Miscarriage of Justice: Appellate Review of Unpreserved Constitutional Objections to the Admission of Evidence in Massachusetts

"[R]everse for error not preserved permits the losing side to second-guess its tactical decisions after they do not produce the desired result . . . [and] there is something unseemly about telling a lower court it was wrong when it never was presented with the opportunity to be right."1

I. INTRODUCTION

In Melendez-Diaz v. Massachusetts,2 the Supreme Court controversially held that criminal defendants have a Sixth Amendment right to cross-examine government lab analysts regarding certificates of chemical analysis (drug certificates) admitted at trial.3 The Supreme Judicial Court of Massachusetts (SJC) had previously held that admission of drug certificates—which state results of forensic drug tests—does not implicate defendants’ confrontation rights under the Sixth Amendment.4 Massachusetts appellate courts must now decide what standard of review to apply to claims of error arising from admission of such certificates where defendants had no opportunity to confront the authoring analyst.5 Where defense counsel has failed to object to the

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3. See id. at 2542 (reversing conviction due to admission of out-of-court affidavits in violation of Sixth Amendment); Tom Jackman, Lab Analyst Decision Complicates Prosecutions: High Court Requires Scientists to Testify, WASH. POST, July 15, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/07/14/AR2009071403565.html (discussing controversy surrounding Melendez-Diaz decision); see also U.S. CONST. amend. VI (reserving to criminal defendants right “to be confronted with the witnesses against [them]”); Crawford v. Washington, 541 U.S. 36, 53-54 (2004) (holding Sixth Amendment limits admission of testimonial statements of witnesses unavailable for cross-examination). While Melendez-Diaz involved a drug certificate, its holding applies to documents stating the results of other forensic tests, such as ballistics certificates. See Commonwealth v. Depina, 922 N.E.2d 778, 787 (Mass. 2010) (concluding Melendez-Diaz “applies equally” to ballistics certificates).
introduction of drug certificates at trial, Massachusetts courts will order a new trial only if the admission of the certificates created a substantial risk of a miscarriage of justice.\(^6\) This state of affairs resurrects a debate that ran through the Massachusetts courts a decade ago regarding appellate review of unpreserved objections and the meaning of a “miscarriage of justice.”\(^7\)

Traditionally, Massachusetts appellate courts did not review unpreserved trial errors.\(^8\) In the 1960s, however, the SJC softened this strict rule of finality, empowering appellate courts to order a new trial where an unpreserved trial error created a substantial risk of a miscarriage of justice.\(^9\) In essence, this new exception to the finality rule meant that a Massachusetts appellate court could now order a new trial in any case where unpreserved error “left [the court] with uncertainty that the defendant’s guilt ha[d] been fairly adjudicated.”\(^{10}\) By the turn of the century, the SJC had further liberalized appellate review, making clear that serious unpreserved trial errors could create a substantial risk of a miscarriage of justice in spite of compelling evidence of defendant’s factual guilt.\(^{11}\)

Under this new understanding of the miscarriage of justice standard, admission of highly incriminating but objectionable evidence—such as drug certificates, if the analyst is not available for cross-examination—constitutes potential grounds for a new trial, even if defense counsel fails to object.\(^{12}\) It

\(^6\) See infra notes 41-42 (listing cases indicating miscarriage of justice standard appropriate in most appeals based on unpreserved error). See generally Commonwealth v. Freeman, 227 N.E.2d 3, 9 (Mass. 1967) (ordering new trial where unpreserved error created substantial risk of miscarriage of justice). Where defense counsel properly preserves a constitutional error at trial by raising an objection, a Massachusetts appellate court will reverse the defendant’s conviction unless the error was harmless beyond a reasonable doubt. See, e.g., Depina, 922 N.E.2d at 787 (applying harmless error beyond reasonable doubt standard to preserved Confrontation Clause objection); Commonwealth v. Muniz, 921 N.E.2d 981, 983 (Mass. 2010) (reversing conviction where admission of forensics certificates over defendant’s objection not harmless beyond reasonable doubt); Commonwealth v. Connolly, 913 N.E.2d 356, 375 (Mass. 2009) (identifying harmless error beyond reasonable doubt as standard for preserved constitutional error).


\(^8\) See infra Part II.B.1 (discussing traditional Massachusetts rule).

\(^9\) See Freeman, 227 N.E.2d at 8-9 (ordering new trial due to incorrect jury instruction despite absence of contemporaneous objection); see also Commonwealth v. Miranda, 490 N.E.2d 1195, 1198-201 (Mass. App. Ct. 1986) (describing Freeman and other exceptions to traditional finality rule).

\(^10\) Commonwealth v. Randolph, 780 N.E.2d 58, 65 (Mass. 2002) (quoting Commonwealth v. Azar, 760 N.E.2d 1224, 1234 (Mass. 2002)) (describing miscarriage of justice standard). As the Randolph court noted, the miscarriage of justice standard is technically a default standard of review in appeals based on unpreserved error, rather than an exception to the finality rule. Id. (noting miscarriage of justice standard applies in “all cases” of unpreserved error).

\(^11\) See Alphas, 712 N.E.2d at 580 & n.6 (stating substantial risk of miscarriage of justice could exist despite improper admission of compelling evidence).

