No. 23-6573

In the

SUPREME COURT OF THE UNITED STATES

BRENDA EVERS ANDREW,

***Petitioner*,**

-vs-

TAMIKA WHITE, WARDEN,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CAPITAL CASE
EXECUTION DATE PENDING

Gentner F. Drummond
Attorney General of Oklahoma
Joshua L. Lockett
Asst. Attorney General, Director of General Appeals
**Counsel of Record*
Jennifer L. Crabb
Asst. Attorney General, Director of Capital Appeals
Oklahoma Office of the Attorney General
313 NE Twenty-First St.
Oklahoma City, OK 73105
joshua.lockett@oag.ok.gov
(405) 522-4404
Counsel for Respondent

February 26, 2024

CAPITAL CASE
QUESTION PRESENTED

The United States Court of Appeals for the Tenth Circuit denied Petitioner Brenda Evers Andrew habeas relief following her conviction and sentence of death in Oklahoma state court. Unhappy with the circuit court's faithful application of the Antiterrorism and Effective Death Penalty Act (AEDPA), Andrew now essentially seeks error correction through her Petition for Writ of Certiorari to that circuit court based upon the following questions:

1. **Whether this Court should address an evidentiary issue under AEDPA review that is vastly different from its original presentation in the state court.**

2. **Whether this Court should apply de novo review to a claim of cumulative error in spite of the Tenth Circuit's finding that Andrew had failed to overcome AEDPA's deferential standard of review as to the underlying alleged errors.**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

FEDERAL STATUTES

INTRODUCTION

Andrew was convicted of first-degree murder and sentenced to death[1] in the District Court of Oklahoma County, State of Oklahoma, Case No. CF-2001-6189, for murdering of her estranged husband, Robert Andrew ("Robert").[2] Andrew acted in concert with her paramour, James Pavatt, who is also under a sentence of death. *See Pavatt v. Sharp*, Case No. 19-697, *cert. denied* (Jan. 27, 2020). As will be shown, there was overwhelming evidence that Andrew and Pavatt plotted the murder of Robert after seeking to gain control of Robert's life insurance policy. At her trial, Andrew sought to establish that she was a good mother, who would never go to such lengths as killing the father of her children. Instead, Andrew blamed the murder on Pavatt and he readily took the blame. The State countered this defense with evidence indicating Andrew's visceral hatred of Robert and her ability to get men (including Pavatt) to do her bidding. Contrary to the impression left by Andrew's Petition, this so-called "other bad acts" evidence was both relevant and but a drop in the ocean of the State's evidence.

Together, Andrew and Pavatt made two attempts on Robert's life. The first attempt, a severed brake line in Robert's car, was discovered before it could achieve its ultimate end. The pair would be far less circumspect with their second attempt, ending Robert's life with two shotgun blasts in his own garage.

---

[1] The jury found the existence of two aggravating circumstances: (1) Andrew committed the murder for remuneration or the promise of remuneration; and (2) the murder was especially heinous, atrocious, or cruel. *See* Pet. App. 259a.

[2] Andrew was also convicted of Conspiracy to Commit First Degree Murder and sentenced to ten years.

On direct appeal to the Oklahoma Court of Criminal Appeals (OCCA), Andrew argued the admission of certain evidence such as her prior affairs and flirtatious behavior was improper. The OCCA found much of the contested evidence properly admitted to show Andrew's motive and intent to kill Robert; as to the limited remainder, the OCCA found little to no relevance, but determined its admission was harmless due to the overwhelming evidence against her. Pet. App. 267a-68a, 272a-73a, 277a-80a, 282a-83a. The OCCA also rejected a *Miranda*[3] claim as well as a cumulative error claim raised by Andrew, among various others. Pet. App. 285a, 311a. Ultimately, the OCCA affirmed Andrew's convictions and sentences in a published opinion on June 21, 2007. *See* Pet. App. 258a-321a. The OCCA denied Andrew's rehearing motion a few months later. *See Andrew v. State*, 168 P.3d 1150 (Okla. Crim. App. 2007). This Court denied Andrew a petition for writ of certiorari the following year. *See Andrew v. Oklahoma*, 552 U.S. 1319 (2008).

