Arizona v. Fulminante: The Application of Harmless Error Analysis to Admission of a Coerced Confession in Violation of the Due Clause of the Fourteenth Amendment

Robert Paul
West Virginia University College of Law

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ARIZONA v. FULMINANTE: THE APPLICATION OF HARMLESS ERROR ANALYSIS TO ADMISSION OF A COERCED CONFESSION IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

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I. INTRODUCTION

Section 1 of the Fourteenth Amendment to the United States Constitution provides that “No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . .”1 Historically, in the field of criminal procedure, courts have held the due process clause to prohibit the admission into evidence of coerced

or involuntary\textsuperscript{2} confessions.\textsuperscript{3} In every case in which the United States Supreme Court found a confession to be involuntary, the Court reversed the conviction and ordered a new trial.\textsuperscript{4}

Recently, in \textit{Arizona v. Fulminante},\textsuperscript{5} the United States Supreme Court considered whether harmless error analysis applies to the admission into evidence of a coerced confession in violation of the due process clause. To reach this question, the Supreme Court divided the case into three issues: (1) whether the confession had been coerced; (2) if coerced, whether harmless error analysis could be applied; and (3) if harmless error did apply, whether admission of the coerced confession was harmless given the facts of the case.\textsuperscript{6}

Ultimately, a deeply divided Court held that harmless error analysis did apply to the admission of a coerced confession into evidence.\textsuperscript{7} Then, a different majority of the Court held that the error was not harmless in the case before it.\textsuperscript{8} The \textit{Fulminante} decision has inspired much comment but little agreement regarding its implications for constitutional law and the criminal justice system.\textsuperscript{9}

This comment discusses \textit{Arizona v. Fulminante} to permit a more accurate understanding of the decision and its potential influence in the areas of constitutional rights and criminal procedure. The holding is complex, consisting essentially of three parts, each with a corresponding dissent and further complicated by the logical relationship between those parts. The decision within each part is close,

\textsuperscript{2} A coerced or involuntary confession is defined in the following manner: "Confession is 'involuntary' if it is not the product of an essentially free and unrestrained choice of its maker or where maker's will is overborne at the time of the confession." \textit{Black's Law Dictionary} 827 (6th ed. 1990). As used throughout this comment, and by the United States Supreme Court, the terms "coerced" and "involuntary" are synonymous.

\textsuperscript{3} Wayne R. LaFave & Jerold H. Israel, \textit{Criminal Procedure} § 26.6, at 1001-05 (abr. student ed. 1985).

\textsuperscript{4} Id.

\textsuperscript{5} 111 S. Ct. 1246 (1991)

\textsuperscript{6} Id. at 1248-49.

\textsuperscript{7} Id.

\textsuperscript{8} Id.

and the justices comprising the majority vary from one part to the next.

First, the prior applicable law will be described. Prior law will be divided into two separate categories: the establishment of the voluntariness doctrine as the appropriate measure of a coerced confession, and the development of the doctrine of harmless constitutional error. Second, the facts of Fulminante will be recounted. Third, the holding of Fulminante will be analyzed in the order of its three parts. The first part will discuss the question of coercion. The second part will consider the application of harmless error analysis to admission of a coerced confession into evidence. The third and final part will examine the application of harmless error analysis to the facts of the case. Finally, this comment will discuss the implications of the Fulminante decision.

II. PRIOR LAW

Two different lines of prior law are relevant in considering Fulminante, that involving the coerced or involuntary confession, and that involving harmless constitutional error. Fulminante might reasonably be considered a clash of two legal doctrines with very different aims. Their contrary intent can be characterized in a single question. How much efficiency can be added to the administration of justice before constitutional rights are effectively compromised?

A. Coerced Confession

The notion of "voluntariness", whether the accused confesses voluntarily or someone forces him to confess, originates in eighteenth century England.\textsuperscript{10} Prior to that time, courts admitted any type of confession, including those induced by force.\textsuperscript{11} The requirement that a confession be voluntary to be admissible as evidence originates with a concern for reliability.\textsuperscript{12} Courts proscribed only those activities that they believed likely to induce a false confession.\textsuperscript{13}

\textsuperscript{10} LaFave & Israel, supra note 3, § 6.2, at 264.
\textsuperscript{11} Id.
\textsuperscript{12} Id.
\textsuperscript{13} Id.
This common law rule influenced early United States Supreme Court decisions. Then, in 1897, *Bram v. United States* added something new to the old formula. In *Bram*, the Court suggested that "any direct or implied promises, however slight" or even the "exertion of any improper influence" by the authorities would be enough to invalidate a confession. *Bram* and other early Supreme Court opinions did not consider due process issues, and the Court neither developed nor applied the idea that voluntariness meant something more than reliability of testimony.