\(^12\) See Commonwealth v. Harris, 916 N.E.2d 396, 404 (Mass. App. Ct. 2009) (reviewing admission of
seems inappropriate, however, to call the admission of such evidence “error” in
the absence of a contemporaneous objection, or to suggest that the conviction
of a factually guilty defendant is a “miscarriage of justice.”13 Furthermore, by
reviewing admission of objectionable evidence as possible error rather than
ineffective assistance of counsel, the courts erode the role of counsel in our
legal system.14

This Note argues that, absent objection at trial, the Massachusetts courts
should review admission of objectionable evidence as potential ineffective
assistance of counsel, rather than as error under the miscarriage of justice
standard.15 Part II.A discusses the impact of the Melendez-Diaz decision on
Confrontation Clause jurisprudence and posits that the Massachusetts courts
will apply the miscarriage of justice standard to unpreserved claims of error
based on Melendez-Diaz.16 Part II.B.1 begins a discussion of the evolution of
appellate review in Massachusetts, describing the state’s traditional rule of
finality.17 Part II.B.2 examines the emergence of review for a substantial risk
of a miscarriage of justice and ineffective assistance of counsel as exceptions to
the traditional rule.18 Part II.B.3 recounts the Massachusetts courts’ struggle to
define the limits of miscarriage of justice review.19 Lastly, using appeals based
on Melendez-Diaz as illustrative examples, Part III argues that the
Massachusetts courts’ current approach is inconsistent with the traditional
meaning of “miscarriage of justice,” misunderstands the distinction between the
miscarriage of justice and ineffective assistance of counsel standards, and
undermines the role of counsel in our legal system.20

drug certificates without defense objection for substantial risk of miscarriage of justice); Eason, 681 N.E.2d at
870 (holding admission of “crucial” evidence from illegal wiretap created substantial risk of miscarriage of
justice).

(“Applying miscarriage analysis to a plainly guilty defendant . . . cut[s] the doctrine loose completely from its
historical moorings . . . .”), rev’d on other grounds, 694 N.E.2d 1264 (Mass. 1998). According to the
Amirault court, “a right that must be claimed is not denied if it is not claimed, and the proceeding in which the claim is
not made is, in that respect, wholly free from error.” Amirault, 677 N.E.2d at 668 n.15.

14. See infra Part III.B.3 (arguing current Massachusetts approach erodes role of counsel); see also Paul
less rigorous regarding counsel’s conduct” than ineffective assistance standard).

15. See infra Part II.B.3 (advocating return to guilt-based application of miscarriage of justice standard).

16. See infra Part II.A (explaining effect of Melendez-Diaz and discussing appropriate standard of review
in subsequent appeals).

17. See infra Part II.B.1 (discussing traditional finality rule).

18. See infra Part II.B.2 (describing adoption of exceptions to finality rule).

19. See infra Part II.B.3 (examining competing formulations of miscarriage of justice standard).

20. See infra Part III.A (noting anomalous state of Massachusetts law); Part III.B.1 (arguing in favor of
traditional guilt-based definition of miscarriage of justice); Part III.B.2 (suggesting admission of evidence
without objection more appropriately reviewed for ineffective assistance of counsel); Part III.B.3 (arguing
current Massachusetts approach erodes role of counsel).
II. HISTORY

A. The Right of Confrontation After Melendez-Diaz

1. The Confrontation Clause

The Confrontation Clause of the Sixth Amendment guarantees criminal defendants the “right . . . to be confronted with the witnesses against [them].” 21 The clause reflects concerns regarding the reliability of secondhand evidence, untested by the rigors of cross-examination. 22 In Crawford v. Washington, 23 the Supreme Court interpreted the Confrontation Clause to prohibit admission of “testimonial statements” of witnesses not testifying at trial. 24 Under Crawford, a witness’s testimonial statements are inadmissible unless the witness appears at trial, or—if the witness is unavailable to testify—the defendant had a prior opportunity to cross-examine the witness. 25 The Court declined to precisely define the term “testimonial” or delineate the class of statements that implicate the Confrontation Clause. 26 At the very least, however, the Court indicated that prior testimony and police interrogations are testimonial statements, and thus trigger defendants’ confrontation rights. 27


24. See id. at 54 (concluding Framers intended Confrontation Clause to prohibit admission of “testimonial statements” of absent witnesses). In so holding, the Court abandoned its prior Confrontation Clause jurisprudence, which permitted admission of an absent witness’s statement, provided that the statement was sufficiently reliable. See Ohio v. Roberts, 448 U.S. 56, 66 (1980) (holding hearsay admissible despite Confrontation Clause “if it bears adequate indicia of reliability” (internal quotation marks omitted)), overruled by Crawford, 541 U.S. 36; see also Davis v. Washington, 547 U.S. 813, 834 (2006) (Thomas, J., concurring in the judgment in part and dissenting in part) (characterizing Crawford as abandoning Court’s prior “general reliability” approach to Confrontation Clause).

25. See Crawford 541 U.S. at 53-54 (concluding Sixth Amendment incorporates common-law limitations on admissibility of examinations of absent witnesses).

26. See id. at 68 (“We leave for another day any effort to spell out a comprehensive definition of ‘testimonial.’”).

27. See id. (linking admission of prior testimony and police interrogations with historical abuses
Two years later, in *Davis v. Washington*, the Court provided some further guidance as to the meaning of “testimonial.” The Court held that, in the context of police interrogations, statements are testimonial when there is no ongoing emergency and the primary purpose of the interrogation is to create a record for use in a criminal prosecution. Thus, the Court concluded that a witness’s statement to police after officers had secured the scene of an alleged domestic dispute was testimonial; conversely, the Court held a 911 call under emergency circumstances nontestimonial. Nevertheless, the Court left open the question of whether laboratory reports stating the results of forensic tests—such as drug and ballistics certificates—were testimonial statements under *Crawford*’s interpretation of the Confrontation Clause.

**2. Melendez-Diaz and its Aftermath**

In *Melendez-Diaz v. Massachusetts*, the Supreme Court held that admission of drug certificates against a criminal defendant who has not had an opportunity to cross-examine the preparing analyst violates the defendant’s Sixth Amendment confrontation rights. Relying on its decision in *Crawford*, the Court concluded that drug certificates fall squarely within the class of animating Confrontation Clause).


29. See id. at 822 (clarifying meaning of “testimonial” without providing “exhaustive classification of all conceivable statements”).

