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PROCEEDINGS BEFORE

THE SUPREME COURT  
OF THE  
UNITED STATES

CAPTION: ARIZONA, Petitioner V. ORESTE C. FULMINANTE

CASE NO: 89-839

PLACE: Washington, D.C.

DATE: October 10, 1990

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WASHINGTON, D.C. 20543

1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - -X

3 ARIZONA, :

4                      Petitioner                      :

5 v. : No. 89-839

6 ORESTE C. FULMINANTE :

7 - - - - -X

8 Washington, D.C.

9 Wednesday, October 10, 1990

10           The above-entitled matter came on for oral  
11       argument before the Supreme Court of the United States at  
12       12:59 p.m.

13      APPEARANCES:

14 BARBARA M. JARRETT, ESQ., Senior Assistant Attorney  
15 General of Arizona; on behalf of the Petitioner.

16 PAUL J. LARKIN, ESQ., Assistant to the Solicitor  
17 General, Department of Justice, Washington, D.C.;  
18 as amicus curiae, in support of the Petitioner.

19       STEPHEN R. COLLINS, ESQ., Phoenix, Arizona; on behalf  
20       of the Respondent.

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1 P R O C E E D I N G S

2 CHIEF JUSTICE REHNQUIST: We'll hear argument  
3 now in No. 89-, excuse me, 839, Arizona v. Oreste  
4 Fulminante.

5 Ms. Jarrett.

6 ORAL ARGUMENT OF ROBERT T. ADAMS

7 ON BEHALF OF THE PETITIONER

8 MRS. JARRETT: Thank you, Mr. Chief Justice, and  
9 may it please the Court:

10 This case presents two separate issues, a  
11 voluntariness issue regarding a confession and a harmless  
12 error issue.

13 QUESTION: Will we need to decide both?

14 MRS. JARRETT: I do not know if the Court will  
15 need to decide both of these, Your Honor.

16 QUESTION: Well, you win if we decide either one  
17 of them your way.

18 MRS. JARRETT: That is correct.

19 I will be addressing the voluntariness issue,  
20 and Mr. Larkin from the Solicitor General's office will be  
21 addressing the harmless error issue.

22 At Oreste Fulminante's trial for first-degree  
23 murder, two separate confessions were introduced to him  
24 over his objection. The first was a confession that he  
25 made while he was incarcerated in a Federal prison. He



1 made the first confession to a fellow inmate, who was in  
2 reality an FBI informant.

3 The second confession Mr. Fulminante made was 6  
4 months after the first one. It was after he had been  
5 released from the Federal prison and was no longer an  
6 inmate. He made this confession to Donna Sarivola, who  
7 was at that time Mr. Sarivola's fiancée. They were  
8 shortly thereafter married.

9 Prior to trial, Mr. Fulminante filed his motion  
10 -- voluntariness motion for a hearing. There was a  
11 Jackson v. Denno hearing in the trial court, but no  
12 witnesses were called at this hearing. The defense agreed  
13 to the -- a stipulated set of facts that were set forth in  
14 the prosecutor's trial response.

15 The trial court ruled on the voluntariness issue  
16 and other issues regarding both of these confessions based  
17 upon oral argument by the parties and the stipulated  
18 facts. The court ruled that the first confession, the one  
19 to the inmate informant, was voluntarily made. The court  
20 specifically found it was not the result of any promises,  
21 threats, or coercion by any Government agent. The court  
22 found it was fully voluntary. The court also found that  
23 the second confession to the inmate informant's wife was  
24 also voluntarily made and was not the fruit of the  
25 poisonous tree, as the defendant argued.

1           On direct appeal, after Mr. Fulminante had been  
2 convicted of first-degree murder, on his direct appeal, he  
3 re-raised the voluntariness question. He claimed in the  
4 Arizona Supreme Court that this -- this confession to the  
5 inmate informant had in fact been coerced by a promise of  
6 protection.

7           QUESTION: In examining that issue, did the  
8 Arizona -- was the Arizona Supreme Court confined just to  
9 the suppression motion that the judge ruled on or could it  
10 and should it also take into account the evidence that  
11 might have been given at trial on the point?

12          MRS. JARRETT: The court did consider the  
13 evidence at trial, and I believe it was proper for the  
14 court to do so. The Arizona court has always, as a matter  
15 of Arizona law, whether it's constitutionally required or  
16 not, has looked to the entire trial record in determining  
17 whether a confession is coerced.

18          QUESTION: And if we hear that issue, we look at  
19 the same testimony?

20          MRS. JARRETT: That is correct, Your Honor. I  
21 believe it would be proper for this court to also examine  
22 the entire record, which is what --

23          QUESTION: Well, don't we owe some deference to  
24 the court's findings in -- of a coerced confession?

25          MRS. JARRETT: Your Honor, I believe that the

1 only deference that this Court owes to the Arizona Supreme  
2 Court regarding the coerced confession is to the facts,  
3 the underlying facts that the Arizona Supreme Court found  
4 in regard to the confession. The question whether the  
5 confession was actually coerced is a matter of Federal  
6 constitutional law, which this Court should resolve with a  
7 -- due deference to the Arizona Supreme Court's findings  
8 that --

9 QUESTION: But that court drew some inferences  
10 from the trial court record and on that basis made its  
11 finding of coercion. It's a little hard for us to undo  
12 that, don't you think?

13 MRS. JARRETT: Your Honor, I respectfully  
14 disagree, and one reason I disagree is that the Arizona  
15 court determined as a matter of fact that Fulminante was  
16 in danger while in prison. And this is not borne out by  
17 the record. The only evidence in the record, and this is  
18 from Sarivola's trial testimony, is that it is possibly a  
19 prison -- or a prisoner who is known to have killed a  
20 child or be a child murderer would be in danger while in  
21 prison.

22 This was not a stipulated fact that was before  
23 the trial judge when he made his finding, and there is  
24 simply no evidence in the regarding that particular fact,  
25 so that is why the State contends that the Arizona's

1 court's finding of involuntariness is based in a large  
2 part upon its finding that this promise of protection was  
3 so incredibly coercive because Mr. Fulminante was in  
4 actual danger while it was in prison.

5 QUESTION: Well, I thought that Sarivola said  
6 that his name that -- he was going to be carried out  
7 horizontally and so forth?

8 MRS. JARRETT: That is a portion of the record.  
9 That was not part of the evidence before the trial judge.  
10 A portion of his interview with the defense counsel prior  
11 to trial was attached to one of the pleadings, and he did  
12 speculate in that particular portion of the interview that  
13 that was his feeling.

14 QUESTION: But that was not recounted again at  
15 trial?

16 MRS. JARRETT: No. The defense attorney at  
17 trial never asked him whether Mr. Fulminante was in actual  
18 danger or asked him his feelings about the danger to  
19 Fulminante. And the only evidence that there was even a  
20 remote possibility was that there was a stipulated fact  
21 that Fulminante had been receiving some sort of rough  
22 treatment and what-not is the phrase Sarivola used from  
23 the other prisoners, but no one ever asked Fulminante or  
24 Sarivola what this rough treatment consisted of. And the  
25 record is just unclear on that.



1 But in any event, he -- Fulminante did not ask  
2 Sarivola for protection. He never indicated that he was  
3 in need of protection, and even after Sarivola made this  
4 offer of protection to him, he merely told him about the  
5 murder during their casual conversation without saying now  
6 are you going to help me?

