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TRIAL COUNSEL'S ACTS TODAY COULD AFFECT A CLIENT'S APPEAL TOMORROW: MASSACHUSETTS AND NEW HAMPSHIRE TAKE DIFFERING POSITIONS ON APPELLATE REVIEW OF UNPRESERVED ISSUES

I. INTRODUCTION

Massachusetts and New Hampshire state courts, through common law or statutory rules of evidence, require that an advocate make an objection or take other contemporaneous action at trial to preserve an issue for appellate review. The two states similarly reject the federal plain error rule, however, both have refused to adopt that rule for distinct reasons and differ drastically in their view of the consequences if counsel fails to object at trial. The federal plain error rule, allows federal appellate courts to hear those unpreserved errors which affect substantial rights, are particularly egregious, or where a miscarriage of justice would otherwise result.¹ Massachusetts, however, favors the "substantial risk of a miscarriage of justice" standard. New Hampshire, on the other hand, through the state's Rules of Evidence and case law interpreting those rules, has established that unpreserved issues will not be heard under any circumstances.

Massachusetts courts have determined that they will review an issue not properly preserved for appeal when the circumstances of the case indicate that there is a substantial risk of a miscarriage of justice. Unfortunately, determining whether there is a substantial risk of a miscarriage of justice is a case-by-case endeavor in which the state's appellate courts rarely offer any insight into which unpreserved errors will meet that standard. As a result, many unpreserved issues are appealed, but few are heard because the appellate courts often determine that the particular error appealed does not create a substantial risk of a miscarriage of justice. When a court in Massachusetts determines that there is no substantial risk of a miscarriage of justice resulting from the unpreserved error, the court's review ends. Often an appeal is based solely on unpreserved errors so if the court determines there is no substantial risk of a miscarriage of justice the consequences of a trial attorney's failure to preserve the error through a contemporaneous objection can be devastating.

Counsel practicing in New Hampshire are not as fortunate as those in Massachusetts. In New Hampshire there is no safety net. According to the New Hampshire Rules of Evidence and cases interpreting the rule, if counsel fails to

¹ FED. R. EVID. 103(d); FED. R. CRIM. P. 52(b).

preserve an issue through a contemporaneous objection at the trial level, the appellate courts will not review that issue on appeal. As a result, New Hampshire has staunchly and consistently refused to hear any issue on appeal, no matter the significance, which was not properly preserved in the trial court below.

II. MASSACHUSETTS JURISPRUDENCE: SUBSTANTIAL RISK OF A MISCARRIAGE OF JUSTICE

A. Recognition and Articulation of the Substantial Risk of a Miscarriage of Justice Standard

The Massachusetts Supreme Judicial Court and the Commonwealth's lower appellate court have attempted, for over thirty years, to determine when and how they will review a case not properly preserved for appeal through a contemporaneous objection.² In an early case, the Supreme Judicial Court established that where there are no exceptions taken at trial and where the court determines, after a search of the record, that there is no substantial risk of a miscarriage of justice, it will not consider alleged claims of error.³ In a later case, the court highlighted its two major concerns about allowing unpreserved issues to appear before the Commonwealth's appellate courts.⁴ First, the risk of a miscarriage of justice must be substantial for the court to hear unpreserved issues.⁵ Second, the court warned appellate counsel that review for a substantial risk of a miscarriage of justice was neither a strategic tool nor a way to

² See, e.g., *Commonwealth v. Loguidice*, 420 Mass. 453, 455-56, 650 N.E.2d 1254, 1256 (1995) (establishing errors creating a substantial risk of miscarriage of justice reviewed absent objection); *Commonwealth v. Foley*, 358 Mass. 233, 235, 263 N.E.2d 451, 453 (1970) (hearing unpreserved errors deprives trial court of opportunity to review error); *Commonwealth v. Freeman*, 352 Mass. 556, 563-64, 227 N.E.2d 3, 8-9 (1967) (identifying standard of review for unpreserved errors as substantial risk of a miscarriage of justice).

³ See *Foley*, 358 Mass. at 236, 263 N.E.2d at 453 (expressing disapproval of appellate counsel arguing unpreserved errors on appeal). The court in *Foley* stated that many of the unpreserved errors which counsel have brought to the court "border on the specious and impose an unnecessary burden on [the] court." *Id.* The *Foley* court explained that for the Supreme Judicial Court to "consider alleged claims of error in cases where no exceptions were taken would deprive the trial judge of the opportunity to reconsider his ruling" and "[i]t would make a shambles of our trial procedure to consider such assignments of error except in rare and unusual circumstances." *Id.*; see also *Commonwealth v. Lombardo*, 2 Mass. App. Ct. 387, 392, 313 N.E.2d 140, 143 (1974) (stating where no compelling considerations of justice are present appellate court not inclined to review).

⁴ See *Commonwealth v. Harris*, 371 Mass. 462, 471-72, 358 N.E.2d 982, 987-88 (1976).

⁵ *Id.*

“sandbag” a trial court which was not put on notice of the alleged error through a contemporaneous objection and thus never had the opportunity to rectify the error.⁶ The Supreme Judicial Court will not allow appellate counsel to benefit by searching through the record for every appealable issue, whether preserved or not, in an attempt to overturn the lower court's decision.⁷

Massachusetts has distinguished itself from other state courts as well as the federal system by rejecting the federal plain error standard in favor of the substantial risk of a miscarriage of justice standard.⁸ The plain error rule, found in Federal Rule of Evidence 103(d) and Federal Rule of Criminal Procedure 52(b), allows review of errors that affect substantial rights although those errors were not preserved for appeal at the trial level.⁹ In Massachusetts, however, if there is no substantial risk of a miscarriage of justice or there are no compelling considerations of justice, there will be no review of the unpreserved assignments of error will occur.¹⁰

⁶ *Id.*

⁷ *See, e.g.,* Commonwealth v. Hooks, 375 Mass. 284, 296, 376 N.E.2d 857, 864-65 (1978) (insisting the trial judge must be given fair opportunity to correct alleged errors); *Harris*, 371 Mass. at 471-72, 358 N.E.2d at 987-88 (noting it is common for lawyer to strategically fail to object then allege error by trial court); *Foley*, 358 Mass. at 236, 263 N.E.2d at 453 (considering alleged errors where no exceptions deprives trial judge of opportunity to reconsider ruling).

⁸ *See* *Foley*, 358 Mass. at 236, 263 N.E.2d at 453 (reviewing case under substantial risk of a miscarriage of justice test); Commonwealth v. Lemar, 22 Mass. App. Ct. 170, 173, 492 N.E.2d 105, 106 (1986) (clarifying in Massachusetts proper standard is substantial risk of miscarriage of justice not plain error); *Lombardo*, 2 Mass. App. Ct. at 392, 313 N.E.2d at 143 (declining to adopt federal plain error standard).

⁹ FED. R. EVID. 103(d); FED. R. CRIM. P. 52(b); *see* U.S. v. Frady, 456 U.S. 152, 163, 102 S. Ct. 1584, 1592 (1982) (establishing the federal plain error rule in criminal cases). Rule 52 (b) of Federal Rules of Criminal Procedure allows a conviction to be overturned on direct appeal for “plain error” even if the defendant failed to bring a timely objection. Fed. R. Crim. P. 52(b). Rule 30 of the Federal Rules of Criminal Procedure states that a party may not claim there was an error in the jury instructions unless he raises a specific objection, stating the grounds for the objection prior to the retirement of the jury. Fed. R. Crim. P. 30. Rule 52(b) plain error rule tempers this contemporaneous objection requirement. Fed. R. Crim. P. 52(b). The plain error rule, however, was intended as a way to promptly redress any miscarriages of justice. *Id.* The error must have been so plain that the judge and prosecution were derelict in their duty by not addressing it, “even absent the defendant’s timely assistance in detecting it.” *Id.* This balances the defendant’s interest with the court’s interest to have one court deal fairly and accurately with the case before it. *Frady*, 456 U.S. at 163.

