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Confusion in the Court: Wisconsin's Harmless Error Rule in Criminal Appeals

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CONFUSION IN THE COURT — WISCONSIN'S HARMLESS ERROR RULE IN CRIMINAL APPEALS

I. INTRODUCTION

While a criminal defendant has a fundamental right to a fair trial,[1] it has been said that he or she is not entitled to a perfect trial.[2] Less-than-perfect criminal trials result from errors committed at the trial level which have been allowed to stand uncorrected. These errors may implicate federal constitutional rights[3] or may be of nonconstitutional magnitude.[4] When reviewing such allegedly improper trials, appellate courts must determine whether an error occurred, and if so, whether the conviction should be affirmed. This latter determination is made by applying the doctrine of harmless error.

Unfortunately, appellate courts have not approached the process of reviewing trial court error in a consistent manner. This has resulted in confusion as to what harmless error rule should be applied.[5] Wisconsin is no exception. At least three

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1. Irvin v. Dowd, 366 U.S. 717, 722 (1961); *In re* Murchison, 349 U.S. 133, 136 (1955); Hart v. State, 75 Wis. 2d 371, 395, 249 N.W.2d 810, 820-21 (1977) (citing Boldt v. State, 72 Wis. 7, 17, 38 N.W. 177 (1888)).

2. Michigan v. Tucker, 417 U.S. 433, 446 (1974); Lutwak v. United States, 344 U.S. 604, 619 (1953); Nyberg v. State, 75 Wis. 2d 400, 411, 249 N.W.2d 524, 529 (1977).

3. *See, e.g.*, Rudolph v. State, 78 Wis. 2d 435, 254 N.W.2d 471 (1977) (prosecution's use of defendant's post-arrest silence in case-in-chief); Reichhoff v. State, 76 Wis. 2d 375, 251 N.W.2d 470 (1970) (repeated use of defendant's post-arrest silence by prosecution); Scales v. State, 64 Wis. 2d 485, 219 N.W.2d 286 (1974) (admission of statement in violation of defendant's *Miranda* rights); Allison v. State, 62 Wis. 2d 14, 214 N.W.2d 437 (1974) (exclusion of evidence in violation of defendant's sixth amendment right to compel witnesses in one's own behalf).

4. These errors are usually based upon state substantive or procedural law. *See, e.g.*, State v. Sarinske, 91 Wis. 2d 14, 280 N.W.2d 725 (1979) (erroneous use of absent-witness instruction); Simpson v. State, 83 Wis. 2d 494, 266 N.W.2d 270 (1978) (erroneous admission of photographs); State v. Spraggin, 77 Wis. 2d 89, 252 N.W.2d 94 (1977) (erroneous admission of other-conduct evidence); State v. Jennaro, 76 Wis. 2d 499, 251 N.W.2d 800 (1977) (inadmissible hearsay).

5. *See* Field, *Assessing the Harmlessness of Federal Constitutional Error—A Process in Need of a Rationale*, 125 U. PA. L. REV. 15 (1976) (discussing three different formulations for determining constitutional harmless error); Saltzburg, *The Harm of Harmless Error*, 59 VA. L. REV. 988 (1973) (discussing the various formulations applied to constitutional and nonconstitutional error, and stating that "[c]haos surrounds the standard for appellate review of errors in criminal proceedings." *Id.* at 988).

different approaches are currently advocated by members of the Wisconsin Supreme Court.[6] This article will review and evaluate the approach to harmless error formulated by the United States Supreme Court, and examine how this doctrine has affected Wisconsin's approach to harmless error. The different tests currently applied in Wisconsin will then be evaluated. The article will conclude by advocating an approach that would remove the inconsistency found in Wisconsin's current harmless error doctrine.

II. THE FEDERAL APPROACH

Under the current approach in federal courts, the reviewing court first determines whether the error is of a constitutional nature. If the error is nonconstitutional,[7] federal courts usually apply a formulation which first appeared in *Kotteakos v. United States*.[8] In *Kotteakos*, the United States Supreme Court found prejudicial error in an indictment, trial, and jury instructions which assumed that one large conspiracy among multiple defendants had occurred, despite evidence which established eight separate conspiracies. The petitioners did not contend that the evidence, if considered apart from the alleged error, would have been insufficient to establish the separate conspiracies.[9] Rather, they contended that the erroneous assumption of only one conspiracy prejudiced the entire trial. The Court considered a harmless error statute adopted by Congress in 1919[10] which "was intended to prevent matters

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6. *See* part III *infra*.

7. *See, e.g.*, United States v. Freeman, 514 F.2d 1314 (D.C. Cir. 1975); United States v. Hilton Hotels Corp., 467 F.2d 1000 (9th Cir. 1972); United States v. O'Dell, 462 F.2d 224 (6th Cir. 1972); United States v. Carney, 461 F.2d 465 (3d Cir. 1972); United States v. Achtenberg, 459 F.2d 91 (8th Cir. 1972); United States v Straughn, 453 F.2d 422 (8th Cir. 1972); United States v. Crawford, 438 F.2d 441 (8th Cir. 1971).

8. 328 U.S. 750 (1946).

9. *Id.* at 753.

10. The Act of February 26, 1919, ch. 48, § 269, 40 Stat. 1181 (amended 1949) (current version at 28 U.S.C. § 2111 (1976)) provided:

> All [United States] courts shall have the power to grant new trials, in cases where there has been a trial by jury, for reasons which new trials have usually been granted in courts of law. On the hearing of any appeal, certiorari, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.

concerned with the mere etiquette of trials and with the formalities and minutiae of procedure from touching the merits of a verdict."[11] Applying the statute,[12] the Court held the errors to be not harmless. The Court indicated that the inquiry was not whether the jury reached the correct result, but what effect the error may reasonably have had on the jury's deliberations:

> [T]he question is not were they right in their judgment, regardless of the error or its effect upon the jury. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men . . . in the total setting.
>
> This must take account of what the error meant to them, not singled out and standing alone, but in relation to all else that happened. . . .
>
> If when all is said and done, the conviction [sic] is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress. But if one can say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.[13]

Thus, *Kotteakos* emphasized the effect of the error on the jury's deliberations and expressly rejected a harmless error determination which merely weighed the sufficiency of the remaining, untainted evidence. The Court left open the formulation of a different harmless error rule where "the departure

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11. Bruno v. United States, 308 U.S. 287, 294 (1939).

