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Adopting the Confluence of Factors Doctrine in Oklahoma: A Case of Innocence for Roderick Webster

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ADOPTING THE CONFLUENCE OF FACTORS DOCTRINE IN OKLAHOMA: A
CASE OF INNOCENCE FOR RODERICK WEBSTER

Jessica Durann

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INTRODUCTION

If Oklahoma was its own independent nation, it would have the world’s third highest incarceration rate.¹ As of 2019, 38,008 Oklahomans are incarcerated with 3,119 serving life sentences² and an additional 936 serving life sentences without parole.³ Out of those persons incarcerated, Black persons in Oklahoma are 4.5 times more likely to be incarcerated as compared to White persons.⁴ Despite efforts within the Oklahoma state legislature aimed

¹ Emily Wildra & Tiana Herring, *States of Incarceration: The Global Context 2021*, Prison Policy Initiative (Sept. 2021), <https://www.prisonpolicy.org/global/2021.html>.

² *Criminal Justice Facts: State by State Data*, THE SENTENCING PROJECT (last visited Apr. 27, 2022), <https://www.sentencingproject.org/the-facts/#detail?state1Option=U.S.%20Total&state2Option=Oklahoma>.

³ *Id.*

⁴ *Id.*

towards combating the incarceration crisis, researchers predict Oklahoma’s prison population will increase by 14% by the year 2028.⁵

Given the status of incarceration in Oklahoma, it is puzzling that Oklahoma has only exonerated a total of 41 prisoners.⁶ A possible contributing factor for the small number of exonerations for a state with a high incarceration rate may be the Oklahoma Court of Criminal Appeals’ (“OCCA”) use of the harmless error analysis.

The harmless error analysis is applied by the OCCA to determine if an error made during a criminal trial impacted the jury’s verdict.⁷ When the OCCA determines the trial error effected the outcome of the trial, the error mandates reversal of the conviction.⁸ However, if the OCCA determines the error did not affect the jury verdict, then the error is deemed harmless, and the conviction is upheld despite the trial error.⁹

The harmless error analysis may contribute to Oklahoma’s low number of exonerations because it allows trial errors that contribute to a defendant’s wrongful conviction to be viewed in isolation and thus be labeled as harmless. Yet, applying this analysis to trial errors wholly ignores the way in which juries perceive and corroborate evidence to reach a unanimous verdict. It also ignores the ways in which an error contaminates other seemingly credible evidence presented at trial. Therefore, defendants who are wrongfully convicted are not given the chance to litigate their innocence. The OCCA robs them of the opportunity when the court reviews errors in isolation, and defendants cannot overcome the incredibly high hurdle of harmless error.

⁵ *Long Sentences Drive Oklahoma’s High Imprisonment Rate*, FWD.US (Jun. 2020), <https://www.fwd.us/news/long-sentences-oklahoma/>.

⁶ *Exonerations by State*, THE NATIONAL REGISTRATION OF EXONERATIONS (Apr. 2022), <https://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx>

⁷ *Simpson v. State*, 876 P.2d 690, 697 (Okla. Crim. App. 1994).

⁸ *Id.*

⁹ *Id.*

In recognizing this issue, law professor and legal scholar Stephanie Hartung proposes the confluence of factors analysis in lieu of the harmless error doctrine.¹⁰ Professor Hartung derives the confluence of factors doctrine from the Massachusetts’s Supreme Judicial Court (“SJC”) case *Rosario*.¹¹ In *Rosario*, the SJC recognized that “in rare cases...a court may need to consider how a number of factors act in concert to cause a substantial risk of a miscarriage of justice and therefore warrant the granting of a new trial.”¹² This ruling was in response to the trial court finding that newly discovered fire evidence did not “cast real doubt” on the conviction of a man imprisoned for arson and murder.¹³ Recognizing that the defendant’s “delirium tremens diagnosis and related interrogation tactics, along with the evidence of new fire science, *taken together* could have influenced the jury’s verdict,” the SJC granted Rosario a new trial.¹⁴

The confluence of factors analysis is a legal standard that helps to prevent wrongful convictions. As Professor Hartung explains, because most state and federal courts have adopted a “piecemeal approach to addressing trial level error,” the courts, “fail to acknowledge that interrelationship between multiple trial errors, the causation between factors, the impact of cognitive bias, and thus, the cumulative effect of these errors on the jury.”¹⁵ The failure to acknowledge this interrelatedness results in the errors that contribute to wrongful convictions to be diminished—labeled as harmless—and therefore not given the chance to be litigated. By giving the courts the opportunity to understand that trial errors do not occur in a vacuum and often have a compounding effect on the trial, the seemingly harmless errors that innocent

¹⁰ See Stephanie Hartung, *The Confluence of Factors Doctrine: A Holistic Approach to Wrongful Convictions*, 51 SUFFOLK UNIV. L. REV. 369–97 (2018).

¹¹ Commonwealth v. Rosario, 74 N.E.3d 599, 607 (Mass. 2017).

¹² *Id.*

¹³ *Id.* at 605–06.

¹⁴ *Id.* at 609.

¹⁵ See Hartung, *supra* note 10, at 371.

defendants challenge will be adjudicated with greater weight. The hope is that courts under this standard will offer greater relief.

In light of Professor Hartung's research, this paper argues for the OCCA to adopt the confluence of factors analysis when reviewing post-conviction petitions. The OCCA should adopt this analysis because it compels the OCCA to recognize that a single trial error has the ability to taint seemingly independent corroborative evidence and therefore influence the jury decision to convict. Part I of this paper provides a brief overview of the harmless error doctrine in the Oklahoma appellate process. Part II of this paper explains the role cognitive bias plays in criminal investigations. Part II further explains how this cognitive bias can taint forensic evidence and ultimately influence the jury's perception of the evidence. Part III will explain how the confluence of factors analysis can be used in Oklahoma to prevent a wrongful conviction by applying the analysis to the case of Roderick Webster.¹⁶ Part III will summarize the crime scene, the subsequent Oklahoma City Police Department investigation, the trial and conviction of Webster twenty years after the murder, and Webster's direct appeal to the OCCA. Part IV of the paper argues the ways in which cognitive bias contributed to the erroneous expert's testimony and why this "harmless" erroneous testimony of the forensic experts at Webster's trial may have resulted in his wrongful conviction. Part IV concludes by applying the confluence of factors doctrine to Webster's case to demonstrate how the analysis may have compelled the OCCA to grant Webster a new trial.