30. See id. (distinguishing testimonial and nontestimonial statements in context of police interrogations). The Court was quick to note that statements outside the context of interrogations are not necessarily nontestimonial. See id. at 822 n.1 (“Our holding refers to interrogations because . . . the cases presently before us . . . [involve] interrogations . . . .”).

31. Compare id. at 829-30 (concluding witness’s statement to police responding to domestic disturbance testimonial absent “immediate threat” to witness), with id. at 827-28 (holding “frantic” 911 call during ongoing domestic disturbance not testimonial).


33. 129 S. Ct. 2527 (2009).

34. See id. at 2542 (reversing defendant’s conviction based on Sixth Amendment violation under *Crawford*). In *Melendez-Diaz*, the Commonwealth charged the defendant with distributing cocaine and trafficking in cocaine in an amount between fourteen and twenty-eight grams. *Id.* at 2530. At trial, the prosecution introduced drug certificates stating that a substance linked to the defendant “was found to contain: Cocaine.” *Id.* at 2531. The trial court overruled the defendant’s Confrontation Clause objection, and the jury found him guilty. *Id.* The appeals court affirmed. *Id.*
testimonial statements that implicate the Confrontation Clause.  

The Court reasoned that drug certificates are testimonial because they are functionally equivalent to a lab analyst’s live testimony.  

Under Crawford, the Court reiterated, such testimonial statements are inadmissible “unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination.”

Melendez-Diaz changed the law in Massachusetts, as the SJC had previously held that drug certificates were not testimonial statements that trigger a defendant’s confrontation right under Crawford. Since Melendez-Diaz, Massachusetts courts have faced a wave of appeals claiming violations of the Confrontation Clause. In hearing such appeals, the courts must necessarily determine the appropriate standard of review. In the absence of a contemporaneous objection, Massachusetts courts generally review admission of constitutionally objectionable evidence under the substantial risk of a miscarriage of justice standard.

After Melendez-Diaz, this same standard of

35. Id. at 2532 (concluding drug certificates fall within “core class of testimonial statements” under Crawford (quoting Crawford v. Washington, 541 U.S. 36, 51 (2004)); see also Crawford, 541 U.S. at 53-54 (holding Sixth Amendment generally prohibits admission of “testimonial statements” of witnesses not appearing at trial).

36. See Melendez-Diaz, 129 S. Ct. at 2532 (characterizing drug certificates as “functionally identical to live, in-court testimony” of preparing analysts). The Court refused to treat lab analysts differently than ordinary witnesses, noting that the reliability concerns underlying the Confrontation Clause apply equally to forensic evidence. See id. at 2536 (“Forensic evidence is not uniquely immune from the risk of manipulation.”).

37. Id. at 2531 (citing Crawford, 541 U.S. at 54). The majority found the Commonwealth’s invocation of the practical difficulties of making state lab analysts available to testify at every trial involving forensic evidence unpersuasive. See id. at 2540 (“The Confrontation Clause . . . is binding, and we may not disregard it at our convenience.”).

38. See, e.g., Commonwealth v. Verde, 827 N.E.2d 701, 706 (Mass. 2005) (concluding drug certificates beyond scope of “principal evil at which the Confrontation Clause was directed” (quoting Crawford, 541 U.S. at 50)), abrogated by Melendez-Diaz, 129 S. Ct. at 2532 (“[U]nder our decision in Crawford the analysts’ affidavits were testimonial statements . . . ”).


40. See Vasquez, 923 N.E.2d at 530 (recognizing appellate review “focuses in the first instance on the standard of review on appeal”).

review will apply to unpreserved claims of error arising from admission of drug certificates.42

B. The Evolution of Appellate Review in Massachusetts

1. The Traditional Finality Rule

The Massachusetts courts did not review objections that litigants first raised on appeal until 1967.43 The strict requirement of timely objections served judicial economy and prevented litigants who tactically chose not to object from seeking reversal if their gamble did not pay off.44 At the time, the SJC set forth two rationales for the finality rule:

[The finality rule] proceeds upon two grounds; one, that if the exception is intended to be relied on, and is seasonably taken, the omission may be supplied, or the error corrected, and the rights of all parties saved. The other is, that it is not consistent with the purposes of justice, for a party knowing of a secret defect, to proceed and take his chance for a favorable verdict, with the power and intent to annul it, as erroneous and void, if it should be against him.45

42. See Commonwealth v. Harris, 916 N.E.2d 396, 404 (Mass. App. Ct. 2009) (applying miscarriage of justice standard to Melendez-Diaz issue defendant first raised on appeal); Commonwealth v. Vasquez, 914 N.E.2d 944, 955 (Mass. App. Ct. 2009) (concluding miscarriage of justice standard applies to unpreserved claims of error based on Melendez-Diaz), rev’d, 923 N.E.2d at 527-28 (applying harmless error standard due to timing of defendant’s trial between Verde and Melendez-Diaz). A narrow subset of appeals based on Melendez-Diaz is subject to the more defendant-friendly harmless error beyond a reasonable doubt standard, pursuant to the clairvoyance exception. See Vasquez, 923 N.E.2d at 528 (reviewing error as if properly preserved because objection at trial “would have been futile”); infra note 49 (describing clairvoyance exception); see also Charles, 923 N.E.2d at 522 (applying harmless error standard to appeal based on Melendez-Diaz “for the reasons explained in Vasquez”). The clairvoyance exception applies only to cases tried during the interim between the SJC’s Verde decision—which seemingly settled the issue of the constitutionality of drug certificates under the Confrontation Clause—and the Supreme Court’s decision in Melendez-Diaz. See Vasquez, 923 N.E.2d at 533 (“The defendant should not be penalized because of any doubt . . . Verde may have created.”); id. at 531 n.8 (noting result “no different” had trial occurred any time after Verde but before Melendez-Diaz decision).

