying Harmless Error to Coerced Confessions*, 105 Harv. L. Rev. 152 (1991).

8. "Pretrial proceedings" refers to matters such as continuance motions, discovery, arraignment, including challenges to timeliness of the institution of prosecution. It does not encompass evidence-related rulings that may occur prior to the commencement of trial, such as rulings on motions to suppress evidence or motions in limine.

9. A separate category not included herein is errors that occur post-verdict, for example, errors at sentencing.

have attendant and particularized modes of analysis.[10] The category of errors concerning improper argument or comment can, in turn, be seen as derivative of, or at least interrelated with, evidentiary issues; after all, it is the evidence presented that determines the proper scope of argument and comment.[11] Similarly, in assessing errors falling within the category of erroneous jury instructions, it is often the evidentiary impact that is determinative, i.e., did the erroneous instruction unduly focus the jury's attention on particular evidence, or did it distract the jury from focusing upon evidence beneficial to the defendant?[12]

Thus, given the normative, if not heuristic, thrust of this article, the focus herein will be upon evidentiary error. Accordingly, all the exemplars presented herein fall within the category of evidentiary error.[13] Such a focus is warranted because of its commonplace occurrence, the fact that at least two other categories relate to evidentiary error (and may therefore benefit from a systematization of the way in which such error is reviewed), and the synchronicity between such error and our current formulation of the generic harmless error rule.

Finally, this article concerns the standard of harmless error review to be given evidentiary errors claimed by the defendant in an appeal from a verdict of guilty rendered by a petit jury.[14] This is because a claim by a defendant that he was prejudiced because evidence was erroneously admitted or excluded from his trial is, in the author's estimation, the most frequently occurring and most vexing species of error. If this article sheds any light upon the way in which the harmlessness of evidentiary error is to be determined, then its influence upon other categories of error will follow.

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10. *See, e.g.*, State v. Ignot, 701 So. 2d 1001, 1013–14 (La. App. 2 Cir. 1997), *writ denied*, 745 So. 2d 618 (La. 1999) (considering errors arising from amendment of bill of information, motion for continuance, and arraignment).

11. La. Code Crim. P. art. 774; *see* State v. Casey, 775 So. 2d 1022, 1036 (La. 2000) (discussing proper scope of argument and analysis of errors therein).

12. To the extent a challenged jury instruction addresses issues not related to the evidence actually received at trial, such as the burden of proof or the elements of an offense, the courts have tended to evolve particularized modes of analysis for such errors, including finding that such errors are "structural" in nature and thus not subject to harmless error review. *See, e.g., Cage*, 583 So. 2d at 1125.

13. It must be recognized that this category is subject to a further division into two subcategories, namely evidentiary error involving the admission of evidence, and error involving the exclusion of evidence. While each of these subcategories of error may suggest different methodologies in assessing harmlessness, these differences are not so great as to justify variance of the governing legal principles of harmless error review.

14. This is "obvious" given that, as a matter of statutory and constitutional law, the State cannot appeal a verdict of acquittal. La. Code Crim. P. art. 912.

III. THE NATURE OF HARMLESS ERROR

Before any consideration of the standards to be applied to harmless error review can take place, the origins and history of the harmless error doctrine, as well as the public policies animating it, must be understood. That being said, this article will not attempt to cover again ground that has been thoroughly plowed by other commentators. Suffice it to say, in the early years of the Twentieth Century both the public and jurists became highly critical of the widespread appellate practice of overturning judgments and convictions upon the discovery of any error, regardless of its significance.[15] Congress responded in 1919 by enacting the first harmless error rule, a statutory guide applicable to cases heard in federal courts.[16] The state legislatures subsequently adopted harmless error rules of their own. As the number of rights enjoyed by criminal defendants expanded over the 1960's and 1970's, the application of the harmless error doctrine expanded as well.

Louisiana has followed the national trend. In Louisiana, harmless error review is mandated by the legislature. The legislative history of this provision was examined by the Louisiana Supreme Court in *State v. Johnson*:

> The Louisiana harmless error rule was first codified in 1928 with the enactment of former LSA–R.S. 15:557.[17] This rule limited reversals to cases where the error complained of probably had a substantial effect upon the outcome of the trial. Paul M. Hebert, *The Problem of Reversible Error in Louisiana*, 6 Tul.L.Rev. 169, 199–200 (1932); Dale E. Bennett, *The 1966 Code of Criminal Procedure*, 27 La.Law Rev. 175, 230 (1967). *See also*, La. Code Crim. P. art. 921, Official Revision Comment (C)).

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15. *See, e.g.*, Addison K. Goff, IV, *Variations of a Common Theme: An Analysis of Louisiana's Experience With Harmless Error in Criminal Cases*, 53 La. L. Rev. 1577, 1578–82 (1993) (providing a succinct summary of the history of the American harmless error rule).

16. Harry T. Edwards, *To Err is Human, But Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. Rev. 1173 (1996).

17. Former La. R.S. 15:557 provided:

> No judgment shall be set aside, or a new trial granted by any appellate court of this state, in any criminal case, on the grounds of misdirection of the jury or the improper admission or rejection of evidence, or as to error of any matter of pleading or procedure, unless in the opinion of the court to which application is made, after an examination of the entire record, it appears that the error complained of has probably resulted in a miscarriage of justice, is prejudicial to the substantial rights of the accused, or constitutes a substantial violation of a constitutional or statutory right.

