IN THE COURT OF APPEALS OF IOWA

No. 1-163 / 90-44

FILED
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CLERK SUPREME COURT

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STATE OF IOWA,

Appellee,

vs.

MATIAS RIOS QUINTERO,

Appellant.

Appeal from the Iowa District Court for Scott County, David J. Sohr and Max Werling, Judges.

Defendant appeals his convictions for possession of cocaine with the intent to deliver and for fifth-degree theft on grounds that his involuntary statements were erroneously admitted into evidence. **REVERSED AND REMANDED.**

Linda Del Gallo, State Appellate Defender, and Shari Barron, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Bruce Kempkes, Assistant Attorney General, William E. Davis, County Attorney, and Joe Grubisich, Assistant County Attorney, for appellee.

Heard by Donielson, P.J., and Schlegel and Hayden, JJ., but decided en banc.

SCHLEGEL, J.

Defendant Matias R. Quintero was convicted by a jury of conspiring to possess, manufacture, or deliver a controlled substance with intent to manufacture or deliver a controlled substance, Iowa Code § 204.401(1)(a), and fifth-degree theft, Iowa Code § 714.1. The only issue before us is whether the trial court erred in refusing to suppress statements made by Quintero which allegedly were obtained through police coercion. We reverse the judgment of conviction and remand for a new trial.

(1)

Davenport police received anonymous information that Quintero had moved from Minnesota to the Quad Cities and had been making trips to Texas to pick up cocaine. The caller gave a description of Quintero's car and license plate number. Using this information, police traced Quintero's address and began surveillance. The residence was actually rented in the name of Quintero's nephew, Johnny Briones. After several days with few results, Quintero's car disappeared for three days. Police somehow learned that three individuals, Johnny and Rauel Briones and their juvenile brother, M. Briones, had gone to Texas to pick up cocaine and would return on April 8. The Briones brothers are Quintero's nephews.

Police stopped and searched the Quintero car when it returned to the Quad Cities. Police discovered 247.33

grams of cocaine and arrested the three Briones brothers. Police then obtained a search warrant for Quintero's home. Quintero had $4,000 and a number of notes with names on them. Police found a small scale, Inositol (which an officer testified to be a cutting agent used for cocaine), and another scale in Johnny Briones' bedroom. Police found a third scale in an apartment to which Quintero was in the process of moving. Police took Quintero into custody and interviewed him.

Quintero testified that police Detective Lindbom talked to him for thirty minutes before conducting a taped interview. Quintero testified at trial:

> **Q:** What conversation took place during that time? **A:** Well, [Detective Lindbom] told me . . . how things were, you know. . . . [H]e told me that he had . . . my three nephews, and that I was going to have to, you know, give him some kind of a testimony . . . . He told me that my nephews have told him that I was involved in this drug deal--dealing. Okay? And I say, no, sir, I'm not involved. Okay? Then he told me, well, listen, we got your little nephew, and I talked to your older nephews--which are Rauel and Johnny . . . . So they wanted to save [M.], [who] . . . was about 16 years old, almost 17 at the time. So I said, what do you want me to do? I want you to, you know, tell me everything you know that--what you know. I say, I don't know nothing about this. They say, . . . if you don't tell me exactly, you know, what your part is, you're going to be directly responsible for sending your nephew to Fort Madison to penitentiary. And there, . . . they going to rape him. They going to do stuff, you know. So I was forced to accept, you know. I had no other choice. Prior to this, when they take you down to the police station over here, the cells are lined this way, you know, so you can hear everything what's going on there. So when they got me there, they were talking. They already interview them.
>
> **Q:** Who was talking? **A:** Rauel, [M.], and Johnny. They were talking, you know, so I listen

> to everything what they were saying. So I got my information mainly from them. So . . . when you hear in the tape that I say, well, it will be very cruel of you to pin [M.], you know, in this, because they had already, you know, told me that I was going to be responsible you know, if I didn't take the rap, . . .for sending him to the penitentiary. In those words, you know, he -- he terrorize me with my nephew. And I say, well, I think I'm a man, you know, I already lived enough so I will take it. So I just start telling him what I hear the guys saying in the cells. That's why there is so much confusion in the tape in my part -- that I have to think, you know, and come back, and think and come back.

Asked whether he had told Quintero that M. Briones would be transferred into adult court if Quintero did not give information, Detective Lindbom replied:

> I don't recall exactly word-for-word that conversation in there. We discussed what was going to happen. I believe I told him I couldn't be sure. I don't have any way to predict what's going to happen to anybody.

