No. 18-8652

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

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REPLY BRIEF

CAPITAL CASE

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TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

I.

ARGUMENT:
THE NEVADA SUPREME COURT INCORRECTLY APPLIED THE HARMLESS-ERROR DOCTRINE AS DESCRIBED BY THIS COURT AND THEREBY VIOLATED MR. HARRIS' CONSTITUTIONAL RIGHTS

1) As described throughout the Petition, the Nevada Supreme Court is following a *de facto* overwhelming evidence standard, rather than the correct harmless-error doctrine.

Contrary to the State's suggestion in its opposition brief, the Nevada Supreme Court's error creates a conflict with this Court's relevant decisions. Briefly, the Nevada Supreme Court fails to consider whether there was "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). The Nevada Supreme Court's challenged decision instead follows a *de facto* – but incorrect – overwhelming evidence standard: ". . . 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), Pet. App. A.

In fact, the error is highlighted by Justice Cherry, dissenting: "[the Nevada Supreme Court] seems to consider how appellate court judges would have responded to such photographs instead of jurors." *Harris*, 134 Nev. Adv. Op. at 11, Pet. App. A, *dissent* 1. The majority opinion of Nevada Supreme Court argues that the court is following and correctly applying the standards laid out by this Court in *Kotteakos v. United States*, 328 U.S. 750, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946), and its progeny, but a

close examination of the decision shows the error in the Court's rationale for upholding Mr. Harris' conviction. In fact, in numerous passages outlined in Mr. Harris' Petition for Writ of Certiorari, *see, e.g.*, *Harris*, 134 Nev. Adv. Op. at 11 (" . . . in light of the overwhelming evidence supporting the verdict, we conclude no relief is warranted."), the Nevada Supreme Court indicates that in truth, their examination was focused on the *de facto* overwhelming evidence test, rather than the correct inquiry into whether the erroneous admission of the grotesque photographs in question created "a reasonable possibility that the evidence complained of might have contributed to the conviction." *Fahy*, 375 U.S. at 86 – 87.

2) <u>Harris raised these federal and Constitutional claims at all levels</u>.

The State argues that Mr. Harris is "manufactur[ing] a federal claim that was never addressed by Nevada courts." Brief in Opposition, 6. However, Mr. Harris objected to admission of the photographs in question on all relevant bases at all times – as violations of federal and state constitutions, as well as federal and state law.[1,2] The Motion quoted

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[1] "Comes now, the Defendant, Ammar Harris . . . and hereby moves this Honorable Court to, pursuant to the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, Article 1 of the Nevada Constitution, and applicable state law, preclude the State from moving to admit into evidence unduly prejudicial or cumulative gruesome photographs or videos of the victims." App. A, *Motion to Preclude the State from Admitting into Evidence Photographs or Videos Which are Unduly Prejudicial and/or Cumulative*, 1.

[2] "Photographs and videos exist of the victims that are entirely gruesome, gory and inflammatory and serve no evidentiary purpose. They are also cumulative. Because this is a capital prosecution, exacting standards must be met to assure that it is fair. *Johnson v. Mississippi*, 486 U.S. 578, 584, 108 S. Ct. 1981, 100 L. Ed. 2d 575 (1988); *Gardner v. Fla.*, 430 U.S. 349, 363 – 64, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977); *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976) (White, J., concurring) . . . At a capital trial, the avoidance of inflammatory appeals to the passions

herein was before the Nevada Supreme Court – the full text is in the record on appeal – and was specifically referred to and cited by Mr. Harris in his brief. *See,* Appendix A, Motion to Preclude the State from Admitting into Evidence Photographs or Videos Which Are Unduly Prejudicial and/or Cumulative.

The Nevada Supreme Court understood it was presented with an argument regarding not only Nevada state law, but also federal law and constitutional principles, as it cited numerous circuit court opinions and relevant opinions from this Court in its opinion on this subject specifically. *See, e.g.*, *Harris*, 134 Nev. Adv. Op. at 9 – 14, *citing Old Chief v. United States*, 519 U.S. 172, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997), *United States v. Ford*, 839 F.3d 94 (1st Cir. 2016), *United States v. Hasting*, 461 U.S. 499, 103 S. Ct. 1974, 76 L. Ed. 2d 96 (1983), *Delaware v. Van Arsdall*, 475 U.S. 673, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986).

To appropriately 'federalize,' appellant's must offer "state courts [...] a 'fair opportunity' to apply controlling legal principles to the facts bearing upon [their] constitutional claim." *Castillo v. McFadden*, 399 F.3d 993, 999 (9th Cir. 2005), *quoting*

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and prejudices of juries is constitutionally protected. The United States Supreme Court has repeatedly held that "because of the qualitative difference [between the death penalty and any other form of punishment], there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson*, 428 U.S. at 305, *Gardner*, 430 U.S. at 357 – 58, *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)." *Motion to Preclude the State from Admitting into Evidence Photographs or Videos Which are Unduly Prejudicial and/or Cumulative*, 3 – 4.

Kelly v. Small, 315 F.3d 1063, 1066 (9th Cir. 2003), *overruled by Robbins v. Carey*, 481 F.3d 1143 (9th Cir. 2007) (citations and internal quotations omitted in original). The Nevada Supreme Court clearly had such an opportunity, in light of their discussion of the cases noted above, and the briefing and record presented by Mr. Harris on his direct appeal.

The State further suggests that a challenged evidentiary ruling is by its nature nonconstitutional error, but a long line of cases from this Court has described a variety of Constitutional implications which arise from the admission of evidence. *See, e.g.*, *Dawson v. Delaware*, 503 U.S. 159, 112 S. Ct. 1093, 117 L. Ed. 2d 309 (1992) (First Amendment implicated when capital defendant's membership in the Aryan Brotherhood was admitted as an aggravating factor during the penalty phase; *Arizona v. Fulminante*, 499 U.S. 279, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991) (Fifth and Fourteenth Amendments violated when a coerced confession was admitted at trial); *Satterwhite v. Texas*, 486 U.S. 249, 108 S. Ct. 1792, 100 L. Ed. 2d 284 (1988) (admission of psychiatric report in capital trial violated the Sixth Amendment when defendant did not consult with counsel before submitting to the evaluation); *Moore v. Illinois*, 434 U.S. 220, 98 S. Ct. 458, 54 L. Ed. 2d 424 (1977) (Sixth and Fourteenth Amendment rights violated when identification evidence obtained improperly was admitted at trial); *Mapp v. Ohio*, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961).

Mr. Harris made clear to the Nevada Supreme Court that his claim was based in Constitutional and federal law, and the Nevada Supreme Court considered it in that light.

3) **Mr. Harris' case cries out for examination by this Court, as it illustrates the deprivation of critical Constitutional trial rights and the stakes are as high as can be.**

Lastly, Respondent the State of Nevada appears to suggest that, although the Nevada Supreme Court may be incorrectly applying this Court's standards to the detriment of capital and other defendants, nonetheless this Court should ignore that fact for the time being, as Mr. Harris' case is a poor vehicle by which to correct the error. This notwithstanding that Mr. Harris very life hangs in the balance.

This Court must recognize that although Mr. Harris' case may represent an imperfect vehicle, none is perfect. Nonetheless, the Court has an opportunity to correct a massive injustice, indeed, an ongoing series of injustices, of which Mr. Harris' case is simply one example – albeit an egregious, and, failing this Court's intervention, a monumentally costly one.

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II.

CONCLUSION

Mr. 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 10th day of May, 2019.

Respectfully submitted,

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