No. _____

In the Supreme Court of the United States

AMMAR ASIMFARUQ HARRIS,

Petitioner,

v.

STATE OF NEVADA,

Respondent.

On Petition for a Writ of *Certiorari* to the Nevada Supreme Court

---

PETITION FOR WRIT OF *CERTIORARI*

CAPITAL CASE

JoNell Thomas*
Robert L. Langford
Matthew J. Rashbrook
Thomas A. Ericsson
330 S. Third Street, 8th Floor
Las Vegas, Nevada 89155
(702) 455-6265
Email: thomasjn@clarkcountynv.gov
* Counsel of Record for Petitioner

CAPITAL CASE

QUESTION PRESENTED

Whether Mr. Harris' rights under the Fifth, Sixth and Fourteenth amendments to a fair trial by jury were violated when the Nevada Supreme Court incorrectly used a *de facto* overwhelming evidence test rather than the appropriate harmless error test, in determining whether the admission of grotesque photographs was a constitutional error in his capital case?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

I.

PARTIES TO THE PROCEEDING

The Petitioner is Ammar A. Harris, the defendant and appellant in the courts below. The Respondent is the State of Nevada, the plaintiff and appellee in the courts below. There are no parties to this proceeding other than those listed in the caption.

II.

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Ammar Harris, respectfully petitions for a writ of *certiorari* to review the Nevada State Supreme Court judgment in Petitioner's capital case.

III.

OPINION BELOW

The decision of the Nevada Supreme Court denying Harris' direct appeal of three capital sentences is published in *Harris*, 134 Nev. Adv. Op. 107, and attached as Appendix "A."

IV.

BASIS FOR JURISDICTION

The judgment and opinion of the Nevada Supreme Court was issued on December 27, 2018. App. A. This Court has jurisdiction under 28 U.S.C.A. § 1257(a) (West). *See also*, Sup.Ct.R. 13(3)(mandating a petition for writ of *certiorari* be filed within 90 days from the date of entry of judgment sought to be reviewed).

V.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall . . . be compelled in any criminal case to be a witness against himself or herself, nor be deprived of life, liberty, or property without due process of law . . ..

U.S. Const. amend. V.

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law . . . and to have the assistance of counsel for his defense.

U.S. Const. amend. VI.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> . . . No State shall . . . deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV.

VI.

STATEMENT OF THE CASE

This Petition arises from a melee that began at a major Las Vegas hotel/casino, a subsequent shooting between Harris and others involved in the melee, and a horrific

car crash and explosion on the Las Vegas Strip on February 21, 2013. Three people were killed in the shooting and automobile collisions.

On April 26, 2013, the State of Nevada charged Petitioner Ammar Harris with the following crimes: three counts of Murder with use of a Deadly Weapon; one count of Attempt Murder with use of a Deadly Weapon; and seven counts of Discharging Firearm at or into Structure, Vehicle, Aircraft, or Watercraft. The State of Nevada sought capital sentences against Harris on each of the murder counts.

Harris pleaded not guilty, and a jury trial was held from October 12 through October 26, 2015. The jury returned verdicts of guilty on all counts. Following a penalty hearing, the jury returned death sentences on each murder count.

On January 4, 2016, the trial judge sentenced Harris to three consecutive death sentences, along with prison sentences on the non-murder counts.

Harris appealed his conviction to the Nevada Supreme Court, and the court rendered the divided opinion upon which Harris respectfully seeks a Writ of *Certiorari*. In its decision, a divided Nevada Supreme Court found that the trial judge had allowed extremely prejudicial and "shocking" photographs to be shown to the jury, the court then incorrectly applied an overwhelming evidence test, rather than the appropriate harmless error analysis and affirmed the capital conviction of Harris.