Thirty-nine years later, in *Brown v. Mississippi*, the Court held that the admission of a coerced confession violates the due process clause of the Fourteenth Amendment. The Court found the situation in *Brown* to be so extreme, and the coercion so blatant and brutal that the holding might still have been based on the old reliability standard, despite the Court's reference to the Fourteenth Amendment.

In subsequent cases, the Court clarified that coercion could be psychological as well as physical and that reliability is not the only reason for due process. In 1957, *Fikes v. Alabama* established

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15. Id.
16. Id. at 542-43.
17. Id. at 543.
20. In the spring of 1934, over a span of four days, three men were arrested, accused of murder, and tortured until they confessed to having committed the crime. Although both trial and state appellate courts were informed of the whippings and hangings that were employed to obtain the confessions, and despite there being no evidence save the confessions, the men were convicted of murder and their convictions affirmed. As a dissenting member of the state appellate court wrote "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 mediaeval account than a record made within the confines of a modern civilization which aspires to an enlightened constitutional government." *Brown v. State*, 161 So. 465, 470 (Miss. 1935) (Griffith, J., dissenting). Referring to the appellate court's majority holding he added: "To my mind it would be as becoming a court to say that a lynching party has become legitimate and legal because the victim, while being hung by the mob, did not object in the proper form of words at precisely the proper stage of the proceedings." Id. at 472.
the "totality of the circumstances" test as the correct measure of voluntariness. In *Fikes*, the Court noted that the case lacked certain seemingly important elements, such as physical brutality or prolonged questioning in relays, from previous coerced confession cases. Nevertheless, the Court recounted a number of troubling elements, such as the lengthy questioning of a prisoner of low intelligence, held far from home and incommunicado for several days, despite the efforts of his father and a lawyer. Apparently unwilling to single out a particular element as dispositive, the Court concluded that the "totality of the circumstances" leading up to the confession had gone "beyond the allowable limits" and constituted a denial of due process. Taking into account the personal characteristics of the accused, the tactics of the police and the effect of the entire situation on the will of the accused, this standard remains the test of voluntariness to the present day.

In 1963, in *Blackburn v. Alabama*, the Court reviewed several past cases, and noted that the prohibition of the use of coerced confessions relied upon a "complex of values" and that "the role played by each in any situation varies according to the particular circumstances of the case." In this complex of values, the Court included the reliability of the confession and protection of the "individual's freedom of will", but the *Blackburn* opinion stressed unacceptable police practices.

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24. *Id.* at 197.
25. *Id.*
26. *Id.*
27. *See*, e.g., *Fulminante*, 111 S. Ct. at 1252. The voluntariness test has been subject to considerable criticism. *See* LAFAYE & ISRAEL, supra note 3, § 6.2, at 266-69. The authors discuss the need for a clear rule to guide both police and lower courts, and note that the voluntariness test invites manipulation by the court. *See also* Yale Kamisar, *A Dissent from the Miranda Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test*, 65 Mich. L. Rev. 59 (1966), for a strong argument that the voluntariness test provides virtually no protection for the accused.
29. Payne v. Arkansas, 356 U.S. 560 (1958) (other evidence establishing guilt or corroborating the confession is immaterial); *Fikes* v. Alabama, 352 U.S. 191 (1957) (the totality of the circumstances is reviewed); Chambers v. Florida, 309 U.S. 227 (1940) (coercion can be mental as well as physical).
31. *Id.*
32. *Id.* *See also* LAFAYE & ISRAEL, supra note 3, § 6.2, at 265-66 (discussing the values underlying the voluntariness requirement). *But see* Colorado v. Connelly, 479 U.S. 157 (1986) (individual freedom of will may not matter in the absence of coercive police methods).
In the cases that deal with coerced confession, the application of the voluntariness test, considering the totality of the circumstances, occupies the Court. Once the Court completes the voluntariness test and a confession is held coerced, the decision becomes simple. From Brown on, whenever the Court determined that a trial court had admitted a coerced confession into evidence, the result was an automatic reversal.33 This result was held to be necessary regardless of the amount of evidence presented in addition to the confession34 and the Court confirmed automatic reversal as recently as 1978.35

B. Harmless Constitutional Error

For the better part of the twentieth century, there appeared to be no such thing as harmless constitutional error. A constitutional error resulted in an automatic reversal.36 In the 1960's, the due process revolution occurred. With the increasing federal control of what had been purely state procedural matters on the basis of preserving the constitutional rights of the accused, the Court also recognized that harmless constitutional error could exist.37