¹⁰ *See Lombardo*, 2 Mass. App. Ct. at 392, 313 N.E.2d at 143 (reviewing the record and finding no compelling considerations of justice).

Failing to object in Massachusetts alters the standard review.¹¹ If a defendant fails to object, the appellate courts of Massachusetts limit review solely to the issue of whether the unpreserved error created a substantial risk of a miscarriage of justice.¹² If there is no substantial risk that a miscarriage of justice would result because of the unpreserved error, the courts' review is at an end and the merits of that appeal will not be heard.¹³ If the trial attorney objects to an alleged error, then the appellate court will review the merits of the appeal without first determining if the error creates a substantial risk of a miscarriage of justice.¹⁴ Additionally, the appellate courts use this standard of review where the defendant objected at trial on certain grounds but raised different grounds for the objection on appeal.¹⁵ Finally, if an objection is made at trial but the issue is not raised on appeal, the proper standard of review returns to whether the error created a substantial risk of a miscarriage of justice.¹⁶

If a party objects at trial, preserving the issue for appeal, but fails to object to a subsequent issue, the standards of review for each issue are different.¹⁷ An appeals court will fully review the preserved issue, however, if counsel failed to object to additional issues, which were also part of the appeal, then the appellate court will review these unpreserved issues exclusively for whether there was a substantial risk of a miscarriage of justice.¹⁸

An often-cited case, *Commonwealth v. Freeman*,¹⁹ exemplifies how courts apply the substantial risk of a miscarriage of justice standard. On appeal,

¹¹ See *Loguidice*, 420 Mass. at 455-56, 650 N.E.2d at 1256 (objecting alters standard of review; failing to object allows review only for substantial risk of miscarriage of justice).

¹² *Id.* (reiterating unpreserved error only significant if creates substantial risk of miscarriage of justice).

¹³ See *Commonwealth v. Dupont*, 2 Mass. App. Ct. 566, 571, 317 N.E.2d 83, 87 (1974) (reviewing court can hear merits of unpreserved issue creating substantial risk of miscarriage of justice).

¹⁴ See *Loguidice*, 420 Mass. at 455-56, 650 N.E.2d at 1256 (stating when objection made appellate court cautiously considers alleged error's impact on jury decision).

¹⁵ See *Commonwealth v. Fitzpatrick*, 14 Mass. App. Ct. 1001, 1002, 441 N.E.2d 559, 560 (1982) (finding objections taken on grounds other than those urged on appeal).

¹⁶ See *Commonwealth v. Trowbridge*, 419 Mass. 750, 762, 647 N.E.2d 413, 422 (1995) (stating where issue not raised on appeal standard is substantial risk of miscarriage of justice).

¹⁷ See *Loguidice*, 420 Mass. at 456, 650 N.E.2d at 1256 (stating objection by counsel alters standard of review).

¹⁸ *Id.* (noting where no objection made errors only significant if create substantial risk of miscarriage of justice).

¹⁹ 352 Mass. 556, 227 N.E.2d 3 (1967).

Freeman's counsel challenged the instructions the judge gave to the jury.²⁰ The Massachusetts Supreme Judicial Court admonished counsel for not objecting to the jury instructions in order to alert the judge that an error was claimed.²¹ However, the court determined that the test for whether the court will review such an unpreserved issue is whether there is a substantial risk of a miscarriage of justice.²² The court did not define the term, and so, it is from this vague beginning that many cases followed.²³

In *Freeman*, the defendant was indicted for assault with intent to rape and annoying a female with offensive language.²⁴ The Supreme Judicial Court found that there was a substantial risk of a miscarriage of justice because of the defective jury instructions which included an instruction on "admission by silence" evidence which should not have been part of the jury charge.²⁵ The error in the trial court's instructions went to the crucial issue of the identity of the criminal defendant.²⁶ The *Freeman* court said:

there is a substantial danger that the jury were misled by the erroneous instruction, and that the instruction may have materially influenced their appraisal of the identification testimony. Consequently, we employ the rarely used power [to review unpreserved issues where there is a substantial risk of a miscarriage of justice] so that there may be a new trial.²⁷

What is noteworthy from the *Freeman* decision is the fortune of this particular defendant and the counsel who failed to object. The court noted that had the trial attorney simply objected to the instructions when they were given, the court would not have had to review the case for a substantial risk of miscarriage of justice in order to consider the merits of the alleged error.²⁸ The error was patent and prejudicial and had the exception been saved, the court

²⁰ *Id.* at 563, 227 N.E.2d at 8.

²¹ *Id.*

²² *Id.* at 564, 227 N.E.2d at 9.

²³ *Id.* Like many legal standards, substantial risk of a miscarriage of justice defies precise definition. Rather, it is a standard which courts must interpret and apply.

²⁴ *Freeman*, 352 Mass. at 557, 227 N.E.2d at 5.

²⁵ *Id.* at 561-62, 227 N.E.2d at 7-8. In *Freeman*, the court stated that the trial judge should not have charged "at all on admissions by silence with respect to the identification at the police station." *Id.* at 562, 227 N.E.2d at 8. The trial judge in *Freeman*, while instructing on the issue of identification, told the jury to ask themselves whether the defendant could hear what the police and witnesses said regarding his identification. *Id.*

²⁶ *Id.* at 563, 227 N.E.2d at 8-9.

²⁷ *Freeman*, 352 Mass. at 564, 227 N.E. 2d at 9.

²⁸ *Id.* at 563-64, 227 N.E.2d at 8-9.

would have easily and unanimously ordered a new trial.²⁹ A defendant's life hung in the balance and the court had to use valuable time and resources simply because a trial attorney did not object to the clearly erroneous jury instructions.

B. Cases involving a substantial risk of a miscarriage of justice

While the substantial risk of a miscarriage of justice standard is firmly established, the appeals courts still faces the daunting task of applying the standard to the numerous cases that come before them.³⁰ Of the substantial number of cases, however, few are found to have an error which creates a substantial risk of a miscarriage of justice.³¹ This reflects the high standard an appellant must meet in order for an appeals court to review an issue where it was not preserved for appeal.

Commonwealth v. Harris,³² is one case in which the Supreme Judicial Court held that there was a substantial risk of a miscarriage of justice resulting from an unpreserved issue.³³ Harris, the defendant, was convicted of first degree murder and armed assault with intent to rob and sentenced to death.³⁴ He appealed, arguing the trial court failed to conduct a voir dire and instruct the jury

²⁹ *Id.* at 563, 227 N.E.2d at 9.

³⁰ *See, e.g., Commonwealth v. Matsos*, 421 Mass. 391, 397-98, 657 N.E.2d 467, 471 (1995) (finding stalking conviction did not create a substantial risk of a miscarriage of justice); *Commonwealth v. Souza*, 390 Mass. 813, 814, 818-19, 461 N.E.2d 166, 167, 170 (1984) (finding claimed errors did not create a substantial risk of a miscarriage of justice); *Commonwealth v. Barton*, 367 Mass. 515, 517, 326 N.E.2d 885, 887 (1975) (reviewing for error under substantial risk of a miscarriage of justice standard).

