SUPREME COURT, U.S. WASHINGTON, D.C. 20543

OFFICIAL TRANSCRIPT
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

PAGES: 1 - 50

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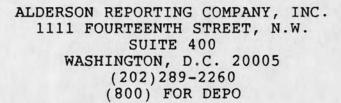


1	IN THE SUPREME COURT OF THE UNITED STATES
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3	ARIZONA, :
4	Petitioner :
5	v. : No. 89-839
6	ORESTE C. FULMINANTE :
7	X
8	Washington, D.C.
9	Wednesday, October 10, 1990
10	The above-entitled matter came on for oral
11	argument before the Supreme Court of the United States a
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	PROCEEDINGS
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, an
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 on
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. The second confession Mr. Fulminante made was 6 3 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 fiancee. 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 upon oral argument by the parties and the stipulated facts. The court ruled that the first confession, the one to the inmate informant, was voluntarily made. The court specifically found it was not the result of any promises, threats, or coercion by any Government agent. The court found it was fully voluntary. The court also found that the second confession to the inmate informant's wife was also voluntarily made and was not the fruit of the poisonous tree, as the defendant argued.

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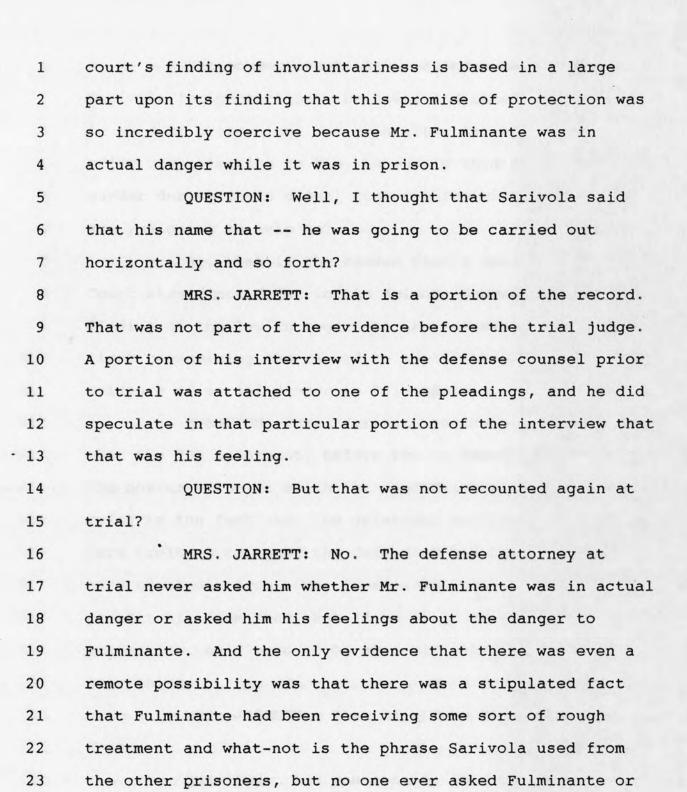
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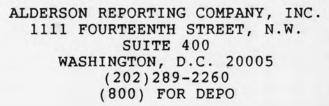
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1	On direct appeal, after Mr. Fulminante had been
2	convicted of first-degree murder, on his direct appeal, he
3	re-raised the voluntariness question. He claimed in the
4	Arizona Supreme Court that this this confession to the
5	inmate informant had 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
1,5	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
7	due deference to the Arizona Supreme Court's findings
8	that
9	QUESTION: But that court drew some inferences
.0	from the trial court record and on that basis made its
1	finding of coercion. It's a little hard for us to undo
2	that, don't you think?
.3	MRS. JARRETT: Your Honor, I respectfully
.4	disagree, and one reason I disagree is that the Arizona
.5	court determined as a matter of fact that Fulminante was
.6	in danger while in prison. And this is not borne out by
.7	the record. The only evidence in the record, and this is
.8	from Sarivola's trial testimony, is that it is possibly a
.9	prison or a prisoner who is known to have killed a
0	child or be a child murderer would be in danger while in
1	prison.
2	This was not a stipulated fact that was before
13	the trial judge when he made his finding, and there is
24	simply no evidence in the regarding that particular fact,
.5	so that is why the State contends that the Arizona's



Sarivola what this rough treatment consisted of. And the



record is just unclear on that.



