Arizona v. Fulminante: Where's the Harm in Harmless Error?

Kenneth R. Kenkel

University of Kentucky

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INTRODUCTION

The United States Supreme Court’s decision in Arizona v. Fulminante1 spurred immediate controversy. It seemed to announce a significant change in constitutional law, declaring that the admission of a coerced confession could be considered harmless error.2 Many members of the media and the legal community viewed the decision as a major blow to the protection of defendants’ rights.3 Others questioned the impact the case would have on the delicate balance between law enforcement interests and the rights of the accused.4

This Note examines the factual and legal background of the Fulminante decision and its implications. Part I sets forth the facts, procedures, and holdings of the lower court opinions, concluding with the issues and holdings at the Supreme Court level.5 Part II discusses the two major legal doctrines involved: the voluntariness of confessions and harmless constitutional error.6 Part III describes the Court’s application of these legal doctrines to the facts of Fulminante.7 Part IV concludes that the true significance of Fulminante may not be what was decided, but how it was decided.8

2 Id. at 1251.
5 See infra notes 9-21 and accompanying text.
6 See infra notes 22-93 and accompanying text.
7 See infra notes 94-118 and accompanying text.
8 See infra notes 119-34 and accompanying text.
I. THE PATH TO THE SUPREME COURT

The path to the Court began with a murder. Oreste Fulminante's 11-year-old stepdaughter was killed in September of 1982. Because of inconsistent statements to the police, he was soon a suspect. No charges were filed, however, and Fulminante traveled from Arizona to New Jersey. After two arrests and convictions on federal charges of possession of a firearm by a felon, he was imprisoned in Ray Brook Federal Correctional Institution in New York. He became acquainted with an inmate named Anthony Sarivola, a former police officer convicted of extortion and linked to organized crime. While at Ray Brook, Sarivola masqueraded as an organized crime figure but was actually a paid informant for the Federal Bureau of Investigation. Sarivola had heard rumors that Fulminante was suspected in his stepdaughter's death and passed these to the FBI. The FBI requested that he find out more.9

While other inmates at Ray Brook treated Fulminante harshly, due in part to the rumors of his involvement in the Arizona child murder, Sarivola formed a friendship with Fulminante. Sarivola offered Fulminante protection from the other inmates, but only if Fulminante agreed to tell him the truth about the murder. Fulminante initially denied his guilt but eventually confessed to Sarivola with a detailed account of the crime. After Fulminante's release in May of 1984, Sarivola and his fiancée drove him to Pennsylvania. On that trip, Fulminante confessed once again, this time to Sarivola's future wife. He was indicted for first degree murder on September 4, 1984.10

Fulminante unsuccessfully moved to suppress the two confessions at trial. He claimed that the statement to Sarivola was coerced and the second confession was the "fruit" of the first. The trial court found the confessions voluntary, basing its findings on the stipulated facts.11 Both confessions were used at trial, and in December of 1985, a jury found Fulminante guilty of first degree murder. By special verdict, the trial court sentenced him to death.12

The Supreme Court of Arizona considered a number of issues on appeal,13 but initially reversed the trial court only on its finding

10 Id. at 609.
12 Id.
13 Fulminante evidently took a "shotgun" approach on appeal, challenging virtually every significant ruling by the trial court in hopes of obtaining a reversal based on any
that Fulminante’s confession to Sarivola was voluntary. This ruling was based on both the stipulated facts from the motion to suppress and the evidence at trial. However, the court concluded that, in view of the overwhelming evidence, the admission of the first confession was harmless error beyond a reasonable doubt and affirmed the conviction and death sentence. On motion for reconsideration, Fulminante raised many of the same issues from his appeal. He also argued that under federal constitutional law a coerced confession could not be held harmless error. The Arizona court agreed, with one dissent. It set aside Fulminante’s conviction and remanded the case for a new trial without the use of the coerced confession.

On certiorari from Arizona, the United States Supreme Court considered: (1) whether Fulminante’s confession to Sarivola was coerced; (2) whether the admission at trial of a coerced confession is subject to harmless-error analysis; and (3) if so, whether using single error. The court resolved the issues on appeal as follows: (1) Fulminante was not subject to a custodial interrogation by Sarivola, so no Miranda warnings were required; (2) Fulminante was not entitled to counsel because he was not under indictment at the time of Sarivola’s questioning; (3) the fruit of the poisonous tree was not applicable because the passing of six months, Fulminante’s release from prison, and the circumstances of the second confession meant the second confession was not tainted by the first; (4) it was not error to admit a photograph of the victim, where it was relevant to disputed testimony and not inflammatory as altered; (5) relationship with victim, association with Sarivola, prior felony convictions, and relationship with wife were all found properly admitted character evidence against Fulminante; (6) evidence that a third party committed the murder was found too vague to admit; (7) evidence of FBI agent’s opinion of Anthony Sarivola’s character was properly admitted where Fulminante attacked Sarivola’s character; (8) detective’s opinion of Fulminante’s guilt could be admitted where defense counsel “opened the door” to such evidence; (9) alleged errors concerning death penalty issues and ineffective assistance of counsel did not affect result of proceeding. State v. Fulminante, 778 P.2d 602 passim (1988).