43. See Linn, supra note 14, at 2 (describing “harsh but simple” traditional rule); see also Commonwealth v. Freeman, 227 N.E.2d 3, 8-9 (Mass. 1967) (reversing defendant’s conviction based on incorrect jury instruction despite defendant’s failure to object).

44. See Commonwealth v. Alphas, 712 N.E.2d 575, 585 (Mass. 1999) (Greaney, J., concurring) (identifying judicial economy as principal rationale for traditional finality rule); Cady v. Norton, 31 Mass. (14 Pick.) 236, 237 (1833) (setting forth rationale of finality rule); see also Linn, supra note 14, at 2 (discussing purposes of traditional finality rule). In cases involving failure to object to the admission of evidence, the requirement of a contemporaneous objection also enables opposing counsel to ameliorate any problems with their case—most likely by seeking to admit alternative evidence. See Vasquez, 923 N.E.2d at 545 (Spina, J., dissenting in part and concurring in part) (arguing reversal based on unchallenged admission of drug certificates unfair to Commonwealth).

45. Cady, 31 Mass. (14 Pick.) at 237 (upholding verdict for plaintiff where defendant failed to object to testimony of unsworn witness). Justice Greaney of the SJC later endorsed the following description of the reasons underlying the finality rule:
Even so, in *Commonwealth v. Conroy*, the SJC maintained that it possessed the authority to reverse a criminal conviction based on an objection the defendant did not raise at trial. The SJC would only invoke this power, however, “in appropriate instances . . . to prevent a miscarriage of justice.”

2. Safety Valves for Unpreserved Objections: The Freeman and Saferian Exceptions

Over the course of the 1960s and 1970s, the SJC significantly loosened its sometimes draconian rule of finality, adopting a number of exceptions to the traditional rule. In *Commonwealth v. Freeman*, the SJC first employed the power it referenced in *Conroy*, ordering a new trial based on an incorrect jury instruction—despite the defendant’s failure to object at trial—because the erroneous instruction created a substantial risk of a miscarriage of justice.

There are many rationales for the [finality] rule: that it is a necessary corollary of our adversary system in which issues are framed by the litigants and presented to a court; that fairness to all parties requires a litigant to advance his contentions at a time when there is an opportunity to respond to them factually, if his opponent chooses to; that the rule promotes efficient trial proceedings; that reversing for error not preserved permits the losing side to second-guess its tactical decisions after they do not produce the desired result; and that there is something unseemly about telling a lower court it was wrong when it never was presented with the opportunity to be right. The principal rationale, however, is judicial economy. There are two components to judicial economy: (1) if the losing side can obtain an appellate reversal because of error not objected to, the parties and public are put to the expense of retrial that could have been avoided had an objection been made; and (2) if an issue had been raised in the trial court, it could have been resolved there, and the parties and public would be spared the expense of an appeal.

*Alphas*, 712 N.E.2d at 585 (Greaney, J., concurring) (quoting State v. Applegate, 591 P.2d 371, 373 (Or. Ct. App. 1979)).

46. 133 N.E.2d 246 (Mass. 1956).

47. See id. at 250 (reserving power to set aside verdict based on unpreserved objection “to prevent a miscarriage of justice”); Linn, *supra* note 14, at 2 (noting SJC’s insistence on its power to reverse based on unpreserved objection).


49. See *Commonwealth v. Saferian*, 315 N.E.2d 878, 883 (Mass. 1974) (setting forth standard for constitutionally ineffective assistance of counsel warranting new trial); *Commonwealth v. Freeman*, 227 N.E.2d 3, 8-9 (Mass. 1967) (ordering new trial based on unpreserved objection to prevent substantial risk of miscarriage of justice). Aside from the *Freeman* and *Saferian* exceptions, there are currently two additional exceptions to the finality rule: plenary review of unpreserved error in capital cases, and the so-called “clairvoyance” exception for constitutional error, which applies where an area of constitutional law was not sufficiently developed for defense counsel to have known to object. See MAss. GEN. LAWS ch. 278, § 33E (2008) (providing for SJC review of “the whole case” following first degree murder conviction); *Commonwealth v. Randolph*, 780 N.E.2d 58, 65 (Mass. 2002) (stating clairvoyance exception applies where defendants lacked “genuine opportunity” to raise claims of constitutional error (quoting *Commonwealth v. Rembiszewski*, 461 N.E.2d 201, 204 (Mass. 1984)); see also *Commonwealth v. Miranda*, 490 N.E.2d 1195, 1198-200 (Mass. App. Ct. 1986) (describing review under § 33E and clairvoyance exception).


51. See id. at 9 (employing “power referred to in . . . Conroy” to order new trial despite absence of contemporaneous objection).
While chiding defense counsel for failing to bring the defective instruction to the attention of the trial judge, the court nevertheless reversed, fearing that the erroneous instruction misled the jury into convicting the defendant. Going forward, the SJC applied the exception it established in *Freeman* to any highly prejudicial trial error, doing little to delineate the contours of the doctrine.

Soon after *Freeman*, in *Commonwealth v. Saferian*, the SJC significantly broadened another exception to the finality rule: constitutional claims of ineffective assistance of counsel. Both the Sixth Amendment and Article XII of the Massachusetts Declaration of Rights guarantee criminal defendants the right to counsel. As both the Supreme Court and SJC have made clear, the right to counsel necessarily entails the right to “effective assistance of counsel,” and, as such, contemplates a certain baseline standard of competency, below which counsel is constitutionally ineffective. Massachusetts originally adhered to the federal standard for ineffectiveness, which at that time required that a defendant show that counsel “turned the proceedings into a ‘farce and a mockery.’” Under *Saferian*, however, a defendant is entitled to a new trial.

