

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2002

LARRY DONELL DAVIS,

Petitioner

VS.

STATE OF TEXAS,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO
THE TEXAS COURT OF CRIMINAL APPEALS

THIS IS A CAPITAL CASE

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February 25, 2003

QUESTION PRESENTED

In affirming Petitioner’s conviction for capital murder and resulting sentence of death on direct appeal, did the Texas Court of Criminal Appeals unconstitutionally substitute an improper “beyond a reasonable doubt” harmless error rule, derived from the seminal case of *Chapman v. California*, 386 U.S. 19 (1967), when it utilized the standard of review found in *Anderson v. Nelson*, 390 U.S. 523 (1968) which suggests that before concluding whether federal constitutional error is harmless beyond a reasonable doubt, the reviewing court must, *inter alia*, find evidence in the record which supports an acquittal?

LIST OF PARTIES

The following is a list of all parties to the proceeding in the court whose judgment is sought to be review:

Counsel for the State of Texas:

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Counsel for Larry Donell Davis:

Warren L. Clark, Attorney at Law, Amarillo, Texas

TABLE OF CONTENTS

	<u>Page</u>
QUESTION PRESENTED	2
LIST OF PARTIES	3
TABLE OF AUTHORITIES	5-6
OPINION BELOW	8
JURISDICTION	8
CONSTITUTIONAL PROVISIONS INVOLVED	8
STATEMENT OF THE CASE	8
A. Course of Prior Proceedings	8
B. Statement of Facts	9
REASON THIS COURT SHOULD GRANT THE WRIT	13
I. Evisceration of the harmless error rule as established in <i>Chapman v. California</i> , 386 U.S. 19 (1967) with unconstitutional substitution of an inapplicable standard of review from <i>Anderson v. Nelson</i> , 390 U.S. 523 (1968).	
CONCLUSION	22
CERTIFICATE OF SERVICE	23
APPENDIX A	24

TABLE OF AUTHORITIES

CASES

Anderson v. Nelson, 390 U.S. 523 (1968) 2,4,13,16,20,21,22

Brecht v. Abrahamson, 507 U.S. 619 (1993) 16

Chapman v. California, 386 U.S. 19 (1967) 2,4,8,13,14,16-22

Delaware v. Van Arsdall, 475 U.S. 673 (1986) 17,18

Dinkins v. State, 894 S.W.2d 330 (Tex.Crim.App.),
cert. denied, 516 U.S. 832 (1995) 14,15

Harrington v. California, 395 U.S. 250 (1968) 17,22

Harris v. State, 790 S.W.2d 568 (Tex.Crim.App. 1989) 15

Kotteakos v. United States, 328 U.S. 750 (1946) 16

Milton v. Wainwright, 407 U.S. 371 (1972) 16

Moore v. Illinois, 434 U.S. 220 (1977) 17

Rose v. Clark, 478 U.S. 570 (1986) 16

Rushen v. Spain, 464 U.S. 114 (1983) 17

Satterwhite v. Texas, 486 U.S. 249 (1988) 16

United States v. Hasting, 461 U.S. 499 (1983) 17-20,22

Wesbrook v. State, 29 S.W.3d 103 (Tex.Crim.App. 2000) 14,15

Yates v. Evatt, 500 U.S. 391 (1991) 16

STATUTES

28 U.S.C. § 1257(3) 8

Rule 44.2(a) Texas Rules of Appellate Procedure 14,15

CONSTITUTIONAL PROVISIONS

U.S. Constitution

Fifth Amendment 8

Fourteenth Amendment 8

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The Petitioner, LARRY DONELL DAVIS, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Texas Court of Criminal Appeals rendered in these proceedings on October 23, 2002.

THE OPINION BELOW

The *en banc* opinion of the Texas Court of Criminal Appeals on submission of the direct appeal was ordered not to be published. See Appendix A, *Larry Donell Davis vs. The State of Texas*, slip opinion, No. 73,458, October 23, 2002. Petitioner's Motion For Rehearing was denied by the Texas Court of Criminal Appeals on November 27, 2002.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the application of the constitutionally mandated harmless error rule as enunciated in *Chapman v. California*, 386 U.S. 19 (1967) to the State's violation of Petitioner's right to remain silent as guaranteed through the Fifth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

Course of Prior Proceedings

Petitioner was originally indicted for the offense of the murder of Michael Barrow in 1995. This charge of murder was subsequently elevated to capital murder through re-indictment the next year. Two years later, in 1998 and on the eve of trial, Petitioner was yet re-indicted again on the identical charge of capital murder. Trial proceeded on the third indictment on December 30, 1998.