STATEMENT OF TRIAL EVIDENCE RELEVANT TO THE HARMLESS ERROR ANALYSIS

Much of the action of the people involved in the case was captured on video tape from casinos, taxi cabs, and police cameras. At trial, the State presented a compilation of the collected videos which depicted the following the events and the approximate times listed below:

February 20, 2013

11:00 p.m. Harris and his friend arrived at the Aria Hotel and Casino and reserved a table scheduled to be held several hours later at the Haze Nightclub inside the Aria; Harris and his friend left the hotel shortly after reserving a table

February 21, 2013

1:30 a.m. Harris and his girlfriend Yenesis ("Yeni") Alfonzo arrived at the Aria

1:37 a.m. Harris and his group entered the Haze nightclub

3:33 a.m. Decedent Michael Cherry, in his Maserati car, arrived in the Aria valet area

3:36 a.m. Cherry and Freddy Walters go down the escalator to the Haze lobby

3:45 a.m. Cherry and Walters returned to the Maserati in the valet area

3:51 a.m. The Maserati departed the valet area

3:51 a.m. Harris and a security officer left Haze Nightclub;

Harris has a verbal confrontation with a black male adult in the casino

3:52 a.m. Maserati again returned to the valet area

3:54 a.m. The security guard, Harris, and Yeni exited the north lobby doors into the valet area

3:54 a.m. Maserati left the north valet

3:57 a.m. Maserati again returned to valet area

Cherry and Walters got out of the Maserati - Harris walked past Cherry and Walters – Cherry and Walters returned to the Maserati

3:57 a.m. The security guard, Harris, and Yeni walked into the valet area

3:58 a.m. Maserati again leaves the valet area

3:59 a.m. Maserati returns to the valet area

3:59 a.m. Altercation between a large black male and another black male

3:59 a.m. Cherry and Walters get out of the Maserati

3:59 a.m. The security guard and Harris walked back toward the north lobby area

3:59 a.m. Cherry entered north lobby doors from the valet area

4:01 a.m. Cherry and Walters exited the north lobby doors into the valet area

4:02 a.m. Cherry and Walters stand in the valet area for a short time before going back into the north lobby

4:03 a.m. Cherry and Walters entered the north lobby doors

4:05 a.m. Cherry and Walters exited the north lobby doors

4:08 a.m. Altercation – male pointed what appeared to be a gun toward the crowd and a gun is reported to security

4:08 a.m. Yeni left the black Range Rover and walked toward the north valet doors to find Harris and let him know there is more fighting going on in the valet area

4:09 a.m. **Cherry meets w/ male who had gun; the two are standing next to the Maserati and shook hands**

4:10 a.m. Yeni exited the north lobby doors into the valet

4:11 a.m. Harris exited the north lobby doors; **it appears that the group Cherry is with points at Harris as he walks to his Range Rover**

4:13 a.m. Harris walked from the Range Rover to the Maserati driver's door

4:13 a.m. Cherry and Walters walk to the Maserati

4:13 a.m. Maserati left the north valet area

4:15 a.m. Harris returned to the Range Rover

4:16 a.m. The Range Rover departed the valet area

4:17 a.m. Range Rover drove east on Harmon and pulled in front vehicles stopped at a light, including the Maserati

4:17 a.m. The light turned green and the Range Rover accelerated – **the Maserati quickly accelerated after and caught up to the Range Rover**

4:18 a.m. Range Rover stopped at a red light – **the Maserati pulled up next to the Range Rover at the light**

4:18 a.m. The Range Rover appears to be trying to get a jump on the stoplight to leave before the Maserati does; both vehicles accelerated north when the light turned green

4:19 a.m. A single shot is fired from the Range Rover at the Maserati - the Maserati began following the Range Rover at a high rate of speed

4:19 a.m. Several additional shots fired from the Range Rover

4:19 a.m. Multiple cars collided as the Maserati enters the intersection of Las Vegas Boulevard and Flamingo, including the Maserati and the taxi cab, which exploded upon impact

The following witness testimony was presented at the trial:

Yeni Alfonso testified that she was Harris' girlfriend at the time of the events at issue. After she and Harris left the nightclub and were walking through the Aria Casino, a black male she knew by the nickname of "Filthy" got into a verbal argument with Harris. The confrontation continued between the two in the valet area of the Aria. She and two other young women who were with her went and got into Harris' Range Rover. Harris went back into the casino as he thought he had left his jacket inside. The women in the vehicle saw more fighting going on in the valet area and saw someone with a gun. She got out of the vehicle and went back into to the casino to let Harris know his jacket was in the vehicle and that there was fighting going on in the valet area.