Historically, the harmless error statutes adopted by the states called for the review of the trial record, to see if the proceeding as a whole had resulted in a miscarriage of justice.38 In the application of harmless error analysis to the presentation of evidence, the factors of greatest importance were the weight of the evidence and the likely effect of the error on the jury's decision.39 The essential question for a harmless error test is whether or not the error had a significant impact on the judgment of the jury.40 The standards used by state courts in applying a harmless error test vary considerably.41

33. Fulminante, 111 S. Ct. at 1253.
36. LAFAVÉ & ISRAEL, supra note 3, § 26.6, at 1000.
37. Id.
38. Id. at 996.
39. Id.
40. Id. at 997-1000.
41. Id.
include various levels of probability that the error did not affect the verdict and comparisons of the error's impact with the weight of the evidence presented. After every state had established some kind of harmless error rules, the Supreme Court, after years of doubt, held that harmless constitutional error could also exist, and attempted, in *Chapman v. California* to state guidelines for its application.

The *Chapman* holding recognizes that some constitutional error is likely to be as harmless as any other error and that nothing inherent in constitutional error calls for automatic reversal. Consequently, the harmless constitutional error test requires "the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman* also states that prior cases have established a rule of automatic reversal for certain types of constitutional error that can never be held harmless. The Court clearly believed that the rule of automatic reversal still applied to many types of constitutional error and that the three cases listed in *Chapman* were simply representative of the many types of error that still demanded automatic reversal.

The Court held that a coerced confession admitted in violation of the due process right still called for reversal as recently as 1985.

42. *Id.*
43. 386 U.S. 18 (1967).

44. *LaFave & Israel, supra* note 3, § 26.6 at 1001-05.

46. *Id.* at 24.
47. *Id.* at 23. The Court provides three illustrative cases in a footnote. The first of the cases listed is *Payne v. Arkansas*, a coerced confession case. The *Chapman* Court does not distinguish the three cases in any way, and the reasonable conclusion, that the admission of a coerced confession can never be harmless error but demands automatic reversal is explicitly stated in a subsequent opinion that was joined by then Justices Rehnquist and O'Connor. *See Rose v. Clark*, 478 U.S. 570, 577-78 (1985).

49. *Id.* See also *LaFave & Israel, supra* note 3, § 26.6, at 1001-05 (discussing the meaning of *Chapman* relative to the rule of automatic reversal).

50. *Rose*, 478 U.S. at 577-78. In explaining why the extension of harmless error to an erroneous malice instruction is appropriate, the Court distinguishes the admission of a coerced confession, and states essentially the same argument as Justice White in *Fulminante*. 
In 1972, however, in *Milton v. Wainwright*, the Court held that admission of a confession in violation of the Sixth Amendment right to counsel was harmless error. Commentators were left to conclude that although the impact on the jury would not be inherently different from admission of a coerced confession, the lack of any element of coercion made the case distinguishable.

In the years following *Chapman*, the harmless constitutional error test was extended to include many types of error, including among others: faulty jury instructions, erroneous exclusion of evidence, restrictions on cross-examination and admission of evidence obtained in violation of the Fifth Amendment Self-Incrimination Clause and the Sixth Amendment Counsel and Confrontation Clauses. Their review of *State v. Fulminante* gave the Court the opportunity to confirm a line of cases reaching back to *Brown* in 1936, or to overturn those cases and substantially alter the common understanding of *Chapman*. Chief Justice Rehnquist claims to have done neither.

C. The Meaning of Payne and Chapman

Although Chief Justice Rehnquist and Justice White cite liberally in *Fulminante* to several cases involving coerced confession and harmless constitutional error, their strongest disagreement revolves around two cases: *Payne v. Arkansas*, a coerced confession case; and *Chapman v. California*, the seminal harmless constitutional error case. Portions of each of these cases must be examined in more detail to consider the merits of the opinions in *Fulminante*.

In addition to noting that all previous Supreme Court coerced confession cases resulted in reversal upon a finding of coercion, Justice White stresses 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, a coerced confession

52. U.S. Const. amend. VI.
53. LAFAYE & ISRAEL, supra note 3, § 26.6, at 1005.
54. Fulminante, 111 S. Ct. at 1263.
55. Id. at 1263-66.
56. Id. at 1233-54, 1263.
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.\(^5\)

Justice White argues that *Payne* clearly states the rule: when an involuntary confession is admitted into evidence, a judgment of conviction must be overturned due to the violation of the Due Process Clause.

The Chief Justice's response in *Fulminante* is, in essence, to argue that since harmless error is not mentioned in *Payne*, it was not ruled out by the *Payne* Court. This response is disingenuous at best. *Payne* dates from 1957 and the Court did not recognize the existence of harmless constitutional error until *Chapman* in 1966. Had counsel suggested harmless error in 1957, the Court would have dismissed it. Cheif Justice Rehnquist ignores what *Payne* clearly states, and what Justice White virtually shouts in *Fulminante*: upon a finding that a coerced confession has been admitted into evidence, the Supreme Court has always overturned the conviction, on the basis of violation of the Due Process Clause and because the impact of the violation is impossible to judge.

