No. 23-_______
(CAPITAL CASE)

IN THE
Supreme Court of the United States

BRENDA EVERS ANDREW, PETITIONER,

v.

TAMIKA WHITE, WARDEN, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE
QUESTIONS PRESENTED

Brenda Andrew faces execution for the shooting death of her estranged husband. Her co-defendant, James Pavatt, confessed to plotting and committing the murder without her. To bolster its circumstantial case against Ms. Andrew, the State exploited sex-based stereotypes and presented concededly irrelevant evidence about her sexual history, gender presentation, demeanor, and motherhood. At trial, the prosecution relentlessly derided Ms. Andrew, using sexually-charged descriptions to cast her in the role of an unchaste wife. The State elicited testimony about Ms. Andrew's "short skirt, low-cut tops, just sexy outfits," "very tight" dresses, "a leather outfit" that was not "appropriate," and otherwise "improper clothing." The State's sex-based argument peaked when the prosecution called Ms. Andrew a "slut puppy" and displayed her thong underwear during its guilt-phase closing argument.

The State similarly fixated on Ms. Andrew's demeanor where it did not comport with stereotypically feminine standards. In just over one day of testimony, Ms. Andrew's demeanor and lack of tears were referenced fifteen times. Subsequently, during the penalty phase closing arguments, the State relied on Ms. Andrew's demeanor in comparing her to stereotypes of women generally. The State invited the jury to convict and condemn Ms. Andrew to die because she was a "hoochie," was a bad mother and wife, did not cry publicly, and otherwise failed to adhere to feminine stereotypes. Judge Johnson's dissent at the Oklahoma Court of Criminal Appeals (OCCA) observed this presentation had "no purpose other than to hammer home that Brenda Andrew is a bad wife, bad mother, and a bad woman."

Judge Bacharach's Tenth Circuit dissent identified a "slew of errors" affecting "the fundamental fairness" of the conviction. Among these was a *Miranda* violation that occurred when the police signed Ms. Andrew's hospital discharge papers, placed her in the back of a police car, and interrogated her at the police station, where, clad only in two hospital gowns, she curled up in a fetal position and whimpered. Although police repeatedly refused her requests to leave, the OCCA held she was not in custody.

This petition presents the following questions:

1. Whether clearly established federal law as determined by this Court forbids the prosecution's use of a woman's plainly irrelevant sexual history, gender presentation, and role as a mother and wife to assess guilt and punishment.

2. Whether this Court should summarily reverse in light of cumulative effect of the errors in this case at guilt and sentencing, including the introduction of a custodial statement made without the warnings *Miranda v. Arizona*, 384 U.S. 436 (1966) requires.

PARTIES TO THE PROCEEDING

The petitioner is Brenda Evers Andrew.

The respondent is Tamika White, Warden.

STATEMENT OF RELATED PROCEEDINGS

State v. Andrew, No. CF-2001-6189, Oklahoma County District Court for the State of Oklahoma. Judgment entered September 22, 2004.

State v. Andrew, No. D-2004-1010, 164 P.3d 176 (Okla. Crim. App. 2007), as corrected (July 9, 2007), opinion corrected on denial of reh'g, 168 P.3d 1150 (Okla. Crim. App. 2007)

Andrew v. State, No. PCD-2005-176, Oklahoma Court of Criminal Appeals. Judgment entered June 17, 2008.

Andrew v. Moham, No. 5:08-CV-00832-R, Western District of Oklahoma. Judgment entered September 9, 2015.

Andrew v. White, No. 15-6190, 62 F.4th 1299, Tenth Circuit Court of Appeals, Judgment entered March 21, 2023 and petition for rehearing and rehearing en banc denied on August 25, 2023.

<u>Cases Involving Ms. Andrew's Co-defendant, James Pavatt</u>

Pavatt v. State, No. D-2003-1186, 159 P.3d 272 (Okla. Crim. App. 2007). Judgment entered May 8, 2007.[1]

Pavatt v. Trammell, No. CIV-08-470-R, Western District of Oklahoma. Judgement entered on May 1, 2014.

[1] Ms. Andrew was charged jointly with James Pavatt, but their cases were severed for trial.

Pavatt v. Royal, No. 14-6117, 859 F.3d 920, Tenth Circuit Court of Appeals. Judgment entered June 9, 2017. Rehearing denied July 2, 2018.

Pavatt v. Carpenter, 928 F.3d 906 (10th Cir. 2019) (en banc). Judgment entered June 27, 2019.

Pavatt v. Carpenter, No. 19-697, 140 S. Ct. 958 (2020) (mem.). Judgment entered January 27, 2020.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Brenda Evers Andrew respectfully petitions for a writ of certiorari to review the judgment of the Tenth Circuit Court of Appeals.

INTRODUCTION

Ms. Andrew has steadfastly maintained her innocence of her husband's murder. Her co-defendant has confessed to the crime and insisted she had no involvement in it. Yet Ms. Andrew was convicted and sentenced to death after the introduction of a passel of irrelevant evidence and argument capitalizing on sex-based stereotypes, which ultimately prompted the dissent at the OCCA to observe the prosecution's strategy was to "hammer home that Brenda Andrew is a bad wife, bad mother, and a bad woman." App. 318a.

But the sexist stereotyping is but one of the problems with the conviction. The state court admitted the statements of Ms. Andrew, pictured below in the police station's interrogation room:

Excerpts from State Tr. Ex. 204a.

The OCCA concluded Ms. Andrew was not in custody despite having been whisked from the hospital to the police station wearing nothing more than twoopen-backed hospital gowns (one for each side of her body) and hospital-issue underwear, despite being told she was not free to go care for her children, and despite over two hours of accusatory questioning. The OCCA affirmed the admission of Ms. Andrew's statement despite the egregious Miranda violation and also affirmed the exclusion of key defense witnesses who would have undermined the state's primary theory and bolstered her defense, further undermining the reliability of the proceedings.

As set forth below, the Tenth Circuit's decision implicates a split of authority on whether clearly established federal law provides that the admission of irrelevant and prejudicial evidence violates the Due Process Clause. Certiorari is warranted for that reason alone.

But in light of the slew of egregious errors in this capital case, the Court should summarily reverse, setting aside Ms. Andrew's conviction and, in the alternative, her sentence.

OPINION BELOW

The March 21, 2023 opinion of the Tenth Circuit Court of Appeals is published. *See Andrew v. White*, 62 F.4th 1299 (10th Cir. 2023); App. 1a–144a. The decision denying rehearing en banc is unpublished. App. 322a–24a.