Pre-trial hearings were conducted in the case on December 30, 1998 and January 6 & 11, 1999. General and individual voir dire began on January 15, 1999

and concluded on March 9, 1999. Trial on the merits commenced on March 11, 1999. On March 19, 1999, the jury found Petitioner guilty of capital murder as alleged in the indictment. The punishment phase of the trial commenced on March 22, 1999 and concluded on March 27, 1999 with the jury verdict mandating imposition of the death penalty. On that same day, the trial court sentenced Petitioner to death. On April 22, 1999, Petitioner filed his motion for new trial. On May 6, 1999, a hearing was held on the motion. It was overruled by operation of law without a ruling by the trial court.

Petitioner's case was automatically appealed to the Texas Court of Criminal Appeals. Petitioner filed his brief with the Court on July 24, 2000 and argued the case the following year. On October 23, 2002, the Court of Criminal Appeals handed down its unpublished opinion overruling all of Petitioner's points of error. Petitioner's motion for rehearing and motion to publish opinion were filed on November 5, 2002. The motion for rehearing was overruled on November 27, 2002 and the motion to publish was denied on December 17, 2002.

Statement of Facts

On August 28, 1995, an Amarillo police officer was dispatched to a house in reference to a report that a body had been found in a house. The victim, Michael Barrow, had been beaten and slashed about the throat. The crime scene investigation revealed shoe impressions left on the floors of the residence. It was theorized that there had been more than one assailant. In addition, it was determined that numerous items, such as jewelry, a television and other electronics had been taken from the residence.

Interviews with the victim's known friends revealed evidence which led to the arrest of two persons, Kristy Castillo and Donald Drew. These individuals were later indicted for the murder of Barrow, along with Petitioner. Further investigation into the case led to the arrest of Ray Drew, brother of Donald Drew. Ray Drew provided a written statement whereby he implicated himself and Petitioner in the murder and robbery of Barrow. Based upon the confession of Drew, Petitioner was arrested.

Following his arrest, Petitioner provided a lengthy, detailed written confession to law enforcement. His statement implicated himself and the Drew brothers. Petitioner described the manner of the robbery which he and the Drew brothers carried out as well the beating and stabbing that Ray Drew inflicted on Barrow. Petitioner also described the taking of various items from the house and where these items were taken for storage. He also described efforts at selling the stolen items and the money realized from fencing the loot. Petitioner's confession ran fourteen single-spaced pages. It did not contain a single reference to Kristy Castillo nor did it implicate Donald Drew as having participated in the actual murder of Barrow.

Cynthia Green, Petitioner's paramour during the relevant time span, described Petitioner's appearance and state of mind on the night of Barrow's murder. According to Green, Petitioner came home that night nervous. He had blood stains on his clothes. He also had a bruise on his forehead and scratches on his face. Later that day, Petitioner brought to Green's residence items taken from the Barrow residence. Petitioner and Green pawned most of these items at a local pawn shop. Green later provided consent to the Amarillo Police Department to search her residence. The

search of the Green residence turned up bloody clothing linked to the slaying. Green also testified at trial about a visitation she had with Petitioner at the Potter County Correctional Facility where Petitioner was incarcerated while awaiting trial. At that meeting, Petitioner, according to Green, allegedly made an admission to her that he had pinned the victim down while others committed the murder. Green was also permitted to testify that Petitioner was a known gang member. Petitioner's written statement had confirmed that the murder of Barrow was gang-related.

One of Petitioner's co-defendants, Kristy Castillo, provided law enforcement with a written confession. This statement was read to the jury. It directly implicated Castillo, Donald Drew and two other individuals in the burglary of the Barrow residence, the resulting robbery of the victim and his murder. Castillo recounted in the statement that she held the knife with Drew as the victim's throat was cut. Castillo also described the beating that the other actors inflicted on Barrow prior to the stabbing murder. Castillo also described the theft of many items from the Barrow residence. At no time in any portion of the written statement did Castillo ever mention Petitioner by name or implicate him in the burglary, robbery, theft of items or murder. Castillo did not testify live before the jury.