7 So, that is the reason that I believe that this  
8 Court should not defer to the Arizona Supreme Court's  
9 finding of the law in regard to the voluntariness without  
10 first reexamining the record to see if there is any  
11 evidence of actual danger to Fulminante.

12 QUESTION: Mrs. Jarrett, you concede, however,  
13 that the FBI informant, before the -- immediately before  
14 the conversation at which the confession was made, did  
15 refer to the fact that the defendant had been receiving  
16 hard treat -- he heard the defendant had been receiving  
17 hard treatment from other inmates and that he could  
18 protect him from that, but if he -- if he wanted such  
19 protection, he'd have to be open with him about  
20 everything.

21 MRS. JARRETT: That is a fair statement, Your  
22 Honor.

23 QUESTION: And you concede that all of that was  
24 in the record?

25 MRS. JARRETT: That is all in the record, Your

1 Honor.

2 In regard to the State's contention that the  
3 Arizona court not only ruled incorrectly on the  
4 involuntariness issue, it is the State's contention that  
5 the court actually applied an incorrect standard in ruling  
6 on the voluntariness issue. The court in effect found a  
7 promise resulting in a confession and stated that it was a  
8 coerced confession without ever examining one of the most  
9 important facts or one of the most important circumstances  
10 in the case, whether Fulminante was a person whose will  
11 could easily be overborne by a promise of promise of  
12 protection.

13 When Fulminante's character is examined it is  
14 very clear that he is not such a person. When he made  
15 this admission to Sarivola, he went into great detail  
16 about the terrible way in which he had killed his young  
17 stepdaughter, and he used the phrase that he had clipped  
18 her. He did not, you know, show any remorse or, or  
19 anything of that nature. He went into the details and  
20 there's a finding by the Arizona court that, and this is  
21 in appendix to the petition at A76, the trial court found  
22 in its special verdict in this matter that these were the  
23 statements of a man who was bragging and relishing the  
24 crime committed.

25 So, the Arizona court on one hand finds that

1 this person was person was compelled to confess. But on  
2 the other hand, finds -- makes a finding that he is  
3 bragging and relishing at the time that he's actually  
4 confessing that. That is simply --

5 QUESTION: Well, isn't it two different courts?  
6 Isn't it the supreme court that found that it was coerced?  
7 And this is the finding by the trial court.

8 MRS. JARRETT: This is a finding by the trial  
9 court, Your Honor.

10 QUESTION: In the trial court there was not  
11 coerced, didn't it?

12 MRS. JARRETT: That is correct. The trial --

13 QUESTION: So there's no inconsistency there, is  
14 there?

15 MRS. JARRETT: I disagree respectfully, Your  
16 Honor, because this language by the trial court in the  
17 special verdict about him bragging and relishing --

18 QUESTION: Right.

19 MRS. JARRETT: -- was affirmed on appeal. The  
20 Arizona court basically adopted that finding regarding his  
21 state of mind at the time he was confessing by affirming  
22 the trial court's --

23 QUESTION: They referred to this specific  
24 language in the --

25 MRS. JARRETT: They do quote this language in

1 the opinion --

2 QUESTION: I see.

3 MRS. JARRETT: -- which is -- I was referring to  
4 the opinion at A76. That is a portion of their opinion in  
5 which they quote the trial court's finding.

6 QUESTION: I see.

7 MRS. JARRETT: And in regard to, to --

8 QUESTION: And that was in connection with  
9 affirming the aggravating circumstance, right?

10 MRS. JARRETT: That is correct, Your Honor.

11 QUESTION: Yeah.

12 MRS. JARRETT: It was in connection with that.

13 In looking at one of the most important factors in  
14 determining whether Fulminante's state of mind was such  
15 that he could have been coerced by a promise into  
16 confessing, the court has to look not only at the fact  
17 that he did confess in response to the promise but at his  
18 characteristics.

19 And, as noted in the briefs, he's a middle-aged  
20 sociopath. He's low- to low-average -- or low-to-average  
21 intelligence. He had absolutely no mental or physical  
22 problems that would have made him especially susceptible  
23 to coercion.

24 QUESTION: Well, how big was he?

25 MRS. JARRETT: This pre-sentence report



1 indicates anywhere from 5 foot 3 to 5 foot 5 and around  
2 120 pounds, so --

3 QUESTION: How big was this -- the informant?

4 MRS. JARRETT: I'm not aware. I -- that didn't  
5 -- as far as I'm aware that did not come out in --

6 QUESTION: There is no dispute about the fact  
7 that everybody seemed to understand the informant was in a  
8 position through his connections or otherwise to provide  
9 protection to somebody who might otherwise be violently  
10 treated by inmates, isn't that right?

11 MRS. JARRETT: Yes, he was.

12 QUESTION: Yeah.

13 MRS. JARRETT: Going back to Mr. Fulminante's  
14 characteristics. He had been in prison before. This was  
15 the third time he was in prison. He had six prior felony  
16 convictions and, interestingly enough, the first time he  
17 was in prison as a young man at age 26, when he felt fear  
18 of other inmates, all he did was ask to be put in  
19 protective custody and it was done. There is simply  
20 nothing to indicate that if he was actually in fear, he  
21 could have done that in this case. None of the prison  
22 authorities were apparently aware that he was receiving  
23 any kind of treatment, or this rough treatment was  
24 certainly not bad enough that he would complain to  
25 authorities.

1           And another aspect of Mr. Fulminante's character  
2   and part of the whole circumstances of this case are his  
3   relationship with this prison informant. He wanted to be  
4   like Sarivola. He wanted to become involved in organized  
5   crime and although -- unbeknownst to him -- Sarivola was  
6   acting as an informant, to Mr. Fulminante's knowledge, he  
7   was still actively involved in organized crime. And  
8   Fulminante, after becoming acquainted with Sarivola,  
9   actually agreed to commit some contract killings after his  
10  release from prison. So this is the man that he wants to  
11  work for.

12           QUESTION: May I just clear up one thing? Were  
13  any of these confessions taped or were -- or is this all  
14  the testimony of Sarivola as to what the man told him?

15           MRS. JARRETT: None of them were taped, Your  
16  Honor. They were -- they were made in the prison.  
17  Sarivola was not wearing a mike.

18           QUESTION: So, the whole -- the facts that you  
19  describe are entirely based on the testimony of this  
20  individual --

21           MRS. JARRETT: Yes.

22           QUESTION: -- Sarivola?

23           MRS. JARRETT: Yes, they are, Your Honor. And  
24  also there was the second confession, which was also not  
25  taped, but which was made to the -- Donna Sarivola later.

1 QUESTION: Whom?

2 MRS. JARRETT: To Donna Sarivola, the --

3 QUESTION: The wife?

4 MRS. JARRETT: That's correct. The prison  
5 informant's wife.

6 QUESTION: That -- that confession wasn't with  
7 any kind of an inducement I -- at that time?

8 MRS. JARRETT: No, Your Honor, other than the  
9 inducement that Donna Sarivola inquired of Mr. Fulminante  
10 when he got in the car to drive to Pennsylvania, well, why  
11 aren't you going back to Arizona, don't you have family  
12 there. Whereupon he launched into this diatribe about the  
13 young child he had killed there and the terrible things he  
14 did to her. So it was certainly not the result of any  
15 sort of inducement.