12. *See* note 10 *supra*. The present statute provides:

> On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

28 U.S.C. § 2111 (1976).

13. 328 U.S. at 764-65 (citations omitted).

was from a constitutional norm or a specific command of Congress."[14]

In *Chapman v. California*,[15] the United States Supreme Court specifically addressed constitutional error. Applying California's harmless error rule, the California Supreme Court had affirmed defendants' convictions despite repeated references by the prosecutor to their refusals to testify, and despite instructions that the jury could draw adverse inferences from the refusals to testify.[16] The United States Supreme Court held that this was a violation of the fifth amendment right to remain silent made applicable to the states by the fourteenth amendment, and held that state harmless error rules were inapplicable to "infractions by the States of federally guaranteed rights."[17] The Court then prescribed a federal standard, binding on the states, for reviewing the effect of constitutional error. The Court stated that for constitutional error to be held harmless, "the court must be able to declare a belief that it was harmless beyond a reasonable doubt."[18] The *Chapman* Court rejected any formulation of the harmless error rule that placed undue emphasis on the remaining, untainted evidence. Instead, the Court quoted from *Fahy v. Connecticut*,[19] which had indicated that the proper inquiry was "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction."[20] Therefore, like the *Kotteakos* standard for nonconstitutional error, the *Chapman* standard focuses on the effect of the constitutional error on the jury's deliberations[21] with the express additional requirement that harmlessness be found beyond a reasonable doubt.

While the *Kotteakos* approach has enjoyed continuing vitality in Supreme Court decisions,[22] the *Chapman* test for

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14. *Id.* at 764-65.

15. 386 U.S. 18 (1967).

16. *Id.* at 19.

17. *Id.* at 21. The *Chapman* Court recognized that all fifty states had adopted harmless error rules or statutes, but noted that none of them distinguished between federal constitutional error and violations of state laws or rules. *Id.* at 22.

18. *Id.* at 24.

19. 375 U.S. 85 (1963).

20. 386 U.S. at 23 (quoting Fahy v. Connecticut, 375 U.S. 85, 86-87 (1963)).

21. *See* Field, *Assessing the Harmlessness of Federal Constitutional Error — A Process in Need of a Rationale*, 125 U. PA. L. REV. 15, 26 (1976).

22. *See, e.g.*, United States v. Agurs, 427 U.S. 97, 112 (1976).

harmless constitutional error appears to have undergone change.[23] In a series of cases involving violations of a defendant's sixth amendment confrontation rights in joint trials contrary to the Court's holding in *Bruton v. United States*,[24] the Court appears to have modified the emphasis of *Chapman*. In *Harrington v. California*,[25] the Court made repeated references to *Chapman* and purported to apply the *Chapman* test, but it did not focus on whether the error complained of had contributed to the conviction. Instead, in a move which provoked a three-member dissent,[26] Justice Douglas' majority opinion examined the remaining, untainted evidence and determined it to be so overwhelming in favor of conviction that, unless the Court were to fashion an automatic reversal rule for constitutional error, the error must be found harmless.[27] In *Schneble v. Florida*,[28] the Court upheld a conviction despite constitutional error because it found "the independent evidence of guilt . . . so overwhelming . . . ."[29] Similarly, in *Brown v. United States*,[30] constitutional error was deemed harmless because the improperly admitted evidence "was merely cumulative of other overwhelming and largely uncontroverted evidence properly before the jury."[31] Recently, in *Parker v. Randolf*,[32] the Court cited *Harrington* and summarized the harmless error rule it had employed in *Schneble* and *Brown* as follows: "In some cases, the properly admitted evidence of guilt is so overwhelming, and the prejudicial effect of the codefendant's admission so insignificant by comparison,

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23. *See* Comment, *Harmless Error: The Need for a Uniform Standard*, 53 ST. JOHN'S L. REV. 541, 551 n.51 (1979) (suggesting that inconsistencies in decisions since *Chapman* may be attributable to changes in the composition of the Court).

24. 391 U.S. 123 (1968). In *Bruton*, a witness testified that petitioner's codefendant had orally confessed that he and petitioner committed the armed robbery. The Supreme Court reversed petitioner's conviction because there was a substantial risk that the jury, despite instructions to the contrary, looked to the incriminating statement in determining petitioner's guilt, which was a violation of the defendant's right of confrontation secured by the sixth amendment.

25. 395 U.S. 250 (1969).

26. *Id.* at 257 (Brennan, J., dissenting, joined by Warren, C.J., and Marshall, J.).

27. *Id.* at 254.

28. 405 U.S. 427 (1972).

29. *Id.* at 431.

30. 411 U.S. 223 (1973).

31. *Id.* at 231.

32. 422 U.S. 62 (1979).

that it is clear beyond a reasonable doubt that the introduction at trial was harmless error."[33]

Thus, it would appear that the standard for reviewing constitutional error is reasonably well settled based on *Harrington, Schneble, Brown* and *Parker*. While both *Kotteakos* and *Chapman* focused on the prejudicial effect of the error complained of, *Harrington, Schneble, Brown* and *Parker* appear to have regressed[34] by redirecting the attention to the sufficiency of the remaining evidence. It would appear that, rather than focusing solely on the effect of the error itself, the Court will also examine the properly admitted, untainted evidence and render the error harmless where that evidence is overwhelming in favor of guilt.