JURISDICTION

The Tenth Circuit Court of Appeals entered judgment on March 21, 2023 and denied the petition for rehearing en banc on August 25, 2023. App. 1a; App. 323a. On October 24, 2023, Justice Gorsuch extended the time to file the petition until January 22, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2254(d)(1) provides, in relevant part: "An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."

Section One of the Fourteenth Amendment to the United States Constitution provides, in relevant part: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state 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."

STATEMENT

A. The Shooting

On November 20, 2001, Ms. Andrew's husband, from whom she had separated, was fatally shot at their home. Leading up to the shooting, Ms. Andrew had been dating a man named James Pavatt, her co-defendant in this case, but she continued to communicate with her husband and share custody of their children. On the day of the shooting, Ms. Andrew's husband arrived at the home to pick up their children for visitation. Before leaving, he went into the garage with Ms. Andrew to light the pilot light on the furnace. App. 259a. While in the garage, Ms. Andrew's husband was shot twice by a shotgun and Ms. Andrew was shot in her arm with one .22 round. App. 259a–60a.

Ms. Andrew called 911 and reported the shooting. When emergency personnel arrived, Ms. Andrew was beside her husband and urged them to help, but Mr. Andrew was already deceased App. 122a; App. 260a. Ms. Andrew was then taken to the hospital.

B. The Interrogation

> "Q: She was required to come [from] the hospital in an . . . open-backed hospital smock and not allowed to go home . . . ? A: Correct." App. 107a (omissions and alteration in original).

As hospital staff treated Ms. Andrew, the police went to her bedside to interview her. App. 48a. At the time, Ms. Andrew had already been treated by Emergency Medical Technicians and placed on an IV. The police collected Ms.

Andrew's clothing, believing it to be crime evidence, and asked her a series of questions. App. 48a. Ms. Andrew responded to the officers' questions at the hospital, describing the assailants in her garage and acknowledging that she was in the middle of a divorce. When one officer asked Ms. Andrew if Mr. Andrew had ever hit her, she said not since the kids were born. Trial Tr. 1820–25.

It was after ten o'clock at night when the officers then escorted Ms. Andrew out of the hospital after signing her discharge papers in her stead, placed her in the back of a police car, and drove her to the police station for over two hours of questioning, which they videotaped. App. 48a, 104a; Trial Tr. 2388–89 (explaining papers were signed by Officer Roger Frost); 2004 Pre-Trial Tr. 06-07 hearing at 24, 157. Throughout her transport to the police station and the entirety of the interrogation, the wounded Ms. Andrew was clad only in the open-backed hospital gowns and hospital-issued underwear and booties, as the police had taken her clothing and provided her with nothing else before taking her out of the hospital. App. 50a. What's more, according to the interrogation video, the officer's first question to Ms. Andrew was whether she had been given anything at the hospital for her pain. Ms. Andrew nodded in the affirmative.[2]

The police officers also indicated that Ms. Andrew was required to go with them and had no choice in the matter. Indeed, during a pre-trial hearing, one of the

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[2] During trial, interrogating Officer Garrett testified that he did not remember if Ms. Andrew "said she had gotten anything or not . . . She appeared normal." Trial Tr. 2286.

interrogating officers was asked three times whether Ms. Andrew could have chosen to go home or elsewhere instead of the police station. App. 106a. He eventually confirmed that Ms. Andrew "did not have any choice on that." App. 106a. Another officer echoed: "Q: She was required to come [from] the hospital in an . . . open-backed hospital smock and not allowed to go home . . . ? A: Correct. She didn't go back home." App. 107a (omissions and alteration in original).

At no point during the interrogation did the police inform Ms. Andrew that she was free to leave. App. 104a. Even more grievous, the police failed to address the affirmative pleas and requests to leave made by Ms. Andrew, who had been shot and wounded, and who was medicated and exposed in the used hospital gowns. Instead, in response to Ms. Andrew "repeatedly [telling] the officers that she needed to leave . . . [the officers asked] more questions rather than [granting] her permission to leave." App. 106a. One hour and twenty minutes into the interview, Ms. Andrew inquired: "Can I go see my kids?" App. 107a. Instead of answering, the detective continued to press her. Forty minutes later, Ms. Andrew again asked to go care for her children; this time the detective told her she could only leave after they had finished the questioning. App. 107a (citing State Trial Exhibit 204a, the videotape of the examination). By the time Ms. Andrew was released from the police station, it was after one o'clock in the morning.

The interrogation was pointed and confrontational. The dissent at the Tenth Circuit observed five examples of accusatory questions:

1. Roughly 30 minutes into the interview, the police detective asked Ms. Andrew what had been going on with Mr. Andrew, why he had moved out, and what they had fought about.

2. The detective left the room for roughly 20 minutes. When he returned, he asked Ms. Andrew if she had loved or hated her husband, expressing a belief that she seemed to lack emotion: "Did you hate him that much that you don't show any emotion about it?" He followed up with: "How do you feel about the fact that he's dead now?"

3. The detective also pressed Ms. Andrew on her affairs, her relationship with Mr. Pavatt, and the increases in Mr. Andrew's life insurance policy.

4. The detective then quizzed Ms. Andrew about the incident with her husband's brake lines, asking if Mr. Andrew had suspected her.

5. Near the end of the interview, the detective questioned Ms. Andrew about her promiscuity: "How many guys did [Mr. Andrew] accuse you of having affairs with?" The detective then asked Ms. Andrew if she was currently having an affair.

App. 105a (alteration in original). At times during the interrogation, Ms. Andrew curled up in the fetal position, knees pulled to her chest under the hospital gown, wounded arm dressed and wrapped across her chest, back hunched over against the chair in the interrogation room. State Tr. Ex. 204a.

The State's argument at trial was that either Ms. Andrew or her co-defendant fatally shot Mr. Andrew and then staged the gun shot injury to Ms. Andrew using the .22. The State primarily offered circumstantial evidence of Ms. Andrew's involvement, including a dispute over the beneficiary of Mr. Andrew's life insurance policy and her romantic involvement with her co-defendant, both of which the State

argued provided motive for the offense for both co-defendants. The State also tried to link Ms. Andrew to a previous incident in which Mr. Andrew's brake lines were tampered with. Forensic evidence before the jury included powder burns on Ms. Andrew's shirt and skin – which the State argued was proof that her gunshot wound was inflicted at close range and, therefore, was staged – and testimony from a crime scene reconstruction expert opining that the blood spatters on Ms. Andrew's clothing came from Mr. Andrew, a claim which DNA testing has since disproved.