In 1966, LSA–R.S. 15:557 was amended and reenacted as La. Code Crim. P. art. 921.[18] Article 921 now provides:

> A judgment or ruling shall not be reversed by an appellate court because of any error, defect, irregularity, or variance which does not affect substantial rights of the accused.[19]

The history of Louisiana's harmless error rule makes clear that there has been one common directive: appellate courts should not reverse convictions for errors unless the accused's substantial rights have been violated.

Is, then, the application of the harmless error doctrine in Louisiana merely the application of a statute? Hardly. First, as will be discussed in the following section, the current harmless error rule essentially ignores the plain text of Code of Criminal Procedure Article 921 in favor of the judge-made rule articulated by the United States Supreme Court in *Chapman v. California*.[20] This fact is not particularly disturbing, as the manner in which an appellate court reviews a case, as well as the particular remedies available to that court, are questions that tend to fall within the judicial purview, and not the legislative one.[21] What it does suggest, however, is that, as in many other areas of the law that fall within the judicial function, the particular contours of Louisiana's harmless error doctrine are the result of the balancing of several competing policy factors by the courts of this state. The ultimate question presented in this process is whether, in light of the applicable policies, a particular error in a particular case warrants reversal of a conviction and, if appropriate, retrial.

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18. The 1966 version of LSA–Code Crim. P. art. 921 provided:
A judgment or ruling shall not be reversed by an appellate court on any ground unless in the opinion of the court after an examination of the entire record, it appears that the error complained of has probably resulted in a miscarriage of justice, is prejudicial to the substantial rights of the accused, or constitutes a substantial violation of a constitutional or statutory right.

19. 664 So. 2d 94, 100.

20. 386 U.S. 18, 87 S. Ct. 824 (1967).

21. *See* Paul M. Hebert, *The Problem of Reversible Error in Louisiana*, 6 Tul. L. Rev. 169, 169–70 (1932) ("Most courts, independent of statute, announced the rule that to warrant a reversal the error must be prejudicial to the party complaining, and that the commission of harmless error furnishes no ground for a new trial.") (footnote omitted). Indeed, rigid adherence to the language of Article 921, to the extent it is contrary to what custom and experience has taught the courts, might well comprise a violation of the separation-of-powers between the legislative and judicial branches. This argument, while intriguing, has not been made in any reported Louisiana case, and given the tendency of the courts of this state to proceed unilaterally in the application of Louisiana's harmless error rule is probably academic at best.

What are those policy factors? One that frequently lurks in the background, although rarely stated, is the significant cost of retrial. The term "cost" covers a range of items that far exceed the simple demands of time and money that a new trial engenders. This term also includes certain human costs, such as the imposition that a new trial will place upon the jurors forced to surrender valuable time to hear a case already presented to another jury. Not least of the "costs" that attend retrials is the significant impact that they have upon the victims of crime, and the families of those victims. Succinctly put, the American criminal justice system exhibits an unfortunate tendency towards "victimization of the victim." While it is possible to write this off as a necessary concomitant of our adversarial system, this factor grows in weight when the victim of a crime, who has already stepped forward and been subjected to the psychological rigor of one trial, is asked to do so again. Further human costs can be measured in the dedication and effort that prosecutors, defense counsel, and court staff put towards their respective tasks.

Another policy that comes into play is respect for the petit jury system. This factor must be distinguished from the question of the courts' ability to revisit jury issues as questions of law. Rather, the point here is that the reversal of a jury's verdict is an explicit rejection of that jury's disposition of the case. In the absence of evidence of extrinsic influences upon that jury, it is legally presumed to have considered all of the evidence presented and to have followed the law given to it by the trial court. If society is to respect the purview of the jury and trust in the wisdom of twelve people accepted by court and counsel to hear the case and decide the defendant's fate, then the judiciary should tread lightly when reversing a jury's verdict. This particular policy issue, which often appears in the guise of a respect for the "finality" of judgments, strongly suggests the need for a harmless error rule of appellate review. It is bolstered by the negative experience of the American judiciary with the rule of automatic reversal that pre-dated Congress's enactment of the first harmless error rule.

A related policy point is the question of respect for the law. When a defendant's guilt has been laid bare in a public trial followed by the community, the deleterious effects of appellate reversal can be significant. In addition to the distrust that such results engender in the law-abiding public, such outcomes can only exhort the criminal elements of the affected community to more nefarious activities. Respect for the law is similarly eroded when the courts ratify the conviction of a defendant whose guilt has been determined by reliance upon slipshod or inappropriate practices. As one commentator has put it, "[t]he law can be an aggravating thing. It imposes duties and responsibilities, and it sometimes forces results

that many people in society find unpalatable."[22] Our criminal justice system exists to serve a specific function, namely to determine the true facts and, where appropriate in light of those facts, sanction those who transgress the penal laws of this state. Any court ruling that is perceived to run counter to this function cannot help but undermine public confidence in the ability of the criminal justice system to protect the citizenry, including those citizens wrongly accused of criminal conduct. Part of respect for the law is respect for the integrity of the judiciary, and, more specifically, a belief that the judiciary is ready and willing to enforce those rights that we enjoy as citizens of this state. When the judiciary abdicates this protective role to promote a favorable outcome in a particular case, it leads to negative ramifications in the long run.

