CRIMINAL PROCEDURE—APPLICATION OF THE HARMLESS ERROR RULE TO MIRANDA VIOLATIONS

John J. Henry
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INTRODUCTION

In 1966, the United States Supreme Court decided *Miranda v. Arizona*. The *Miranda* decision created a broad procedural rule for protecting the Fifth Amendment privilege against compulsory self-incrimination. Under *Miranda*, if a defendant has made a statement during a custodial interrogation, the prosecution must show that the defendant was given an adequate warning of his or her constitutional rights.

2. The status of the *Miranda* rule is an anomaly in constitutional jurisprudence. See Stephen J. Markman, *Miranda v. Arizona: A Historical Perspective*, 24 AM. CRIM. L. REV. 193, 235 (1987). The *Miranda* opinion alternately refers to its holding as a constitutional requirement and a procedural rule. See *Miranda*, 384 U.S. at 445, 478. Although the Court relied on the Fifth Amendment as a foundation for its rule, the opinion acknowledged that the rule was not a constitutional requirement. *Id.* at 467 (“[W]e cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted.”). Nor is the rule founded on the Court’s power to declare rules of procedure for the federal courts, as evidenced by the rule’s applicability to state court proceedings. Thus, the survival of the *Miranda* rule has been described as an anomaly. Markman, supra, at 235.

Congress has attempted to statutorily override the *Miranda* decision. See 18 U.S.C. § 3501 (1988). This statute provides that the giving of warnings similar to those required by *Miranda* is one factor to be considered in determining whether the defendant’s statement was voluntary. Under this statute, the failure to give the warnings does not necessarily render a confession inadmissible. *Id.* The constitutionality of the statute has been upheld by at least one federal court of appeals. See United States v. Crocker, 510 F.2d 1129 (10th Cir. 1975).


This Note will only discuss aspects of the Fifth Amendment to the United States Constitution. For a discussion of aspects of compulsory self-incrimination clauses of state constitutions, see generally Mary A. Crossley, *Note, Miranda and the State Constitution: State Courts Take a Stand*, 39 VAND. L. REV. 1693 (1986).

5. The *Miranda* rule applies to both inculpatory statements, those which implicate a suspect in an offense, and exculpatory statements, those made by a suspect in an attempt to avoid criminal liability. *Id.*
6. For a discussion of the issues involved in defining a custodial interrogation, see infra notes 43-58 and accompanying text.
rights prior to giving the statement. Once the prosecution has shown that the warning was given, it must also show that the defendant voluntarily, knowingly, and intelligently waived his or her rights before giving the statement. If the prosecution fails to do so, the statement cannot be used in the prosecution's case-in-chief.

The value of the *Miranda* decision as a prophylactic rule has been eroded by several doctrines and decisions of the United States Supreme Court. One such doctrine is the rule of harmless federal constitutional error, which allows a reviewing court to sustain a conviction even though illegally obtained evidence has been admitted at trial. The rule of harmless constitutional error allows such a conviction to be sustained if the state can show, beyond a reasonable doubt, that the error did not contribute to the conviction. The ostensible purpose of this rule is to serve the concerns of judicial economy by avoiding a retrial that would result in a conviction despite the exclusion of the illegally obtained evidence.

Although the harmless error rule is useful in some contexts, the

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7. For a discussion of the requirements of an adequate *Miranda* warning, see infra notes 59-66 and accompanying text.


9. For a discussion of the *Miranda* waiver of rights standard, see infra notes 67-70 and accompanying text.

10. The prosecution may, however, use statements obtained in violation of *Miranda* to impeach the defendant's testimony. See *Harris v. New York*, 401 U.S. 222 (1971).

Prior to 1966, the Supreme Court determined the admissibility of statements made by a defendant under the coerced confession doctrine. Under this doctrine, the admissibility of a defendant's statement or statements is determined on a case by case basis, looking at the facts of each case to determine whether the statement was coerced and therefore violative of the defendant's due process rights. See, e.g., *Haynes v. Washington*, 373 U.S. 503, 514 (1963) (applying a totality of circumstances approach in determining whether a confession was coerced and thus violative of due process); see generally WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 6.2 (1985). For a more complete history of the tests used by the Supreme Court prior to 1966 to determine the admissibility of a defendant's confession, see Markman, supra note 2; Bettie E. Goldman, Note, Oregon v. Elstad: *Boldly Stepping Backwards to Pre-Miranda Days?*, 35 CATH. U. L. REV. 245, 246-53 (1985).

11. See, e.g., *New York v. Quarles*, 467 U.S. 649 (1984) (creating a public safety exception to *Miranda* whereby police need not give a *Miranda* warning to a suspect in custody if an answer to the police questioning is necessary to protect the immediate safety of the public); *Harris v. New York*, 401 U.S. 222 (1971) (creating an impeachment use exception); see also Goldman, supra note 10.

12. For a discussion of the development of the doctrine of harmless constitutional error, see infra notes 90-132 and accompanying text.


14. See id. at 22; ROGER J. TRAYNOR, THE RIDDLE OF HARMLESS ERROR 81 (1970) (stating that the purpose of harmless error analysis is to "conserve judicial resources by enabling appellate courts to cleanse the judicial process of prejudicial error without becoming mired in harmless error").
rule does present some dangers, particularly when applied to a prophylactic rule such as *Miranda*. One of the dangers of the rule of harmless constitutional error is that it impairs the right to a jury trial. By allowing a reviewing court to sustain a conviction despite the admission at trial of illegally obtained evidence, the harmless error rule allows the reviewing court to make determinations of the relative weight of that evidence. This is particularly dangerous in the context of *Miranda* violations, which always involve the admission of a defendant's own statements. A defendant's statements have a unique evidentiary value, and the application of harmless error analysis to a *Miranda* violation must be undertaken in recognition of this evidentiary role.

This Note addresses two issues: whether the harmless error rule should be applied to *Miranda* violations, and what standard of harmlessness should be applied to the admission of evidence obtained in violation of *Miranda*. Section I of this Note discusses the rule of *Miranda v. Arizona*, and its subsequent implementation and clarification by both the United States Supreme Court and the lower courts. Section II discusses the origins of the rule of harmless federal constitutional error and the United States Supreme Court's current harmless error jurisprudence. Section III discusses *Butzin v. Wood*, a case

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15. See Steven H. Goldberg, *Harmless Error: Constitutional Sneak Thief*, 71 J. CRIM. L. & CRIMINOLOGY 421, 430 (1980). Professor Goldberg suggests that the harmless error rule impairs the right to a jury trial by establishing an "appellate jury" that sits to determine what effect the illegal evidence had on the original trial jury. *Id.* This violates the right to a jury trial by allowing the appellate judges, rather than a lay jury, to determine the facts of the case. To Professor Goldberg, the usurpation of the jury function is "[t]he greatest cost of the constitutional harmless error rule." *Id.* (footnote omitted).

See also Tom Stacy & Kim Dayton, *Rethinking Harmless Constitutional Error*, 88 COLUM. L. REV. 79, 81 (1988). Professors Stacy and Dayton suggest that the Supreme Court's harmless error jurisprudence is flawed in three respects. First, the Court ignores the premise of the protection of the Bill of Rights in applying the harmless error rule. Second, the Court has applied different standards of harmless error depending on the particular right involved. Third, the Court has not been clear on the scope of review of determinations of harmlessness. *Id.*

16. The United States Supreme Court has not yet directly applied the harmless error rule to *Miranda* violations. See Berkemer v. McCarty, 468 U.S. 420, 443-45 (1984) (leaving the issue open); cf. *Arizona v. Fulminante*, 111 S. Ct. 1246 (1991) (applying harmless error analysis to admission of coerced confession); Pennsylvania v. Muniz, 110 S. Ct. 2638, 2652 n.22 (1990) (stating that the state court was free on remand to apply harmless error doctrine to a *Miranda* violation).

In *Berkemer*, the state argued that the admission of the suspect's statement, although obtained in violation of *Miranda*, was harmless error. *Berkemer*, 468 U.S. at 443. The Court, however, refused to apply a harmless error analysis to the *Miranda* violation for three reasons. *Id.* at 443-45. First, the issue was not presented to any of the lower courts. Second, the defendant had made two different statements to the police, only one of which was obtained in violation of *Miranda*. The statement that was obtained in violation of
that illustrates the difficulties encountered in applying the harmless error rule to *Miranda* violations. Lastly, Section IV discusses the issues of whether the harmless error rule should be applied to *Miranda* violations, and under what standard of harmlessness these violations are to be reviewed. This Note concludes that the harmless error rule should be applied to *Miranda* violations. This Note also suggests that when a reviewing court employs harmless error analysis in determining whether the admission of evidence obtained in violation of *Miranda* was harmless, the court should employ a standard of harmlessness which focuses on the possible effect that the erroneously admitted evidence may have had on the jury verdict.