³¹ *See, e.g., Commonwealth v. Lorette*, 37 Mass. App. Ct. 736, 743, 643 N.E.2d 67, 71 (1994) (finding combined effect of errors created a substantial risk of a miscarriage of justice); *Commonwealth v. Schmukler*, 22 Mass. App. Ct. 432, 435-36, 494 N.E.2d 48, 51 (1986) (determining that faulty mens rea instruction created a substantial risk of a miscarriage of justice); *Commonwealth v. Brochu*, 23 Mass. App. Ct. 937, 940-41, 501 N.E.2d 532, 535 (1986) (finding operating under the influence instruction created a substantial risk of a miscarriage of justice). Of the fifty-three Massachusetts cases this paper addresses in which the appellate courts reviewed for a substantial risk of a miscarriage of justice between 1962 and 1997, only five, or 9.4%, were found to contain a substantial risk of a miscarriage of justice. Therefore, the chances of an appellate court reviewing for substantial risk of a miscarriage of justice, finding it, and subsequently reversing a lower court decision is quite small. This further emphasizes the need to preserve the issue through a contemporaneous objection, even in a state like Massachusetts which will hear unpreserved issues where there is a substantial risk of a miscarriage of justice.

³² 371 Mass. 462, 358 N.E.2d 982 (1976).

³³ *Id.* at 471-72, 358 N.E.2d at 987-88.

³⁴ *Id.* at 463, 358 N.E.2d at 983.

on the voluntariness of the confessions.³⁵ The defendant did not preserve the issue for appeal, therefore, the Supreme Judicial Court reviewed the case for a substantial risk of a miscarriage of justice, found that the error created a substantial risk, and decided that the trial court's failures constituted reversible error.³⁶

In reaching this decision, the court eloquently stated its dilemma: This rule of procedure [requiring a contemporaneous objection] stems from the necessity of placing an affirmative obligation on trial counsel to inform both the trial court and subsequent courts of review of alleged error in the admission of evidence at the earliest possible time and in the most direct manner. Furthermore, since it is not uncommon for a lawyer to forego the exercise of such a right as part of the trial tactics or strategy being employed for his client, this court cannot be put in a position of giving defense counsel the benefit of hindsight and in effect allowing the opportunity to compensate for erroneous, but conscious strategic, decisions. However, we may disregard such a failure in order to prevent a substantial risk of a miscarriage of justice.³⁷

When the state or the court interferes with a defendant's right to conduct a defense or an appeal, the reviewing court will likely view such actions as reversible error.³⁸ For example, in *Charpentier v. Commonwealth*,³⁹ the trial judge refused to supply the indigent defendant with a full transcript of the trial.⁴⁰ The Supreme Judicial Court found that the defendant was at a substantial disadvantage because he was not given an opportunity to appeal those unpreserved errors which created a substantial risk of a miscarriage of justice.⁴¹

Additionally, counsel's improper use of testimony or arguments can create a substantial risk of a miscarriage of justice which subsequently causes the

³⁵ *Id.* at 463-64, 358 N.E.2d 982, 983.

³⁶ *Id.* at 471-72, 358 N.E.2d at 987-88.

³⁷ *Harris*, 371 Mass. at 471-72, 358 N.E.2d at 987-88 (internal quotes and citations omitted).

³⁸ See *Commonwealth v. Angiulo*, 415 Mass. 502, 523-26, 615 N.E.2d 155, 168-70 (1993) (failing to provide prisoner facing life imprisonment or death penalty with juror list is error); *Charpentier v. Commonwealth*, 376 Mass. 80, 81-83, 379 N.E.2d 1067, 1068-69 (1978) (denying an indigent defendant a free transcript violates Massachusetts statute).

³⁹ 376 Mass. 80, 379 N.E.2d 1067 (1978).

⁴⁰ *Id.* at 81-82, 379 N.E.2d at 1068-69.

⁴¹ *Id.* at 87-88, 379 N.E.2d at 1072.

appeals court to reverse the lower court's decision.⁴² For example, in a sexual molestation case, a mother testified that her daughter was telling the truth and the prosecutor implored the jury to "end the family's nightmare."⁴³ The Massachusetts Appeals Court determined that the combined effect of the mother's testimony and the prosecutor's remarks created a substantial risk of a miscarriage of justice and, therefore, reversed the lower court.⁴⁴

Although appellate courts rarely find that minor unpreserved mistakes in jury instructions create a substantial risk of a miscarriage of justice, instructions which fail to include an element of a crime or a tort, or do not properly instruct on an affirmative defense have resulted in reversals of the trial courts which issued the instruction.⁴⁵ In addition, a lower court's instruction which fails to include the intent requirement can create a substantial risk of a miscarriage of justice.⁴⁶ The appeals court in *Commonwealth v. Schmuckler*⁴⁷ required a reversal of the trial court's decision because the jury instructions failed to properly instruct the jury on the necessity of finding the required level of mens rea in order to convict the defendant.⁴⁸ The court stated that intent was an element of the crime which the prosecution had to prove and, therefore, the outcome of the case depended on the jury's decision regarding the defendant's state of mind.⁴⁹ However, because of the defect in the instruction, there was a substantial risk that the jury failed to properly analyze the defendant's mens rea, resulting in an conviction in which the defendant's state of mind was not considered.⁵⁰ When a defendant is convicted under such circumstances there are

⁴² See *Lorette*, 37 Mass. App. Ct. at 737, 740-43, 643 N.E.2d at 68, 70-71 (finding mother's testimony and prosecution's closing argument created substantial risk of a miscarriage of justice).

⁴³ *Id.*

⁴⁴ See *id.* at 743, 643 N.E.2d at 71 (holding that combined effect of the two errors created a substantial risk of a miscarriage of justice).

⁴⁵ See *Commonwealth v. Cowie*, 28 Mass. App. Ct. 742, 743, 748, 556 N.E.2d 103, 104, 107 (1990) (reversing denial of new trial on murder charge because jury instruction fatally defective); *Brochu*, 23 Mass. App. Ct. at 938, 940-41, 501 N.E.2d at 533, 535 (1986) (stating erroneous definition of operating under the influence created a substantial risk of a miscarriage of justice); *Schmuckler*, 22 Mass. App. Ct. at 433, 435-36, 494 N.E.2d at 49, 51 (finding faulty state of mind instruction created substantial risk of a miscarriage of justice) (1986).

⁴⁶ See *Schmuckler*, 22 Mass. App. Ct. at 436, 494 N.E.2d at 51 (interpreting instructions to allow jury to find defendant guilty of non-criminal acts).

⁴⁷ 22 Mass. App. Ct. 432, 494 N.E.2d 48 (1986).

⁴⁸ *Id.* at 436, 494 N.E.2d at 51.

⁴⁹ *Id.* at 435-36, 494 N.E.2d at 51.

⁵⁰ *Id.* at 436, 494 N.E.2d at 51.

compelling considerations of justice and the faulty instruction will likely create a substantial risk of a miscarriage of justice.

Appellate courts may also order a new trial because trial counsel inadequately represented his or her client.⁵¹ Such failures of counsel can also put an attorney on the wrong side of an ineffective assistance of counsel claim.⁵² In *Commonwealth v. Childs*,⁵³ the trial counsel failed to keep the defendant's stale convictions out of the case.⁵⁴ Counsel's failure to invoke the statute sealing pardoned felony convictions compelled a new trial and constituted ineffective assistance of counsel.⁵⁵

The lesson provided by these cases is simple. Objecting contemporaneously to rulings, jury instructions, or other issues constitute the most efficient way to preserved appellate issues. Preserving the issue for appeal on all possible grounds, is not only necessary to protect a client's chances for an appeal, but benefits a client at the trial level. If the attorney can obtain a favorable ruling for her client through objections, then the issue is efficiently resolved at the trial stage. Secondly, should an appeal be required, the objection protects the client's appellate rights. Properly preserving issues for appeal also helps to protect an attorney from ineffective assistance or malpractice claims.