¹⁶ Webster v. State, 252 P.3d 259 (Okla. Crim. App. 2011).

I. The Oklahoma Appeals Process and Harmless Error

A. Direct Appeals

In the state of Oklahoma, direct appeal to the OCCA from any adverse judgement against the defendant is guaranteed as a matter of right.¹⁷ The defendant must give notice of appeal at the time of judgement¹⁸ and, now appellant, must file all claims within 90 days.¹⁹ There are two general types of errors an appellant can raise: preserved error and plain errors.²⁰ Preserved errors are errors objected on specific grounds during the trial level proceedings.²¹ Plain errors are errors that are not preserved during the trial level, and therefore waived, but are available for appellate review given the affect the error may have on the outcome of the proceeding.²² For errors preserved at the trial level, the OCCA applies the harmless error analysis to determine whether a case warrants reversal.²³ The OCCA has also expanded this standard to apply to plain errors, holding that a plain error, one “which go[es] to the foundation of the case, or which take from a defendant a right which was essential to his defense”²⁴ could be subjected to harmless error review.²⁵

Harmless error doctrine has deep roots within the Oklahoma’s justice system.²⁶

Nationally, the doctrine was a response to critics of the appellate system that believed a small

¹⁷ Okla. Stat. tit. 22, § 1051.

¹⁸ Okla. Stat. tit. 22, § 1076.

¹⁹ Okla. Stat. tit. 22, §§ 1051, 1054.

²⁰ Bryan Lester Dupler, *Sweeping Down the Plain: A Modern Rule for Direct Review in Oklahoma Criminal Appeals*, 15 J. APP. PRAC. & PROCESS 259, 260 (2014).

²¹ *Id.* at 261.

²² *Id.*

²³ *Simpson v. State*, 876 P.2d 690, 697 (Okla. Crim. App. 1994).

²⁴ *Id.* at 695.

²⁵ *Id.* at 699 (“[T]here must be circumstances where an error, even though constituting plain error (in that it goes to the foundation of the case, does not do anything so egregious that a new trial is warranted.”).

²⁶ See Dupler, *supra* note 20, at 260 n.2 (listing cases):

Fowler v. State, 126 P. 831, 833 (Okla. Crim. App. 1912) (“[T]his court must give judgment without regard to technical errors or defects or exceptions which do not affect the substantial rights of the parties.”); *Martin v. Territory*, 78 P. 88 (Okla. Terr. 1904) (“Criminal cases should be reviewed by

procedural technicality should not demand a new trial.²⁷ Unlike other jurisdictions, the common law rule that injury is presumed when an error occurs is not embraced in Oklahoma.²⁸ In fact, at the time of Oklahoma's statehood and before, the courts adhered to Wilson's Rev. & Ann.St.1903, § 5618 which stated "[o]n an appeal the court must give judgment without regard to technical errors or defects or to exceptions which do not affect the substantial rights of the parties."²⁹ The current harmless error doctrine is now codified in Title 20 section 3001.1 of the Oklahoma Statutes and reads: "No judgment shall be set aside or new trial granted by any appellate court of this state in any case, civil or criminal, on the ground of misdirection of the jury or for error in any matter of pleading or procedure, unless it is the opinion of the reviewing court that the error complained of has probably resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right."³⁰

appellate courts with the idea of promoting justice, and not for the purpose of determining as to whether there is some technical error by which the defendant may be aided in thwarting just punishment for his crime. A defendant has a right to a fair and impartial trial, and to be protected by every safeguard of the law; but when these are afforded him, and the evidence establishes his guilt, no technical error which has not affected the result of the trial should be made a means of escape.); *Buis v. State* 792 P.2d 427 (Okla. Crim. App. 1990) ("If verdicts are to be set aside when they are clearly right upon the evidence simply because the trial court on the spur of the moment, and in the haste of the trial, may have made some errors in its instructions or rulings which could not reasonably have altered the verdict before an honest and intelligent jury, then the enforcement of law would become a farce and courts would become the protectors of criminals."); *Robinson v. State*, 255 P.3d 425, 428 (Okla. Crim. App. 2011) ("[t]here is a strong presumption that errors which occur during trial are subject to harmless error analysis, as long as a defendant is represented by counsel and is tried by an impartial judge." (citing *Neder v. United States*, 527 U.S. 1, 8 (1999)).

²⁷ Roger A. Fairfax Jr., *A Fair Trial, Not a Perfect One: The Early Twentieth-Century Campaign for the Harmless Error Rule*, 93 MARQ L. REV. 433, 436 (2009) (discussing the motives of the United States judicial system to adopt the harmless error rule).

²⁸ *Compare Eierman v. United States*, 46 F.2d 46, 49 (10th Cir.1930) (error presumed injurious unless it affirmatively appears harmless) *with Mitchell v. State*, 124 P. 1112 (1912) (the common law doctrine stating an error is presumed injurious is not recognized in Oklahoma; therefore, there is no reversal unless a defendant can show he is deprived of a substantial right to his injury).

²⁹ *Morris v. Territory*, 99 P. 760, 771 (Okla. Crim. App. 1909) quoting Wilson's Rev. & Ann.St.1903, § 5618.

³⁰ 20 OK Stat § 20-3001.1 (2015).

The OCCA holds for an error to be worthy of mandating reversal it must have had a bearing on the outcome of the trial.³¹ The occurrence of an error is not enough—injury must accompany the error.³² Therefore, if the error does not result in what the court views as an injury³³, then the error is harmless, and the conviction will stand. The OCCA gave an example of an application of the harmless error analysis for a preserved error in *Simpson*:

Typically, a witness is on the stand, and the prosecutor seeks to elicit certain evidence from him. The prosecutor asks the question, and the witness gives a very damning answer.... **If defense counsel objects**, and the trial court overrules the objection and allows in the evidence, the court has committed error. However, as we noted above, it is not only error, but also injury, that requires reversal. As injury has been defined as “an error which affected the result,” applying harmless error analysis this Court will not overturn unless appellant can show the improper evidence contributed to the conviction.³⁴

In this situation, the burden is placed on the appellant to prove that error contributed to the conviction.³⁵

When alleging plain error, that is error that was waived or forfeited, the standard for reversal is elevated. First, the appellant must show that the error was (1) is unpreserved—that is, forfeited or waived—error that (2) is obvious from the record and (3) affects the outcome of the proceeding.³⁶ Once the appellant meets the heavy burden of establishing plain error, then the plain error is subjected to the harmless error doctrine.³⁷ If the error is a constitutional violation,

³¹ *Simpson*, 876 P.2d at 695 (“Whatever the label, an error which has no bearing on the outcome of the trial will not mandate reversal”).