16 QUESTION: Well, did the Supreme Court of  
17 Arizona reach the question of whether the second  
18 confession was -- was or was not the fruit of the  
19 poisonous tree?

20 MRS. JARRETT: Yes, they did, Your Honor, and in  
21 their opinion they determined that it was not the fruit of  
22 the poisonous tree that was fully litigated both at the  
23 trial court. The trial court ruled against Mr. Fulminante  
24 on that and it was relitigated in the direct appeal. The  
25 Arizona court found no, it was not. It was too

1 attenuated. It was 6 months later after he was no longer  
2 in need of any kind of protection.

3 QUESTION: Then on rehearing, the Supreme Court  
4 of Arizona said that the admission of a involuntary  
5 confession can't be harmless error, and so they reversed  
6 -- I suppose they didn't have to go back under that line  
7 of reasoning and decide again whether the second  
8 confession was the fruit of a poisonous tree. The  
9 admission of the first confession made the -- the judgment  
10 infirm -- or the verdict infirm.

11 MRS. JARRETT: It did, however, the court did  
12 look at that question again, because it was raised in the  
13 defendant's motion for reconsideration and the court in  
14 its second -- in its supplemental opinion specifically  
15 rejected that claim again, saying none of his other claims  
16 are any good, just this one regarding harmless error.

17 QUESTION: Thank you.

18 MRS. JARRETT: Thank you. I'll reserve my time.

19 QUESTION: Very well, Mrs. Jarrett.

20 Mr. Larkin, we'll hear from you.

21 ORAL ARGUMENT OF PAUL J. LARKIN

22 ON BEHALF OF UNITED STATES AS AMICUS CURIAE,

23 IN SUPPORT OF PETITIONER

24 MR. LARKIN: Thank you, Mr. Chief Justice, and  
25 my it please the Court:



1           The rule of automatic reversal applied by the  
2   Arizona Supreme Court in this case is an anachronism. It  
3   was adopted at a time when rules of automatic reversal  
4   were the only ones known to the law.

5           QUESTION: Is it the law?

6           MR. LARKIN: It is. It is still the law today.  
7   In that respect the Arizona Supreme Court was correct.  
8   The Arizona Supreme Court initially ruled that it was  
9   legally permissible to find that the error in this case  
10  was factually harmless. On reconsideration they changed  
11  only the first half of that ruling. In fact, if you look  
12  to page C2 in the petition appendix, the Arizona Supreme  
13  Court lists all the claims that were made in the rehearing  
14  petition. One of them was that the error was not  
15  factually harmless and that, as my colleague has pointed  
16  out, was among the claims that was rejected on rehearing.

17           So what we have before you then, Your Honor, is  
18  a case in which the only reason the Arizona Supreme Court  
19  held this error to be prejudicial was it felt that this  
20  Court's precedence foreclosed it from giving effect to its  
21  finding that the error was harmless as a factual matter.

22           Since Chapman v. California 20 years ago first  
23  held that harmless error analysis can apply to  
24  constitutional violations, this Court has often made clear  
25  that the harmless error doctrine is in fact the rule and

1 no longer the exception. The law, therefore, generally  
2 speaking, is the exact opposite of where the law stood in  
3 1897 when the Bram case was decided.

4 It is Bram in fact that is the source of the  
5 rule that the Arizona Supreme Court invoked in this case  
6 and Bram in fact describes the only category of evidence  
7 that is today automatically and in every case excepted  
8 from harmless error analysis.

9 Interest -- interestingly --

10 QUESTION: Mr. Larkin, the Supreme Court of  
11 Arizona at least articulated in its opinion that it was  
12 applying the totality of the circumstances test, didn't  
13 it?

14 MR. LARKIN: Yes, on the -- on the question of  
15 whether the statement to Anthony Sarivola was in fact  
16 coerced, they said --

17 QUESTION: Why?

18 MR. LARKIN: They said that they were applying  
19 the totality of circumstances test.

20 QUESTION: Why?

21 MR. LARKIN: But on that issue, the first issue  
22 in this case, what they treated as decisive, was the fact  
23 that there was an offer of protection made and they  
24 treated as dispositive, the ruling in the other half of  
25 the Bram case, that when such an offer is made of any

1 type, a confession is necessarily involuntary. So  
2 actually the Arizona Supreme Court invoked both halves of  
3 the Bram decision in this case to upset the conviction,  
4 the first half being that any offer renders a statement  
5 involuntary, the second half being that any involuntary  
6 statement has to require a reversal.

7 Now, interestingly, neither Respondent nor  
8 supporting amicus defends the rationale given in the Bram  
9 case for that rule, and we think they're right not to do  
10 so. Bram rested on a perceived logical contradiction  
11 between the propositions that a particular item of  
12 evidence could be at once probative and yet harmless.

13 In fact today, under modern principles of  
14 appellate review, there is no longer any such  
15 contradiction. A particular piece of evidence can be  
16 probative if it has any tendency to prove or disprove a  
17 matter in issue. But the same piece of evidence can in  
18 fact be harmless if it is generally insignificant in the  
19 context of the entire record. And it is in the context of  
20 the entire record that the harmlessness determination must  
21 be made, while it is in the context of that particular  
22 piece of evidence that the relevancy determination must be  
23 made.

24 In fact, under present principles of appellate  
25 review, the contradiction that troubled the Court in Bram

1 exists only when a particular item of evidence is the sole  
2 proof of a disputed issue in the case. In all other  
3 circumstances the contradiction does not exist.

4 The question then becomes whether there is  
5 any --

6 QUESTION: Do you think that that's why Bram  
7 reached that conclusion or did it see the logical  
8 contradiction in every case?

9 MR. LARKIN: Well, Bram didn't have before it  
10 the rule that harmless errors could be overlooked.

11 QUESTION: I recognize that, but we're talking  
12 about the logical contradiction that the Court thought  
13 that it saw in Bram. Did it see that just because the  
14 confession was the only piece of evidence?

15 MR. LARKIN: No, I think it saw it because any  
16 piece of evidence, whether or not it was a confession,  
17 would lead to that type of contradiction. In other words,  
18 they -- the Court in Bram thought that it was  
19 contradictory for a prosecutor to argue to the trial court  
20 that this evidence proves the defendant is guilty and then  
21 argue to an appellate court that the same evidence doesn't  
22 prove he's guilty or at least didn't have any prejudicial  
23 effect because there was plenty of other evidence in the  
24 case.

25 QUESTION: Are you saying, Mr. Larkin, just to



1 be sure that I get it, that if the -- this case were  
2 retried without the Sarivola confession admitted that all  
3 the other evidence admitted, you can say that -- the judge  
4 would state beyond a reasonable doubt that the man would  
5 be convicted?

6 MR. LARKIN: Yes. We think the error in this  
7 case was factually harmless and that the Court in this  
8 case should use this vehicle for saying that errors like  
9 this should no longer be excepted from the harmless error  
10 --

11 QUESTION: So the result is purely to save the  
12 cost to the State of a retrial. It has nothing to do with  
13 the ultimate outcome and being sure you get the right  
14 verdict, because you'll get the right verdict anyway.