I. THE *MIRANDA* DOCTRINE

A. *Miranda v. Arizona* 18

The *Miranda* decision involved the consolidation of four appeals from various state courts. 19 Each of these appeals involved "incommunicado interrogation of individuals in a police-dominated atmosphere, resulting in self-incriminating statements without full warnings of constitutional rights." 20 All of the confessions were admitted against the defendants at their respective trials. 21 The Supreme Court was faced with the issue of determining the admissibility of the confessions under the Fifth Amendment's privilege against compulsory self-incrimination. 22

The starting point for the Court's analysis was that its holding was "not an innovation in our jurisprudence." 23 The Court recognized that the Fifth Amendment privilege was adopted by the Framers "only after centuries of persecution and struggle" in England. 24 The Court went on to detail the history of the sources of the privilege

*Miranda* was probably more prejudicial to the defendant than the one that did not violate *Miranda*. Therefore, it was unlikely that the error was harmless. Third, the case arose in a procedural posture that made it difficult to determine whether the error was harmless. The suspect had pleaded no contest to the charges against him and therefore he did not have the opportunity to present his own evidence or to rebut the prosecution's evidence. *Id.*

19. *See id.* at 491.
20. *Id.* at 445.
21. In each of the consolidated cases, the defendant's statement was not obtained in violation of the Due Process Clauses of the Fifth and Fourteenth Amendments, and would, therefore, be admissible under the coerced confession doctrine. *See id.* at 457; *see also supra* note 10.
23. *Id.* at 442.
24. *Id.*
against compulsory self-incrimination. According to the Court, this privilege was jeopardized by the pressures inherent in modern custodial interrogation. The Court found that, in order to protect an individual’s Fifth and Sixth Amendment rights from the pressures inherent in a custodial interrogation, the police need to warn the individual of his or her rights prior to questioning. The warning required by Miranda has four essential components. The first requirement of an adequate Miranda warning is that the individual in custody be told that he or she has a right to remain silent. Second, the individual needs to be told that anything he or she says can be used against him or her. Third, the police need to

25. Id. at 458-66. Chief Justice Warren, the author of the majority opinion, found that the sources of the Fifth Amendment stretch back as far as biblical times. Id. at 458 n.27. One of the significant historical events that Chief Justice Warren cited as a source of the Fifth Amendment privilege against compulsory self-incrimination was the Lilburn trial, which occurred in England in 1637. Id. at 459. John Lilburn was a political prisoner who was made to take the Court of Star Chamber Oath, which required him to answer all questions that the chamber posed to him on any subject. Lilburn’s refusal to take the oath was ultimately responsible for the abolishment of the Star Chamber by Parliament. According to Chief Justice Warren, the principles to which Lilburn appealed gained popular acceptance in England and were brought over to the colonies where they eventually found their way into the Bill of Rights. Id.

26. Id. at 445-58. In a lengthy discussion, the Court detailed the types of coercion often employed by police in interrogating a suspect. The first type was physical abuse of suspects by police. Id. at 446 (citing People v. Portelli, 205 N.E.2d 857 (N.Y. 1965) (per curiam) (police beat, kicked, and placed lighted cigarette butts on the back of an accused in an attempt to elicit a response incriminating a third party)).

According to the Court, however, physical abuse was not necessary for a finding of coercion. The Court stated that “the modern practice of in-custody interrogation is psychologically rather than physically oriented. . . . [T]his Court has recognized that coercion can be mental as well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisition.” Id. at 448 (citation omitted) (quoting Blackburn v. Alabama, 361 U.S. 199, 206 (1960)).

The Court looked to two police interrogation manuals for support of the proposition that psychological coercion was important to the police interrogation process. Id. at 449-50 (citing Fred E. Inbau & John E. Reid, Criminal Interrogation and Confessions (1962); Charles E. O’Hara, Fundamentals of Criminal Investigation (1956)). These works detailed various tactics and ploys aimed at weakening the suspect’s will and thus eliciting an incriminating response. The works stress that it is important to interrogate the suspect in private, and to use such ploys as feigning sympathy with the suspect in order to elicit an incriminating response. Id.

27. The Sixth Amendment provides: “In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence.” U.S. Const. amend. VI.


29. See id. at 504 (Harlan, J., dissenting). In his dissent, Justice Harlan began with a summary of the requirements of the rule created by the majority. Id.

30. Id. at 467-68.

31. Id. at 469. This requirement was necessary to ensure that the defendant was
tell the suspect that he or she has the right to have counsel present during interrogation. 32 Fourth, the individual needs to be told that, if indigent, he or she has the right to appointed counsel. 33

Under Miranda, the prosecution needs to show not only that the individual was given the warning, but also that the individual waived his or her right to remain silent and right to counsel before making a statement during a custodial interrogation which the prosecution intends to use at trial. 34 The Court placed a "heavy burden" on the government to show that the defendant voluntarily and intelligently waived the privilege against compulsory self-incrimination and the right to have counsel present during interrogation. 35 Any evidence that the individual was "threatened, tricked, or cajoled" into giving a waiver would prohibit the admission of the statement. 36

The Court also addressed the issue of what must happen if the suspect has asserted his or her rights. If a suspect invokes the right to silence, the Court stated that "the interrogation must cease." 37 If, on the other hand, the individual invokes his or her right to counsel, the Court stated that questioning must cease until a lawyer is present. 38

Although the Miranda Court intended to create a "bright line" rule, 39 the Court gave little guidance as to how the rule was to be

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aware of the consequences of his or her waiver of rights and, therefore, ensure that the suspect intelligently exercised the privilege. Id.

32. Id. at 471. The Court stated that "an individual held for interrogation must be clearly informed that he [or she] has the right to consult with a lawyer and to have the lawyer with him [or her] during interrogation." Id. (emphasis added).

To the Miranda Court, the presence of counsel served several important goals:

If the accused decides to talk to his interrogators, the assistance of counsel can mitigate the dangers of untrustworthiness. With a lawyer present the likelihood that the police will practice coercion is reduced, and if coercion is nevertheless exercised the lawyer can testify to it in court. The presence of a lawyer can also help to guarantee that the accused gives a fully accurate statement to the police and that the statement is rightly reported by the prosecution at trial. Id. at 470 (citing Crooker v. California, 357 U.S. 433, 443-48 (1958) (Douglas, J., dissenting)).

33. Id. at 473 ("Without this additional warning, the admonition of the right to consult with counsel would often be understood as meaning only that [the suspect] can consult with a lawyer if [the suspect] has one or has the funds to obtain one.").

34. Id. at 475.

35. Id.

36. Id. at 476.

37. Id. at 474.

38. Id.

39. The Court granted certiorari in the Miranda case to give "concrete constitutional guidelines" for lower courts to follow. Miranda, 384 U.S. at 441-42. The Court expressly rejected a case by case approach. See id. at 468 ("[W]e will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given."); cf. Hon. William H. Erickson, The Unfulfilled Promise of Miranda v. Arizona, 24 AM.
implemented. For example, the Court stated that the warnings and waiver were only required when an individual was subject to custodial interrogation, but did not adequately define what the term "custodial interrogation" meant.\footnote{CRIM. L. REV. 291 (1987) (suggesting that Miranda failed in its promise to provide concrete constitutional guidelines).} Also, the Court did not state whether it was necessary for law enforcement personnel to use the exact language used by the Court in its decision when giving a warning to a suspect,\footnote{See infra notes 59-66 and accompanying text.} or whether a suspect could ever be interrogated after invoking his or her rights.\footnote{See infra notes 71-80 and accompanying text.} The following section discusses the subsequent United States Supreme Court decisions clarifying these complex issues.

B. Implementation of the Miranda Rule

1. Custodial Interrogation

The threshold question in any Miranda analysis is whether the suspect was subjected to custodial interrogation.\footnote{See infra notes 59-66 and accompanying text.} In implementing the Miranda rule, many subsequent lower court decisions used a totality of the circumstances approach in determining whether the suspect was in custody at the time of the interrogation.\footnote{See infra notes 71-80 and accompanying text.} These lower court decisions emphasized several factors, including whether the investigation had focused on the individual being questioned,\footnote{See Jefferson V. Smith, The Threshold Question in Applying Miranda: What Constitutes Custodial Interrogation?, 25 S.C. L. REV. 699 (1974).} whether there was probable cause to arrest the suspect at the time of the questioning,\footnote{See, e.g., Arnold v. United States, 382 F.2d 4, 7 (9th Cir. 1967); People v. Merchant, 67 Cal. Rptr. 459, 461-62 (Ct. App. 1968).} and whether the subject matter of the offense was of the type normally associated with a criminal investigation.\footnote{See, e.g., Arnold, 382 F.2d at 7 n.3 (stating that Miranda did not apply to questioning of an individual until the investigative process has become accusatorial); Merchant, 67 Cal. Rptr. at 461 (holding that when investigation reaches stage of accusation suspect is entitled to warning of constitutional rights prior to interrogation) (citing Escobedo v. Illinois, 378 U.S. 478 (1964); Massiah v. United States, 377 U.S. 201 (1964); People v. Dorado, 398 P.2d 361 (Cal. 1965)).}
Eventually, however, the Supreme Court rejected the totality of the circumstance approach in determining whether an individual was in custody at the time he or she made a statement. Instead, the Court has come to focus solely on the restraint on the person's freedom of movement. Under Supreme Court precedent, there is no requirement that there be a formal arrest of the suspect before the warnings are required. Rather, the test is whether there has been a "restraint on freedom of movement of the degree associated with a formal arrest." This determination is to be made from the viewpoint of a reasonable person in the suspect's position. Thus, even though a particular individual may have a subjective belief that he or she is in custody, the police need not give *Miranda* warnings unless that belief is reasonable.


49. See Beheler, 463 U.S. at 1125; Mathiason, 429 U.S. at 495. *Beheler* and *Mathiason* involved factual circumstances that were nearly identical. In both cases, the suspects were requested by a police officer to appear at the police station for questioning regarding their possible involvement in crimes. *Beheler*, 463 U.S. at 1122-23; *Mathiason*, 429 U.S. at 492-93. In both cases, the suspects were expressly told, prior to interrogation, that they were not under arrest and were free to leave at any time. Both Beheler and Mathiason made inculpatory statements during the ensuing questioning, and these statements were subsequently used against them at their respective trials. The United States Supreme Court held in both cases that the suspects were not in custody for *Miranda* purposes. *Beheler*, 463 U.S. at 1125; *Mathiason*, 429 U.S. at 495. In both cases the Court emphasized that the suspects were expressly told that they were free to leave at any time. *Beheler*, 463 U.S. at 1122; *Mathiason*, 429 U.S. at 495.

50. See Beheler, 463 U.S. at 1125.

51. Id. (citing Mathiason, 429 U.S. at 495).

52. Berkemer, 468 U.S. 420, 441-42 (1984) (holding that *Miranda* warning is not required when suspect is questioned during routine traffic stop because a reasonable person would not believe that he or she was in custody).