III. The Wisconsin Approach

The standard of review in Wisconsin for harmless error is addressed in numerous cases and has been affected not only by the federal approach but also by statutory provisions. The statutes provide that error will be held harmless unless "a substantial right of the party is affected."[35] These sources have resulted in many different formulations of Wisconsin's harmless error rule, and confusion as to which rule is to be applied in any given case.

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33. *Id.* at 70-71.

34. *See* Harrington v. California, 395 U.S. 250, 255, where Justice Brennan, writing for the dissent, stated that the majority had, in effect, overruled *Chapman*, "the very case it purport[ed] to apply."

35. Wis. Stat. § 901.03 (1977), adopted by supreme court order at 59 Wis. 2d R9 (1974) provides:

> **Rulings on Evidence.** (1) Effect of Erroneous Ruling. Error may not be predicated upon a ruling which admits or excludes evidence *unless a substantial right of the party is affected* . . . .

Wis. Stat. § 817.37 (1975), repealed by 1979 Wis. Laws ch. 89, provided:

> **Judgments; application to reverse or set aside; new trial; reversible errors.** No judgment shall be reversed or set aside or new trial granted in any action or proceeding, civil or criminal, on the ground of misdirection of the jury, or the improper admission of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court to which application is made, after an examination of the entire action or proceeding, it shall appear that the error complained of *has affected the substantial rights of the party* seeking to reverse or set aside the judgment, or to secure the new trial.

(emphasis added).

A. *The Effect of the Error:* State v. Jennaro

State v. Jennaro[36] most directly reflects the federal approach to harmless error. In *Jennaro,* hearsay testimony, although inadmissible with respect to the petitioner, was admitted in a joint trial to show the guilt of a codefendant.[37] In measuring the prejudicial effect of this error, the court reviewed the tests for harmless error as follows:

> Under *Chapman v. California,* the United States Supreme Court stated that, before a federal *constitutional* error can be held harmless, "the court must be able to declare a belief that it was harmless beyond a reasonable doubt." This standard of *Chapman* was specifically reaffirmed in *Harrington v. California.* Under the *Chapman* test, it is apparent beyond a reasonable doubt that the error complained of did not contribute to the guilty verdict in respect to Jennaro. Under the test apparently applicable to nonconstitutional error, set forth in *Kotteakos v. United States,* and recently restated in *United States v. Agurs,* the error is equally harmless, because it is clear that the error did not influence the jury or had only a slight effect.[38]

This analysis and application confused the federal courts' clearly bifurcated approach to constitutional and nonconstitutional error: the states are free to formulate their own rules for determining nonconstitutional error, but are bound by *Chapman* and subsequent cases interpreting *Chapman* in determining the effect of constitutional error.[39] The court also ignored *Harrington's* emphasis on examining the remaining, untainted evidence to determine harmlessness.[40] More importantly, by finding the error before it to be harmless under both *Chapman* and *Kotteakos,* the court may have engaged in a far more stringent examination of the effect of the error than it would have if it had applied the harmless error test formulated in *Wold v. State.*[41]

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36. 76 Wis. 2d 499, 251 N.W.2d 800 (1977).
37. *Id.* at 509, 251 N.W.2d at 805.
38. *Id.* at 509-10, 251 N.W.2d at 805 (emphasis in original) (citations omitted).
39. *See* part II *supra.*
40. *See* text accompanying note 27 *supra.*
41. 57 Wis. 2d 344, 204 N.W.2d 482 (1973).

B. *Sufficiency of the Properly Admitted Evidence:* Wold v. State

In *Wold,* which involved nonconstitutional error, the supreme court held that the trial court should have excluded testimony of a state crime laboratory analyst concerning the results of a test which, despite a motion for discovery, was not disclosed to the defendant prior to trial.[42] The court, holding that this erroneous admission was harmless error, formulated the following test: "The test of harmless error is not whether some harm has resulted, but, rather, whether the appellate court in its independent determination can conclude there is sufficient evidence, other than and uninfluenced by the inadmissible evidence, which would convict the defendant beyond a reasonable doubt."[43] While purporting to examine the effect of the error, the court examined the sufficiency of the untainted evidence, stating that the effect of the error "must be realistically evaluated in the context of the case."[44] The court applied the test it had postulated and concluded that the error was harmless: "Without the consideration of the laboratory test . . ., this evidence would be sufficient in the minds of any jury to convict Wold beyond a reasonable doubt. We conclude from our independent consideration of the admissible evidence that no reasonable jury considering only such evidence could have acquitted Wold."[45]

Although the *Wold* court addressed nonconstitutional error, it cited and discussed *Fahy, Chapman* and *Harrington,* all of which dealt with constitutional error, as support for the rule it formulated.[46] This seeming indifference to the constitutional/nonconstitutional error distinction was underscored when the court applied the rule formulated in *Wold* to constitutional error twice in the following year. In *Allison v. State,*[47]

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42. *Id.* at 347-49, 204 N.W.2d at 487-90.

43. *Id.* at 356, 204 N.W.2d at 490.

44. *Id.* at 357, 204 N.W.2d at 491.

45. *Id.* at 358, 204 N.W.2d at 491.

46. Interestingly enough, although formulating a rule weighing the sufficiency of the remaining, untainted evidence, the *Wold* court synthesized the applicable federal rule after *Harrington* to be that an error cannot be deemed harmless beyond a reasonable doubt where there is a reasonable probability that the evidence complained of might have contributed to the conviction. 57 Wis. 2d at 356 n.12, 204 N.W.2d at 490.