15 MR. LARKIN: Well, I'm not --

16 QUESTION: This guy will go to jail no matter  
17 what we do.

18 MR. LARKIN: Well, we're not -- we're not in  
19 this case interested in the particulars of this particular  
20 judgment, if that's --

21 QUESTION: But it would be true in every  
22 comparable case.

23 MR. LARKIN: Well, in every case where any  
24 erroneously admitted evidence is harmless you will  
25 automatically have the verdict stand. If that's what --

1 if that's what you're getting at then I would certainly  
2 agree.

3 QUESTION: Well, not only that, but if you lose  
4 on retrial and if the evidence is excluded, in every case  
5 we would be able to say beyond a reasonable doubt he would  
6 be reconvicted because the other evidence is so power --  
7 powerful.

8 MR. LARKIN: Sure. And that -- that's the sort  
9 of inquiry that's --

10 QUESTION: So all that's at stake --

11 QUESTION: Assuming the jury does its duty.

12 MR. LARKIN: Correct. I mean, the assumption  
13 you have to make is the jury is going to be rational.  
14 That's the type of assumption you have to make --

15 QUESTION: Right.

16 QUESTION: Mr. Larkin, can you conceive of a  
17 confession that would not be considered harmless error  
18 because it was such a bad way of getting it?

19 MR. LARKIN: Absolutely. Well, I would  
20 certainly concede --

21 QUESTION: Well, was that considered in this  
22 case?

23 MR. LARKIN: They did -- they did not consider  
24 whether the means by which the confession was obtained  
25 affected the -- inquiry into prejudice. And that --

1 QUESTION: Well, what constraint is there on the  
2 offices of Government in Arizona to prevent them from  
3 denying people their rights?

4 MR. LARKIN: Well, Your Honor, what you're  
5 talking about is a question --

6 QUESTION: Is there any restraint at all?

7 MR. LARKIN: Yes. What you're talking about is  
8 a question of deterrence. Applying a harmless error rule  
9 is not likely to lead to an increased number of coerced  
10 confessions, because no police officer at the time he is  
11 deciding whether and how to question someone --

12 QUESTION: Do you think that you and the members  
13 of this Court are better able to decide that than the  
14 Supreme Court of Arizona?

15 MR. LARKIN: Well, this Court is certainly  
16 better able to decide whether generally speaking such  
17 errors can be harmless, because this Court is the only  
18 court that has the power to overrule the Bram case, which  
19 the Arizona Supreme Court didn't.

20 QUESTION: Well, how do we know what goes on in  
21 Arizona?

22 MR. LARKIN: Well, the way that we know what  
23 goes on is to rely on the find --

24 QUESTION: Is what you tell us.

25 MR. LARKIN: No, it's to rely on the findings

1 made by the trial court and the appellate court. It is  
2 true a great many confessions will be prejudicial, but it  
3 does not follow that every confession will be prejudicial.

4 QUESTION: In deciding -- it depends on what you  
5 mean by what -- the error's harmless. You've described it  
6 as though it means another jury -- a different jury would  
7 have come to the same conclusion. But what if I think  
8 that the test of harmlessness should rather be would this  
9 jury -- did this jury rely upon -- substantially rely upon  
10 that evidence --

11 MR. LARKIN: Well --

12 QUESTION: -- in reaching its conclusion? And  
13 if I believe that the latter is the test, there may be  
14 some sense in a special rule for coerced confessions,  
15 because nothing is as -- is as conclusive as a confession.  
16 The jury might well not even look at the rest of the  
17 evidence. They say, you don't have to worry about the  
18 rest. You have the man's confession right here.

19 MR. LARKIN: I have several responses. First,  
20 in the Milton and Satterwhite cases the Court said that  
21 confessions obtained in violations of the Sixth Amendment  
22 can be harmless. There's no material difference between a  
23 Sixth Amendment and a Fifth Amendment violation if the  
24 question is whether the defendant was prejudiced. The  
25 question of prejudice doesn't focus on the label given to



1 the violation. It focuses on the substance of the  
2 statement and the context in which a statement is made,  
3 which is the remaining evidence in a case.

4 In either case, the question is was this error  
5 likely to have had a material effect on the jury. I  
6 agree. The question is whether this jury was prejudiced,  
7 whether the defendant was prejudiced before this jury by  
8 the error. That's not, I think, different from the answer  
9 I gave to Justice Stevens, because generally what you're  
10 trying to decide is what a reasonable jury would have  
11 taken in response to this sort of mix of evidence before  
12 it.

13 QUESTION: Yeah, but this jury might have gotten  
14 together, when you have this kind of a confession, might  
15 have gotten together in the jury room and said, look it,  
16 we have this confession. We don't even have to look at  
17 the rest of the evidence, don't you think this confession  
18 is enough. And they all say, yes, that's right. So the  
19 jury never really even considered the rest of the  
20 evidence.

21 MR. LARKIN: Well, but the same argument, Your  
22 Honor, could be made in response to any erroneously  
23 admitted evidence, and the Court has held in numerous  
24 cases throughout the past 2 decades, that erroneously  
25 admitted evidence is a classic example of where the

1 harmless error rule should apply, because the record is  
2 before the appellate court. There's no inquiry that has  
3 to made into what should have been put into the record.  
4 You have the entire record. And you can have cases where  
5 there is an eyewitness identification, where there is  
6 testimony by confederates who've now turned State's  
7 evidence, where there is videotaped testimony.

8 In the -- once of the cases cited in our brief,  
9 Brown v. the United States. There was a Bruton violation  
10 but the police had pictures of the defendant committing  
11 the crime. It's impossible, I think, to say in those sort  
12 of circumstances that a reasonable jury would  
13 automatically have said, the confession is all I need to  
14 look at. I can just disregard the rest of the evidence.

15 Our submission in this case simply asks the  
16 Court on this issue to say that appellate courts in the  
17 State and Federal system should be free to look into that  
18 question. We're not saying every confession will be  
19 nonprejudicial. We're just saying they should be allowed  
20 to make the inquiry.

21 Thank you.

22 QUESTION: Thank you, Mr. Larkin.

23 Mr. Collins, we'll hear now from you.

24 ORAL ARGUMENT OF STEPHEN R. COLLINS

25 ON BEHALF OF THE RESPONDENT

1 MR. COLLINS: Mr. Chief Justice, and may it  
2 please the Court:

3 In at least 25 opinions this Court has stated  
4 that a conviction can never stand when a coerced  
5 confession has been admitted at trial. And the Court has  
6 stated many times that the reason for this is that no  
7 civilized system of justice can condone the use of a  
8 coerced confession.

9 QUESTION: Mr. Collins, the Arizona Supreme  
10 Court found that this was extremely coercive, didn't they?

11 MR. COLLINS: Yes, it did.

12 QUESTION: Uh, what evidence supports that?

13 MR. COLLINS: The fact that the informant, Mr.  
14 Sarivola, told Mr. Fulminante that he was in jeopardy --  
15 his life was in jeopardy, that if he did not agree to  
16 confess in exchange for protection that Mr. Sarivola was  
17 going to let the other inmates go after Mr. Fulminante.  
18 So in order to save his own life, Mr. Fulminante had to  
19 confess. There was no other option. So, it was indeed  
20 extremely coercive.