53. See id. There are several factual situations in which an important issue is whether a court should employ a subjective or an objective test of custody. The first situation is one in which a police officer approaches a suspect for questioning with the intention of arresting the suspect if he or she attempts to leave, but does not formally arrest the person or communicate his or her intention to the suspect. The second situation is one in which the suspect may have an objectively reasonable belief that he or she is in custody even though the investigating officer has no intention of arresting the suspect. The third situation is one in which the individual may have only a subjective belief that he or she is in custody.

The Supreme Court has defined the appropriate test as "how a reasonable man in the suspect's position would have understood his situation." *Id.* The Court rejected the notion that the police officer's intent or plan is to be considered in determining whether an individual is in custody for *Miranda* purposes, except to the extent that that intent is communicated to the suspect. *Id.* This view is logical because the rationale behind the *Miranda* decision is that warnings of constitutional rights are needed prior to custodial interrogation in order to protect the individual's Fifth Amendment rights from the pres-
The Court has also addressed several cases dealing with the issue of defining interrogation for Miranda purposes.\textsuperscript{54} Under the current test, promulgated by the Court in Rhode Island v. Innis,\textsuperscript{55} interrogation includes both express questioning and its "functional equivalent."\textsuperscript{56} In Innis, the Court defined the "functional equivalent" of questioning as "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect."\textsuperscript{57} Under this definition of interrogation, a police practice, other than express questioning, designed at soliciting infor-

\textsuperscript{54} See, e.g., Rhode Island v. Innis, 446 U.S. 291 (1980).

\textsuperscript{55} Id.

\textsuperscript{56} Id. at 300-01.

\textsuperscript{57} Id. In Innis, the police had received a report from a cab driver that he had just been robbed by a man wielding a shotgun and that he had dropped the man off in a certain area. Id. at 293. The police then spotted Innis in the area where the cab driver had let his assailant off and arrested him. The police believed that Innis had hidden the shotgun somewhere in the area of the arrest scene, which was near a school for handicapped children. After the police arrested Innis, they gave him several sets of Miranda warnings and Innis invoked his right to remain silent. The police then transported him from the scene of his arrest in a police patrol car. Id. at 294.

During the drive to the police station, one of the patrolmen stated to another: "there's a lot of handicapped children running around in this area, and God forbid one of them might find a weapon with shells and they might hurt themselves." Id. at 294-95. Hearing this conversation, Innis told the police to return to the scene of the arrest and he would show them where the weapon was hidden. The weapon proved to be the one used in an
mation from the suspect will not be considered interrogation unless a reasonable police officer would consider the practice as reasonably likely to elicit an incriminating response from the suspect.58

2. Adequacy of Warning

Once it has been established that the individual's statement was the product of custodial interrogation, the next step in a Miranda analysis is to determine whether the suspect was given an adequate warning of his or her rights.59 In California v. Prysock,60 and Duckworth v. Eagan,61 the United States Supreme Court declared that there is no requirement that the police use a warning which mimics the precise language of the warning in the Miranda opinion.62 However, it is necessary that the warning used by the police be the "fully effective

earlier, unrelated, murder of a cab driver, and Innis was subsequently convicted of this murder. Id. at 295-96.

On appeal, the United States Supreme Court upheld the conviction, reasoning that the defendant's decision to return to the arrest scene, and his subsequent incriminating statements, were not the product of interrogation. Id. at 302.


58. See United States ex rel. Church v. De Robertis, 771 F.2d 1015 (7th Cir. 1985); see also Jonathan L. Marks, Note, Confusing the Fifth Amendment with the Sixth: Lower Court Misapplication of the Innis Definition of Interrogation, 87 MICH. L. REV. 1073 (1989).

The Court has also used this definition of interrogation to create an exception to the Miranda rule for standard questions involved in the booking procedure. Pennsylvania v. Muniz, 110 S. Ct. 2638, 2650 (1990). The exception applies to questions designed to elicit the suspect's name, address, date of birth, and other similar information. Id.; see also United States v. Webster, 769 F.2d 487, 491-92 (8th Cir. 1985).

The lower courts have also held that an officer's request for clarification of a suspect's volunteered statement does not fit within the definition of interrogation under Miranda, as long as it is not reasonably likely to elicit an incriminating response. See, e.g., United States v. Rhodes, 779 F.2d 1019, 1032 (4th Cir. 1985), cert. denied, 476 U.S. 1182 (1987).


62. Id. at 202; Prysock, 453 U.S. at 360. In Miranda, the Court used the following language in its holding: "Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." Miranda, 384 U.S. at 444. However, the Court did use different language at other points in its opinion:

[The suspect] must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

Id. at 479.
equivalent" of the language used in the *Miranda* opinion. In order to satisfy the *Miranda* strictures, the warning that the police give must "touch all of the bases" of the language used in *Miranda*. Therefore, even if the police use language that arguably dilutes the protection given suspects by a *Miranda* warning, the warning will still be ade-

63. *Prysock*, 453 U.S. at 359-60 (citing *Miranda*, 384 U.S. at 476). In *Miranda*, the Court stated that "[t]he warnings required and the waiver necessary in accordance with our opinion today are, in the absence of a fully effective equivalent, prerequisites to the admissibility of any statement made by a defendant." *Miranda*, 384 U.S. at 476 (emphasis added).

64. *Duckworth*, 492 U.S. at 202; *Prysock*, 453 U.S. at 360. In *Prysock*, the suspect was given the following warning:

Your legal rights, Mr. Prysock, is [sic] follows: Number One, you have the right to remain silent. This means you don't have to talk to me at all unless you so desire. . . . If you give up your right to remain silent, anything you say can and will be used as evidence against you in a court of law. . . . You have the right to talk to a lawyer before you are questioned, have him present with you while you are being questioned, and all during the questioning.

*Id.* at 356 (alteration in original).

The *Prysock* Court indicated that several lower court decisions had found *Miranda* warnings inadequate because the warnings linked the right to have an attorney to some future point in time and, consequently, did not inform the suspect of his right to have an attorney present during interrogation. *Id.* at 360 (citing United States v. Garcia, 431 F.2d 134 (9th Cir. 1970) (per curiam); People v. Bolinski, 67 Cal. Rptr. 347 (Ct. App. 1968)). The Court went on to distinguish the case before it from those cases by emphasizing that the warning that the police gave Prysock did not limit his right to have an attorney present. *Id.* at 360-61. The Court emphasized that the warning "clearly conveyed rights to a lawyer in general, including the right 'to a lawyer before you are questioned, . . . while you are being questioned, and all during the questioning.'" *Id.* at 361 (quoting Appendix A to Petition for Certiorari at 9-10, California v. Prysock, 453 U.S. 355 (1981)).

In *Duckworth*, the suspect was given the following warning:

Before we ask you any questions, you must understand your rights. You have the right to remain silent. Anything you say can be used against you in court. *You have a right to talk to a lawyer for advice before we ask you any questions, and to have him with you during questioning.* You have this right to the advice and presence of a lawyer even if you cannot afford to hire one. *We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court.* If you wish to answer questions now without a lawyer present, you have the right to stop answering questions at any time. You also have the right to stop answering at any time until you've talked to a lawyer.


The *Duckworth* Court found that this warning was adequate because it "touched all of the bases required by *Miranda*." *Id.* at 203. Again, the Court emphasized that the warnings given informed the suspect of his right to have counsel present during interrogation. *Id.* at 205.


66. See Yale Kamisar, *Duckworth v. Eagan: A Little Noticed Miranda Case That May Cause Much Mischief*, 25 CRIM. L. BULL. 550, 554 (1989). Professor Kamisar suggests that the warning given by the police in *Duckworth* "colored" the defendant's right to have counsel present during questioning by implying that there was no way that the defendant would be able to talk to a lawyer during his stay in the police station. *Id.*
quate as long as the suspect is advised of his or her four *Miranda* rights.

3. Waiver of Rights

If the police have given the suspect an adequate warning, it is then necessary to determine whether the suspect waived his or her rights to counsel and to remain silent before making any statement.\(^67\) The test used to determine whether the suspect waived his or her rights requires the court to determine whether, looking at the totality of the circumstances, the suspect knowingly, voluntarily, and intelligently relinquished his or her rights.\(^68\)

Although the prosecution’s burden in establishing a waiver is high, there is no requirement that the prosecution establish an express waiver by the suspect.\(^69\) The prosecution may show by the totality of the circumstances that the suspect intended to relinquish his or her rights. These circumstances include the suspect’s age, intelligence, experience in the criminal justice system, and the conduct of the police surrounding the waiver.\(^70\)

4. Reinterrogation

Although the *Miranda* decision purported not to allow the police to interrogate the suspect after the individual has invoked his or her rights, in *Michigan v. Mosley*\(^71\) the Court allowed the police to reinterrogate a suspect after an invocation of rights.\(^72\) Under the holdings of *Mosley* and *Edwards v. Arizona*,\(^73\) the determination of whether a statement made by a defendant in response to a second interrogation

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69. *North Carolina v. Butler*, 441 U.S. 369, 373 (1979) ("An express written or oral statement of waiver of the right to remain silent or of the right to counsel is usually strong proof of the validity of that waiver, but is not inevitably either necessary or sufficient to establish waiver.").
71. 423 U.S. 96 (1979); *see also Edwards*, 451 U.S. at 481-82.
72. *Mosley*, 423 U.S. at 104. In *Mosley*, the Court found that a per se rule that prohibits the police from interrogating a suspect at any time after the suspect has invoked his or her rights would produce absurd results in practice. *Id.* at 102-03.
session is admissible depends on which right the suspect has invoked. If the suspect invoked his or her right to remain silent, the admissibility of the statement depends on whether the police "scrupulously honored" the suspect's invocation of the right.

In *Mosley*, the defendant invoked his right to silence after the police gave him a *Miranda* warning. After a two hour break, the police questioned him again and he gave an incriminating statement. The *Mosley* Court found that the police "scrupulously honored" Mosley's right to cut off questioning. In so doing, the Court emphasized several factors, including the time lapse between the two questioning sessions, the difference in the subject matter of the two questioning sessions, and the giving of a *Miranda* warning by the police before each questioning session.