³² *Ryan v. State*, 128 P. 685, 686 (Okla. Crim. App. 1913). The OCCA has also use terms such as “material” in the context of “material error” to describe something “of solid or weighty character; of consequence; not to be dispensed with; important; specific; especially law, such as does or would affect the determination of a case, the effect of an instrument, or the like; constituting a matter that is entitled to consideration, such as must be considered in deciding a case on its merits.” *Thompson v. State*, 117 P. 216 (Okla. Crim. App. 1911). However, the OCCA found this distinction between injury and materiality to have little difference when determining whether an error requires reversal. *Simpson*, 876 P.2d at 695.

³³ *Ryan*, 128 P. at 685 (defining injury as, “an error which affected the result”).

³⁴ *Simpson*, 876 P.2d at 698.

³⁵ *Id.* at 701.

³⁶ *Hogan v. State*, 139 P.3d 907, 923 (Okla. Crim. App. 2006).

³⁷ *Simpson*, 876 P.2d at 698.

the court will review the error to determine whether or not it was harmless beyond a reasonable doubt.³⁸ The burden is on the State to prove the error was harmless because in cases of constitutional error prejudice is presumed.³⁹ If the plain error was in violation of state law, it is considered harmless unless the error has a substantial influence on the outcome of the case or leaves the court in grave doubt as to whether it has such an effect.⁴⁰ Here, the appellant has the burden of proof.⁴¹

B. Post-conviction Relief

Oklahoma's second avenue of relief for wrongfully convicted appellants, after a denial of relief on direct appeal, is to apply for relief under the Oklahoma Post-Conviction Procedure Act.⁴² Unlike direct appeals, an appellant must first file their application for post-conviction relief through the district court in which the original conviction occurred.⁴³ Those who wish to seek relief must claim that one of the six errors outlined in the statute applies to their conviction.⁴⁴ Errors properly raised under this statute are ones that, "could not or were not raised

³⁸ Chapman v. California, 386 U.S. 18, 24 (1967); Fritz v. State, 572 P.2d 290, 292 (Okla. Crim. App. 1986).

³⁹ Simpson, 876 P.2d at 701 n.14.

⁴⁰ Stewart v. State, 372 P.3d 508, 514 (Okla. Crim. App. 2016).

⁴¹ Simpson, 876 P.2d at 701 n.13 ("However, Section 3001.1 does *not* allocate the *burden of proving injury* one way or the other. It simply sets the standard which requires reversal. What we are doing in *Simpson* is allocating the burden in *non-constitutional* issues where it belongs: on the party who had the opportunity to correct the error at trial but chose not to do so").

⁴² Okla. Stat. tit. 22, §1080.

⁴³ *Id.*

⁴⁴ *Id.* (stating,

"Any person who has been convicted of, or sentenced for, a crime and who claims:
(a) that the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this state; (b) that the court was without jurisdiction to impose sentence; (c) that the sentence exceeds the maximum authorized by law; (d) that there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice; (e) that his sentence has expired, his suspended sentence, probation, parole, or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or (f) that the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy; may institute a proceeding under this act in the court in which the judgment and sentence on conviction was imposed to secure the appropriate relief").

on direct appeal and support a conclusion either that the outcome of the trial would have been different but for the errors or that the defendant is factually innocent.”⁴⁵ On review, the court must determine: (1) whether controverted, previously unresolved factual issues material to the legality of the applicant's confinement exist; (2) whether the applicant's grounds were or could have been previously raised; and (3) whether relief may be granted.⁴⁶ The OCCA has warned, “We will not treat the post-conviction process as a second appeal, and will apply the doctrines of *res judicata* and waiver where a claim either was, or could have been, raised in the petitioner's direct appeal.”⁴⁷ If the application is denied, the appellant may appeal the denial to the OCCA.⁴⁸

The harmless error analysis plays a role in post-conviction claims based on the kind of error alleged. For example, in *Coddington*, the appellant was convicted of first-degree murder and sentenced to death. In the application for post-conviction relief, the appellant claimed that his resentencing appellate council failed to raise, as an ineffective assistance of council claim, the appellant’s trial counsel’s failure to object to autopsy results that were presented by a medical examiner who did not perform the autopsy. Here, the court applied the harmless error analysis to a violation of the confrontation clause to determine if the resentencing council failure to raise this issue was ineffective. The court determined that given other evidence presented in the case, a violation of the confrontation clause was harmless and therefore would not have affected the outcome of the resentencing trial. This application of harmless error analysis has also been used

⁴⁵ 22. O.S.Supp.2004, §1089(C).

⁴⁶ Okla. Stat. tit. 22, § 1089(D)(4).

⁴⁷ *Cummings v. State*, 970 P.2d 188, 190 (Okla. Crim. App. 1998).

⁴⁸ Okla. Stat. tit. 22, § 1089(D)(7).

in cases of post-conviction relief claiming new evidence that could not have been discovered before the application requires a vacation of the conviction in the interest of justice.⁴⁹

The OCCA's application of the harmless error doctrine, in both direct and post-conviction appeals, leads to a piecemeal approach to examining evidence. What is meant by piecemeal approach is that the OCCA views the erroneous piece of evidence in isolation, as compared to holistically, to determine whether that *one* piece of evidence had an affect so substantial on the trial that the evidence was determinative of the trial's outcome. In other words, the piecemeal approach requires that a single piece of evidence, by itself, be sufficient to cast doubt on the conviction.⁵⁰ This approach to analyzing trial errors fails to account for other factors that play a critical role in cases of wrongful convictions. Because the objective of harmless error is to deem the error meaningless to uphold the integrity of the conviction, it does not compel the OCCA to understand how cognitive bias may motivate different courtroom players to arrive at their conclusions. Further, harmless error doctrine fails to consider how the jury's perception regarding other pieces of evidence presented at trial was influenced by the *one* piece of erroneous evidence. The analysis should therefore refrain from looking any errors in isolation but instead look for the interconnectedness between pieces of evidence. Under the current harmless error analysis, a court is not obligated to make any of these considerations.