Yeni testified that Harris eventually came to the Range Rover and asked her to get a hand gun out of the vehicle's glove box. She was unable to and Harris retrieved the gun. Harris handed her the gun and went back to the valet area to talk with people.

Ashley Jones testified that she went to the Haze Nightclub with Harris' group. She was in Harris' Range Rover at the time of the fighting in the valet area. She observed more men arguing in the valet area. Harris came to the Range Rover, got a gun from the vehicle, and left the gun with the three women in the Range Rover.

Jones testified that "there was like a big altercation" between a number of men and Harris was involved. She saw someone she knew as "Filthy" get into a verbal altercation with Harris inside the casino. She testified that that the argument between Filthy and Harris continued in the valet area.

Jones saw Filthy retrieve a hand gun from a vehicle she believed to be a Maserati. The person she saw retrieve a hand gun from a car was the same person she saw arguing with Harris. She testified that Yeni was also aware that the man retrieved a gun from the car.

Jones testified that Harris returned to the Range Rover and retrieved a gun from the vehicle's glove box. Harris left the gun with Yeni and he indicated to Ms. Alfonso that she should use the gun to protect herself if needed. Harris again left the Range Rover, and he did not take the weapon with him.

Jones testified that she did not hear what, if anything, was said between Harris and Cherry.

Courtney Harper testified at trial that she had known Harris for a number of years. She testified that Harris contacted her later on the morning of the shooting and that he sounded "panicked, worried." She testified that Harris said he killed three people. Harper asked him what happened and she testified that Harris "said he had [an]

altercation with someone at the club I believe in the valet area. **And when they left he was being followed and the other person pulls on the side and he thought that they were reaching for something and so he want[ed] to shoot them before he got shot."**

The video evidence of the events is consistent with Harris' trial theory that he thought he was in extreme danger and had to defend himself when he shot into Cherry's car.

VII.

ARGUMENT: THE COURT SHOULD GRANT CERTIORARI TO CONSIDER THE NEVADA SUPREME COURT'S CONTINUING INCORRECT APPLICATION OF HARMLESS ERROR ANALYSIS

At trial, the State of Nevada introduced, notwithstanding Harris' timely written and oral objections, a sequence of high-resolution color photographs which depicted, variously, the victims' bodies *in situ* at the scene of the horrific automobile collision and explosion, and then later in various stages of dismemberment as autopsies were performed. Harris objected to the admission of these photographs in advance of trial, specifically on the basis that, as this Court has frequently discussed "the qualitative difference [between death and any other punishment], there is a corresponding difference in the need for reliability[.]" *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976). *See, also, e.g. Johnson v. Mississippi*, 486, U.S. 578, 584 (1988), *Gardner v. Fla.*, 430 U.S. 349, 363 – 64, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977), *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978), *Beck v. Alabama*, 447 U.S. 625, 637 – 38, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980). At trial, Harris renewed his motion orally, objecting to the admission of the prejudicial

photographs. The trial court admitted the photographs. On appeal, the Nevada Supreme Court determined the admission was an abuse of discretion, due to the extraordinarily high likelihood of prejudice and the absence of any meaningful probative value.[1]

Nonetheless, despite candidly acknowledging the extraordinarily prejudicial nature of the photographs at issue in Harris' trial[2], and their extremely limited probative value, the Nevada Supreme Court—without further discussion—referred to this error as nonconstitutional, and then proceeded to usurp the role of the jury, in violation of the Sixth Amendment, by determining that the jury would nonetheless have convicted Harris in a hypothetical trial in which the photos were not admitted: " . . . in light of the overwhelming evidence supporting the verdict, we conclude that no relief is warranted." This, despite acknowledging of the pictures that "Their graphic nature could easily inflame the passion of a reasonable juror, consciously or subconsciously tempting him or her to evaluate the evidence based on emotion rather than reason—the very definition of unfair prejudice," *Harris v. State,* 134 Nev. Adv. Op. 107, 7, 432 P.3d 207 (2018), citing *Old Chief v. United States*, 519 U.S. 172, 180, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997). App. A.

[1] "[T]he photographs' probative value was unquestionably minimal under the circumstances . . . Indeed there was not even a remote suggestion that the victims died by means other than the impact and explosion . . . And the State had abundant, far less inflammatory evidence to support the testimony . . . including a video of the Maserati striking the taxicab[.]" *Harris v. State*, 134 Nev. Adv. Op. 107, 7 – 8, 432 P.3d 207 (2018). App. A.