While Massachusetts appellate courts will review unpreserved issues for a substantial risk of a miscarriage of justice, this standard is not a strategic tool. It is a risky strategy to fail to object and trust that a court will hear the appeal to prevent a miscarriage of justice. Few courts which have reviewed cases for a substantial risk of a miscarriage of justice have found that such a risk existed and reversed a lower court's decision based on an unpreserved issue. If an attorney fails to preserve an issue for appeal and a court subsequently finds that the unpreserved issue did not create a substantial risk of a miscarriage of justice it can be devastating for a client. Failing to preserve the issue also puts the attorney in the unenviable position of having to tell the client that his mistakes at trial precludes an appeal.

⁵¹ See *Commonwealth v. Childs*, 23 Mass. App. Ct. 33, 35-36, 499 N.E.2d 299, 300-01 (1986) (ordering new trial because counsel's critical error amounted to ineffective assistance of counsel).

⁵² See *id.* (warning that failing to exclude stale convictions in a criminal case amounts to ineffective assistance).

⁵³ 23 Mass. App. Ct. 33, 499 N.E.2d 299 (1986).

⁵⁴ *Id.* at 35-36, 499 N.E.2d at 300-01.

⁵⁵ *Id.* at 36, 499 N.E.2d at 301.

C. Errors that do not create a substantial risk of a miscarriage of justice

Appellate courts in the Massachusetts rarely exercise their power to hear unpreserved errors on appeal.⁵⁶ The courts' reasoning in these cases fall into four categories. First, in light of counsel's failure to object there is no substantial risk of a miscarriage of justice.⁵⁷ Second, in light of evidence against the appellant, the alleged errors did not create a substantial risk of a miscarriage of justice.⁵⁸ Third, the claimed errors in jury instructions did not create a substantial risk of a miscarriage of justice because of the overall instructions.⁵⁹ Fourth, there was an error but it did not rise to the level of being reversible error.⁶⁰

(1) In light of counsel's failure to object there is no substantial risk of a miscarriage of justice

The purpose of a contemporaneous objection at trial is to notify the trial

⁵⁶ See *Harris*, 371 Mass. at 471-72, 358 N.E.2d at 988 (disregarding failure to object is a rare occurrence); *Foley*, 358 Mass. at 236, 263 N.E.2d at 453 (stating that court reviews unpreserved issues only in rare and unusual circumstances); *Freeman*, 352 Mass. at 564, 227 N.E.2d at 9 (employing the rarely used power to hear unpreserved issues).

⁵⁷ See, e.g., *Commonwealth v. Alvarez*, 413 Mass. 224, 237, 596 N.E.2d 325, 332-33 (1992) (determining no substantial risk of miscarriage of justice where no objection or request for instructions); *Commonwealth v. Doucette*, 391 Mass. 443, 450, 462 N.E.2d 1084, 1092 (1984) (viewing absence of objection as relevant to whether error creates substantial risk of miscarriage of justice); *Commonwealth v. Dupont*, 11 Mass. App. Ct. 931, 932, 416 N.E.2d 515, 516 (1981) (finding no substantial risk of miscarriage of justice because of instructions, evidence, and no objection).

⁵⁸ See, e.g., *Commonwealth v. Nadal-Ginard*, 1997 WL 1175, at *5, __ N.E.2d. __ (1997) (finding no substantial risk of a miscarriage of justice due to evidence of larceny); *Commonwealth v. Littleton*, 28 Mass. App. Ct. 951, 952, 649 N.E.2d 162, 163 (1995) (finding error was insignificant where evidence of guilt is strong); *Commonwealth v. Rivera*, 29 Mass. App. Ct. 290, 294-95, 560 N.E.2d 131, 134-35 (1990) (concluding defendant's statements and other evidence made case against defendant overwhelming).

⁵⁹ See, e.g., *Commonwealth v. Dyer*, 389 Mass. 677, 683-84, 451 N.E.2d 1161, 1164-65 (1983) (stating charge properly conveyed need to find intent); *Commonwealth v. Vieux*, 41 Mass. App. Court. 526, 535, 671 N.E.2d 989, 995 (1996) (determining jury instructions did not warrant hearing unpreserved issue); *Dupont*, 11 Mass. App. Ct. at 932, 416 N.E.2d at 516 (finding charge as a whole conveyed elements of armed robbery).

⁶⁰ See, e.g., *Commonwealth v. Delaney*, 418 Mass. 658, 663-64, 639 N.E.2d 710, 713-14 (1994) (holding although there was an error by the judge the error did not create a substantial risk of a miscarriage of justice); *Commonwealth v. Gagliardi*, 418 Mass. 562, 571-72, 638 N.E.2d 20, 25 (1994) (finding no reversible error in judge's instruction which used "moral certainty" language); *Commonwealth v. Ely*, 388 Mass. 69, 70, 444 N.E.2d 1276, 1278 (1983) (finding no reversible error or substantial risk of a miscarriage of justice in malice instruction).

judge that counsel believes the court has committed an error.⁶¹ Objecting gives the court an opportunity to remedy the error if possible.⁶² In *Commonwealth v. Hooks*,⁶³ the defendant was charged with murder in the first degree, armed robbery, and armed assault in a dwelling house with intent to commit a felony therein.⁶⁴ The defendant assigned as error the trial judge's failure to instruct the jury on lesser offenses and second degree murder.⁶⁵ At trial, the defendant failed to request those instructions, as required, and therefore did not alert the judge that he believed the charge given was inadequate.⁶⁶ The appellate court found no error in light of the fact that the trial court gave defense counsel an opportunity to request further instructions to the jury and the court was correct in excluding lesser included offenses from the charge.⁶⁷

Additionally, proper notification of alleged errors requires counsel to state the grounds for the objection. Appeal of those errors must be on the same grounds raised in the trial court.⁶⁸ An appellate court faced with an appeal of an error on grounds other than those presented to the trial court will review the case only to determine whether the alleged error created a substantial risk of a miscarriage of justice.⁶⁹

When counsel makes no objection to jury instructions and does not request or propose jury instructions, the court also limits its examination of the case to whether there is a substantial risk of a miscarriage of justice.⁷⁰ The failure of

⁶¹ See *Commonwealth v. Keegan*, 400 Mass. 557, 563, 511 N.E.2d 534, 539 (1987) (bringing alleged errors to trial court's attention can eliminate necessity of a new trial).

⁶² See *Foley*, 358 Mass. at 236, 263 N.E.2d at 453 (considering unpreserved errors deprives the trial judge of the opportunity to reconsider his ruling).

⁶³ 375 Mass. 284, 376 N.E.2d 857 (1978).

⁶⁴ *Id.* at 285, 376 N.E.2d at 858-59.

⁶⁵ *Id.* at 290, 376 N.E.2d at 861.

⁶⁶ *Id.*

⁶⁷ *Id.* at 290-91, 376 N.E.2d at 861.

⁶⁸ See *Fitzpatrick*, 14 Mass. App. Ct. at 1002, 441 N.E.2d at 560 (appealing error on grounds other than those objected to at trial limits appellate review).

⁶⁹ *Id.* (confining review to substantial risk of miscarriage of justice where different grounds for objection urged on appeal).