The Supreme Court, however, has developed a more demanding test for determining the admissibility of a statement made by a defendant after the defendant has invoked his or her right to counsel. If the suspect has invoked his or her right to counsel, in order for a subsequent statement to be admissible, the resumption of interrogation must have been initiated by the suspect. Even if the defendant indicates, without prompting by the police, that he or she wishes to resume speaking with the police, the officers must also obtain a knowing, intelligent, and voluntary waiver of the suspect's Fifth and Sixth Amendment rights prior to any subsequent interrogation.

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74. See id. at 481-82; *Mosley*, 423 U.S. at 103.
76. *Id.* at 97.
77. *Id.* at 104.
78. *Id.*

Eight of the nine justices on the Court agreed that *Edwards* called for [a] two step inquiry and that the first step of the inquiry established a per se rule prohibiting interrogation when the arrestee had not initiated the renewed conversation. However, the Court was unable to agree on the definition of initiation.

*Id.* (footnote omitted).
5. Non-Applicability of the Fruit of the Poisonous Tree Doctrine to \textit{Miranda} Violations

If a statement does follow a \textit{Miranda} violation, a statement obtained during a second interrogation session may nevertheless be admissible. The admissibility of such a statement depends on whether the "fruit of the poisonous tree" doctrine is applied to \textit{Miranda} violations. Under this doctrine, evidence that is derived from an illegal source must be excluded at trial, even though the evidence is not the direct result of the initial violation. Thus, if the police violate a defendant's Fourth Amendment rights and obtain a confession as a result of that violation, the confession should be suppressed as the derivative fruit of the Fourth Amendment violation, even though the confession would be admissible under the Fifth Amendment.

In \textit{Oregon v. Elstad}, the Supreme Court refused to apply this derivative fruit doctrine to \textit{Miranda} violations. The Court drew a distinction between a constitutional violation and a violation of \textit{Miranda}, which, according to the Court, is merely a procedure for protecting a constitutional right. The Court held that the fruit of the poisonous tree doctrine only applies to constitutional violations. Therefore, the doctrine does not apply to the derivative fruits of a \textit{Miranda} violation unless the police conduct was so coercive as to become violative of the Fifth Amendment.

\begin{footnotesize}
\begin{enumerate}
\item The "fruit of the poisonous tree" doctrine is a judicially created doctrine that prohibits the use at trial of evidence indirectly obtained from an illegal source. \textit{See} Wong Sun v. United States, 371 U.S. 471 (1963) (prohibiting the use at trial of a confession obtained as a result of a Fourth Amendment violation); \textit{see also} LAFAVE \& ISRAEL, supra note 10, §§ 9.3-9.5. The Supreme Court has stated that the purpose of the doctrine is to deter law enforcement personnel from violating constitutional rights. \textit{Stone v. Powell}, 428 U.S. 465, 486 (1976).
\item \textit{See} Wong Sun, 371 U.S. at 484-85 (citing Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920), \textit{overruled on other grounds}, United States v. Hanes, 446 U.S. 620 (1980)).
\item The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated." \textit{U.S. Const. amend. IV}.
\item \textit{See} Wong Sun, 371 U.S. at 485.
\item 470 U.S. 298 (1985). In \textit{Elstad}, the defendant made two statements to the police. The first was in violation of \textit{Miranda} because he was in custody and had not yet been given a \textit{Miranda} warning. \textit{Id.} at 301. The police gave Elstad a \textit{Miranda} warning and he then made a second incriminating statement. \textit{Id.} at 301-02.
\item \textit{Id.} at 304.
\item \textit{Elstad}, 470 U.S. at 309.
\item \textit{See id}. If the standard version of the fruits doctrine were applied in a situation in which the police obtained an initial statement in violation of \textit{Miranda} and then obtained a
\end{enumerate}
\end{footnotesize}
II. THE HARMLESS ERROR RULE

After Miranda v. Arizona, but before the advent of the harmless error doctrine, the admission of a defendant's statement obtained in violation of the Miranda rule resulted in automatic reversal of a conviction. However, after the advent of the harmless error doctrine, it became possible for a conviction to stand even though the trial court had admitted a statement in violation of Miranda. A reviewing court can now avoid reversal by applying the harmless error rule. The following section discusses the origins of the harmless constitutional error rule and its current status.

A. Development of the Harmless Error Rule for Federal Constitutional Violations

During the latter half of the 1960's, as both the lower courts and the Supreme Court were grappling with emerging constitutional protections for criminal defendants, the Supreme Court began to develop the doctrine of harmless constitutional error. Fahy v. Connecticut was the first Supreme Court case to suggest that a federal constitutional error could be held harmless. Although the Fahy Court did...
not state that a harmless error rule could be applied to federal constitutional violations, in *Chapman v. California*, the United States Supreme Court formulated a harmless error rule that could be applied to the admission of evidence obtained in violation of the Federal Constitution.

In *Chapman*, the defendant was charged with murder and chose not to testify at his trial. Acting pursuant to a California state constitutional provision, the prosecution commented extensively at trial on the defendant's failure to testify. After the trial, but before the appeal to the California Supreme Court, the United States Supreme Court decided *Griffin v. California*. In *Griffin*, the Court held that the provision of the California Constitution at issue violated the defendant's Fifth and Fourteenth Amendment rights. Nevertheless, the California Supreme Court affirmed the convictions in *Chapman* by applying the state's harmless error rule.

On Chapman's appeal, the United States Supreme Court held

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**Wigmore, Evidence in Trials at Common Law § 21 (3d ed. 1940), rev'd, 375 U.S. 85 (1963).**

Without stating whether a state's harmless error rule could be applied to a federal constitutional violation, the United States Supreme Court found that, because the admission of this evidence was prejudicial to the defendant, application of a harmless error rule was inappropriate. *Fahy*, 375 U.S. at 86. The Court found that the evidence was prejudicial to Fahy in several ways. First, it made the trial testimony more credible. *Id.* at 88. The arresting officer had testified that he found a jar of paint and a paintbrush in Fahy's car. An expert witness also testified that the paint found in the car was of the type used in the crime and the brush was the same width as that used in the crime. *Id.* at 89. Second, Fahy had made incriminating statements to the police when he was arrested. *Id.* at 90. Although these admissions were more damaging than the paint and brush, they were "probably" made in response to confrontation with the illegally seized evidence. Therefore, the Fourth Amendment violation was not harmless. *Id.* at 91-92.

95. 386 U.S. 18 (1967).
96. *Id.* at 19.
97. *Id.* The prosecutor was acting pursuant to a section of the California Constitution then in force which provided that "in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury." *Id.* (quoting CAL. CONST. art. I, § 13 (repealed 1974)).
99. *Id.* at 613.

*No judgment shall be set aside, or new trial granted, in any case, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.*

CAL. CONST. art. VI, § 4 1/2 (repealed 1966).
that a harmless error rule could be applied to the case. The first issue decided by the Court was whether state or federal law governed. Because the appeal involved the application of a state's harmless error rule to rights guaranteed by the Federal Constitution, the Court found that federal law applied.

The Court then answered the major issue on appeal: whether denial of a federal constitutional right could ever be deemed harmless. Chapman had argued that all federal constitutional errors must always be deemed harmful, and, therefore, a violation of a federal constitutional right would automatically result in a new trial. The Court, however, rejected this argument and found instead that some federal constitutional errors could be deemed harmless.

Justice Black, writing for the majority, looked to the federal statutory harmless error provisions in order to support his position. Although these provisions do not distinguish between violations of the Federal Constitution and statutory rules, they could not be used to apply to violations of the Federal Constitution. This is because the United States Supreme Court, rather than Congress, stands as the ultimate arbiter of the Constitution. For Justice Black, a federal rule of harmless constitutional error would "serve a very useful purpose inso-

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102. Id. at 20-21.
103. Id. at 21. The Court stated that it could not "leave to the States the formulation of the authoritative laws, rules, and remedies designed to protect people from infractions by the States of federally guaranteed rights." Id. States are, however, free to fashion harmless error rules for violations of state procedure or state law. Id.; see also Brecht v. Abrahamson, 944 F.2d 1363 (7th Cir. 1991).
In his dissent, Justice Harlan argued that the application of a state's harmless error provision to federal constitutional violations was an issue that should be left to the states. Chapman, 386 U.S. at 46 (Harlan, J., dissenting). In his view, instead of fashioning a new rule of federal constitutional harmless error, the Court should simply have remedied constitutional violations from the application of a state's harmless error rule by striking down unconstitutional harmless error provisions and applications. Id. at 48 n.2.
105. Id. at 21.
106. Id. at 22.
108. For a discussion of the distinctions between the congressionally created harmless error provisions and the judicially created standard of harmless constitutional error, see United States v. Lane, 474 U.S. 438, 460-62 (1986) (Brennan, J., concurring in part and dissenting in part).
far as [it would] block setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial." 109

Once Justice Black established that a rule of federal constitutional harmless error could exist, the next step in his analysis was to determine what the appropriate harmless error rule would be. 110 Here, Justice Black used essentially the same standard as that discussed by the Court in *Fahy*. In *Fahy*, the standard discussed was "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." 111 In *Chapman*, the Court elaborated on this standard by noting that the prosecution must carry the burden of showing that the error complained of was in fact harmless. 112 The Court stated that the rule to be applied was "that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." 113

In the majority opinion, Justice Black did acknowledge that there are "some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." 114 These rights include the right not to have a coerced confession admitted at trial, 115 the right to counsel, and the right to be adjudged by an impartial magistrate. 116 However, the Court did not elaborate on what made these particular rights so significant that their infraction could not be harmless, other than by classifying them as "basic to a fair trial." 117

B. Federal Constitutional Errors Subject to Harmless Error Analysis

Although the *Chapman* decision did not elaborate on what constitutional rights could be subjected to harmless error analysis, after