C. The Trial

While this was the State's theory of how the shooting took place and what motivated Ms. Andrew and Mr. Pavatt, the State's case against Ms. Andrew alone fixated on obtaining a conviction and death sentence by denigrating her character as a woman. In order to do so, the State relied on sex-based stereotypes to dehumanize and portray Ms. Andrew as immoral, remorseless, deviant, dangerous, and thus more likely to have committed the crime and more deserving of the ultimate punishment of death. By stripping Ms. Andrew of her humanity as a whole person, the State instead offered the jury an archetype of a "slut" and depraved adulterer who dressed in "improper" clothing, did not display feminine emotion, kept a "filthy" home, and was a bad mother. And the State explicitly told the jury that Ms. Andrew's deviance from "the rest of us" and failure to cry was a reason to condemn her to die.

i. Ms. Andrew's Sexual History

"[H]ow many occasions did you have sex with her in her car." Trial Tr. 251.

Among the prosecution's first witnesses were two of Ms. Andrew's former sexual partners: James Higgins and Rick Nunley. The prosecution used their testimony to provide the jury with salacious details about Ms. Andrew's past sexual relationships, opening both witnesses' testimonies with a series of questions about their sexual activities with Ms. Andrew. According to the State's own evidence, Ms. Andrew had stopped seeing Mr. Higgins over six months before the crime, and, while she spoke with Mr. Nunley over the phone, she had ended her sexual relationship with him several years earlier. Mr. Nunley admitted that he "rarely saw her for [the] four-year period of time" leading up to the instant offense. Trial Tr. 250, 367. Yet the prosecution asked Mr. Higgins a series of questions about their sexual encounters contrived to elicit prurient and irrelevant details, including "was it always the same motel" and "how many occasions did you have sex with her in her car." Trial Tr. 251. In fact, as the State's closing argument reached its apogee, the prosecution read Mr. Andrew's journal entries about a sexual relationship that he claimed Ms. Andrew had engaged in while she was a Freshman in college – almost twenty years before the day of the offense. Trial Tr. 4124.

ii. Ms. Andrew's Clothing, Appearance, and Gender Expression

> "Ms. Andrew wasn't wearing attire that I would consider appropriate . . . She had on a leather—it was a leather outfit." Trial Tr. 343.

The State's reliance on sex-based stereotypes to "other" Ms. Andrew in the eyes of the jury extended to her gender expression and appearance. Throughout the trial, the State made pointed and disparaging remarks about Ms. Andrew's clothing and

elicited testimony about her "short skirt, low-cut tops, just sexy outfits, [and] provocative." Trial Tr. 246–47. During the guilt phase, for example, the State asked four separate witnesses to describe the clothing Ms. Andrew wore years before the offense, repeatedly urging them to comment on Ms. Andrew's modesty (or lack thereof). Trial Tr. 247, 320, 343, 2714. The prosecution asked one witness to "describe the way Ms. Andrew presented herself, please?" Trial Tr. 320. When that witness did not offer a normative judgment about Ms. Andrew's attire, the prosecution pressed the witness until he relented, "[Ms. Andrew's] dress was very tight, very short. Trial Tr. 323.

The prosecution directly questioned a second witness about Ms. Andrew's clothing, eliciting testimony that "Ms. Andrew wasn't wearing attire that I would consider appropriate . . . She had on a leather—it was a leather outfit." Trial Tr. 343. Later in that witness's testimony, the State returned to this subject, asking, "When you arrived that day did you notice anything about her appearance," to which the witness described Ms. Andrew's clothing as "provocative." Trial Tr. 356. A third witness described Ms. Andrew's attire as "improper," trial Tr. 1112, and a fourth testified that Ms. Andrew "dressed sexy." Trial Tr. 246. One State witness went so far as to characterize Ms. Andrew as a "hoochie" because she had "lots of cleavage exposed." Trial Tr. 323.

Even Ms. Andrew's hair was proffered by the State as a reason to convict. In response to questioning, one witness recounted that Ms. Andrew "had rolled her hair

and it was really, really big," which was "the opposite" of what "other mothers" look like. Trial Tr. 343. Another explained, again in response to questioning, that Ms. Andrew had "very Gothic, long black hair." Trial Tr. 323. According to the State, these supposedly indecorous hairstyles were demonstrative of Ms. Andrew's unseemly sexual history and immoral, un-womanly character. To support this narrative, the State called a former baby sitter who worked for the Andrew family, eliciting testimony that Ms. Andrew's "hair was really messed up" when she returned from the grocery store on one occasion, suggesting that she had had a sexual encounter. Trial Tr. 347. Prosecutors then juxtaposed these characterizations of Ms. Andrew's clothing, hair, and make-up with her position as a Catholic Sunday school teacher so as to emphasize her fall from grace as a sexually deviant woman.

The State's narrative culminated in Hawthorne-inspired public shaming when, in its guilt phase closing argument, the prosecutor plucked a pair of thong underwear from Ms. Andrew's suitcase and, with a flourish, asked whether a "grieving widow" would wear "this." Trial Tr. 4101. In a final dehumanizing blow, the prosecutor dubbed Ms. Andrew a "slut puppy," leaving the slur hanging in the air shortly before the jury began deliberations. Trial Tr. 4125.

iii. Ms. Andrew as a Bad Mother

As part of the State effort to portray Ms. Andrew as an immoral and guilty woman, the prosecution next attacked Ms. Andrew as a mother. The State elicited testimony about Ms. Andrew's home, including statements that it was "filthy,"

"unkempt," and "shocking." Trial Tr. 1991. The State asked multiple witnesses a series of normative questions beginning with "does a good mother . . . ?," thereby inviting the witnesses to opine on what a good mother should be like and how Ms. Andrew failed in that regard. Trial Tr. 419–20, 4312–14, 4345–46. The state even argued that the fact that her children were reading murder mystery was "clearly indicative that she was not a good mother." Trial Tr. 2345.

In fact, on the last day of trial, the prosecution pressed one witness no fewer than nine times about what a "good mother" would do:

> Does a good mother take her children four days after their father has been murdered to Mexico? . . . Do you believe that a good mother would have her children make book reports from murder mystery novels? . . . Do you believe that a good mother would program their children to chant 'I want my mommy's family? . . . Do you believe that a good mother would kill their children's father? . . . Would a good mother not take their children to their father's funeral? Does a good mother manipulate [her daughter]? . . . Do you think [Ms. Andrew is] still a good mother?