⁷⁰ See *Commonwealth v. Sheline*, 391 Mass. 279, 292, 461 N.E.2d 1197, 1206 (1984) (failing to object to jury charge limits review to substantial risk of a miscarriage of justice); *Barton*, 367 Mass. at 517, 326 N.E.2d at 887 (determining where no instructions requested no reversible error because no objection made at trial); *Commonwealth v. Messer*, 36 Mass. App. Ct. 708, 709, 713, 635 N.E.2d 5, 6, 8 (1994) (stating incorrect instruction did not create substantial risk of a miscarriage of justice where no objection at trial); *Commonwealth v. Gamache*, 35 Mass. App. Ct. 805, 812, 626 N.E.2d 616, 621-22 (1994) (finding prosecution's closing argument did not create substantial risk of a miscarriage of

appellate counsel to show either that trial counsel objected and preserved the issue for appeal, or that there is a substantial risk of a miscarriage of justice, will result in an appellate court's refusal to consider the issue on appeal.⁷¹ For example, in *Commonwealth v. Ramos*,⁷² the appellate court determined that the trial court's comments that the defendant carried two bags of cocaine and that the defendant's inculpatory remark was voluntary did not create a substantial risk of a miscarriage of justice.⁷³ The defendant failed to object at the time the judge made the comments, therefore, the appellate court held that even if there were "something to" the alleged error the issue could not be raised for the first time on appeal.⁷⁴

Failing to object not only limits appellate review to whether there was a substantial risk of a miscarriage of justice, but allows the court to consider such an omission in determining whether a substantial risk of a miscarriage of justice exists.⁷⁵ In *Commonwealth v. Doucette*,⁷⁶ the defendant appealed a first degree

justice); *Commonwealth v. Johnson*, 32 Mass. App. Ct. 355, 358, 589 N.E.2d 328, 330 (1992) (considering judge's failure to instruct the jury on lesser charge under substantial risk of a miscarriage of justice standard); *Commonwealth v. De La Cruz*, 15 Mass. App. Ct. 52, 56-57, 443 N.E.2d 427, 430-31 (1982) (indicting doctor did not create risk of miscarriage of justice).

⁷¹ See *Alvarez*, 413 Mass. at 237, 596 N.E.2d at 333 (holding defendant failed to ask for a supplementary instruction or object and failed to prove a substantial risk of a miscarriage of justice); *Commonwealth v. Nuby*, 32 Mass. App. Ct. 360, 363-64, 589 N.E.2d 331, 333 (1992) (refusing to give relief in absence of an objection to instructions). The absence of a vicarious liability instruction regarding a mother's involvement in a rape case did not create a substantial risk of a miscarriage of justice and, therefore, no relief could be granted in the absence of a timely objection even though the instruction may have been faulty. *Nuby*, 32 Mass. App. Ct. at 363-64, 589 N.E.2d at 333; *Commonwealth v. Bent*, 19 Mass. App. Ct. 950, 950, 473 N.E.2d 212, 213 (1985) (rejecting argument that instruction was defective where defendant did not object below). The defendant in *Bent* did not raise the objection below, and there was no substantial risk of a miscarriage of justice, so the appellate court would not hear an argument that the intent instruction in the murder case was defective. *Bent*, 19 Mass. App. Ct. at 950, 473 N.E.2d at 213; *Dupont*, 2 Mass. App. Ct. at 571, 317 N.E.2d at 87 (refusing to consider issue because no substantial risk of miscarriage of justice and issue not preserved).

⁷² 30 Mass. App. Ct. 915, 566 N.E.2d 1141 (1991).

⁷³ *Id.* at 918, 566 N.E.2d at 1142.

⁷⁴ *Id.*

⁷⁵ See *Matsos*, 421 Mass. at 397-99, 657 N.E.2d at 471-72 (determining no substantial risk of a miscarriage of justice where defendant failed to raise statute's constitutional validity at trial). Despite that fact that the stalking statute at issue was found unconstitutional, the *Matsos* court held that there was no substantial risk of a miscarriage of justice. *Id.*; *Commonwealth v. Brown*, 394 Mass. 510, 516-17, 476 N.E.2d 580, 584 (1985) (refusing to find substantial risk of a miscarriage of justice where defendant did not

murder conviction on the ground that several jury instructions were erroneous.⁷⁷ The court stated that the absence of an objection and the fact that the overall instructions conveyed the correct message to the jury were relevant to the determination that the challenged instructions did not create a substantial risk of a miscarriage of justice.⁷⁸ In another first degree murder case, the Massachusetts Supreme Judicial Court stated that the failure to instruct the jury that intoxication could render a statement involuntary did not create substantial risk of a miscarriage of justice because the judge was not required to instruct on the issue, the instruction helped the defendant, and the defense counsel fully cross-examined witnesses on the issue and argued it in his closing.⁷⁹

Determining that there was a substantial risk of a miscarriage of justice is a difficult decision for an appellate court to make because the trial court never had an opportunity to correct a decision which is now assigned as error. The risk becomes a question of how could the issue be so substantial as to create a potential miscarriage of justice if the trial attorney did not object at the time the error occurred. In cases previously mentioned, where a substantial risk of a miscarriage of justice was found, the error was so significant that considerations of justice overrode the trial attorney's failure to bring an alleged error to the attention of the trial court. However, in these cases, considerations of justice

object at trial). In *Brown*, the Supreme Judicial Court found that there was no substantial risk of a miscarriage of justice in the judge's failure to charge the jury that a participant in a joint venture must share the requisite criminal intent to be convicted as a principal. *Brown*, 394 Mass. at 516-17, 476 N.E.2d at 584; *Doucette*, 391 Mass. at 450, 462 N.E.2d at 1092 (stating that in determining whether there was substantial risk of a miscarriage of justice, the absence of an objection and the overall instruction is relevant); *Commonwealth v. Dise*, 31 Mass. App. Ct. 701, 706, 583 N.E.2d 271, 275 (1991) (determining that failure to instruct the jury regarding co-defendant's testimony does not create a substantial risk of a miscarriage of justice); *Commonwealth v. Brown*, 9 Mass. App. Ct. 609, 612, 403 N.E.2d 424, 426-27 (1980) (reasoning that there was no substantial risk of a miscarriage of justice where trial counsel failed to object and except to charge). In *Dise* there was no relationship or deal between the co-defendant and the state, there was no objection to the jury instructions by trial counsel, no request by counsel for an instruction, and co-defendant's possible bias was fully explored at trial. *Dise*, 31 Mass. App. Ct. at 706, 583 N.E.2d at 275. "There was no error, let alone a substantial risk of a miscarriage of justice." *Dise*, 31 Mass. App. Ct. at 706, 583 N.E.2d at 275.

⁷⁶ 391 Mass. 443, 462 N.E.2d 1084 (1984).

⁷⁷ *Id.* at 450, 462 N.E.2d at 1092.

⁷⁸ *Id.* Although the appeal was unsuccessful, the court noted that the trial counsel's failure did not amount to ineffective assistance of counsel because the trial attorney made some attempt to supplement the instructions. *Id.* at 456, 462 N.E.2d at 1096.

⁷⁹ See *Commonwealth v. Waters*, 399 Mass. 708, 715, 506 N.E.2d 859, 864 (1987) (concluding instruction not so erroneous to create a substantial risk of a miscarriage of justice).

were not implicated to the level in which the appellate court could ignore the failure to make a contemporaneous objection to the error because of the insignificant nature of the minor errors claimed on appeal.

(2) In light of the evidence against the appellant, errors do not create a substantial risk of a miscarriage of justice.