II. HOW COGNITIVE BIASES CONTRIBUTE TO WRONGFUL CONVICTIONS

Cognitive bias is an innate part of the human experience. Cognitive bias arises from the use of what psychologist call "heuristics," mental short cuts, to make quick decisions in

⁴⁹ See *Smith v. State*, 1996 OK CR 13, ¶3-4 (the OCCA finding that trial court, on post-conviction relief, should have determined the admission of a blood-splatter analyst testimony, in which newly discovered evidence determined the analyst was unqualified to testify, was error. However, the OCCA found the admission of erroneous expert testimony was subject to harmless error analysis and held that beyond a reasonable doubt the jury would still found the defendant guilty without hearing the unqualified expert's testimony).

⁵⁰ See Hartung, *supra* note 10, at 388.

situations that feel familiar to the decision maker and when the decision maker does not feel the need to gather additional information.⁵¹ The human brain resorts to these mental short cuts to optimize the likelihood of an acceptable outcome and may be effective, “in conditions with time-constraints, lack of overload of relevant information, or when no optimal solution is relevant.”⁵² In other words, humans use what is familiar to them to make decision about what is unfamiliar to them. Humans usually feel confident about making a decision using heuristics even when they lack evidence and are aware of their cognitive inclinations.⁵³ However, a human’s use of mental short cuts leads to deviation of logic and probability given the available information and expected benefits of the decision.⁵⁴ The result of this suboptimal decisions making are known as cognitive biases.⁵⁵

Given how pervasive and persistent cognitive biases can be, it is no surprise they found a home in various stages of the conviction process resulting in the incarceration of innocent people.⁵⁶ Cognitive bias may rear its head within law enforcement in the form of confirmation bias. Confirmation bias is one’s tendency to, “seek or interpret evidence in ways that support existing beliefs, expectations, or hypothesis.”⁵⁷ Put into context of an investigation, investigators may only search for information that confirms *their* own view of what took place in a case. For example, when a sexual assault victim identifies a perpetrator, the investigators may spend most of their time interviewing that suspect and ignoring other possible leads to confirm what *they*

⁵¹ Johan E. Korteling, Anne-Marie Brouwer, & Alexander Toet, *A Neural Network Framework for Cognitive Bias*, 9 FRONTIERS IN PSYCHOLOGY 1, 2 (2018).

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision In Criminal Cases*, 2006 WIS. L. REV. 291, 292 (2006) (noting how tunnel vision, a cognitive bias, was a running theme underlying the most common errors found in cases of exoneration).

⁵⁷ *Id.* at 309.

believe to be true: the victim's eye-witness identification. Investigators tend to filter pieces of evidence through this conclusion which results in investigators placing an elevated significance on evidence that seems to *confirm* their theory of the case.⁵⁸

This pattern of thinking leads investigators to experience tunnel vision. Tunnel vision motivates investigators to turn their back on exculpatory evidence and deem evidence that is inconsistent with their theory as irrelevant and unreliable.⁵⁹ By only filtering information that confirms their version of events, investigators create a "feedback loop" that ends up bolstering and reinforcing their assessment of guilt.⁶⁰ This cognitive feedback loop is problematic in cases of innocence for two reasons. The first reason is obvious: tunnel vision discourages investigators to pursue any other credible information, such as an alibi witness or a potential suspect, and encourages them to place heightened importance on any fact, whether credible, that increases culpability for the innocent defendant.

The second reason this pattern of thinking is harmful is because once investigators, forensic analysts, and other courtroom players are presented evidence that challenges their conclusion, research has shown they may exhibit belief perseverance.⁶¹ Belief perseverance a phenomenon that makes these players resistant to change in their conclusion despite new evidence that wholly undermines this original conclusion.⁶² Belief perseverance can be seen in cases of innocence when even after DNA testing has excluded the defendant from the crime,

⁵⁸ *Id.* at 313 (explaining that when gathering new information pertaining to one's belief, "the research shows a general tendency to overweight positive confirmatory evidence and underweight negative disconfirmity evidence").

⁵⁹ *Id.* at 292.

⁶⁰ *Id.* at 293.

⁶¹ *Id.* at 314 (describing how belief perseverance or belief persistent "can render a belief or opinion very intractable").

⁶² *Id.*

jurors and prosecutors still rationalize their original conclusion of guilt.⁶³ These two reasons in conjunction with the OCCA application of the harmless error doctrine leaves an innocent defendant trapped between an investigation fueled by incredible evidence and a standard that does not compel the OCCA to take into account the effects of the incredible evidence on the trial.

The result of investigator confirmation bias can also plague forensic analysts, and subsequently jurors, in the form of contextual bias. Contextual bias occurs when “well-intentioned experts are vulnerable to making erroneous decision by extraneous influences.”⁶⁴ The bias causes, “objectivity [to be] hampered as the extraneous influences can cause experts to subconsciously develop expectations about the outcome of an examination.”⁶⁵ The presence of extraneous information woven into the outcome of an examination creates what University of California Irvine Professor William Thompson coined as “double counting evidence.”⁶⁶ Thompson explains that becoming aware of certain contextual facts about a case bleeds into the work of the analyst by influencing the analyst’s ability to make a match independently.⁶⁷ After the scientist makes the match, and the jury receives the results, the jury is unaware that the evidence has been counted twice—once by the analyst and a second time by the jury.⁶⁸ The jury is not able to appreciate the fact that the results of the analyst have now been colored by the analyst’s knowledge of the contextual facts.⁶⁹ An example of double counting evidence would be

⁶³ *Id.* at 315 (describing the words of Professor Lieberman, “prosecutors have become . . . sophisticated about hypothesizing the existence of ‘unindicted co- ejaculators’ (to borrow Peter Neufeld’s phrase) to explain how the defendant can still be guilty, though another man’s semen is found on the rape-murder victim.”).