Quintero eventually signed a statement waiving his rights and made the taped interview. In the interview Quintero states that he gave his nephews $5,000 and told them to pick up the cocaine from somebody named Poncho in a Houston bar. At one point in the interview, the Detective Lindbom questioned Quintero as follows:

> **Q:** Yeah, everything you've told me so far is pretty much true except for -- **A:** -- Except for the person?
> **Q:** Yeah. **A:** (Pauses.) It would be too -- too -- cruel of me to -- you know -- to -- ah, ah -- some other -- ah --
> **Q:** No, what would be cruel is for a seventeen-year-old boy to go to prison. That would be cruel, and that is what is going to happen here. Unless we get the straight talk here. **A:** I don't want that to happen.
> **Q:** Well, you've got a pretty good idea what goes on in prison. You ever been in prison before? **A:** Well -- ah -- no, sir.

Q: You've got a pretty good idea what goes on? **A:** Oh, I think --

Q: It'd be bad enough for a grown man like yourself to go, but a young kid like that, that -- that's not going to be too good for him. You know, you've been around the block enough you can probably can take care of yourself, but he can't. **A:** Well, I -- ah --

Q: I don't know about the other two guys. **A:** I was a fighter for eight years professionally, you know. You know where -- ah --

Q: Okay, well, he don't look like no fighter. **A:** That old -- ah, ah -- jail, I mean, the old police station used to be? You know, where over there -- ah -- downstairs in the basement -- I used to fight over there.

Q: Well, the young guy, [M.], he don't look like no fighter. **A:** No, sir.

Q: He ain't very big. **A:** No, sir.

Q: He maybe weighs 130 pounds if he's wet. **A:** I know. I know.

Q: So, when he goes to prison, he ain't goin' to do too good. **A:** Well --

Q: So, if you don't want to -- You know, I can understand you saying, you know, "I'm not going to," you know, "sell anybody out here." But you're not. You're saving his ass is what you're doing. (Pauses.) If we get cooperation from you -- we've got cooperation from the other three -- you're the fourth link in the chain here -- we need all four. You're either all four going to cooperate, or you're all gonna go. (Pauses.) If you want to save the kid, maybe get him, you know, so he's got a little bit of life left ahead of him, you can. 'Cause you admitted to me yourself, you know, we've got you dead to rights -- **A:** Oh, yeah, oh, yeah, yeah, yeah --

Q: We've got everyone of you -- **A:** Oh, yeah, yeah -- When they got me -- when -- they went in get me, you know, I didn't, you know --

Q: Okay, well, (hits table) you're man enough to admit that -- that they've got you. So, why ruin that kid's life? **A:** (Clears throat.)

Q: You know, he's trying to be as brave as he can, but he's scared, and he should be. The other two guys are worried about, you know, their brother and what's going to happen to him. (Pauses.) At the conclusion of this interview, when we get done here, you know, if we come up with what we need to here, we're going to see about -- the little guy's in a cell here -- we're going to see about taking him over to a juvenile holding facility where he doesn't have to be with adults. (Pauses.) 'Cause by the time this goes

to trial he's going to be an adult, and he's gonna be right up there along with the other three of you. You can go before the judge if you want and say, "It's all my fault," but we've got taped statements from all three of 'em, same like I'm gettin' from you now, but they're admittin' they were in on it. **A:** Well -- ah -- they, they, they are in on it --

Q: Okay, the young guy was saying that too. **A:** What? That he --

Q: [M.], yeah -- he gave -- we talked to him for half an hour here. **A:** (Laughs.) He's not.

Q: Hmm? **A:** He's not, though.

Q: That's what he's saying. And that's what the other two said. **A:** He was in the car, but he's not.

Q: (Pauses.) What you need to decide is if you're going to cooperate here. And that's the only way that's going to help him out. **A:** (Pauses.) So, you -- you -- you guys go down -- down to Houston, or what?

Q: We're not going anywhere. We just want to know what -- we want to know the whole story here. I don't know what's going to happen down in Houston. I don't know if Houston, Texas, police'll do something with it down there. Doesn't make any difference to me. We've got four people right here. We've got all that money. We've got all the coke. We got the car. You know, we got it all. Our case is pretty much open and shut right here; we're just trying to close up the loose ends. (Pauses.) So when you go to court and that judge's gonna hear all this -- the same story here, he's going to ask you the same thing. Okay? When it comes to that part of where you went to buy it at, he's going to be aware that the other three people have already said -- And when they come to you -- "Well, I'm not telling you." Don't you think it's going to piss him off a little bit? **A:** I suppose.