[2] "The photographs at issue are shocking. In full color and high-resolution, they show the terrible aftermath of the taxicab's explosion and the further mutilation caused by the victims' autopsies. They include images of charred limbs and burned flesh, dissected tracheas and chest cavities ripped open, and the desecrated bodies of human beings who clearly died a horrific death." *Harris v. State*, 134 Nev. Adv. Op. 107, 7, 432 P.3d 207 (2018). App. A.

Kotteakos v. United States remains the seminal case regarding harmless-error analysis, and describes exactly the fault with the Nevada Supreme Court's decision in describing that although a review of the weight of the evidence is unavoidable, it cannot be "the sole criteria" in determining whether the error was harmless. *Kotteakos v. United States*, 328 U.S. 750, 763, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946). However the analysis of the Nevada Supreme Court was constrained to "overwhelming evidence supporting the verdict," rather than the effect on the jury. *Harris v. State*, 134 Nev. Adv. Op. 107, 11, 432 P.3d 207 (2018).

Unfortunately, *Kotteakos*'s command is not always easy to follow when reviewing courts believe the defendant guilty. The temptation to supplant the jury's deliberation with the court's deliberation has led to a variety of harmless-error analyses including the overwhelming-evidence test, which is inconsistent with *Kotteakos*.

Early cases interpreting the harmless-error rule confined their analysis to errors concerning extremely minor or technical errors, as it was "intended to prevent matters concerned with the mere etiquette of trials." *Bruno v. United States*, 308 U.S. 287, 294, 60 S. Ct. 198, 84 L. Ed. 257 (1939). Even as the rule was expanded to embrace more substantial errors, the Court carefully noted that it was "not authorized to look at the printed record, resolve conflicting evidence, and reach the conclusion that the error was harmless because we think the defendant was guilty," because to do so "would be to substitute our judgment for that of the jury." *Weiler v. United States*, 323 U.S. 606, 611, 65 S. Ct. 548, 89 L. Ed. 495 (1945). The Court has warned of the danger of supplanting the jury's judgment with its own: "the question is not whether guilt may be spelt out of

the cord, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials." *Bollenbach v. United States*, 326 U.S. 607, 614, 66 S. Ct. 402, 90 L. Ed. 350 (1946).

This Court explained in *Fahy v. Connecticut* that the appropriate harmless-error inquiry requires courts to examine "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction," *Fahy v. State of Conn.*, 375 U.S. 85, 86 – 87, 84 S. Ct. 229, 11 L. Ed. 2d 171 (1963). Later the Court discussed *Fahy* in *Chapman v. California*, further elucidating 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." *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).

The Nevada Supreme Court offered no explanation for its apparent belief that the jury was not impacted by the photographs, other than to refer to the other evidence offered in the case. *See, generally, Harris v. State*, 134 Nev. Adv. Op. 107, 10 – 11, 432 P.3d 207 (2018). ("[I]n light of the overwhelming evidence supporting the verdict, we conclude that no relief is warranted."); App. A. This makes clear the reality that the Nevada Supreme Court was in fact considering whether there was overwhelming evidence, but the sum of the law in this area makes clear the correct inquiry: "Do I, the judge, think that the error substantially influenced the jury's decision?" *O'Neal v. McAninch*, 513 U.S. 432, 436, 115 S. Ct. 992, 130 L. Ed. 2d 947 (1995). The Nevada Supreme Court provided no analysis of the evidence presented at trial that showed Harris had been in a major altercation with individuals in the casino and in the valet area; that

someone had pulled a gun from what was testified to as a Maserati; and that the video evidence showed Harris had tried to outrun the Maserati on the street but was unable to pull away from the faster vehicle that had been circling the valet area many times during the melee.

By contrast, the dissent in the decision at issue, authored by Justice Cherry, and in which Justice Gibbons joined, recognized that "the majority correctly conclude[d] that the graphic content of the photographs might have caused reasonable jurors to react so emotionally that they could not neutrally evaluate the evidence." *Harris v. State*, 134 Nev. Adv. Op. 107, 432 P.3d 207 (2018), *dissent* 1; App. A. Justice Cherry highlights the error of his fellow justices: "[the Nevada Supreme Court] seems to consider how appellate court judges would have responded to such photographs instead of jurors." *Id.* The conclusion reached by the majority can only be arrived at by preferring the inapplicable and constitutionally unsound *de facto* test for overwhelming evidence.