24

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 no
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
	Q

1 Honor.

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

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

So, the Arizona court on one hand finds that



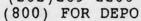


1	this person was person was compelled to confess. But on
2	the other hand, finds makes a finding that he is
3	bragging and relishing at the time that he's actually
4	confessing that. That is simply
5	QUESTION: Well, isn't it two different courts?
6	Isn't it the supreme court that found that it was coerced?
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

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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
	11

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

the third time he was in prison. He had six prior felony convictions and, interestingly enough, the first time he was in prison as a young man at age 26, when he felt fear of other inmates, all he did was ask to be put in protective custody and it was done. There is simply nothing to indicate that if he was actually in fear, he could have done that in this case. None of the prison authorities were apparently aware that he was receiving any kind of treatment, or this rough treatment was certainly not bad enough that he would complain to 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.
.3	In fact today, under modern principles of
4	appellate review, there is no longer any such
1.5	contradiction. A particular piece of evidence can be
.6	probative if it has any tendency to prove or disprove a
17	matter in issue. But the same piece of evidence can in
8	fact be harmless if it is generally insignificant in the
9	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
2.5	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 woul
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
	22



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 In deciding -- it depends on what you QUESTION: mean by what -- the error's harmless. You've described it 5 as though it means another jury -- a different jury would 6 7 have come to the same conclusion. But what if I think that the test of harmlessness should rather be would this 8 9 jury -- did this jury rely upon -- substantially rely upon 10 that evidence --MR. LARKIN: Well --11 12 QUESTION: -- in reaching its conclusion? And 13 if I believe that the latter is the test, there may be some sense in a special rule for coerced confessions, 14 15 because nothing is as -- is as conclusive as a confession. The jury might well not even look at the rest of the 16 17 evidence. They say, you don't have to worry about the rest. You have the man's confession right here. 18 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. 25 question of prejudice doesn't focus on the label given to

23

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

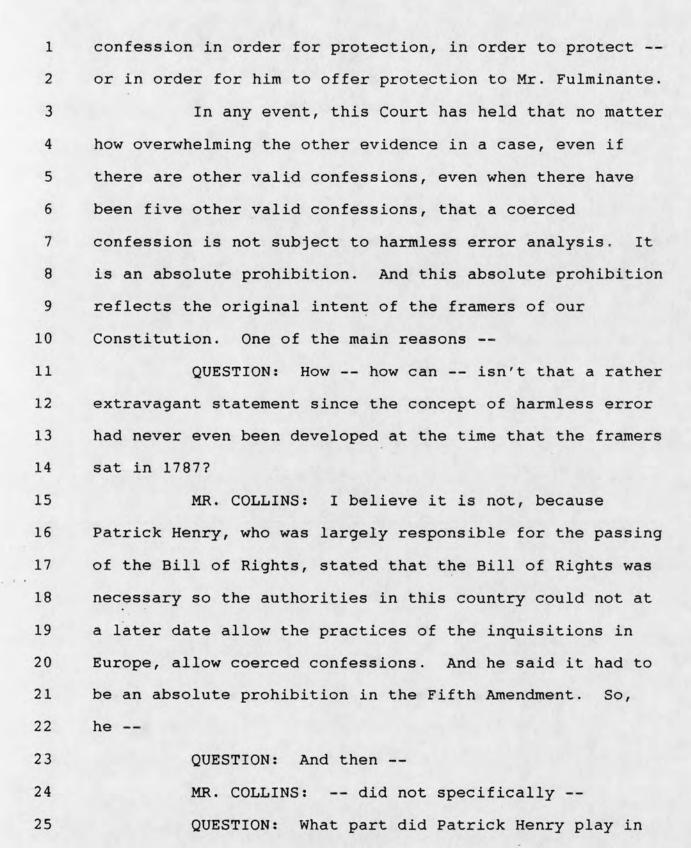
1	MR. COLLINS: Mr. Chief Justice, and may it
2	please the Court:
3	In at least 25 opinions this Court has stated
4	that a conviction can never stand when a coerced
5	confession has been admitted at trial. And the Court has
6	stated many times that the reason for this is that no
7	civilized system of 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