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52. See id. at 8-9 (“[T]here is substantial danger that the jury were misled by the erroneous instruction . . . .”).
53. See *Miranda*, 490 N.E.2d at 1202 (describing *Freeman* as “most fluidly defined” exception to finality rule); *Linn*, supra note 14, at 3 & n.10 (describing SJC’s unsystematic approach to *Freeman* review).
55. See id. at 883 (setting forth test for constitutionally ineffective assistance of counsel requiring new trial).
56. See U.S. Const. amend. VI (guaranteeing criminal defendants “the right . . . to have the Assistance of Counsel for [their] defence”); Mass. Const. pt. 1, art. XII (guaranteeing subjects right “to be fully heard in [their] defence by . . . council at [their] election”). The Supreme Court has held that the right to counsel is a fundamental constitutional right. Gideon v. Wainwright, 372 U.S. 335, 342-43 (1963) (reiterating its “unmistakable” conclusion regarding fundamental character of right to counsel).
57. See Lavallee v. Justices in the Hampden Superior Court, 812 N.E.2d 895, 903 (Mass. 2004) (citing Kimmelman v. Morrison, 477 U.S. 365, 377 (1986)) (“The right to counsel means the right to effective assistance of counsel.”). It is nevertheless unclear whether the right to effective assistance of counsel derives from the right to counsel or from the right to due process under the Fifth and Fourteenth Amendments. See U.S. Const. amend. V (“No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .”); U.S. Const. amend. XIV, § 1 (“No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .”). Compare Commonwealth v. Urena, 632 N.E.2d 1200, 1202 (1994) (identifying various constitutional sources of right to effective assistance of counsel), with *Saferian*, 315 N.E.2d at 882 (recognizing right to effective assistance of counsel as deriving from Sixth Amendment). See generally Mark A. Fogg, Comment and Casenote, Defects in Ineffective Assistance Standards Used by State Courts, 50 U. COLO. L. REV. 389 (1979) (tracing origins and history of right to effective assistance of counsel). As the Supreme Court has explained:

[T]he Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial. The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause . . . .

where defense counsel behaved in a manner that (1) fell “measurably below . . . [that of] an ordinary fallible lawyer,” and (2) likely deprived the defendant of a “substantial ground of defence.”

Saferian thus considerably liberalized the ineffective assistance of counsel standard in Massachusetts, as a defendant needed only show that counsel was ineffective with regard to a particular ground of defense, rather than the entire case.

3. The Struggle to Define a “Substantial Risk of a Miscarriage of Justice”

Over time, the Massachusetts courts narrowed the distinction between the Freeman and Saferian standards. In Commonwealth v. Miranda, the Massachusetts Appeals Court developed a three-pronged test for the existence of a substantial risk of a miscarriage of justice under Freeman, requiring a showing that: (1) a “genuine question of guilt or innocence” exists; (2) the error was “sufficiently significant” to have altered the outcome of the trial; and (3) the defendant’s failure to object was not simply a tactical choice. A decade later, in Commonwealth v. Amirault, the SJC explicitly endorsed the Miranda elements. This definition of Freeman’s substantial risk of a miscarriage of justice test differed from Saferian’s ineffective assistance standard only in that the Freeman exception required a real possibility that the defendant did not commit the crime.


61. See Commonwealth v. Curtis, 632 N.E.2d 821, 826 n.4 (Mass. 1994) (stating counsel not ineffective unless failure to object created substantial risk of miscarriage of justice); Linn, supra note 14, at 3 (noting growing similarity of Freeman and Saferian standards).


63. Id. at 1202.

64. 677 N.E.2d 652 (Mass. 1997).

65. See id. at 673 (endorsing Miranda’s statement of substantial risk of miscarriage of justice standard).

Justice Charles Fried, who wrote the SJC’s opinion in Amirault, later characterized his opinion adopting the Miranda elements as an attempt to “rationalize the practice of the Massachusetts courts in respect to post-conviction remedies.” Charles Fried, Scholars and Judges: Reason and Power, 23 HARV. J.L. & PUB. POL’Y 807, 825 n.56 (2000).

66. Linn, supra note 14, at 3 (comparing Freeman and Saferian standards after Miranda); see also Miranda, 490 N.E.2d at 1199-200 (describing Freeman and Saferian standards). As Paul Linn put it, “the Freeman standard was essentially the Saferian standard with one additional element: a genuine possibility that
By endorsing *Miranda*, the SJC effectively adopted a guilt-based approach to the *Freeman* exception.67 Under such an approach, a new trial would not typically be available where defense counsel failed to object to highly incriminating evidence, because such evidence would dispel the “genuine question of guilt or innocence” *Miranda* requires.68 Just two years later, however, the SJC reversed itself in *Commonwealth v. Alphas*,69 rejecting *Miranda*’s insistence that a genuine question of the defendant’s guilt or innocence is a necessary prerequisite to the existence of a substantial risk of a miscarriage of justice under *Freeman*.70 After *Alphas*, then, Massachusetts appellate courts look simply to the effect of a trial error on the verdict, rather than whether the error may have led to the conviction of an innocent defendant.71
A. The Current State of the Law

By rejecting guilt-based application of Freeman, the SJC removed the key remaining distinction between Freeman’s miscarriage of justice standard and Saferian’s ineffective assistance standard. The SJC thus made Saferian redundant of Freeman, as both standards require the same level of prejudice to the defendant. Moreover, while Freeman requires only a reasonable inference that counsel’s failure to object was not a reasonable tactical decision, Saferian requires a judicial finding that counsel’s behavior fell below that of an ordinary, fallible lawyer. After Alphas, then, defendants can more easily obtain a new trial through Freeman than Saferian.