Q: I know. **A:** I -- I -- ah --

Q: Or if there's twelve people on a jury there, you know, twelve men and women, you know that -- **A:** I think he's going to be very mad at the three of us --

Q: And the only time they have anything to do with drugs is when they go to the pharmacy to get something, you know. How do you think they are going to hear this? They're the one's who decide what happens to you. **A:** (Pauses.) Well, I know this person named Poncho. That's all. We all know him.

Quintero unsuccessfully sought to have his incriminating statements suppressed.

At trial, Quintero testified that he had no part in buying or selling cocaine. He explained that he had repeated facts he had overheard his nephews discussing. Quintero and his cousin, Macedonio Quintero, both testified that the cousin had loaned Quintero a large amount of money to open a Mexican food stand. Both also testified that he earned money as a professional singer. Quintero further testified he was living with Johnny Briones until he got his own apartment and that he had loaned the car to his nephews because they were going to visit their parents in Houston.

In rebuttal, the State offered testimony from Rauel Briones, who, like his brothers, had accepted a plea agreement. Briones testified that Quintero had given them money to buy cocaine in Texas and that they had purchased it from a man named Poncho at a Houston restaurant.

(2)

We first address the State's waiver arguments. Citing State v. McCowen, 297 N.W.2d 226 (Iowa 1979), the State argues that it may raise the issue of whether the defendant's motion to suppress was untimely and, therefore, waived. Indeed, we may uphold a ruling of the district court on the admissibility of evidence on any ground appearing in the record, whether urged before the district

court or not. Id. at 227 (citations omitted). The court in McCowen, however, went out of its way to note that the case before it was unaffected by a recent amendment to the Rules of Criminal Procedure. Under the rule applied in McCowen, if the district court wished to grant relief from the waiver, it was required to make an extension of time for filing the motion, but the current rule 10(3) allows the court to grant relief from the waiver. It appears that the district court did so in this case and addressed the merits of the issue and that the State has acquiesced in this. Moreover, the Iowa Supreme Court has recognized that, although late filing may be a sufficient ground for upholding the trial court's admission of evidence, this is a type of fundamental error which can materially prejudice a defendant's case. See State v. Rhiner, 352 N.W.2d 258, 261 (Iowa 1984).

The State further contends that Quintero failed to raise the issue of the voluntariness of his statements before the district court. This argument is simply unsupportable in the record. Quintero's motion urged that his fifth amendment rights had been violated. His evidence, as exemplified by the excerpt included above, was specific on the issue of coercion. In overruling the motion, the district court explicitly recognized that Quintero sought to have his statements suppressed. The court was not required to give its reasoning, State v. Boelman, 330 N.W.2d 794, 795 (Iowa 1983), and we reject the

State's argument that we must draw some inference from the court's failure to make a specific conclusion.

(3)

Turning to the merits of the suppression motion, we consider the totality of the circumstances, the equivalent of a de novo review. Rhiner, 352 N.W.2d at 262. The Iowa Supreme Court in State v. Cullison set forth the principles which we must apply when, as here, the defendant challenges the admission into evidence of allegedly involuntary inculpatory statements:

> There is no talismanic definition of voluntariness. The "totality of the circumstances" encompasses the characteristics of the accused and the details of the interrogation process. The court determines the facts surrounding the inculpatory statement, assesses their psychological impact on defendant, and evaluates the legal significance of defendant's reactions.
>
> Defendant's choice to confess must be essentially free and unconstrained with his will not overborne and his capacity for self-determination not critically impaired.
>
> When, as here, the inculpatory statement is the result of custodial interrogation absent legal representation for defendant the State has the burden of proving the statement was voluntary. That burden is heavy, although it is by a preponderance of evidence and not beyond a reasonable doubt.

227 N.W.2d 121, 127 (Iowa 1975) (citations omitted). State v. Hodges noted many of the factors bearing on the issue of voluntariness:

> These include the defendant's knowledge and waiver of his Miranda rights; the defendant's age, experience, prior record, level of education and intelligence; the length of time defendant is detained and interrogated; whether physical

> punishment was used, including the deprivation of food or sleep; defendant's ability to understand the questions; the defendant's physical and emotional condition and his reaction to the interrogation; whether any deceit or improper promises were used in gaining the admissions; any mental weakness the defendant may possess.