Trial Tr. 4312–14, 4345. The witness refused to succumb to this line of questioning, leading the prosecutor to dredge up lurid details about Ms. Andrew's romantic past and asking the witness if this information changed her opinion. Trial Tr. 4342–44. This witness continued to withstand the prosecutor's efforts to pass judgment on Ms. Andrew as a mother or to connect her motherhood and sexual history with her culpability, but was the first and only witness to do so.

iv. Ms. Andrew's Demeanor

> “I thought that was odd . . . usually they’re very emotional, very distraught . . . so normally you have to calm them down . . . but with her she was just unusually calm. It actually kinda bothered me.” Trial Tr. 2030.

Finally, the State presented evidence of Ms. Andrew’s demeanor after Mr. Andrew was shot, during her interrogation, and during her trial to argue that it deviated from the “normal” emotional response. Indeed, the prosecution repeatedly reminded the jury that Ms. Andrew’s reactions to her husband’s death were counter to how a woman should respond, arguing that this made her “different” from the jury, more culpable, and more deserving of the death penalty. One by one, prosecutors asked every witness to the crime scene to comment on Ms. Andrew’s demeanor following the shooting. In just over a day of testimony, Ms. Andrew’s demeanor or lack of tears was brought up 15 times, Trial Tr. 1800–2285, and at least 29 times throughout the trial. Trial Tr. 21, 137, 1103, 1181, 1801, 1811-12, 1826, 1827, 1880, 1898, 1928, 1928, 1931, 1958, 1959, 2030, 2174, 2278, 2285, 2582, 3404, 3973, 3903, 4069, 4070, 4111, 4122, 4475, 4487, 4493 One officer expressly compared Ms. Andrew’s demeanor to that of “normal” people, opining: “I thought she was unusually calm. I thought that was odd . . . usually they’re very emotional, very distraught . . . so normally you have to calm them down . . . but with her she was just unusually calm. It actually kinda bothered me.” Trial Tr. 2030.

The State also used Ms. Andrew’s demeanor during the questioning at the police station against her. It even argued that her request to end the interview—which was denied—demonstrated she was cunning:

> And you know what? She did ask to go home. Think about this. At the end of that tape, and she doesn't like the questions this detective . . . is starting to ask her, and she's not a stupid lady. She's starting to realize he's asking her about insurance, he's asking her about boyfriends, he's asking about shotguns, he's asking about child custody. Oh my God, she's thinking to herself. I want to leave.

App. 108a.

The State's sexist narrative that Ms. Andrew failed to show the stereotypical amount of grief[3] for a widowed wife had a devastating impact on the outcome of Ms. Andrew's trial. As the State made clear in penalty phase closing arguments, because Ms. Andrew did not publicly break down in tears after she and her husband were shot, or during the police interrogation when she was wounded, medicated, and partially clothed, or during the trial for her very life in which she was called a "hoochie," "slut puppy," and a bad mother, Ms. Andrew was "different," "not like you and me," and deserving of the death penalty. Trial Tr. 4493. In fact, the prosecutor expressly contrasted Ms. Andrew with more ideal stereotypes of womanhood, portraying her as a gender transgressor disguised by the false meekness of a moral woman: "she sits over here today and has for the last five weeks all meek and quiet

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[3] Research and clinical studies have long established that a flat affect may reflect symptoms of emotional numbing, which is a core defining feature of Post-Traumatic Stress Disorder. See, e.g., Gregory P. Strauss, et al., *Posttraumatic Stress Disorder and Negative Symptoms of Schizophrenia*, 37 Schizophrenia Bulletin 603–10, available at https://doi.org/10.1093/schbul/sbp122; Brett T. Litz & Matt J. Gray, *Emotional Numbing in Posttraumatic Stress Disorder: Current and Future Research Directions*, 36 The Australian and New Zealand J. of Psychiatry 198–204 (2002), available at https://doi.org/10.1046/j.1440-1614.2002.01002.x

and pretty. She's a pretty woman. And she's been on her best behavior. But that's not the real Brenda Andrew." Trial Tr. 3908.[4] And as the State's use of double-edged female archetypes urged the jury to dismiss as inauthentic any indication of femininity and good behavior it simultaneously condemned Ms. Andrew's failure to conform to stereotypes regarding female emotion:. "until today she's never shed a tear. She never shed a tear until people started testifying about what she deserved . . . ." The State was clear that the punishment for such a transgression was death, concluding, "that's another reason why she deserves the death penalty." Trial Tr. 4475.

Although defense counsel did not object to every instance of this barrage of inflammatory argument and testimony, it did raise over 150 objections to it. The trial judge failed to sustain the vast majority of them, offering rationalizations like "maybe I'm hardened to it[,] but the State is not trying to show they care about the sexual relationship, only as it relates to her ability to manipulate men." Trial Tr. 2958.

By contrast, the trial court sustained several of the State's objections to Ms. Andrew's witnesses, including Officer Ronald Warren, Carol Shadid, and Lisa Gisler. Officer Warren was among the first to respond to the scene of the crime and would have testified that when he arrived, Ms. Andrew was kneeling at Mr. Andrew's side and pleading for someone "to help her husband." App. 100a. His testimony would

[4] Later in closing, the prosecution called Ms. Andrew "an attractive woman" and suggested that that somehow made the evidence harder to believe. Trial Tr. 4121.

have countered the State's theory and evidence that Ms. Andrew was acting coldly towards Mr. Andrew and had not inquired about his condition after the shooting. App. 100a.

Ms. Shadid and Ms. Gilser would have testified about the timing of the gunshots. Ms. Shadid heard three shots. Ms. Gisler heard a single loud noise. App. 101a. Together, their testimony would have countered the State's theory that Ms. Andrew had taken time after her husband was shot to stage her own shooting. App. 101a. If the shots were in rapid succession (suggested by one loud noise), and there were three (as Shadid noted), then their testimony would have supported Ms. Andrew's account and not the State's.

Ms. Andrew was convicted of first-degree murder and sentenced to death.

B. The Appeal

Ms. Andrew appealed, raising challenges to the State's reliance on her sexual history and behavior, clothing and appearance, and demeanor as a basis to convict her and obtain a death sentence, the admission of her un-*Mirandized* statements, and the exclusion of Warren, Shadid and Gisler as witnesses. App. 277a–79a, 282a, 285a, 289a–92a. She also presented a claim of cumulative error. Br. at 99–100, *State v. Andrew*, No. D-2004-1010 (Feb. 21, 2006).

The OCCA held that the admission of Ms. Andrew's underwear and evidence of her affairs did not constitute error, but nevertheless acknowledged that it "struggle[d] to find any relevance" for much of the other evidence. The State conceded

that the admission of such evidence constituted error, but argued that its admission was harmless. App. 279a. Ultimately, the OCCA held that any error was harmless. App. 279a. Similarly, the court held that excluding the testimony of Warren, Shadid, and Gisler was an abuse of discretion, but that any error was harmless. App. 289a–92a.