A pathologist established that the victim had sustained multiple blunt force injuries to the skull. There was other blunt force trauma to the chest, sufficient to cause rupture of the heart. There were knife wounds to the body as a whole, particularly two sharp wounds to the neck. The hands displayed defensive wounds. Cause of death was multiple blunt force and sharp force injuries with massive internal

injuries. A criminalist identified footprints left at the scene of the crime, more specifically on the floor and on the body of the victim, which were consistent with the prints lifted from tennis shoes identified by Cynthia Green as belonging to Petitioner.

The guilt-innocence phase of the trial lasted six days. The essence of the defensive theory was that Petitioner had been recruited by Castillo and the Drew brothers to assist in the robbery of the victim and the fencing of the loot taken from the residence but that the original conspiracy to break into the victim's home and kill him in order to carry out the burglary originated with Castillo and the Drew brothers *only* and that Petitioner could not be considered an accomplice to those acts. The defense final argument highlighted the irreconcilable inconsistencies between Petitioner's confession and the physical evidence recovered from the crime scene. Defense final argument called for the jury to find Petitioner guilty of the lesser included offense of murder.

On rebuttal, the prosecutor made specific reference to Petitioner's silence at trial while physically pointing to him. Petitioner's objection to the argument was sustained, his instruction to the jury to disregard given but his motion for mistrial was denied. At the hearing on the motion for new trial, Petitioner once again urged reversible error in the prosecutor's argument. In support of the argument urged, Petitioner presented various witnesses present in the courtroom at the time that the prosecutor made the offending remark. These witnesses described how the prosecutor slammed down Petitioner's written confession in the presence of the jury and then took a "lunging step" toward a sitting Petitioner prior to his reference to silence. The

witnesses were unequivocal in their belief that the prosecutor pointed to *no one else but Petitioner*. The witnesses estimated that the prosecutor was only three to four feet away from Petitioner when he made the remark. After the remark, the prosecutor then sat down at counsel table. His face was “very, very red” and he was “literally trembling.” One witness also described the reactions of several of the jurors at the time that the statement was made. According to the witness, there was “immediate movement” from several jurors at the crucial point in time and that they seemed to lean forward at the very moment of hearing the comment.

REASON WHY THIS COURT SHOULD GRANT THE WRIT

This Court should grant certiorari because the Court of Criminal Appeals failed to apply the correct federal constitutional standard of review for assessing harm. In this regard, the Court of Criminal Appeals impermissibly substituted its own version of the “beyond a reasonable doubt” standard, derived from this Court’s seminal case of *Chapman v. California*, 386 U.S. 19 (1967) with a standard of review utilized by this Court in a habeas proceeding which directed the reviewing court to identify evidence supporting an acquittal before affording relief. *Anderson v. Nelson*, 390 U.S. 523 (1968). This bastardization of the *Chapman* harmless error rule, eviscerating the reviewing court’s responsibility to determine the critical inquiry (whether the error may have contributed to a defendant’s conviction or punishment) beyond a reasonable doubt, contradicts the express admonition expressed in *Chapman* in that “we cannot 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.” *Chapman*, 386 U.S. at 21. The manner in which the Court of Criminal Appeals determined harmless error in light of the egregious violation of Petitioner’s Fifth Amendment right to remain silent “is every bit as much a federal question as what particular federal constitutional provisions themselves mean, what they guarantee, and whether they have been denied.” *Id.*

Analysis

Petitioner’s first point of error on direct appeal to the Texas Court of Criminal Appeals addressed the prosecutor’s impermissible comment on Petitioner’s Fifth Amendment right to remain silent. The court agreed without reservation that the comment was improper and constituted a violation of Petitioner’s Fifth Amendment right to remain silent. The court acknowledged that the prosecutor raised his voice, walked toward and pointed directly at Petitioner when he made the comment. Noting the flagrancy of the error, the court implicitly held that the trial court’s instruction to disregard was insufficient to cure error and proceeded to a constitutional harm analysis as required by Rule 44.2(a) Texas Rules of Appellate Procedure. It provides as follows:

(a) Constitutional error. If the appellate record in a criminal case reveals constitutional error that is subject to harmless error review, the court of appeals must reverse a judgment of conviction or punishment unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment.