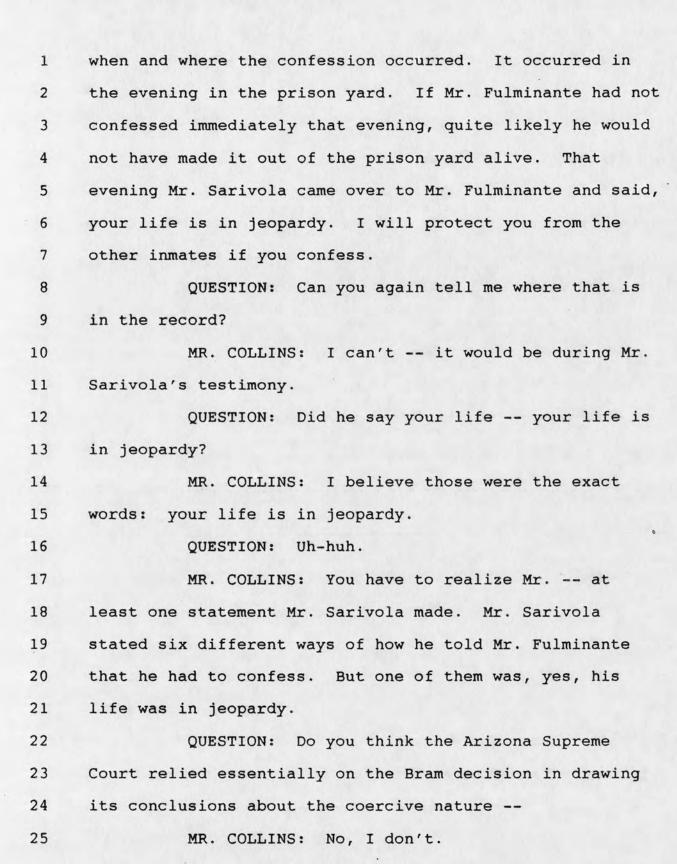




1	drafting the Constitution?
2	MR. COLLINS: He is the one that advocated
3	having a bills of rights and was largely responsible
4	QUESTION: Well, he wasn't even there, was he?
5	MR. COLLINS: No, he did not sign it, but he is
6	the one that insisted and was largely responsible for
7	having it passed.
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.

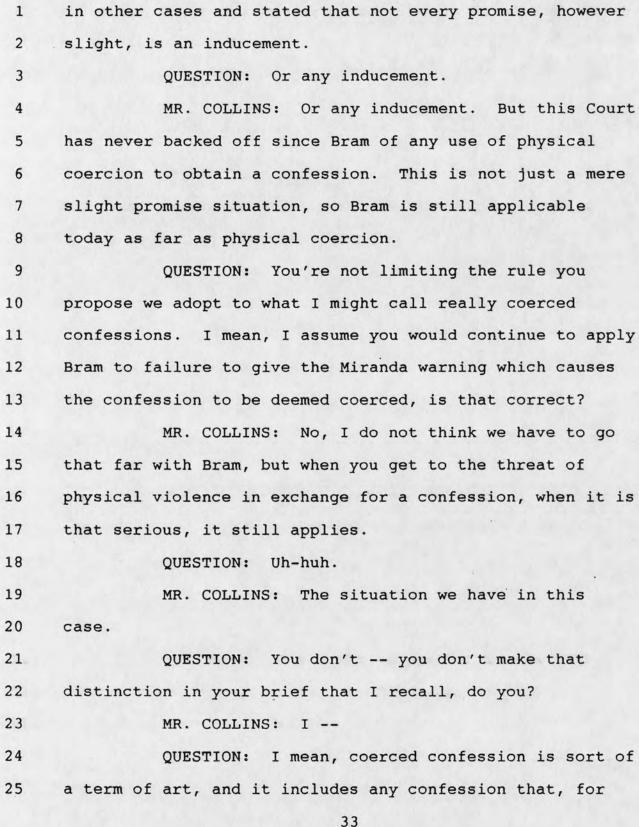
1	QUESTION: Is, is there evidence in the record
2	to the effect that the defendant was in danger while in
3	prison from the other inmates?
4	MR. COLLINS: Uh, Sarivola did testify that,
5	that Mr. Fulminante was in danger from the other inmates
6	and in any event the fact that Mr. Sarivola himself told
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



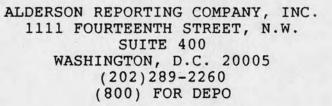




1	QUESTION: of that first confession?
2	MR. COLLINS: No, I do not think so at all.
3	They correctly applied the totality of the circumstances
4	test. They relied on the other cases since Bram where
5	this Court has held that where there is a coerced
6	confession, the case must be reversed, automatic 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
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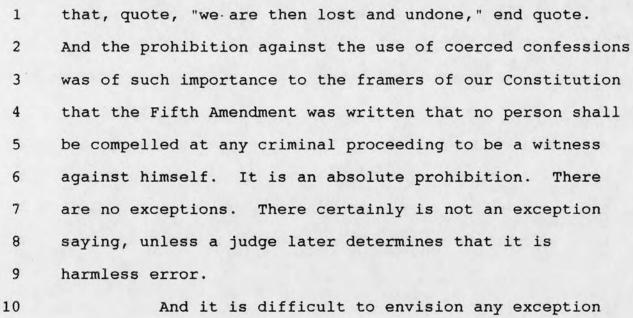


1	example, doesn't comply with the requirements of Miranda.
2	Do you think we can draw a line between some other
3	confessions and a really coerced confession? Is that it?
4	MR. COLLINS: Well, many courts have talked
5	about a violation of Miranda being a coerced confession
6	and that was part of the 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,









that would have more horrified the framers of our

Constitution than that exception, for with that exception it allows at given case the practices of the inquisitions in Europe to be condoned in this country if a judge or a panel of judges later determines that it was harmless error. In other words, whether the use -- the conduct involved in coerced confession is condemned or condoned would be decided on a case-by-case basis. The framers of our Constitution would not have tolerated that.