The federal district court denied Andrew habeas relief several years thereafter. Pet. App. 146a-243a. The district court denied relief on all grounds, including those Andrew raises in her Petition.

At the Tenth Circuit, Andrew raised similar grounds again. However, Andrew's "other bad acts" claim was transformed by her reliance on evidence and prosecutorial argument she did not allege to be improper when she presented this claim to the OCCA and the federal district court. The Tenth Circuit denied this claim, finding no clearly established federal law existed by which to assess the OCCA's

[3] *Miranda v. Arizona*, 384 U.S. 436 (1966).

decision on the matter. The circuit court also rejected Andrew's *Miranda* and cumulative error claims.

Andrew has petitioned this Court for a writ of certiorari on two issues, the admission of "other bad acts" evidence and cumulative error. But Andrew has once again expanded the scope of her "other bad acts" claim, even beyond that claim's presentation in the Tenth Circuit. Andrew's case is a poor vehicle for her first question presented for two primary reasons. *First*, Andrew has attempted to circumvent AEDPA by materially transforming her "other bad acts" claim with each presentation. *See Sexton v. Beaudreaux*, 585 U.S. 961, 967-68 (2018) (holding the circuit court "committed fundamental errors that this Court has repeatedly admonished courts to avoid," including "consider[ing] arguments against the state court's decision that Beaudreaux never even made in his state habeas petition"). *Second*, Andrew ignores the OCCA's findings that most of the challenged evidence was admissible and that the improperly admitted evidence amounted to harmless error. These holdings provide an independent basis for affirmance regardless of the answer to Andrew's first question presented. Setting aside these issues, Andrew's claimed circuit split is illusory, and the Tenth Circuit correctly determined that there exists no clearly established federal law by which to compare or contrast the OCCA's decision pursuant to AEDPA deference. Her second question presented also suffers from considerable flaws; she seeks to bypass AEDPA deference by claiming that her *Miranda* claim may be considered in conjunction with her cumulative error claim despite her failure to demonstrate the OCCA's decisions on the underlying claim was

contrary to or an unreasonable application of clearly established federal law. Shoehorning the *Miranda* claim into a cumulative error analysis in this way strips the AEDPA of its purpose and would allow federal habeas courts to substitute their own judgment for that of the state appellate courts.

This Court should, therefore, deny the Petition for Writ of Certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit.

STATEMENT OF THE CASE

Reading Andrew's Petition, one is left with the impression that there was no evidence presented of her involvement in the murder and she was convicted and sentenced to death only because the State convinced the jury she is a bad person. Nothing could be further from the truth. As found by the OCCA:

> [Andrew]'s husband Robert ("Rob") Andrew was shot to death at their Oklahoma City home sometime around 7:00 p.m. on November 20, 2001. [Andrew] was also shot in the arm during this incident.
>
> The Andrews were separated at the time and Rob Andrew was at the home to pick[ ]up the two minor children for visitation over the Thanksgiving holiday. The custom was that [Andrew] would bring the children out to the car and Rob would take them from there. However, on this night, [Andrew] asked Rob Andrew to come into the garage to light the pilot light on the furnace because it had gone out. [Andrew]'s version of the events from that point on was that as Rob was trying to light the furnace, two masked men entered the garage. Rob turned to face the men and was shot in the abdomen. He grabbed a bag of aluminum cans to defend himself and was shot again. [Andrew] was hit during this second shot.
>
> Undisputed facts showed that after that, [Andrew] called 911 and reported that her husband had been shot. Emergency personnel arrived and found Rob Andrew's

> body on the floor of the garage; he had suffered extensive blood loss and they were unable to revive him. [Andrew] had also suffered a superficial gunshot wound to her arm. The Andrew children were found in a bedroom, watching television with the volume turned up very high, oblivious to what had happened in the garage.
>
> [Andrew] was taken to a local hospital for treatment. Her behavior was described by several witnesses, experienced in dealing with people in traumatic situations, as uncharacteristically calm for a woman whose husband had just been gunned down.[4]
>
> Rob Andrew was shot twice with a shotgun. A spent 16-gauge shotgun shell was found in the garage on top of the family van. Rob Andrew owned a 16-gauge shotgun, but had told several friends that [Andrew] refused to let him take it when they separated. Rob Andrew's shotgun was missing from the home. One witness testified to seeing [Andrew] at an area used for firearm target practice near her family's rural Garfield County home eight days before the murder and he later found several 16-gauge shotgun shells at the site.
>
> [Andrew]'s superficial wound was caused by a .22 caliber bullet, apparently fired at close range, which was inconsistent with her claim that she was shot at some distance. About a week before the murder, Pavatt purchased a .22 caliber handgun from a local gun shop. Janna Larson, Pavatt's daughter testified that, on the day of the murder, Pavatt borrowed her car and claimed he was going to have it serviced for her. When he returned it the

