

No. 18-8652

IN THE SUPREME COURT OF THE UNITED STATES

April 30, 2019

AMMAR ASIMFARUQ HARRIS, *Petitioner*,

v.

THE STATE OF NEVADA, *Respondent*

*ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF NEVADA*

RESPONDENT'S BRIEF IN OPPOSITION

JONELL THOMAS*
Clark County Special Public Defender
Nevada Bar #004771
Robert L. Langford, Esq.
Matthew J. Rashbrook, Esq.
Thomas A. Ericsson, Esq.
330 S. Third Street, 8th Floor
Las Vegas, Nevada 89155
(702) 455-6265

CHARLES W. THOMAN
Chief Deputy District Attorney
Nevada Bar #012649
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

Counsel for Petitioner*

Counsel for Respondent

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Counsel for Petitioner*

Counsel for Respondent

QUESTION PRESENTED

CAPITAL CASE

After holding that the district court abused its discretion when it allowed the State of Nevada to introduce photographs of victims who Petitioner Harris had killed, the Nevada Supreme Court held that the error was harmless. It based its decision on the overwhelming evidence introduced at trial of Harris' guilt, including a video—the introduction of which was not challenged—that showed all of the relevant events and eyewitness testimony which filled in any gaps.

The question presented is whether the Nevada Supreme Court applied an incorrect standard of harmless-error review when it found that any error from the introduction of pictures was harmless because of the overwhelming evidence of guilt.

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE AND FACTS	1
REASONS FOR DENYING THE PETITION	5
I. The petition has failed to demonstrate that the holding below conflicted with this Court's precedents.	5
II. Even if this Court believes that Nevada's harmless-error jurisprudence conflicts with its prior holdings, the instant case is an improper vehicle to correct Nevada's error.	8
CONCLUSION.....	10

TABLE OF AUTHORITIES

Page Number:

Cases

<i>Holmes v. South Carolina</i> , 547 U.S. 319, 324 (2006).....	7
<i>Arizona v. Fulminante</i> , 499 U.S. 279, 306–307 (1991).....	7
<i>Knipes v. State</i> , 192 P.3d 1178, 1183 (Nev. 2008).....	5
<i>Kotteakos v. United States</i> , 328 U.S. 750, 757 (1946).....	5
<i>Milton v. Wainwright</i> , 407 U.S. 371, 372-73 (1972)	6, 9
<i>Rose v. Clark</i> , 478 U.S. 570, 579 (1986).....	7
<i>Schneble v. Florida</i> , 405 U.S. 427, 431 (1972).....	6
<i>States v. Lane</i> , 474 U.S. 438, 472 n.11 (1986).....	8
<i>United States v. Hasting</i> , 461 U.S. 499, 510-11 (1983)	6

Statutes

NRS 178.598.....	5
NRS 48.035(1)	3, 6

Other Authorities

U.S. Const., art. VI, cl. 2.....	7
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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE AND FACTS

On February 21, 2013, Harris, his girlfriend, Yeni, and two others were partying at a nightclub in Las Vegas, Nevada. Pet. App. 2. Early in the morning, Harris and the women left the club. Pet. App. 2. They walked to the valet and, upon arriving, Harris discovered that he left his jacket at the club. Pet. App. 2-3. He left to retrieve it, and while he was gone, an argument broke out between the women and a man, who Yeni saw waving a gun. Pet. App. 3. She followed after Harris and told him about the argument. Pet. App. 3.

1. Harris returned and retrieved a gun from his glove compartment. Pet. App. 3. He handed it to Yeni, telling her to use it if she needed to. Pet. App. 3. Kenneth Cherry and Freddy Walters had arrived at the club at roughly 3:30 a.m., but they had not stayed long before returning to Cherry's car, a Maserati, to leave. Around this time, Harris began to approach Cherry's Maserati. Pet. App. 3. Cherry then sped off. Pet. App. 3.