14 Id. at 609.
15 Id. at 608-09. The Arizona Supreme Court found that Sarivola’s offer of protection rendered the confession involuntary. Id. at 609 n.1. The court also held that the prosecution had not met its burden in the suppression hearing of showing the confession was voluntary, as required under Arizona law. Id. at 609.
16 Id. at 611.
17 Id. at 629 (Cameron, J., dissenting). In the court’s supplementary opinion, id. at 626, it noted that the four federal cases and one Arizona case relied on in its harmless-error analysis each involved violation of a defendant’s Miranda rights, not coerced confessions. Such Miranda violations have been held subject to harmless-error analysis. See, e.g., United States v. Mahar, 801 F.2d 1477 (6th Cir. 1986). Cameron argued that harmless-error analysis was appropriate where a confession is coerced only in a technical sense, and is cumulative of other testimony or evidence, but conceded that United States Supreme Court decisions have held otherwise. Fulminante, 778 P.2d at 628.
18 Fulminante, 778 P.2d at 627.
Fulminante's confession at trial constituted harmless error. In an unusually structured split decision, the Court found that the confession was coerced,19 decided that the admission of a coerced confession could be harmless error,20 but concluded, based on the available facts, that the admission of Fulminante's confession was not harmless error.21

II. WHEN DOCTRINES COLLIDE: COERCED CONFESSIONS AND HARMLESS ERROR

A. The Voluntariness of Confessions

Determining whether a particular confession was voluntary and admissible or coerced and inadmissible has been a difficult question for the Court. Due in part to the fact-specific nature of the inquiry and the inherent subjectiveness of assessing a person's will and reactions, the Court has arrived at no mechanically-applicable standard. Decisions reflect a tension between concern over police methods used to obtain confessions and law enforcement's need for confessions as evidence. Examining the Supreme Court cases that most explicitly discuss the voluntariness standard, the decision that established the constitutional basis for federal oversight of state cases on the issue, and some of the factors that have been found significant in the application of the standard, sheds light on the voluntariness question raised in Fulminante.

*Brain v. United States*22 contains the seeds of the modern voluntariness standard. In *Brain*, the Court observed that "all the decided cases necessarily rest upon the state of facts which existed in the particular case . . . ."23 The Court further noted:

The rule is not that . . . the proof must be adequate to establish that the particular communications contained in a statement were voluntarily made, but it must be sufficient to establish that the making of the statement was voluntary; that is to say that, from the causes, which the law treats as legally sufficient to engender in the mind of the accused hope or fear in respect to the crime charged, the accused was not involuntarily impelled to make a

19 111 S. Ct. at 1252.
20 *Id.* at 1251, 1264-65.
21 *Id.* at 1258.
22 168 U.S. 532 (1897).
23 *Id.* at 548.
statement, when but for the improper influences he would have remained silent.24

The test is a subtle one, involving the facts of the particular case, the subjective state of mind of the accused, and the legal inference to be drawn. The distinction between the substantive content of a particular statement and the circumstances under which the statement was made was an important one in Bram.25 But the distinction also suggests the complexity of inquiring into the psychological effects on the accused.

Bram, a federal case, grounded its discussion on the Fifth Amendment:26 "[W]herever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the fifth amendment to the constitution of the United States, commanding that no person 'shall be compelled in any criminal case to be a witness against himself."27 The Court examined the reasons for the adoption of the Fifth Amendment and tied these to the inadmissibility of involuntary confessions. The Fifth Amendment was in part a rejection of the inquisitorial methods of interrogation used in Europe, where questioning often amounted to browbeating or entrapment.28 Elsewhere, the Court suggested reliability as a rationale.29 For the Bram Court, admitting an involuntary confession meant reversal,

since the prosecution cannot on the one hand, offer evidence to prove guilt, . . . and on the other hand, for the purpose of

24 Id. at 549.
25 In Bram, the accused was stripped before being questioned by a police officer. The officer told Bram he was convinced of his guilt, but implied that he would get easier treatment if he named an accomplice. Bram never actually confessed, but did give a statement that allowed an inference of guilt. It was used at trial as a confession. The Court held that

the impression is irresistibly produced that [the incriminating statement] must necessarily have been the result of either hope or fear, or both, operating on the mind. . . . [T]he fear [was] that, if he remained silent, it would be considered an admission of guilt, . . . and . . . by denying, there was hope of removing the suspicion from himself.

Id. at 562.
26 U.S. Const. amend. V.
27 Bram, 168 U.S. at 542.
28 Id. at 544 (citing Brown v. Walker, 161 U.S. 591, 596 (1896) (noting that English criminal procedure eventually banned self-incrimination as a rule of evidence, while this right became constitutionally protected in the United States)).
29 Id. at 546 (quoting Gilbert, EVIDENCE 139 (2d ed. 1760) ("[P]ain and force may compel men to confess what is not the truth of facts, and consequently such extorted confessions are not to be depended on.").
avoiding the consequences of the error, caused by its wrongful admission, be heard to assert that the matter offered as a confession was not prejudicial, because it did not tend to prove guilt.\textsuperscript{30}

\textit{Brown v. Mississippi}\textsuperscript{31} was the first decision to hold that the use of involuntary confessions in state proceedings violates the Fourteenth Amendment.\textsuperscript{32} In \textit{Brown}, the coerciveness of the police tactics was not in doubt. Three black men arrested for murder were repeatedly and severely whipped until they confessed to the crime, using the details demanded by their questioners.\textsuperscript{33} Within a week of the murder, the men were convicted and sentenced to death. Without the confessions, there was no evidence on which they could have been convicted. The Mississippi Supreme Court upheld the convictions on procedural grounds, finding no violation of any constitutional right. The United States Supreme Court took offense not only at the police tactics but also at the complicity of the Mississippi courts:

The trial court was fully advised by the undisputed evidence of the way in which the confessions had been procured. The trial court knew that there was no other evidence upon which the conviction and sentence could be based. Yet it proceeded to permit conviction and to pronounce sentence. The conviction and sentence were void for want of the essential elements of due process, and the proceeding thus vitiated could be challenged in any appropriate manner. It was challenged before the Supreme Court of the State by the express invocation of the Fourteenth Amendment. That court entertained the challenge, considered the federal question thus presented, but declined to enforce petitioners' constitutional right. The court thus denied a federal right

\textsuperscript{30} See \textit{Bram}, 168 U.S. at 541.
\textsuperscript{31} 297 U.S. 278 (1936).
\textsuperscript{32} U.S. CONSERT. amend. XIV.
\textsuperscript{33} 297 U.S. at 281-83 (citing \textit{Brown v. State}, 161 So. 465, 470-71 (1935)).