This statute codifies the *Chapman* harmless error rule. *Wesbrook v. State*, 29 S.W.3d 103, 119 (Tex.Crim.App. 2000); *Dinkins v. State*, 894 S.W.2d 330 (Tex.Crim.App.), *cert. denied*, 516 U.S. 832, 116 S.Ct. 106, 133 L.Ed.2d 59 (1995);

Harris v. State, 790 S.W.2d 568 (Tex.Crim.App. 1989). In *Wesbrook*, the Court identified the “critical inquiry” as being whether the error may have contributed to a defendant’s conviction or punishment and that if there is a reasonable likelihood that the error materially affected the jury’s deliberations, then the error cannot be termed harmless beyond a reasonable doubt. *Id.* at 119. Likewise, both *Dinkins* and *Harris* directed the reviewing court, once it had determined the existence of constitutional error, to consider a number of factors which included the source and nature of the error, the extent to which it was emphasized by the State, the probable collateral implications of the error, the weight a juror would probably place upon the error and whether finding the error harmless would encourage the State to repeat the same error with impunity. *Dinkins v. State*, 894 S.W.2d at 356; *Harris v. State*, 790 S.W.2d at 587. All three cases involved harmless error analysis arising from violations of federally protected constitutional rights.

In the instant opinion, the Court of Criminal Appeals did not utilize the mandated Art. 44.29(a) harm analysis. Instead the Court stated its intention to “determine whether the impermissible comment harmed the [petitioner],” citing *Chapman*. The following constitutes the entirety of its *Chapman* harmless error analysis:

In the context of a comment on the defendant’s failure to testify, the Supreme Court has held that a comment such as the one in this case cannot be labeled harmless if (1) the comment was extensive, (2) an inference of guilt is stressed as the basis of conviction, and (3) there is evidence that could have supported acquittal. *Anderson v. Nelson*, 390 U.S. 523, 524 (1968). We believe that none of the Anderson criteria are met. This entailed a single comment, the emphasis of the State’s argument was the evidence, and there was no evidence that supported

acquittal. **The appellant's first point of error is overruled.**

Davis v. State, slip opinion at 5.

The court's reliance on *Anderson v. Nelson* bears discussion. It appears that the *Anderson* case was one of four habeas cases where this Court applied the *Chapman* standard in assessing harm flowing from a constitutional violation. See, e.g. *Yates v. Evatt*, 500 U.S. 391 (1991); *Rose v. Clark*, 478 U.S. 570 (1986); *Milton v. Wainwright*, 407 U.S. 371 (1972). Subsequently, the Court saw fit to apply a less stringent harmless error test to habeas cases in *Brecht v. Abrahamson*, 507 U.S. 619 (1993). Whereas the classic *Chapman* test required the reviewing court to review the *entire record* in the assessment of harm and assign to the State the burden of proving beyond a reasonable doubt that the error was harmless, the *Brecht-Kotteakos* harmless error standard inquired as to whether, in light of the record as a whole, the error complained of had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, *supra* at 639; *Kotteakos v. United States*, 328 U.S. 750, 776 (1946).

Nevertheless, up to the time that this Court handed down *Brecht*, the *Chapman* harmless error standard had been primarily applied to cases involving errors of constitutional dimension coming to the Court on direct appeal; see, e.g. *Satterwhite v. Texas*, 486 U.S. 249 (1988) (denial of Sixth Amendment right to counsel when defendant examined by mental health expert without notice to defense lawyer and findings used at punishment phase of trial to establish future dangerousness); *Delaware v. Van Arsdall*, 475 U.S. 673 (1986) (failure to permit cross-examination

concerning witness bias); *Rushen v. Spain*, 464 U.S. 114 (1983) (denial of right to be present at trial); *United States v. Hasting*, 461 U.S. 499 (1983) (improper comment on defendant's failure to testify); *Moore v. Illinois*, 434 U.S. 220 (1977) (admission of witness identification obtained in violation of right to counsel); *Harrington v. California*, 395 U.S. 250 (1969) (use of non-testifying co-defendant's confession in state's case-in-chief). What is clear from a meticulous review of the *Chapman* analyses made in each case is this: the responsibility falls to the reviewing court to consider the trial record *as a whole* before making a determination as to the harmfulness or harmlessness of an alleged constitutional error, whether accomplished by the lower appellate court or by the Supreme Court itself.

