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Fifth Amendment--Harmless Error Analysis Applied to Coerced Confessions

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FIFTH AMENDMENT—HARMLESS ERROR ANALYSIS APPLIED TO COERCED CONFESSIONS

Arizona v. Fulminante, 111 S. Ct. 1246 (1991)

I. INTRODUCTION

In *Arizona v. Fulminante*,[1] the Supreme Court for the first time applied the harmless error analysis of *Chapman v. California*[2] to a case where a confession had allegedly been coerced, and therefore erroneously admitted into evidence at trial. The three issues before the court were: whether the confession was coerced and therefore inadmissible; whether harmless error analysis could be applied to the admission of the confession, if erroneous; and whether any error was harmless in the present case.

Five Justices, in an opinion by Justice White, held as to the first issue that the respondent had given his confession involuntarily, and that the trial court had improperly admitted evidence of the confession at trial. Only one of those Justices, Justice Scalia, agreed with Justice Rehnquist and the three remaining Justices on the second issue. Those five Justices held that the error in question should be subject to harmless error analysis. This position on the harmless error analysis was criticized sharply by Justice White. On the third issue, however, Justice White prevailed, leading four other Justices in the holding that even if analyzed in terms of harmlessness, the present error was not in fact harmless.

This Note will argue that the majority's decision with respect to the voluntariness of Fulminante's confession was impermissibly expansive of the Court's prior holdings of involuntariness, when viewed in light of all of the surrounding circumstances. However, the majority's apparent expansion of the *Chapman* harmless error holding to involuntary confessions may be justifiable even if one does not agree with Justice Rehnquist's argument in its entirety. Although the application of harmless error analysis to involuntary confessions seems to present some danger of completely eroding

[1] 111 S. Ct. 1246 (1991).
[2] 386 U.S. 18 (1967).

the category of constitutional errors which always warrant a new trial, prudent use of this analysis by the courts will likely result in no erosion of constitutional rights. Finally, this discussion will attempt to show that, assuming that the majority's holding with respect to the involuntariness of Fulminante's confession was correct, the Court correctly held that the error of admitting that confession was not harmless. These three positions are not inconsistent with one another, as Justice Kennedy's brief concurring opinion illustrates.

II. FACT SUMMARY

On September 14, 1982, Oreste Fulminante called the Mesa, Arizona Police Department to report that his eleven year-old stepdaughter, Jeneane, had disappeared.[3] Fulminante had been caring for Jeneane while her mother, Mary, was hospitalized for surgery.[4] Two days after Fulminante reported her disappearance, a passer-by discovered Jeneane's body in the desert outside Mesa.[5] She had been shot twice in the head with a large caliber weapon at close range, and had a cloth ligature tied around her neck.[6] Because the body was badly decomposed, it could not be determined whether Jeneane had been sexually assaulted.[7] Fulminante's statements to police concerning Jeneane contained a number of inconsistencies, and he became a suspect in her killing.[8] When the Arizona authorities did not file any charges against him, however, Fulminante left Arizona.[9]

During the investigation into Jeneane's death, the Arizona police discovered that Fulminante had previously been convicted of a felony in New Jersey.[10] In addition, the police learned that just one day prior to his call to the Mesa Police reporting Jeneane's disappearance, Fulminante had purchased an extra barrel for his .357 revolver.[11] After receiving this information from the Arizona police, federal authorities arrested Fulminante in New Jersey on the charge of possession of a firearm by a felon.[12] Fulminante was returned to

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3 *Fulminante*, 111 S. Ct. at 1250.

4 Petition for Writ of Certiorari at 4, Arizona v. Fulminante, 111 S. Ct. 1246 (1991) (No. 89-839).

5 *Id.*

6 *Id.*

7 *Fulminante*, 111 S. Ct. at 1250.

8 Arizona v. Fulminante, 161 Ariz. 237, 240-241 (1988). Fulminante told police that he had a good relationship with his stepdaughter and had instructed her in the use of firearms. Both of these claims were contradicted by Jeneane's mother.

9 *Fulminante*, 111 S. Ct. at 1250.

10 *Fulminante*, 161 Ariz. at 241.

11 *Id.*

12 *Id.*

Arizona and convicted in U.S. District Court on the firearm charges.[13] After serving a sentence in a federal prison in Missouri, Fulminante was released, only to be arrested and convicted of another firearm violation.[14] On this second conviction, the district court sentenced Fulminante to the Ray Brook Federal Correctional Institution in New York.[15]

While at Ray Brook, Fulminante became friends with Anthony Sarivola, a fellow inmate and former police officer.[16] Sarivola was at one time involved in organized crime, but had since become a paid informant for the Federal Bureau of Investigation (FBI).[17] Sarivola was serving a sixty-day sentence at Ray Brook for extortion, and during that time, posed as an organized crime figure.[18]

After becoming friends with Fulminante, Sarivola heard a rumor in the prison that Fulminante might have killed a child in Arizona.[19] When Sarivola questioned him about the rumor, Fulminante denied that it was true and during the course of several conversations gave Sarivola a variety of other explanations for Jeneane's death.[20] Sarivola reported these conversations to his FBI contact, who instructed him to obtain more information.[21]

In October 1983, during a conversation between Sarivola and Fulminante, Sarivola said that he knew Fulminante had been getting "some tough treatment" from other inmates because of the rumor.[22] Sarivola further told Fulminante that he would help him if he told him the story.[23] Later that evening, Fulminante admitted to Sarivola that he had taken Jeneane to the desert on his motorcycle, choked and sexually assaulted her and that after making her beg for her life, he had shot her twice in the head.[24] In addition, Fulminante told Sarivola that he had hidden the murder weapon in a pile of rocks at the murder scene.[25]

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13 *Id.*

14 *Id.*

15 *Id.*

16 Arizona v. Fulminante, 111 S. Ct. 1246, 1250 (1991).

17 *Id.*

18 *Id.*

19 *Id.*

20 *Id.* Fulminante's "other" explanations included a story that Jeneane had been killed by bikers looking for drugs.

21 *Id.*

22 *Id.*

23 *Id.* Sarivola's exact words to Fulminante were, "You have to tell me about it, you know. I mean, in other words, for me to give you any help."

24 *Id.*

25 Arizona v. Fulminante, 161 Ariz. 237, 241 (1988).

Sarivola was released from Ray Brook in November 1983.[26] Fulminante was released in May 1984, at which time Sarivola and his fiancee, Donna, met him at a local bus terminal.[27] When Donna asked Fulminante whether he had friends or relatives he wanted to see, Fulminante indicated that he could not return to Arizona because he had killed a little girl there.[28] Fulminante proceeded to give Donna details of Jeneane's murder.[29] Sarivola and Donna then drove Fulminante to a friend's house in Pennsylvania.[30] In September 1984, Fulminante was indicted in Arizona for the first-degree murder of Jeneane.[31]

III. PROCEDURAL HISTORY

A. TRIAL

In December 1985, a jury found Fulminante guilty of the first degree murder of his stepdaughter.[32] Prior to trial, Fulminante had moved to suppress both the statement he had given to Sarivola in prison and the statement he had given to Donna following his release from prison.[33] Fulminante argued that the confession to Sarivola was coerced and that the confession to Donna was the "fruit" of the first.[34] The trial court denied the motion in a pre-trial hearing, and admitted both confessions into evidence at the trial.[35]

In addition, the trial court found, in a special verdict, that Fulminante had committed the murder in an especially cruel, heinous and depraved manner.[36] Finding no mitigating circumstances sufficient to overcome these aggravating circumstances, the court sentenced Fulminante to death.[37]

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26 *Fulminante*, 111 S. Ct. at 1250.

27 *Fulminante*, 161 Ariz. at 241.

28 *Id.*

29 Petition for Writ of Certiorari at 5, *Fulminante* (No. 89-839).

30 *Fulminante*, 161 Ariz. at 241.