[One defendant was hanged before being beaten, \textit{id.} at 281, and the two others] were made to strip and they were laid over chairs and their backs were cut to pieces with a leather strap with buckles on it, and they were likewise made by the said deputy to understand that the whipping would be continued unless and until they confessed . . . Further details of the brutal treatment to which these helpless prisoners were subjected need not be pursued. It is sufficient to say that in pertinent respects the transcript reads more like pages torn from some medieval account than a record made within the confines of a modern civilization which aspires to an enlightened constitutional government.

\textit{Id.} at 282.
fully established and specially set up and claimed and the judgment must be reversed.\textsuperscript{34}

While Brown announced the constitutional basis for rejecting involuntary confessions coming from state courts, it did not address the standard for evaluating voluntariness. As noted in Bram, cases deciding this question are very fact-specific.\textsuperscript{35} In many cases following Brown, the issue was decided without invoking any particular standard.\textsuperscript{36} In those and later decisions, the Court identified various factors bearing on the voluntariness of confessions. These include the subjection of the defendant to violence or threats of violence;\textsuperscript{37} the length of the defendant's detention, the duration and intensity of his interrogation, and deprivation of food or sleep;\textsuperscript{38} and the defendant's age, education, and mental capacity.\textsuperscript{39} The Court did not, however, remain silent on the voluntariness standard, and two decisions in 1961 mark the most recent and most thorough examinations of the question.

The first of these two decisions was Rogers v. Richmond.\textsuperscript{40} Rogers was convicted of murder, and the evidence against him included a confession. In a proceeding without the jury, the trial judge deemed the confession voluntary. The Supreme Court of Errors of Connecticut affirmed.\textsuperscript{41} Rogers sought a writ of habeas corpus on the voluntariness question. After a complex route through the federal courts, the writ was denied and the Connecticut decision

\textsuperscript{34} Id. at 287 (citations omitted).
\textsuperscript{35} Bram, 168 U.S. at 548-49.

The rule is not that in order to render a statement admissible the proof must be adequate to establish that the particular communications contained in a statement were voluntarily made, but it must be to say, that from the causes, which the law treats as legally sufficient to engender in the mind of the accused hope or fear in respect to the crime charged, the accused was not involuntarily impelled to make a statement, when but for the improper influences, he would have remained silent.

\textit{Id.}

\textsuperscript{36} See, e.g., Lisbena v. California, 314 U.S. 219 (1941) (prolonged questioning before arraignment and without counsel held not to have rendered confession 10 days later coerced); Chambers v. Florida, 309 U.S. 227 (1940) (confessions by poorly educated defendants held coerced, where they were subjected to isolation and protracted questioning until they "broke"); Ziang Sung Wan v. United States, 266 U.S. 1 (1924) (confession made while ill and in extended police custody held not voluntary).
\textsuperscript{40} 365 U.S. 534 (1961).
\textsuperscript{41} State v. Rogers, 120 A.2d 409 (Conn. 1956).
allowed to stand. When the case reached the United States Supreme Court, however, Justice Frankfurter, writing for the majority, found that the trial judge and the Supreme Court of Errors had applied the wrong standard. The courts had judged admissibility of the confession by its "probable truth or falsity. And this is not a permissible standard under the Due Process Clause of the Fourteenth Amendment." Instead, they should have asked "whether the behavior of the State's law enforcement officials was such as to overbear petitioner's will to resist and bring about confessions not freely self-determined . . . ."  

Frankfurter elaborated on the voluntariness standard in a decision later the same year, *Culombe v. Connecticut*. The lengthy opinion discussed two conflicting interests: law enforcement's need to question suspects about crimes to which there are no witnesses, and the idea that it is fundamentally wrong to compel a man to confess and then use the confession to convict him. In an approach reminiscent of *Bram*, Frankfurter referred to the inquisitorial methods once known to America's founders, and to both the English and American approaches to the problem. Various factors such as extensive questioning, delay in arraignment, failure to warn a prisoner of his rights, and denial of communication with friends or legal counsel, combined with "all the surrounding circumstances," should be considered. After citing some of the above-quoted language from *Rogers v. Richmond*, Frankfurter described a three-phased inquiry:

First, there is the business of finding the crude historical facts, the external, "phenomenological" occurrences and events surrounding the confession. Second, because the concept of "voluntariness" is one which concerns a mental state, there is the imaginative recreation, largely inferential, of internal, "psycho-

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42 365 U.S. 537-40. In the habeas corpus proceedings, the U.S. District Court held an additional hearing, found the confession involuntary and vacated the conviction. This decision was in turn vacated by the U.S. Court of Appeals for the Second Circuit, which remanded the case back to the district court with instructions to examine the entire state court record. On remand, the district court adhered to the state court's determination, dismissing the habeas corpus petition and letting stand the finding that the confession was voluntary. The court of appeals affirmed on appeal. Id.  
43 Id. at 543-44.  
44 Id. at 544.  
46 Id. at 578-81.  
47 Id. at 581-87.  
48 Id. at 601-02.
logical" fact. Third, there is the application to this psychological fact of standards for judgment informed by the larger legal conceptions ordinarily characterized as rules of law but which, also, comprehend both induction from, and anticipation of, factual circumstances.\footnote{Id. at 603.}

_Culombe_ thus gives a very thorough examination of the concerns surrounding involuntary confessions and an articulate expression of the voluntariness test. The decision does not, however, simplify the inquiry or even change it dramatically from the _Bram_ era inquiry.\footnote{Five years after _Culombe_, the Court dramatically changed confession law in the landmark case of _Miranda v. Arizona_, 384 U.S. 436 (1966). Finding custodial interrogations by police inherently coercive, _Miranda_ required police to inform a suspect of the right to remain silent and the right to counsel. Confessions obtained without this warning are deemed involuntary and inadmissible. However, in situations not involving both police custody and interrogation, the _Culombe_ due process voluntariness test still applies, and it can be invoked as a "back up" even if _Miranda_ warnings are given. See Keith R. Dolliver, *Voluntariness of Confessions in Habeas Corpus Proceedings: The Proper Standard for Appellate Review*, 57 U. Cin. L. Rev. 141, 144 n.10 (1990).}