⁶⁴ Nikkita Venville, *A Review of Contextual Bias in Forensic Science and its Potential Legal Implications*, Australia New Zealand Policing Advisory Agency, 1, 5 (2015).

⁶⁵ *Id.*

⁶⁶ William C. Thompson, *What Role Should Investigative Facts Play in the Evaluation of Scientific Evidence?*, 43 AUSTRALIAN JOURNAL OF FORENSIC SCIENCES, 124, 132 (2011). *See also* Hartung, *supra* note 10, at 382 (describing a similar phenomenon called the “snowball effect” in which forensic analysts are exposed to extraneous information that compounds into bias-tainted evidence that influences independent evidence).

⁶⁷ *See* Thompson, *supra* note 58, at 132.

⁶⁸ *Id.*

⁶⁹ *Id.*

the analyst in the sexual assault case above making a match to a hair sample because they are aware sample came from the suspect in police custody. During trial, when the jury is told about the hair sample match, they are unaware that the match was influenced by the analyst's knowledge with bias towards confirming the police's theory.⁷⁰ If the jury was aware the match was colored by the analyst's knowledge, it is possible they would be more critical of the match.

This phenomenon is especially alarming given a recent study conducted by researchers interested in understanding a jury's perception of forensic science. In a study involving mock jurors, researchers examined how the combination of the forensic expert's subjective level of certainty of over their findings and the presence or absence of any forensic exculpatory evidence impacted the jury's perception of forensic evidence.⁷¹ The study found that the jury was three times more likely to yield a guilty verdict when the expert was "certain" in their findings as compared to an expert who was less certain.⁷² In the presence of exculpatory forensic evidence, the study found the evidence did little to influence the jurors.⁷³ It was only after deliberation did the exculpatory evidence become influential in the jury's verdict.⁷⁴ For innocent defendants, this means that even if the analyst testifying at trial unintentionally makes an incorrect match by way of confirmation bias, the jury will likely believe the incorrect analyst if the analyst believes their match to be certain.

It is through this well understood and documented presence of cognitive bias that leads to double counting evidence, also referred to as evidence contamination,⁷⁵ that warrants a change in the standard of reviewing evidence post-conviction. The harmless error standard demands that

⁷⁰ *Id.*

⁷¹ N.J. Schweitzer, *Communicating Forensic Science, NIJ Final Report*, Project 2008-DN-BX-0003, Arizona State Univ. 1, 9 (explaining the results of a controlled study involving jury simulations and mock trials).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ See Hartung, *supra* note 10, at 382.

one piece of evidence be sufficient to cast doubt on the conviction but, this standard does not reflect how easily cognitive bias can lead to *one* piece of erroneous evidence contaminating subsequent pieces. In the example of the sexual assault case above, at trial the prosecutors may present the eyewitness testimony and the evidence of the hair match as “independent pieces of evidence that *corroborate* one another.”⁷⁶ To the jury, the prosecution set forth a strong case of guilt with the admission of these two pieces of evidence, yet jurors are unaware how influential the knowledge of the eyewitness’s match was to the confirmation of the hair match. The consequence of this disconnect is heightened given the research that a jury’s conviction is heavily influenced by a forensic analyst’s subjective certainty.⁷⁷ Later, if the eyewitness recants their statement, under the harmless error analysis, the court will have to decide whether the recantation is sufficient enough to cast doubt on the conviction. The OCCA may find the recantation as immaterial to the conviction and uphold the sentence because the of the hair match made by the analyst. This harmless error doctrine fails innocent defendants because it ignores how juries often use *both* pieces of evidence to corroborate one another. Therefore, without the eyewitness testimony, or any other error found by the OCCA on appeal, the jury may not have convicted the defendant solely on the remaining pieces of evidence. The harmless error analysis’s flaw in assuming trial evidence is not influenced by other evidence results irreparable harm to claims of innocence.

To demonstrate why the confluence of factors analysis is a more just alternative to analyzing trial errors than the harmless error doctrine, the confluence of factors analysis will be applied to the case of Roderick Webster in the next part of this paper.

⁷⁶ *Id.* (using a similar example to explain how evidence contamination by forensic analysts affect the prosecution’s case in chief).

⁷⁷ *See* note 63.

III. The Case Against Roderick Webster

On March 22, 1989, 75-year-old Audrey Harris was brutally disemboweled and murdered in her apartment in downtown Oklahoma City, Oklahoma.⁷⁸ The evidence at the crime scene suggested Harris had been “hit in the face, gagged, held down, cut open from vagina to rectum, penetrated by a broom, and completely disemboweled.”⁷⁹ Investigators first charged her common-law husband Llyod Ballentine with the murder of Harris.⁸⁰ Soon after Ballentine’s arrest, investigators developed doubts that Ballentine was the sole perpetrator.⁸¹ Overtime investigators became convinced of Ballentine’s innocence and persuaded the prosecution to dismiss the charges against Ballentine.⁸² The case went cold for over twenty years until a cold case unit ran the bloody palm print found at the crime scene through AFIS.⁸³ AFIS named Roderick Webster as the source of the print.⁸⁴ Webster was arrested and charged with the murder of Audrey Harris after latent fingerprint examiners matched Webster’s prints to those found at the crime scene.⁸⁵ Webster’s DNA also matched the DNA found on the sweater Harris was wearing when she was murdered.⁸⁶ In 2009, a jury convicted Webster of first-degree murder and sentenced Webster to life in prison without parole.⁸⁷ Webster appealed his conviction two years later to the OCCA.⁸⁸ Applying the harmless error analysis to erroneous forensic expert witness testimony, the OCCA found the testimony harmless and affirmed Webster’s life sentence.⁸⁹

⁷⁸ Webster v. State, 252 P.3d 259, 263 (Okla. Crim. App. 2011).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* at 269.

⁸⁴ Webster, 252 P.3d at 269.

⁸⁵ *Id.* at 269-270.

⁸⁶ *Id.* at 272.

⁸⁷ *Id.* at 262.

⁸⁸ *Id.*

⁸⁹ *Id.* at 280.