Several Massachusetts cases explicitly state that although the trial court may have erred, if there is abundant evidence against the appellant, there is no substantial risk of a miscarriage of justice.⁸⁰ In *Commonwealth v. Lemar*,⁸¹ the defendant was charged with criminal acts which occurred on three separate dates.⁸² The judge instructed the jury that they must act unanimously but did not specifically state that to convict the defendant the jury must unanimously believe that one or more of the events occurred.⁸³ The defendant did not object to the instruction at trial but argued to the Massachusetts Appeals Court that the instruction was an error which required reversal of the conviction.⁸⁴ The Appeals Court found that even if the instruction was erroneous it certainly did not rise to the level of plain error under Federal Rule of Criminal Procedure 52(b).⁸⁵ The court noted that because Massachusetts appellate courts have rejected the plain error standard, the issue is whether the alleged error created a substantial risk of a miscarriage of justice.⁸⁶ The court reasoned that because the evidence was sufficient for a jury to find beyond a reasonable doubt that each of

⁸⁰ See *Nadal-Ginard*, 1997 WL 1175 at * 5, __ N.E.2d __ (finding sufficient evidence larceny was committed); *Commonwealth v. Conefrey*, 37 Mass. App. Ct. 290, 295 n.5, 640 N.E.2d 116, 120 n.5 (1994) (determining general instruction sufficient where substantial evidence against defendant); *Gamache*, 35 Mass. App. Ct. at 812, 626 N.E.2d at 622 (1994) (failing to object is sign that trial counsel thought closing argument not misleading); *Rivera*, 29 Mass. App. Ct. at 294-95, 560 N.E.2d at 134-35 (concluding that defendant's own statements and other evidence made prosecution's case overwhelming); *Littleton*, 28 Mass. App. Ct. at 952, 649 N.E.2d at 163 (finding error insignificant where strong evidence of guilt); *Commonwealth v. Ranahan*, 23 Mass. App. Ct. 201, 202-03, 500 N.E.2d 1349, 1350-51 (deciding no error in face of substantial evidence against defendant); *Lemar*, 22 Mass. App. Ct. at 173, 492 N.E.2d at 107 (stating sufficient evidence available for jury to find beyond a reasonable doubt the three incidents occurred).

⁸¹ 22 Mass. App. Ct. 170, 492 N.E.2d 105 (1986).

⁸² *Id.* at 171, 492 N.E.2d at 105.

⁸³ *Id.* at 171, 492 N.E.2d at 106.

⁸⁴ *Id.*

⁸⁵ *Id.* at 172, 492 N.E.2d at 106. The *Lemar* court defined federal plain error as "an error so serious as to call for overturning a conviction." 22 Mass. App. Ct. 170, 171, 492 N.E.2d 105, 106 (1986).

⁸⁶ *Lemar*, 22 Mass. App. Ct. at 173, 492 N.E.2d at 106.

the three incidents had occurred and it was unlikely that the verdict would have been different had the instruction been clarified, there was no substantial risk of a miscarriage of justice.⁸⁷

The Massachusetts Appeals Court, in a subsequent decision, also ruled that the trial judge's failure to charge on diminished ability to operate a vehicle safely did not create a substantial risk of a miscarriage of justice and that excluding the defendant's chemist did not rise to the level of abuse of discretion.⁸⁸ The appeals court found that reversal in the absence of a contemporaneous objection was not warranted due to the substantial evidence of intoxication and the undisputed fact that the defendant's ability to operate the vehicle was impaired.⁸⁹

In recent years, the appeals court continued to factor the amount of evidence against an appellant into the analysis of whether there was a substantial risk of a miscarriage of justice.⁹⁰ These decisions indicate that when the evidence clearly points to the defendant's guilt and counsel failed to make a contemporaneous objection there is no substantial risk that the claimed error caused a miscarriage of justice.⁹¹

(3) Due to overall instructions, claimed errors in jury instructions did not create a substantial risk of a miscarriage of justice

When reviewing an appeal based on alleged errors in the jury instructions, the appeals court will look at the entire charge to determine whether the alleged error created a substantial risk of a miscarriage of justice.⁹² In *Commonwealth*

⁸⁷ *Id.*

⁸⁸ *Ranahan*, 23 Mass. App. Ct. at 203-04, 500 N.E.2d at 1351.

⁸⁹ *See Id.* at 203, 500 N.E.2d at 1351 (stating that a jury could reasonably find defendant's driving abilities impaired because evidence undisputed).

⁹⁰ *See Commonwealth v. Amirault*, 1997 WL 128911, *16, __ N.E.2d __ (1997) (denying new trial because no serious doubt as to the defendants' guilt); *Littleton*, 28 Mass. App. Ct. at 952, 649 N.E.2d at 163 (concluding where guilt strong, prosecution's comment did not create substantial risk of a miscarriage of justice); *Gamache*, 35 Mass. App. Ct. at 812, 626 N.E.2d at 621-22 (stating evidence supports conviction); *Rivera*, 29 Mass. App. Ct. at 295, 560 N.E.2d at 134 (determining no substantial risk of a miscarriage of justice where no objection and evidence of guilt).

⁹¹ *See Conefrey*, 37 Mass. App. Ct. at 295 n.5, 640 N.E.2d at 120 n.5 (holding no substantial risk of a miscarriage of justice where evidence sufficient to defeat motion for required finding).

⁹² *See Brown*, 394 Mass. at 516, 476 N.E.2d at 584 (finding no substantial risk of a miscarriage of justice based on instruction as a whole); *Souza*, 390 Mass. at 819, 461 N.E.2d at 170 (finding charge regarding reasonable doubt does not equal plain error); *Doucette*, 391 Mass. at 450, 462 N.E.2d at 1092 (concluding that taken as a whole instructions do not equal substantial risk of a miscarriage of justice); *Dyer*, 389 Mass. at

v. Dupont,⁹³ for example, the Massachusetts Appeals Court held that the instruction was not reversible error because the charge taken as a whole was not erroneous.⁹⁴ Despite the judge's failure to instruct the jury that it is necessary to find intent to permanently deprive the victim of property in an armed robbery case, the court held that in the light of trial counsel's failure to object there is no substantial risk of a miscarriage of justice.⁹⁵

Therefore, if a trial attorney wants an appellate court to review a specific portion of the jury instructions, it is important that she preserve that issue through a contemporaneous objection and to present the trial judge with proposed instructions. When an appellate court reviews an unpreserved jury instruction it considers the entire charge to determine whether the instruction conveyed the proper message. An appellate court will not find that an individual error in the jury instruction created a substantial risk of a miscarriage of justice if the overall instruction was proper and did not create a substantial risk of a miscarriage of justice.

(4) The error or claimed error did not rise to level of being reversible or plain error

Where an appellant fails to object, a harmless error will not serve to overturn the lower court. Rather, an appellant must show that an error was made which created a substantial risk of a miscarriage of justice.⁹⁶ For example, in

683-84, 451 N.E.2d at 1164-65 (stating charge as a whole conveyed to jury that they had to find an act and criminal intent); *Vieux*, 41 Mass. App. Court. at 535, 671 N.E.2d at 995 (determining jury instructions did not create substantial risk of a miscarriage of justice); *Connors*, 18 Mass. App. Ct. at 288, 464 N.E.2d at 1379 (finding charge that identification was essential issue in case did not create substantial risk of a miscarriage of justice).

⁹³ 11 Mass. App. Ct. 931, 416 N.E.2d 515 (1981).

⁹⁴ *Id.* at 931-32, 416 N.E.2d 516.

⁹⁵ *Id.* at 932, 416 N.E.2d 516.