The issue of integrity must also be considered in light of the courts' normative function. The issue here, of course, is the integrity of the law enforcement officers who investigate crimes and the prosecutors who bring the defendants to trial. This policy increases in significance when the error claimed is one of prosecutorial misconduct, or when the error complained of is apparent and incontrovertible in light of reason or the applicable jurisprudence. Conversely, this policy is a minor one, in light of the other policy factors recited herein, when the challenged legal error is of a new or uncertain legal vintage, and recedes even further from view when a defendant's connivance or cooperation facilitates or abets the error.

This, of course, leads us to the primary, although not exclusive, policy that influences the harmless error doctrine, namely the need to respect and enforce the rights of a criminal defendant under the law.[23] While this point carries great rhetorical force when stated as a general proposition, it often loses vigor when examined at the level of the particular. The doctrine of harmless error is one of both right and remedy, and the existence and vindication of a particular "right" should not be the sole focus. Rather, it is one of the factors to be considered in determining whether reversal of a particular conviction is warranted. In that weighing, the nature and role of a particular

22. *Supra* note 16, at 1169.

23. It should be noted that one of those rights is not the right to automatic reversal on a finding of error in the trial court. While the Louisiana Constitution does provide that a criminal defendant has the "right of judicial review based upon a complete record of all the evidence upon which the judgment is based," it provides no direction regarding the manner or scope of such review. La. Const. art. 1, § 9. *See also* State v. Walker, 844 So. 2d 1060, 1066 (La. 2003) (reversing conviction due to lack of transcript); State v. Williams, 800 So. 2d 790 (La. 2001) (Calogero, C.J., dissenting) ("[T]here is no federal constitutional right of appeal corresponding to our state constitutional right to judicial review"). *Accord* Abney v. U.S., 431 U.S. 651, 656, 97 S. Ct. 2034, 2038, (1977).

"right" are significant in that certain rights are so fundamental to both legal and popular notions of "fairness" that their derogation negatively impacts the policy factors of respect for the law and integrity of the judiciary.

In sum, the harmless error doctrine exists because the interplay of these policy factors dictates that a rule of automatic reversal for every error is imprudent. While these policy considerations help justify the need for harmless error, however, and perhaps may influence the scope of the doctrine, they do not define any particular mode of analysis. This is a question for the courts.

That being said, it must be emphasized that harmless error is fundamentally a remedial doctrine. By the time the harmless error question is reached, the existence of legal error in the trial record has (or should have) already been established. Thus, the harmless error question presents a quintessential question of law for the court, in the sense that its formulation is uniquely part of the judicial function. Just as the Supreme Court has struggled over the years with the reach of the exclusionary rule to remedy Fourth Amendment violations, the courts of this state must struggle with the reach of the harmless error rule to redress errors in the trial court. That a determination of that question may involve a review of factual findings should not be disconcerting, given the wide range of so-called "questions of law" that turn upon factual determinations.[24]

The preceding discussion hopefully sheds some light upon the nature of the harmless error doctrine, and explains why such a doctrine should exist as a prudential matter. To fully understand how these general concepts translate to a particular mode of analysis, it is necessary to understand the standard of harmless error review actually being applied by Louisiana courts today.

IV. GOVERNING LOUISIANA LEGAL PRINCIPLES

As noted above, the ostensible basis for Louisiana's harmless error rule is Code of Criminal Procedure Article 921, which confines the remedy of reversal to those errors that "affect" the "substantial rights" of the defendant. As written, this statute focuses upon whether the "right" violated is "substantial" in nature. Under this

24. *See, e.g.*, Connecticut v. Barrett, 479 U.S. 523, 527 n.1, 107 S. Ct. 828, 831 n.1 (1987) (determination of whether questioning comprised a *Miranda* violation was question of law, not of fact); *State ex rel. R.T.*, 781 So. 2d 1239, 1241 (La. 2001) ("[T]he constitutional standard for evaluating the sufficiency of the evidence is whether, upon viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could find that the state proved all of the essential elements of the crime beyond a reasonable doubt.") (citing Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781 (1979)).

analysis, any error, however passing or innocuous, that violates a "substantial" right warrants reversal. Conversely, any error, however egregious or prejudicial, that violates rights that cannot be characterized as "substantial" is harmless.

In practice, however, the Louisiana courts have tended to place the adjective "substantial" before the term "violation," rather than "rights."[25] Stated another way, the focus in Louisiana is clearly upon the extent to which the challenged error actually affected the outcome of the trial. This comports with the traditional Louisiana view that "appeals in criminal cases are not granted merely to test the correctness of the trial court's ruling, but only to rectify injuries caused thereby."[26] It also reflects the spirit of the United States Supreme Court's admonition that a criminal "defendant is entitled to a fair trial but not a perfect one."[27]

The standard of harmless error review followed by the courts of this State is the familiar *Chapman* standard, i.e., "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction," and that "the court must be able to declare a belief that [the error] was harmless beyond a reasonable doubt."[28] Although initially accepted by the Louisiana Supreme Court as only a "supplemental guide in cases involving only errors of state procedure or state law,"[29] subsequent case law indicates the wholesale acceptance of the *Chapman* standard as the controlling harmless error standard for errors arising under state law.[30] Unlike federal courts,[31] Louisiana courts apply the *Chapman* standard to all such errors, regardless of whether they are of constitutional or statutory dimension.

Louisiana's high court has provided several theoretical principles to govern the application of the harmless error standard. For

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25. This continues the plain meaning of the prior incarnations of the harmless error rule, which asked, *inter alia*, whether the error "constitutes a substantial violation of a constitutional or statutory right." *Johnson*, 664 So. 2d at 100 (discussing legislative history of La. Code Crim. P. art. 921).