326 N.W.2d 345, 348 (Iowa 1982). In the present case, Quintero signed a form waiving his Miranda rights. He was inexperienced with the legal system. There is no evidence of protracted interrogation or physical punishment. Quintero speaks with an accent, but his English is clear, and his answers appropriate. Having heard the interview, we reject the State's contention that Quintero was relaxed and jovial. In fact, Quintero, who chain-smoked throughout the interview, was tense and laughed the nervous laugh of someone who believed himself to be in serious trouble.

We think deceit and improper promises were made here to obtain statements involuntarily. The record shows that there was a conversation between Detective Lindbom and Quintero before the taped statement. The conversation pertained to the effect Quintero's statement would have on mitigating M. Briones' punishment. The State's argument to the contrary is thoroughly unsupported, indeed, contradicted by the record. Although the parties dispute the substance of the conversation, it cannot escape notice that defendant's version of events is consistent with tactics used and the type of pressure put on him in the taped interview. Compare ante at 3 with ante at 4-5.

The taped interview demonstrates that the officer was deceitful in several respects. Although the juvenile court had exclusive jurisdiction over the sixteen-year-old, Iowa Code § 232.8, subject to a full hearing waiving the juvenile court's jurisdiction, Iowa Code § 232.45, the officer suggested that it was Quintero's statement that would affirmatively prevent his nephew from being under the juvenile court's jurisdiction. The officer's statement that the juvenile would be an adult by the trial is likewise deceitful given speedy trial requirements and the fact that the juvenile court retains jurisdiction of an adult who commits a delinquent act prior to having become an adult. Iowa Code § 232.8(1).

The record further shows that the officer attempted to scare incriminating statements out of Quintero. The officer speculated that both Quintero and his nephew would be harmed in prison. There is a suggestion that the boy could be abused either physically or sexually. The officer goes on to speculate that, unless his statements matched those of his nephews, he would cause the judge and jury to be angry with him, thereby suffering greater punishment. Given our indeterminate sentencing system, this too was deceitful.

In Hodges the supreme court stated:

> An officer can ordinarily tell a suspect that it is better to tell the truth. The line between admissibility and exclusion seems to be crossed, however, if the officer also tells the suspect what advantage is to be gained or is likely from making a confession. Ordinarily the officer's

> statements then become promises or assurances, rendering the suspect's statements involuntary.

326 N.W.2d at 349 (citing State v. Mullin, 249 Iowa 10, 16-17, 85 N.W.2d 598, 601-02 (1957)). By intimating that there were multiple benefits to be gained by confessing, both for defendant and his nephew, the officer crossed the line and rendered Quintero's statements involuntary. We are not persuaded that the State has carried its burden to show by a preponderance of evidence that the statements were voluntary.

(4)

Last, we consider the State's harmless error argument. The State contends that there was simply overwhelming evidence to establish Quintero's guilt beyond a reasonable doubt. We find this issue was raised for the first time in the State's brief before this court. We consider issues not raised at the trial court level waived. State v. Olson, 249 Iowa 536, 555, 86 N.W.2d 214, 230 (1957); State v. Rutledge, 243 Iowa 179, 199, 47 N.W.2d 251, 263 (1951).[1] Even if we find the "harmless error" issue was preserved for our review or that we may review it in spite of the failure to raise it below, the State's argument does not apply in this case.

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1. The concurrence contends the State is penalized for its lack of clairvoyance. The State, however, did raise the harmless error issue in its appellate brief before Fulminante was decided by the Supreme Court. In order to preserve the issue, the State should have raised it at the time of the motion for a new trial.

The State cites the physical evidence obtained in the search of Johnny Briones' home and Quintero's car, which the Briones brothers were driving. The State also cites the scale found in Quintero's apartment and the notes on his person and rebuttal testimony from Rauel Briones. The State offers little argument, but relies on Milton v. Wainwright, 407 U.S. 371, 377-78 (1972), presumably for the proposition that this constitutes "overwhelming evidence of guilt."