47. 62 Wis. 2d 14, 214 N.W.2d 437 (1974).

the exclusion of defendant's alibi evidence was held to be constitutional error implicating the defendant's sixth amendment right to compel the attendance of witnesses in his own behalf, but it was held harmless under the *Allison* court's somewhat distorted restatement of *Wold*: "[E]rror is harmless unless the result would reasonably have been different . . . ."[48] In *Scales v. State*,[49] admission of a statement in violation of *Miranda v. Arizona*,[50] "though of constitutional dimensions,"[51] was held to be harmless error. Indicating that *Wold* had accepted the harmless error test of *Harrington*, the *Scales* court applied the *Wold* rule: Whether there was "sufficient evidence, other than and uninfluenced by the inadmissable evidence, which would convict the defendant beyond a reasonable doubt."[52]

C. *Challenge to the* Wold *Rule:* Kelly v. State

After similar application of the *Wold* rule to a case involving nonconstitutional error,[53] the majority's application of the *Wold* rule to constitutional error was challenged in *Kelly v. State*.[54] After determining that the evidence complained of should have been excluded as fruit of an illegal search in contravention of the fourth amendment, the majority restated the *Wold* rule and refused to reverse the conviction:

> [W]e find that the admission of this evidence constituted harmless error in this case. We conclude from examination of this record that the evidence of the defendant's guilt was such that without this evidence and uninfluenced by it that the admissible evidence was such as would allow the jury to

48. *Id.* at 29, 214 N.W.2d at 445. *See also* Rohl v. State, 65 Wis. 2d 682, 233 N.W.2d 567 (1974).

49. 64 Wis. 2d 485, 219 N.W.2d 286 (1974).

50. 384 U.S. 436 (1966).

51. 64 Wis. 2d at 492, 219 N.W.2d at 291.

52. *Id.* (quoting Wold v. State, 57 Wis. 2d 344, 356, 204 N.W.2d 482, 490 (1973)).

53. State v. Dean, 67 Wis. 2d 513, 227 N.W.2d 712 (1975). In *Dean*, the court was faced with testimony admitted at trial which "was clearly inadmissible hearsay and should have been excluded." *Id.* at 532, 227 N.W.2d at 721. The court quoted the test promulgated in *Wold*, considered the inadmissible evidence untainted by the error, and concluded that the error was harmless: "While this testimony . . . was improperly admitted . . . , it was merely cumulative to evidence that was ultimately presented by the prosecution which covered the same points. We conclude that because of other evidence offered in the trial that the receipt of this testimony constituted harmless error." *Id.* at 533, 227 N.W.2d at 721.

54. 75 Wis. 2d 303, 249 N.W.2d 800 (1977).

> convict the defendant beyond a reasonable doubt. . . . We conclude in our independent determination that the other evidence uninfluenced by the inadmissible evidence is sufficient to convict the defendant beyond a reasonable doubt.[55]

In a concurring opinion,[56] Justice Heffernan advocated reconsideration of the *Wold* rule because of its "obvious overbreadth" and misplacement of emphasis:

> This writer doubts the correctness of the formulation of the harmless error rule in *Wold* relied upon in the majority opinion. Under that rule no error can be prejudicial if the evidence properly admitted is highly probative of guilt. This is an invitation for prosecutorial abuse. There is always a temptation for a prosecutor to make a good case better by urging admission of dubious or improper evidence. The *Wold* rule gives no recourse against errors which may well have a substantial impact upon the jury's finding of guilt. The philosophy of *Wold* is simply that a person who may properly be found guilty under admissible evidence cannot be deprived of a fair trial because of error, even though that error contributes substantially to the finding of guilt. *Wold*, erroneously I believe, places the emphasis upon the admissible evidence rather than upon the alleged error. Attention should be focused on whether the error prejudices the rights of the defendant.
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> When *Agurs* refers to the usual harmless error rule as being such that, ". . . when error is present in the record, the reviewing judge must set aside the verdict and judgment unless his 'conviction is sure that the error did not influence the jury, or had but only slight effect' . . . " it is clear that the United States Supreme Court speaks of a rule different than that adopted in *Wold*.[57]

The court has subsequently stated that, notwithstanding Justice Heffernan's challenge, "[t]he present harmless error rule in this state is set forth in *Wold v. State* . . . ."[58] While

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55. *Id.* at 316-17, 249 N.W.2d at 807 (citation and footnote omitted).

56. *Id.* at 321, 249 N.W.2d at 809 (Heffernan, J., concurring). Justice Heffernan stated that the error was harmless under his formulation of the harmless error rule as well as under the *Wold* formulation. *Id.* at 322, 249 N.W.2d at 809.

57. *Id.* at 321, 249 N.W.2d at 809 (citations omitted) (quoting United States v. Agurs, 427 U.S. 97, 112 (1976)). As the court has so often done, Justice Heffernan relied upon *Kotteakos* rather than *Chapman* in addressing constitutional error.

58. Thompson v. State, 83 Wis. 2d 134, 145, 265 N.W.2d 467, 472 (1978).

the court has continued to apply the *Wold* rule to both constitutional[59] and nonconstitutional[60] error without distinction, it would appear that the continued vitality of a rule examining only the sufficiency of the remaining evidence is uncertain. Justice Heffernan's approach has gained the support of Justice Abrahamson who has advocated a reconsideration of the *Wold* rule in three opinions written by her.[61]

*D. Post-*Wold *Cases Holding Error Not Harmless*

In *Hart v. State,*[62] a nonconstitutional error case involving admission of evidence which should have been excluded on grounds of remoteness,[63] Justice Abrahamson, writing for the court, noted that the *Wold* formulation of the harmless error rule "is accepted for the purposes of this opinion."[64] The court unanimously agreed that the error was not harmless under *Wold.* The *Wold* test was not applied in the opinion, however. The court considered the probable influence of the improperly admitted evidence on the jury and concluded that the defendant did not have a fair trial.[65]

Justice Abrahamson again addressed the harmless error test in *State v. Spraggin,*[66] where the defendant had been convicted of intentionally aiding and abetting in the delivery of heroin. The trial judge had permitted the state to introduce marijuana, weapons and stolen goods found in defendant's home as "[e]vidence of other crimes, wrongs, or acts" apparently "offered for . . . proof . . . of intent."[67] Justice Abra-

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59. *See, e.g.,* Scales v. State, 64 Wis. 2d 485, 219 N.W.2d 286 (1974); Allison v. State, 62 Wis. 2d 14, 214 N.W.2d 437 (1974).