---

[4] This is one category of evidence Andrew claims was an improper appeal to sexist stereotypes. But a defendant's reaction to the murder of a person close to them (*e.g.*, the parent of his or her children) is highly relevant, irrespective of the defendant's sex. *See* Pet. App. 280a (OCCA's opinion finding evidence of Andrew's demeanor "relevant to show a consciousness of guilt"); *accord Scott v. State*, 163 So.3d 389, 438 (Ala. Crim. App. 2012) ("Testimony of Scott's reactions after the fire and the death of her son was relevant to Scott's guilt and was propertly admitted."); *State v. Diaz*, 900 N.E.2d 565, 585 (Ohio 2008) (defendant's "lack of grief and exuberant behavior on the day of [her son]'s funeral were relevant in proving motive under Evid.R. 404(B)"); *State v. Hand*, 840 N.E.2d 151, 177 (Ohio 2006) (testimony that husband displayed lack of grief after wife's murder was admissible); *State v. Day*, 754 P.2d 1021, 1025 (Wash. App. 1988) (testimony by police officers that husband's reactions to wife's murder were inappropriate was properly admitted).

morning after the murder, the car had not been serviced, but Larson found one round of .22 caliber rimfire ammunition on the floorboard. In a conversation later that day, Pavatt told Larson never to repeat that [Andrew] had asked him to kill Rob Andrew, and he threated to kill Larson if she did. He also told her to throw away the .22 round she found in her car.

Police searched the home of Dean Gigstad, the Andrews' next-door neighbor, after the Gigstads reported finding suspicious things in their home. Police found evidence that someone had entered the Gigstads' attic through an opening in a bedroom closet. A spent 16[-]gauge shotgun shell was found on the bedroom floor, and several .22 caliber rounds were found in the attic itself. There were no signs of forced entry into the Gigstad home. Gigstad and his wife were out of town when the murder took place, but [Andrew] had a key to their home. The .22 caliber round found in Janna Larson's car was of the same brand as the three .22 caliber rounds found in the Gigstads' attic; the .22 caliber bullet fired at [Andrew] and retrieved from the Andrews' garage appeared consistent with bullets in these unfired rounds. These rounds were capable of being fired from the firearm that Pavatt purchased a few weeks before the murder; further testing was not possible because that gun was never found. The 16[-]gauge shotgun shell found in the Gigstads' home was of the same brand as the 16[-] gauge shell found in the Andrews' garage. Ballistics comparison showed similar markings, indicating that they could have been fired from the same weapon. Whether these shells were fired from the 16-gauge shotgun Rob Andrew had left at the home was impossible to confirm because, as noted, that gun remains missing.

Within days after the shooting, before Rob Andrew's funeral, [Andrew], James Pavatt and the two minor children left the State and cross[ed] the border into Mexico. They were apprehended while attempting to re-enter the United States in late February 2022.

[Andrew] and Pavatt met while attending the same church. At some point they began teaching a Sunday school class together. [Andrew] and Pavatt began having a sexual relationship.[3] Around the same time, Pavatt, a life

insurance agent, assisted Rob Andrew in setting up a life insurance policy through Prudential worth approximately $800,000. In late September 2001, Rob Andrew moved out of the family home, and [Andrew] initiated divorce proceedings a short time later.

> [3] The State presented evidence that the Andrews' marriage had been strained for several years, and that [Andrew] had a number of extramarital affairs.