Faced with an allegedly coerced confession, admitted in a state court and challenged under the Fourteenth Amendment, a court must independently\footnote{In _Miller v. Fenton_, 474 U.S. 104 (1985), the Court held that this question is one for independent federal determination. The precise question in _Miller_ was whether, in a habeas corpus proceeding, the state court's determination of voluntariness was presumed to be correct as a factual issue. _Id._ at 109. The issue arose because of confusion over the effect of a change in statutory habeas corpus law, but the holding reaffirmed the independent-review approach for cases coming to the Court on direct appeal. According to the Court, independent federal determination is required not because voluntariness is a question of law or a mixed question of law and fact, but because securing convictions using coerced confessions violates the Due Process Clause of the Fourteenth Amendment. "[T]actics for eliciting inculpatory statements must fall within the broad constitutional boundaries imposed by the Fourteenth Amendment's guarantee of fundamental fairness." _Id._ at 110.} assess the factual, psychological, and legal implications under the _Culombe_ "totality of the circumstances" test. This test reflects the Court's attempts to balance law enforcement needs and defendants' rights, and its application provides plentiful examples of significant factors. This was the state of the law on the voluntariness of confessions when _Fulminante_ reached the Court.\footnote{Schneckloth v. Bustamonte, 412 U.S. 218 (1973), is mentioned in both the majority and dissenting opinions on the issue of voluntariness in _Fulminante_. See _Fulminante v. Arizona_, 111 S. Ct. 1246, 1248, 1256 (1991). The Court in _Schneckloth_ applied the voluntariness test for confessions to the issue of consent to a search, and relied on _Culombe_ for the test. After identifying some of the factors considered in confession cases, the Court concluded: "In all of these cases, the Court determined the factual circumstances surround-}
B. Harmless Constitutional Error

While the voluntariness test has a long history, the harmless constitutional error doctrine is a relatively recent one. Its birth in *Chapman v. California* in 1967 marked a significant change in the law, answering some questions but also raising new ones. The background of the *Chapman* decision, the actual holding, and its treatment of coerced confessions are essential to understanding *Fulminante*.

1. Background of the Chapman Decision

Generally, harmless-error rules allow affirmations of convictions where the defendant was not prejudiced by an error found to have been committed at trial. This view prevailed at early English common law but was supplanted by the "Exchequer rule," which required automatic reversal. In the United States, the automatic reversal rule was criticized on two grounds: as a burden on the judicial system, where the end result would be the same if the error were indeed harmless, and as encouragement for lawyers to introduce errors against their clients to obtain reversal on appeal. By the time of *Chapman*, all fifty states and the federal system had harmless-error statutes or rules in place. Before *Chapman*, however, the Court had not "squarely faced the issue of whether federal constitutional rights violations could be harmless."

Two early cases pointed in opposite directions. In *Bram v. United States*, the Court required automatic reversal of a conviction based on a violation of the Fifth Amendment, while in *Motes v. United States* it found harmless a violation of a defendant's Sixth Amendment right. *Motes*, however, was the only case before *Chapman* in which the Supreme Court held a constitutional error...
harmless. After Chapman, the Court reversed convictions in a number of cases involving constitutional violations without discussing harmless error. Based on these cases, many commentators concluded that no constitutional error could be harmless.

One type of constitutional error promised to force the Court to address this question directly. In 1961, Mapp v. Ohio applied the federal exclusionary rule of Weeks v. United States to the states, making unconstitutionally seized evidence inadmissible in both state and federal courts. Lower federal and state appellate courts, however, were confused about whether violations of these rules could ever constitute harmless error. This confusion led the Court to grant certiorari in the case of State v. Fahy in 1963. Fahy involved a state conviction based in part on evidence admitted in violation of Mapp. The Connecticut Supreme Court of Errors affirmed, finding the error harmless under that state's harmless-error statute. The United States Supreme Court reversed, holding that the error was clearly harmful. Thus, the Court did not reach the question of whether Mapp violations found to be harmless required automatic reversal. It was not clear from the opinion what standard of harmlessness was applied, and legal commentators and various state courts reached varying conclusions as to Fahy's mandate to the states. Thus, whether violations of

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60 See Mause, supra note 55, at 521; Note, supra note 55, at 85.
64 232 U.S. 383 (1914).
65 Mapp, 367 U.S. at 660. The Weeks rule was developed as a protection of defendants' Fourth Amendment rights by deterring violations. Weeks, 232 U.S. at 391. Mapp applied this rule to the states through the Fourteenth Amendment. 367 U.S. at 650.
68 183 A.2d at 262.
69 375 U.S. at 85-86.
70 See Mause, supra note 55, at 522-23.
the *Mapp* and *Weeks* exclusionary rules could be harmless, and the more general question of whether any constitutional error could be harmless, remained to be answered in *Chapman*.

2. The Chapman Holding

In *Chapman*, two defendants were convicted of murder in a California state court. As the California Constitution permitted, the prosecutor commented extensively on the defendants' failure to testify. The defendants appealed to the California Supreme Court. Before that court reached a decision, the United States Supreme Court decided *Griffin v. California*, holding California's constitutional provision invalid under the Constitution of the United States. Permitting prosecutors to comment on defendants' silence was said to penalize defendants for exercising their Fifth Amendment right not to be compelled to incriminate themselves. When it heard the *Chapman* defendants' appeal, the California Supreme Court applied its harmless-error rule to this constitutional error and affirmed the conviction. The questions before the U.S. Supreme Court in *Chapman*, therefore, were "whether there can ever be harmless constitutional error and whether the error here was harmless . . . ."75

The Court first asserted that the question was a federal one. Justice Black's opinion for the Court quoted James Madison's view that "the 'independent' federal courts would be the 'guardian of those rights'" found in the Bill of Rights, including the Fifth Amendment as implicated in *Chapman*.77 Black specifically rejected the idea that all federal constitutional errors require automatic reversal and fashioned a harmless constitutional error standard by

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73 *Chapman*, 386 U.S. at 19.
74 380 U.S. 609 (1965).
75 *Chapman*, 386 U.S. at 20.
76 *Id.* at 21.
77 *Id.*

But the error from which these petitioners suffered was a denial of rights guaranteed against invasion by the Fifth and Fourteenth Amendments, rights rooted in the Bill of Rights, offered and championed in the Congress by James Madison, who told the Congress that the "independent" federal courts would be the "guardians of those rights."

