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## ARIZONA v. FULMINANTE 111 S. Ct. 1246, (1991)

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In the first instruction for implying or presuming malice on the part of the defendant, the trial judge warned the jury that the presumption was a rebuttable one. However, the United States Supreme Court rejected the instruction despite this cautionary advice given by the judge. The Court's concern was that jurors, while considering evidence tending to rebut presumptions, continue to give weight to presumptive assertions rather than disregarding them in favor of the evidence alone.

As to the second instruction for implying or presuming malice on the part of the defendant, the court warned the jury that admission of evidence as to the circumstances surrounding use of a deadly weapon may remove the presumption. This instruction is inherently contradictory and confuses more than clarifies. As the Court pointed out, "language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity." *Francis*, 471 U.S. at 322.

### B. Harmless Error Standard

When an error has been committed in the finding of guilt of an accused, the United States Supreme Court has ruled that a test may be applied to determine whether it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman*, 386 U.S. at 24 (emphasis added). The *Chapman* test is a two step analysis in which the court first must ask what evidence the jury actually considered in reaching its verdict. Then, the court must weigh the probative force of that evidence as against the probative force of the error standing alone.

The Supreme Court of South Carolina, however, applied a different analysis in its treatment of harmless error. The state court's goal was to determine whether it was beyond a reasonable doubt that the jury would have found it unnecessary to rely on the unconstitutional presumptions. See *Rose v. Clark*, 478 U.S. 570, 583 (1986) (holding that *Sandstrom* error can be harmless). Based on this language, the state did not find the constitutional error in its instruction to be a reversible error.

The United States Supreme Court in this decision determined that the Supreme Court of South Carolina misapplied the *Rose v. Clark* standard. The inquiry should not have been whether it was unnecessary for the jury

to rely on the presumption; rather, to determine that the jury did not rely on the presumption and thus no error resulted.

The Court, having set up the parameters of the test, examined the entire record to determine what evidence the jury considered regarding intent, removed from the presumptions themselves. It found that assertions of Davis' "lunging" and inflicting "wounds" were unsubstantiated by the record. The mother died of a single wound and no other evidence tended to prove Davis' malice towards her. On this evidence, the Court concluded that the state court could not infer beyond a reasonable doubt that the presumptions did not contribute to the jury's finding.

### C. Impact

Attorneys defending capital clients may learn important lessons from this case. Harmless error is a difficult standard to meet. Given a particular fact pattern, a *Sandstrom* error may be harmless under the *Rose v. Clark* rule. See also *Waye v. Townley*, 871 F.2d 18 (4th Cir. 1989). However, defense attorneys should recognize that an error will not automatically be harmless. Often, even when there is other evidence of guilt, the evidence may not meet the harmless error analysis. For additional analyses of the treatment of harmless error, see case summary of *Arizona v. Fulminante*, Capital Defense Digest, this issue, and case summary of *Satterwhite v. Texas*, Capital Defense Digest, Vol. 1, No. 1, p. 14 (1988) (errors found not to be harmless).

Another important lesson is to review carefully the jury instructions to be given at trial. *Yates* may support a challenge to the Virginia second degree murder instruction on malice. That instruction also raises a presumption but adds that the presumption disappears if a reasonable doubt is raised. The reasonable doubt caveat can be said to contradict but not explain the presumption. This may create the same confusion that the court condemned in *Yates* and lead to a successful challenge to the Virginia malice instruction for defense counsel.

Summary and analysis by:  
Laura J. Fenn

## ARIZONA v. FULMINANTE

111 S. Ct. 1246, (1991)  
United States Supreme Court

### FACTS

Defendant Oreste Fulminante was a suspect in the murder of his 11-year-old stepdaughter, who was killed on or around September 14, 1982 in Arizona. No charges were filed against him, and Fulminante left for New Jersey where he was convicted on unrelated federal charges and incarcerated in a federal prison in New York. While in the penitentiary, Fulminante became friends with a former police officer named Anthony Sarivola who was serving time for loansharking. Sarivola was also an informant for the F.B.I. and was posing as an organized crime figure.