21 QUESTION: Well, the other side disagrees  
22 mightily with that, doesn't it?

23 MR. COLLINS: I think the record will support my  
24 position.

25 QUESTION: And your position is borne out based

1 on the stipulated testimony that was given to the trial  
2 judge or does it necessarily rely on what was testified --  
3 what was the testimony at trial?

4 MR. COLLINS: The testimony at trial was also  
5 that -- okay, first of all at trial the coercion  
6 involvement confession was not considered greatly.  
7 Defense counsel did not pursue that. There was --

8 QUESTION: Do you -- do you interpret the  
9 testimony that was given to the judge by stipulation in  
10 connection with the suppression hearing fully sufficient  
11 to support the interpretation of the evidence that you've  
12 just given to Mr. Justice Blackmun?

13 MR. COLLINS: Yes, I do.

14 QUESTION: That Sarivola told Fulminate that  
15 Fulminate's life was endangered?

16 MR. COLLINS: Yes, and that he had to confess in  
17 order to be protected. The stipulated facts are enough  
18 alone, but this Court does not have to look at just the  
19 stipulated facts.

20 QUESTION: Well, I'm asking if you get that  
21 interpretation just from the stipulated facts?

22 MR. COLLINS: Yes, I do. But this Court can  
23 also consider the other interviews and the court  
24 testimony. And it was clear from both -- or from the  
25 informant, Mr. Sarivola, that indeed he did require a



1 confession in order for protection, in order to protect --  
2 or in order for him to offer protection to Mr. Fulminante.

3 In any event, this Court has held that no matter  
4 how overwhelming the other evidence in a case, even if  
5 there are other valid confessions, even when there have  
6 been five other valid confessions, that a coerced  
7 confession is not subject to harmless error analysis. It  
8 is an absolute prohibition. And this absolute prohibition  
9 reflects the original intent of the framers of our  
10 Constitution. One of the main reasons --

11 QUESTION: How -- how can -- isn't that a rather  
12 extravagant statement since the concept of harmless error  
13 had never even been developed at the time that the framers  
14 sat in 1787?

15 MR. COLLINS: I believe it is not, because  
16 Patrick Henry, who was largely responsible for the passing  
17 of the Bill of Rights, stated that the Bill of Rights was  
18 necessary so the authorities in this country could not at  
19 a later date allow the practices of the inquisitions in  
20 Europe, allow coerced confessions. And he said it had to  
21 be an absolute prohibition in the Fifth Amendment. So,  
22 he --

23 QUESTION: And then --

24 MR. COLLINS: -- did not specifically --

25 QUESTION: What part did Patrick Henry play in

1 drafting the Constitution?

2 MR. COLLINS: He is the one that advocated  
3 having a bills of rights and was largely responsible --

4 QUESTION: Well, he wasn't even there, was he?

5 MR. COLLINS: No, he did not sign it, but he is  
6 the one that insisted and was largely responsible for  
7 having it passed.

8 Justice Frankfurter in *Culombe v. Connecticut*  
9 discussed the fact that the founders of our country were  
10 well aware of the Star Chamber act that had occurred in  
11 England and were well aware of the inquisitions that had  
12 occurred on the continent of Europe. And because of those  
13 inquisitions, the framers of our Constitution insisted  
14 that we have a system of justice based on accusation and  
15 independent proof, not on inquisition. Patrick Henry --

16 QUESTION: Mr. Collins, do you think that our  
17 recent holding in *Perkins* against Illinois has any bearing  
18 on whether this confession was coerced?

19 MR. COLLINS: I think the bearing that *Perkins*  
20 v. Illinois has is the Court specifically noted there that  
21 the conduct was -- permissible by the undercover agent  
22 because there was no coercion. It was clear that this  
23 Court held or was stating that if there was coercion, it  
24 would be a different situation, and that is what we have  
25 here. We do have coercion.

1 QUESTION: Is, is there evidence in the record  
2 to the effect that the defendant was in danger while in  
3 prison from the other inmates?

4 MR. COLLINS: Uh, Sarivola did testify that,  
5 that Mr. Fulminante was in danger from the other inmates  
6 and in any event the fact that Mr. Sarivola himself told  
7 Mr. Fulminante that his life was jeopardy made Mr.  
8 Fulminante believe that his life was in jeopardy. So he  
9 had to confess. So subjectively Mr. Fulminante had to be  
10 in fear.

11 QUESTION: Well, I guess the State's position is  
12 that he could have sought protective custody.

13 MR. COLLINS: The State makes that claim but  
14 provides no evidence to support, and indeed the evidence  
15 tends to show it was not a viable alternative. When Mr.  
16 Fulminante was in prison previously, he could not  
17 psychologically handle the isolation of protective  
18 custody. He had to be transferred to a State psychiatric  
19 hospital and the psychologist at that hospital determined  
20 that Mr. Fulminante should remain at the State hospital  
21 until his term expired, because he could not handle being  
22 sent back to the prison, the general population, or to  
23 protective custody. So that was not a viable alternative.

24 In any event, stating that Mr. Fulminante could  
25 seek protective custody ignores the actually setting of

1 when and where the confession occurred. It occurred in  
2 the evening in the prison yard. If Mr. Fulminante had not  
3 confessed immediately that evening, quite likely he would  
4 not have made it out of the prison yard alive. That  
5 evening Mr. Sarivola came over to Mr. Fulminante and said,  
6 your life is in jeopardy. I will protect you from the  
7 other inmates if you confess.

8 QUESTION: Can you again tell me where that is  
9 in the record?

10 MR. COLLINS: I can't -- it would be during Mr.  
11 Sarivola's testimony.

12 QUESTION: Did he say your life -- your life is  
13 in jeopardy?

14 MR. COLLINS: I believe those were the exact  
15 words: your life is in jeopardy.

16 QUESTION: Uh-huh.

17 MR. COLLINS: You have to realize Mr. -- at  
18 least one statement Mr. Sarivola made. Mr. Sarivola  
19 stated six different ways of how he told Mr. Fulminante  
20 that he had to confess. But one of them was, yes, his  
21 life was in jeopardy.

22 QUESTION: Do you think the Arizona Supreme  
23 Court relied essentially on the Bram decision in drawing  
24 its conclusions about the coercive nature --

25 MR. COLLINS: No, I don't.



1 QUESTION: -- of that first confession?

2 MR. COLLINS: No, I do not think so at all.

3 They correctly applied the totality of the circumstances  
4 test. They relied on the other cases since Bram where  
5 this Court has held that where there is a coerced  
6 confession, the case must be reversed, automatic reversal.

7 The State contends that the State of Arizona was  
8 relying on the mere promise language of Bram. That is  
9 absolutely incorrect. It is taken out of context. If you  
10 read the opinion of the Arizona Supreme Court, they cite  
11 Bram only for the language "or other undue influence."  
12 They underline that language. They specifically do not  
13 underline "a promise." The Arizona Supreme Court clearly  
14 did not hold that this was a situation in which there was  
15 a promise. They considered it was violence -- a threat of  
16 violence.

17 QUESTION: Well, Bram talks about promises,  
18 doesn't it?

19 MR. COLLINS: Yes, it does.

20 QUESTION: And any inducement, no matter how  
21 small?

22 MR. COLLINS: Yes, it does.

23 QUESTION: Well, I suppose you're relying on  
24 that, too?

25 MR. COLLINS: No, I'm not. This Court has gone

1 in other cases and stated that not every promise, however  
2 slight, is an inducement.