31 Arizona v. Fulminante, 111 S. Ct. 1246, 1250 (1991).

32 *Id.* at 1251.

33 *Id.* at 1250.

34 *Id.* at 1251. With the "fruit of the poisonous tree" argument, Fulminante maintained that since the confession to Sarivola was allegedly the result of a violation of defendant's fifth amendment rights, the later confession to Donna might be inadmissible as the "fruit" of the first. *Fulminante*, 161 Ariz. at 246. The second confession would be admissible under those circumstances, however, if the taint of the illegally obtained confession had been sufficiently attenuated by the passage of time or by the presence of intervening circumstances. *Id.*

35 *Fulminante*, 161 Ariz. at 241.

36 *Id.*

37 *Id.*

B. APPEAL

Fulminante appealed to the Supreme Court of Arizona.[38] On appeal, Fulminante argued, among other things, that the confessions at issue were coerced and their admission at trial violated his rights to due process under the Fifth and Fourteenth Amendments of the United States Constitution.[39]

Examining the totality of the circumstances surrounding Fulminante's confession to Sarivola, the Arizona Supreme Court found that the trial court erred in finding that the confession to Sarivola was voluntary.[40] The court also found, however, that the confession to Donna should have been admitted, as it was not the "fruit of the poisonous tree."[41] The court concluded that the invalid first confession was merely cumulative of the admissible second confession.[42] In addition, the court found that based on the overwhelming evidence contained in the second confession, the jury would have had enough evidence to convict respondent on the basis of that confession alone.[43] As a result, the court held that the error of admitting the first confession was harmless beyond a reasonable doubt.[44] Accordingly, the Arizona Supreme Court affirmed the conviction and judgment of death.[45]

C. RECONSIDERATION

Fulminante filed a Motion for Reconsideration, which was granted on April 11, 1989.[46] On July 11, 1989, the Arizona Supreme Court filed a Supplemental Opinion.[47]

In that opinion, the Arizona Supreme Court agreed with Fulminante that it had erred in holding that the confession to Sarivola was harmless error.[48] The court stated that federal constitutional law precluded its holding that admission of a coerced confession to a government agent was harmless error.[49] Although the court had held in its previous opinion that where a proper second confession exists, an earlier confession is harmless error, it reversed that hold-

38 161 Ariz. 237 (1988).
39 Arizona v. Fulminante, 111 S. Ct. 1246, 1251 (1991).
40 *Fulminante*, 161 Ariz. at 244.
41 *Id.*
42 *Id.* at 246.
43 *Id.*
44 *Id.*
45 *Id.* at 261.
46 *Id.*
47 *Id.*
48 *Id.* at 261-262.
49 *Id.* at 262.

ing on the grounds that the cases on which it had relied were not cases that involved a violation of the Fifth Amendment.[50] Those cases instead involved *Miranda*[51] violations.[52] The court concluded that where a first confession is coerced, and therefore violative of due process, admission of that first confession cannot be harmless error, despite the fact that a second, admissible confession exists.[53] The court set aside the conviction and sentence and remanded the cause for a new trial.[54]

Justice Cameron, the author of the original opinion, dissented, arguing that the confession to Sarivola was coerced only in a "technical" sense.[55] The "coercion" present in Fulminante's confession did not involve the same egregious conduct as that present in the cases cited by the supplemental opinion majority for its holding that coerced confessions are not subject to harmless error analysis.[56] Rather than accept a rule that would never permit harmless error to be applied to coerced confessions, Justice Cameron argued in favor of recognizing an exception to that rule where the involuntary confession merely duplicates other testimony or admissible statements offered by the accused.[57]

IV. Decision of the United States Supreme Court

After filing a Motion for Reconsideration, which was denied Sept. 19, 1989,[58] the State of Arizona appealed to the United States Supreme Court.[59]

A. MAJORITY OPINIONS

The widely divergent views with respect to coerced confessions and the harmless error doctrine are reflected in the fact that the Court's resolution of the three separate issues was articulated by three different majorities. Justice White[60] wrote for the majority on the issue of whether Fulminante's confession was voluntary; Chief

50 *Id.* at 261.
51 Miranda v. Arizona, 384 U.S. 436 (1966).
52 *Fulminante*, 161 Ariz. at 261.
53 *Id.* at 262.
54 *Id.*
55 *Id.* at 263, 265 (Cameron, J., dissenting).
56 *Id.* at 268 (Cameron, J., dissenting).
57 *Id.* at 267 (Cameron, J., dissenting).
58 *Id.* at 237.
59 111 S. Ct. 1246 (1991).
60 Justices Marshall, Blackmun, Stevens and Scalia joined Justice White in this portion of the majority opinion.

Justice Rehnquist[61] wrote the majority opinion with respect to whether harmless error analysis may be applied to the erroneous admission of an involuntary, or coerced, confession; and Justice White[62] articulated the majority's opinion on the determination of whether the specific error of admitting the coerced confession of Fulminante to Sarivola was harmless.

1. Voluntariness

In resolving the issue of voluntariness, Justice White, writing for the Court, first rejects the State's argument that the lower court applied a "but for" test[63] to determine whether the confession to Sarivola was involuntary, or coerced,[64] when it should have viewed the confession in the "totality of the circumstances."[65] Although the Arizona Supreme Court cited *Bram v. United States*,[66] which no longer states the test for voluntariness, neither the case nor its rule was relied upon by the lower court for its holding.[67] Rather, the Arizona Supreme Court applied the correct test, which required consideration of the "totality of the circumstances."[68]

Next, Justice White agrees with the Arizona Supreme Court's finding that the confession to Sarivola was coerced.[69] Justice White's majority finds Fulminante's fear of physical violence from

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61 Justices O'Connor, Kennedy, Souter and Scalia joined Justice Rehnquist in this portion of the majority opinion.

62 Justices Marshall, Blackmun, Stevens and Kennedy joined Justice White in this portion of the majority opinion.

63 A "but for" test would rely solely on a theory of causation whereby a court could determine that the challenged confession would not have been obtained absent the coercive acts in question.

64 The Court indicates that prior confession cases have used "coerced" and "involuntary" interchangeably and that the Court uses coerced in the present case only to preserve consistency with the language of the Arizona Supreme Court. Arizona v. Fulminante, 111 S. Ct. 1246, 1252 n.3 (1991).

65 *Id.* at 1251. A "totality of the circumstances" analysis requires the court to examine all of the circumstances surrounding the challenged confession to determine whether the confessor made the statement voluntarily. A voluntary statement may be defined in a variety of ways, one of which may equate voluntariness with a decision that is the product of an unrestrained will, or a will that has not been overborne. *Id.* at 1261 (Rehnquist, C.J., dissenting in part).

66 168 U.S. 532 (1897). The *Bram* decision stated that a voluntary confession is one that has not been obtained by "any direct or implied promises, however slight, nor by the exertion of any proper influence." *Id.* at 542-43 (quoting 3 RUSSELL ON CRIMES at 478 (6th ed.)).

67 *Fulminante*, 111 S. Ct. at 1251.

68 *Id.* at 1252. The "totality of the circumstances" analysis replaced the *Bram* test for determining voluntariness at least as early as Stein v. New York, 346 U.S. 156 (1953) and Lynumn v. Illinois, 372 U.S. 528 (1963). *See* CASES AND COMMENTS ON CRIMINAL PROCEDURE 32 (James B. Haddad, et al. eds., 3d ed. 1987).

69 *Fulminante*, 111 S. Ct. at 1252.

other prisoners absent any protection from Sarivola analogous to the factors that motivated the defendant in *Payne v. Arkansas*[70] to confess.[71] The Court holds that Fulminante's will was overborne in a way that rendered his confession the product of coercion.[72] Justice White relies on a number of factors not relied upon by the Arizona Supreme Court to support this finding of coercion, including Fulminante's previous experience with the prison system.[73] The White majority concludes, based on these considerations, that the confession was involuntary and should not have been admitted into evidence at trial.