26. State v. Saia, 33 So. 2d 665, 668 (La. 1947) (citation omitted).

27. Lutwack v. U.S., 344 U.S. 604, 619, 73 S. Ct. 481, 490 (1953).

28. *Gibson*, 391 So. 2d at 428.

29. *Id.*

30. *See, e.g., Johnson*, 664 So. 2d at 96; *Cage*, 583 So. 2d at 1125; State v. Willie, 559 So. 2d 1321, 1332 (La. 1990).

31. Federal courts apply the less stringent standard of *Kotteakos v. United States*, 328 U.S. 750, 66 S. Ct. 1239 (1946), to cases involving only non-constitutional error. This standard calls for reversal only when the error can be said to have had a "substantial and injurious effect or influence in determining the jury's verdict." *Kotteakos*, 328 U.S. at 776, 66 S. Ct. at 1253. In addition to setting forth the standard for harmless error review of non-constitutional error on direct appeal, the *Kotteakos* standard has also been adopted as the applicable harmless error test for federal habeas courts in collateral review of state convictions. *See* Brecht v. Abrahamson, 507 U.S. 619, 113 S. Ct. 1710 (1993).

example, the focus of the *Chapman* standard is "on the impact of the error rather than the untainted evidence."[32] "The proper analysis for determining harmless error 'is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error.'"[33] This distinction, as posited, is one of perspective and assumes that the question of what impact the error had upon the jury can be severed from the question of whether the jury would have convicted in the absence of error.

A view implicit in a number of the appellate decisions cited herein is that this distinction between the impact of the error and the legal sufficiency of the remaining evidence is a meaningless one. This position is not, the defense bar's objections notwithstanding, an indefensible one. If an appellate court is certain, beyond a reasonable doubt, that a guilty verdict would have been rendered in the absence of the error, how, then, can that error still be said to have "contributed" to the guilty verdict actually rendered? While the philosopher's distinction between the glass half empty and the glass half full may comprise subtle commentary about the cognitive role of perspective, it does not alter a shared perception of what the glass contains. Similarly, regardless of whether it is approached from the perspective of the error, or the perspective of the "untainted" evidence, the key question in harmless error review is whether, in light of the entire record, the jury relied to some measure upon improper evidence in reaching its verdict.

While many commentators have criticized the foregoing principle, it is not necessarily inconsistent with the plain language of one aspect of the *Chapman* standard. The key lies in the operative definitions of the terms utilized in the *Chapman* formulation. What does it mean, for example, to ask if an error "contributed" to the verdict? The plain definition of the word "contribute" is "to have a share in any act or effect,"[34] or "to give a part."[35] Thus, to contribute to a guilty verdict, improperly received evidence must have played a part in the rendition of that verdict. A guilty verdict represents a finding by a competent jury that the quantum of evidence presented *in toto* demonstrates the factual guilt of the defendant beyond any reasonable doubt. Similarly, if there is no doubt at the appellate level that the quantum of evidence correctly introduced would have led to the same result, it should then follow that the erroneously admitted evidence had no "share" in the evidence upon which the conviction rests.

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32. *Gibson*, 391 So. 2d at 427.

33. State v. Quatrevingt, 670 So. 2d 197, 206 (La. 1996) (quoting Sullivan v. Louisiana, 508 U.S. 275, 279, 113 S. Ct. 2078, 2081 (1993)).

34. Blacks Law Dictionary (4th ed. 1968).

35. Webster's New Twentieth Century Dictionary (2d ed. 1971).

To restate this concept in terms more familiar to practitioners and judges, the term "contribute" indicates a causal nexus, however tenuous, between the error and the verdict. If there is no reasonable doubt that a guilty verdict would be rendered in the absence of error, then that same error could not have had a hand in "causing" that same verdict to be rendered. In this circumstance, nothing is gained by distinguishing between two sides of the same coin.

While this mode of analysis is reasonable, cognizance must be taken of the defense bar's objection that such an analysis does not fully comport with the admonition that the "focus" of harmless error review rest upon the error complained of, and not the other evidence of record. Upon a review of the relevant case law, this objection appears well founded. A simple review of the record without reference to the erroneously admitted evidence is of necessity incomplete because it does not address the full range of information that was available to the jury. Indeed, in any practical circumstance it seems that without considering both the properly admitted and improperly admitted evidence, no meaningful review of the jury's verdict is possible, as any such review must delve into the effect of such evidence upon the jury.

The problem with any analysis that focuses solely upon the error, however, is that the *Chapman* standard implicitly assumes a quantitative, and not a qualitative, standard for harmless error review. The focus of the *Chapman* standard is upon the error's contribution to the verdict, not upon any quality appurtenant to the error. Turning the appellate lens upon the actual verdict returned necessitates a quantitative consideration of the impact of all evidence received in relation to the evidence erroneously admitted. Thus, if the error complained of is minor or insignificant in relation to the competent evidence admitted, the error is harmless. Conversely, if the competent evidence admitted is so overwhelming in relation to the evidence improperly admitted as to make the latter minor or insignificant, the error is harmless. While Louisiana's State Capitol building may be a breathtaking site upon the alluvial flatlands of the Mississippi, it fades to a meaningless speck against the backdrop of Mount Everest. Similarly, the impact of any evidentiary error can only be assessed against the backdrop of the other evidence of record.