3 QUESTION: Or any inducement.

4 MR. COLLINS: Or any inducement. But this Court  
5 has never backed off since Bram of any use of physical  
6 coercion to obtain a confession. This is not just a mere  
7 slight promise situation, so Bram is still applicable  
8 today as far as physical coercion.

9 QUESTION: You're not limiting the rule you  
10 propose we adopt to what I might call really coerced  
11 confessions. I mean, I assume you would continue to apply  
12 Bram to failure to give the Miranda warning which causes  
13 the confession to be deemed coerced, is that correct?

14 MR. COLLINS: No, I do not think we have to go  
15 that far with Bram, but when you get to the threat of  
16 physical violence in exchange for a confession, when it is  
17 that serious, it still applies.

18 QUESTION: Uh-huh.

19 MR. COLLINS: The situation we have in this  
20 case.

21 QUESTION: You don't -- you don't make that  
22 distinction in your brief that I recall, do you?

23 MR. COLLINS: I --

24 QUESTION: I mean, coerced confession is sort of  
25 a term of art, and it includes any confession that, for

1 example, doesn't comply with the requirements of Miranda.  
2 Do you think we can draw a line between some other  
3 confessions and a really coerced confession? Is that it?

4 MR. COLLINS: Well, many courts have talked  
5 about a violation of Miranda being a coerced confession  
6 and that was part of the problem with the original opinion  
7 of the State of Arizona -- the Supreme Court of --

8 QUESTION: Right.

9 MR. COLLINS: -- Arizona. They confused and  
10 coerced confessions that are in violation of Miranda with  
11 truly coerced confessions --

12 QUESTION: Uh.

13 MR. COLLINS: -- such as we have here. So a  
14 violation of Miranda is not what I'm considering a truly  
15 coerced confession, no.

16 QUESTION: You wouldn't agree with the  
17 Government I suppose that if the court had relied on this  
18 "any inducement however small or any promise." that the  
19 court was wrong?

20 MR. COLLINS: If it determined that it was a  
21 very slight promise. It's not an absolute rule that every  
22 slight promise requires automatic reversal. That's true,  
23 but this is not a slight promise case.

24 Patrick Henry stated that if this country ever  
25 came to condone the use of coercion to obtain confessions,

1 that, quote, "we are then lost and undone," end quote.  
2 And the prohibition against the use of coerced confessions  
3 was of such importance to the framers of our Constitution  
4 that the Fifth Amendment was written that no person shall  
5 be compelled at any criminal proceeding to be a witness  
6 against himself. It is an absolute prohibition. There  
7 are no exceptions. There certainly is not an exception  
8 saying, unless a judge later determines that it is  
9 harmless error.

10 And it is difficult to envision any exception  
11 that would have more horrified the framers of our  
12 Constitution than that exception, for with that exception  
13 it allows at given case the practices of the inquisitions  
14 in Europe to be condoned in this country if a judge or a  
15 panel of judges later determines that it was harmless  
16 error. In other words, whether the use -- the conduct  
17 involved in coerced confession is condemned or condoned  
18 would be decided on a case-by-case basis. The framers of  
19 our Constitution would not have tolerated that.

20 The State of Arizona is requesting this Court to  
21 nullify the intentions -- the original intent of the  
22 framers of our Constitution in considering the right  
23 involved, the one that carries as much weight as any right  
24 in our country. It would be expected that the State of  
25 Arizona would hav an extremely compelling reason. The



1 State does not. The only reason the State of Arizona has  
2 for requesting that this -- that harmless error analysis  
3 be applied, is so the State of Arizona does not have to  
4 retry Mr. Fulminante. So, the State of Arizona does not  
5 have to give Mr. Fulminante the trial that the State  
6 deprived -- the fair trial -- that the State deprived him  
7 of in the first place.

8 QUESTION: Mr. Collins, on retrial are -- is the  
9 issue of whether the second confession is -- may come into  
10 evidence, is that resolved now against the defendant  
11 conclusively?

12 MR. COLLINS: I believe it would be because of  
13 the final of the Supreme Court of Arizona.

14 And the inconvenience in retrying Mr. Fulminante  
15 carries slight weight here, because a retrial would take  
16 less than 2 weeks and if, as the State of Arizona claims,  
17 there is this overwhelming evidence of guilt, there should  
18 be little difficult -- difficulty for the State of  
19 Arizona.

20 And the State's position ignores the great  
21 inconvenience to the entire judicial system if this Court  
22 abandons the bright-line rule that a conviction cannot  
23 stand when there is a coerced confession at trial. If  
24 this Court abandons that rule, then the appellate court  
25 will not just be reviewing the limited portion of the

1 appellate record to determine if there actually was a  
2 coerced confession.

3 QUESTION: Well, Mr. Collins, you could say that  
4 about the harmless error doctrine generally, that it does  
5 dispense with a bright-line rule where any error was made  
6 reversible. But the judgment of certainly the State  
7 courts and of this Court for 20 years has been that in  
8 many cases harmless error is a permissible doctrine.

9 MR. COLLINS: That is correct regarding rights  
10 carrying lesser value.

11 QUESTION: Of course, it's a question of whether  
12 this right is to be properly numbered among that one  
13 bundle or another.

14 MR. COLLINS: To an extent that is true. This  
15 right is of the highest magnitude in our society.  
16 Therefore, the State needs a much more compelling reason  
17 than they would need as far as harmless error analysis  
18 being applied to some other right such as the Miranda --

19 QUESTION: Well, Mr. Collins, in the case of  
20 Milton against Wainwright, this Court indicated that  
21 admission of a confession allegedly obtained in violation  
22 of Fifth as well as Sixth Amendment rights could be  
23 harmless error.

24 MR. COLLINS: The Milton v. Wainwright --

25 QUESTION: And I think that case has been relied

1 on by some lower courts, has it not?

2 MR. COLLINS: Yes, it was relied on by the  
3 Arizona Supreme Court in its original opinion. That is  
4 how they got into trouble.

5 QUESTION: Uh-huh.

6 MR. COLLINS: The dissenting opinion on the  
7 second opinion of the Arizona Supreme Court still relied  
8 on Milton v. Wainwright, saying that it held that coerced  
9 confessions can be subject to the harmless error doctrine.  
10 Well, cases since Milton v. Wainwright by this Court have  
11 noted that it only dealt with Sixth Amendment rights not  
12 coerced confessions.

13 And, indeed, it would be rather strange that if  
14 Milton v. Wainwright reversed over 25 previous cases  
15 holding that harmless error doctrine could not be applied  
16 to coerced confessions. It would be rather strange if  
17 Milton v. Wainwright does not discuss one single case,  
18 does not discuss any of those 25 other cases. Obviously,  
19 if it's reversing a long string -- a long line of cases.

20 QUESTION: Do you think that 25 other cases  
21 simply have dicta to that effect or are they direct  
22 holdings for your position?

23 MR. COLLINS: Some of them are dicta. Many of  
24 them, probably a dozen, are direct holdings.

25 The judicial -- the inconvenience to the

1 judicial system would be great because when weighing  
2 harmless error, the appellate are required to review the  
3 entire record on appeal. Often that entails thousands of  
4 pages. It is a lengthy and complex process. So judicial  
5 economy dictates against the State's position.