The next bone of contention is a passage from *Chapman*: "Although our 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, . . . [not] all trial errors which violate the Constitution automatically call for reversal."\(^5\) Footnote eight lists three cases: *Payne v. Arkansas*, a coerced confession case; *Gideon v. Wainwright*, a right to counsel case; and *Tumey v. Ohio*, an impartial judge case.\(^9\)

Justice White sees this language as support for the proposition that, among the rights so basic to a fair trial that their violation can never be treated as harmless, are the right to counsel, the right

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58. *Chapman*, 386 U.S. at 23 (emphasis added) (footnote omitted).
59. *Id.*
to an impartial judge and the right to be free from coercion. Chief Justice Rehnquist dismisses the language as a mere "historical reference" to the holdings of those three cases, noting that Chapman does not actually hold that harmless error does not apply to a coerced confession. Justice White would undoubtedly agree that the language does refer to the holding of Payne, and that it shows that the Chapman Court clearly considered admission of a coerced confession, as in Payne, to be well beyond the scope of harmless error analysis. Whatever the Chief Justice actually believes, his argument may be characterized as follows: even if the Court issues the same ruling on the same issue several times in several different cases, no rule exists and stare decisis does not apply.

III. STATEMENT OF THE CASE

Two days after Oreste Fulminante reported to the Mesa, Arizona, police that his 11-year old stepdaughter was missing, her body was found in the desert outside the city. An unknown assailant had killed her by shooting her twice in the head with a large caliber firearm. Police suspected Fulminante but brought no charges against him. He subsequently moved to New Jersey, where authorities arrested and imprisoned him on a federal charge of firearms possession by a convicted felon.

While serving his term in a federal penitentiary in New York, Anthony Sarivola, an informant for the Federal Bureau of Investigation, befriended Fulminante. Sarivola posed as an organized crime figure while serving sixty days for a conviction on charges of extortion. He had worked for organized crime while serving as a uniformed police officer. Sarivola reported to the FBI that other

60. Fulminante, 111 S. Ct. at 1264.
61. Id. at 1250.
62. Id.
63. Id.
64. Id.
65. Id.
66. Id.
67. Id.
prison inmates thought Fulminante was a child-murderer, and they instructed him to find out more.\textsuperscript{68}

After several fruitless conversations, but aware of Fulminante’s poor treatment at the hands of his fellow prisoners, Sarivola approached Fulminante and offered to help him if he would talk about the murder.\textsuperscript{69} In response, Fulminante made a detailed confession, admitting that he had taken his stepdaughter out to the desert, where he choked her, assaulted her sexually and shot her to death.\textsuperscript{70}

Fulminante completed his term in prison. On the day of Fulminante’s release, Sarivola and his fiancee, Donna, picked Fulminante up.\textsuperscript{71} Over one year later, Sarivola reported to authorities that, while riding with them, Fulminante had confessed to the murder in detail a second time, in response to Donna Sarivola’s asking him why he did not return to Arizona.\textsuperscript{72}

The Arizona authorities indicted Fulminante for the first-degree murder of his stepdaughter.\textsuperscript{73} Before trial, Fulminante attempted to exclude the two confessions to Sarivola from use as evidence, arguing that the first was coerced and the second followed from it.\textsuperscript{74} The trial court found the confessions to be voluntary and permitted their use as evidence.\textsuperscript{75} The trial resulted in a conviction and a sentence of death for Fulminante.\textsuperscript{76}

He appealed his conviction on the grounds that Sarivola coerced the first confession and its admission into evidence violated his right to due process guaranteed by the Fifth and Fourteenth Amendments to the Constitution.\textsuperscript{77} The Supreme Court of Arizona acknowledged the element of coercion, but held that admission at trial constituted harmless error given the second detailed confession

\begin{itemize}
\item \textit{68. Id.}
\item \textit{69. Id.}
\item \textit{70. Id.}
\item \textit{71. Id. at} 1258-59.
\item \textit{72. Id. at} 1259.
\item \textit{73. Id. at} 1250.
\item \textit{74. Id. at} 1250-51.
\item \textit{75. Id. at} 1251.
\item \textit{76. Id.}
\item \textit{77. Id.}
\end{itemize}
and the other circumstantial evidence presented.\textsuperscript{78} Fulminante moved for reconsideration of the opinion on the basis of several issues. The court, however, found merit in only one.\textsuperscript{79} The court reversed Fulminante's conviction on the ground that admission of a coerced confession in violation of the due process clause requires automatic reversal.\textsuperscript{80} The State petitioned the United States Supreme Court for certiorari on the question of whether admission at trial of a coerced confession is subject to harmless error analysis, and the Court granted the petition.\textsuperscript{81}