Janna Larson, Pavatt's adult daughter, testified that in late October, Pavatt told her that [Andrew] had asked him to murder Rob Andrew. On the night of October 25-26, 2001, someone cut the brake lines on Rob Andrew's automobile. The next morning, Pavatt persuaded his daughter to call Rob Andrew from an untraceable phone and claim that [Andrew] was at a hospital in Norman, Oklahoma, and needed him immediately. An unknown male also called Rob that morning and made the same plea. Rob Andrew's cell phone records showed that one call came from a pay phone in Norman (near Larson's workplace), and the other from a pay phone in south Oklahoma City. Rob Andrew discovered the tampering to his car before placing himself in any danger. He then notified the police. The next day, [Andrew] told Rob that she read in the newspaper that someone cut his brakes, but no media coverage of this event had occurred.[5]

One contentious issue in the Andrews' relationship was control over the insurance policy on Rob Andrew's life. After his brake lines were cut, Rob Andrew inquired about removing [Andrew] as beneficiary of his life insurance policy. Rob Andrew spoke with Pavatt's supervisor about changing the beneficiary. He also related his suspicions that Pavatt and [Andrew] were trying to kill him. At trial, the State presented evidence that in the months preceding the murder, [Andrew] and Pavatt actually attempted to transfer ownership of the insurance policy to [Andrew] without Rob Andrew's knowledge, by forging his signature

[5] Andrew also exhibited knowledge of the plan even before speaking to Robert, when she showed up at Larson's place of work only minutes after Larson had placed the call to inquire why her phone number was on Robert's caller I.D. (Trial Tr. 891).

to a change-of-ownership form and backdating it to March 2001.[4]

> [4] According to one witness, [Andrew] had told her husband that she could sign his name "better than he could." Among other evidence, the State presented recordings of telephone conversations from [Andrew] and Pavatt to the insurance company's home office, inquiring about the status of the policy and attempting to persuade them that a legitimate ownership change had been made.

In the days following the murder, Pavatt obtained information over the Internet about Argentina, because he had heard that country had no extradition agreement with the United States. Larson also testified that after the murder, [Andrew] and Pavatt asked her to help them create a document, with the forged signature of Rob Andrew, granting permission for his children to travel with [Andrew] out of the country. [Andrew] also asked Larson to transfer funds from her bank account to Larson's own account, so that Larson might wire them money after they left town.

[Andrew] did not attend her husband's funeral, choosing instead[] to go to Mexico with Pavatt and the children. Pavatt called his daughter several times from Mexico and asked her to send them money. Larson cooperated with the FBI and local authorities in trying to track down the pair. After her apprehension, [Andrew] came into contact with Teresa Sullivan, who was a federal inmate at the Oklahoma County jail. Sullivan testified that [Andrew] told her that she and Pavatt killed her husband for the money, the kids, and each other. [Andrew] also told her that Pavatt shot her in the arm to make it look as if she was a victim.

Expert testimony opined that the wound to [Andrew]'s arm was not self-inflicted, but was part of a scheme to stage the scene to make it look like she was a victim, just like her husband.

Pet. App. 259a-64a. *See also* Pet. App. 26a (finding by Tenth Circuit that evidence was "overwhelming"). 279a (same by OCCA).

On January 22, 2024, Andrew's Petition for Writ of Certiorari was placed on this Court's docket.

REASONS FOR DENYING THE PETITION

This Court grants certiorari "only for compelling reasons," Sup. Ct. R. 10, and Andrew presents no such reasons in her Petition. As to her first question presented, Andrew's claim bears little resemblance to that which she raised before the OCCA on direct appeal. *See Beaudreaux*, 585 U.S. at 967-68 (holding the circuit court "committed fundamental errors that this Court has repeatedly admonished courts to avoid" including "consider[ing] arguments against the state court's decision that Beaudreaux never even made in his state habeas petition"); *Davila v. Davis*, 582 U.S. 521, 527 (2017) ("The exhaustion requirement [of 28 U.S.C. § 2254(b)] is designed to avoid the 'unseemly' result of a federal court 'upset[ting] a state court conviction without' first according the state courts an 'opportunity to … correct a constitutional violation[.]") (quoting *Rose v. Lundy*, 455 U.S. 509, 518 (1982) (alterations by *Davila* Court). In addition, Andrew fails to grapple with the OCCA's merits determinations; overwhelming evidence of her guilt was adduced at trial, making her case a poor vehicle for the issue she presents. *See United States v. Fruehauf*, 365 U.S. 146, 157 (1961) (this Court does not issue advisory opinions "upon issues which remain unfocused because they are not pressed before the Court with that clear correctness provided when a question emerges precisely framed *and necessary for decision*")

(emphasis added). Finally, contrary to Andrew's assertions, there is no clearly established federal law on the matter by which to assess the OCCA's decision under the AEDPA, much less a circuit split on the issue, meaning the issue is not an important one warranting this Court's intervention. *See* Sup. Ct. R. 10.