6 Now, in dozens of cases involving coerced  
7 confessions this Court has never approved of the conduct  
8 involved when you have a coerced confession. If the Court  
9 now condones that conduct by applying the harmless error  
10 doctrine, it has the same practical consequences as if the  
11 Court approves the use of coerced confessions.

12 As this Court has stated many times that conduct  
13 must be condemned. To do otherwise is fundamentally  
14 unfair to the defendant, who is denied a fair trial. It  
15 undermines public confidence in the entire judicial  
16 system, because it has the appearance that the courts will  
17 look the other way when the police have coerced a  
18 confession from a suspect. It has the appearance of  
19 impropriety because it appears that the courts will look  
20 the other way when do not enforce or when the police  
21 violate the very laws that they are to enforce.

22 And it signals to the police that is they have a  
23 suspect but insufficient evidence to obtain a conviction,  
24 they have nothing to lose by obtaining a coerced  
25 confession. The conduct may later be condoned. This



1 should not be tolerated.

2 The matter presently before this Court is a  
3 classic case of the threat of violence being used to  
4 overbear the free will of a suspect who previously has  
5 refused to confess.

6 n 1982, Anthony Sarivola was a uniformed police  
7 officer in the New York City area. He was also working  
8 for the Columbo organized crime family. He was involved  
9 in loan sharking. He used violence to collect payments on  
10 extortionate loans made by the Columbo family. Because of  
11 this activity, in the fall of 1982, he was arrested by FBI  
12 Agent, Walter Ticano. Ticano knew of Sarivola's extensive  
13 and violate criminal history. Ticano knew that Sarivola  
14 was a corrupt and violent man. But despite this fact,  
15 Ticano chose to make Sarivola a paid Government informant  
16 and sent him after targeted suspects.

17 QUESTION: Do you think that he could hold off  
18 all the other inmates?

19 MR. COLLINS: Yes, there is a serious  
20 possibility that he could. Because of his connections  
21 with organized crime, the other inmates were afraid to do  
22 other than what he said. Also because of his power on a  
23 powerful prison commission, he did --

24 QUESTION: Is there evidence in the record to  
25 that effect?

1 MR. COLLINS: Not at trial but at the hearing I  
2 believe the prosecutor admitted that fact and in the  
3 interviews that is discussed -- interviews that were  
4 attached to a motion at the pretrial hearing.

5 Now, Agent Ticano knew that Sarivola had  
6 resorted to any means including the use of violence to  
7 obtain payments for the Columbo family. Ticano also knew  
8 that Sarivola would resort to any means necessary to  
9 obtain confessions from targeted suspects, that is, if  
10 Sarivola was paid well enough. And indeed the FBI did pay  
11 Sarivola well.

12 So it is entirely predictable that once Oreste  
13 Fulminante became a targeted suspect that we would have a  
14 coerced confession in this case. And I'm not claiming  
15 there is anything wrong with using undercover agents --  
16 using Government informants. That's a proper police  
17 procedure. But there is everything wrong when the  
18 Government sends a known violent criminal after a citizen.

19 QUESTION: But he wasn't so susceptible to Donna  
20 was he?

21 MR. COLLINS: Well, when the confession was made  
22 to Donna Sarivola, Anthony Sarivola was also present then.  
23 It is not fleshed out in the record how much of that  
24 effect it takes, but certainly there was an influence.

25 QUESTION: But I thought you said that you were

1 foreclosed to challenge the second rule for a confession?

2 MR. COLLINS: I'm afraid legally I am on the  
3 facts I disagree with how the Arizona Supreme Court ruled.

4 QUESTION: What if the defendant had asked for  
5 counsel -- and this is the only degree of coercion there  
6 is -- he -- they tried to interrogate him. He asked for  
7 counsel. They said all right, we'll send for counsel, but  
8 they continued to interrogate him before counsel arrived.  
9 Now we would consider that under our case as a coerced  
10 confession. Would that be the kind of coerced confession  
11 that you think harmless error would not apply to?

12 MR. COLLINS: I think, as I recall -- I don't  
13 recall the name of the case that this Court has applied it  
14 in similar situations to that, where --

15 QUESTION: Is that a really coerced confession  
16 or not a really --

17 MR. COLLINS: By no means.

18 QUESTION: That is not a really --

19 MR. COLLINS: No one would be as offended by the  
20 fact they confessed, because a lawyer wasn't next to him  
21 as they would if their very life was endangered. Having a  
22 lawyer is nowhere near the same value as saving your life.

23 And the problem with FBI Agent Ticano's conduct  
24 in this case is that no citizen can truly feel safe if at  
25 -- if at Ticano's whim he could send Sarivola, a violent

1 man, against any citizen. And if he pays Sarivola well  
2 enough, Sarivola is going to obtain a confession from just  
3 about any person.

4 Now for all of his extensive and violent  
5 criminal activity, Sarivola received a total sentence of  
6 60 days in prison, and he was serving this sentence in  
7 October of 1983 when he met another inmate named Oreste  
8 Fulminante. Rumors were spreading through the prison that  
9 Fulminante had murdered his stepdaughter. Because of  
10 those rumors, his life was indeed in jeopardy. The other  
11 inmates wished to harm him. Sarivola told Ticano of the  
12 rumors, and Ticano requested that Sarivola find out more  
13 information.

14 So Sarivola then employed the guise of  
15 friendship to obtain a confession. He befriended  
16 Fulminante, was with him everyday for weeks for several  
17 hours everyday. Sarivola on numerous occasions asked  
18 Fulminante if he committed the murder. Fulminante  
19 continually denied any involvement. So it was clear that  
20 Sarivola's attempt at deception was not going to work.

21 With 2 weeks left before Sarivola was to be  
22 released from prison, FBI Agent Ticano made a personal  
23 visit to the prison and specifically told Sarivola, quote,  
24 "get me the whole story," end quote. Clearly, Sarivola  
25 wanted a confession. And within hours of this directive,



1 Sarivola did get a confession. It was better than 24-  
2 hour service.

3 Now that same evening after the personal visit  
4 by Ticano, Sarivola approached Fulminante in the prison  
5 yard. And, again, he reminded him that his life was  
6 jeopardy, that he had to confess in order to get  
7 protection. Now the State of Arizona has conceded that  
8 this -- in their briefs -- that this conduct was extremely  
9 or was objectively coercive. However --

10 QUESTION: Can you tell us generally where in  
11 the transcript the testimony is that you're referring to  
12 now? I realize you said you don't have a page citation.  
13 Is it somewhere in the joint appendix?

14 MR. COLLINS: Yes, it would be during Sarivola's  
15 testimony. I believe approximately page 12 or so of his  
16 testimony.

17 QUESTION: Thank you.

18 MR. COLLINS: Now the State claims that even  
19 though objectively we have coercive conduct that this  
20 Court should find that it was not coercive for the fact  
21 that Mr. Fulminante did not testify that he was in fear.  
22 Well, first of all, this argument ignores the fact that  
23 the burden of proof is on the State. Mr. Fulminante is  
24 not required to produce any evidence.