The difference between the tests is significant. A court applying the effect-on-the-verdict test must review the entire record to determine the nature and effect of the error. The scope of this inquiry includes the extent to which the error was emphasized and whether the jury's verdict or conduct indicates that the error was influential. On the other hand, a court applying the overwhelming-evidence test has no need to consider the nature and effect of the error because it asks only whether the untainted evidence was sufficient to assure conviction.

The overwhelming-evidence test can be traced to language in two cases: *Harrington v. California*, 395 U.S. 250, 89 S. Ct. 1726, 23 L. Ed. 2d 284 (1969), and

Schneble v. Fla., 405 U.S. 427, 92 S. Ct. 1056, 31 L. Ed. 2d 340 (1972). Neither of these cases, however, created an "overwhelming-evidence" rule. Rather, in both cases, the Court repeated the familiar rule of *Kotteakos* and *Chapman*, but, while applying it, made statements that some courts took out of context.

In *Harrington*, the Court considered whether a *Bruton* violation was harmless under the *Chapman* standard. *Harrington*, 395 U.S. at 252. The Court made clear that Harrington's holding was not intended to modify that standard in any way. "We do not depart from *Chapman* nor do we dilute it by inference. We reaffirm it." *Id.* at 254. Despite this plain admonition, some courts have read *Harrington*'s language to permit harmlessness determinations based solely on the court's finding of overwhelming evidence. See, *e.g., United States v. Holmes*, 620 F.3d 836, 844 (8th Cir. 2010) ("[e]vidence erroneously admitted ... is harmless . . . as long as the remaining evidence is overwhelming").

The language in *Harrington* that the lower courts have misinterpreted stated: "It is argued that we must reverse if we can imagine a single juror whose mind might have been made up because of [the codefendants'] confessions and who otherwise would have remained in doubt and unconvinced. We of course do not know the jurors who sat. Our judgment must be based on our own reading of the record and on what seems to us to have been the probable impact on the minds of an average jury." *Harrington*, 395 U.S. at 254. The Court went on to conclude that "apart from [the codefendants' confessions] the case against Harrington was so overwhelming that we conclude that this violation of Bruton was harmless beyond a reasonable doubt." *Id.*

Taken out of context, these statements have been read by certain courts of appeals to allow courts to simply guess whether a reasonable jury would have convicted in a trial without error. However, a closer look at *Harrington* reveals a much narrower holding. First, *Harrington* was decided based on its unique facts. The Court noted that its decision was tied to those facts: "We granted the petition for certiorari to consider whether the violation of *Bruton* was on these special facts harmless error under *Chapman*." *Id.* at 252; see *also id.* at 253 ("we conclude on these special facts [the error was] ... harmless"); and at 254 ("[o]ur decision was based on the evidence in this record").

Second, the Court's reference to "the minds of an average jury" did not announce a new rule. Naturally, reviewing courts will consider how an error would affect an average jury. Such considerations are inescapable, since there is seldom direct proof of the jury's impression of evidence. Nonetheless, the *Harrington* Court attempted to determine whether the error influenced the jury that heard the evidence by examining the error's nature. It did not hypothesize an error-free trial and a hypothetical jury's reaction thereto. It is one thing to inquire how the error as presented would affect a reasonable person—often that is a reviewing court's best means of determining an error's probable effect. It is quite another thing to ask whether a jury that did not hear the error would convict. Nothing in *Harrington* can be read to allow a reviewing court to hypothesize an error-free trial and ignore the error's potential effect or specific indications that it influenced the jury's decision.