Under most circumstances, a court reviewing for a substantial risk of a miscarriage of justice will reach the same conclusion regardless of whether it weighs the evidence of the defendant’s guilt. This is because trial errors prejudicial enough to warrant a new trial typically call the defendant’s factual guilt into question. For example, an incorrect jury instruction generally casts doubt upon a defendant’s conviction, absent overwhelming evidence of the defendant’s guilt or reason to believe that the error did not impact the jury’s verdict. This is not the case, however, where the error alleged is admission of

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72. See supra note 66 and accompanying text (identifying possibility of defendant’s innocence as sole requirement distinguishing Freeman from Saferian).


74. See Eason, 681 N.E.2d at 876 (Armstrong, J., dissenting) (criticizing majority for rendering “superfluous . . . the core element of Saferian”); Linn, supra note 14, at 4 & n.27 (describing Freeman’s requirements regarding counsel’s conduct as “less rigorous” than Saferian’s). Compare Alphas, 712 N.E.2d at 580 (stating reasons counsel failed to object “can be inferred from the record” for Freeman purposes (internal quotation marks omitted)), with Commonwealth v. Brookins, 617 N.E.2d 621, 625 (Mass. 1993) (concluding assessment of counsel’s effectiveness under Saferian requires evidentiary hearing or stipulation of facts).

75. See Linn, supra note 14, at 4 n.27 (“Freeman . . . is thus more favorable to a defendant than the Saferian standard regarding unpreserved trial errors . . . ”).

76. See id. at 5 (noting guilt-based approach requires nothing more of appellate courts in most circumstances).

77. See id. ("[M]ost material trial errors cast some doubt on the defendant’s factual guilt.").

incriminating but objectionable evidence. For instance, under the Massachusetts courts’ current approach, if a defendant fails to object to admission of evidence obtained in violation of the Fourth Amendment’s bar on unreasonable searches and seizures, Massachusetts appellate courts consider whether admission of the evidence created a substantial risk of a miscarriage of justice without reference to the evidence itself. Under a guilt-based approach, an appellate court would consider the objectionable evidence, so long as it is reliable, and order a new trial only if there was a genuine possibility that the jury had convicted an innocent defendant.

The reliability of drug certificates and similar documents stating the results of forensic tests is subject to debate, as Justice Scalia noted in Melendez-Diaz. Even so, the SJC does not appear to share these concerns. Before Melendez-Diaz, such certificates had long served as prima facie evidence in criminal cases in Massachusetts—evidence that defendants were free to rebut. Once a defendant fails to object to admission of drug or ballistics certificates, any Confrontation Clause objection loses its constitutional imperative. Appellate courts should be free to consider such evidence, along with any countervailing evidence, in determining whether a substantial risk of a miscarriage of justice exists.

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79. See Linn, supra note 14, at 5 (recognizing admission of objectionable evidence as only significant instance where guilt-based approach produces different outcomes).
80. See Alphas, 712 N.E.2d at 580 (reviewing un preserved error under Freeman “without consideration of any evidence erroneously admitted”).
81. See id. at 589 (Fried, J., concurring) (rejecting majority’s refusal to consider erroneously admitted testimony in reviewing for miscarriage of justice); Commonwealth v. Miranda, 490 N.E.2d 1195, 1202 n.22 (Mass. App. Ct. 1986) (stating admission of incriminating evidence without objection does not generally risk miscarriage of justice). As Justice Fried argued: “It is not a miscarriage of justice that a person reliably judged to be guilty failed to avail himself of a technicality and so allowed admission of the proof that clinches the case against him.” Alphas, 712 N.E.2d at 588 (Fried, J., concurring).
82. See Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 2536 (2009) (“Forensic evidence is not uniquely immune from the risk of manipulation.”).
84. See id. (concluding drug certificates fall within public records exception to Confrontation Clause); see also Commonwealth v. Vasquez, 923 N.E.2d 524, 533 (Mass. 2010) (noting precedent contrary to Melendez-Diaz “enjoyed a long, unproblematic history in this Commonwealth”).
85. See Commonwealth v. Amirault, 677 N.E.2d 652, 673 (Mass. 1997) (“Once a defendant has waived his right to face-to-face confrontation, this right drops out as a constitutional absolute.”).
B. Massachusetts Should Return to a Guilt-Based Approach to Miscarriage of Justice Review

1. Admission of Incriminating but Objectionable Evidence Cannot Create a “Substantial Risk of a Miscarriage of Justice”

Historically, preventing a “miscarriage of justice” did not entail reversal of convictions founded upon compelling evidence of guilt. The Freeman exception originally functioned as a safety valve appellate courts could trigger if it appeared to them that an unpreserved trial error might well have resulted in the conviction of an innocent defendant. In such rare instances, the interests of justice would outweigh the judicial system’s strong interest in finality. As critics of this historical, guilt-based definition of a “miscarriage of justice” rightly point out, even the guilty have a right to a fair trial. But such defendants may seek a new trial based on ineffective assistance of counsel, provided they can establish that their attorney’s conduct fell below that of an ordinary, fallible lawyer.

Many scholars and jurists have suggested that guilt-based appellate review effectively permits a reviewing court to usurp the fact-finding function of the jury. In reality, however, the guilt-based approach does not ask appellate judges to do any more than they must do under the Massachusetts courts’ present approach. In the case of admission of objectionable evidence, the difference between the two approaches simply comes down to whether the reviewing judge does or does not consider the objectionable evidence when determining whether there has been a miscarriage of justice.

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88. See id. (highlighting historical requirement of factual innocence for substantial risk of miscarriage of justice to exist).

89. See supra notes 44-45 and accompanying text (discussing rationale behind traditional finality rule).


91. See Linn, supra note 14, at 5 (“[M]ost unpreserved violations of a defendant’s constitutional rights would remain remediable under Saferian.”).