Until recently the federal courts had proceeded on the principle that the right against having an involuntary statement admitted into evidence was one of those "constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." Chapman v. California, 386 U.S. 18, 23 & n.8 (1967). After the briefs in this matter were submitted, five members of a badly fractured United States Supreme Court held that admission into evidence of a coerced confession is a "trial error" subject to the Chapman harmless error analysis rather than a "structural defect" in the trial mechanism. Arizona v. Fulminante, 111 S. Ct. 1246, 1264-65, 113 L. Ed. 2d 302, 330-31 (1991) (Rehnquist, C.J., maj. op. in part and dissenting in part). No Iowa case has yet adopted Chief Justice Rehnquist's reasoning in Fulminante and what four members of the Supreme Court agreed is "a meaningless

dichotomy." Id. at 1254, 113 L. Ed. 2d at 318 (White, J., maj. op. in part and dissenting in part).

We note that the states are bound by the fifth amendment by adoption of the fourteenth amendment. See Chapman, 386 U.S. at 21. Article 1, section 9 of the Iowa Constitution contains due process guarantees substantially the same as those in the fourteenth amendment. When "constitutional provisions contain a similar guaranty, they are usually deemed to be identical in scope, import and purpose." Davenport Water Co. v. Iowa State Commerce Comm'n, 190 N.W.2d 583, 593 (Iowa 1971) (citations omitted). The United States Supreme Court sets the minimum guarantees of due process required under the federal constitution, Chapman, 386 U.S. at 21; however, Iowa courts are the guardians of the due process rights reserved under the Iowa Constitution, Davenport Water Co., 190 N.W.2d at 593, and may grant such additional protections as are necessary to satisfy the Iowa Constitution.

In State v. Ware, the Iowa Supreme Court discussed Chapman, 386 U.S. at 23 & n.8, which it felt "clearly indicates certain types of constitutional error require automatic reversal." 205 N.W.2d 700, 705 (Iowa 1973). Among these, the court noted, "are involuntary confession, right to counsel and impartial presiding judge." Id.; see also State v. Sowder, 394 N.W.2d 368, 372 (Iowa 1986). As Justice White writes,

> A confession is like no other evidence. Indeed, "the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him. . . . . [T]he admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct. Certainly, confessions have a profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so."

Fulminante, 111 S. Ct. at 1257, 113 L. Ed. 2d at 322 (citations omitted). The states that have addressed the issue have followed this reasoning and have held that the erroneous admission of a coerced or involuntary inculpatory statement can never constitute harmless error. See, e.g., People v. Lee, 738 P.2d 752, 757 (Cal. 1987); People v. Wilson, 506 N.E.2d 571, 576 (Ill. 1987); Hastings v. State, 560 N.E.2d 664, 670 (Ind. 1990); State v. Graham, 768 P.2d 259, 265 (Kan. 1989); State v. Roberts, 574 P.2d 164, 170-71 (Kan. 1977); State v. Seward, 509 So.2d 413, 418-19 (La. 1987); Commonwealth v. Gilday, 327 N.E.2d 851, 866 n.3 (Mass. 1975); State v. Garner, 294 N.W.2d 725, 727 (Minn. 1980); Commonwealth v. Perry, 379 A.2d 545, 548 (Pa. 1977); Satter v. Solem, 458 N.W.2d 762, 770 (S.D. 1990); Jackson v. State, 705 S.W.2d 227, 232 (Tex. App. 1986); State v. Ng, 750 P.2d 632, 635 (Wash. 1988); Jones v. Warden, 241 S.E.2d 914, 919 (W. Va. 1978); State v. Dyess, 370 N.W.2d 222, 231-32 n.10 (Wis. 1985).

We are unable to make the distinction under the Iowa Constitution and case law between a coerced confession and other "structural errors," such as denial of right to

counsel or impartial judge.[2] Iowa courts have now long recognized that a coerced confession may so infect the trial process that its admission into evidence demands reversal. State v. Rhiner, 352 N.W.2d 258, 263 (Iowa 1984); State v. Hrbek, 336 N.W.2d 431, 436 (Iowa 1983); State v. Ware, 205 N.W.2d 700, 703 (Iowa 1973); State v. Mullin, 249 Iowa 10, 18, 85 N.W.2d 598, 602-03 (1957). The well-accepted premise of this rule is that coerced statements do not provide the requisite trustworthiness and, perhaps more important, subvert the adversarial trial system guaranteed to Iowa citizens in article 1, section 9 of the Iowa Constitution. See Ware, 205 N.W.2d at 704

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2. The concurrence asserts that "trial error" may be quantitatively assessed and that this task of weighing evidence is for judges. This attempted justification for the Fulminante dichotomy puts the appellate court erroneously in the position of the jury. See State v. Williams, 315 N.W.2d 45, 58 (Iowa 1982) (credibility of witnesses and weight to be given their testimony is sole province of jury); State v. Trammell, 458 N.W.2d 862, 863 (Iowa App. 1990) (jury's function is to sort out evidence presented and place credibility where it belongs). Unlike an appellate court, a jury must decide the fate of a criminal defendant unanimously. The Fulminante Court twisted these established rules.