To reach the question posed by the State, the Supreme Court divided the issue of the case into three separate questions: (1) whether the confession was coerced; (2) if coerced, whether harmless error analysis is applicable; and, (3) if applicable, whether the admission of the confession into evidence was harmless under the circumstances of the case.\textsuperscript{82} The resulting opinion is complex.\textsuperscript{83}

Ultimately, a majority of the Supreme Court determined that Sarivola coerced Fulminante's first confession.\textsuperscript{84} A different majority concluded that harmless error applies to coerced confessions.\textsuperscript{85} Upon application of the harmless error test, a third majority held that admission of the confession had not been harmless and that a new trial should be granted to Fulminante.\textsuperscript{86}

\begin{thebibliography}{86}
\item 78. \textit{Id.}
\item 79. State v. Fulminante, 778 P.2d 602, 626 (Ariz. 1988) (dismissing as meritless the contentions that the harmless error analysis was incorrect and that the second confession was the product of the first, among other claims).
\item 80. \textit{Id.}
\item 81. \textit{Fulminante}, 111 S. Ct. at 1251.
\item 82. \textit{Id.} at 1248-49.
\item 84. \textit{Id.} at 1261.
\item 85. \textit{Id.}
\item 86. \textit{Id.}
\end{thebibliography}
IV. ANALYSIS OF THE HOLDING

A. Coerced Confession or Voluntary?

1. The Majority Opinion

Justice White, writing for the majority, noted that the Court granted certiorari in this case to determine "whether the admission at trial of a coerced confession is subject to a harmless-error analysis" given the divergence of opinion among the circuits.87 Justice White dismissed the State’s contention that the Arizona court applied the wrong standard in assessing coercion. He stated that the court below had clearly applied the correct "totality of the circumstances" standard.88 Justice White then reviewed the reasoning of the Arizona Supreme Court in applying the correct standard.89 He noted that the record included considerable evidence of Fulminante’s heightened susceptibility to coercion: his lack of education, his small physical size and his documented adverse reaction to the conditions routinely found in prison.90 Justice White also noted Sarivola’s status as an apparent friend of Fulminante as a factor influencing the determination of voluntariness.91

Although the Court generally defers to the factual findings of the lower court, the issue of "voluntariness", Justice White stated, constitutes a legal question that the Court must determine independently.92 Justice White agreed with the finding of the Arizona court, noting that the facts of the case presented a close question.93 In affirming the lower court he relied on prior holdings indicating that mental coercion is impermissible and that actual physical violence need not be present or threatened.94 Finally, he compared Sarivola’s offer of help to Fulminante to the protection from a lynch mob.

87. Id. at 1251.
88. Id. at 1251-52.
89. Id. at 1252.
90. Id. at 1252 n.2.
91. Id.
92. Id. at 1252.
93. Id.
94. Id. at 1253.
that had been promised to the accused, and held to be coercion, in *Payne v. Arkansas*.95

2. The Rehnquist Dissent

Chief Justice Rehnquist began by stating the findings of his own three-part opinion: (1) Fulminante’s confession was voluntary, (2) harmless error analysis applies to coerced confessions, and (3) Fulminante’s first confession was harmless given the weight of the remaining evidence against him.96 He then proceeded to consideration of the "voluntariness" question as an independent federal determination,97 quoting *Culombe v. Connecticut*98 to the effect that the essential question is whether or not the confession is a product of free will.99 Chief Justice Rehnquist failed to add that the Court must apply the "totality of the circumstances" standard to resolve that question.100

Focusing instead on certain stipulations made by Fulminante at a suppression hearing held at the trial level,101 Chief Justice Rehnquist acknowledged but apparently discounted Sarivola’s statements that he believed Fulminante to be in mortal danger, that Fulminante had received "rough treatment" from other inmates and that Sarivola offered protection conditioned on Fulminante’s telling the truth about the murder.102 He stressed that Fulminante had never actually told anyone that he feared his fellow prisoners and that he had not asked Sarivola for the protection that Sarivola offered.103 Absent evidence of any fear or anxiety on the part of Fulminante prior to the confession, Chief Justice Rehnquist claimed the finding of coercion rested on an assumption contrary to Fulminante’s stipulated actions.104 Chief Justice Rehnquist emphasized Fulminante’s prior