The Louisiana Supreme Court has recognized this practical reality on several occasions. In *State v. Johnson*,[36] for example, the Court stated that "[a]n error did not 'contribute' to the verdict when the erroneous trial feature is unimportant in relation to everything else the jury considered on the issue."[37] Similarly, in the 1998 case of

36. 664 So. 2d 94.
37. *Id.* at 100 (citation omitted).

State v. Tyler,[38] the Court found an evidentiary error involving the improper admission of "other crimes" evidence harmless, and opined that "one [could] reasonably conclude beyond a reasonable doubt that the jury 'actually rested the verdict' on the evidence properly introduced by the prosecutor, rather than on the improper references to 'other crimes.'"[39] Moreover, on several occasions the Court has stated that factors to be considered in determining whether a particular error warrants reversal "include the importance of the evidence to the State's case, the presence or absence of additional corroboration of the evidence, and the overall strength of the State's case."[40]

It is clear from these cases that review of the entire record before the jury is determinative of an error's harmlessness *vel non*. As the Louisiana Supreme Court has put it, echoing the point made in the preceding paragraphs, evidentiary error "may be quantitatively assessed in the context of the other evidence to determine whether its admission at trial is harmless beyond a reasonable doubt."[41] This sentiment is buttressed by the admonition of Justice Scalia in *Sullivan v. Louisiana*[42] (endorsed by the Louisiana Supreme Court[43]) that "[h]armless-error review looks . . . to the basis on which 'the jury actually rested its verdict.'"[44]

As already noted, the view that the appellate court should sit as a surrogate jury, redact the erroneous evidence from the trial record, and then gauge what remains to determine guilt, is, under *Chapman*, an incomplete approach (although such a review is an essential step in the process). The essence of harmless error review is a weighing process, namely the weighing of the evidence properly admitted against that evidence erroneously admitted to determine the "impact" of the latter. It is this step, not a simple *Jackson* sufficiency review of the properly admitted evidence, that is the proper mode of analysis to determine harmless error.

A functionally necessary concomitant of this principle is that Louisiana appellate courts, when reviewing criminal convictions, sit as arbiters of law, not of fact. As Justice Dennis put it in *State v. Gibson*:

> [a]lthough the [*Chapman*] standard requires a reviewing court to consider the evidence in order to determine if there is a reasonable possibility that the error had prejudicial effect, it

38. 723 So. 2d 929 (La. 1998).
39. *Id.* at 948 (citations omitted).
40. State v. Harris, 711 So. 2d 266, 269 (La. 1998) (citing *Willie*, 559 So. 2d at 1332).
41. State v. Johnson, 664 So. 2d at 100–01.
42. 508 U.S. 275, 113 S. Ct. 2078 (1993).
43. *Johnson*, 664 So. 2d at 100.
44. *Sullivan*, 508 U.S. at 279, 113 S. Ct. at 2081 (quoting Yates v. Evatt, 500 U.S. 391, 404, 111 S. Ct. 1884, 1893 (1991)).

> does not permit a court to substitute for the verdict its judgment of what the jury would or should have decided in the absence of error.[45]

Nor does this mean that a reviewing court should attempt to glean the scope of the actual jury's deliberations, for, as any trial judge, prosecutor, or defense attorney can clearly attest, "in the end no judge can know for certain what factors led to the jury's verdict."[46]

Nonetheless, Justice Dennis also recognized in *Gibson* that "[w]hether there is a reasonable possibility that the error complained of might have contributed to the conviction is no more a question of fact than other rules applied by us routinely that call for careful consideration of the evidence."[47] Additionally, every appellate court has had experience with "weighing" the evidence, as a question of law, to determine evidentiary sufficiency under *Jackson v. Virginia*,[48] or in the review of summary judgments and similar matters involving application of a legal standard to a factual record. Appellate harmless error review is proper as long as the jury's province of "crediting or discrediting evidence" is not invaded, i.e., as long as the appellate court reviews the record under a legal standard. Thus, any appellate court reviewing the record of a criminal conviction must view the record from the point of view of a "reasonable" juror.[49] This standard, one with which appellate courts are intimately familiar, eliminates any question of impermissible inquiry into the actual jury's deliberations.

Moreover, "[o]nce a defendant has been found guilty of the crime charged, the fact finder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review all of the evidence is to be considered in the light most favorable to the prosecution."[50] Given the existence of a jury verdict of guilty as a

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45. 391 So. 2d at 427.

46. *Sullivan*, 508 U.S. at 284, 113 S. Ct. at 2084) (Rehnquist, C.J., concurring). Nor does our law of evidence allow any inquiry into the factors that actually went into the makeup of a particular jury verdict. La. Code Evid. art. 606(B) (1995).

47. 391 So. 2d at 427(footnote omitted).

48. 443 U.S. 307, 99 S. Ct. 2781 (1979).

49. At first glance there may appear to be an inherent tension here between the reviewing court's inquiry into questions of law, and the admonition of *Sullivan* that the inquiry be upon the actual basis of the jury's verdict. Any such tension is illusory. Justice Scalia's point in *Sullivan* was that the court must consider the evidence actually presented from the perspective of the actual jury. No court or commentator has ever suggested that the appellate court should utilize its own discretion and judgment in passing upon such evidence. Rather, the clear appellate standard is that of a reasonable juror sitting in the shoes of the jurors who actually decided the case. If such review is not possible, then the standard for appellate review of sufficiency of the evidence in *Jackson* is unworkable.

50. Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979).

precursor to any harmless error review, this legal conclusion is apposite. Again, the pertinent question is not whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt,"[51] but rather whether such a rational trier of fact would consider the error unimportant in relation to the other evidence presented. Stated another way, if a reasonable juror, after considering the error, would find no cause to question his verdict, then the verdict "actually rested upon" the other evidence of record, and the error cannot be said to have "contributed" to the verdict.[52] If an appellate court can make such a finding, then there is no reasonable[53] possibility the error contributed to the verdict.

Finally, there is no simple formula or magic incantation that can guide the appellate court's ultimate determination of harmlessness *vel non*. The key ingredient to resolving this issue is an experienced and knowledgeable jurist who must make a determination one way or the other. Nearly every day the appellate courts of this state review summary judgments and convictions to determine whether the evidence presented is "sufficient" to justify the result. These same courts, applying the same standards, may utilize the same technique of legal review of a factual record to determine whether the impact of an evidentiary error, when compared against the evidence of record, is so significant as to be "harmful," or so minor as to be "harmless." No additional exercise in legal legerdemain is required.

V. THE "PROBATIVE IMPACT" OF THE ERROR

One additional point should be addressed to complete the picture. It must be recognized that, in determining the "impact" of the error, the isolation of erroneously admitted evidence alone potentially does not address the full prejudice that may accrue from evidentiary error. Rather, a reviewing court, to fully perform the appellate function from the perspective of a "reasonable" juror, must be able to consider both the "content" and the "probative effect" of such evidence.[54]

As a matter of common sense, erroneously admitted evidence, almost by definition, is prejudicial due to its content. "Other crimes" evidence, for example, is prejudicial because when a jury hears about

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51. *Id.* (emphasis added).

52. *See Harris*, 723 So. 2d at 948.

53. This adjective is an important one, as it reinforces the notion that appellate review must proceed under a legal standard that assumes the deliberative processes of a rational juror. Actual juries often seize upon evidence of little legal significance, and thereby draw inferences that are not "rational" in a legal sense, in reaching their verdicts. Such deliberative jaunts are not available to appellate courts. *See supra* note 46.

54. *See* Roger J. Traynor, The Riddle of Harmless Error 70 (1970).

other crimes, acts, or wrongs the defendant may have committed, it tends to believe that the defendant is more likely to be guilty of the additional criminal acts with which he is charged because he is a "bad" man. Erroneously admitted evidence can also have a significant "probative effect," in the sense that it may corrupt or undermine other properly admitted evidence, or may otherwise alter the dynamics of the trial. Since the duty of the appellate court is to assess the "contribution" of the error to the verdict, that appellate court must be able to effectively assess the "probative effect" of erroneously admitted evidence. If not, then the scope of the error has not been fully quantified, and the error cannot be properly evaluated in relation to the properly admitted evidence of record.

A perfect example of a case where the distinction between an error's "content" and "probative effect" may have been telling is *State v. Johnson*.[55] In *Johnson*, the defendant, charged with attempted second-degree murder and aggravated burglary, testified that he was at another location when the crime occurred.[56] The State, in an attempt to impeach the defendant's credibility, introduced documentary evidence of five prior felony burglary convictions, whose existence the defendant denied.[57] It was subsequently discovered, although the jury never heard it, that the defendant had been correct and that the five counts of felony burglary had been *nolle prosequied* by the State.[58] The majority of the Louisiana Supreme Court found that the admission of this evidence had been erroneous, but also held that its admission was harmless given the substantial other evidence indicating defendant's guilt.[59]

Justice Victory, writing in dissent, pointed out that the majority's decision failed to consider the "probative effect" of the error, which extended beyond the mere content of that evidence to the heart of the defendant's alibi defense:

> The state's complete destruction of [the defendant's] credibility, and thus his alibi defense, through the use of certified court documents showing five felony burglary convictions that did not exist, in my view prevented the defendant from having a fair trial. By the time the case was submitted for decision, the jury had been erroneously led to believe that the defendant, who was on trial for attempted second degree murder and aggravated burglary, had been previously convicted of five burglaries, had lied about the

55. 664 So. 2d 94.
56. *Id.* at 97.
57. *Id.* at 97–98.
58. *Id.*
59. *Id.* at 102.

> convictions under oath, and had been caught lying about them in the jury's presence. In fact, the defendant was telling the truth about these nonexistent convictions, but the jury never knew it. Any chance that the jury had of properly weighing the defendant's credibility, and thus his alibi, was destroyed by the prejudice created by the inadmissible evidence.[60]

As Justice Victory realized, the "impact" of the error upon the jury stretched far beyond the mere submission that the defendant was a bad man because he had prior burglary convictions (although this itself is by no means a negligible impact). It also included a direct and forceful attack upon the defendant's theory of innocence, and further made the defendant appear a liar by directly contradicting his trial testimony.

In reaching its decision, the majority failed to examine the impact of the improperly admitted "other crimes" evidence in relation to the evidence properly admitted; in fact, it failed to consider the error at all in performing its harmless error analysis. If, as asserted herein, the proper question is the proportional relationship of the error to the competent evidence, the *Johnson* majority failed to perform the comprehensive analysis called for by the harmless error doctrine. The "probative effect" of the error extends beyond the evidence erroneously admitted to other evidence and the inferences that may be taken therefrom. Accordingly, the scope of the error should encompass related evidence and inferences fairly traceable to the error. The "legal conclusion" that the evidence should be viewed in the light most favorable to the jury cannot obtain for such "tainted" evidence, and all inferences reasonably drawn from such evidence cannot be treated as favorable to the prosecution.