The Supreme Court Justices in Fulminante split five to four when determining the State did not satisfy its burden of demonstrating the erroneously admitted confession was harmless beyond a reasonable doubt. Fulminante, 111 S. Ct. at 1257, 113 L. Ed. 2d at 322 (White, J., maj. op. in part and dissenting in part). Because the court must find an error harmless beyond a reasonable doubt, Chapman v. California, 386 U.S. at 24, 87 S. Ct. at 828, 17 L. Ed 2d at 711, the majority's standard is an anomaly since it does not require unanimity. The unjust result of this standard would be more evident were a majority, but not all, of the justices to find the error harmless beyond a reasonable doubt. A reasonable doubt must exist in the court when its decision is not unanimous. The jury should be allowed to determine if the evidence other than the coerced confession overwhelmingly establishes guilt.

(quoting State v. Coffee, 182 N.W.2d 390, 392 (Iowa 1970)); see also Roberts, 574 P.2d at 170-71; Garner, 294 N.W.2d at 727. Notwithstanding the United States Supreme Court's decision in Fulminante resting on the fifth and fourteenth amendments of the United States Constitution, we hold that the admission into evidence of a coerced confession or involuntary statement continues to be cause for automatic reversal under the due process guarantees of article I, section 9 of the Iowa Constitution. We therefore reverse the judgment of conviction and remand the case to the district court for a new trial.

(5)

We hold that Quintero properly presented the issue of whether his allegedly involuntary statements should be suppressed to the district court and that the issue is properly preserved for our consideration. Having considered the totality of the circumstances, we conclude that Quintero's statements to police were involuntary because they were induced by deceit and promises for himself and his nephew. Finally, we hold that the erroneous admission into evidence of these involuntary statements requires reversal of the conviction and a new trial pursuant to the due process guarantees of Iowa Constitution article I, section 9.

REVERSED AND REMANDED.

Oxberger, C.J., and Hayden and Sackett, JJ., concur; Donielson and Habhab, JJ., concur in part and dissent in part.

DONIELSON, P.J. (concurring in part and dissenting in part)

I concur in the result reached by the majority, but respectfully dissent to its reasoning.

The majority, in refusing to follow the United States Supreme Court's holding in Arizona v. Fulminante, ___ U.S. ___, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991), has entered the fray of state judicial activism. In its zeal to circumvent one holding, the majority has sacrificed the Iowa judiciary's long-held philosophy governing construction of the Iowa Constitution.

I. **Applicability of the harmless error analysis.** This court's failure to follow the United States Supreme Court's holding in Arizona v. Fulminante is a departure which will have undesired ramifications. Surely, the Iowa judiciary can establish an independent body of individual rights under the Iowa Constitution, but whether it should is a different question. This state's precedent as well as practical considerations make such a departure unwise.

This state has never recognized the Iowa Constitution as the primary source of individual rights for Iowa citizens. Rather, this state's precedent clearly recognizes the dominance of the United States Constitution in defining individual rights. This has been for good reason. Two sources of rights which diverge on their prescription of the boundaries of those rights present the usual problems associated with lack of uniformity.

As the Iowa Supreme Court stated in Des Moines Joint Stock Land Bank v. Nordholm when construing article 1, section 21 of the Iowa Constitution

> There is no doubt that this court has the power, in interpreting the Constitution of Iowa, to reach a conclusion on the contract clause different from that reached by the Supreme Court of the United States when interpreting a similar clause of the Federal Constitution; that is to say, so long as the Iowa Constitution, as interpreted by this court, does not violate any provision of the Federal Constitution, there will be no complaint from the federal government.
>
> But assuming that to be true, good policy and a desired consistency between the two Constitutions rather dictate that the interpretation of the two clauses be similar. Such consistency in interpretation will accomplish consistency in operation. Uniformity in the construction of these contract clauses is most desirable, if not absolutely necessary.