110. *Id.* at 22-23.
113. *Id.* In *Chapman*, the Court ultimately found that the error complained of was not harmless, and the case was remanded for a new trial. *Id.* at 26. Although there was a strong web of circumstantial evidence, the Court found that the prosecutor's comments allowed the jury to draw only inferences that were favorable to the state in determining guilt. *Id.* at 25.
114. *Id.* at 23.
115. *But see Arizona v. Fulminante*, 111 S. Ct. 1246, 1264-65 (1991) (holding that admission of a coerced confession is a "trial error" which can be subjected to harmless error analysis).
117. *Id.*
the *Chapman* decision, the Court began to expand upon the list of constitutional violations that may be considered harmless.\textsuperscript{118} As the law stands now, the Court has assumed that most errors are subject to the *Chapman* analysis.\textsuperscript{119} In fact, there is a "strong presumption" that "if the defendant had counsel and was tried by an impartial adjudicator, . . . any other errors that may have occurred are subject to harmless-error analysis."\textsuperscript{120}

In a recent Supreme Court case, the Court applied harmless error analysis to the admission of a coerced confession.\textsuperscript{121} In *Arizona v. Fulminante*,\textsuperscript{122} the Court expressly rejected the *Chapman* assertion that harmless error analysis was inapplicable to the admission of a coerced confession.\textsuperscript{123} The Court, through the opinion of Chief Justice Rehnquist, drew a distinction between a "trial error" and a "structural defect in the trial process."\textsuperscript{124} According to the Court, any trial error can be subjected to harmless error analysis, while a structural defect cannot.\textsuperscript{125} The Court defined "trial error" as "error which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt."\textsuperscript{126}

According to Chief Justice Rehnquist, "structural defects" affect the entire trial process. Examples of these structural defects are the deprivation of the right to an impartial judge, the unlawful exclusion of members of the defendant's race from a grand jury, the deprivation of a due process right against burden shifting jury instruction; Crane v. Kentucky, 476 U.S. 683, 691 (1986) (right to adduce exculpatory evidence at trial); Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986) (failure to permit cross examination of witness concerning possible bias); Rushen v. Spain, 464 U.S. 114, 118 (1983) (per curiam) (denial of right to be present at all stages of trial); Milton v. Wainwright, 407 U.S. 371, 378 (1972) (admission of confession obtained in violation of Sixth Amendment); Chambers v. Maroney, 399 U.S. 42, 52-53 (1970) (violation of Fourth Amendment exclusionary rule); Bumper v. North Carolina, 391 U.S. 543, 550 (1968) (same); see generally Stacy & Dayton, *supra* note 15.


\textsuperscript{119} See *Rose*, 478 U.S. at 578 ("[W]hile there are some errors to which *Chapman* does not apply, they are the exceptions and not the rule.") (citing United States v. *Hasting*, 461 U.S. 499, 509 (1983)).

\textsuperscript{120} *Id.* at 579.


\textsuperscript{122} 111 S. Ct. 1246 (1991).

\textsuperscript{123} *Id.* at 1264.

\textsuperscript{124} *Id.* at 1264-65.

\textsuperscript{125} *Id.* at 1265.

\textsuperscript{126} *Id.* at 1264.
of the right to counsel at trial, the deprivation of the right to self-representation at trial, and the deprivation of the right to a public trial. 127

C. Standard for Determining Harmlessness

Determining which federal constitutional errors are subject to harmless error analysis leaves open the question of the appropriate standard by which such errors are to be deemed harmless. Both the Supreme Court and the lower courts have wavered on standards of harmlessness to be used in review of federal constitutional errors.

The standard discussed in Chapman involved determining whether the erroneously admitted evidence might have contributed to the verdict. 128 This approach requires an evaluation of the possible effect that the erroneously admitted evidence may have had on the factfinder and disregards the sufficiency of evidence other than that which was erroneously admitted. 129

The Supreme Court, however, has not been entirely clear on the process by which it determines that a particular error was harmless. Some early decisions of the Court appear to have relied on an “overwhelming evidence” test. 130 Under this approach, an error will be deemed harmless if the evidence other than that which was illegally obtained is so overwhelming that it compels a guilty verdict. 131 In later decisions, however, the Court returned to the Chapman Court’s focus on the effect that the erroneously admitted evidence may have had on the jury verdict, emphasizing that the prosecution bears the


130. See, e.g., Harrington v. California, 395 U.S. 250, 254 (1969). Harrington involved the admission of several statements of a co-defendant who did not take the stand. Id. at 252. These statements were admitted in violation of the confrontation clause of the Sixth Amendment. Id. (citing Bruton v. United States, 391 U.S. 123 (1968)). Although purporting to rely on the Chapman standard, the Court refused to reverse the conviction because “the case against Harrington was so overwhelming that [the Court] conclude[d] that [the] violation of Bruton was harmless beyond a reasonable doubt.” Id. at 254. See also id. at 256 (Brennan, J., dissenting) (“The Court holds that constitutional error in the trial of a criminal offense may be held harmless if there is ‘overwhelming’ untainted evidence to support the conviction. This approach, however, was expressly rejected in Chapman . . . .”) (citing Chapman, 386 U.S. at 23).

burden of establishing beyond a reasonable doubt that the erroneously admitted evidence did not affect the factfinder.\(^{132}\)

### III. **Butzin v. Wood**\(^{133}\)

The Supreme Court has not yet directly applied harmless error analysis to *Miranda* violations.\(^{134}\) The lower courts that have confronted the issue, however, have routinely applied the rule to *Miranda* violations.\(^{135}\) *Butzin*, decided by the United States Court of Appeals for the Eighth Circuit, illustrates the problems of such application.

#### A. Facts

On August 14, 1985, police officers found the dead bodies of David Butzin's pregnant wife, Melody Butzin, and his eighteen month-old son, Alex Butzin, in Cat Creek in Wadena County, Minnesota.\(^{136}\) When the police first discovered the bodies, they believed that the deaths were accidental and did not make a complete investigation...
of the scene.  

Two days after the bodies were found, however, a local insurance agent notified the police that David Butzin had recently purchased a significant amount of insurance on his wife's life. The police then contacted Butzin's father-in-law and asked him to tell Butzin that the police wanted him to come in for questioning on August 26, 1985. Butzin appeared at the police station at the requested time. He was not formally arrested at that time, but, prior to questioning, the police gave Butzin the following warning: "You have the right to remain silent. Anything you say can be used against you in court. You have the right to an attorney. If you cannot afford an attorney, one will be appointed for you at no cost." The questioning officer, Deputy Young, asked Butzin if he understood the rights that had just been read to him, and Butzin replied that he did.

Young then proceeded to question Butzin for one hour. During this questioning session, Butzin responded to all of Young's questions, but did not implicate himself in the deaths of his wife and child. Nor did he at any time indicate that he wanted the questioning to cease, or that he wanted to speak to an attorney.

Butzin was then questioned for a period of between one-half and one hour by a private investigator hired by the county to assist in the investigation. It was during this questioning session that Butzin first indicated he was involved in the deaths. The investigator, Richard Polipnick, came into the questioning room after taking a break, and stated, "David, you're in a world of hurt, aren't you?" He then asked Butzin to tell him what happened at Cat Creek. Butzin first stated that he saw his wife and child fall into the creek and that he panicked and ran away. Polipnick asked Butzin if he would give a written statement to the sheriff's deputies. When the deputies returned, Butzin changed his story to indicate that he had "bumped" his

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137. Id. The police did, however, notice that there were two adult-sized sets of footprints leading from Melody Butzin's car. Id.

138. Id. Melody Butzin's life was insured for $239,000. There were a total of five different policies on Melody's life, three of which David Butzin had purchased within one week of his wife's death. There was also an application for another policy worth $25,000, which was pending at the time of her death. Alex Butzin's life was also insured for $6,000. Id.

139. Butzin, 886 F.2d at 1017.

140. Id.

141. Butzin, 404 N.W.2d at 822-23. For a discussion of the adequacy of this warning, see infra notes 221-24 and accompanying text.

142. Butzin, 404 N.W.2d at 823.

143. Id.

144. Id.
wife and child into the creek. The officers then took Butzin's written statement and placed him under arrest.

After spending the night in jail, Butzin requested to speak with Deputy Young. It was at this time that Butzin confessed to intentionally killing Melody and Alex. There was no indication that Young gave Butzin another Miranda warning. In addition, there was no indication that Butzin was mistreated during the night.

Butzin was charged with second degree murder. At trial, the prosecution introduced Butzin's incriminating statements into evidence, over Butzin's objection. Butzin was convicted and sentenced to thirty-two and one-half years in prison. Butzin appealed his conviction.

B. Decision of the Minnesota Court of Appeals

On appeal, Butzin raised, inter alia, the issue of the adequacy of the Miranda warning he received. Butzin argued that because the police did not inform him of his right to have counsel present during interrogation, the Miranda warning which was given was inadequate. The Minnesota Court of Appeals disagreed and found that Butzin had received an adequate Miranda warning. Finding inconsistent precedent, the court nonetheless held that Miranda warn-

145. This statement made by Butzin will be referred to as Butzin's "first confession."
146. Butzin, 404 N.W.2d at 823. Butzin stated that he went to the stream with Alex and Melody to catch minnows. He stated that as he walked down the bank of the creek towards his wife, he made up his mind to kill her. He stated that he intentionally pushed her into the creek with Alex in her arms, knowing that neither could swim. Id. This statement will be referred to as Butzin's "second confession."
147. The confessions which Butzin gave to the police would not be considered violative of the coerced confession doctrine of the Fifth and Fourteenth Amendments. See supra note 10. Butzin was apparently treated decently. He was given breakfast in the morning and was offered coffee and milk during the interrogation. Butzin, 404 N.W.2d at 827.
148. Butzin, 404 N.W.2d at 824. Butzin received a sentence of 180 months of incarceration for Melody's death and 210 months for Alex's death. Id.
149. Id.
150. Id.
151. Id. at 825.
152. Id. at 824-25 (citing South Dakota v. Long, 465 F.2d 65, 70 (8th Cir. 1972) (holding invalid a warning that did not specifically apprise the defendant of his right to have an attorney present during questioning), cert. denied, 409 U.S. 1130 (1973); Evans v. Swenson, 455 F.2d 291, 295-96 (8th Cir.) (holding that a warning which included statements that the defendant had the right to make a phone call, and had the right to an attorney, clearly suggested that the defendant had a right to call an attorney before questioning), cert. denied, 408 U.S. 929 (1972); Tasby v. United States, 451 F.2d 394, 398-99 (8th Cir. 1971) (holding that a warning which stated that "an attorney would be appointed at the proper time" was adequate), cert. denied, 406 U.S. 922 (1972)).
ings are to be judged from a common sense viewpoint, and that it is sufficient that the statements given, when considered together, "convey the substance of the defendant's constitutional rights." Here, this standard was met because Butzin was informed that he "had an unqualified right to have an attorney present in general, and that he was entitled to the presence of an attorney before [the] questioning began." The court also stressed that the warning Butzin received did not limit the right to have counsel present at any particular phase of the investigation.