⁹⁶ *See Delaney*, 418 Mass. at 663-64, 639 N.E.2d at 713-14 (holding error by judge did not create substantial risk of a miscarriage of justice); *Gagliardi*, 418 Mass. at 571-72, 638 N.E.2d at 25 (finding no plain error in judge's instruction on reasonable doubt which failed to explain burdens and used "moral certainty" language); *Keevan*, 400 Mass. at 562, 563-65, 511 N.E.2d at 538-39 (finding hearsay admittance and failure to instruct did not create substantial risk of a miscarriage of justice); *Commonwealth v. Turner*, 24 Mass. App. Ct. 902, 902, 506 N.E.2d 151, 152 (1987). The reviewing court in *Turner* concluded that the judge's language in the instruction was at most harmless error. *Turner*, 24 Mass. App. Ct. at 902, 506 N.E.2d at 152. The standard of review where the defendant failed to object to an instruction at trial is whether the charge created substantial risk of a miscarriage of justice. *Id.*; *Commonwealth v. Dane Entertainment Services, Inc.*, 18 Mass. App. Ct. 446, 451-52, 467 N.E.2d 222, 226-27 (1984) (restricting defendant's witness on artistic value of film while admitting movie poster is harmless error).

Commonwealth v. Ely,⁹⁷ while the court erred in equating intent to do serious bodily harm with murder in the first degree, this mistake was not reversible error and did not constitute a substantial risk of a miscarriage of justice.⁹⁸ Even in cases where the prosecution acts impermissibly, the action must still be shown to create a substantial risk of a miscarriage of justice.⁹⁹

A claimed, unpreserved error which is minor and insignificant to the outcome of the case will not be the basis for reversing the trial court's decision. The Massachusetts Appeals Court in *Commonwealth v. Cowie*¹⁰⁰ explained that the substantial risk of a miscarriage of justice standard is not easy to meet. In *Cowie*, the court heard an appeal based on a claim that the trial court erred in charging the jury.¹⁰¹ Consideration of the case was limited to whether there was a substantial risk of a miscarriage of justice due to the failure of trial counsel to preserve the issue for appeal.¹⁰² Appellate counsel argued that a particular instruction was "understated."¹⁰³ The appellate court responded that "[s]ubstantial risk of a miscarriage of justice does not turn on that sort of nuance" and found that the "alleged deficiency" did not involve a substantial risk of a miscarriage of justice.¹⁰⁴

Relevant to whether a substantial risk of a miscarriage of justice occurred is whether there was an objection, the amount of inculpatory evidence against a defendant, if the overall instructions properly informed the jury, and whether the error claimed constitutes reversible error. The substantial risk of a miscarriage of justice standard is a rarely exercised power of the appellate court to hear unpreserved issues where a miscarriage of justice may otherwise occur. As such, this standard is not a strategic tool to be used by trial counsel. Only where compelling considerations of justice are implicated will an appellate court overlook the failure of trial counsel to preserve an issue for appellate review through a contemporaneous objection. Therefore, the best policy for trial counsel is to preserve potential appellate issues for appeal at the trial level.

⁹⁷ 388 Mass. 69, 444 N.E.2d 1276 (1983).

⁹⁸ *Id.* at 70, 444 N.E.2d at 1277-78.

⁹⁹ *See Sanchez*, 405 Mass. at 375, 540 N.E.2d at 1320-21 (imploring jury to end children's nightmare was improper but did not create substantial risk of a miscarriage of justice).

¹⁰⁰ 28 Mass. App. Ct. 742, 556 N.E.2d 103 (1990).

¹⁰¹ *Id.* at 747, 556 N.E.2d at 106.

¹⁰² *Id.*

¹⁰³ *Id.* at 747, 556 N.E.2d at 106.

¹⁰⁴ *Cowie*, 28 Mass. App. Ct. at 747, 556 N.E.2d at 106.

III. NEW HAMPSHIRE'S REFUSAL TO ADOPT THE PLAIN ERROR RULE

The New Hampshire Supreme Court's refusal to adopt the federal "plain error" rule, which allows federal appellate courts to hear those unpreserved errors which affect substantial rights, stems from New Hampshire Rule of Evidence 103.¹⁰⁵ The New Hampshire rule mirrors the Federal Rules of Evidence, except for one important aspect: the New Hampshire Rules do not allow for review for plain error and deems any objection not raised at trial to be waived.¹⁰⁶ New Hampshire Rule of Evidence 103 requires a specific, contemporaneous objection to an admittance of evidence and a timely offer of proof for a ruling excluding evidence.¹⁰⁷ There is no safety net in New Hampshire. The Supreme Court of New Hampshire has emphatically refused to review an issue not preserved.¹⁰⁸

In addition, the New Hampshire Supreme and has steadfastly denied many requests to adopt the federal "plain error" rule.¹⁰⁹ If a contemporaneous objection specifically stating the grounds for objection was not made in the trial court the issue is deemed waived and may not be considered or reviewed on appeal.¹¹⁰ Appellate courts in New Hampshire simply and absolutely refuse to review an issue not preserved for appeal.¹¹¹

In *State v. Nadeau*,¹¹² the appeals court found a defendant's confession was admissible even though the trial judge previously held it inadmissible.¹¹³ The defendant claimed the trial judge erred in instructing the jury that the confession

¹⁰⁵ See N.H. R. EVID. 103 (stating contrary to federal plain error rule New Hampshire deems failure to object a waiver of the issue).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ See e.g., *State v. Zankowski*, 665 A.2d 1081, 1083 (N.H. 1995) (finding that the defendant did not prove waiver of right to jury trial was not voluntary); *State v. McAdams*, 134 N.H. 445, 446 594 A.2d 1273, 1273 (1991) (affirming conviction because defendant failed to raise the insufficiency of evidence claim at trial); *State v. Menard*, 133 N.H. 708, 710, 584 A.2d 752, 754 (1990) (denying appellate review because evidentiary issue was not preserved at trial).

¹⁰⁹ See *Johnson*, 130 N.H. at 587, 547 A.2d at 218 (stating New Hampshire Supreme Court deems objections not raised at trial waived).

¹¹⁰ *Id.* (refusing to consider grounds of objection not specified or called to judge's attention).

¹¹¹ See *Menard*, 133 N.H. at 710-712, 584 A.2d 752, 753-55 (refusing to review several unpreserved errors for plain error).

¹¹² 126 N.H. 120, 489 A.2d 623 (1985).

¹¹³ *Nadeau*, 126 N.H. at 123, 489 A.2d at 625 (arguing second court bound by first court).

could be used to determine guilt or innocence.¹¹⁴ The defendant further argued that the confession was a prior inconsistent statement and hence should only be used for the limited purpose of evaluating the defendant's credibility.¹¹⁵ Although the defendant failed to object to the jury instruction at trial, he argued that his request for instructions cured the failure to object and thus the jury instruction was so unfair that it constituted plain error.¹¹⁶ The New Hampshire Supreme Court rejected the defendant's position, stating that the defendant waived the issue when he failed to object at trial.¹¹⁷ The court advised that in situations where the issue involves a jury instruction, the defendant should object in order to give the trial judge the opportunity to remedy the error.¹¹⁸

One year later, the New Hampshire Supreme Court rejected a similarly situated defendant who argued that the court should have given limiting instructions *sua sponte*.¹¹⁹ The court rejected this argument, indicating counsel has the responsibility to suggest that the court impose limiting instructions.¹²⁰ The court stated its concern that at trial counsel could have decided not to draw attention to the evidence by requesting limiting instructions, and later raised the issue on appeal after the strategic move backfired.¹²¹

State v. Johnson,¹²² is often cited by the New Hampshire appellate courts to support New Hampshire's position that an issue must be properly preserved for there to be an appellate review.¹²³ The trial court in *Johnson* convicted the defendant of sexual assault.¹²⁴ On appeal, the defendant claimed the coercion charge to the jury was incorrect because it was improperly focused on the

¹¹⁴ *Id.* at 125, 489 A.2d at 626.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Nadeau*, 126 N.H. at 125, 489 A.2d at 626.