96. *Fulminante*, 111 S. Ct. at 1261.
97. *Id.*
100. *Id.*
101. *Id.* at 1261-62.
102. *Id.* at 1261-63.
103. *Id.*
104. *Id.*
felony convictions and characterized him as “an experienced habitue of prisons.”105 He presumed Fulminante to be “able to fend for himself,”106 despite the clear evidence to the contrary cited by Justice White.107 Chief Justice Rehnquist likened Fulminante’s situation to cases involving informants,108 but failed to note that, in the cases listed, none of the informants had made an offer of protection to a suspect who was in danger.109

B. Violations of the Due Process Clause Subject to Harmless Error Analysis

1. The Majority Opinion

Chief Justice Rehnquist opened the only part of his opinion that spoke for the majority with a reference to Chapman v. California as the precedent-setting case establishing the existence of harmless constitutional error.110 Listing cases since Chapman that had applied the harmless constitutional error test to various types of error, he concluded that “trial error” constituted the common thread connecting the cases.111 He defined trial error as “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 in order to determine whether its admission was harmless beyond a reasonable doubt.”112

Chief Justice Rehnquist stressed that harmless error analysis guaranteed the “underlying fairness of the trial” while avoiding the distraction of “virtually inevitable” but “immaterial” error.113 He dropped the introductory explanation at that point and attacked the White dissent.114
Quoting *Chapman*, to the effect that "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error" Chief Justice Rehnquist argued that the quoted passage and the subsequent footnote, containing three illustrative cases, did not state a rule that involuntary confession requires automatic reversal. He argued that the three types of cases referred to in the *Chapman* footnote constitute only historical references to past holdings. Chief Justice Rehnquist quoted the paragraph from *Payne* that has been commonly understood to say that a coerced confession demands reversal since "no one can say what credit and weight the jury gave to the confession." He added that it was "apparent" that the *Payne* Court had not rejected the subsequent *Chapman* "harmless beyond a reasonable doubt" test, but had referred to a more lenient "enough other evidence to convict" standard. The state had offered this lenient standard and the dissent accepted it in *Payne*.

Chief Justice Rehnquist followed his explications of *Payne* and *Chapman* with further explanation of the nature of "trial error." He distinguished it from what he termed a "structural defect" that precluded application of the harmless error analysis. A structural defect, as defined by the Chief Justice, affects the "framework" of the trial, unlike a simple evidentiary "trial error" that occurs within the trial and can be compared with the rest of the evidence presented.

115. *Id.* But see Rose v. Clark, 478 U.S. 570, 577-78 n.6. Justices Rehnquist and O'Connor joined the opinion explaining the "rule" of automatic reversal for coerced confession cases and stating the traditional view of *Payne* and *Chapman*.

116. *Id.* at 1264. Chief Justice Rehnquist fails to note that this interpretation makes the complete sentence into nonsense, but it appears that he noticed the problem. He spends the next few paragraphs arguing, in effect, that *Payne* has been misunderstood for over 30 years, and that the other two cases in the footnote can be distinguished by applying the terms "trial error" and "structural defect." *Id.* at 1264-65.


118. *Id.* at 568.

119. *Fulminante*, 111 S. Ct. at 1264. Unfortunately, since the *Payne* paragraph clearly states that "no one can say what credit and weight the jury gave to the confession" it follows that no one can ever hold it to be harmless beyond a reasonable doubt. As to Chief Justice Rehnquist's contrast of the *Chapman* test and the "lenient" standard, the contrast is not that clear. See, e.g., *LaFave & Israel*, supra note 3, § 26.6, at 1005-08, and consider Part III of Chief Justice Rehnquist's opinion in light of the hypothetical future case at 1008.

120. *Fulminante*, 111 S. Ct. at 1264-65.

121. *Id.* at 1264-65.
within the trial. He then categorized admission of a coerced confession as a trial error, and compared it to other types of potentially harmless trial error as being indistinguishable in its impact on the jury.

Chief Justice Rehnquist listed cases in which the Court had applied the harmless error test and argued that the evidentiary impact of such errors was potentially the same as the impact of a coerced confession. He denied that a coerced confession could be distinguished, in any meaningful way, from other types of error already subject to harmless error analysis. Concluding his opinion, Chief Justice Rehnquist noted that on those occasions when a coerced confession had an especially dramatic evidentiary impact, it would be held not harmless by the reviewing court. He added that the Arizona Supreme Court’s original opinion held Fulminante’s first confession harmless.

2. The White Dissent

In dissent, Justice White refused to apply harmless error analysis to the admission of a coerced confession and accused the majority of overturning a long line of precedent reaching back to 1944. Justice White characterized the majority argument as maintaining the admission of a coerced confession into evidence as indistinguishable from other types of trial error and therefore subject to the identical harmless error test. Justice White insisted that the admission of a coerced confession is fundamentally different from other types of evidence. He claimed the Court had recognized this difference in Chapman and quoted the same passage used by Rehnquist in the majority opinion.