60. *See, e.g.,* State v. Sarinske, 91 Wis. 2d 14, 280 N.W.2d 725 (1979); Simpson v. State, 83 Wis. 2d 494, 266 N.W.2d 270 (1978); State v. Spraggin, 77 Wis. 2d 89, 252 N.W.2d 94 (1977); State v. Jennaro, 76 Wis. 2d 499, 251 N.W.2d 800 (1977).

61. State v. Spraggin, 77 Wis. 2d 89, 101 n.9, 252 N.W.2d 94, 100 (1977); Micale v. State, 76 Wis. 2d 370, 373 n.2, 251 N.W.2d 458, 460 (1977); Hart v. State, 75 Wis. 2d 371, 395 n.11, 249 N.W.2d 810, 821 (1975).

62. 75 Wis. 2d 371, 249 N.W.2d 810 (1977).

63. *Id.* at 393, 249 N.W.2d at 820.

64. *Id.* at 395 n.11, 249 N.W.2d at 821.

65. *Id.* at 395, 249 N.W.2d at 820.

66. 77 Wis. 2d 89, 252 N.W.2d 94 (1977).

67. WIS. STAT. § 904.04(2) (1977) provides:

> OTHER CRIMES, WRONGS, OR ACTS. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent,

hamson, writing for a four-member majority, held that this violation of an evidentiary rule[68] was not harmless error and reversed the conviction. While mentioning that the admission of the improper evidence was not harmless error under the *Wold* rule,[69] the court did not examine the remaining, untainted evidence to test its sufficiency to support the conviction beyond a reasonable doubt. Instead, the court noted that "[a] significant portion of the transcript sets forth evidence we find inadmissible."[70] While such an observation may well imply that the remaining evidence was insufficent under the *Wold* rule, a contrary emphasis in testing for harmless error came through clearly: "After careful reading of the record, we believe that the presentation to the jury of the testimony and physical evidence linking the defendant with marijuana, stolen goods and weapons, created a definite risk that the conviction might be based on that evidence."[71] The dissent indicated that the admission of the other-crimes evidence was proper, but even if it had been error, it would have been harmless error under *Wold*.[72]

In *Schimmel v. State*,[73] the court held that the exclusion of psychiatric evidence during the guilt phase of a bifurcated first-degree murder trial was not harmless error under the *Wold* rule. In reversing the conviction, however, the court looked only to the nature of the evidence excluded, and did not consider the admissible evidence in the record supporting conviction.[74]

*E. Post-*Wold *Cases Holding Error to be Harmless: The "Under Any Test" Approach*

While Justice Heffernan concurred in finding the error harmless in *Kelly v. State*, he advocated a reconsideration of the *Wold* rule because it "erroneously . . . places the emphasis upon the admissible evidence rather than upon the alleged

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preparation, plan, knowledge, identity, or absence of mistake or accident.

68. *Id.*

69. 77 Wis. 2d at 101 n.9, 252 N.W.2d at 100.

70. *Id.* at 103, 252 N.W.2d at 100.

71. *Id.* at 101-02, 252 N.W.2d at 100.

72. *Id.* at 104, 252 N.W.2d at 101.

73. 84 Wis. 2d 287, 267 N.W.2d 271 (1978).

74. *Id.* at 302, 267 N.W.2d at 278.

error."[75] Cases subsequent to *Kelly* holding error to be harmless appear to have minimized the controversy by emphasizing that the error complained of was nonprejudicial "under any test of harmless error."[76] In *Simpson v. State*,[77] the court cited Justice Heffernan's *Kelly v. State* concurrence in a footnote,[78] and in the text held: "We conclude, applying either the test adopted in *Wold v. State* or the test suggested in *State v. Jennaro* that the error was not prejudicial."[79] A recent example of this trend to determine that error is not prejudicial under any test appears in *State v. Sarinske*:[80]

> The issue then is whether the error, if any, requires reversal. In the instant case we conclude that any error was harmless whatever formulation of the harmless error rule is used. *Kelly v. State.* We do not believe the error influenced the jury or if it did the effect was slight. On the record, it cannot reasonably be said that had the error not been committed, the verdict might probably have been different. *Wold v. State.* In the framework of the instant case, there is no significant possibility that the defendant would have been found not guilty . . . in the absence of error.[81]

Thus, the tension continues between the *Wold* rule, mandating reversal only when the remaining, untainted, admissible evidence is found by the reviewing court to be insufficient to support conviction; and the *Kotteakos/Chapman* rule, mandating reversal unless the appellate court is convinced that the error had at most a slight influence on the jury. Furthermore, there is still no Wisconsin recognition of the Supreme Court's constitutional/nonconstitutional distinction.[82]

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75. 75 Wis. 2d 303, 321, 249 N.W.2d 800, 809 (1977).

76. *See, e.g.*, State v. Clark, 87 Wis. 2d 804, 818, 275 N.W.2d 715, 722 (1979); Lunde v. State, 85 Wis. 2d 80, 93, 270 N.W.2d 180, 186 (1978).

77. 83 Wis. 2d 494, 266 N.W.2d 270 (1978).

78. *Id.* at 507 n.1, 266 N.W.2d at 275.

79. *Id.* at 507, 266 N.W.2d at 275 (citations omitted).

80. 91 Wis. 2d 14, 280 N.W.2d 725 (1979).

81. *Id.* at 55, 280 N.W.2d at 743-44 (citations omitted).

82. *See* notes 59 and 60 *supra*. For an uncharacteristic recognition by the Wisconsin court of the bifurcated approach to constitutional and nonconstitutional error, see State v. Clark, 87 Wis. 2d 804, 818 & n.3, 275 N.W.2d 715, 722 (1979), where the court criticized the defendant for invoking the *Chapman* standard in a case involving nonconstitutional error, and indicated that *Wold* was applicable to nonconstitutional error determinations. *But see* Sheehan v. State, 65 Wis. 2d 757, 767, 223 N.W.2d 600, 605 (1974), expressly rejecting the contention that *Chapman* rather than *Wold*

Despite the court's insistence that the *Wold* test is the present harmless error rule in Wisconsin, it has been misapplied since *Hart v. State* and has not been applied in any case since *Kelly v. State* where application of a different formulation of harmless error would have yielded a different outcome.