25 QUESTION: Is that a Federal rule, Mr. Collins?

1 MR. COLLINS: Yes, this Court has held that the  
2 burden of proof is indeed on the State.

3 QUESTION: To prove a statement by the defendant  
4 admissible?

5 MR. COLLINS: Well, to prove that the conduct  
6 was coercive the burden was on the State.

7 QUESTION: Well, but other -- to prove it was  
8 not coercive, the State certainly has no motive to proving  
9 that conduct was coercive.

10 MR. COLLINS: Oh, yes.

11 QUESTION: It's in --

12 MR. COLLINS: That is their burden to prove that  
13 it is not coercive. I'm sorry, that's correct.

14 QUESTION: Not coerced.

15 MR. COLLINS: Not coerced. Yes.

16 Now the State's argument also ignores this  
17 Court's holding in Lee v. Mississippi in which the  
18 defendant denied confessing, but the Court still held that  
19 the confession was coerced. This Court held to do  
20 otherwise would be a denial of due process.

21 And the main flaw with the State's argument is  
22 it ignores the facts themselves. There was no reason for  
23 Sarivola to approach Mr. Fulminante, tell him his life was  
24 in danger, offer protection unless he was trying to obtain  
25 a confession.

1           Indeed, you should consider the relationship  
2   that Sarivola had with Ticano because of the informant  
3   relationship. Sarivola had the motive, intent, and  
4   certainly the plan to obtain a confession. It was not an  
5   accident or a mere coincidence, as the State claims, that  
6   Mr. Sarivola just mentioned the fact of Mr. Fulminante's  
7   life being in danger and the fact that he needed  
8   protection.

9           And there's no conceivable reason in this case  
10   why Mr. Fulminante would have continually denied any  
11   involvement in this murder for over a year and why he had  
12   denied for weeks any involvement to Mr. Sarivola despite  
13   constant questioning. There is only one conceivable  
14   reason why Mr. Fulminante confessed and that be -- and  
15   that was because he was in fear.

16           And indeed an order to avoid torture or death  
17   any person, whether innocent or guilty, in Mr.  
18   Fulminante's situation would have confessed. As the  
19   Arizona Supreme Court correctly held, quote, "this is a  
20   coerced confession in every sense of the word," end quote.  
21   The framers of our Constitution would never have allowed  
22   the use of this coerced confession. They certainly would  
23   not have done so merely to save the State of Arizona the  
24   inconvenience of giving Mr. Fulminante a fair trial.  
25   There has been no change in our society that today compels

1 us to abandon one of our most fundamental protections  
2 under the Bill of Rights.

3 If there are no further questions, I will sit  
4 down.

5 QUESTION: Thank you, Mr. Collins.

6 Mrs. Jarrett, you have 4 minutes remaining.

7 REBUTTAL ARGUMENT OF BARBARA M. JARRETT

8 ON BEHALF OF THE PETITIONER

9 MRS. JARRETT: Thank you, Your Honor.

10 Just briefly and I would direct the Court to  
11 page 63 of the joint appendix -- excuse me, page 83 of the  
12 joint appendix is the trial testimony of Anthony Sarivola  
13 in which he testifies that after he and the defendant are  
14 walking on the track and after the defendant, Fulminante,  
15 has been receiving rough treatment, Sarivola tells him,  
16 you have to tell me about it in order for me to give you  
17 any help. That is the sum total of this promise of  
18 protection, the implied promise of protection which  
19 Fulminante claims was so incredibly coercive.

20 QUESTION: Well, what about the language that  
21 the respondent here relies on and perhaps the Arizona --  
22 that you -- telling him his life was in danger?

23 MRS. JARRETT: Your Honor, that is not reflected  
24 any place in the record that I am aware of. The only  
25 reference --



1 QUESTION: There was no statement by Sarivola to  
2 Fulminante that his life was in danger?

3 MRS. JARRETT: No, not as reflected in  
4 Sarivola's testimony. There is one reference in the  
5 record to that, but it was made during oral argument on  
6 the voluntariness motion.

7 QUESTION: By a, a oral argument or by a lawyer?

8 MRS. JARRETT: Yes, the prosecutor did indicate  
9 he was paraphrase something of Sarivola's and paraphrased  
10 it in that manner, but it is the State's position that it  
11 was not any kind of concession. He may have misspoke  
12 himself about that.

13 QUESTION: At any rate, there's nothing in the  
14 record that supports the claim that Sarivola told  
15 Fulminante that his life was in danger? There's nothing  
16 in the testimony?

17 MRS. JARRETT: Nothing in the testimony, Your  
18 Honor, either the stipulated statement of facts or in the  
19 Sarivolas' testimony.

20 QUESTION: But what do you understand the  
21 testimony you called our attention to mean? You have to  
22 tell me about it for me to give you any help. What does  
23 that mean?

24 MRS. JARRETT: It means that if Fulminante needs  
25 help from the other prisoners who are giving him the rough

1 time, then he can call on Sarivola. But there's no  
2 indication, Your Honor, that this rough time that  
3 Fulminante was receiving was in fact any sort of physical  
4 thing that was being done to him. There's no indication  
5 that other than perhaps ostracizing him and ignoring him  
6 that the other prisoners are doing anything to him.

7 QUESTION: Do you think that's what they mean by  
8 a rough time in prison? They call you names?

9 (Laughter.)

10 MRS. JARRETT: Well, Your Honor, there's nothing  
11 in the record to indicate otherwise in this case, and it's  
12 certainly did not deter Fulminante from taking his evening  
13 stroll around the track with his friend Sarivola, so --

14 QUESTION: With his friend Sarivola?

15 MRS. JARRETT: That is correct, Your Honor. If  
16 he had truly been in danger, he would have perhaps been  
17 seeking help from prison authorities.

18 QUESTION: I don't know. Do you think that if  
19 you had the choice between going into isolation or walking  
20 around freely with your friend Sarivola, you'd say I'd  
21 rather be in isolation?

22 MRS. JARRETT: Well, that's a choice he had to  
23 make. And I think that's a very good point, Your Honor.  
24 He did have that choice.

25 QUESTION: Right.

1 MRS. JARRETT: And as defense counsel has --

2 QUESTION: I would think if Sarivola is -- I  
3 don't know if -- the mystery to me is how big was this guy  
4 anyway? But anyway --

5 (Laughter.)

6 QUESTION: -- he apparently felt perfectly safe  
7 when he was with Sarivola. And then I don't understand  
8 why you say he should have run and said -- asked the  
9 warden to put him in isolation if he's already got all the  
10 protection he needs?

11 MRS. JARRETT: Well, Your Honor, I'm saying that  
12 he had a choice if he's -- to a -- he could have continued  
13 to deny that he committed this crime.

14 QUESTION: Right.

15 MRS. JARRETT: He's not compelled to confess to  
16 this. He had the choice. Sarivola is saying, tell me  
17 what happened and I'll protect you, but if you don't tell  
18 me, there was no threat that anything would be done to  
19 him, that he would be in any danger from Sarivola.

20 CHIEF JUSTICE REHNQUIST: Thank you, Mrs.  
21 Jarrett.

22 The case is submitted.

23 MRS. JARRETT: Thank you, Your Honor.

24 (Whereupon, at 1:59 p.m., the case in the above-  
25 entitled matter was submitted.)

# CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#89-839 - ARIZONA, Petitioner V. ORESTE C. FULMINANTE

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BY

*Lois Anne Hulse*

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