217 Iowa 1319, 1335, 253 N.W. 701, 709 (1934).

Iowa courts have seen fit to accord special respect and deference to United States Supreme Court interpretations of language in the Federal Constitution which is similar to language in the Iowa Constitution. See State v. Davis, 304 N.W.2d 432, 434 (Iowa 1981). In fact, when the Iowa and Federal Constitutions contain similar provisions, the provisions are usually deemed to be identical in scope, import and purpose. Id. at 434; Redmond v. Ray, 268 N.W.2d 849, 852 (Iowa 1978); In Interest of Johnson, 257 N.W.2d 47, 49 (Iowa 1977); Chicago Title Insurance Co. v. Huff, 256 N.W.2d 17, 23 (Iowa 1977); Davenport Water Co. v. Iowa State Commerce Commission, 190 N.W.2d 583, 593 (Iowa 1971).

Article 1, section 9 of the Iowa Constitution provides that "no person shall be deprived of life, liberty, or property, without due process of law." The fourteenth amendment of the United States Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law . . . ." The operative phrase in each, "due process of law", is identical. Iowa caselaw dictates an identical construction must follow.

The majority has now opted to construe the Iowa Constitution through the selective adoption of United States Supreme Court decisions construing the Federal Constitution. The majority looks to the federal construction of the United States Constitution when convenient, but claims to turn to the Iowa Constitution when the result of a federal construction is not to their liking.

However, the majority has not genuinely turned to the Iowa Constitution as an independent source of rights. Rather, it has merely turned to earlier decisions, and to dissenting opinions from Justices, of the same Court it refuses to follow. In rejecting the Supreme Court's decision, the majority draws primarily upon federal sources of authority and treats the Iowa Constitution as no more than a blank slate onto which they may write their favored federal decisions.

In determining the defendant's due process rights, the majority apparently first looked to the fifth and fourteenth amendments of the United States Constitution. Finding they did not like the most recent interpretation of those rights by the United States Supreme Court, the majority chose to look to the Iowa Constitution. After finding no Iowa constitutional due process doctrine, other than the words "due process of law", the majority adopted all of the federal constitutional due process doctrine except that part which specifically differentiates between trial and structural errors. Then, they looked at what they had. Unable to find anything that specifically differentiated between trial and structural errors, they concluded "We are unable to make the distinction under the Iowa Constitution and case law between a coerced confession and other 'structural errors,' such as denial of right to counsel or impartial judge." This seems misguided at best.

While article 1, section 9 of the Iowa Constitution is viewed by the majority as a blank slate, this state's precedent views it as a provision to be construed in a manner parallel with the United States Constitution.

The majority does not present considerations unique to the history, people, government or Constitution of Iowa which necessitate a construction different than that in Arizona v. Fulminante. The majority provides nothing to suggest that it is defining anything other than the same due process right the Supreme Court has recently

authoritatively defined. This selective adoption of federal reasoning implicitly equates the content of the federal and Iowa due process rights.

The majority cannot cite a previously established body of Iowa law, independent of federal law, which establishes a distinctive characterization of the Iowa constitutional due process right. The Iowa Supreme Court in State v. Ware, quoting from the United States Supreme Court's decision in Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967), was construing the fourteenth amendment, not article 1, section 9 of the Iowa Constitution. See State v. Ware, 205 N.W.2d 700, 705 (Iowa 1973).

The due process and jury trial provisions of the Iowa Constitution do not recognize or characterize due process rights in a way significantly different than do the similar clauses contained in the fifth and fourteenth amendments to the United States Constitution. However, the majority asserts that application of the Arizona v. Fulminante holding would "subvert the adversarial trial system guaranteed to Iowa citizens in article 1, section 9 of the Iowa Constitution." In support of this assertion, the majority fails to demonstrate how the Iowa constitutional rights to due process and a jury trial have been interpreted to be any more expansive than have the federal constitutional rights.

In fact, application of the analysis demonstrates an even greater trust in the adversarial system. Any subversion of the system is bound to come, not from added flexibility, but in the form of strict rules; to wit, that the erroneous admission of involuntarily given inculpatory statements can never constitute harmless error.

The majority bases its refusal to adopt the opinion on a perceived flaw in the Supreme Court's reasoning. The majority disagrees with the Supreme Court's classification of the admission into evidence of involuntary confessions as "trial errors" rather than "structural errors" for the purpose of applying the Chapman harmless error analysis.