2. *Applicability of the Harmless Error Analysis*

In this portion of the decision, Justice Rehnquist points out that since the introduction of the modern harmless error analysis in *Chapman v. California*,[74] the Court has analyzed a wide range of errors in terms of harmless error and has decided that most constitutional errors may be considered harmless.[75]

Chief Justice Rehnquist argues that *Chapman* does not actually stand for the proposition that admission of a coerced confession may never be harmless error.[76] Instead, *Chapman* simply mentions coerced confessions in its eighth footnote, which lists prior cases that have held that some errors may never be harmless.[77] The *Chapman* court cited the *Payne*[78] decision in this footnote,[79] and the dissent in the present case cites *Payne* for the proposition that coerced

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70 356 U.S. 560 (1958) (police officer's promise of protection from an angry mob outside the jail in exchange for a confession).

71 *Fulminante*, 111 S. Ct. at 1253.

72 *Id.*

73 *Id.* at 1252 n.2. Justice White concludes that Fulminante was especially susceptible to coercion since he is a physically small man with average intelligence. *Id.* In addition, Justice White points out that Fulminante had "felt threatened by the [prison] population" when he had previously been incarcerated at age twenty-six. *Id.* Justice Rehnquist, in his dissent, also relies upon the fact that Fulminante had been in prison before, but does so in order to show that Fulminante was a seasoned veteran of sorts who should not have been easily coerced. *See id.* at 1262-63 (Rehnquist, C.J., dissenting in part).

74 386 U.S. 18 (1967). The *Chapman* decision marked the first Supreme Court decision permitting a trial error that violated a defendant's federal constitutional rights to be deemed harmless rather than requiring automatic reversal of the conviction. *Id.*

75 *Fulminante*, 111 S. Ct. at 1263.

76 *Id.* at 1264. By using this argument, Justice Rehnquist seems able to avoid explicitly extending the holding of *Chapman*.

77 *Id.*

78 356 U.S. 560 (1958) (holding that the admission in evidence of a coerced confession vitiates the judgment of conviction because it violates the mandates of 14th Amendment due process).

79 Chapman v. California, 386 U.S. 18, 23 n.8 (1967).

confessions may never be harmless error.[80] However, the majority argues that the analysis rejected in *Payne* was not actually the harmless error analysis later adopted in *Chapman*, but was instead an earlier, much more lenient rule.[81] Justice Rehnquist concedes that the *Payne* decision correctly rejected a test that would make the admission of a coerced confession essentially risk-free for the state, but argues that this does not require rejection of *Chapman*'s harmless error analysis in cases of coerced confessions.[82]

The Chief Justice, then, does not use *Payne* to draw the line for errors which are never potentially harmless, and does not believe that *Payne* prohibits the use of harmless error analysis in cases of coerced confessions. Instead, Justice Rehnquist distinguishes potentially harmless errors from those that may never be harmless by arguing that the former always involve "trial error", or error which occurs during presentation of the case to the jury, rather than error which reflects a structural defect in the constitution of the trial mechanism itself.[83]

Although Justice Rehnquist does not believe *Payne* should be read to prevent application of harmless error analysis to coerced confessions, he does distinguish coerced confessions from the two other errors mentioned in footnote 8 of *Chapman*. This distinction can be understood in terms of his "trial error"/"structural error" analysis. The admission of a coerced confession, he argues, is a classic "trial error" and is similar in degree and kind to erroneous admission of other types of evidence.[84] The deprivation of the right to counsel[85] and the presence of an impartial judge,[86] however, are structural defects, or defects in the framework within which the trial occurs, which affect the entire trial from beginning to end.[87] Such structural defects can never be harmless errors.[88] The Rehnquist majority also cites the right to self-representation and the right to a public trial as members of this class of errors exempt from harmless error analysis.[89]

Justice Rehnquist states that he has found no reason to treat

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80 *Fulminante*, 111 S. Ct. at 1254 (White, J., dissenting in part).

81 *Id.* at 1264.

82 *Id.* at 1264-65.

83 *Id.* at 1264-65. This distinction will be discussed further. *See infra* part V.B.

84 *Fulminante*, 111 S. Ct. at 1264-1265.

85 *See* Gideon v. Wainwright, 372 U.S. 335 (1963).

86 *See* Tumey v. Ohio, 273 U.S. 510 (1927).

87 *Fulminante*, 111 S. Ct. at 1265.

88 *Id.*

89 *Id.*

differently statements elicited in violation of the Sixth Amendment[90] and the statements elicited from Fulminante, which arguably violated the Fourteenth Amendment.[91] He rejects the assertion made in Justice White's dissent that there is something more "fundamental" about coerced confessions that requires assigning more weight to those errors than to other "trial errors."[92] Although Justice Rehnquist recognizes that admitting a coerced confession into evidence may have a more dramatic effect on a trial than certain other errors might, he denies that this is sufficient reason to render all such confessions immune from harmless error analysis.[93] In cases where such a dramatic admission is in fact harmful to the defendant, the harmless error analysis should nevertheless be employed, but will not permit the error to actually be deemed harmless.[94]

3. Harmlessness of the Present Error

Justice White, writing for the Court, defines the test for determining harmlessness as the test from *Chapman v. California*,[95] requiring that an error be harmless beyond a reasonable doubt.[96] Justice White also states that a confession is perhaps the most damaging evidence that can be brought against a defendant.[97] A coerced confession not only carries a high risk of unreliability, but in addition has a profound effect on the jury.[98] The White majority warns that a court must be extremely cautious before determining that the admission of a coerced confession was harmless.[99]

Justice White argues that three factors weigh in favor of holding the present error not harmless.[100] First, the State recognized that a successful prosecution depended on the jury's belief of the two confessions.[101] The prosecutor conceded that the physical evidence was short of proof beyond a reasonable doubt.[102] Thus admission of the first confession could not have been harmless if it was a necessary component of the prosecution's case. Second, if the first confes-

90 *See* Milton v. Wainwright, 407 U.S. 371 (1972) (admission of statement obtained in violation of Sixth Amendment subject to harmless error analysis).
91 *Fulminante*, 111 S. Ct. at 1265.
92 *Id.*
93 *Id.* at 1266.
94 *Id.*
95 386 U.S. 18, 23 (1967).
96 *Fulminante*, 111 S. Ct. at 1257.
97 *Id.*
98 *Id.*
99 *Id.* at 1258.
100 *Id.*
101 *Id.* at 1258.
102 *Id.*

sion to Sarivola had not been admitted, the jurors might not have believed Donna's story that Fulminante confessed to her.[103] Circumstantial evidence corroborated some, but not all, of the details of the confession to Donna.[104] In addition, Fulminante's motive and state of mind were only corroborated by the first confession.[105] Thus one confession could not be said to be merely cumulative of the other.[106] Third, the admission of the first confession led to the admission of additional evidence that prejudiced Fulminante.[107] For example, evidence pertaining to Sarivola's character portrayed Fulminante as one who willingly associated with criminals.[108] In addition, evidence provided by the confession to Sarivola concerning the way in which the crime was committed was influential in the trial judge's decision to sentence Fulminante to death.[109]

For these reasons, the White majority holds that the erroneous admission of the confession to Sarivola may not be considered harmless.[110] Thus the Court affirms the judgment of the Supreme Court of Arizona.[111]

B. DISSENTING OPINIONS

Dissenting on the first issue, Justice Rehnquist, joined by Justices O'Connor, Kennedy and Souter, disagreed with the majority's holding that the confession to Sarivola was coerced.[112] Justice White dissented from the Rehnquist majority's holding that harmless error analysis may be applied to the erroneous admission of coerced confessions.[113] Justices Marshall, Blackmun and Stevens joined Justice White in this dissenting opinion.[114] Finally, Justice Rehnquist wrote for himself, as well as Justices O'Connor and Scalia, when he refused to hold that application of the harmless error analysis resulted in a finding that the present error was in fact

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103 *Id.*

104 *Id.* at 1259. The majority notes that Fulminante's statements concerning the choking and sexual assault of Jeneane were not corroborated by circumstantial evidence. *Id.*

105 *Id.*

106 *Id.* at 1259.