The OCCA next addressed Ms. Andrew's *Miranda* claim on the merits, App. 285a, rejecting the claim on the sole basis that she was not in custody at the time of her interview. App. 285a. And although it rejected Ms. Andrew's claim of cumulative error, the OCCA did not "consider the effect of the *Miranda* violation on the other trial errors." App. 96a.

Judge Chapel, in summary fashion, dissented, noting he would have reversed and remanded for a new guilt-phase trial. Judge Johnson also dissented. He described an "egregious . . . pattern of introducing evidence that has no purpose other than to hammer home that Brenda Andrew is a bad wife, a bad mother, and a bad woman." App. 318a. He explained how that evidence had "the effect of trivializ[ing] the value of her life in the minds of the jurors." App. 320a. He concluded that the error was harmless as it related to guilt, but would have reversed and remanded for resentencing. App. 321a.

C. The Proceedings in Federal Court

Ms. Andrew presented in federal court the claims at issue here, along with additional claims not relevant to the instant proceedings. The District Court denied relief. App. 146a–243a.

The Tenth Circuit affirmed. Regarding the argument and evidence concerning Ms. Andrew's sexual history, behavior, and demeanor, the Circuit Court held that no clearly established federal law barred admission of irrelevant, prejudicial evidence. App. 16a. In fact, the court concluded that there was no "'on-point' Supreme Court precedent for [the] evidentiary claims." App. 16a. Relying on Circuit precedent, the court thus rejected Ms. Andrew's reliance on *Payne v. Tennessee*, 501 U.S. 808 (1991) for the proposition that the Due Process Clause prohibits introduction of evidence "so unduly prejudicial that it renders the trial fundamentally unfair." App. 17a (citing *Holland v. Allbaugh*, 824 F.3d 1222, 1228 (10th Cir. 2016)). The Tenth Circuit required a holding from this Court that, when "narrowly construed" applied to the admission of the type evidence in question. App. 10a (quoting *Fairchild v. Trammell*, 784 F.3d 702, 710 (10th Cir. 2015)). Describing the State's use of "sexual and sexualizing" evidence as "concern[ing]," App. 21a, the Circuit nevertheless concluded that no such case exists regarding the prejudicial evidence and argument at issue. The majority did not address whether the prosecutor's arguments violated clearly established federal law.

Regarding the *Miranda* claim, the Tenth Circuit held that the OCCA did not unreasonably apply *Miranda*. App. 53a. It rejected Ms. Andrew's argument that the police actions in taking her directly from the hospital to the police station, telling her she was required to go to the station, and not providing her with clothes or the opportunity to change into clothes (instead of a hospital gown) would lead an objectively reasonable person to believe she was not free to leave. App. 51a. Instead, the court enumerated what it deemed the "objective" criteria, as opposed to what "Ms. Andrew '*felt*'" (App. 53a (emphasis in original) as follows:

- At the crime scene, Ms. Andrew answered questions from the police.
- At the hospital Officer Frost informed Ms. Andrew that she would be going to the police station so that a detective (Detective Garrett) could talk to her about the murder.
- Ms. Andrew knew that she could not go home from the hospital, because the police were still processing the crime and searching the premises.
- Ms. Andrew was told that when the investigation was complete, she could return home.
- Officer Frost transported Ms. Andrew, who was dressed in two hospital gowns (each covering a side of her body) because her clothes were taken into evidence, from the hospital to the police station for the interview.
- Ms. Andrew never objected to going to the police station for the interview.

- Ms. Andrew wasn't arrested, handcuffed, or told that she was a suspect in the murder.
- After Ms. Andrew's two-and-a-half-hour interview was over, Officer Frost took Ms. Andrew directly to her friend's house where her children were staying.

App. 52a–53a. In light of these circumstances, the Tenth Circuit held "not every reasonable jurist would conclude that the OCCA's custody determination was unreasonable." App. 53a.

The Tenth Circuit also affirmed the denial of relief on the exclusion of the testimony of Warren, Gisler, and Shadid, holding the OCCA's harmlessness determination was not unreasonable. App. 29a–32a, 34a–38a. Regarding Warren, the Circuit rejected Ms. Andrew's explanation that Warren's testimony that Ms. Andrew was kneeling over Mr. Andrew and "deeply upset and imploring the police to help her husband" would have countered the State's "callous-indifference narrative" to support her alleged responsibility. App. 31a.

Regarding Gisler and Shadid, the Tenth Circuit rejected Ms. Andrew's argument that, taken together, their testimony would corroborate Ms. Andrew's account that the shots were made in quick succession and, therefore, Ms. Andrew did not have time to stage her shooting. Instead, the Tenth Circuit did not find the OCCA's harmlessness determination to be unreasonable.

Judge Bacharach dissented. He identified three "categories of errors that combined to prevent a fair trial," requiring reversal of Ms. Andrew's conviction:

presentation of evidence and argument that played on gender-based stereotypes, the exclusion of defense witnesses, and introduction of Ms. Andrew's statements which were made without *Miranda* warnings.[5] App. 96a. The Tenth Circuit denied rehearing or rehearing en banc. App. 323a.

This petition follows.

REASONS FOR GRANTING THE PETITION

I. CLEARLY ESTABLISHED FEDERAL LAW PROHIBITS STATE-RELIANCE ON PREJUDICIAL AND IRRELEVANT SEXUAL HISTORY FOR CULPABILITY AND CAPITAL SENTENCING

A. The Court Below Erred

The Tenth Circuit affirmed Ms. Andrew's conviction and death sentence without addressing the merits of the state misconduct that it found "concern[ing]." App. 20a. The court countenanced the prosecution's presentation of "'sexual and sexualizing' evidence" that was wholly irrelevant to the crime in question and played to sexist stereotypes. It reached that conclusion by issuing a broad ruling: no clearly established federal law prohibits the admission of evidence reifying sex-based stereotypes, no matter how unfair that renders the trial. App. 14a–21a.

That ruling is flatly wrong. The Tenth Circuit acknowledged this Court has, in fact, held that when "evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth

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[5] Judge Bacharach also concluded that Ms. Andrew had made a colorable claim of ineffective assistance of counsel as it related to the penalty phase. App. 124a.

Amendment provides a mechanism for relief." App. 16a (quoting *Payne v. Tennessee*, 501 U.S. 808, 825 (1991)). But the Circuit held *Payne* was inadequate to establish a principle applicable to the State in Ms. Andrew's case because Payne involved the "'factually distinct context' of victim-impact statements in a capital case." App. 17a (quoting *Holland v. Allbaugh*, 824 F.3d 1222, 1229 (10th Cir. 2016)).