For example, in *Harrington v. California*, 395 U.S. 250, the Court applied the *Chapman* test to *Bruton* error. In emphasizing “the probable impact of the two confessions [the focus of the *Bruton* error] on the minds of an average jury,” the Court cautioned against giving too much weight to “overwhelming evidence” of guilt. Nevertheless, after having considered the record from beginning to end, the Court was convinced of the harmlessness of the two confessions, particularly after it had conducted its own review of the record and calibrated the substantial weight of evidence that was tendered against the defendant, independent of the suspect confessions. *Id.* at 253-54. It is significant that the opinion makes no reference to the duty of the reviewing court to glean exculpatory evidence from the trial record before an assessment of harmfulness is made.

Similarly, in *Delaware v. Van Arsdall*, 475 U.S. 673, the Court held that the

constitutionally improper denial of a defendant's opportunity to impeach a witness for bias was subject to *Chapman* harmless error analysis.

Whether such an error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted and, of course, the overall strength of the prosecution's case.

Delaware v. Arsdall, supra at 684.

Again, it is significant that the Court cautioned reviewing courts that the necessary *Chapman* analysis is not "outcome determinative" but rather, the focus must be on deciding whether the State was successful in showing "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.* at 680. Nowhere in its opinion did the Court cite to any factor upon which a reviewing court might attach some importance or weight to evidence which might have supported an acquittal.

Finally, *United States v. Hastings*, 461 U.S. 499 is instructive as it provides a blueprint for the required harm analysis to the instant case. In *Hastings*, multiple defendants were tried for a variety of offenses, including kidnapping, transporting women across state lines for immoral acts and rape. Among the defenses urged at trial, consent was tendered for the jury's consideration. None of the defendants testified. During the prosecution's summation to the jury, comments were made as to the defense's failure to challenge certain key portions of the prosecution's case. These statements were objected to as constituting comments on the defendants' failure

to testify. The objections were sustained and a curative instruction was given but the motion for mistrial was denied. The Court of Appeals reversed and remanded for new trial. In so doing, the Court of Appeals declined to rely on the *Chapman* harmless error rule. In rebuffing this approach, this Court held that *Griffin* error does not per se require automatic reversal and that a conviction should be affirmed if the reviewing court concludes that, on the whole record, the error was harmless beyond a reasonable doubt. The Court, undertaking its own reading of the trial record, focused on the central inquiry: absent the prosecutor's allusion to the failure of the defense to proffer evidence to rebut the testimony of the victims, was it clear beyond a reasonable doubt that the jury would have returned a verdict of guilty? *Id.* at 510-11.

In attempting to answer the critical inquiry, the *Hastings* Court conducted its own exhaustive review of the totality of the prosecution's evidence, including the direct testimony given by the victims and corroborating evidence supplied by neutral witnesses and physical evidence. Contradictory defenses of misidentification and consent by the victims were examined with the Court noting that the evidence underlying these inconsistent theories, which "could have hardly escaped the attention of the jurors," was "scanty" at best. On the basis of the whole record, the Court concluded that it was satisfied beyond a reasonable doubt that the error relied upon was harmless pursuant to appropriate application of *Chapman* analysis. *Id.* at 512. Again, it is instructive to note that this Court, in conducting its own factual analysis of the record, did not isolate nor highlight trial evidence which was exculpatory nor did it place undue emphasis on the overwhelming weight of the inculpatory evidence,

although it did note that the substantial inculpatory evidence and the *inconsistency* of the scanty defensive evidence preponderated in favor of a finding of harmlessness. *Id.* If “evidence which could support an acquittal” were an integral part of the analysis, surely *Hastings* would have said so with appropriate citation to the *Anderson* case.