The court also questioned whether Butzin was in custody for Miranda purposes at the time of his first confession. In determining whether Butzin was in custody, the court stated that the appropriate test was "whether there [was] a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." Since Butzin had come to the police station on his own initiative, was not placed under arrest, and was not informed that he was not free to leave, the court found that Butzin was not in custody at the time of his first confession.

Butzin also argued that even if the warning that the police gave was adequate, the police needed to give him a second warning before obtaining the second confession. In rejecting this argument, the court stated that the appropriate standard for determining whether a second warning was necessary was "whether the lack of a second warning left the defendant unaware of the meaning or seriousness of the second interrogation." According to the court, the police were not required to give Butzin a second warning because he knew the purpose of the interrogation that led to his second confession and because he had initiated the conversation with Deputy Young. The court emphasized that Butzin had admitted that he was aware of his constitutional rights prior to the making of the second confession.

Butzin then sought federal habeas corpus relief. The Federal District Court for the District of Minnesota denied Butzin's petition.

153. Id. at 825.
154. Id.
155. Id.
156. Id.
157. Id. (quoting California v. Beheler, 463 U.S. 1121, 1124-25 (1983)).
158. Id. at 826.
159. Id. (quoting State v. Andrews, 388 N.W.2d 723, 731 (Minn. 1986)).
160. Id.
161. Id.
Butzin then appealed this decision to the United States Court of Appeals for the Eighth Circuit.

C. Decision of the United States Court of Appeals for the Eighth Circuit

1. Majority Opinion

The majority of the United States Court of Appeals for the Eighth Circuit upheld the denial of Butzin's petition. The court first addressed the admissibility of the second confession. Conceding that Butzin was in custody at the time of this confession, the court nonetheless held that this statement was admissible because it was a volunteered statement and not the product of interrogation. Hence, it would be admissible without regard to the adequacy of the Miranda warning he received.

The court next addressed the issue of the admissibility of Butzin's first confession. The court acknowledged that there was some question as to whether Butzin was in custody at the time of his first statement. However, the majority found it unnecessary to address the issue of whether Butzin was in custody for Miranda purposes at the time of the first confession. Instead, the court relied on the harmless error rule. The court first noted that the defendant's own counsel had acknowledged that it was the second confession which was responsible for Butzin's conviction. The court agreed with this characterization, and since the court had already determined that there

163. Id. at 1019.
164. Id. at 1018.
165. Butzin was in custody because he had been formally arrested and placed in a jail cell overnight. See supra notes 48-53 and accompanying text.
166. Butzin, 886 F.2d at 1018. The court pointed to two factors that made this statement spontaneous and not in response to interrogation. First, Butuin initiated the conversation with the police. Second, the court argued that this statement was not in response to the interrogation of the day before. According to the court, since Butzin had already made a statement, he was not under a great deal of pressure to make another statement. Also, the interrogation session had ended the day before. Thus, his second confession was not in response to the questioning of the day before and was, therefore, volunteered. Id.
167. See supra notes 55-58 and accompanying text.
168. Butzin, 886 F.2d at 1019.
169. Id.
170. Id.
171. Id. The defendant's appellate brief stated that Butzin's first confession was a "relatively innocuous, cryptic disclosure. . . . Butzin makes it sound accidental. . . . His first confession was not the stuff of premeditated murder, rather, arguably it's [a] manslaughter type confession and it was certainly not what convicted him. The second statement . . . provided the proof of intent." Id. (quoting Brief for Appellant, Butzin v. Wood, 886 F.2d 1016 (8th Cir. 1989)) (alteration in original).
was no *Miranda* violation in admitting the second confession, the court concluded that the admission of the first confession could not have prejudiced Butzin. The court also pointed to two other incriminating statements Butzin had made which were admitted at trial, and to the evidence of the insurance coverage which was admitted to the jury. Therefore, according to the court, the admission of the first statement was harmless beyond a reasonable doubt.

2. Concurrence

Judge Beam wrote a brief concurrence. Judge Beam believed that under the Supreme Court's recent *Duckworth* decision, the warning given to Butzin was adequate. In *Duckworth*, the police gave the defendant a warning which included the language that a lawyer would be appointed "if and when you go to court." Judge Beam found that this warning was "a far greater departure from the specific pronouncements set forth in *Miranda v. Arizona* than the warning given Butzin."

3. Dissent

In his dissent, Chief Judge Lay criticized the majority for failing to address the major issue on appeal by employing the harmless error rule. To the dissent, the major issue was whether Butzin was given an adequate *Miranda* warning. According to the dissent, Butzin was never given an adequate warning because he was never expressly...
advised of his right to have counsel present during interrogation.\textsuperscript{181}

Additionally, the dissent argued that Butzin's second confession could not be separated from his prior custodial interrogation of the day before.\textsuperscript{182} Chief Judge Lay argued that this case was unlike \textit{Oregon v. Elstad},\textsuperscript{183} which the majority relied on. In \textit{Elstad}, the Supreme Court held that, because of the nonapplicability of the fruit of the poisonous tree doctrine, a statement obtained in violation of \textit{Miranda} did not necessarily prevent the admission of a second confession that was not in violation of \textit{Miranda}.\textsuperscript{184} In \textit{Elstad}, however, the defendant was given an adequate \textit{Miranda} warning prior to making the second confession.\textsuperscript{185} According to the dissent, this case was unlike \textit{Elstad} because Butzin was never given an adequate \textit{Miranda} warning before his second confession.\textsuperscript{186} Chief Judge Lay also argued that because Butzin was never given an adequate \textit{Miranda} warning, it would not be possible to argue that Butzin had waived his rights.\textsuperscript{187}

\section*{IV. Applying the Harmless Error Rule to \textit{Miranda} Violations}

The \textit{Butzin} decision raises two issues encountered in applying the harmless error rule to \textit{Miranda} violations. The first issue is whether \textit{Miranda} violations may be subjected to harmless error analysis. The second issue involves determining the standard by which such errors, if susceptible to harmless error analysis, are to be deemed harmless. This section concludes that \textit{Miranda} violations should be subjected to harmless error analysis and suggests that courts should apply the \textit{Chapman} standard of harmlessness to \textit{Miranda} violations. This section then illustrates the application of the \textit{Chapman} standard of harmlessness to \textit{Butzin v. Wood}.

\begin{thebibliography}{99}
\bibitem{} Id. at 1021 (citing \textit{Duckworth}, 492 U.S. 195; \textit{United States v. Noti}, 731 F.2d 610 (9th Cir. 1984) (holding a warning inadequate where the investigating officer failed to inform a defendant that he had a right to counsel during questioning as well as before questioning); \textit{Windsor v. United States}, 389 F.2d 530 (5th Cir. 1968) (holding a warning defective that merely told a defendant that he could "speak with an attorney or anyone else before saying anything at all").
\bibitem{} Id. at 1022. The dissent argued that even "[a]ssuming one could say that the second statement was voluntary, . . . it [was] not a separate and isolated instance from the fact that the defendant had previously made his incriminating statements the day before." \textit{Id.}
\bibitem{} 470 U.S. 298 (1985).
\bibitem{} See supra notes 85-89 and accompanying text.
\bibitem{} \textit{Elstad}, 470 U.S. at 301.
\bibitem{} \textit{Butzin}, 886 F.2d at 1020 (Lay, C.J., dissenting).
\bibitem{} Id.
\end{thebibliography}
A. Should Harmless Error Analysis be Applied to Miranda Violations?

The lower courts have routinely applied the harmless error rule to Miranda violations.188 The United States Supreme Court, however, has not yet directly applied harmless error analysis to Miranda violations.189 A review of the violations to which the Court has applied harmless error analysis, however, indicates that the Court would apply harmless error analysis to Miranda violations.190

Under the approach taken by the Court in Arizona v. Fulminante,191 Miranda violations would fall under the definition of "trial errors."192 Miranda involves the exclusion of evidence from presentation to the jury. The violation of Miranda is unlike those violations listed by the Court in Fulminante as structural defects because Miranda violations do not affect the entire trial process. Rather, these violations affect only the presentation of evidence to the jury.