107 *Id.*

108 *Id.* at 1260.

109 *Id.* The sentencing judge apparently relied exclusively on the two confessions in finding that Fulminante committed the crime in an especially "heinous and depraved" manner. *See id.* at 1260. Based on this finding, the judge sentenced Fulminante to death. *Id.*

110 *Id.* at 1261.

111 *Id.*

112 *Id.* at 1263 (Rehnquist, C.J., dissenting in part).

113 *Id.* at 1253 (White, J., dissenting in part).

114 *Id.*

not harmless.[115]

1. *Voluntariness*

Justice Rehnquist defines the test of voluntariness as whether the confession is the product of a free and unconstrained choice.[116] If one's will has been overborne, the confession offends due process requirements.[117]

The Chief Justice states that the facts of the present case differ significantly from previous cases in which the Court held that defendant's will had been overborne.[118] For example, Fulminante offered no evidence that he believed his life was in danger or that he confessed to Sarivola in order to obtain protection.[119] In addition, Fulminante and Sarivola had engaged in relatively brief conversations, and Sarivola never prevented Fulminante from leaving his company.[120] Furthermore, Sarivola never threatened Fulminante or demanded that he confess.[121] Justice Rehnquist argues that these factors add up to an entirely different picture than those of previous cases of involuntariness, and that based on these differences, the Court's holding that the confession was involuntary, or coerced, defines that concept more broadly than the Court's previous decisions warrant.[122]

2. *Applicability of Harmless Error Analysis*

Justice White argues that the Court, by extending *Chapman*, has abandoned the principle found in *Rogers v. Richmond*.[123] The *Rogers* court held that a criminal defendant is deprived of due process if his conviction is founded, even in part, upon an involuntary confession, regardless of whether the confession is true or whether there is ample evidence aside from the confession to support the conviction.[124]

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115 *Id.* at 1266 (Rehnquist, C.J., dissenting in part). Justice Souter did not appear to join either Justice Rehnquist or Justice White on this third issue, nor did he file a separate opinion. *Id.* at 1249.

116 *Id.* at 1261 (Rehnquist, C.J., dissenting in part).

117 *Id.*

118 *Id.* at 1262 (Rehnquist, C.J., dissenting in part).

119 *Id.*

120 *Id.* at 1263 (Rehnquist, C.J., dissenting in part).

121 *Id.*

122 *Id.*

123 365 U.S. 534 (1961). Unlike Justice Rehnquist, Justice White sees the majority's opinion on the applicability of harmless error analysis as an overly broad expansion, rather than an application of the *Chapman* decision. *See supra note 76.* In addition, Justice White argues that the expansion constitutes a repudiation of *Rogers'* important due process protections. *See Fulminante*, 111 S. Ct. at 1253 (White, J., dissenting in part).

124 *Rogers*, 365 U.S. at 540-541.

This principle has been upheld even in cases such as *Haynes v. Washington*[125] and *Payne v. Arkansas*,[126] where other, proper confessions were admitted into evidence.[127]

Justice White then argues that a coerced confession is fundamentally different from other types of erroneously admitted evidence to which the harmless error analysis may be applied.[128] In making this argument, he relies on the fact that *Chapman* quite literally noted[129] that this type of error, as well as deprivation of counsel and trial before an impartial judge may not be categorized as harmless error.[130]

He also argues that the majority's dichotomy between "trial errors" and "structural errors" is meaningless. Since both errors may occur at precisely the same stage in the trial process, the majority's analysis simply does not work.[131] For example, the Court's prior decisions have permitted the failure to instruct the jury on the presumption of innocence to be analyzed in terms of harmless error, but not the failure to instruct a jury on the reasonable doubt standard.[132]

A more plausible explanation for these results, according to Justice White, is that constitutional due process does not require a jury instruction on the presumption of innocence in every case.[133] The presumption of innocence instruction merely provides an additional due process safeguard to the instruction on reasonable doubt, which the Constitution does require in every case.[134] The reasonable doubt instruction's fundamental nature is derived from the fact that it is impossible to assess the effect on the jury of its omission.[135] This creates the risk that the jury will convict even though the state has not met its required burden of proof.[136]

Justice White believes the same concerns and uncertainties involved in determining what weight a jury has given damaging evidence or omissions support his argument against applying harmless error analysis to the admission of a coerced confession.[137] He em-

125 373 U.S. 503 (1963).
126 356 U.S. 560, 568 (1958).
127 *Fulminante*, 111 S. Ct. at 1254 (White, J., dissenting in part).
128 *Id.*
129 Chapman v. California, 386 U.S. 18, 23 n.8 (1967).
130 *Fulminante*, 111 S. Ct. at 1254 (White, J., dissenting in part).
131 *Id.* at 1255 (White, J., dissenting in part).
132 *Id.*
133 *Id.*
134 *Id.*
135 *Id.*
136 *Id.*
137 *Id.*

phasizes that evidence of a confession can damage a defendant's case more than any other kind of evidence.[138] However, Justice White acknowledges two situations in which the Court has permitted analysis of confessions in terms of harmless error: admission of a confession obtained in violation of the Sixth Amendment right to counsel,[139] and admission of incriminating statements taken in violation of *Miranda*[140] requirements.[141] Justice White distinguishes these cases by arguing that neither the Sixth Amendment cases nor the *Miranda* cases involve a specifically coerced confession or the two distinctive reasons underlying the exclusion of that type of involuntary statement.[142]

The first of these reasons, he argues, is that some coerced confessions may be unreliable.[143] Admission of these unreliable statements would distort the truth-seeking function of the trial.[144] Second, the methods used to obtain involuntary confessions offend the underlying principle in our legal system that ours is an accusatorial and not an inquisitorial system.[145] Our society has a strong belief that governments sacrifice important human values when they force a confession out of an accused against his will.[146]

In sum, Justice White argues that there are some constitutional errors which should never be considered harmless errors because they violate rights that protect important human values unrelated to the truth-seeking function of the trial.[147] Justice White also argues that the principle of stare decisis is fundamentally important to the rule of law and states that the majority offers no convincing reason for overturning the long line of decisions requiring the exclusion of coerced confessions.[148]

3. Harmlessness of Present Error

Justice Rehnquist argues briefly that the present case represents a "classic case" of harmless error, since the second confession gave even more details of the crime than the first confession and was

138 *Id.*
139 *See* Milton v. Wainwright, 407 U.S. 371 (1972).
140 384 U.S. 436 (1966).
141 *Fulminante*, 111 S. Ct. at 1255 (White, J., dissenting in part).
142 *Id.* at 1256 (White, J., dissenting in part).
143 *Id.*
144 *Id.*
145 *Id.*
146 *Id.*
147 *Id.* at 1257 (White, J., dissenting in part).
148 *Id.*

properly admitted into evidence.[149]

C. CONCURRING OPINION

Justice Kennedy, in a separate concurring opinion, emphasizes that he does not believe the confession to Sarivola was coerced, but states that he will accept the holding of the five Justices[150] who found coercion.[151] Justice Kennedy does not, however, join in Justice White's opinion on the voluntariness issue. Although Justice Kennedy's stated rationale for accepting the holding of involuntariness is to provide a "clear mandate" to the Arizona Supreme Court, it is not at all clear from his opinion why he believes that his sixth "vote" will achieve this result.[152]

Justice Kennedy also argues, however, assuming that the admission of the confession was erroneous, that the Court correctly determines that harmless error analysis should be applied to coerced confessions.[153] Nevertheless, he does not agree with Justices Rehnquist, O'Connor and Scalia in their opinion that the present error was harmless, but argues instead, as Justice White does, that under the present circumstances, the present error could not be considered harmless.[154]

V. ANALYSIS

A. VOLUNTARINESS

Although the majority purports to analyze the voluntariness of Fulminante's confession in terms of the proper "totality of the circumstances" test,[155] the result reached by the majority is impermissibly expansive of prior holdings of involuntariness. In addition, the holding does not reflect a reasonable consideration of whether the particular circumstances in question in fact caused the particular

149 *Id.* at 1266 (Rehnquist, C.J., dissenting in part).