*Id.*
reference to existing state and federal harmless-error rules. He considered errors that affect defendants' "substantial rights" harmful and defined harmless constitutional error as error that does "not contribute to the verdict obtained." Finally, the Court held that the beneficiary of the error had the burden of proving the error harmless. In brief, Chapman held that some constitutional errors may be harmless and not require automatic reversal, but 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."

3. Chapman and Coerced Confessions

While Chapman clearly stated that some constitutional errors can be harmless and set a harmless constitutional error standard, it did not clearly set out whether all violations of federal constitutional rights were to be subject to this standard. At one point in the opinion, Black observed that "prior cases have indicated that there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error . . . ." and referred by footnote to Payne v. Arkansas, Gideon v. Wainwright, and Tumey v. Ohio. In finding the Griffin violation harmful, he wrote that the error "can no more be considered harmless than the introduction against a defendant of a coerced confession," citing Payne as an example.

Different conclusions can be drawn from the language used in Chapman. Writing shortly after Chapman was decided, one commentator interpreted the earlier quote as incorporating a line of cases requiring reversal without evaluating the harm of the error.

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78 Id. at 21-24 (citing Ch. 139, § 110, 63 Stat. 105 (1949) (current version at 28 U.S.C. § 2111 (1964)), which 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."); Fed. R. Crim. P. 52(a), which provides: "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.").

79 Id. at 24.

80 Id.

81 Id.

82 Id. at 23 & n.8.

83 Id. (citing 356 U.S. 560 (1958) (coerced confession)).

84 Id. (citing 372 U.S. 335 (1963) (right to counsel)).

85 Id. (citing 273 U.S. 510 (1927) (impartial judge)).

86 Id. at 26 (citing Payne, 356 U.S. at 568).

87 See Note, supra note 55, at 88-89.
Another concluded that the intent of Black's footnote was to include "any error which falls into the categories established by these [three] cases" as requiring automatic reversal, and saw the later reference to Payne as conclusive that the admission of a coerced confession leads to automatic reversal. A later observer described the footnote reference as "simply descriptive of Supreme Court precedents" and possibly a "relic of the pre-Chapman view that all federal constitutional errors require automatic reversal."

Beyond the literal meaning of the opinion, the rationale behind submitting some constitutional errors and not others to harmless-error analysis is unclear. One writer distinguished between those errors affecting the reliability of the guilt-determination process, those having little impact on this process, and those falling somewhere in between. Coerced confessions would be placed in the first category. Another author identified five rationales for requiring automatic reversal: (1) where the constitutional error was inherently prejudicial; (2) where the constitutional error provided inherently unreliable evidence; (3) where the error was an example of police misconduct; (4) where the error was an example of prosecutorial misconduct; or (5) where the error was an example of conduct that undermines public confidence in the criminal justice system. Under this view, coerced confessions are clearly inherently prejudicial but could fit in all five categories. Both approaches assumed that the admission of a coerced confession requires automatic reversal.

4. Chapman Applied

Supreme Court decisions after Chapman expressed various rationales for applying the harmless constitutional error standard. Commentators have described three distinct approaches taken by the Court in identifying harmless error: focusing on the error to judge whether it contributed to the verdict; asking whether, in the absence of the error, there was overwhelming evidence to support

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* See Mause, supra note 55, at 538 n.129.
* Id. at 544.
* See Note, supra note 55, at 89-97 (describing coerced confessions as inherently unreliable).
* See Mause, supra note 55, at 540-46 (arguing that the goal of the harmless-error doctrine—judicial economy—is best served by requiring automatic reversal in cases of coerced confessions; such confessions are inherently prejudicial and will almost always be found harmful, making litigation on the issue of harmlessness inefficient).
the verdict; and asking whether the error resulted in merely cumu-

lative evidence. Although Supreme Court opinions do not explicitly distinguish between these approaches, recognizing them can be useful in analyzing harmless-error decisions.

Chapman changed basic assumptions about how to treat con-

stitutional errors, finding that some could be harmless but requiring the beneficiary of an error to prove the error’s harmlessness beyond a reasonable doubt. The decision spawned new questions as well. The intent of Chapman’s footnote reference to cases requiring automatic reversal is unclear. The Court has not yet expressed a rationale for requiring automatic reversal for some constitutional errors but not others, leaving considerable room for speculation. Finally, the Court’s approach to harmless-error analysis has been inconsistent in decisions since Chapman. It was against this back-

drop that Justices White and Rehnquist squared off in Fulminante.

III. THE FULMINANTE DEBATE: WHITE V. REHNQUIST

Arizona v. Fulminante reached the United States Supreme Court on petition for certiorari. Fulminante had been convicted of murder and sentenced to death partly because of his confession to fellow inmate and FBI informant, Sarivola. The Arizona Supreme Court held that this confession was involuntary, and its admission required automatic reversal and a new trial without the confession. Shifting majorities of the United States Supreme Court addressed three questions in the following order: (1) whether Fulminante’s confession to Sarivola was coerced; (2) if so, whether the admission of a coerced confession can be harmless error; and (3) whether the admission of Fulminante’s confession constituted harmless error. To frame the debate, the issues are presented in that order, beginning with the majority opinion on each question.