Despite the presence of Webster’s DNA at the crime scene,⁹⁰ this case exemplifies how cognitive bias and evidence contamination can help induce wrongful convictions. The following sections explain the investigation that followed the gruesome murder, the forensic testimony at Webster’s trial twenty years after the murder, and his direct appeal to the OCCA. The last part of this paper, part IV, explains how the OCCA’s use of the harmless error doctrine allows the presence of cognitive bias and evidence contamination to be undermined and how the confluence of factors analysis can be used to prevent Roderick Webster’s possible wrongful conviction.

A. The Interrogation

At trial, the jury was played a redacted version of Webster’s interrogation conducted by Investigator Burke and Detective Eastridge⁹¹ Throughout the interrogation Webster consistently denied he knew any details about the crime including Harris and Ballentine, the apartment complex, and the neighbors at the complex.⁹² Investigator Burke and Detective Eastridge explained to Webster that the DNA evidence found at the crime scene proved he was present and pressured Webster to explain why he killed Harris.⁹³ Webster, visibly agitated, replied by asking questions such as, “You saying I did it? What evidence is there? Did you find a knife that belonged to me or something?”⁹⁴ After more pressuring Eastridge stated, “It’s you. It’s your evidence.”⁹⁵ Webster then passed out and fell onto the floor.⁹⁶ When Webster woke up, he explained that he passes out due to stress and sometimes because of his severe back pain.⁹⁷

⁹⁰ See generally Mark W. Perlin, *When DNA is Not a Gold Standard: Failing to Interpret Mixture Evidence*, THE CHAMPION, 50, 54 (2018) (discussing how the current standard for analyzing DNA does not account for the mixing of two different sources of DNA and “has led to incorrect results on hundreds of thousands of items of evidence”).

⁹¹ Webster, 252 P.3d at 270.

⁹² *Id.*

⁹³ *Id.* at 271.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ Webster, 252 P.3d at 271. .

The EMTs cleared Webster and the interrogation proceeded.⁹⁸ Webster explained that he was sorry that the crime had occurred but continued to state he did not remember what happened or, “what [he] did to her.”⁹⁹ Burke and Eastridge once again told Webster that the evidence showed he killed Harris to which Webster replied, “I am sorry I killed her.”¹⁰⁰ Burke then tried to have Webster explain what happened the night of the murder and Webster repeatedly asked, “Is evidence saying I did this?”¹⁰¹ When Burke confronted Webster with his aforementioned apology, Webster denied he apologized for the crime but that he was sorry about, “whatever happened.”¹⁰² The video was cut for the jury as soon as Webster asked for a lawyer.¹⁰³

B. The Forensic Expert Testimony at Trial

As the OCCA pointed out, an overwhelming majority of the evidence and testimony presented at Webster trial was the State’s attempt to prove Ballentine was innocent of killing Harris and the defense’s attempt at proving the perpetrator of the crime was Ballentine.¹⁰⁴ As a result, the greatest evidentiary battles within the case involved the interpretation of forensics found at the crime scene.¹⁰⁵

A multitude of expert witnesses testified at Webster’s trial regarding the forensic evidence at the scene. Karen Smith, a latent fingerprint examiner for the Oklahoma City Police Department for the past twenty-eight years, testified to the finger and palm prints found at the crime scene.¹⁰⁶ Smith testified that she has been working with Burke *since the time of the*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ Webster, 252 P.3d at 272.

¹⁰⁴ *Id.* at 273

¹⁰⁵ *Id.* at 269, 272.

¹⁰⁶ *Id.* at 272.

crime.¹⁰⁷ Smith explained that Burke had submitted hundreds of palmprints with hopes of finding a match to the bloody palmprint found on the closet door.¹⁰⁸ Smith testified that after AFIS yielded Webster's name and *he was arrested*, she examined the three palmprints, *she took from the crime scene herself*.¹⁰⁹ Smith found two of the three palmprints to be a match to the right palm of Webster.¹¹⁰

Michelle Reznicek, a latent fingerprint examiner for the F.B.I., also testified to the prints found at the crime scene and the workings of the AFIS system. She testified that at the time of the murder the F.B.I. received "high-quality photos" of the palmprints and stored them into evidence after no match was found.¹¹¹ When the F.B.I. was sent the known prints of Webster, Reznicek told the jury that Webster's print was an exact match to the two bloody palmprints found on the closet door.¹¹² Two other F.B.I. examiners separately verified Reznicek's conclusions.¹¹³

The next expert to testify was Elaine Taylor, a forensic scientist for the Oklahoma City Police Department serology laboratory.¹¹⁴ Taylor testified that she compared the unknown DNA profile from the buccal swabs taken from the unknown mucoid substance on Harris' sweater and compared it to the DNA swab taken after Webster's arrest.¹¹⁵ Taylor found the DNA on Harris' sweater matched Webster's DNA.¹¹⁶ Taylor also testified that she would have expected Harris'

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ Webster, 252 P.3d at 272.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* Reznicek testified there was "no doubt" in her mind that the fingerprints did not match. *Id.* at 272 n.24.

¹¹³ *Id.* at 272.

¹¹⁴ *Id.*

¹¹⁵ Webster, 252 P.3d at 272.

¹¹⁶ *Id.*

DNA to be more prominent under Ballentine finger nails, as compared to the presence of his own DNA, if Ballentine had disemboweled Harris.¹¹⁷

Collette Callum, forensic chemist for the Oklahoma City Police Department forensic lab, testified to the collection, testing, and recording of blood and fecal matter at Harris' crime scene.¹¹⁸ Callum mainly testified to what she expected the forensics evidence found on Ballentine to have been if he had committed the dismemberment.¹¹⁹ She explained that if Ballentine was told not to wash his hands by police officers, which the record claims he did not, she would have expected to find "a lot more evidence."¹²⁰ Callum opined that because only five out of the eleven finger nail clipping taken from Ballentine the night of the murder had fecal evidence, she did not think there was "a significant amount of feces under or on Ballentine's fingernails."¹²¹ Callum further testified that based on her recollection of the "gruesome" crime scene, the blood and fecal matter found on Ballentine was more consistent with him being "assaulted" or "pushed around" or "beaten up" rather than him being "present" at the murder scene.¹²²

Lastly, Don Wilson, a technical investigator for the Oklahoma City Police Department, testified as an expert to his own theory of the case.¹²³ Wilson explained that he kept photos he took from the crime scene, over twenty years ago, in his desk drawer because of the "nature of the crime and it not being prosecuted."¹²⁴ Wilson testified that he never agreed with the investigator's initial theory that Ballentine was the sole perpetrator.¹²⁵ The State then used

¹¹⁷ *Id.* at 279.