Sarivola learned that Fulminante had been suspected of his stepdaughter's murder. The F.B.I. instructed Sarivola to find out more information concerning Fulminante. In October of 1983, Sarivola offered to protect Fulminante from the rough treatment he was beginning to receive from the other inmates, but told Fulminante that he would have to know about Fulminante's involvement in the stepdaughter's murder. Fulminante then admitted to Sarivola that he had taken the stepdaughter to the desert, choked her, sexually assaulted her, made her beg for her life, and then shot her in the head. Fulminante was released from prison in May of 1984 and made a

second confession to Sarivola's fiancée. Fulminante was indicted for the first-degree murder of his stepdaughter on September 4, 1984.

Fulminante moved to suppress the first confession because it was coerced, and the second because it was the fruit of the first confession. The trial court allowed the confessions, convicted Fulminante of first degree murder and sentenced to death. The Arizona State Supreme Court, upon motion for reconsideration, found the confession was coerced, decided that the use of a coerced confession could not be harmless error, and ordered a retrial without use of the confession to Anthony Sarivola. The Supreme Court granted certiorari upon appeal by the State of Arizona.

### HOLDING

In an opinion by Justice White, the Court affirmed the Arizona State Supreme Court's decision and held that Fulminante's confession to Anthony Sarivola was coerced. In a second opinion written by Chief Justice Rehnquist, the Court reversed the reasoning of the Arizona high court that use of a coerced confession is always reversible error, and instead held that admission of an involuntary confession is subject to harmless error analysis. *Arizona v. Fulminante*, 111

S. Ct. 1246 at 1265. In the Rehnquist opinion, the Court differentiated between potentially harmless errors which affect only the procedure of the trial, and structural errors which violate due process requirements so severely that their commission can never be harmless. Formerly, coerced confessions were generally held to be in the latter category and so automatically invalidated the conviction. *Payne v. Arkansas*, 356 U.S. 560 (1958). The portion of the opinion authored by the Chief Justice held that coerced confessions, once considered institutional violations of the accused's due process rights, now may be scrutinized under the more lenient "harmless error" standard. The portion of the Court's opinion delivered by Justice White applied the harmless error standard, held that the confession to Sarivola was not harmless under these facts, and affirmed the Arizona supreme court's reversal and remand of Fulminante's conviction.

#### ANALYSIS / APPLICATION IN VIRGINIA

*Arizona v. Fulminante* is important because it changes what had been a well established principle of criminal law. For nearly half a century any reliance on a coerced confession invalidated the conviction even if there existed enough evidence apart from the confession to convict the defendant. See 111 S. Ct. at 1253 (dissenting opinion of Justice White providing history of decisions leading up to this case). The majority specifically reversed this tenet of law: "It is evident from a comparison of the constitutional violations which we have held subject to harmless error, and those which we have held not, that involuntary statements or confessions belong in the former category." *Id.* at 1265.

However, the majority decision authored by Justice White applied the harmless error ruling to Fulminante's case and held that the admission of the confession to Sarivola in the prison was not harmless. *Id.* at 1257. The Court noted that in order to determine that a constitutional error is harmless, the Court must be satisfied on *de novo* review that the federal constitutional error was "harmless beyond a reasonable doubt". *Id.*, citing *Chapman v. California*, 386 U.S. at 24 (1967). The Court expressly stated that a confession where the defendant discloses the motive and means of a crime requires the

reviewing court to "exercise extreme caution before determining that the admission of the confession at trial was harmless" because of the temptation it creates in the mind of the jury to find guilt. 111 S. Ct. at 1258. In addition to looking at the prejudicial effect of the confession upon the fact finder, the Court looked at the likelihood that the confession prejudiced the defendant at the sentencing phase of the trial. The Court also pointed out that in Fulminante's case, the sentencer relied on the defendant's confession to establish otherwise uncorroborated aggravating factors necessary for a capital sentence. *Id.* at 1260.