150 Justices White, Marshall, Blackmun, Stevens and Scalia.

151 *Fulminante*, 111 S. Ct. at 1266 (Kennedy, J., concurring in the judgment).

152 *Id.* at 1267 (Kennedy, J., concurring in the judgment).

153 *Id.*

154 *Id.* at 1266-67. (Kennedy, J., concurring in the judgment). Justice Kennedy stresses that when a court is applying harmless error analysis to an error, it must appreciate the great impact a full confession is likely to have on the trier of fact. *Id.* at 1266. This impact can be distinguished from the effect of an isolated statement that is only incriminating to the defendant when linked with other evidence. *Id.* Because Justice Kennedy argues that harmless error analysis should apply, he must believe that in some circumstances erroneous admission of a coerced confession may be harmless. However, it appears that he would proceed with great caution in such situations, due to the inherently damaging nature of a full confession.

155 *Id.* at 1252.

suspect's will to be overborne. If the court chooses to ignore the significance of the circumstances it examines, the totality of the circumstances test loses its meaning and instead begins to resemble a per se rule of exclusion. A true totality analysis most likely would show that Fulminante's confession in fact was not coerced.

The Chief Justice, in dissent, correctly points out that the prior cases in which the Court has held that a confession was involuntary involved circumstances that are very far removed from the circumstances surrounding Fulminante's confession.[156] Both the majority and the dissenters cite *Miller v. Fenton*[157] and acknowledge that the legal question of voluntariness requires an independent determination by the reviewing court.[158] However, the *Miller* principle cannot be read to mean that the Court is free to depart from prior holdings outlining the boundaries of voluntariness each time it makes a determination as to the voluntariness of a particular confession.

Even the prior voluntariness cases cited by the majority illustrate Justice White's inappropriate extension of the voluntariness doctrine in the present case. These cases, *Watts v. Indiana*,[159] *Blackburn v. Alabama*,[160] *Culombe v. Connecticut*,[161] *Reck v. Pate*[162] and *Payne* all involve circumstances radically different from those in *Fulminante*. For example, *Watts* involved physical and mental mistreatment of the suspect prior to his confession.[163] Not only was the suspect held and interrogated for several days in solitary confinement in a cell called "the hole", there was evidence that he had been deprived of basic needs such as food and sleep.[164] Fulminante alleged no such mistreatment by Sarivola or anyone else in the period of time leading up to his confession.

The majority's reliance on *Blackburn, Culombe* and *Reck* is similarly misplaced. Blackburn had been diagnosed as a "schizophrenic . . . paranoid type . . . insane, incompetent . . . ."[165] Further, authorities had subjected Blackburn to interrogation for eight or nine hours by several officers, at times three at once.[166] Similarly, authorities held and questioned Culombe for four nights and five days, and

156 *Id.* at 1262 (Rehnquist, C.J., dissenting in part).
157 474 U.S. 104 (1985).
158 *Fulminante*, 111 S. Ct. at 1252, 1261 (quoting *Miller*, 474 U.S. at 110).
159 338 U.S. 49 (1949).
160 361 U.S. 199 (1960).
161 367 U.S. 568 (1961).
162 367 U.S. 433 (1961).
163 *Watts*, 338 U.S. at 52-53.
164 *Id.*
165 Blackburn v. Alabama, 361 U.S. 199, 202 (1960).
166 *Id.* at 204.

the Court held that because Culombe was very "suggestible and subject to intimidation. . .", the circumstances were sufficient to show that his powers of resistance could not have overcome the interrogation procedures.[167] Finally, Reck was a mentally retarded nineteen year-old whose intelligence level was that of someone ten or twelve years old.[168] The *Reck* Court was also influenced by the fact that the defendant had no prior experience with the police prior to being detained by them for eight days without a hearing.[169]

All three of these decisions stand for the proposition that coercion may be mental or emotional and need not be physical. However, Fulminante possessed none of the characteristics that caused the Court to find that the wills of these prior defendants had been overborne. The factors considered by Justice White in footnote 2 to illustrate that Fulminante was susceptible to coercion are only superficially similar to the circumstances of previous cases. Fulminante's physical size cannot be analogized to physical mistreatment or severe intimidation. In addition, although Fulminante's intelligence may have been low-average or average, and he may have at one time received psychiatric treatment, he was by no means incompetent or functioning at a child's level. Therefore, a higher level of influential behavior may have been required to constitute coercion in his case. Nor is the fact that he had allegedly felt "threatened by the [prison] population"[170] during one of his prior incarcerations particularly persuasive in the present case. Therefore the present circumstances in their totality cannot be said to be sufficiently analogous to prior cases of coerced confessions to warrant the present finding of coercion.

Perhaps the majority's most misplaced analogy is *Payne*. The majority seems to think that the "fear of physical violence . . . which motivated Fulminante to confess" is quite similar to the suspect's fear in *Payne*.[171] However, the situations in the two cases are really quite different. Payne was faced with choosing between a promise of protection by a police officer if he confessed and "an angry mob

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167 Culombe v. Connecticut, 367 U.S. 568, 625 (1961). Although Justice White attempts to describe Fulminante with language similar to that used by the *Culombe* court, the two men were not really similarly "susceptible." *See* Arizona v. Fulminante, 111 S. Ct. 1246, 1252 n.2 (1991). The court in *Culombe* described the defendant as a "mental defective of the moron class." *Culombe*, 367 U.S. at 620. Such language was clearly meant to indicate some form of retardation. Based on Justice White's characterization of Fulminante as a man of "average" intelligence, a comparison of the susceptibility of Culombe and Fulminante is not appropriate. *See Fulminante*, 111 S. Ct. at 1252 n.2.

168 Reck v. Pate, 367 U.S. 433, 435 (1961).

169 *Id.* at 441.

170 *Fulminante*, 111 S. Ct. at 1252 n.2.

171 *Id.* at 1253.

outside the jailhouse door."[172] The danger for Payne was obviously much more immediate and certain than the danger for Fulminante. Sarivola was aware that Fulminante had allegedly been receiving rough treatment because of the rumors that he had killed a child. However, it was not at all certain that any real harm would come to Fulminante if he did not confess. In addition, the danger was not immediate and did not call for a hurried decision to confess. There was no angry mob waiting outside his cell to tear him limb from limb if he did not confess. It must be conceded, however, that if Fulminante reasonably perceived such a danger and believed that Sarivola could protect him if he confessed, the fact that the danger was not imminent or certain to occur would not prevent the confession from being coerced. However, the evidence does not support such a finding, as will be discussed below.

Although the majority acknowledges that the question of voluntariness in Fulminante's case is a "close one,"[173] the Court holds the confession to Sarivola to be involuntary without any discussion of the particular events surrounding Fulminante's confession, or Fulminante's perception of these events. These omissions result in an analysis that is inconsistent with the reasoning in the cases cited by the Court for its holding, discussed above.

In its analysis of the totality of the circumstances, the majority fails to consider certain subjective factors that indicate that although a suspect's will might have been overborne in the present circumstances, Fulminante's will was not in fact overborne. These subjective factors, although perhaps not dispositive, are at least significant to the voluntariness inquiry. However, the majority relies solely on the objective finding of the Arizona Supreme Court that there was a credible threat of physical violence for its holding that Sarivola coerced Fulminante into confessing.[174] However, the Chief Justice's dissent properly points to the fact that at the suppression hearing, Fulminante did not dispute that he at no time indicated that he was in fear of other inmates nor did he ever seek Mr. Sarivola's "protection."[175] This evidence would seem to indicate that although in some circumstances a person in Fulminante's situation might have confessed in order to receive protection, Fulminante did not in fact confess because he was in need of Sarivola's protection.