Faulty assumptions and misplaced inquiries underlie the Circuit Court's approach. First, this Court's own precedents *do* establish that *Payne* stands for precisely the proposition Ms. Andrew proposed. In *Kansas v. Carr*, 577 U.S. 108 (2016) the Court explained that "it is the Due Process Clause that wards off the introduction of 'unduly prejudicial' evidence that would 'render' the trial fundamentally unfair.'" 577 U.S. at 123 (quoting *Payne*, 501 U.S. at 825). The Tenth Circuit attempted to distinguish *Carr*, explaining it had not been decided at the time of the relevant state court decision and was, therefore, inapplicable. App. 19a n.13 (citing *Greene v. Fisher*, 565 U.S. 34, 38 (2011)).

But Ms. Andrew was not relying on *Carr* for clearly established federal law. She was relying on *Payne*, and she was doing so in precisely the manner this Court contemplated: that *Payne* established the Due Process Clause places limits on admitting evidence that would render the trial fundamentally unfair. *See Carr*, 577 U.S. at 123. Ms. Andrew did not need *Carr* for that proposition. She needed *Payne*, which *had* been decided at the time of the OCCA's decision. *Carr* just proved her right about *Payne*.

Payne is but one of this Court's cases which clearly establish that both argument and evidence may render a trial fundamentally unfair. It has long been understood, based on this Court's precedents, that the "aim" of the Due Process Clause's protections is "to prevent fundamental unfairness in the use of evidence whether true or false." *Lisenba v. California*, 314 U.S. 219, 236 (1941). Even when the evidence is relevant, its admission may violate the Due Process Clause if it violates a defendant's right to a fair trial. *See Gooding v. Wynder*, No. 1:CV-07-1243, 2009 WL 4810857 a *6 (M.D. Pa. Dec. 9, 2009) (citing *Donnelly v. DeChristoforo*, 416 U.S. 637, 642–43 (1974)). The Tenth Circuit was wrong, even on the narrow point about whether this Court's precedents clearly establish that admission of irrelevant evidence may violate the Due Process Clause.[6]

The Tenth Circuit also asked the wrong question. The court inquired only whether admission of irrelevant *evidence* (not argument) might violate the Due Process Clause, ignoring the fact that the evidence presented in Ms. Andrew's case was not merely irrelevant, but was unfairly prejudicial in ways that played on sexist stereotyping. As discussed below, this Court and the federal courts do not tolerate the kind of animus the evidence endorsed. Infra. The court's analysis was flawed,

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[6] The Tenth Circuit's reliance on *Estelle v. McGuire*, 502 U.S. 62 (1991) is perplexing. The Circuit Court infers there is no clearly established federal law concerning admission of irrelevant evidence based on dicta in the case. App. 18a. But, as the Circuit court acknowledges, this Court held the evidence in question was, in fact, relevant. *Estelle*, 502 U.S. at 70. Thus, whether admission of irrelevant evidence could violate the Due Process Clause was not before the Court.

however, because it looked only for a directly "on-point" decision from this Court when reading those decisions "narrowly." App. 9a.

What's more, the Circuit Court's flawed analysis failed to account for the State's sexist arguments that exploited the prejudicial and irrelevant evidence. App. 14a. Specifically, the court did not address whether any clearly established federal law precluded those arguments. Had it done so, it would have been able to identify ample basis for concluding the OCCA violated clearly established federal law. *See, e.g.*, *Darden v. Wainwright*, 477 U.S. 168, 179–83 (1986).

When examining a charge of allegedly improper comments, "[c]ourts must conduct a fact-specific inquiry and examine the challenged comments in the context of the whole record." *Bennett v. Stirling*, 842 F.3d 319, 323 (4th Cir. 2016) (citing *United States v. Young*, 470 U.S. 1, 11–12 (1985)); *see also Donnelly*, 416 U.S. at 643 (requiring review of "the entire proceedings" to determine whether an argument is improper in violation of due process); *Land v. Allen*, 573 F.3d 1211, 1219–20 (11th Cir. 2009) ("in determining whether [prosecutor's closing/sentencing phase] arguments are sufficiently egregious to result in the denial of due process, we have considered the statements in the context of the entire proceedings, including factors suchas (1) whether the remarks were isolated, ambiguous, or unintentional, (2) whether there was a contemporaneous objection by defense counsel; (3) the trial court's instructions; and (4) the weight of the aggravating and mitigating factors."); *Thomas v. Lynaugh*, 812 F.2d 225, 230–31 (5th Cir. 1987) (collecting cases). That

requirement—to examine the whole record—is reason to reverse the Tenth Circuit's flawed refusal to assess the problematic evidence the prosecution put forth.

Had the Tenth Circuit jointly inquired into both evidence and argument, drawing on the clearly established principles at the time of the OCCA's decision on each, it would hardly have been remarkable, even without *Young*'s mandate to do so. This Court has repeatedly done so in the context of AEDPA and section 2254(d). *See Panetti v. Quarterman*, 551 U.S. 930, 953 (2007); *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 246–64 (2007). And although "the AEDPA and *Teague* [*v. Lane*, 489 U.S. 288 (1989)] inquiries are distinct," *Horn v. Banks*, 536 U.S. 266, 272 (2002) (per curiam), this Court has repeatedly combined strands of related precedent to conclude that a requested rule is not "new" within the meaning of *Teague*, a question closely analogous to whether it is clearly established. *See Stringer v. Black*, 503 U.S. 222, 232 (1992) (discerning non-new rule from "the dual constitutional criteria of precise and individualized sentencing"). And there is no question that assessing the whole record—the arguments and the evidence—to determine whether the trial was fundamentally unfair is required as a matter of clearly established federal law.

The Tenth Circuit's assessment of whether it could reach the merits of the constitutional error in this case also went awry because of methodological flaws. The task for the court when determining what constituted clearly established law required "look[ing] for 'the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision.'" *Yarborough v.*

Alvarado, 541 U.S. 652, 660–61 (2004) (quoting *Lockyer v. Andrade*, 538 U.S. 63, 71–72 (2003)). Importantly, "AEDPA does not 'require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied.'" *Panetti*, 551 U.S. at 953 (quoting *Carey v. Musladin*, 549 U.S. 70, 81 (2006) (Kennedy, J., concurring in judgment)); *see also Abdul-Kabir*, 550 U.S. at 246–64 (deriving clearly established law from series of Supreme Court cases existing at time of state court decision and granting habeas relief). Instead, the habeas court must apply the legal principles, however general or specific, in place at the time of the state court's decision.