While such an approach may not change the outcome in cases like *Johnson*, fully defining the evidence and inferences which the State cannot claim as its own will reduce the amount of evidence and inferences upon which the "reasonable" juror could base a finding of guilty beyond a reasonable doubt. Conversely, the impact of a particular error may be ameliorated or even nullified by other evidence bearing upon the fact or facts at issue. Thus, while the admission of a confession to the police might be held erroneous, the presence of other statements containing the same incriminating facts and made in other, admissible (and possibly more reliable) circumstances may nullify the probative impact of such error. As always, a resolution of such issues involves the appellate court's determination, sitting as reasonable jurors, of the impact of the alleged error *in relation to* the other competent evidence of record.

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60. *Id.* at 102–03 (Victory, J., dissenting).

In sum, the standard actually applied by Louisiana appellate courts is the *Chapman* standard of harmless error, which calls for reversal if there is any reasonable possibility that the error contributed to the verdict. In practice, the question of whether an error contributed to the verdict is determined by examining that evidence unaffected by the error and weighing that evidence against the illegitimate evidence to determine the impact of the error. If the court concludes that the error, in relation to the properly admitted evidence, is such that it would not cause a reasonable juror to question the verdict rendered, then the erroneously admitted evidence did not comprise a "part" or "share" of the verdict, and thus the error did not "contribute" to the verdict. It is important, however, that an assessment of the scope of the error include both the "content" of the erroneously admitted evidence and the "probative effect" of that error.

VI. EXORCISING THE GHOSTS FROM THE MACHINE

Regardless of the legal principles under which harmless error review occurs, it is irreducibly part of the appellate function. As such, it is subject to the vagaries and regimen of Louisiana appellate practice. The purpose of this section is to suggest substantive and procedural refinements that will promote clarity and consistency in the harmless error jurisprudence of this state, while serving the policies described previously in this article.

At the outset it must be recognized that the issue of harmless error is reached in many cases where it need not be. This is due to the unfortunate growth of what can be termed the "even if" and "regardless" approaches to harmless error. In the first, the appellate court reaches a claim of error and concludes that no legal error has occurred, but then continues that "even if" error had occured, it would have been harmless. The "regardless" approach goes one step further, bypassing entirely the question of whether error has occurred, to a finding that any prejudice the defendant may have suffered was harmless "regardless" of whether there was any error.

There are several reasons for the development of these approaches. One is no doubt efficiency and convenience. As our appellate courts grapple with an ever-increasing caseload, it must be attractive in terms of both time and effort to simply recognize a harmless error as such without jumping through all of the hoops. Another is the marked judicial reticence to reach matters unnecessary to the judgment. This logic, slightly perverted, might suggest that prudence dictates that a review for harmlessness of a claimed error, which will tend to be case-specific, is preferable to a precedential pronouncement on the scope of a particular right, i.e., the source of

the "error." A further development that may abet the "even if" and "regardless" approaches is the development and refinement of tests for determining error, in relation to particular rights, that actually include a finding of prejudice as a factor in determining the existence of error.[61]

While these reasons may dictate similar approaches in other contexts, they ignore the fact that review for harmlessness is only appropriate if error has occurred. It is important that the courts first reach the question of error, for a number of reasons. First, prosecutors, judges, and defense counsel need to be informed about the propriety of their conduct. If a reviewing court bypasses or pays only lip service to the question of whether particular conduct is proper, it is not serving its normative function. This is particularly true in the case of the "regardless" approach, which gives no clue at all whether the challenged conduct is proper. [62]

Furthermore, because such use of the harmless error doctrine tends to be a matter of convenience, the manner in which it is applied tends to be slipshod and erratic. Such a use of the harmless error doctrine merely detracts further from its already tarnished reputation. If a harmless error analysis is to be undertaken, it should be fully

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61. For example, to prove a violation of the due process right to discovery of favorable evidence, the defendant must show that the evidence was "material either to guilt or to punishment." Edwards, *supra* note 16, at 1177. Evidence is material under this standard "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result would have been different." *Id.* Thus, a defendant seeking to vindicate a constitutional right to discovery of exculpatory evidence generally must show that a challenged action was reasonably likely to have affected the actual verdict. A similar showing is necessary to establish a violation of the Sixth Amendment right to effective assistance of counsel. A defendant asserting such a violation must establish not only that his or her counsel's work "fell below an objective standard of reasonableness," but also that the shortcomings in counsel's work prejudiced the defense, meaning "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*

62. Judge Edwards has noted a similar trend in the federal courts:

> Another troubling aspect of this trend is judicial use of the harmless-error rule to avoid reaching a difficult issue in a case. Courts sometimes openly decline to decide whether a defendant's rights have been violated, instead evading the issue by stating that any error that might have occurred was harmless. This practice leaves unresolved the question of whether an error even occurred, thus offering no guidance to trial courts. What may be an important question of trial error is therefore sidestepped by the application of a doctrine that itself presupposes the existence of such an error. Nothing suggests that the harmless-error rule was meant to serve such a purpose. The flip side of this practice is the needless use of harmless error, which occurs when, upon rejecting the merits of some claim of error in an action of the trial judge, the appellate court goes on to say that even if error had occurred, it would have been harmless.