The majority assumes that the fact that a credible threat of danger may have existed for Fulminante means that Fulminante per-

172 Payne v. Arkansas, 356 U.S. 560, 564-565, 567 (1958).
173 *Fulminante*, 111 S. Ct. at 1252.
174 *Id.* at 1253.
175 *Id.* at 1262 (Rehnquist, C.J., dissenting in part).

ceived this danger and was motivated by the danger to such an extent that the Court could say his will had been overborne. It is conceivable that Sarivola coerced Fulminante with a credible threat, rather than actual violence; however, the record appears to contain no evidence that that was the case.[176] On the contrary, the dissent correctly points to factors considered in prior voluntariness decisions and ignored by the majority in *Fulminante* to show that Fulminante confessed of his own unconstrained will. These factors include the brevity of the conversations between Fulminante and Sarivola, Fulminante's freedom at all times to leave Sarivola's presence or refuse to talk with him, and Fulminante's previous experience with prisons and law enforcement.[177]

The final result of the majority's voluntariness analysis is a departure from the line of cases that define a voluntary confession as one that is the product of a free and unconstrained choice.[178] By relying solely on an objective view of the circumstances surrounding the confession, the majority has effectively reduced the totality rule to a new rule. This new rule seems to provide that where the confessor might have been improperly motivated to make a confession, the confession will be held involuntary, regardless of whether the confession was in fact the product of a constrained choice, or an overborne will. The White majority's rule is an extension of the boundaries of involuntariness that is unwarranted by prior cases.[179]

B. APPLICABILITY OF HARMLESS ERROR ANALYSIS

The Rehnquist majority correctly determines that involuntary, or coerced, confessions may be analyzed in terms of harmless error. The majority correctly points out that many other constitutional errors have been held to be subject to harmless error analysis since the *Chapman* decision. Presuming all constitutional errors carry

176 *See id.* at 1262 (Rehnquist, C.J., dissenting in part). In addition, the Arizona Supreme Court emphasized certain facts in the record that, although used to support a penalty of death, actually may suggest other motivations for Fulminante's confession. The Court noted that Fulminante's confessions to Sarivola and Donna both contained many unsolicited details—"statements of a man who was bragging and relishing the crime he committed." Arizona v. Fulminante, 161 Ariz. 237, 256 (1988). In addition, Fulminante told Donna that he wanted to "'go piss on [Jeneane's] grave.'" *Id.* at 256. Therefore, Fulminante may have confessed to Sarivola in order to brag about his actions.

177 Justice Rehnquist, like Justice White, emphasizes the fact that Fulminante had been in prison before. Justice Rehnquist, however, does so to point out that Sarivola should not have been particularly susceptible to coercion since he was no stranger to prison life. *Fulminante*, 111 S. Ct. at 1263 (Rehnquist, C.J., dissenting in part).

178 *Id.* at 1261 (Rehnquist, C.J., dissenting in part).

179 *Id.* at 1263 (Rehnquist, C.J., dissenting in part).

equal weight, there would seem to be no prima facie reason, then, to exclude the erroneous admission of involuntary confessions from harmless error analysis. Although the dissenters' reliance on *Payne v. Arkansas*[180] for the proposition that erroneous admission of coerced confessions may never be harmless is somewhat convincing, particularly in light of principles of stare decisis, there is reason to believe, as Justice Rehnquist does, that the *Payne* court actually rejected an analysis quite different from the modern harmless error doctrine announced nine years later in *Chapman*.[181]

Rejection of the belief that footnote 8 of *Chapman* (citing *Payne*) precludes application of harmless error analysis in cases of coerced confessions presents a serious problem, however, in that it may erode any distinction between errors which may be harmless and those which may never be harmless. However, rejection of Justice Rehnquist's "trial error"/"structural error" distinction to counter the "erosion of constitutional rights" criticism does not necessarily require a concession that such an erosion is certain to occur after *Fulminante*.

The Supreme Court has, as Justice Rehnquist points out in the majority opinion, applied the harmless error doctrine to a wide variety of errors, including constitutional errors.[182] Two of the constitutional errors have included a violation of the Fifth Amendment Self-Incrimination Clause by an improper comment on a defendant's silence at trial,[183] and admission of a confession obtained in violation of *Massiah v. United States*[184] principles.[185] The application of harmless error analysis to these errors cannot effectively be distinguished from application of harmless error in the case of a coerced confession, unless one believes, as Justice White does, that there is something "fundamentally different"[186] about a confession obtained in violation of the Fourteenth Amendment that warrants a special per se rule of exclusion.

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180 356 U.S. 560 (1957).

181 Chapman v. California, 386 U.S. 18, 23-24 (1967).

182 *Fulminante*, 111 S. Ct. at 1263.

183 United States v. Hasting, 461 U.S. 499 (1983).

184 377 U.S. 201 (1964). *Massiah* held that incriminating statements deliberately elicited by federal agents from an accused against whom adversary proceedings, such as indictment, had already been initiated, in the absence of his attorney, deprived the accused of his right to counsel under the Sixth Amendment, and were, therefore, inadmissible at trial. *Id.*

185 Milton v. Wainwright, 407 U.S. 371 (1972). The *Milton* decision held that the use at trial of incriminating statements that had been deliberately elicited from the defendant by law enforcement agents after defendant had been indicted and out of the presence of his counsel violated the Sixth Amendment right to counsel. *Id.*

186 *Fulminante*, 111 S. Ct. at 1254.

Although the *Chapman* court pointed out in footnote 8 that three prior cases had held that certain errors could never be subject to harmless error analysis, the court did not attempt to explain the reasoning behind the decisions.[187] The only rationale offered by the *Chapman* court was that those three prior decisions had held that some rights are "so basic to a fair trial that their infraction can never be seen as harmless . . . ."[188] The court also indicated that the harmless error doctrine carries with it the implication that errors which affect "substantial rights" should not be treated as harmless.[189] It seems difficult to argue that some constitutional errors are "substantial" and others are not. Presumably all rights currently protected by the Constitution were once seen as important enough to warrant some "special" protection. Therefore, the distinction between errors which may be harmless and the present error, which the White majority argues may never be harmless, should not lie solely in the fact that the present error is a violation of the more "substantial" rights contained in the Fourteenth Amendment.

Yet this seems to be the implication of Justice White's dissenting opinion. He argues that the distinction lies in the fact that the present confession was improperly elicited by coercion rather than in violation of another constitutional mandate.[190] He also states that the reasons underlying exclusion of the former type of evidence are distinct from the reasons one could give for excluding the latter.[191] However, aside from the Justice's concerns about unreliability, the only justification for this distinction is that involuntary confessions are inherently more offensive to society than confessions obtained by other constitutionally inappropriate means, such as violation of Sixth Amendment rights.[192]

Justice White's argument, however, does not explain what renders some constitutional violations more offensive than others, and why this should necessarily result in disparate treatment of seemingly similar wrongs. If the *Chapman* court was correct in asserting that "substantial rights" preclude harmless error analysis in some cases, those rights should be defined in such a way that eliminates or at least diminishes the need for a system of ranking the importance of various constitutional rights that is incapable of delineation. Although it is true that judges are often called upon to place certain

187 Chapman v. California, 386 U.S. 18, 23-24 (1967).
188 *Id.* at 23.
189 *Id.*
190 *Fulminante*, 111 S. Ct. at 1256 (White, J., dissenting in part).
191 *Id.*
192 *Id.*

values on different constitutional provisions, to require them to compare and rank various rights arbitrarily is to require judges to act beyond the scope of their office and will produce largely inconsistent results.[193]

It may seem at this point that if one is unwilling to say that some constitutional rights are more "important" than others, without any concrete definitional criteria,[194] then inevitably all errors, constitutional and otherwise, are placed on equal footing and are therefore all subject to harmless error analysis. In fact, Justice Rehnquist's argument with respect to *Chapman*'s footnote 8 seems to lead to precisely that point. The Chief Justice in his opinion argues that *Chapman* does not actually adopt the rule that an involuntary confession may not be analyzed in terms of harmless error, but instead "relegates" the cases standing for this idea to a footnote.[195] The Chief Justice interprets this to mean that the reference to the *Payne* decision is merely an historical reference rather than an adoption of its "rule."[196] The next logical step in this argument would be that the other two cases cited in footnote 8 of *Chapman*[197] are also mere historical references, and are on more or less equal footing with *Payne*. There would seem to be no logical basis, then, for exempting the errors of those cases from harmless error analysis while permitting it in the case of a *Payne*-type error.