In *Satterwhite v. Texas*, 486 U.S. 249, 108 S.Ct. 1792, 100 L.Ed.2d 284 (1988), the Court applied harmless-error analysis in the context of death penalty sentencing. The

court of appeals had found that erroneous admission of a psychiatric report "was harmless because 'the properly admitted evidence was such that the minds of an average jury would have found the State's case [on future dangerousness] sufficient . . . even if Dr. Grigson's testimony had not been admitted.'" *Id.* at 258. This Court rejected this analysis: "The question, however, is not whether the legally admitted evidence was sufficient to support the death sentence, which we assume it was, but rather, whether the State has proved 'beyond a reasonable doubt' that the error complained of did not contribute to the verdict obtained." *Id.* at 258–259. In Harris' case, no such analysis was ever undertaken by the Nevada Supreme Court, who incorrectly assumed this to be a nonconstitutional error. Instead, the Nevada Supreme Court examined the incorrect *de facto* test discussed herein: " . . . in light of the overwhelming evidence supporting the verdict, we conclude no relief is warranted." *Harris v. State*, 134 Nev. Adv. Op. 107, 11, 432 P.3d 207 (2018).

This unconstitutional usurpation of the role of the jury as factfinder conflicts with the rulings of this Court and violated Harris' rights under the Sixth and Fourteenth Amendments, and requires review by this Court to bring an end to the continued stream of such rulings issuing from the Nevada Supreme Court: "It is not the role of courts to extrapolate from the words of the Sixth Amendment to the values behind it, and then to enforce its guarantees only to the extent they serve (in the court's views) those underlying values. The Sixth Amendment seeks fairness indeed—but seeks it through very specific means . . . that were the trial rights of Englishmen." *Giles v. California*, 554 U.S. 353, 375, 128 S. Ct. 2678, 171 L. Ed. 2d 488 (2008).

The right to be tried by a jury is "fundamental to the American scheme of justice." *Duncan v. State of La.*, 391 U.S. 145, 149, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968). The "most important element" of the right is "to have the jury, rather than the judge, reach the requisite finding of 'guilty.'" *Sullivan v. Louisiana*, 508 U.S. 275, 277, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993). The right "reflect[s] a profound judgment about the way in which law should be enforced and justice administered." *Duncan*, 391 U.S. at 155.

The right to a jury trial protects both defendants and society from the arbitrary decisions of state actors. This is why the "preservation and proper protection" of the jury-trial right "as a protection against arbitrary rule were among the major objectives . . . of the Declaration and Bill of Rights of 1689." *Duncan*, 391 U.S. at 151. The reason for the jury-trial right was not the ability of juries to discern truth better than judges. See *id.* at 157 (noting criticism that juries are incapable of determining issues of fact). Instead, the jury was meant as a check on the judicial branch's power. As John Adams wrote, "[a]s the constitution requires that the popular branch of the legislature should have an absolute check, so as to put a peremptory negative upon every act of government, it requires that the common people should have as complete a control, as decisive a negative, in every judgment of a court of judicature." The Works of John Adams, Second President of the United States 253 (Charles Francis Adams ed., 1850).

The core of the jury-trial right is its limitation of judicial power. The right to jury trial "is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the

judiciary." *Blakely v. Washington*, 542 U.S. 296, 305–06, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), *disapproved of by Collins v. State*, 232 So. 3d 739 (Miss. Ct. App. 2017). In fact, Thomas Jefferson opined that it was more important that the people, through the jury, have control over the judicial branch of government as opposed to the legislative branch. The Papers of Thomas Jefferson 282, 283 (Julian P. Boyd ed., 1958). "The Framers would not have thought it too much to demand that, before depriving a man of three more years of his liberty, the State should suffer the modest inconvenience of submitting its accusation to 'the unanimous suffrage of twelve of his equals and neighbors,' rather than a lone employee of the State." *United States v. Booker*, 543 U.S. 220, 238, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005) (quoting *Blakely*, 542 U.S. 296, U.S. 296, quoting 4 Blackstone, Commentaries on the Laws of England, 343).

The Framers expressed specific concern about legal doctrines that could encroach upon the jury's role and break down the important boundary between judge and jury erected by the jury-trial right. "[W]e often hear in conversation doctrines advanced for law, which, if true, would render juries a mere ostentation and pageantry, and the Court absolute judges of law and fact." Works of John Adams at 253. The jury-trial right was intended to emphasize "the important boundary between the power of the court and that of the jury." *Id.*

The Sixth Amendment right to a jury trial carries with it common-law traditions. "When the American constitutions provide for the trial by jury, they provide for the common law trial by jury; and not merely for any trial by jury that the government itself may chance to invent, and call by that name. It is the thing, and not merely the name, that

is guaranteed." Lysarider Spooner, An Essay on the Trial by Jury, Boston: John P. Jewett and Company (1852).