Harris and the women then left, and Harris cut the Maserati off. Pet. App. 3. Harris ordered Yeni to roll down her window and lean back. Pet. App. 3. Harris had, by this point, retrieved the gun, and Yeni, recognizing what Harris was about to do, told Harris that Cherry was not the person with whom she had argued. Pet. App. 3. Harris ignored her, pointed his gun at Cherry, and pulled the trigger. Pet. App. 3. Cherry, who died almost instantly, had his foot on the gas pedal when Harris shot him. Pet. App. 3. The Maserati began racing down the Las Vegas Strip, and Harris followed, hitting Walters as he continued firing his gun at the Maserati. Pet. App. 3. With its driver dead, the Maserati hit several vehicles before crashing into a taxicab while going eighty-eight miles per hour. Pet. App. 3. Upon collision, the taxicab exploded into flames, killing both the driver of the taxicab, Michael Bolden, and his passenger, Sandra Sutton. Pet. App. 3. Walters miraculously survived both the collision and the bullet wound. Pet. App. 3.

2. The State of Nevada charged Harris *inter alia* with murdering Cherry, Bolden, and Sutton and with attempting to murder Walters. Pet. App. 3. For each murder, the State sought the death penalty. Pet. App. 3. Harris conceded that he was the person who killed Cherry but argued (1) that it was done in self-defense and (2) that he was too intoxicated to form the specific intent to commit murder. Pet. App. 3-4. The State rebutted Harris's

self-defense claim by arguing that it was belied by both video evidence and testimony. Pet. App. 4. Further, it argued that Harris could not have been acting in self-defense because Cherry had left the club before he did. Pet. App. 4. At trial, the State admitted photographs depicting “the manner in which the victims were found, the extent of their injuries, and the cause of their deaths.” Pet. App. 5. Harris argued that by conceding to the killing of Cherry, the question of the victim’s deaths was not in dispute. Pet. App. 5. The district court allowed the State to admit the photographs. Pet. App. 4. The jury rejected each defense and found Harris guilty of three counts of first-degree murder with the use of a deadly weapon, one count of attempted murder with the use of a deadly weapon, and “other felonies.” Pet. App. 4.

3. At a penalty hearing, the jury found ten aggravating circumstances for each of the three murders. “[N]o juror found any mitigating circumstances.” Pet. App. 4. Having addressed each, the jury sentenced Harris to die.

4. Harris appealed his conviction. Pet. App. 4. On appeal, he alleged *inter alia* that the district court abused its discretion by allowing the State to introduce the photographs. Pet. App. 5. The Nevada Supreme Court agreed with Harris, holding that the “photographs’ probative value was substantially outweighed by the danger of unfair prejudice” in violation of NRS 48.035(1) and that the district court had abused its discretion by allowing the State to introduce them. Pet. App. 6, 9–10. The court limited its decision to the trials’ guilt phase, as during a penalty phase, Nevada law allows the admission of any evidence relevant to the sentence “whether or not the evidence is ordinarily admissible.” Pet. App. 10 n.1 (*citing* NRS 175.552(3)).

Although the Nevada Supreme Court held that the district court abused its discretion in admitting the photographs, it held that the error was harmless in light of the overwhelming evidence against Harris. Pet. App. 10. “Almost all of the relevant events, from the moment Harris left the club to the moment the taxicab exploded, were captured on video, and eyewitness testimony filled in any gaps.” Pet. App. 10. It determined that the evidence the State presented “conclusively showed” that Harris killed Cherry and that as a direct result, Sutton and Bolden had also been killed. Pet. App. 10–11. It also found that Harris had not adequately demonstrated that he was acting in self-defense or was voluntarily intoxicated based on his actions after the shooting, which the court found were “entirely inconsistent with the actions of a person who had acted lawfully.” Pet. App. 10. Furthermore, it held that the district court “tempered” the photographs’ effect by giving a warning to the jurors and those in the audience about what they were about to see and instructing them not to react. Pet. App. 11. This warning, coupled with the overwhelming evidence of Harris’s guilt, caused the court to find that the photographs did not have a substantial influence over the jurors’ evaluation of the evidence, “particularly when they could see the relevant events unfold for themselves.” Pet. App. 11.

Having found only harmless error, the Nevada Supreme Court affirmed the Judgment of Conviction. Pet. App. 16.

REASONS FOR DENYING THE PETITION

Contrary to the petition's claims, there is no reason to grant the petition. First, there is no genuine conflict with this Court's precedent, and Harris has not alleged a split among the lower courts. Second, Harris is raising a constitutional claim that he did not raise below to manufacture a federal claim. And third, even if there were a reason to grant plenary review of the question presented in the petition, this is a poor vehicle to address Nevada's understanding of the harmless error doctrine as the circumstances of this case—which were captured on video and largely undisputed—involve Harris shooting and killing the driver of a Maserati which then rammed into a taxicab, causing it to explode and kill its occupants. Accordingly, even if certiorari were granted and the case remanded to the Nevada Supreme Court, the end result will likely be the same. This Court should deny the Petition for Writ of Certiorari.