The implications of this broad application of harmless error analysis may raise serious concerns about the future of the constitutional rights of criminal defendants. If *Chapman* in fact provides no meaningful limitation on the harmless error doctrine, then any type of error committed against a criminal defendant could be deemed harmless, at the discretion of a reviewing judge. It appears that the Chief Justice, however, is unwilling to follow his argument to that

193 For example, as Justice Rehnquist argued, the facts that often give rise to violations of the Sixth Amendment right to counsel sometimes involve police conduct that is at least as offensive to abstract notions of "fairness" as conduct found in cases of involuntary confessions. *Id.* at 1266. *See also* Massiah v. U.S., 377 U.S. 201 (1964); Milton v. Wainwright, 407 U.S. 371 (1972). Yet Justice White would preclude harmless error analysis only in the latter category of cases.

194 Justice White's argument that coerced confessions offend "important human values" arguably provides no concrete definitional guidelines, but is simply an abstract justification for sharply restricting the use of harmless error analysis generally. *Cf. Fulminante*, 111 S. Ct. at 1256 (White, J., dissenting in part).

195 *Id.* at 1264.

196 *Id.*

197 Chapman v. California, 386 U.S. 18, 23 n.8 (1967). In addition to *Payne*, the footnote cites Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel) and Tumey v. Ohio, 273 U.S. 510 (1927) (impartial judge) as cases in which harmless error analysis could not be applied. *Chapman*, 386 U.S. at 23 n.8.

conclusion, since he refuses to say that deprivation of the right to counsel and trial before an impartial judge can ever be harmless error.[198]

It would seem that the Chief Justice was aware that his disregard of the apparent distinction suggested by footnote 8 of *Chapman* might subject him to criticism that he has opened the entire spectrum of constitutional errors to harmless error analysis. Justice Rehnquist attempts to counter this criticism by arguing that a distinction can be drawn between the *Payne, Gideon* and *Tumey* cases, listed in *Chapman*'s footnote 8.[199] The distinction, according to the Chief Justice, can be seen in the fact that admission of an involuntary confession is a "classic 'trial error' " occurring during the presentation of the case to the jury, while the other two constitutional violations referred to in *Chapman*'s note 8 are "structural defects in the constitution of the trial mechanism."[200]

A "structural defects" error, he argues, affects the very framework of a trial, at all its stages.[201] Other errors of this type have been defined by Supreme Court decisions since *Chapman* and were properly excluded from harmless error analysis.[202] The common thread in all of these cases is that the errors at issue prevented the trial from serving its function as a fair and reliable determination of guilt or innocence.

Justice White, however, correctly points out that two cases decided by the Supreme Court, *Kentucky v. Whorton*[203] and *Jackson v. Virginia*,[204] illustrate the failure of this "trial error"/"structural error" distinction.[205] The errors in both of these cases occurred at exactly the same stage in the trial, yet only the error in *Whorton* was analyzed in terms of harmless error.[206] The explanation for the exclusion of the *Jackson* error from harmless error analysis cannot be explained by Justice Rehnquist's theory, because both were technically "trial errors" that occurred during the presentation of the case to the jury.[207] The distinction, Justice White argues, is that a jury instruction on reasonable doubt is required by the Constitution be-

198 *Fulminante*, 111 S. Ct. at 1265.
199 *Id.*
200 *Id.*
201 *Id.*
202 *Id.* These include the right to self representation at trial, the right to a public trial, and unlawful exclusion of members of defendant's race from a grand jury. *Id.*
203 441 U.S. 786 (1979)(failure to instruct the jury on the presumption of innocence).
204 443 U.S. 307 (1979)(failure to instruct the jury on the reasonable doubt standard).
205 *Fulminante*, 111 S. Ct. at 1255 (White, J., dissenting in part).
206 *Id.*
207 *Id.*

cause it is impossible to determine on review what effect its omission had on a jury.[208] A jury instruction on the presumption of innocence, however, is not necessary in order to protect a defendant's due process rights, but only serves as an additional safeguard.[209]

Justice White recognizes that his argument concerning the difficulty in assessing the impact on the jury of the error in question does not by itself justify a "per se bar to the use of any confession."[210] This is a concession that must be made in light of the use of harmless error in *Milton*, where the error was, as in *Fulminante*, admission of an improperly obtained confession. However, whereas Justice White attempts to distinguish *Milton* from the present case by arguing vague policy considerations, a better argument might be made by using a version of Justice White's own "impact on the jury" argument to support the line drawn by the majority. Such an argument would advocate preventing harmless error analysis in cases where the error was so broad in scope that the jury's deliberations were necessarily flawed.

One might begin with a presumption that, as the majority argues, all errors which occur during the presentation of the case to the jury (trial errors) are subject to harmless error analysis.[211] However, as Justice White has shown, to end the analysis here is to ignore the inconsistencies of cases such as *Whorton* and *Jackson*. The next step, then, may be to argue that even a trial error could not be analyzed in terms of harmless error if the error had caused the jury to reach its decision based on reasoning that was necessarily and critically flawed. This could be opposed on the ground that these ideas are as vague and incapable of consistent application as Justice White's notions of "human values" and "strongly felt attitude."[212] However, the two cases cited by Justice White in his criticism of the trial error distinction support the idea that consistent application of harmless error might be possible if the focus of the inquiry remains on the error's effect on the reasoning processes of the jury.

The results in *Whorton* and *Jackson*, discussed above, can be understood if considered in terms of the effect of each error on the relative ability of the jury to make a properly reasoned decision. As Justice White points out, the effect on the jury of the judge's failure

208 *Id.*

209 *Id.*

210 *Id.*

211 This implicitly leaves in place the bar on analyzing so-called structural defects, a category which even the dissenters would likely agree could be fairly defined to include at least trial before an impartial judge and complete denial of the right to counsel.

212 *Id.* at 1256 (White, J., dissenting in part).

to give an instruction on reasonable doubt, as was the case in *Jackson*, would be almost impossible to gauge or evaluate.[213] This difficulty would arise because in the absence of that instruction, the jury may be deliberating under a false assumption about what burden of proof is necessary to find the defendant guilty.[214] Justice White uses this problem to illustrate that although the *Jackson* error is technically a trial error, it is a defect that "distorts the very structure of the trial . . ." in a way that should prohibit it from ever being considered harmless.[215] Nevertheless, the error is still a trial error. Perhaps then, this error is excluded from the realm of harmless error because although the error technically occurred during the presentation of the case to the jury, it rendered the jury's entire reasoning process faulty from the beginning of the trial. This is due to the fact that the jury could have convicted the defendant based on a false assumption about the legal standard of proof.

Application of this argument to the *Fulminante* error weighs heavily in favor of permitting application of the harmless error analysis. An improperly obtained confession, no matter what constitutional provision was violated in obtaining it, cannot be said to affect the deliberations of a jury in the same way as the failure to instruct on reasonable doubt, much less the failure to try a defendant in front of an impartial judge or the failure to provide a defendant with counsel. A confession may have, as Justice Rehnquist concedes, a very "dramatic" effect on a trial.[216] Nevertheless, although damaging, it is only one piece of evidence in an entire case. Its admission does not cause a jury to deliberate under any false assumption about what the prosecution had to prove to sustain its burden of proof, or about the state of the law.