There are also no major doctrinal difficulties involved in applying the harmless error rule to Miranda violations.193 Under the Chapman decision, in order to avoid application of harmless error analysis, Miranda warnings would have to be classified as rights fundamental to a fair trial.194 The Miranda requirements, however, possess none of the characteristics traditionally considered as belonging to a fundamental right.195

188. See supra note 135.
189. See supra note 16.
190. The Court has applied harmless error analysis to the admission of confessions obtained in violation of the Sixth Amendment and to confessions obtained in violation of the coerced confession doctrine. See Arizona v. Fulminante, 111 S. Ct. 1246 (1991) (applying harmless error analysis to the admission of a coerced confession); Satterwhite v. Texas, 486 U.S. 249 (1988) (applying harmless error analysis to the admission of a confession obtained in violation of Sixth Amendment right to counsel). The Court has also indicated that lower courts are free to apply harmless error analysis to Miranda violations. See Pennsylvania v. Muniz, 110 S. Ct. 2638, 2652 n.22 (1990) (stating that the state court was free on remand to determine whether the admission of the statement was harmless error).
192. See supra notes 121-27 and accompanying text.
193. But see Goldberg, supra note 15, at 441-42 (suggesting that harmless error analysis should never be applied to a federal constitutional violation).
195. See Robert Pondolfi, Comment, Principles for Application of the Harmless Error Standard, 41 U. CHI. L. REV. 616, 620-26 (1974). In this article, the author suggests several factors for determining whether a right is so fundamental that its violation must result in automatic reversal. These factors are: the explicitness of the constitutional guarantee, the strength of the congressional will favoring the right, and the historical entrenchment of the right. Id. Under these factors, the Miranda requirements would not be considered fundamental. The requirements are based on the Fifth Amendment, which does not explicitly require the warnings. See supra note 3 for the text of the Fifth Amendment.
Moreover, there are no significant policy concerns dictating that
harmless error analysis should not be applied to *Miranda*.\(^{196}\) Violations of *Miranda* occur frequently, and the benefit of the harmless error rule is that it enables courts to ignore confessions which are not prejudicial to the defendant and thus avoid unnecessary litigation.\(^{197}\) Once it is determined that harmless error analysis should be applied to *Miranda* violations, the question becomes one of identifying the appropriate standard for determining the harmlessness of the *Miranda* error.

**B. Standard for Determining Harmlessness**

A violation of *Miranda* means that a defendant's confession\(^{198}\)

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\(^{196}\) The only policy concern presented by the application of the harmless error rule to *Miranda* violations is that such application may not deter prosecutors from introducing statements obtained in violation of *Miranda*. This concern, however, is present whenever harmless error analysis is applied to a constitutional violation.

\(^{197}\) Also, Congress has not favored the *Miranda* requirements, as evidenced by its attempt to statutorily override the decision. See supra note 2. Moreover, the *Miranda* case was decided in 1966, and therefore the requirements are not historically entrenched in our society.

The lower courts that have considered the issue have also uniformly rejected the classification of the *Miranda* requirements as rights basic to a fair trial, and have used two justifications for doing so. The first is that there is a distinction between the *Miranda* requirement, which is only a procedure for protecting an individual's Fifth and Sixth Amendment rights, and the constitutional rights themselves. See Null v. Wainwright, 508 F.2d 340, 343 (5th Cir.) (citing Michigan v. Tucker, 417 U.S. 433 (1974)), cert. denied, 421 U.S. 970 (1975). Although the constitutional rights themselves may be fundamental, the violation of the procedure designed to protect those rights does not mean that the rights themselves were violated.

Another justification which courts have used in determining that *Miranda* requirements are not "so basic to a fair trial that their violation could never be considered harmless" is that the *Miranda* decision was not made retroactive. In *Johnson v. New Jersey*, the Supreme Court held that *Miranda* would only be applied to trials that occurred after the *Miranda* decision. *Johnson v. New Jersey*, 384 U.S. 719, 732 (1966). Lower courts have reasoned that since *Miranda* was not made retroactive, the Supreme Court itself does not consider the requirements fundamental to a fair trial. See, e.g., Guyette v. State, 438 P.2d 244, 248 (Nev. 1968); Commonwealth v. Padgett, 237 A.2d 209, 211 (Pa. 1968); Cardwell v. Commonwealth, 164 S.E.2d 699, 701-02 (Va. 1968).

\(^{198}\) Although the *Miranda* requirements apply to both inculpatory and exculpatory statements, the term "confession" is used here to indicate any statement obtained in violation of *Miranda*. See *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). Although a defendant may have intended his or her statement to be exculpatory at the time the statement was made, the prosecution would not normally introduce the statement unless the statement somehow inculpates the defendant. An illustration of this principle occurred in *Escobedo v. Illinois*, 378 U.S. 478 (1964). In *Escobedo*, the police questioned the defendant about his role in a murder. The defendant, apparently not knowing that his statement would incriminate him, stated to the police that he was at the scene of the murder but did not shoot the victim. The defendant was subsequently convicted under a concert of action theory. *Id.*; see also *Collazo v. Estelle*, 940 F.2d 411, 424 (9th Cir. 1991) (en banc).
has been erroneously admitted into evidence. Because Miranda violations always involve the defendant's own statements, harmless error analysis should be very carefully applied. This need for close analysis results from the unique evidentiary value of a confession. A confession is "'probably the most probative and damaging evidence that can be admitted against [a defendant].'" A defendant's own confession has been described as "so damaging that a jury should not be expected to ignore it even if told to do so."

Even though a confession admitted in violation of Miranda is usually highly prejudicial to a defendant, applying the harmless error rule to Miranda violations is still appropriate. When undertaking harmless error analysis, however, a reviewing court must be careful to focus on the possible effect on the jury verdict, rather than on the sufficiency of the other evidence.

In Arizona v. Fulminante and Yates v. Evatt, the Supreme Court made clear that the Chapman standard is the appropriate standard for determining the harmlessness of federal constitutional errors. In both cases, the Court found that a particular constitutional error alleged to be harmless was not in fact harmless, stating that the test for determining the harmlessness of a constitutional error requires the prosecution to show, beyond a reasonable doubt, that the erroneously admitted evidence did not affect the verdict obtained.

Recently, the United States Court of Appeals for the Ninth Circuit also emphasized the need for a reviewing court to focus on the possible effect of the erroneously admitted evidence on the jury verdict when employing harmless error analysis. In Collazo v. Estelle, the court found that an erroneously admitted confession was not harmless error. In so doing, the court emphasized that the prosecu-


200. Id. at 1255 (White, J., dissenting in part) (citing Bruton v. United States, 391 U.S. 123, 140 (1968) (White, J., dissenting)).


203. Id. at 1897; Fulminante, 111 S. Ct. at 1258-59.

204. Collazo v. Estelle, 940 F.2d 411, 425-26 (9th Cir. 1991) (en banc).

205. Id.

206. Id. at 426. The court found that the confession was inadmissible because "[n]either [the defendant's] ... alleged Miranda waiver, nor his custodial confession were voluntary, as that term applies either to the conduct of the police, or to [the defendant's] subjective reaction to police overreaching." Id.
tion had made extensive references to the confession at trial, and it was therefore impossible to declare that the admission of the confession into evidence did not affect the jury verdict. 207

C. Illustration

The following section illustrates the problems encountered by applying the harmless error rule to Miranda violations through an analysis of Butzin v. Wood. 208 This section begins with a discussion of the admissibility of both of Butzin's confessions under Miranda. The section then discusses the application of the appropriate standard of harmlessness to the facts of Butzin and concludes that the Butzin court reached an incorrect result in its harmless error analysis.

1. Miranda Analysis

In Butzin v. Wood, the majority began its analysis with the issue of the admissibility of the second confession. 209 Finding that this statement was not obtained in violation of Miranda, the court went on to find that the admission of the first statement was harmless in light of the admission of the second confession. 210 In order for the majority to use this analysis, it must have implicitly assumed that the first statement was a Miranda violation. However, the majority failed to discuss why Butzin involved a Miranda violation.

A more appropriate analysis would have been for the court to first determine whether Butzin was being subjected to custodial interrogation at the time of his first confession, 211 and then determine whether he was given an adequate warning. 212 If this analysis yielded a determination that admission of Butzin's first confession was in violation of Miranda, then the court should have applied the same steps to the admission of his second confession. This analysis is more appropriate because it would give more guidance on the Miranda requirements to trial courts, prosecutors, and investigating officers by refining both the requirements of an adequate Miranda warning and

207. Id. at 425-26. The court emphasized that the prosecution used Collazo's confession in cross-examination to discredit Collazo's trial testimony. Also, the court emphasized that the prosecution, in its closing argument to the jury, relied heavily on Collazo's confession to "cement its case," to attack the credibility of Collazo's testimony, and to impugn his theory of defense.


209. Id. at 1018.

210. Id. at 1019.

211. See supra notes 43-58 and accompanying text.

212. See supra notes 59-66 and accompanying text.
the application of the *Miranda* custody test.\textsuperscript{213}

In applying this analysis to the first confession, the first question that needs to be addressed is whether the police subjected Butzin to custodial interrogation at the time of his first confession.\textsuperscript{214} Although Butzin did come to the police station on his own initiative, he was in custody at some point during the interrogation. At one point during the first interrogation session, the private investigator hired by the county asked Butzin "'[w]hy don't you tell me what happened out there at Cat Creek, David'? Butzin replied: 'I lied, I was there.'"\textsuperscript{215} The investigator left the room and returned with two sheriff's deputies.\textsuperscript{216} There are two facts which would support a finding that, at this point, Butzin was in custody. First, he was in a police station and surrounded by police officers.\textsuperscript{217} Since he had just indicated to the police that he was involved in the deaths of his wife and child, Butzin would have had a reasonable belief that he was in custody at that point.\textsuperscript{218} Second, although Butzin was never told that he was under arrest before he made his first confession, he was not told that he was not under arrest.\textsuperscript{219} There was also no dispute that the police were interrogating Butzin at the time of his first confession because the police were expressly questioning Butzin at the time he made the first statement.\textsuperscript{220} Therefore, it appears that the first confession was the result of a custodial interrogation.

The next issue is to determine whether the warning that the police gave Butzin was adequate.\textsuperscript{221} An adequate *Miranda* warning requires that the suspect be expressly advised of his right to have counsel pres-


The unfortunate side of harmless error is that it often prevents full review. Rather than apply technical standards to the process below, the reviewing court may affirm the action below by relying on its feeling that, based on the whole record, the end result below was probably justified, and thus, any errors in the process of reaching the end result must have been harmless. 

*Id.*


\textsuperscript{216} *Id.*

\textsuperscript{217} *Id.*

\textsuperscript{218} See *supra* notes 50-53 and accompanying text.