122. Id.
123. Id.
124. Id. at 1265-66.
125. Id.
126. Id. at 1266. The implied simplicity of this task is called into question by the disparate opinions rendered by the Justices in Arizona v. Fulminante and by the Arizona Supreme Court in State v. Fulminante, 778 P.2d 602 (Ariz. 1988).
127. Fulminante, 111 S. Ct. at 1266.
128. Id. at 1253-54.
129. Id. at 1254.
130. Id.
Justice White cited four cases following *Chapman* as evidence of its meaning and attacked the majority reasoning regarding both the holding in *Payne* and the contrast of "trial error" with "structural defect".131 *Payne*, claimed Justice White, stands for a requirement of automatic reversal "regardless of the amount of other evidence,"132 because the effect of the confession on the jury's verdict cannot be determined and harmless error cannot therefore be applied.133 Justice White countered the "trial error-structural defect" dichotomy with an example of an apparent trial error, given the Rehnquist definition, that could never be held harmless: the failure to instruct the jury regarding the reasonable doubt standard, exemplified by *Jackson v. Virginia*.134 He contrasted this with a jury instruction on the presumption of innocence, as in *Kentucky v. Whorton*,135 which could be harmless error.136 Justice White argued that the lack of a reasonable doubt instruction would be both a "trial error" and a "structural defect" if the jury convicted the defendant, and that the admission of a coerced confession into evidence presented the same problem.137

Justice White went on to state that a confession constitutes the most damaging evidence that can be brought against a defendant, making it distinctly different from all other types of evidence.138 He argued that the element of coercion is the essential difference between the coerced confession and all other types of error to which harmless error analysis had been applied.139 He then denied Rehnquist's claim that no meaningful distinction between confessions in

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131. *Id.* at 1254-55.
132. *Id.* at 1254. It can be argued that Justice White mistakes the meaning of the *Chapman* harmless error test. See *LaFave & Israel, supra* note 3, § 26.6, at 1005-08. It seems more reasonable, since *Payne* predates *Chapman*, to claim that *Payne* supports automatic reversal, than to claim, as Chief Justice Rehnquist does, that since *Payne* does not mention the nonexistent (in 1948) constitutional harmless error standard, it does not rule it out. In 1948, harmless error had never been held to apply to any constitutional error.
133. *Fulminante*, 111 S. Ct. at 1255.
134. 443 U.S. 307 (1979); *Fulminante*, 111 S. Ct. at 1255.
137. *Id.*
138. *Id.*
139. *Id.* at 1256.
violation of the Sixth and Fourteenth Amendments could be made.\textsuperscript{140}

Justice White gave the traditional explanation for the reversal of coerced confession cases. Noting other types of constitutional error held to result in automatic reversal, he likened them to the admission of a coerced confession in that all are violations of a basic constitutional right.\textsuperscript{141} He concluded by stating that \textit{stare decisis} demanded adherence to this long line of established precedent in the absence of any convincing reason for change.\textsuperscript{142}

\section*{C. Application of the Harmless Error Analysis}

1. The Majority Opinion

Justice White began by stating the rule that the record must be examined to determine if the state had met its burden of demonstrating that the error did not contribute to the conviction.\textsuperscript{143} Noting the unique importance of the confession as evidence, he recalled that the Arizona Supreme Court had originally found the error to be harmless and affirmed Fulminante's conviction because of the full, voluntary and duplicative second confession made to Donna Sarivola and the circumstantial physical evidence that corroborated that confession.\textsuperscript{144} Justice White stated that the Court had arrived at the opposite conclusion, that admission of the first confession affected the verdict, for three reasons: (1) the physical evidence was inadequate without the confessions\textsuperscript{145}; (2) the explanation of the circumstances surrounding the second confession was so unlikely that belief in the second confession might well have been based on belief in the first coerced confession;\textsuperscript{146} and (3) admission of the first confession led to the admission of other evidence, prejudicial to Fulminante, that would have been inadmissible absent the first confession.\textsuperscript{147} Justice White stressed that the state had not indicted

\begin{itemize}
\item 140. \textit{Id.}
\item 141. \textit{Id.} at 1256-57.
\item 142. \textit{Id.} at 1257.
\item 143. \textit{Id.}
\item 144. \textit{Id.} at 1258.
\item 145. \textit{Id.}
\item 146. \textit{Id.} at 1258-59.
\item 147. \textit{Id.} at 1259-60.
\end{itemize}
Fulminante until nearly two years after the murder, when the confessions became available as evidence and that this had been specifically recognized in the record.\textsuperscript{148} He noted that the two confessions were mutually reinforcing, less believable when considered independently, and the truthfulness of the Sarivolias so questionable that a single confession might prove unconvincing.\textsuperscript{149} In conclusion, Justice White noted that the sentencing judge had relied on information from both confessions and had specifically focused on the similarities between them, implying that the two confessions had a mutually reinforcing effect leading to a reasonable doubt that the result would have been the same had there been only one confession.\textsuperscript{150}