Of course, if "a legal rule is specific, the range of [unreasonableness] may be narrow." *Yarborough*, 541 U.S. at 664. On the other hand, the more general the rule, the "more leeway courts have in reaching outcomes in case-by-case determinations." *Id.* But that is a different question than whether such a rule exists at all. The Tenth Circuit erred when it conflated the range of constitutionally-tolerated unreasonableness with whether the Due Process Clause placed any limit on the admission of irrelevant and prejudicial evidence as a matter of clearly established federal law.

Allowing the State to obtain a capital conviction and death sentence by wielding dehumanizing sexist stereotypes in its arguments and in the introduction of wholly irrelevant evidence concerning the defendant's sexual history, appearance, and demeanor is far outside the realm of reasonableness. Indeed, to convict and

condemn a woman to death because her clothing, appearance, demeanor, and sexual history does not comport with stereotypes of womanhood is "odious in all aspects [and] especially pernicious in the administration of justice." *See Rose v. Mitchell*, 443 U.S. 545, 555 (1979); *see also Yarborough*, 541 U.S. at 666 ("[c]ertain principles are fundamental enough that when new factual permutations arise, the necessity to apply the earlier rule will be beyond doubt."). Although a prosecutor "may strike hard blows, he is not at liberty to strike foul ones." *Berger v. United States*, 295 U.S. 78, 88 (1935).

Even if the remarks and evidence were taken in isolation and constituted a small part of the trial, they each would warrant reversal. "Some toxins can be deadly in small doses." *Buck v. Davis*, 580 U.S. 100, 122 (2017). Yet the dose here was anything but small. To the contrary, the evidence and argument exploiting sex stereotyping pervade Ms. Andrew's case at guilt and sentencing. There are literally scores of instances of the State presenting evidence or argument concerning her irrelevant sexual history, gender presentation, and role as a mother and wife.

B. The Error Implicates an Important Question

The Tenth Circuit's holding conflicts with this Court's precedents warranting review and reversal on the basis of that conflict alone. *Supra*. But even on the unduly narrow question the Tenth Circuit undertook to answer—whether clearly established federal law can ever prohibit the admission of irrelevant evidence—the circuits are divided.

The Tenth Circuit stands in opposition to at least the First and Fifth Circuits. The Fifth Circuit has held that the Due Process clause may "afford relief where the challenged evidence was . . . the principal focus at trial and the errors . . . permeate[d] the entire atmosphere of the trial." *Gonzales v. Thaler*, 643 F.3d 425, 430–31 (5th Cir. 2011) (citations omitted); *see also Mass v. Quarterman*, 446 F. Supp. 2d 671, 697 (W.D. Tex. 2006) ("When a state court admits evidence that is so unduly prejudicial it renders the trial fundamentally unfair, the Fourteenth Amendment's Due Process Clause provides a mechanism for relief." (citing, inter alia, *Payne*, 501 U.S. at 825)). The First Circuit has, similarly, held that habeas relief may be available where an "erroneous evidentiary ruling [] results in a fundamentally unfair trial . . . ." *Lyons v. Brady*, 666 F.3d 51, 55–56 (1st Cir. 2012). The Tenth Circuit is joined by the Sixth and Ninth Circuits, which have each failed to find clearly established federal law for the proposition that the Due Process Clause prohibits the admission of prejudicial, irrelevant evidence. *See Stewart v. Winn*, 967 F.3d 534, 539 (6th Cir. 2020); *Holley v. Yarborough*, 568 F.3d 1091, 1101 (9th Cir. 2009).

The Sixth Circuit has narrowed its ruling somewhat, explaining where this Court has addressed a "specific kind of evidence," section 2554(d) could be satisfied. *Moreland v. Bradshaw*, 699 F.3d 908, 923 (6th Cir. 2012). But in the Ninth Circuit, even constitutionally protected (gun ownership) and irrelevant conduct appears to provide no potential basis for relief. *See Ruiz v. Barnes*, 731 F. App'x 616, 617 (9th

Cir. 2018) (unpublished) (gun possession). The unqualified holdings of the Ninth and Tenth Circuits place them in the minority on this issue.

This split of authority—presented in a capital case—together with the Tenth Circuit's contravention of this Court's precedents, warrants review.

C. This Case Squarely Presents the Question

The Tenth Circuit's holding on this issue turned entirely on its resolution of whether there was clearly established federal law concerning the admission of irrelevant and prejudicial evidence. App. 20a. In neither state nor federal court has the underlying constitutional claim been procedurally defaulted. This Court should grant review and reverse.

II. THE CUMULATIVE ERRORS WARRANT SUMMARY REVERSAL

The "slew" of additional errors identified in Judge Bacharach's dissent also warrant reversal, individually and cumulatively. Those errors strike at the fundamental fairness of the proceedings. The excluded exculpatory witnesses would have both supported Ms. Andrew's claim that she was surprised by the shooting attack and rebutted the State's claim that she was indifferent to Mr. Andrew's fatal injuries. And the *Miranda* violation wrongfully armed the State with Ms. Andrew's own words which it deployed to paint her as a cold, cunning liar.

The dissent at the Tenth Circuit assessed the cumulative impact of these errors, concluding that AEDPA deference did not apply to the cumulative error claim because the OCCA had concluded there was no *Miranda* violation, meaning its

resolution of the cumulative error claim was fundamentally different than the one the dissent addressed. App. 111a. However, this Court should grant review and reverse regardless of whether AEDPA applies and regardless of whether it considers these serious errors cumulatively.

A. The Court Below Repeatedly Erred

v. The *Miranda* Violation

From the time the police plucked a wounded Ms. Andrew from her hospital bed and transported her in open-backed hospital gowns to the police station, Ms. Andrew was undoubtedly in custody. The OCCA's contrary holding was an unreasonable application of clearly established federal law. 28 U.S.C. § 2254(d)(1). Other than being handcuffed, every objective fact about Ms. Andrew's interrogation pointed strongly to the obvious conclusion: she was not free to leave.

To begin, Ms. Andrew affirmatively asked to leave; in response, the police told her that she could not. App. 107a. Ms. Andrew also repeatedly asked to leave to care for her children, but the police either ignored or rebuffed her requests, using language that made it clear the interrogation was mandatory and she could only go home after the interrogation was over. App. 107a (citing State Tr. Ex. 204a). It is hard to imagine a clearer demonstration that Ms. Andrew was being detained and in custody.