\textsuperscript{219} Cf. Oregon v. Mathiason, 429 U.S. 492 (1977) (per curiam) (holding that defendant who was expressly told that he was not under arrest was not in custody for *Miranda* purposes).

\textsuperscript{220} Butzin, 886 F.2d at 1017.

\textsuperscript{221} See *supra* notes 59-66 and accompanying text.
ent during interrogation.\textsuperscript{222} This requirement was not met here. Although the police told Butzin that he had a right to counsel, they did not inform him that he had the right to have counsel present during the interrogation.\textsuperscript{223} Because Butzin was being subjected to custodial interrogation at the time of his first confession, and was not given an adequate warning, the admission of this confession was in violation of \textit{Miranda}.\textsuperscript{224}

2. Harmless Error Analysis

Once a court has determined that a confession was admitted in violation of \textit{Miranda}, it becomes appropriate to determine whether its

\textsuperscript{222} See supra notes 32, 64 and accompanying text.

\textsuperscript{223} For the text of the warning given to Butzin, see supra text accompanying note 141.

\textsuperscript{224} The \textit{Butzin} court also found that Butzin's second confession was admissible because it was not the product of police interrogation. \textit{Butzin}, 886 F.2d at 1018. This result is questionable. Because Butzin had been formally arrested at the time of his second confession and had not yet been given an adequate \textit{Miranda} warning, the only way that the second statement could not be a \textit{Miranda} violation would be if it were not the result of interrogation. \textit{See supra} notes 55-58 and accompanying text. The Eighth Circuit majority found that the second confession was not the result of interrogation because Butzin had requested to speak with the police on his own initiative. \textit{Butzin}, 886 F.2d at 1018. Although Butzin's request to speak with the officers was voluntary, the resulting confession was the product of interrogation. Butzin was removed from his cell and was questioned on the details of his involvement in the crime. His confession was not a response to routine booking questions, and the officers did not merely request clarification of Butzin's ambiguous statements. Rather, they removed him from his cell and questioned him for a length of time. The Eighth Circuit relied on \textit{United States v. Rhodes}, 779 F.2d 1019, 1032 (4th Cir. 1985), \textit{cert. denied}, 476 U.S. 1182 (1986), \textit{United States v. Grant}, 549 F.2d 942, 946 (4th Cir.), \textit{cert. denied}, 432 U.S. 908 (1977), \textit{vacated on other grounds}, 435 U.S. 912 (1978), and \textit{United States v. Foskey}, 636 F.2d 517, 521-22 (D.C. Cir. 1980) for the proposition that spontaneous statements are not affected by the \textit{Miranda} rule. \textit{Butzin}, 886 F.2d at 1018. In those cases, however, the police did not question the suspect for a significant amount of time.

If Butzin's second confession were found to be inadmissible, his conviction would have to be reversed. This confession was extremely prejudicial to Butzin, and its admission into evidence could not be considered harmless under either the overwhelming evidence or the \textit{Chapman} standards of harmlessness. Although the jury was exposed to the evidence of the insurance coverage, there was no physical evidence linking Butzin to the crime. Because the police originally thought that the deaths were accidental, they did not collect any physical evidence at the scene of the deaths. \textit{See id}. The only physical evidence collected at the scene was the evidence that there were two adult-sized sets of footprints near Melody Butzin's car. \textit{Id}. There was, however, no evidence indicating that these footprints belonged to David Butzin. Because of the lack of physical evidence, the conviction could not be sustained under an overwhelming evidence standard of harmlessness without the admission into evidence of Butzin's second confession. Nor could Butzin's conviction be sustained under the \textit{Chapman} standard of harmlessness. It would be impossible to declare, beyond a reasonable doubt, that a confession which contained the only proof of intent, a necessary element of the crime charged, did not contribute to Butzin's conviction.
admission was harmless error. Different standards for determining harmlessness have been utilized by the courts, and a review of Butzin in light of these standards illustrates that the choice of standards can affect the outcome of a case. In determining that the admission of the first confession was harmless, the United States Court of Appeals for the Eighth Circuit focused on the other "overwhelming evidence" against Butzin. The court, however, failed to address the possible ways in which the introduction of the first confession could have affected the jury verdict.

In Butzin, there was enough evidence other than the first confession to avoid reversal of Butzin's conviction under the overwhelming evidence standard of harmlessness. However, under the Chapman standard, it is certainly possible that the introduction of the first confession may have affected the jury's verdict by damaging Butzin's attempt to discredit his second confession. The problem with the overwhelming evidence approach to determining harmlessness is that the introduction of a tainted piece of evidence becomes virtually risk-free for the prosecution. By using the overwhelming evidence approach to determining harmlessness, the Butzin court allowed the prosecution to avoid the risks associated with the introduction of the first confession.

Under Chapman, in order for a reviewing court to find an error harmless, it must be able to declare, beyond a reasonable doubt, that the erroneously admitted confession did not affect the jury's verdict. When undertaking this analysis, a reviewing court "must entertain with an open mind the possibility that at least one member of the jury [was affected by the evidence]."

Under this standard, it is possible that the admission of Butzin's first confession affected the jury's verdict. Arguably, the first confes-

225. See supra notes 128-32 and accompanying text.
226. Butzin v. Wood, 886 F.2d 1016, 1019 (1989) ("In light of the overwhelming evidence of Butzin's guilt, we conclude that the admission of the first statement, if error, was harmless beyond a reasonable doubt." (citation omitted)).
227. See State v. Butzin, 404 N.W.2d 819, 822-23 (Minn. Ct. App. 1987). Other than Butzin's first confession, the jury was exposed to the evidence of the insurance coverage, the second confession, the other incriminating statements made by Butzin, and the evidence that there were two adult-sized sets of footprints at the death scene. See supra notes 138, 173 and accompanying text. Without Butzin's second confession, however, Butzin's conviction could not have been sustained under the overwhelming evidence standard of harmlessness. See supra note 224.
sion could be considered harmless in light of the second confession because the second confession was more inculpatory than the first. However, the existence of a later admissible confession does not necessarily render the admission of the first confession harmless. For example, in *Arizona v. Fulminante*, the Court found that a coerced confession admitted in violation of the Fourteenth Amendment's Due Process Clause was not harmless error, despite the admission into evidence at trial of a legally obtained confession to the same crime. The Court found that the first confession could have affected the jury's verdict by lending credibility to the second confession.

This possibility is also present in *Butzin*. In *Butzin*, the defendant attempted to discredit the confessions he had made to the police. At his trial, Butzin testified that he had falsely confessed to the killings because he felt responsible for the drownings. He testified that he felt responsible because he had not allowed his wife to purchase minnows for their son. Apparently, his theory was that his wife and son would not have been at the creek, and would not have accidentally drowned, if he had allowed his wife to buy the minnows. Butzin argued that because of these guilty feelings, he confessed to the killings.

This argument would have had a much greater chance of success if the jury had not been exposed to Butzin's first confession. Once the jury had heard that Butzin had confessed before the second confession, it became unlikely that the jury would believe that both confessions were false. This is especially true considering that Butzin had a night free of questioning before making the second confession. Therefore, the admission of the first confession damaged this argu-

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231. For the content of the two confessions that Butzin gave to the police, see *supra* notes 144-46 and accompanying text.
233. *Id.*
234. *Id.* at 1258-59. In *Fulminante*, the defendant made two confessions. One of the confessions was made to a police agent while the defendant was in prison. This confession was found to be coerced. *Id.* at 1251-52. Fulminante then made a second confession to the police agent's wife. This confession was found to be free of constitutional infirmity. The Court found that the admission of the first confession was not harmless because it made the second confession more credible. *Id.* at 1258-61. Because of the lack of physical evidence, the successful prosecution of the case depended on the jury believing the confessions. *Id.* at 1258. The Court found that the admission of the first confession could have made the second confession appear more credible to the jury because the first confession contained some details that corroborated the second confession. *Id.*
236. *Id.*
237. *Id.*
238. Because the jury knew that Butzin had a night free of questioning after making an initial confession, it could have reasonably believed that Butzin's second confession was
ment and could possibly have affected the jury verdict.\footnote{239}

CONCLUSION

A reviewing court should be free to apply harmless error analysis to *Miranda* violations. When such analysis is employed, however, a reviewing court should be careful to focus on the possible effect a confession obtained in violation of *Miranda* had on the jury verdict. The court should explore the various ways in which the defendant's statements may have affected the verdict when determining whether their admission was harmless.\footnote{240} This higher standard of care is necessary because of the unique evidentiary value of a confession.

The Supreme Court has recognized the necessity of this higher level of care in the context of a coerced confession,\footnote{241} as well as in the context of the admission of a confession obtained in violation of the Sixth Amendment.\footnote{242} Because *Miranda* violations always involve the defendant's own statements, the same concerns present in the context of the admission of coerced confessions and confessions obtained in violation of the Sixth Amendment are also present in the context of confessions obtained in violation of *Miranda*. Yet, as the *Butzin* decision indicates, courts have not analyzed the impact of an erroneously admitted confession in light of this unique evidentiary impact. Faithful adherence to the *Chapman* standard of harmless error would effectively protect the right to a jury trial.

*John J. Henry*

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\footnote{239}{The first confession could also have affected the jury verdict by making the jury more hostile towards Butzin. In his first statement, Butzin said that after he had accidentally bumped his wife and child into the river, he "watched them go down the river." *Butzin*, 886 F.2d at 1017. The fact that Butzin watched the victims go down the river may have made the jury more hostile towards Butzin.}

\footnote{240}{Harrington v. California, 395 U.S. 250, 255 (1969) (Brennan, J., dissenting) ("[In order] for an error to be 'harmless' it must have made no contribution to a criminal conviction." (citing Chapman v. California, 386 U.S. 18, 26 (1967))).}

\footnote{241}{Arizona v. Fulminante, 111 S. Ct. 1246, 1257-60 (1991).}

\footnote{242}{Satterwhite v. Texas, 486 U.S. 249 (1988).}