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

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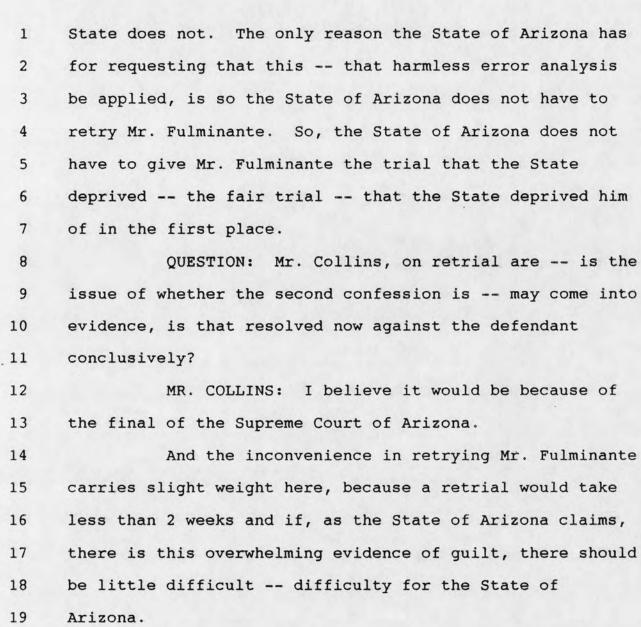
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20 And the State's position ignores the great

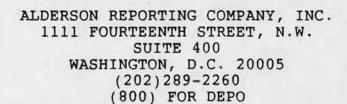
21 inconvenience to the entire judicial system if this Court

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
	27

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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
.0	doctrine, it has the same practical consequences as if the
.1	Court approves the use of coerced confessions.
2	As this Court has stated many times that conduct
.3	must be condemned. To do otherwise is fundamentally
4	unfair to the defendant, who is denied a fair trial. It
.5	undermines public confidence in the entire judicial
.6	system, because it has the appearance that the courts will
.7	look the other way when the police have coerced a
8	confession from a suspect. It has the appearance of

violate the very laws that they are to enforce.

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

impropriety because it appears that the courts will look

the other way when do not enforce or when the police

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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 or
10	extortionate loans made by the Columbo family. Because of
11	this activity, in the fall of 1982, he was arrested by FB
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
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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

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 man, against any citizen. And if he pays Sarivola well

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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 extremel
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'
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

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

not required to produce any evidence.

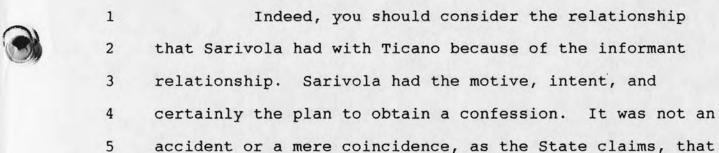
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1	MR. COLLINS: Yes, this Court has held that the
2	burden of proof is indeed on the State.
3	QUESTION: To prove a statement by the defendant
4	admissible?
5	MR. COLLINS: Well, to prove that the conduct
6	was coercive the burden was on the State.
7	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.



6 Mr. Sarivola just mentioned the fact of Mr. Fulminante's

7 life being in danger and the fact that he needed

8 protection.

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

And indeed an order to avoid torture or death any person, whether innocent or guilty, in Mr.

Fulminante's situation would have confessed. As the Arizona Supreme Court correctly held, quote, "this is a coerced confession in every sense of the word," end quote.

21 The framers of our Constitution would never have allowed

the use of this coerced confession. They certainly would

not have done so merely to save the State of Arizona the

inconvenience of giving Mr. Fulminante a fair trial.

There has been no change in our society that today compels

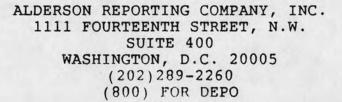
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1	us to abandon one of our most fundamental protections
2	under the Bill of Rights.
3	If there are no further questions, I will sit
4	down.
5	QUESTION: Thank you, Mr. Collins.
6	Mrs. Jarrett, you have 4 minutes remaining.
7	REBUTTAL ARGUMENT OF BARBARA 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
	48



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	OUESTION. Pight

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.)
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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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