But there's more. Ms. Andrew was told the trip from the hospital to the police station—wearing nothing more than a hospital gown—was required. App. 106a. The examination of the police officer involved in her interrogation makes this clear:

> Q. Did you give her a choice of whether she could go home or she could go to the station?
>
> A. No.
>
> Q. She had no choice on that did she?
> A. I told her we were going down to the station, Detective Garrett wanted to talk to her some more.
>
> Q. And so she did not have any choice on that, did she, Officer Frost?
>
> A. No.

App. 106a. She had no choice.

The Tenth Circuit majority relied on the testimony of Detective Garret to conclude her involvement in the interrogation was voluntary. But even he confirmed "[s]he certainly wasn't allowed to go home, check on her children" and that she was not "allowed to go home" prior to the questioning. App. 106a–07a. She was not free to leave.

The more than two-hours of accusatory questioning also demonstrates that the interrogation was custodial. App. 104a (citing *Yarborough v. Alvarado*, 541 U.S. 652, 665 (2004) (treating two-hour duration as indicative of being in custody); *Tankleff v. Senkowski*, 135 F.3d 235, 244 (2d Cir. 1998) (same); *Moore v. Ballone*, 658 F.2d 218, 226 (4th Cir. 1981) (concluding same about one-hour interrogation)). As the dissent noted, "many of the questions were accusatory," further supporting a finding of custody. App. 104a–05a; *see also Takleff*, 135 F.3d at 244; *Moore*, 658 F.2d at 226.

Yet the Tenth Circuit rejected Ms. Andrew's argument that she was in custody during the interrogation, explaining that her claim was based on how she "*felt*." App. 53a (emphasis in original). Respectfully, the claim was not about her feelings. It was about the objective information available and how a reasonable person would respond to it. The Tenth Circuit's decision ignored that objective information and instead placed great emphasis on Ms. Andrew's willingness to assist the investigation while at the hospital, a more palatable pace. App. 51a. The Circuit also relied on information inherently unavailable at the time of the interrogation, namely, what would happen when it was over. The court below used the fact that Ms. Andrew was allowed to go at the conclusion of the interrogation as evidence that she was free to go the entire time. Relying on that information, as well as its treatment of the objective information that was available, was an unreasonable application of clearly established federal law. *See Yarborough*, 541 U.S. at 665.

Although neither the OCCA nor the Tenth Circuit majority undertook any analysis of whether the Miranda violation affected the outcome, the only reasonable conclusion is that it did. The prosecution entered the entire video into evidence, State Tr. Ex. 205a, and gamely made use of Ms. Andrew's own statements to suggest she was lying, angry at Mr. Andrew, and involved in the murder. App. 120a–22a. The State even weaponized her request to end the questioning: "And you know what? She did ask to go home. . . . [S]he's not a stupid lady." App. 108a.

The prosecution also used Ms. Andrew's custodial statements to return to its theme of seeking a conviction and death sentence based on Ms. Andrew's sexual history, appearance, and demeanor. The State claimed she "lied about her boyfriends." App. 120a. It also deployed the statement to inculpate her. During the interrogation, Ms. Andrew stated she could not see the perpetrators because it was dark outside. The State introduced evidence that the lights were on both in the garage where the shooting took place and immediately outside it. Then, in closing, the State argued she was lying because she was involved. App. 121a–22a. As the Tenth Circuit dissent noted, "false exculpatory statements are evidence—often strong evidence—of guilt." App. 122a (quoting *Al-Adahi v. Obama*, 613 F.3d 1102, 1107 (D.C. Cir. 2010)).

The Tenth Circuit's resolution of the Miranda claim was an unreasonable application of both *Miranda* and *Yarborough* and the admission of Ms. Andrew's custodial statement requires reversal.

vi. The Excluded Witnesses

The erroneous exclusion of three witnesses from testifying for Ms. Andrew's defense further undermined the reliability of Ms. Andrew's conviction and sentence. Officer Warren was prepared to testify that at the scene of her ex's murder, Ms. Andrew was distraught, sitting at his side, pleading for help even though he "was obviously dead." App. 122a. That evidence would have offered a powerful counter to the State's theory that Ms. Andrew was a "coldblooded killer." App. 122a (quoting Trial Tr. 4098).

The state court also excluded the testimony of Ms. Shadid and Ms. Gisler, Ms. Andrew's neighbors. Shadid would have testified that she heard three shots. Gisler would have testified that she heard one loud noise. App. 123a. Together, their testimony corroborates Ms. Andrew's account that the shots were fired in quick succession, leaving her no time to stage the third shot, as the State maintained. To hold that excluding that evidence was harmless, particularly in such a circumstantial case, is unreasonable. The witnesses offered a third-party account concerning a key facet of the State's case and Ms. Andrew's defense. Excluding their testimony, on its own, rendered Ms. Andrew's trial fundamentally unfair, violating the Due Process Clause.

vii. Cumulative Error

The slew of errors in this case also cumulatively "had a substantial and injurious effect or influence in determining" the jury's verdict at guilt and sentencing. *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). As Judge Bacharach put it, "The State focused from start to finish on Ms. Andrew's sex life. This focus portrayed Ms. Andrew as a scarlet woman, a modern Jezebel, sparking distrust based on her loose morals." The State's closing arguments continued the "drumbeat . . . plucking away any realistic chance the jury would consider her version of events." App. 120a. If that wasn't enough, the *Miranda* violation allowed the State to erase any credibility she had left, painting her as someone who lied to cover up her crimes. The errors individually warrant reversal, but collectively the demand it.

B. Summary Reversal Is Warranted

Summary reversal is appropriate. "[S]ummarily deciding a capital case, when circumstances so warrant, is hardly unprecedented." *Wearry v. Cain*, 577 U.S. 385, 395 (2016); *see, e.g.*, *Lynch v. Arizona*, 578 U.S. 613 (2016); *Christeson v. Roper*, 574 U.S. 373 (2015); *Hinton v. Alabama*, 571 U.S. 263 (2014); *Sears v. Upton*, 561 U.S. 945 (2010); *Jefferson v. Upton*, 560 U.S. 284 (2010); *Porter v. McCollum*, 558 U.S. 30 (2009). The Court has also "not shied away from summarily deciding fact-intensive cases where, as here, lower courts have egregiously misapplied settled law." *Cain*, 577 U.S. at 395 (summarily deciding that a capital defendant's due process rights were violated). The Court should do so here.

The stakes here could not be higher. Ms. Andrew was convicted and sentenced to death based on evidence that plays to base stereotypes and countenances a flagrant *Miranda* violation. The lower courts—state and federal—failed to reverse, even as they acknowledged some error and had to confront dissents. The foul blows taken by the State were degrading to Ms. Andrew, and beneath the station from which they came. This Court should demand more. Summary reversal would also right this wrongful conviction and prevent an unjust execution.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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