In addition, admission of the confession did not distort every other unrelated piece of evidence in the same way as if the jury had been considering an entire body of evidence that had been skewed by an impartial judge, or if the defendant had not had an adequate chance to prepare any evidence at all because of a lack of counsel. The Court's recent decision prohibiting harmless error analysis where members of a defendant's own race had been unlawfully excluded from a grand jury[217] can also be understood with this analysis. A trial or hearing before a racially skewed or even biased panel

213 *Id.* at 1255 (White, J., dissenting in part).
214 *Id.*
215 *Id.*
216 *Id.* at 1266.
217 Vasquez v. Hillery, 474 U.S. 254 (1986).

creates a very high risk that the reasoning of that panel is inherently biased and therefore faulty.

This distinction may undoubtedly be criticized on the same grounds as this Note has attempted to criticize Justice White's value-based distinction, namely that evaluation of the jury's reasoning may be difficult and somewhat arbitrary. However, it can be argued that a determination as to whether an error caused a jury's reasoning to be flawed in a critical way, or in such a way as to preclude a properly reasoned judgment, can be made much more objectively and consistently than determinations about which constitutional rights are more highly valued by society and which constitutional violations are the most offensive to abstract notions of fairness. To simply state a policy-based judgment that admission of a coerced confession is "fundamentally different"[218] from other types of erroneously admitted evidence, including other erroneously admitted confessions, says nothing about how the different confessions affect the jury determinations. Nonetheless, the effect on the jury is the primary concern of the harmless error doctrine, since the state must prove beyond a reasonable doubt that the error did not contribute to the defendant's conviction.[219]

C. HARMLESSNESS OF THE PRESENT ERROR

Assuming that the admission of Fulminante's confession to Sarivola was erroneous, the majority correctly holds that it cannot determine that the erroneous admission of the confession was harmless beyond a reasonable doubt. The standard announced in *Chapman* for evaluating the harmlessness of an error requires that the prosecution prove beyond a reasonable doubt that "the error complained of did not contribute to the verdict obtained."[220] Considering all of the evidence that led to Fulminante's conviction, and taking into account the existence of a second, constitutionally acceptable confession, the decision as to the harmlessness of the erroneous admission of the first confession is a difficult one. However, the close relationship between the first and second confessions seems to support a finding that it cannot be said beyond a reasonable doubt that the first confession did not contribute to Fulminante's conviction.

The Chief Justice, in dissent, argues that the existence of the second confession to Donna, which gave more details of the crime

218 *Fulminante*, 111 S. Ct. at 1254 (White, J., dissenting in part).
219 *Id.* at 1257.
220 Chapman v. California, 386 U.S. 18, 23 (1967).

than the first confession, and which was properly admitted into evidence, easily renders the error of admitting Fulminante's first confession harmless.[221] The Chief Justice, however, offers no discussion of the relationship of the unconstitutional confession to the properly admitted evidence. Such an examination is necessary if the court is to determine whether the error of improperly admitting the confession contributed to the conviction. The fact that a proper second confession was admitted into evidence may weigh heavily in favor of a finding that the jury would have convicted the defendant based on that confession alone, without consideration of the first confession. However, this evidence cannot be taken at face value, for circumstances may have been such that the court cannot say, beyond a reasonable doubt, that the second confession alone would have caused the jury to convict.

The majority properly points to the close relationship between Sarivola and his fiancee, Donna, to argue that absent the first confession, the jury might not have believed Donna's story recounting the second confession.[222] One reason the story might have been unbelievable was that neither Donna nor Sarivola notified the authorities of Donna's conversation with Fulminante until thirteen months later.[223] The Court also emphasizes that not all of the details of the confession to Donna were corroborated by circumstantial evidence.[224] In addition, the jury might not have believed Donna if it thought that she had an incentive to lie in order to further her fiance's interests as a paid FBI informant.[225] Further, the prosecution conceded at closing argument that the physical evidence, without the confessions, was insufficient to convict.[226] Therefore, if the jury might not have believed Donna's account of Fulminante's confession absent Sarivola's story, and if the physical evidence alone was insufficient to warrant a finding of guilty, it cannot be said beyond a reasonable doubt that the admission of the confession to Sarivola did not contribute to Fulminante's conviction.

Justice White concedes that in some circumstances, two confes-

221 *Fulminante*, 111 S. Ct. at 1266 (Rehnquist, C.J., dissenting in part).

222 *Id.* at 1258-59.

223 *Id.* at 1259.

224 *Id.* Although the majority claims that Donna's allegation that Fulminante told her he choked Jeneane was not corroborated by circumstantial evidence, authorities did find a ligature around Jeneane's neck. However, the physical evidence did not show that Jeneane had been sexually assaulted, even though Fulminante allegedly told Donna that he had. The fact that sexual assault might have been established if not for the decomposed nature of the body does not help the prosecution's case. That part of Donna's story is still uncorroborated.

225 *Id.*

226 *Id.* at 1258.

sions could be completely independent of each other.[227] For example, the jury might find that the confessions did not reinforce each other, in which case one confession could be said to be cumulative of the other.[228] Despite Justice White's disapproval of the use of harmless error analysis in cases of coerced confessions, this statement seems to suggest that in some cases where one, proper confession was admitted into evidence, the improper admission of another confession might be harmless, depending on the relative independence of the two confessions. However, the above discussion illustrates that the two confessions at issue in *Fulminante* simply were not sufficiently independent of one another to warrant a finding that the jury would have convicted based on only the second confession.[229]

The admission of the first confession was held not to have been harmless in part because the second confession did not render it cumulative, but also because it led to the admission of other evidence that was quite prejudicial to Fulminante.[230] Evidence of the confession to Sarivola opened the door to admission of character evidence with respect to Sarivola that reflected on Fulminante by portraying him as someone who willingly kept company with criminals.[231] Although it is impossible to say precisely what weight the jury gave to the character evidence, or to what extent Fulminante was prejudiced in the jurors' minds because of it, it cannot be said beyond a reasonable doubt that it did not contribute to his conviction.

In conclusion, it should not be said that the admission of the first confession, which was arguably given voluntarily and therefore not even erroneously admitted, caused the jurors' reasoning to be necessarily and critically flawed. Therefore the error of the admission should not be exempted from harmless error analysis. However, the question of whether an error may be analyzed in terms of harmlessness is quite different from the question of whether the error was harmless.[232] The present error, although serious, did not so

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227 *Id.* at 1259.

228 *See id.* The position of the Arizona Supreme Court in its initial opinion was that the second confession to Donna rendered the first one to Sarivola cumulative and that based on the overwhelming evidence provided by the second confession, admission of the first confession was harmless. Arizona v. Fulminante, 161 Ariz. 237, 245-46 (1988).

229 *Fulminante*, 111 S. Ct. at 1259.

230 *Id.*

231 *Id.* at 1260.

232 This is illustrated in part by the fact that Justice Kennedy, while not elaborating on his reasoning, stated in his concurring opinion that he believed not only that harmless error analysis was appropriate in the present case, but that the analysis should have shown that the error was not harmless. *Id.* at 1266-1267 (Kennedy, J., concurring in the judgment).

poison the reasoning of the jury that based on a consideration of all of the circumstances it could not be said under any circumstances to have been harmless. Indeed, had the second confession not been flawed in the ways discussed above, it would have been difficult to argue that the jury's reasoning in convicting Fulminante was flawed. However, based on a consideration of all of the interrelated evidence and circumstances of the present case, no court should be able to say beyond a reasonable doubt that the admission of the first confession did not contribute to Fulminante's conviction.

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