In *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), this Court reaffirmed a defendant's right to have every element of an offense proven to a jury beyond a reasonable doubt. *Apprendi*, 530 U.S. 466. This means that a judge's power to convict and sentence "derives wholly from the jury's verdict." *Blakely*, 542 U.S. at 306. Thus, the jury-trial right requires that any harmless-error analysis focus "wholly [on] the jury's verdict," not on the judge's independent view of the evidence's weight. *Id.* If the Court could ignore the jury's verdict, "the jury would not exercise the control that the Framers intended." *Id.*

This Court has warned against nullifying constitutional rights. In the context of the similar Sixth Amendment rights of confrontation and right to counsel, the Court has made plain that the Constitution means what it says:

> What the Government urges upon us here is what was urged upon us with regard to the Sixth Amendment's right of confrontation-a line of reasoning that abstracts from the right to its purposes, and then eliminates the right. Since, it was argued, the purpose of the Confrontation Clause was to ensure the reliability of evidence, so long as the testimonial hearsay bore "indicia of reliability," the Confrontation Clause was not violated. We rejected that argument . . . in *Crawford v. Washington*, saying that the Confrontation Clause 'commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.'

United States v. Gonzalez-Lopez, 548 U.S. 140, 146 – 147, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006) (quoting *Crawford v. Washington*, 541 U.S. 36, 62, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)).

The Court most clearly discussed the Sixth Amendment's role in harmless-error analysis in *Sullivan*, 508 U.S. 275. It defined the harmless-error inquiry with reference to the jury-trial right: "Consistent with the jury-trial guarantee, the question it instructs the reviewing court to consider is not what effect the constitutional error· might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand." *Id.* at 279. This language explicitly ties the harmless-error inquiry's focus to the Sixth Amendment right. Therefore, conducting improper harmless-error inquiry violates the Sixth Amendment. This is because "the Sixth Amendment requires more than appellate speculation about a hypothetical jury's action." *Id.* at 280. When a reviewing court hypothesizes a trial that occurred without error as opposed to considering the error's effect on the jury that heard the case, "the wrong entity judge[s] the defendant guilty." *Id.* (quoting *Rose v. Clark*, 478 U.S. 570, 578, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986)).

Undoubtedly, harmless-error analysis can be conducted without violating the jury-trial guarantee. However, to do so, the reviewing court must determine that the error did not affect the jury's verdict. When a court looks only to its assessment of whether, absent error, there is overwhelming evidence, it ignores the possibility of an error influenced verdict and supplants the jury's finding with its own. This Court can avoid this Sixth

Amendment problem by reaffirming that harmless error analysis requires examination of an error's possible effect on the jury that heard the case.

The Fourteenth Amendment requires not only that an individual be tried by a jury of his peers, but that the process, the trial itself, not be so infected with undue prejudice that it be rendered fundamentally unfair. *Payne v. Tennessee*, 501 U.S. 808, 825, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991). In Harris' case, the Nevada Supreme Court failed to consider whether the prejudicial effect of the photographs colored the jury's thinking in considering Harris' claim of self-defense or a lesser level of criminal homicide, preferring instead to focus solely on whether there was an overwhelming amount of evidence. Harris' rights under the Sixth and Fourteenth Amendments were violated and he should receive a new trial.

/ / /

/ / /

VIII.

CONCLUSION

For the reasons stated in this Petition, Harris respectfully asks that this Court grant a Writ of *Certiorari*, vacate the decision of the Nevada Supreme Court, and remand for entry of an unconditional writ of habeas corpus.

Dated this 27th day of March, 2019.

Respectfully submitted,

/s/ *JONELL THOMAS*

_____

JoNell Thomas*
Robert L. Langford
Matthew J. Rashbrook
Thomas A. Ericsson
330 S. Third Street, 8th Floor
Las Vegas, Nevada 89155
(702) 455-6265
Email: thomasjn@clarkcountynv.gov
* Counsel of Record for Petitioner