So what to make out of *Anderson v. Nelson*? Petitioner submits that the case is a anomaly. It purports to apply *Chapman* to *Griffin* error but utilizes none of the factors required to conduct the necessary analysis. And its stated rule that an error cannot be deemed harmless if, among other things, the record reveals evidence which could support an acquittal has *never* since been cited with approval by this Court when examining the *Chapman* standard of review. This quirky per curiam opinion is best resigned to the dustbin of history, particularly considering the timing of its issuance and the peculiar facts underlying the holding.

Yet, *Anderson* gives rise to mischief and is subject to abuse as is illustrated in Petitioner’s case. It is clear that any reviewing court must conduct a complete review of the record as a whole before determining whether the error was harmful or not. It is doubly clear that the reviewing court must make the necessary finding, only after this exhaustive review of the complete trial record, whether the State has carried its burden beyond a reasonable doubt that the error complained of did not contribute to the jury’s verdict. In carrying out these constitutionally mandated tasks, the Texas Court of Criminal Appeals failed this Court and Petitioner miserably. It failed to set out the proper *Chapman* standard, much less providing any substantive discussion concerning the probable impact of the prosecutor’s comment on the jury’s verdict.

Moreover, for the Court of Criminal Appeals to hold that the trial record lacked *any* evidence for acquittal is disingenuous. This bald holding ignores the totality of Petitioner's defense raised during the case in chief, namely, that the evidence supported a finding that Petitioner was guilty of only robbery or, at worst, murder, but that he lacked the necessary intent required for a capital murder conviction, given the contradictory confessions taken from the various participants in the crimes. In reality, the Court of Criminal Appeals' embrace of this erroneous *Anderson* standard unconstitutionally turns the tables on the aggrieved defendant and shifts the mandated burden of proving harm from the State onto the shoulders of the accused, requiring him to prove the negative. This is not *Chapman* harmless error analysis and never will be. The trouble inherent in the continuing viability of *Anderson* is that it continues to "work very unfair and mischievous results" cautioned against in *Chapman*. 386 U.S. at 22. Just as this Court recognized that any error in admitting plainly relevant evidence which influenced the jury adversely to the aggrieved litigant could never be deemed harmless, it also left no doubt that before the error could ever be termed harmless, the *entire record* must establish beyond a reasonable doubt that the error made no contribution to the criminal conviction. The *Anderson* criteria, among other things, focuses on the existence of evidence which would support an acquittal. *Chapman* admonishes *against* placing excessive emphasis on "overwhelming evidence" of guilt in the case before determining harmless error. These two approaches cannot be reconciled and it falls to this Court to resolve the discrepancy.

Petitioner recognizes that this Court is overburdened. Even a cursory review of its procedures convinces the writer that this Court is never required to review trial records to evaluate a harmless-error claim and if it does so, it does so sparingly. But that does not mean that this Court has never done so and particularly when it believed such review was necessary in light of the stakes involved. See: *United States v. Hasting*, 461 U.S. at 510; *Harrington v. California*, 395 U.S. at 254. The imposition of society's most extreme punishment against Petitioner and the manner in which the Texas Court of Criminal Appeals so blithely determined clear constitutional error to be harmless justify this Court's discretion to grant review and order additional briefing. The review which Petitioner requests here and now differs not one whit from the action this Court took under very similar circumstances years ago in both *Hasting* and *Harrington*. The continuing longevity of *Anderson v. Nelson* will only perpetuate those "unfair and mischievous results" sought to be attenuated by *Chapman*. The instant case is a classic example of the damage wrought.

CONCLUSION

The foregoing establishes the need to reconcile, if at all possible, the holdings of both *Chapman v. California* and *Anderson v. Nelson* in order to standardize, once and for all, uniformity and consistency in this Court's pronouncements on the application of the harmless error rule in cases involving direct appeals from criminal convictions. Petitioner prays that this Court shall grant the writ, place his appeal on this Court's docket and order such additional briefing and oral argument as the Court deems necessary and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Petition For Writ of Certiorari was duly mailed, postage prepaid, to counsel for the State of Texas, Potter County District Attorney's Office, Potter County Courts Bldg., 501 S. Fillmore, Amarillo, Texas 79101; the Office of the Texas Attorney General, P.O. Box 12548, Capitol Station, Austin, Texas 78711 and to the Solicitor General of the United States, Department of Justice, Washington, D.C. 20530, on this the ____ day of _____, 2003.

Warren L. Clark

APPENDIX A