The importance of this decision on the capital defense bar is not inconsequential, especially when taken in conjunction with other recent Supreme Court Decisions. The Court, even as it scales back the scope of reversible error, is maintaining real constitutional protections through strict scrutiny of harmless error issues. *Yates v. Evatt*, 111 S. Ct. 1884 (1991) and *Satterwhite v. Texas*, 486 U.S. 249 (1988), with *Fulminante*, demonstrate the difficulty of the state's showing that a constitutional error is harmless. In *Yates v. Evatt* the Court held that unconstitutionally prejudicial jury instructions shifting the burden of proof to the defendant are subject to harmless error review. The state in this case, however, was unable to meet the burden of showing that the error was not harmless, and relief was granted. Likewise, *Satterwhite v. Texas* held that violations of a sixth amendment right to counsel during psychiatric examination are subject to harmless error evaluation, but that the state had failed to carry its burden of proof.

Counsel should be aware that although they may encounter harmless error evaluation of constitutional error on direct appeal, it is by no means a losing position. The Supreme Court has consistently held against the state if it cannot demonstrate that the error was harmless beyond a reasonable doubt. A defendant's case is even stronger, and counsel should argue even more forcefully, when the constitutional error violates fundamental rights. As the division of the Court in this case demonstrates, where errors affecting these rights are concerned, defendants may successfully argue for relief.

Summary and analysis by:  
Peter T. Hansen

#### SCHAD v. ARIZONA

111 S. Ct. 2491 (1991)  
United States Supreme Court

#### FACTS

A highway worker discovered the decomposed body of Lorimer Grove, strangled with a rope around his neck, on the side of an Arizona highway. The victim had last been seen eight days earlier driving his Cadillac. The next month, New York State Police stopped Edward Schad, Jr. for speeding in Grove's Cadillac. Schad explained that he was transporting the car for a friend named Larry Grove. Schad was later arrested in Utah for a parole violation and possession of a stolen vehicle. Police found several of the victim's belongings in the Cadillac, in Schad's wallet, and in an abandoned rental car which Schad had rented several months earlier and never returned.

The applicable Arizona statute defines first degree murder as "murder which is . . . wilful, deliberate or premeditated . . . or which is committed . . . in the perpetration of, or attempt to perpetrate . . . robbery." Ariz. Rev. Stat. Ann. § 13-452 (Supp. 1973). Schad was convicted of first degree murder and sentenced to death. The conviction was set aside on collateral review and remanded for further proceedings. 142 Ariz. 619, 691 P.2d 710 (1984). At Schad's retrial, the prosecutor advanced theories of both premeditated murder and

felony-murder in support of conviction and the death penalty. Schad's defense was that the circumstantial evidence proved him at most a thief, but not a killer. Schad's attorney requested a jury instruction on the lesser-included offense of theft, but the court refused. The court did, however, instruct the jury on the offense of second-degree murder. The court also instructed the jury that a verdict convicting the defendant of first degree murder had to be unanimous, but the court did not require unanimity as to whether the defendant was guilty of premeditated murder or felony-murder. Under the court's instructions, the jury found Schad guilty and sentenced him to death.

At his appeal, Schad claimed, *inter alia*, that his federal constitutional rights under the sixth, eighth, and fourteenth amendments were violated, in that: (1) the court failed to require unanimity regarding the separate crimes of premeditated murder and felony-murder, and (2) the court failed to instruct the jury on robbery, a lesser-included offense of felony-murder, as required by *Beck v. Alabama*, 447 U.S. 625 (1980). The Arizona Supreme Court rejected Schad's arguments and affirmed the second conviction. *Schad v. State*, 163 Ariz. 411, 788 P.2d 1162 (1989). As to the defendant's first claim, the court ruled that first-degree murder was "one crime regardless whether