Similarly, Andrew's second question presented concerns a claim of cumulative error. Andrew claims that a federal habeas court sitting in review of a state court decision can review every claim of error de novo, so as to include them in a cumulative error analysis. This argument flies in the face of AEDPA's deferential standard of review. *See Harrington v. Richter*, 562 U.S. 86, 102 (2011) (describing 28 U.S.C. § 2254(d)(1) as "the only question that matters") (quoting *Lockyer v. Andrade*, 538 U.S. 63, 71 (2003)).[6] But even if that weren't the case, Andrew's claim suffers from a lack of clearly established federal law and should be rejected. *See Wright v. Van Patten*, 552 U.S. 120, 126 (2008) ("Because our cases give no clear answer to the question presented, let alone one in Van Patten's favor," "relief is unauthorized" under 28 U.S.C. § 2254(d)(1)).

I. ANDREW'S "OTHER BAD ACTS" CLAIM DOES NOT WARRANT THIS COURT'S CONSIDERATION.

Andrew presents this Court with a claim that allegedly inflammatory and irrelevant evidence of a sexualized nature and its subsequent reference by the prosecutor during arguments rendered her trial fundamentally unfair in violation of

[6] 28 U.S.C. § 2254(d) prohibits federal courts from overturning state convictions unless the state court's decision affirming the conviction was contrary to, or an unreasonable application of, clearly established federal law as announced by this Court, or based on an unreasonable determination of the facts.

the Due Process Clause of the Fourteenth Amendment.[7] Pet. 21-29. This issue does not warrant this Court's consideration for several reasons. *First*, the claim, as it is presented to this Court, is vastly different from that which was presented to the state court. Given that Andrew's case has made its way to this Court as a federal habeas claim and is controlled by the AEDPA, that discrepancy makes the claim a poor vehicle for review. *Second*, in reviewing the claim that was presented, the state court determined that much of the evidence was properly admitted to show Andrew's motive to kill her husband; the state court found a limited portion of the evidence Andrew cites in her Petition irrelevant, but nonetheless found its admission harmless in light of the overwhelming evidence indicating her guilt. Given its finding of no clearly established federal law, the Tenth Circuit did not render a decision on the reasonableness of this decision, meaning—once more—the case is a poor vehicle for review. Even if the broad due process principles concerning the introduction of this type of evidence were clearly established to guide ADEPA review of the claim, Andrew cannot show every fair-minded jurist would reach a different conclusion from the state court on the issue. Third, the alleged circuit split cited by Andrew in her Petition

[7] The Respondent has been given notice of potential amicus curiae briefs to be filed in this case. One such brief, that of "A Former Federal Judge, et al.," claims Andrew was convicted and sentenced to death because of widespread gender-bias in the courts and in spite of the fact that "there was no allegation of torture or exceptional cruelty." Former Fed. J. Amicus Br. 3. The Respondent has two brief responses to this submission. First, the fact that Oklahoma has executed only three women in its history, and Andrew is the only woman currently subject to a death sentence in the state, belies the notion that Oklahoma prosecutors, juries, or courts are biased against women. Second, Petitioner's jury found that the murder of Robert was, in fact, especially heinous, atrocious, or cruel. *See* Pet. App. 259a ("The jury found [Andrew] guilty of both counts and found the existence of two aggravating circumstances: the murder was for remuneration and the murder was especially heinous, atrocious, or cruel.").

simply does not exist. As such, there is no inconsistency on the matter warranting this Court's clarification.