¹¹⁸ *Id.* at 273.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ Webster, 252 P.3d at 274.

¹²² *Id.*

¹²³ *Id.* at 279 n.55.

¹²⁴ *Id.* at 278.

¹²⁵ *Id.* at 279.

Wilson as an expert to “summarize practically everything that was inconsistent, weak, or inconclusive about the State’s evidence against Ballentine.”¹²⁶

After deliberation, the jury found Webster guilty of first-degree murder.¹²⁷ The trial judge, in accord with the jury’s recommendation, sentenced Webster to life of imprisonment without parole.¹²⁸

C. Webster’s Appeal to the OCCA

In 2011, Webster filed a direct appeal of his conviction of the OCCA. Webster’s appeal included five propositions.¹²⁹ This paper will only discuss the second proposition: Webster’s trial was fundamentally unfair by the admission of improper opinion testimony.¹³⁰

First Webster challenged the testimony of Karen Smith and Michelle Reznicek.¹³¹ Webster claimed that based on new scholarship from the National Academy of Forensic Science raising “serious questions about the validity and admissibility of fingerprint analysis,” the trial court erred by allowing the experts to testify to the individualization of the fingerprints or that Webster was an exact match to the bloody palmprint found on the closet door.¹³² The OCCA found that Webster failed to preserve this claim in the trial court.¹³³ Therefore, the OCCA declined to address this claim.¹³⁴ However, the court did go out of its way to state that the latent fingerprint testimony did not prejudice Webster’s right to a fair trial because, “the current case is *not* one where fingerprint identification testimony could plausibly have resulted in a mistaken identification or wrongful conviction, since the fingerprint testimony identifying Roderick

¹²⁶ *Id.*

¹²⁷ Webster, 252 P.3d at 262.

¹²⁸ *Id.*

¹²⁹ *Id.* at 274–83 (explaining Webster’s propositions).

¹³⁰ *Id.* at 277.

¹³¹ *Id.*

¹³² *Id.*

¹³³ Webster, 252 P.3d at 277-278.

¹³⁴ *Id.* at 278.

Webster as the source of the bloody palm prints at 2804 North Robinson was decisively confirmed by the subsequent finding that the frothy substance on the victim's sweater was an exact DNA match to Roderick Webster."¹³⁵

Second, Webster challenged the opinion testimony of Collette Callum, Elaine Taylor, and Don Wilson of the Oklahoma Police Department.¹³⁶ Webster argued that trial court erred in allowing these witnesses to testify as experts in areas beyond the scope of their experience.¹³⁷ Specifically, that their experience did not qualify these witnesses to testify in the field of "disembowelment forensics."¹³⁸

Webster first challenged the "extensive and wide-ranging" testimony of Don Wilson.¹³⁹ As noted above, as a technical investigator Wilson testified to his own opinion as to the theory of the case and the majority of evidence presented by the State to exclude Ballentine as a suspect.¹⁴⁰ Webster argued that the trial court erred by placing few limits on his "expert" testimony.¹⁴¹

Next, Webster objected to Callum's testimony that she would have expected "a lot more" blood consistent with Harris and fecal matter under Ballentine's nails if Ballentine had been directly involved with Harris' disembowelment.¹⁴² Webster also argues that it was error for the judge to allow Callum to testify, over objection, to the amount of blood, feces, and flesh one would expect to find on someone who disemboweled Harris, and that the forensic evidence on Ballentine is consistent with being "pushed around" and not "present."¹⁴³

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.* at 278-279.

¹³⁸ *Id.* at 280.

¹³⁹ Webster, 252 P.3d. at 278. Wilson's testimony spanned 150 transcript pages. *Id.*

¹⁴⁰ *Id.* at 279

¹⁴¹ *Id.* at 278. During trial, Webster continuously objected to the content of Wilson's testimony. At the end of the testimony Webster unsuccessfully motioned for a mistrial. *Id.* at 278, n.53.

¹⁴² *Id.* at 279.

¹⁴³ *Id.*

Lastly, Webster did not object to the testimony of Elaine Taylor opining that the DNA found on Harris sweater was a match to Webster.¹⁴⁴ Nor did Webster challenge Taylor's testimony that Ballentine's DNA under Harris' fingernails was not "prominent."¹⁴⁵ Webster challenged Taylor testimony that she would have expected Harris' DNA to be prominent under Ballentine's fingernails as improper.¹⁴⁶

In response to the second portion of Proposition II, the OCCA found that the trial did err in allowing all three Oklahoma City Police Department personnel to opine as to what they would have expected to forensically find in the case of human disembowelment.¹⁴⁷ The OCCA reasoned that Wilson should not have been able to testify as an expert to the strength and validity of the State's case against Ballentine because Wilson's opinion did not stem from "specialized knowledge" but more from "common sense and logic."¹⁴⁸ The OCCA also explained that both Callum and Taylor should not have been allowed to testify as an expert to, "*how much* forensic evidence one would expect to find under the fingernails of a person who has disemboweled another person."¹⁴⁹ Meaning, it was improper for Callum and Taylor to testify that they would have expected to find *more* blood, feces, flesh, and DNA under Ballentine's fingernails if had disemboweled Harris.

However, the OCCA held that allowing the jury to hear the erroneous testimony of Callum, Taylor, and Wilson was harmless error.¹⁵⁰ The court reasoned that the erroneous testimony was offered by the State in attempts to establish that Ballentine was not the perpetrator

¹⁴⁴ *Id.*

¹⁴⁵ Webster, 252 P.3d at 279..

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 280.

¹⁴⁸ *Id.* at 279.

¹⁴⁹ *Id.* at 280.