Those cases in which reversal would have been mandated under the more stringent "slight influence on the jury" test also contained insufficient evidence to support conviction under the "sufficient evidence for conviction" rule of *Wold*. Concomitantly, those cases containing sufficient evidence to trigger affirmance under the *Wold* harmless error rule have coincidentally evidenced error which had at most a slight influence on the jury.

F. Moving Toward a Constitutional/Nonconstitutional Distinction?

Finally, it should be noted that despite the court's indiscriminate application of the *Wold* rule to both constitutional and nonconstitutional error,[83] some Wisconsin cases have approached constitutional error determinations without invoking *Wold*.[84] In *Reichhoff v. State*,[85] Justice Abrahamson, writing for a four-member majority, formulated a test for determining whether constitutional error was harmless. The court considered the frequency of the error, the nature of the state's evidence against the defendant, and the nature of the defense.[86] The court determined that while the evidence in the case before it against the defendant was sufficient to sustain the conviction, the error occurred frequently and was highly prej-

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should be applied to constitutional error.

83. *See* note 82 *supra*.

84. In Virgil v. State, 84 Wis. 2d 166, 267 N.W.2d 852 (1978), Justice Heffernan, writing the majority opinion, applied the approach he had advocated in *Kelly v. State* as part of a plain error determination under WIS. STAT. § 901.03(4), and mandated reversal. After examining the evidence untainted by the erroneously admitted evidence, the court stated:

> We do not conclude that such evidence would have been insufficient to convict were it viewed alone, but it cannot be said beyond a reasonable doubt that the [inadmissible] testimony . . . , which was put into evidence contrary to the salutory provisions of the Wisconsin and United States Constitutions, did not play a part in impelling the jury's verdict.

Id. at 192, 267 N.W.2d at 865.

85. 76 Wis. 2d 375, 251 N.W.2d 470 (1977).

86. *Id.* at 381, 251 N.W.2d at 473.

udicial to the defense employed. The court therefore mandated a new trial.[87] The dissent in *Reichhoff* believed there was no prejudicial error under what it considered to be the correct test: "This court has held that errors occurring in the course of a trial will not serve to overturn a conviction unless it clearly appears that had they not occurred, the result would probably have been more favorable to the defendant."[88]

In *Rudolph v. State*,[89] the court, in a per curiam opinion, relied on both *Reichhoff* and *Chapman* in determining whether the constitutional error before it was harmless:

> The recent case of *Reichhoff v. State* is instructive for the conceptual framework it provides for harmless error analysis. The test of whether constitutional error is harmless, as that test was formulated in *Chapman v. California*, and as it was applied in *Reichhoff*, requires that the beneficiary of the constitutional error, here the state ". . . prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." As recognized in *Reichhoff*, the relevant factors considered when determining whether a constitutional error is harmless include (1) the frequency of the error, (2) the nature of the state's evidence against the defendant, and (3) the nature of the defense.[90]

The court then found the error to be harmless beyond a reasonable doubt, noting that the state's evidence was "amply sufficient to support the conviction,"[91] that the error had not been as repeated or blatant as in *Reichhoff*,[92] that a cautionary explanation had been given to the jury at the time of error,[93] and that a cautionary instruction could have been requested by defense counsel.[94] A three-member dissent noted the weakness of the state's evidence and the high likelihood of prejudice in the error complained of. Quoting *Schneble*,[95] the dissent stated that the error should not have been found harmless because "there is a reasonable possibility that the

87. *Id.* at 381-82, 251 N.W.2d at 473-74.
88. *Id.* at 384, 251 N.W.2d at 475.
89. 78 Wis. 2d 435, 254 N.W.2d 471 (1977).
90. *Id.* at 443, 254 N.W.2d at 474-75 (citation omitted).
91. *Id.* at 444, 254 N.W.2d at 475.
92. *Id.* at 445, 254 N.W.2d at 475.
93. *Id.*
94. *Id.* at 446-47, 254 N.W.2d at 476.
95. 405 U.S. 427, 432 (1972).

improperly admitted evidence contributed to (defendant's) conviction."[96]

IV. MAKING SENSE OUT OF THE WISCONSIN APPROACH

One thing that emerges from the picture painted by these cases is that, almost without exception,[97] the Wisconsin court has ignored the Supreme Court's approach which binds states by the United States Constitution in determining the effect of constitutional harmless error, but which leaves the states free to formulate their own rules for nonconstitutional error. In this respect the Wisconsin approach avoids the criticism of those who label the constitutional distinction an artificial one.[98] It has been argued that a defendant's right to a fair trial can be prejudiced as easily by nonconstitutional errors as by constitutional errors,[99] and that the impact of the error complained of, rather than the label attached to the error, should primarily concern an appellate court.[100] As an example, one commentator points out that the effect of an erroneously admitted hearsay statement upon the jury is the same whether the court views the error as a violation of sixth amendment confrontation rights or state hearsay rules, but under the bifurcated approach, resolution of the primary inquiry as to the nature of the error determines which harmless error standard will be applied.[101]

Another laudable aspect of this indiscriminate approach is that, although required to do so only in cases involving consti-

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96. 78 Wis. 2d at 449, 254 N.W.2d at 475-76 (Day, J., dissenting) (quoting 405 U.S. at 432).

97. *See* State v. Clark, 87 Wis. 2d 804, 818, 275 N.W.2d 715, 722 (1979) and note 82 *supra*.