I. The petition has failed to demonstrate that the holding below conflicted with this Court's precedents.

Harris does not allege that the Nevada Supreme Court “decided an important federal question in a way that conflicts with another state court of last resort or a United States court of appeals.” Sup. Ct. R. 10(b). Instead, he alleges that the court “decided an important federal question in a way that conflicts with relevant decisions of this Court.” *Id.* (c).

The Nevada Supreme Court applied NRS 178.598, the Nevada harmless-error statute, in the instant case. Pet. App. 10. It has long recognized that it is “identical to the federal harmless-error statute.” *Knipes v. State*, 192 P.3d 1178, 1183 (Nev. 2008). Accordingly, Nevada applies this Court's holding in *Kotteakos v. United States*, 328 U.S. 750, 757 (1946) and asks whether a nonconstitutional trial error had a “substantial and injurious

effect or influence in determining the jury's verdict." *Knipes*, 192 P.3d at 1183 (internal citation omitted); Pet. App. 10.

Kotteakos applies in nonconstitutional challenges and requires a reviewing court to ask if it has a "fair assurance" that the verdict would have been the same but-for the nonconstitutional error. 328 U.S. at 765.

On questions of a constitutional nature, the question is not whether the reviewing court has a "fair assurance," but whether the court is clear beyond a reasonable doubt that the verdict was unaffected by the error. *United States v. Hasting*, 461 U.S. 499, 510-11 (1983) ("The question a reviewing court must ask is this: absent [the constitutional error], is it clear beyond a reasonable doubt that the jury would have returned a verdict of guilty?"); *Milton v. Wainwright*, 407 U.S. 371, 372-73 (1972) (similar); *Schneble v. Florida*, 405 U.S. 427, 431 (1972) (similar).

This was a question of nonconstitutional error as it challenged an evidentiary ruling based on Nevada statutory law. Pet. App. 5. As the Nevada Supreme Court recognized, Harris cited NRS 48.035(1), not any constitutional provisions, as his reason for challenging the photographs. Pet. App. 5.¹ It appears that Harris has restructured his arguments now to manufacture a federal claim that was never addressed by Nevada courts. That alone is a sufficient reason for this Court to deny the petition.

But it is not alone. Instead, a review of the cases this Court has considered "constitutional" for purposes of determining whether to apply the *Kotteakos* fair-assurance

¹ In fact, on direct appeal, Harris's challenge to the introduction of the photographs was void of any reference to the United States Constitution.

standard or the *Chapman* beyond-a-reasonable-doubt standard demonstrates that only *bone fide* allegations of explicitly enumerated constitutional provisions constitute constitutional error. *Arizona v. Fulminante*, 499 U.S. 279, 306–307 (1991) (opinion of Rehnquist, C.J., for the Court) (collecting examples of constitutional error).

Nevada’s Rules of Evidence are what they purport to be, merely evidentiary and not of a constitutional dimension as contemplated by this Court’s prior precedents. U.S. Const., art. VI, cl. 2; *see, e.g., Holmes v. South Carolina*, 547 U.S. 319, 324 (2006) (recognizing the “broad latitude” of state lawmakers to establish rules of evidence). Harris’s attempt to repackage as constitutional error his previous evidentiary challenge to the photographs in a petition for certiorari do not suddenly change the issue from evidentiary to constitutional. Pet. 10, 16. The Nevada Supreme Court held that the district court violated a Nevada evidentiary rule because that was the question which Harris presented to it. Pet. App. 5. Harris was right to call this an evidentiary issue in the first instance. He is wrong here.

Applying the fair-assurance standard, the Nevada Supreme Court did not err. Despite Harris’s repeated claim that considering the weight of the evidence is not sufficient by itself to determine harmless error, this Court has repeatedly addressed just that in determining that error is harmless. Pet. 3, 10-12; *see Rose v. Clark*, 478 U.S. 570, 579 (1986) (“Where a reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt, the interest in fairness has been satisfied and the judgment should be affirmed.”); *see also Arizona v. Fulminante*, 499 U.S. 279, 307-08 (1991) (“[Evidence] 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.”).