¹⁵⁰ *Id.*

of the crime.¹⁵¹ Therefore, none of the erroneous testimony was used as a part of the State’s evidence for Webster’s guilt, which ultimately came down to his palmprint and DNA at the crime scene.¹⁵² The OCCA concluded that because there was the presence of palmprint and DNA evidence, the erroneous testimony did not affect Webster’s conviction—the admission of the expert testimony was harmless beyond a reasonable doubt.¹⁵³ The OCCA denied the appeal and affirmed Webster’s life sentence.¹⁵⁴

IV. THE IMPACT OF HARMLESS ERROR DOCTRINE AND THE APPLICATION OF CONFLUENCE OF FACTORS ANALYSIS TO RODERICK WEBSTER’S APPEAL

A. *The Impact of the Harmless Error Doctrine*

If the OCCA had applied the confluence of factors analysis to the erroneous testimony of the forensic experts, the resolution of Webster’s direct appeal may have ended in grant of a new trial. When the OCCA applied the harmless error analysis, it discussed the influence each erroneous piece of evidence, by itself, had on Webster’s verdict. Meaning, the OCCA reviewed the testimony of Wilson, Callum, and Taylor (hereinafter “the experts”) and decided that without the erroneous testimony, the jury still would have convicted Webster. The OCCA’s concluded Webster’s palmprints and DNA made him guilty beyond a reasonable doubt *even if* the jury had not heard the erroneous testimony. Therefore, making the testimony harmless.

Although this analysis may seem predictive of the jury’s conclusion, it wholly ignores how the jury processes evidence. More specifically, the harmless error doctrine did not account for the cognitive bias of the experts and how the erroneous testimony contaminated the jury’s perception of the other seemingly credible evidence. As a mechanism to combat this issue, the

¹⁵¹ Webster, 252 P.3d at 280.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 283.

OCCA should adopt the confluence of factors analysis that is receptive to the effects of cognitive bias amongst the courtroom players and allows the OCCA to account for the influence erroneous testimony had on the jury's perception of the palmprint and DNA evidence.

Based on scholars' understanding of cognitive bias in criminal investigations,¹⁵⁵ it seems clear that cognitive bias influenced these expert analyst in two ways. First, the experts experience both confirmation and contextual bias by virtue of being employed by the Oklahoma City Police Department. It is plausible that the experts already knew Webster was arrested for the murder of Harris when they were given the evidence to analyze. With this information, Wilson, Callum, and Taylor may have implicitly decided that there was not enough evidence to prove Ballentine committed the murder to confirm the investigators' suspect (Webster) was the perpetrator.

Second, it is plausible that the expert's opinion was influenced by their own personal feelings and knowledge about the case. During Webster trial, each expert testified to their own, personal connection to the case. For example, Wilson, the technical investigator, testified that he kept crime scene pictures he took the night of the murder in his office drawer, twenty years later, because of its gruesome nature and lack of prosecution.¹⁵⁶ Callum also testified that she was at the crime scene and personally involved in the collection, testing, and reporting of the forensic evidence.¹⁵⁷ It is plausible that the investigator's confidence in their analysis of the evidence was motivated by their interest in the case as well as validation in their ability to correctly manage and test forensic evidence. Even though the OCCA acknowledge this testimony as erroneous, finding it harmless ignores the compounding effects of the expert's confirmation and contextual

¹⁵⁵ See *supra* Part II.

¹⁵⁶ Webster, 252 P.3d at 278.

¹⁵⁷ *Id.* at 273.

bias had on the rest of the evidence presented at trial. Meaning, the erroneous testimony was not harmless because it influenced the jury's perception of the fingerprint and DNA analysis.

B. The Application of the Confluence of Factors Analysis

If the OCCA were to have applied MA's confluence of factors analysis, it would have to acknowledge that a number of factors work together to result in a miscarriage of justice. First, it would consider the fact that the erroneous testimony came from forensic examiners that were a part of the Oklahoma City Police Department. Then, the OCCA would consider how the expert's own personal interest in the case influenced their opinion of the forensic evidence. Next, the OCCA would step into the role of the jury and contemplate how this testimony may have influenced their perception of the other evidence presented at trial. Meaning, as a juror, did the opinion that there was not enough evidence to prove Ballentine disemboweled Harris influence the validity of the palmprint match and the DNA match. Given that Webster's trial was unique in that the litigation was focused not on Webster's guilt but on Ballentine's innocence, the OCCA would be faced with possibility that the jury may have used the expert's erroneous testimony to corroborate the presence of Webster's palmprint at the crime scene and his DNA on Harris' sweater. If a juror is told by a confident expert witness that Ballentine could not have disemboweled Harris based on the lack of materials found on Ballentine and under his fingernails, it is plausible that that erroneous testimony influenced the juror's belief that the palmprint and DNA at the crime scene belonged to Webster.

It becomes clear that the erroneous testimony is no longer as harmless as it seems when the OCCA applies a standard that does not account for the compounding nature of evidence. If the OCCA had been given the opportunity to assess the influence the erroneous testimony had on the jury's perception of other independent pieces of evidence, Webster may have been given a

chance to litigate for his innocence in a new trial. Instead, the OCCA's use harmless error doctrine cut Webster's opportunity at its knees.

CONCLUSION

The OCCA's use of the harmless error doctrine harms claims of innocence. The harmless error doctrine's piecemeal approach to the review of errors at the trial level has created an unobtainable standard for relief for potentially innocent appellants. The harmless error doctrine fails to recognize how the well documented cognitive bias woven through police investigations and forensic analysts can contaminate seemingly independent pieces of evidence and subsequently influence a jury's verdict. To combat this problem, the OCCA should adopt the confluence of factors analysis applied by Massachusetts's SJC for review of trial level errors. By applying the confluence of factors analysis, the OCCA can take the harmless error doctrine a step further, and not only ask, "Does this error have an effect on the conviction," but ask "what impact did the error have on the other pieces of trial evidence and did *that impact* effect the jury's verdict." Asking these questions gives the court the opportunity to assess the impact multiple factors have on trial evidence and compels the OCCA to perform an analysis that is realistic of how juries perceive evidence. Most importantly, applying the confluence of factors analysis gives defendants who were wrongfully convicted an actual opportunity for their claims to be heard rather than dismissed because of an error that is perceptually harmless but realistically harmful.