The majority characterizes this analytical framework as a meaningless dichotomy. The analytical dichotomy stems from a fundamental difference between two types of error. "Trial error," which occurs during the presentation of the case to the jury, may be "quantitatively assessed" in the context of other evidence. See Arizona v. Fulminante, ___ U.S. at ____, 111 S. Ct. at 1264, 113 L. Ed. 2d at 330 (Rehnquist, C.J., maj. op. in part and dissenting in part). One can imagine a particular set of hypothetical circumstances in which other evidence introduced at trial so overwhelmingly establishes guilt that the introduction of one inculpatory statement made by the defendant can be said to have been harmless. This is essentially an exercise of weighing evidence. Judges do this.

On the other hand, "structural errors" affect the framework within which the trial proceeds, rather than simply an error in the trial process. See id. ____ U.S. at ____, 111 S. Ct. at 1265, 113 L. Ed. 2d at 331. The mischief caused by those errors the Supreme Court refers to as structural errors is not subject to the same type of analysis. "The entire conduct of the trial from beginning to end is obviously affected by the absence of counsel for a criminal defendant, just as it is by the presence on the bench of a judge who is not impartial." Id. ____ U.S. at ____, 111 S. Ct. at 1264, 113 L. Ed. 2d at 331. An appellate court has no method by which to measure the impact on the trial of a denial of the right to counsel or to an impartial judge. Such a measure would involve much more than the weighing of evidence.

I accept the majority's premise that a confession is highly probative and damaging evidence likely to have a profound impact on a jury. It follows that application of the harmless error analysis will seldom render a finding that the erroneous admission of this evidence was harmless. As Chief Justice Rehnqhist states:

> Of course an involuntary confession may have a more dramatic effect on the course of a trial than do other trial errors--in particular cases it may be devastating to a defendant--but this simply means that a reviewing court will conclude in such a case that its admission was not harmless error; it is not a reason for eschewing the harmless error test entirely.

Id. ___ U.S. at ___, 111 S. Ct. at 1266, 113 L. Ed. 2d at

333. After all, to be held harmless, the error must be found by the court to be harmless beyond a reasonable doubt. See Chapman v. California, 386 U.S. at 24, 87 S. Ct. at 828, 17 L. Ed. 2d at 711. The State must show the admission of the confession did not contribute to the conviction. Id. 386 U.S. at 26, 87 S. Ct. at 829, 17 L. Ed. 2d at 711.

II. **Application of the harmless error analysis.** The majority finds that the harmless error issue was raised by the State for the first time in its appellate brief. For this reason, the majority finds the issue to have been waived. Arizona v. Fulminante, the decision by which the issue was created, was not decided until March 26, 1991, more than a month after the appellate briefs were filed in the instant case. ____ U.S. ____, 111 S. Ct. at 1246, 113 L. Ed. 2d at 302. In fact, the motion to suppress was argued on July 11, 1988. Certainly, the State should not be expected to have foreseen that the United States Supreme Court would, between trial and appeal, reverse the well-established, twenty-four year precedent in Chapman. Arizona v. Fulminante represents a clear reversal of, and break with, the law as it existed at the time of trial in the instant case. To consider the issue waived is to penalize the State for its lack of clairvoyance and to encourage frivolous arguments at trial. The Iowa Supreme Court has held that failure to predict changes in the law does not qualify as ineffective assistance of counsel. See

Cuevas v. State, 415 N.W.2d 630, 633 (Iowa 1987). Surely, such failure does not affect a waiver either.

Applying the harmless error analysis to the facts of this case, I would find the admission of Quintero's involuntary statements did not constitute harmless error. I would also reverse the judgment of conviction and remand the case to the district court for a new trial.

III. **Conclusion**. In its selective adoption of federal reasoning, the majority borrows from Justice White's opinion in Arizona v. Fulminante, ___ U.S. at ___, 111 S. Ct. at 1253-67, 113 L. Ed. 2d at 313-26. However, the majority has failed to follow Justice White's most persuasive argument. That argument applies with at least equal force to the decision facing this court. "Stare Decisis is of 'fundamental importance to the rule of law,' the majority offers no convincing reason for overturning our long line of decisions . . . ." Id. ___ U.S. at ___, 111 S. Ct. at 1257, 113 L. Ed. 2d at 322 (White, J., maj. op. in part and dissenting in part)(citations omitted).

The majority opinion is not an example of interstitial constitutional law making; rather, it impacts on the whole of this state's philosophy governing the construction of the Iowa Constitution. If a time ever comes when it is necessary to depart from this precedent, this is surely not it.

HABHAB, J. (concurring in part and dissenting in part)

I join Judge Donielson's special concurrence and dissent.