A. Voluntariness of the Confession

As required by Miller v. Fenton, the Justices undertook an independent assessment of the voluntariness of Fulminante’s con-
fession, applying a "totality of the circumstances" approach derived from *Culombe v. Connecticut.* The Court split 5-4 on this issue, with each side relying on opposite lower court opinions. Justice White, joined by Justices Marshall, Blackmun, Stevens, and Scalia in the majority opinion, adopted much of the Arizona Supreme Court's findings. He quoted that court's conclusions that Fulminante was in danger of physical harm as an alleged child murderer in prison, was receiving "rough treatment," and was compelled to confess because of Sarivola's offer of protection. White found that these factors combined to present a credible threat that physical violence would occur unless Fulminante confessed. The opinion emphasized the mental elements of coercion, likening Fulminante's situation to that of the accused in *Payne v. Arkansas,* in which, among other abuses, the interrogating police officer promised protection from an angry mob if the accused would confess. Noting that Sarivola, as an FBI informant, was a government agent, the opinion concluded, "we agree... that Fulminante's will was overborne in such a way as to render his confession the product of coercion."

Chief Justice Rehnquist, joined by Justices O'Connor, Kennedy, and Souter in dissent, agreed with the trial court's conclusion that the confession was voluntary. He quoted from facts stipulated to the trial court on Fulminante's motion to suppress the confession: "At no time did the defendant indicate he was in fear of other inmates nor did he ever seek Mr. Sarivola's 'protection.'"

While acknowledging that the Arizona Supreme Court based its conclusion on additional evidence available only from the trial record, the dissent found of no particular significance claims of rough treatment and offers of protection. The opinion also stressed

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77 367 U.S. 568 (1961). For a discussion of the *Culombe* decision, see *supra* notes 45-52 and accompanying text.

78 *Fulminante,* 111 S. Ct. at 1252-53 (White, J., delivering the opinion of the court).

79 *Id.* at 1253 (citing 356 U.S. 560, 563-64 (1958)). Short of physical torture, *Payne* involved many of the worst excesses of police interrogation methods. The accused, who had only a fifth-grade education, was arrested without a warrant and never taken before a magistrate, was held for two days without legal counsel, was denied access to friends and family, and was deprived of food and shoes and socks. Just before the defendant confessed, the interrogating officer told him there were thirty or forty people outside who wanted to "get to him," and that if he told the truth the officer would prevent them from doing so. *Payne,* 356 U.S. at 563-64.

80 111 S. Ct. at 1253.

81 *Id.* at 1262 (Rehnquist, C.J., dissenting).
that Fulminante was no stranger to prison, did not know Sarivola was an informant, and had had only brief and non-threatening conversations with Sarivola. The dissent concluded that "the Court today embraces a more expansive definition of [the term 'involuntary'] than is warranted by any of our decided cases."102

B. Harmless Error and Coerced Confessions

On the issue of the applicability of harmless-error analysis to the admission of coerced confessions, the Court again split 5-4. Rehnquist, joined by O'Connor, Scalia, Kennedy and Souter, began by citing Chapman103 and asserting that, since that decision, "the Court . . . has recognized that most constitutional errors can be harmless."104 He characterized such cases as involving "'trial error,' . . . which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented . . ."105 Rehnquist contrasted trial errors with "structural defects," which affect "'[t]he entire conduct of the trial from beginning to end . . ."106 Labeling the admission of an involuntary confession "a classic 'trial error,'" he distinguished coerced confessions (represented by Payne) from the other two constitutional errors in the Chapman footnote.107 First, he argued that the Chapman language was merely a historical reference to the holdings of those three cases that required automatic reversal. Rehnquist asserted that the reasoning used by the Payne Court in requiring automatic reversal should not apply after Chapman. When Payne rejected the view that the conviction could stand in spite of the coerced confession, Rehnquist argued, it rejected not the Chapman harmless-error analysis, but a more lenient rule "which would allow affirmance of a conviction if the evidence other than the involuntary confession was sufficient to

102 Id. at 1263.
103 Id. (Rehnquist, C.J., delivering the opinion of the court) (citing Chapman v. California, 386 U.S. 18 (1967)).
105 Id. at 1264.
106 Id. at 1264-65.
107 Id. at 1264.
sustain the verdict." Thus, Payne is not controlling as stare decisis. Finally, Rehnquist suggested that there is no sensible reason for treating confessions obtained in violation of the Sixth Amendment differently from confessions obtained in violation of the Fourteenth Amendment. In Rehnquist's view, neither evidentiary concerns, nor deterrence of improper police conduct, nor something more "fundamental" about coerced confessions can justify such disparate treatment. White's dissent, joined by Marshall, Blackmun, and Stevens, accused the majority of overruling a "vast body of precedent without a word and in so doing dislodging] one of the fundamental tenets of our criminal justice system." White cited many pre-Chapman and a few post-Chapman decisions for the proposition that admitting a coerced confession is a violation of due process of law that requires reversal regardless of other evidence in support of the verdict. Referring to the Chapman footnote, White refused to distinguish coerced confessions from the other two constitutional errors. He quoted different language in Payne, where that Court observed that, "no one can say what credit and weight the jury gave to the confession." The dissent also attacked Rehnquist's "trial error/structural defect distinction," and cited two cases involving errors at the same point in trial proceedings, one requiring automatic reversal and one being subject to harmless-error analysis.

108 Id. at 1264. Rehnquist quoted the following passage from Payne:
"Respondent suggests that, apart from the confession, there was adequate evidence before the jury to sustain the verdict. But where, as here, an involuntary confession constitutes a part of the evidence before the jury and a general verdict is returned, no one can say what credit and weight the jury gave to the confession. And in these circumstances this Court has uniformly held that even though there may have been sufficient evidence, apart from the coerced confession, to support a judgment of conviction, the admission in evidence, over objection, of the coerced confession vitiates the judgment because it violates the Due Process Clause of the Fourteenth Amendment."

109 Id. (quoting Payne, 356 U.S. at 567-68).

110 Id.

111 Id. at 1254 (White, J., dissenting).

112 Id. at 1253-54 (citing Rose v. Clark, 478 U.S. 570 (1986); Jackson v. Denno, 378 U.S. 368 (1964); Rogers v. Richmond, 365 U.S. 534 (1961); Blackburn v. Alabama, 361 U.S. 199, (1960)).