98. *See, e.g.*, Fahy v. Connecticut, 375 U.S. 85, 94 (1963), where Justice Harlan, dissenting, said: "It is obvious that there is no necessary connection between the fact that evidence was unconstitutionally seized and the degree of harm caused by its admission." *See also* Saltzburg, *The Harm of Harmless Error*, 59 VA. L. REV. 988, 1025 (1973); Note, *People v. Crimmins: The New Prejudice Rule*, 40 ALB. L. REV. 405, 419 (1976).

99. *See, e.g.*, People v. Crimmins, 36 N.Y.2d 230, 247, 326 N.E.2d 787, 797, 367 N.Y.S.2d 213, 226 (1975) (dissenting opinion).

100. *See* Saltzburg, *The Harm of Harmless Error*, 59 VA. L. REV. 988, 1025 (1973); Note, *People v. Crimmins: The New Prejudice Rule*, 40 ALB. L. REV. 405, 419 (1976).

101. Note, *People v. Crimmins: The New Prejudice Rule*, 40 ALB. L. REV. 405, 419 (1976).

tutional error,[102] the Wisconsin court finds harmless error beyond a reasonable doubt in reviewing all criminal convictions, an approach advocated in light of *In re Winship's*[103] requirement that all criminal convictions must be based upon proof beyond a reasonable doubt.[104]

It cannot be ignored, however, that while a state is free to adopt a uniform approach to constitutional and nonconstitutional harmless error determinations, such an approach must meet the United States Supreme Court's standard for determining the effect of constitutional error.[105] Thus, the uniform harmless error rule emerging from the *Wold* line of cases must be compared to the rule of *Chapman* and its progeny.

A. Wold *and Constitutional Error*

Under the *Wold* test of harmless error, the court examines the remaining, untainted evidence to determine whether it is sufficient to support conviction beyond a reasonable doubt without assessing the probable effect of the error complained of on the jury's deliberations. As has been discussed,[106] *Chapman's* contrary emphasis on the effect of the error appears to have been eroded by *Harrington, Schneble, Brown* and *Parker.* However, the Supreme Court's "overwhelming evidence" test emerging from these later cases[107] appears to be far more stringent than *Wold's* "sufficient evidence" test.[108] Furthermore, in *Schneble,* the Court restated, even if it did not apply, the original *Chapman* test that constitutional error is not harmless where "there is a reasonable possibility that the improperly admitted evidence contributed to the defendant's conviction."[109] Thus, it appears that the current test

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102. Chapman v. California, 386 U.S. 18, 24 (1967). *See* text accompanying note 18 *supra.*

103. 397 U.S. 358 (1970); *See also* Sandstrom v. Montana, 442 U.S. 510 (1979).

104. *See* Field, *Assessing the Harmlessness of Federal Constitutional Error—A Process in Need of a Rationale,* 125 U. PA. L. REV. 15, 18 (1976); Saltzburg, *The Harm of Harmless Error,* 59 VA. L. REV. 988 (1973), which suggests that "[o]ne implication of a specific constitutional standard of proof at a criminal trial is that appellate review of evidentiary errors must be performed in a manner which does not subvert that standard." *Id.* at 989.

105. Chapman v. California, 386 U.S. 18, 21 (1967).

106. *See* text accompanying notes 23-33 *supra.*

107. *See* text accompanying note 33 *supra.*

108. *See* note 126 *infra.*

109. 405 U.S. 427, 432 (1972).

for constitutional error, binding on the states, is that such error will be found not harmless if there is a reasonable possibility that the improperly admitted evidence contributed to the conviction, unless the evidence supporting conviction is overwhelming.

When compared to this standard, it is readily apparent that the *Wold* test is not sufficiently stringent for determining the effect of constitutional error, and that by indiscriminately applying it to both constitutional and nonconstitutional error, the Wisconsin court is ignoring the Supreme Court's pronouncement in *Chapman* that state harmless error rules are inapplicable to federal constitutional error.[110]

Justice Heffernan's challenge to *Wold,* while arising in a case involving constitutional error,[111] did not recognize this most serious misapplication of the *Wold* test. Instead, his challenge invoked the nonbinding *Kotteakos* rule formulated for determining nonconstitutional error in the federal courts, which has been renewed indiscriminately in both constitutional and nonconstitutional harmless error cases.[112] Thus far, only one Wisconsin decision, *State v. Clark,*[113] has recognized the United States Supreme Court's distinct approach for state determinations of constitutional and nonconstitutional harmless error. In *Clark,* the court invoked the *Wold* rule for determining the effect of the nonconstitutional error which had occurred[114] and cited *Chapman* as the proper test for evaluating constitutional error.[115]

B. Wold *and Nonconstitutional Error*

While Wisconsin is free to formulate its own harmless error doctrine applicable to nonconstitutional error, the "sufficient evidence" test formulated in *Wold* and challenged by Justice Heffernan should be examined as applied to noncon-

110. 386 U.S. 18, 21 (1967). Note that the non-*Wold* approach to constitutional error advanced in Reichhoff v. State, 76 Wis. 2d 375, 251 N.W.2d 470 (1977), and Rudolph v. State, 78 Wis. 2d 435, 254 N.W.2d 471 (1977), also fails to recognize the "overwhelming evidence" standard of the *Chapman* progeny. *See* text accompanying notes 85-94 *supra.*

111. Kelly v. State, 75 Wis. 2d 303, 249 N.W.2d 800 (1977).

112. *Id.* at 321, 249 N.W.2d at 809.

113. 87 Wis. 2d 804, 275 N.W.2d 715 (1979).

114. *Id.* at 818, 275 N.W.2d at 722.

115. *Id.* at 818 n.3, 275 N.W.2d at 722.

stitutional error, keeping in mind the delicate balance between ensuring a fair trial to criminal defendants and the judicial economy goal of preventing reversals based upon technical and trivial errors.[116] Taken most favorably, the *Wold* test is a model of judicial economy which does not deny the criminal defendant a correct verdict. If, indeed, once the error complained of has been excised from the record, the court can conclude that there remains sufficient evidence to convict the defendant, a new trial in which the same "sufficient evidence" would be reintroduced would seem to be a waste of time.