2. The Kennedy Concurrence

Despite his belief that Fulminante had voluntarily confessed to Sarivola in prison, Justice Kennedy stated that he believed it necessary to provide "a clear mandate to the Arizona Supreme Court in this capital case."\textsuperscript{151} He concurred in the judgment that the first confession had a significant influence on the verdict and therefore could not be considered harmless error.\textsuperscript{152}

3. The Rehnquist Dissent

Chief Justice Rehnquist managed only three sentences in dissent, stating simply that he believed \textit{Fulminante} to be a classic case of trial error with a second voluntary confession that so duplicated the first that the first had no distinguishable impact on the jury.\textsuperscript{153} The Chief Justice did not discuss any part of the majority view.\textsuperscript{154}

V. Conclusion

The response to the \textit{Fulminante} decision calls to mind the story of the blind men and the elephant. Each blind man touches a dif-

\begin{itemize}
\item \textsuperscript{148} \textit{Id.} at 1258.
\item \textsuperscript{149} \textit{Id.} at 1258-59.
\item \textsuperscript{150} \textit{Id.} at 1260-61.
\item \textsuperscript{151} \textit{Id.} at 1267.
\item \textsuperscript{152} \textit{Id.}
\item \textsuperscript{153} \textit{Id.} at 1266
\item \textsuperscript{154} \textit{Id.}
\end{itemize}
different part of the elephant, each comes to a very different conclusion about the nature of an elephant, but none are accurate. After *Fulminante*, some commentators claimed that the decision would encourage the police to use coercion in the hope of obtaining enough additional evidence that, even if the confession were deemed coerced, its admission into evidence would also be deemed harmless.\(^{155}\) Others argued that the police would never dare to use any tactic that could be considered coercion for fear of the court excluding a voluntary confession.\(^{156}\) Some expressed confidence in the consistency of harmless error analysis, noting that *Fulminante* would get a new trial. Undoubtedly they would have been even more confident had the Arizona Supreme Court not originally applied harmless error analysis only to confirm *Fulminante*’s death sentence.

In the courts, *Fulminante* has been cited as support for the general application of harmless error analysis to constitutional errors.\(^{157}\) But, in *U.S. v. Jenkins*,\(^{158}\) the court suggested a basis for distinguishing *Fulminante*, implying that coerced confessions involving police violence may not fall within the *Fulminante* harmless error holding. And in *Iowa v. Quintero*,\(^{159}\) the court determined that, if the United States Constitution is not equal to the task after *Fulminante*, the Due Process Clause of the Iowa Constitution demands automatic reversal of a conviction following upon the admission of a coerced confession into evidence. These cases indicate that the *Fulminante* decision has not fulfilled its purpose. *Fulminante* was reviewed in order to provide a clear answer to the question of whether harmless error could be applied to the admission into evidence of a coerced confession. The close and confusing multi-part decision that resulted, with its shifting majorities and strong conflicting arguments, reflects deep disagreement rather than certainty.

Prior to *Fulminante*, some argued convincingly that the voluntariness test has never been sufficient to protect the rights of the

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157. United States v. Wilson, 930 F.2d 616, 619 (8th Cir. 1991); Hunter v. Clark, 934 F.2d 856, 860 (7th Cir. 1991).
158. 938 F.2d 934, 942 (9th Cir. 1991).
accused. With its totality of the circumstances standard, which includes the personality of the accused, the test was easily manipulated. Much like Chief Justice Rehnquist in *Fulminante*, the lower courts were free to characterize the accused as a hardened criminal and therefore capable of resisting techniques that clearly constitute coercion for the average person. Very few of the questionable cases were ever likely to reach the Supreme Court. Even the convictions in *Brown v. Mississippi*, a case notorious for brutality, survived each appeal until they reached the United States Supreme Court. Difficulty in applying the voluntariness test in a clear and consistent manner led to more effective ways of protecting the rights of the accused, culminating in *Miranda*. From this point of view, little may have been lost. Proponents of judicial efficiency effectively agree when they claim that coerced confession is only rarely the basis of an appeal. Does this small victory for judicial efficiency mean that constitutional rights and the ideals of our nation will be further compromised? Only time and another elephant will tell.

_Robert Paul_