Harris alleges that the Nevada Supreme Court transformed his evidentiary claim into a constitutional claim by usurping the role of the jury, but that understanding is untenable. Pet. 16. If all that it took to elevate a nonconstitutional, evidentiary claim to constitutional status was a reviewing court to apply harmless-error analysis, then *Kotteakos*'s fair-assurance standard has effectively been overturned and *Chapman* would of necessity govern. This Court's precedents do not support such a result. Instead, time and again this Court has carefully delineated between constitutional and nonconstitutional error. *United States v. Lane*, 474 U.S. 438, 472 n.11 (1986) (Stevens, J., concurring in part and dissenting in part) (recognizing the "considerable difference" between how this Court treats constitutional error and nonconstitutional error).

The Nevada Supreme Court did not err when it determined that an evidentiary question erroneously decided by the district court was nonconstitutional and then subsequently weighed the evidence in light of the whole record. It cannot be said that the jury would have decided differently had the photographs not been introduced. The petition for certiorari should be denied.

II. Even if this Court believes that Nevada's harmless-error jurisprudence conflicts with its prior holdings, the instant case is an improper vehicle to correct Nevada's error.

Moreover, this case is an improper vehicle for overturning the Nevada Supreme Court for several reasons. First, this was not a murder-trial where the jury was required to identify the killer, as Harris conceded at trial that he killed Cherry and that by killing Cherry, he had proximately caused Bolden and Sutton's deaths. Pet. App. 3, 8; Pet. 9. Accordingly, the question of who killed Cherry, Bolden, and Sutton was uncontested at trial. The jury

only had to determine whether Harris was acting in self-defense or was intoxicated to the point that he was unable to form the necessary intent to be guilty of first-degree murder. Pet. App. 4.

Video surveillance belied Harris's self-defense claim. Cherry had left the club *before* Harris had. Pet. App. 4. Moreover, it was Harris who approached Cherry and caused him to leave. Pet. App. 3. Accordingly, the Nevada Supreme Court determined that the evidence was conclusive that Harris killed Cherry "without any viable justification." Pet. App. 11.

As to the voluntary-intoxication defense, the district court, over objection, declined to give an instruction on voluntary intoxication, and accordingly, the jury was never instructed that voluntary intoxication could negate Harris's intent. Pet. App. 12. Instead, the court instructed that the jury that Harris's "drug and alcohol intoxication could be considered in determining his intent." Pet. App. 12. The pictures cannot now be said to have undermined an intoxication defense on which the jury was never instructed.

To the contrary, the pictures which the State introduced were not probative of Harris's claims of self-defense or intoxication. To challenge Harris's defenses, the State relied solely on evidence which Harris has not challenged here. *Milton v. Wainwright*, 407 U.S. 371, 377-78 (1972) ("[W]e do not close our eyes to the reality of overwhelming evidence of guilt fairly established ... by use of evidence not challenged here[.]") Indeed, the pictures were, at worst, cumulative because of Harris's explicit decision to concede that he was the person whose direct actions led to the death of three individuals on the Las Vegas Strip. The Nevada Supreme Court found that, because Harris had conceded that he was the cause of the deaths, the "already low" probative value of the pictures in determining Harris's

guilt was further diminished. Pet. App. 8. The low probative value of the pictures neither demonstrated Harris's guilt nor undermined his defenses. On these facts, the Nevada Supreme Court did not err in finding that the pictures were admitted in error but that the error was harmless. Granting certiorari, accordingly, is unwarranted here. Even if the Nevada Supreme Court's "overwhelming evidence" test was an incorrect application of this Court's harmless-error analysis for nonconstitutional errors, the record is sufficient to say with a "fair assurance" that the verdict would have been the same but-for the district court's evidentiary abuse of discretion. This Court should decline to grant the petition when it is unlikely that remanding the case to the Nevada Supreme Court would result in a different outcome.

CONCLUSION

The petition establishes no conflict among lower courts on its presented issue and instead raises constitutional claims which were not presented to the Nevada Supreme Court, even as it ignores the heinousness of Harris's crimes. The petition should be denied.

Respectfully submitted.



CHARLES W. THOMAN*
Chief Deputy District Attorney
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Counsel of Record*

Counsel for Respondent