113 Id. (citing 356 U.S. at 568).

114 Id. at 1254-55 (citing Jackson v. Virginia, 443 U.S. 307 (1979) (failure to instruct a jury on the reasonable doubt standard resulted in reversal without an analysis of the harm) and Kentucky v. Whorton, 441 U.S. 786 (1979) (analyzing the failure to instruct the jury on the presumption of innocence under harmless-error)).
White focused instead on the effect the error has on the trial and the nature of the right protected. He argued that the evidentiary impact of a coerced confession is too great to fall under harmless-error analysis. Although he found a distinction between confessions obtained in violation of the Fourteenth and Sixth Amendments, his primary concern was that "ours is an accusatorial and not an inquisitorial system," and that "the police must obey the law while enforcing the law." He concluded that using a coerced confession against a defendant at trial is fundamentally unfair. Finally, White reiterated his view that stare decisis requires automatic reversal.

C. Application of the Harmless-Error Standard

Having concluded that Fulminante's confession was involuntary but subject to harmless-error analysis, the Court split for a third time on the issue of whether the error was harmless under the facts of Fulminante. Applying the Chapman standard, White, joined by Marshall, Blackmun, Stevens, and Kennedy, placed some emphasis on both the danger of the confession's unreliability, and the confession's impact on the jury. He rejected the Arizona Supreme Court's view that Fulminante's confession to Sarivola was cumulative to the other confession, and that the overwhelming evidence remaining would have been enough to convict. Instead, he focused on the importance of the erroneously admitted confession itself. White expressed concern that the prosecution had depended on both confessions, that without the first confession the second would have seemed unbelievable, and that admission of the first confession led to the admission of other prejudicial evidence. He also noted that the first confession may have influenced Fulminante's sentencing.

Rehnquist dissented, joined by O'Connor and Scalia. The brief dissent endorsed the Arizona Supreme Court's view, viewing the case as a "classic case of harmless error" because of the presence of the second confession.

114 Id. at 1256 (quoting Rogers v. Richmond, 365 U.S. 534, 540-41 (1961)).
115 Id. (quoting Spano v. New York, 360 U.S. 315, 320-21 (1959)).
116 Id. at 1257.
117 Id. at 1258-61 (White, J., delivering the opinion of the court).
118 Id. at 1266 (Rehnquist, C.J., dissenting).
IV. SIGNIFICANCE OF THE DECISION

The two opinions on the voluntariness question highlight the amorphous quality of the "totality of the circumstances" test. White and Rehnquist simply drew different conclusions from the same record. With no allegation of physical violence on behalf of the police, the question amounted to analyzing Fulminante's subjective reaction to the events. Under the circumstances, the majority's holding gives a broad meaning to "involuntary." Sarivola was not a police officer, but an inmate and informant. Eliciting the information from Fulminante was somewhat fortuitous, and it is not at all clear that Fulminante ever felt threatened. While coercive factors were present, the situation was readily distinguishable from Payne. White's invocation of that case almost trivializes the Payne defendants' predicament. Fulminante suggests that at least four sitting justices (the majority minus Marshall) are willing to find coercion in much less egregious circumstances than prior cases had indicated.

The debate between Rehnquist and White over whether the admission of a coerced confession could ever be harmless error reflects the ambiguity created by Chapman. First, they disagree over the significance of the footnote reference to a coerced confession case, White reading this most broadly as precedent to be followed and Rehnquist dismissing it as a historical reference. Neither view is unreasonable, and commentators have supported both. Perhaps unwilling to weaken his position by adopting Rehnquist's approach to the analysis, White does not refer to Chapman's later citation of Payne. The second reference is a stronger indication that the Chapman Court meant coerced confessions would continue to require automatic reversal, but emphasis on that reference would not support the idea that Justice Black wanted to retain automatic reversal for the other types of cases discussed in the footnote. Rehnquist's reading of Payne, regarding that Court's rejection of harmless-error analysis, is labored. Rehnquist is much more willing to dissect both Chapman and Payne to

121 Fulminante, 111 S. Ct. at 1254-64 (citing Chapman, 386 U.S. at 23 n.8).
122 See supra note 110 and accompanying text.
123 111 S. Ct. at 1264.
124 See supra notes 71-92 and accompanying text.
125 Chapman, 386 U.S. at 26.
make his point. The ambiguity of those decisions, however, is weak
ground on which to declare a constitutional principle and depart
from precedent.

Moving beyond the language of *Chapman*, the Rehnquist/
White debate over which constitutional errors require reversal and
why grows out of their different approaches to harmless-error
analysis. Rehnquist’s trial error/structural defects distinction is
similar to one commentator’s analysis. Implicit in that author’s
reasoning, though, is the notion that coerced confessions do require
automatic reversal and that the overwhelming evidence rationale
fails to justify this result. The fact that Rehnquist draws a similar
distinction suggests that he supports the overwhelming evidence
approach to harmless error.

Indeed, Rehnquist simply adopts the Arizona Supreme Court’s
original view, which used the overwhelming evidence test and a
broad version of the cumulative evidence approach. His terse opin-
ton on this issue does not adequately respond to White’s marshal-
lng of precedents and treats rather lightly a violation of the
Fourteenth Amendment. His dissatisfaction with the Court’s judge-
ment on the voluntariness question may have led him to treat this
issue too casually. In short, Rehnquist “won” on the theoretical
harmless constitutional error point but “lost” on the specific results
of this case.