Edwards, *supra* note 16, at 1182–83 (citations omitted).

articulated and involve a comprehensive and thoughtful examination of the entire record. Such an approach is not conducive to use as a "quick fix" when treating difficult or convoluted issues of legal error. For these and the foregoing reasons, it is suggested that appellate courts adhere to a consistent, two-step methodology in treating legal error susceptible to a harmless error review: 1) determine fully the existence *vel non* of legal error (and its scope); and 2) review that error in relation to the record evidence to determine its harmlessness.

Additional consideration must also be given to the manner in which cases involving harmless error review are briefed by counsel. As any practitioner knows, appellate courts often look to the briefs of the parties to define the issues before them, and also rely in large part upon the parties' explanation of the record to guide appellate review of that record. Given this, it is unfair to expect appellate courts to engage in a cogent and probing examination of harmless error issues if the defense does nothing more than posit a conclusion that the error is not harmless. The typical response of any prosecutor, when confronted with a conclusory allegation of harm, is to provide the appellate court with a laundry list of record evidence extrinsic to the error that supports the conviction. The result is what we tend to see, namely an opinion concluding that any error is harmless and providing as its basis a restatement of the listing of evidence provided in the State's brief.

The presentation of proper argument is facilitated by the placement of burdens of production and/or persuasion upon the parties. In Louisiana, the current rule is that "the burden is on someone other than the person prejudiced by [the challenged error] to show that it was harmless."[63] The terminology is perhaps misplaced in the appellate context, since "burdens," "presumptions," and other such artifices are usually imposed in light of evidentiary concerns. Be that as it may, the basic principle of forcing the parties to articulate their positions fully, in light of the evidence and controlling or persuasive authority, is a wise one.

This article has already discussed the issues of "content" and "probative effect" that attend an error. Often, however, appellate

63. *Gibson*, 391 So. 2d at 426. This language in *Gibson* cites as its authority the Supreme Court's decision in *Chapman*, which noted that "the original common-law harmless-error rule put the burden on the beneficiary of the error either to prove that there was no injury or to suffer a reversal of the erroneously obtained judgment." 386 U.S. at 24, 87 S. Ct. at 828 (citing 1 Wigmore, Evidence § 21 (3d ed. 1940)). The question of whether an antiquated citation from Wigmore is a sufficient basis for the imposition of this "burden" on the State is a close one. It could be argued that the burden should properly be imposed upon the defendant as the party seeking reversal of the judgment of the trial court. Nonetheless, the proposed refinement of appellate procedure does not remove the ultimate burden of persuasion regarding harmlessness from the State.

courts fail to embrace the full impact of the error, in clear derogation of the *Chapman* standard, in favor of a recitation of the evidence that supports the verdict. Practice and experience dictates that this result is often due to the failure of the defendant to sufficiently brief the "probative effect" of the claimed error. As a finding of error imposes no "presumptions" regarding the quality of the remaining evidence of record, the response of the appellate courts is entirely appropriate in light of such briefing.

Accordingly, in the interests of promoting more comprehensive appellate review of harmless error questions, the courts should consider imposing some threshold burden upon a defendant seeking reversal of a conviction for evidentiary error. Such a burden would require the defendant to make some showing, analogous perhaps to a "burden of production" or *prima facie* case in the trial court, regarding the full scope of the claimed error, i.e., an explanation of both the "content" and "probative effect" of the claimed error. While the ultimate "burden" of demonstrating harmlessness would remain with the State, this approach would obviate frivolous claims; after all, if a defendant cannot articulate how he has been harmed, then a court does not know why the conviction should be reversed. Furthermore, this threshold showing would require the State to specifically address the claimed error, providing the appellate court with a detailed and informed discussion on the actual effect of the error on the verdict rendered. This, in turn, will provide for a higher level of judicial scrutiny and produce better-reasoned opinions, significantly advancing the harmless error jurisprudence of this State.

Finally, in addition to the "procedural" changes noted above, one substantive matter should be considered by the courts of this state, namely the continued application of the *Chapman* harmless error standard to all errors, constitutional and statutory. As already noted, the federal courts apply the less stringent *Kotteakos* to errors arising from misapplication of federal statutory law and in all habeas corpus proceedings.[64] This standard, which calls for reversal only when an error has a "substantial and injurious effect upon the jury's verdict," is one that more directly comports with the actual language of Louisiana's harmless error statute, which also looks to the "substantial" nature of the harm. Additionally, this standard is one that is well-developed and fully explicated in the federal jurisprudence. Application of the policies underlying the harmless error doctrine suggests that applying the same standard to the erroneous admission of a document as would apply to a violation of the defendant's constitutional privilege against self-incrimination is not a well-considered, balanced, or prudent approach.

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64. *See supra* note 31.

VII. CONCLUSION

A criminal appeal does not excite joy in anyone involved. The typical prosecutor, having spent long hours and great effort to secure a conviction, now faces a potential exercise in minutiae in a forum which knows nothing of the travails that have preceded the appeal. The defendant and his counsel recognize the burdens they face in attempting to reverse a duly rendered jury verdict. The court faces long hours of record review and legal research in seeing that justice, as defined by the laws of this state, is done.

It is the author's fervent hope that this article will be of assistance to prosecutor, defense counsel, and court alike. Ethical prosecutors and defense lawyers, when faced with the harmless error question, want above all to know where they stand and how to present their respective arguments in a manner that will be well-received by the reviewing court. I also believe that appellate courts desire a similar clarity and uniformity of practice, particularly given the often complex and nuanced nature of the records they are asked to review. If this article helps any of these in the difficult tasks they face, the author will be satisfied.