92. See Commonwealth v. Alphas, 712 N.E.2d 575, 584 (Mass. 1999) (Greaney, J., concurring) (arguing guilt-based approach “conceptually flawed” because it invades province of jury); Harry T. Edwards, To Err Is Human, but Not Always Harmless: When Should Legal Error Be Tolerated?, 70 N.Y.U. L. REV. 1167, 1171 (rejecting guilt-based approach to federal harmless error standard). According to Justice Greaney of the SJC, “[a]ny test concerning reversible error that requires an appellate court to determine whether a defendant is actually innocent is conceptually flawed because such a test converts the appellate function into the jury function in violation of their different purposes.” Alphas, 712 N.E.2d at 585 (Greaney, J., concurring).

93. See Alphas, 712 N.E.2d at 587 (Fried, J., concurring) (arguing guilt-based and current approaches identical “[e]xcept for ineftable distinctions of degree”).

94. See supra notes 76-81 and accompanying text (comparing current approach and guilt-based approach to miscarriage of justice review).
can consider this evidence as they would any other evidence, without invading the fact-finding province of the jury.\(^95\)

2. Admission of Incriminating but Objectionable Evidence is an Error of Counsel More Properly Reviewed for Ineffective Assistance of Counsel

Massachusetts courts have consistently held that admission of objectionable evidence is error, even if the party prejudiced by that evidence fails to object to its admission at trial.\(^96\) But rights, even of constitutional dimension, are not self-executing.\(^97\) Failure to claim a right is an error of counsel, not of the court, and is thus more appropriately reviewed through the lens of ineffective assistance of counsel.\(^98\)

Reviewing unchallenged admission of incriminating evidence for a substantial risk of a miscarriage of justice rather than for ineffective assistance of counsel misunderstands the differing rationales underlying the two standards.\(^99\) While the ineffective assistance standard derives from the defendant’s constitutional right to counsel, miscarriage of justice review is a discretionary power of the court deriving from concerns of justice.\(^100\) Accordingly, counsel’s failure to object to admission of incriminating evidence may constitute ineffective assistance, as all defendants enjoy a constitutional

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95. See Alphas, 712 N.E.2d at 587 (Fried, J., concurring) (rejecting as “mere wordplay” suggestion that guilt-based approach usurps jury’s role); Linn, supra note 14, at 5 (“An appellate court can consider [reliable but illegally obtained] evidence without making any findings of fact.”).


97. See Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 2532 n.1 (2009) (“[W]hat testimony is introduced must (if the defendant objects) be introduced live.” (second emphasis added)); Commonwealth v. Amirault, 677 N.E.2d 652, 668 n.15 (Mass. 1997) (“[A] right that must be claimed is not denied if it is not claimed . . . .”). For this reason, the jury may consider otherwise impermissible hearsay absent objection at trial. See Commonwealth v. Stewart, 499 N.E.2d 822, 828 (Mass. 1986) (“[H]earsay evidence admitted without objection may be considered by the jury and may be given any probative value it possesses.”).


99. See Eason, 681 N.E.2d at 875 (Armstrong, J., dissenting) (distinguishing rationales underlying miscarriage of justice and ineffective assistance of counsel standards).

100. See id. (characterizing ineffective assistance as “rights-based remedy” and miscarriage standard as discretionary, justice-based remedy); see also supra notes 56-57 and accompanying text (identifying various constitutional sources of right to effective assistance of counsel).
right to effective assistance of counsel. If defense counsel was constitutionally effective, however, conviction of a defendant based on compelling evidence works no injustice, even if the court would have excluded the evidence upon proper objection.

3. Reviewing Admission of Objectionable Evidence Under Freeman Erodes the Role of Counsel

There are many tactical reasons why counsel might choose not to object to admission of objectionable evidence such as drug certificates. First, the defendant’s theory of the case might not depend on challenging the chemical composition of the substance in question. For example, defense counsel’s theory of a case might be that, although there were drugs in defendant’s apartment, the defendant was unaware of their presence and thus could not have possessed them. In such cases, insisting on confrontation of the authoring analyst will merely cause delay, and potentially reduce defense counsel’s credibility in the eyes of the judge or jury. Second, putting a lab...

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102. See Commonwealth v. Alphas, 712 N.E.2d 575, 588 (Mass. 1999) (Fried, J., concurring) (arguing reliably convicted defendant’s failure to “avail himself of a technicality” not miscarriage of justice). Indeed, as Justice Fried pointed out, “if the term justice includes justice to the interests of society and justice to the victims of crime, the release . . . of [a] convicted person on such a basis would itself be a grave miscarriage of justice.” Id.

103. See Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 2542 (2009) (noting strategic considerations militating against objection to admission of drug certificates); see also Hoskinson, supra note 90, at 1132 (describing reasons for intentional failure to object). Of course, defense counsel might unintentionally fail to object, but only tactical decisions by counsel are obstacles to obtaining a new trial under Freeman. See Commonwealth v. Miranda, 490 N.E.2d 1195, 1202 (Mass. App. Ct. 1986) (stating “reasonable tactical decision” not to object not grounds for new trial under Freeman).


105. See Commonwealth v. Madera, 920 N.E.2d 312, 320 (Mass. App. Ct. 2010) (noting defendant’s alleged ignorance of drugs in his apartment formed “central theme” of defense). Similarly, defendants facing distribution charges might concede that substances in their possession were indeed drugs, but maintain that the drugs were for personal use only. See Commonwealth v. Rodriguez, 913 N.E.2d 880, 888 (Mass. App. Ct. 2009) (concluding introduction of drug certificates harmless error where defendant argued drugs for personal use); Dessources, 905 N.E.2d at 592 n.8 (“[Defendant’s] theory was that the marijuana was intended for personal use rather than for distribution.”).