White’s response to Rehnquist’s trial error/structural defects
distinction is convincing and illustrates that no clear lines can be
drawn from prior cases on the harmless error/automatic reversal
question. He brings out various recognized rationales for requiring
reversal in coerced confession cases. White sees coerced confes-
sions as inherently prejudicial, inherently unreliable, and represen-
tative of police misconduct. White’s description of the use of
such confessions as “fundamentally unfair” reflects his concern
with prosecutorial misconduct and public confidence in the criminal
justice system but also restates the Fourteenth Amendment basis

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126 See Field, supra note 90. Field characterizes the admission of a coerced confession
as an error that “by [its] nature [is] especially damaging to a defendant,” as opposed to
the other two types of error, which “infect the entire trial process.” Id. at 29. She argues
that the *Chapman* footnote cases clearly put the focus on the constitutional error, making
the overwhelming evidence test inappropriate. Field points out that it would be inconsistent
to require automatic reversal in coerced confession cases under the overwhelming evidence
test, since if conviction were inevitable because of the remaining evidence, even a coerced
confession could be harmless. Id. at 30.

127 See supra notes 91-92 and accompanying text.

128 See supra notes 114-15 and accompanying text.
for not admitting coerced confessions. Invoking all these rationales, White's analysis does not clarify the reason for requiring automatic reversal due to coerced confessions but not as a result of other constitutional errors. It does suggest, however, that he has a different approach to harmless-error analysis.

White's focus on the effect of the error at trial and the nature of the right protected clearly falls within the first category of errors identified by commentators. Indeed, his harmless-error analysis opinion explicitly rejects the overwhelming evidence and cumulative routes. White's willingness to speculate on the possible effects, both subtle and dramatic, of admitting Fulminante's first confession illustrates how difficult the harmless-error standard of Chapman is to meet. Despite the other evidence and the close vote on voluntariness, White sent the case back to be retried without the first confession.

The opinions on either side of the most controversial aspect of Fulminante—that coerced confessions may in some cases be harmless—reflect academic speculation after Chapman. The White/Rehnquist debate was academic, as well. The application of harmless-error analysis to the coerced confession yielded the same result as automatic reversal. In the end, the Arizona Supreme Court's decision was affirmed. Despite the hue and cry over Rehnquist's one majority holding, it is difficult to see the "harm" coming from Fulminante. The fact that four members of the Court were willing to find a confession coerced on the Fulminante facts, and a slightly different four could find its admission harmful error, suggests that involuntary confessions will almost always be found harmful.

A fairly elaborate set of assumptions is required to conclude that Fulminante could encourage police misconduct. First, Miranda greatly reduced the significance of Fourteenth Amendment challenges to confessions. Furthermore, as one commentator observed about Chapman, "[o]nly on the presumption that some police will violate constitutional standards, in the hope that the trial judge will erroneously admit the evidence obtained and that the appellate court will erroneously find the error harmless, will a harmless error rule encourage" such misconduct. Automatic reversal seems unnecessary, as the protection of a harmless-error rule is enough of a safeguard. However, one can hardly expect any

129 See supra note 93 and accompanying text.
131 Mause, supra note 55, at 552.
gain in judicial efficiency to result from the adoption of the harmless-error approach. As in *Fulminante*, both the questions of voluntariness and harm will be litigated at all levels. Again as in *Fulminante*, the final result may be the same: retrial without the confession.

Discussing the implications of *Fulminante* by examining the votes on the various issues illustrates a more disturbing aspect of the decision. Structured as it is, and framing the questions as it did, it is simply hard to tell what the "message" of the decision is. No holding commanded more than five votes. Rehnquist and O'Connor on the one hand and White, Marshall, Blackmun and Stevens on the other voted as blocs. Scalia diverged, although his opinions would have reached the same result as those of Rehnquist and O'Connor. Souter's vote is missing on the third question.

But perhaps the most unusual stance is that of Kennedy. He voted that the confession was not coerced, that a coerced confession could be harmless error, but found its admission harmful. Kennedy concurred in the judgment to affirm, writing: "In the interests of providing a clear mandate to the Arizona Supreme Court in this capital case, I deem it proper to accept in the case now before us the holding of five Justices that the confession was coerced and inadmissible."

A recent article discusses the issues raised by Kennedy's votes. Kennedy voted against his own position. It may be a "clear mandate" to Arizona, but it would have been equally clear if Kennedy had voted to uphold the conviction. The problem with Kennedy's stance is that it undermines the legitimacy of the Court. The actual result of the case did not have the support of the majority, and leaves a remarkably opaque message for lower courts and Court observers.

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132 Indeed, one commentator, writing shortly after the opinion, asserted that *Fulminante* did not hold that harmless-error analysis applies to coerced confessions. See Lewis J. Liman, *Fulminante: Vote Cycling and the Court*, N.Y. L. J., Apr. 3, 1991, Essay section, at 2 (reasoning that "harmless-error analysis was essential to the vote of only one of the justices in the majority and therefore cannot be considered a holding").

133 111 S. Ct. at 1267.

134 John M. Rogers, "I Vote This Way Because I'm Wrong": The Supreme Court Justice as Epimenides, 79 Ky. L.J. 439 (1990-91). Rogers explains that to overturn the conviction, a majority had to decide both (X) that the confession was coerced, and (Y) that its admission was not harmless error. Voting logically, Kennedy would have voted to uphold the conviction, since he agreed with Y but not X. Instead, he voted against his own view that the confession was not coerced. *Id.* at 475 n.124. A similar stance was taken by Justice White in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989). Rogers, *supra*, at 439 n.1.
CONCLUSION

In the end, the voting pattern in *Fulminante* may be its most disturbing aspect. Once the doctrines they are fighting about are understood, the pointed debate between White and Rehnquist becomes little more than an academic exercise. The inherently fact-specific and subjective nature of the voluntariness inquiry, together with the varying and largely unexpressed rationales behind the Court’s harmless-error analysis, belie any clear results in analogous cases. Given the votes on what constitutes a coerced confession and how its harm is assessed, the decision is unlikely to have any serious impact on the rights of criminal defendants. Those looking for an example of Rehnquist Court extremism or a dramatic retreat from the Warren Court days will probably be disappointed in *Fulminante*. Unfortunately, anyone looking for a clear statement of the law will be equally disappointed. In a country where the Supreme Court declares the law of the land, that is indeed disturbing.

*Kenneth R. Kenkel*