¹¹⁹ *Allen*, 128 N.H. at 398, 514 A.2d at 1269 (rejecting defendant's claim that court's failure to give limiting instructions *sua sponte* was error).

¹²⁰ *Id.*

¹²¹ *Id.* at 399, 514 A.2d at 1269.

¹²² 130 N.H. 578, 547 A.2d 213 (1988).

¹²³ *See, e.g., McAdams*, 134 N.H. at 446-47, 594 A.2d at 1273-74 (stating *Johnson* and cases following reject plain error on grounds of judicial economy); *Menard*, 133 N.H. at 710, 584 A.2d at 754 (quoting *Johnson* that off-record discussion is not an objection); *State v. Nutter*, 135 N.H. 162, 163-64, 600 A.2d 139, 140 (citing *Johnson* to support the well settled rule that objections not raised on appeal are waived).

¹²⁴ *Johnson*, 130 N.H. at 580, 547 A.2d at 214.

victim's state of mind instead of the defendant's acts.¹²⁵ At trial, however, the defendant objected to the charge on grounds other than those raised on appeal.¹²⁶ Therefore the court found that the defendant did not properly preserve the issue.¹²⁷ Although the defendant implored the court to correct the alleged "manifest error," the court refused.¹²⁸ The New Hampshire Supreme Court stated that Rule 103's objection requirement is based on common sense and judicial economy and allows the trial court the opportunity to correct alleged errors.¹²⁹ The court firmly refused to adopt a plain error standard stating that unpreserved errors discovered after trial by "combing the record" should not be used to set aside a verdict.¹³⁰

Despite the *Johnson* court's firm stand against adopting a plain error standard, there have been several subsequent appeals to the New Hampshire Supreme Court based on plain error.¹³¹ Whatever the particular predicament

¹²⁵ *Id.* at 587, 547 A.2d at 218.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* at 587, 547 A.2d at 218.

¹²⁹ *Johnson*, 130 N.H. at 587, 547 A.2d at 217.

¹³⁰ *Id.*; see also N.H. R. EVID. 103 (explaining rulings on evidence).

¹³¹ See *Zankowski*, 665 A.2d at 1083 (refusing to reverse case on collateral attack where record silent on whether defendant knowingly waived jury trial); *Nutter*, 135 N.H. at 164, 600 A.2d at 141 (refusing to reach merits of unpreserved issue). The defendant claimed that the sentencing was in error because related charges were considered but no objection was made. *Nutter*, 135 N.H. at 163, 600 A.2d at 140. The defendant did not properly preserve this issue by objection, therefore, the court refuses to reach merits of the appeal. *Nutter*, 135 N.H. at 163, 600 A.2d at 140. The court said that it is well settled by *State v. Johnson* that an error not objected to will not be considered on appeal. *Nutter*, 135 N.H. at 163-64, 600 A.2d at 140. In the interest of judicial economy, defendants must make specific contemporaneous objections. *Nutter*, 135 N.H. at 164, 600 A.2d at 140. New Hampshire will not recognize plain error. *Nutter*, 135 N.H. at 164, 600 A.2d at 141.; *McAdams*, 134 N.H. at 446, 594 A.2d at 1273. The defendant did not challenge the sufficiency of evidence at trial and thus can not raise that issue for the first time on appeal. *McAdams*, 134 N.H. at 446, 594 A.2d at 1273. The defendant tried to raise this under a plain error standard. *McAdams*, 134 N.H. at 449, 594 A.2d at 1279. Again, the Supreme Court of New Hampshire declined to adopt the standard. *McAdams*, 134 N.H. at 449, 594 A.2d at 1279; *Menard*, 133 N.H. at 712, 584 A.2d at 754-55. The defendant was charged with two counts of sexual assault on a victim under thirteen. *Menard*, 133 N.H. at 709, 584 A.2d 752. The issue of whether rebuttal testimony is admissible was not preserved by an objection. *Menard*, 133 N.H. at 710-11, 584 A.2d at 753-54. In addition, the hearsay issue was not preserved for appeal. *Menard*, 133 N.H. at 712, 584 A.2d at 754. Again, the court held that plain error is not applicable in New Hampshire state courts of appeal. *Menard*, 133 N.H. at 712, 584 A.2d at 754-55. There is no plain error review because the objection was not raised at trial. *Menard*, 133 N.H. at 712, 584 A.2d at 754-55.

defendants find themselves in, the court has consistently protected trial courts from “sandbagging” by refusing to allow the defendant to raise unpreserved issues in the state’s appeals system.¹³²

IV. CONCLUSION

A. Substantial Risk of Miscarriage of Justice: A Working Definition for Massachusetts Courts.

Massachusetts appellate courts determine whether or not an alleged error rises to the level of a substantial risk of a miscarriage of justice on a case-by-case basis and have not established a precise definition of the standard. However, the numerous decisions on this issue give practicing attorneys an insight into the court’s analysis of whether they will review an unpreserved issue based on a substantial risk of a miscarriage of justice.

The standard hinges on whether the error is significant and whether that error creates a substantial risk that there was a miscarriage of justice in the case at bar. If the appellant cannot show that trial counsel either objected to the alleged error or that the error created a substantial risk of a miscarriage of justice, the appeals courts of Massachusetts will not reach the merits of the appeal.

The definition of what constitutes a substantial risk of a miscarriage of justice is best discovered by noting what errors will not reach that high level. Based on the Massachusetts state cases decided, if the alleged error was not substantial or reversible, there was no objection preserving the issue, the evidence is strong against the defendant or the overall instructions remedied any singular erroneous instruction, then it is highly unlikely that the court will hear the defendant’s appeal.

B. The Massachusetts and New Hampshire Position: Justice and Judicial Economy

As noted, Massachusetts courts will review unpreserved issues on appeal if there is substantial risk of a miscarriage of justice. The New Hampshire Supreme Court has staunchly refused to hear an unpreserved issue or adopt a plain error standard. The question as to these two positions remains, which approach best insures that justice is done in an efficient manner?

If the focus is on judicial economy, the New Hampshire position is clearly superior. While the Massachusetts “substantial risk of a miscarriage of justice”

¹³² See *Johnson*, 130 N.H. at 587, 547 A.2d at 218 (warning that errors discovered by combing the record after trial will not set aside the verdict).

standard seems to err on the side of caution in terms of justice, it also gives the defendant whose counsel failed to preserve an issue for appeal a chance at having the appeal heard. This standard of review is an extra measure which insures justice, however, it also creates a substantial amount of work for appeals courts and provides an opportunity for abuse by appellate counsel.

Given these considerations, the Massachusetts' position strikes a fairer balance between insuring justice and judicial economy. Yet, Massachusetts courts would do well to follow New Hampshire's lead in one instance. Perhaps codifying the Massachusetts common law rules of evidence would help clarify the need to properly preserve issues for appeal and the devastating results if trial counsel fails to do so.

New Hampshire's position seems extremely harsh when applied to the situation of an innocent defendant whose counsel made an error in complying with the rules of evidence. However, New Hampshire's rigid position is more reasonable because it makes the necessity of a contemporaneous objection absolutely clear.

In either jurisdiction, the importance of raising a contemporaneous objection at trial is pivotal. Objecting to alleged errors is essential if counsel wishes to avoid the precarious situation where a client's final appeal is based on an unpreserved issue. This issue affects both client and counselor. An attorney who fails to preserve his client's appellate issues opens herself up to an ineffective assistance of counsel claim. In addition, timely objections will help practitioners avoid the unpleasant predicament of informing a client that the court will not hear his appeal because his attorney failed to object at trial.

Windy Rosebush