106. See Melendez-Diaz, 129 S. Ct. at 2542 (suggesting objection to drug certificates might only “antagonize” judge or jury). But see id. at 2555-56 (Kennedy, J., dissenting) (arguing judges and juries not...
analyst on the stand is not always in the defendant’s best interest, as analysts, like all experts, are often highly compelling witnesses. 107 Third, defense counsel may simply be trying to “sandbag” the prosecution by intentionally failing to object in hopes of secretly infecting the case with reversible error and seizing upon that error on appeal should the defendant be convicted. 108

While only the last of these strategies is illegitimate, none are grounds for a new trial under Freeman or Saferian; defendants must live with their attorneys’ reasonable tactical choices. 109 But by eliminating a genuine question of guilt or innocence as a prerequisite for the existence of a substantial risk of a miscarriage of justice, the courts have made Saferian redundant of Freeman, inasmuch as a claim that does not satisfy Freeman would not satisfy Saferian either. 110 While conduct of counsel does factor into the Freeman analysis, Saferian requires a greater showing that counsel’s failure to object was not a tactical decision. 111 Moreover, by treating unpreserved objections to the admission of evidence as claims of error on direct appeal, rather than ineffective assistance of counsel in the context of a motion for new trial, any inquiry into counsel’s conduct takes place without the benefit of an evidentiary hearing. 112

Furthermore, the guilt-based approach is more consistent with our adversarial system, which enshrines counsel—not courts—as the arbiters of their clients’ rights. 113 Reversal for error to which counsel failed to object

“unwilling to accept zealous advocacy” lawyers duty-bound to provide); Vasquez, 923 N.E.2d at 544 (Spina, J., dissenting in part and concurring in part) (“Judges often afford counsel an opportunity to prepare a thorough record [for appellate review] . . . .”).

107. See Melendez-Diaz, 129 S. Ct. at 2542 (reasoning analyst testimony might “highlight rather than cast doubt upon the forensic analysis”); Douglas R. Richmond, Regulating Expert Testimony, 62 Mo. L. REV. 485, 487 (1997) (“Professional experts usually are compelling witnesses whose primary function is persuading the jury . . . .”).

108. See Hoskinson, supra note 90, at 1132 (describing “sandbagging” technique); see also supra notes 44-45 and accompanying text (setting forth rationale for finality rule). Sandbagging is a “nefarious” tactic by which a defendant, rather than bringing a trial error to the attention of the judge, instead “silently monitor[s] the substantial defect and watch[es] it materialize into . . . [reversible] error.” See Hoskinson, supra note 90, at 1132 (discussing sandbagging in context of federal plain error standard).


110. See supra note 73 (noting redundancy of Freeman and Saferian after Alphas).


112. See supra note 74 (noting Freeman requires only judicial inference that counsel’s failure to object not tactical).

should be rare, as it cedes to judges that crucial role our adversarial system reserves for counsel. Thus, courts ought not reverse based on such errors unless there is a substantial risk that the defendant is actually innocent or counsel was so grossly ineffective as to have deprived the defendant of the right to counsel.

IV. CONCLUSION

The Supreme Court’s decision in Melendez-Diaz v. Massachusetts is controversial in its own right, further expanding the class of testimonial statements that implicate the Confrontation Clause under Crawford v. Washington. Melendez-Diaz has significant ramifications for Massachusetts and other states that previously relied on drug certificates and similar forensic documents in criminal prosecutions. In order to admit such certificates into evidence, states must now produce at trial the laboratory analysts who prepared the certificates. Predictably, these states also face a tidal wave of appeals based on Melendez-Diaz, whether or not defendants raised a Confrontation Clause objection at trial.

Where defendants appeal based on unpreserved Confrontation Clause objections, Massachusetts courts will review these cases for a substantial risk of a miscarriage of justice—the default standard of review for unpreserved error. Until the past decade, however, such appeals would likely have been unavailing, as admission of objectionable evidence could not create a substantial risk of a miscarriage of justice, as the Massachusetts courts traditionally understood that phrase. After Commonwealth v. Alphas, however, defendants can potentially obtain a new trial based on the admission of drug certificates, despite their failure to object at trial and the absence of any evidence that the certificates are unreliable, as Alphas did away with the requirement that an unpreserved error raise a genuine question of the defendant’s guilt or innocence.

The more appropriate remedy for defendants in this situation is a claim of ineffective assistance of counsel under Commonwealth v. Saferian. While requiring no greater showing of prejudice than the miscarriage of justice standard, Saferian’s ineffective assistance standard takes a more probing look at defense counsel’s conduct to ensure that counsel’s failure to object was not simply a reasonable tactical decision, and fell measurably below the standards of an ordinary, fallible lawyer. While criminal defendants are surely entitled to

114. See United States v. Silverstein, 732 F.2d 1338, 1349 (7th Cir. 1984) (arguing reversal based on unpreserved error “is inconsistent with the premises of an adversary system”); Commonwealth v. Freeman, 227 N.E.2d 3, 9 (Mass. 1967) (employing “rarely used power” to order new trial based on risk of miscarriage of justice).

115. See Michel, supra note 59, at 113 (arguing ineffective assistance claims remedy “rare instances of serious incompetency,” not “lost issues”); supra notes 87-88 and accompanying text (discussing historical, guilt-based definition of “miscarriage of justice”).
a fair trial, justice does not miscarry when a defendant is convicted based upon compelling—albeit objectionable—evidence, simply because that evidence could have been excluded. Any error in the admission of such evidence lies with counsel, not with the court, and is thus ripe for ineffective assistance analysis.

Assuming counsel was constitutionally effective and there is no genuine possibility that a defendant is innocent, appellate courts ought not bend over backwards to resurrect a defendant’s lost objection on appeal. Doing so undermines the role of counsel in our adversarial system and runs afoul of the careful balancing of interests embodied in the miscarriage of justice standard. Justice does not require that appellate courts invoke a discretionary power to blind themselves to compelling evidence.

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