However, this emphasis on correct result not only ignores whether the defendant received a fair trial the first time around, but also assumes that the appellate court can and should perform the required surgery on and weighing of the evidence in the record. The assumption that an appellate court has this ability has drawn severe criticism because the appellate court is placed in the position of a jury which lacks the benefit of having witnessed the trial.[117] The criticism places great emphasis on the inability of any appellate court to make a satisfactory determination from an appeal record.[118] Regardless of the ability of the appellate court to carry out this procedure, questions as to the propriety of such action cannot be easily ignored. Such questions are grounded in the fear that the court is invading the province of the jury.[119] Furthermore, it may well be that the *Wold* test, as Justice Heffernan asserted,[120] is inadequate to deter prosecutorial misconduct, recognized by many as an important function of harmless error review.[121]

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116. *See, e.g.*, People v. Wander, 61 A.D.2d 1037, 403 N.Y.S.2d 111 (1978).

117. *See, e.g.*, 44 BROOKLYN L. REV. 681, 686-87 n.34 (1978).

118. R. TRAYNOR, THE RIDDLE OF HARMLESS ERROR 18-22 (1970).

119. *See* Note, *Harmful Use of Harmless Error in Criminal Cases*, 64 CORNELL L. REV. 538, 542-43 (1979).

120. Kelly v. State, 75 Wis. 2d 303, 321, 249 N.W.2d 800, 809 (1977) (concurring opinion).

121. United States v. Freeman, 514 F.2d 1314, 1321 (D.C. Cir. 1975); United States v. Bell, 506 F.2d 207, 226 (D.C. Cir. 1974); United States v. Jackson, 429 F.2d 1368, 1373 (7th Cir. 1970); Note, *Harmful Use of Harmless Error in Criminal Cases*, 64 CORNELL L. REV. 538, 544 (1979); Note, *People v. Crimmins: The New Prejudice Rule*, 40 ALB. L. REV. 405, 420-21 (1976); Note, *The Harmless Error Rule Reviewed*, 47 COLUM. L. REV. 450, 459-61 (1947).

This latter inadequacy could be dealt with in Wisconsin in the manner suggested by the New York Court of Appeals in *People v. Crimmins*.[122] In *Crimmins*, after formulating a rule for determining nonconstitutional harmless error, the court acknowledged that, despite a finding of harmlessness under the applicable rule, an appellate court should in some cases of prosecutorial misconduct reverse for "therapeutic purposes."[123] Even so, the more fundamental objection of the impropriety and inability of an appellate court to second-guess the factfinder is clearly applicable to *Wold's* "sufficient evidence" test and not susceptible to cure by such special exceptions or rules.

These deficiencies in Wisconsin's approach to nonconstitutional error could be solved by rejection of the *Wold* test, which examines the remaining, untainted evidence without directly considering the effect of the error on the jury's deliberations, but also without adoption of the *Kotteakos* test,[124] which examines the effect of the error on the jury's deliberations without focusing on the quantum of the remaining, untainted evidence. Instead, the court could adopt for determining nonconstitutional harmless error the current rule applicable to constitutional harmless error determinations: trial error will be found not harmless if there is a reasonable possibility that it contributed to the conviction, unless the remaining, untainted evidence overwhelmingly supports the conviction.[125] This test, with its primary emphasis on determining the harmfulness of the error, is in keeping with a defendant's right to a fair trial and addresses the prosecutorial misconduct problem. At the same time, the "overwhelming evidence" consideration promotes judicial economy without the same degree of second-guessing endemic to the *Wold* "sufficient evidence" test.[126] By adopting such an approach to

122. 36 N.Y.2d 230, 326 N.E.2d 787, 367 N.Y.S.2d 313 (1975).

123. *Id.* at 240 n.*. 326 N.E.2d at 793, 367 N.Y.S.2d at 221. *Cf.* Note, *People v. Crimmins: The New Prejudice Rule*, 40 ALB. L. REV. 405, 421 (1976) (reviewing post-*Crimmins* New York case law and concluding that the cases have not given a clear rule for determining whether prosecutorial misconduct is severe enough for reversal).

124. As advocated by Justices Heffernan and Abrahamson. *See* note 61 *supra*.

125. *See* text accompanying notes 106-110 *supra*.

126. Note, however, that the same criticism directed at the *Wold* "sufficient evidence" test, *see* text accompanying notes 117-119, has been directed at the Supreme Court's "overwhelming evidence" test for constitutional harmless error determina-

nonconstitutional harmless error,[127] Wisconsin would not only avoid the problems inherent in its *Wold* approach, but would also continue to follow its own traditionally uniform treatment of constitutional and nonconstitutional harmless error in criminal convictions.[128]

V. CONCLUSION

Both the Wisconsin majority and minority approaches to harmless error determinations are marked by confusion and an alarming disregard for the dictates and guidance of the United States Supreme Court. Wisconsin has failed to heed the pronouncement in *Chapman v. California* that state harmless error rules are inapplicable to federal constitutional harmless error unless the state rule satisfies the federal standard for constitutional error. When the Supreme Court's constitutional harmless error rule has been noted in Wisconsin decisions, its evolution since *Chapman* has been ignored. In light of the historic certainty that Wisconsin's nonconstitutional harmless error rule will be invoked in cases involving constitutional error, and recognizing the deficiencies inherent in the *Wold* rule, Wisconsin's confused approach to harmless error should be jettisoned in favor of the following harmless error rule, applicable to both constitutional and nonconstitutional error: error will be found not harmless if there is a reasonable possibility that it contributed to the conviction appealed from, unless the untainted evidence remaining in the record after the error is excised overwhelmingly supports the conviction.

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tions. *See, e.g.*, 44 BROOKLYN L. REV. 681, 686 n.34 (1978).

127. *See* text accompanying note 110 *supra*.

128. *See* text accompanying notes 97-104 *supra*.