A. Andrew's claim is vastly different from that presented to the state court.

In raising her claim before the state court, Andrew argued a much more limited version of the claim she now presents to this Court. Before the OCCA, Andrew raised (as Propositions 3 and 7) evidentiary claims as to the admission of: (1) her affairs with two men other than Pavatt; (2) her making advances toward the two adult sons of one of those two other men; (3) her provocative dress at a dinner with friends a few weeks before the murder in which someone in the restaurant referred to her as a "hoochie" and Andrew's inappropriate talk about a trip to Mexico at the dinner; (4) her changing the color of her hair upon discovering that a different man liked women with that hair color; (5) testimony from Pavatt's adult daughter that she thought Andrew had lied to Pavatt when she told him that she had not slept with anyone other than her husband and Pavatt; and (6) the contents of her luggage, which included her thong underwear, from her trip to Mexico with Pavatt and her children just before her husband's funeral. Pet. App. 277a-79a, 282a-83a. Andrew *separately* raised a prosecutorial misconduct claim (as Proposition 13) as to one prosecutor's comment, made in response to mitigating evidence that Andrew was a good mother, where it was questioned whether a good mother would bring other men into the Andrew family home with her children present while Robert was away at work. Pet. App. 304a-08a.

In the Tenth Circuit, Andrew raised both her "other bad acts" and prosecutorial misconduct claims as *one*. Pet. App. 14a-21a. Andrew presented the following bases for this claim: (1) the prosecutor's opening statement (not argued in the OCCA); (2) evidence of her affairs with two men other than Pavatt; (3) the incident in which she dyed her hair; (4) the testimony of *one* witness regarding her tight clothing; (5) her "training" of the children to keep her affairs secret; (6) that she once "came on" to two sons of one of her affair partners; (7) her possession of a book related to sex (not argued in the OCCA); (8) Pavatt's daughter's belief that Pavatt was not the only man with whom Andrew had had an affair; (9) Robert's complaints about Andrew's lack of affection (not argued in the OCCA); (10) introduction of Andrew's thong underwear and lace bras; (11) the prosecutor's alleged "brandishing" of Andrew's underwear and bras during closing argument (not argued in the OCCA); (12) repeated references to her affairs in closing argument (not argued in the OCCA); (13) the prosecutor's reading from Robert's journal during closing argument (not argued in the OCCA); and (14) the prosecutor's use of "a memorable phrase," to wit, "she has had sex on him over and over and over" (not argued in the OCCA).[8]

[8] The Tenth Circuit, in a footnote, acknowledged that the Respondent preserved arguments related to the enhancement of her claim. *See* Pet. App. 15a ("The government argues that though all the challenged evidence was in the record, Ms. Andrew failed to identify it before the OCCA. So it requests that we ignore all newly presented evidence when evaluating this claim. But we need not decide this issue because Ms. Andrew cannot prevail even if we consider all the matters she raises in this claim."). Because the Respondent did not waive exhaustion, Andrew cannot receive relief for the claim she raised in the Tenth Circuit or the further enhanced claim in her Petition. *See* 28 U.S.C. § 2254(b)(3) ("A state shall not be deemed to have waived the exhaustion requirement or be estopped from reliance on the requirement unless the State, through counsel, expressly waives the requirement.").

In this Court, Andrew relies upon the following *additional* allegations: (1) the testimony of three additional witnesses regarding her clothing; (2) the testimony of three additional witnesses about Andrew's hair in addition to the time she dyed it red; (3) an additional comment during the State's closing argument; (4) evidence about the state of Andrew's house; (5) Andrew's demeanor after the murder; and (6) the prosecutor's reference to Andrew as "an attractive woman."

The focus of Andrew's claim has shifted dramatically. In the OCCA, she alleged "other bad acts" evidence (sexual and otherwise) deprived her of a fair trial. Now, Andrew claims the State obtained its conviction and sentence solely by relying on "sex-based stereotypes" to strip her of her humanity by portraying her as someone incapable of "display[ing] feminine emotion,"[9] as someone who "kept a 'filthy' home," and as someone who "was a bad mother."[10] Pet. 8-16.

Even before the enactment of AEDPA, this Court held that, in order to exhaust state court remedies, "[i]t is not enough that all the facts necessary to support the federal claim were before the state courts[.]" *Anderson v. Harless*, 459 U.S. 4, 6 (1982).

---

[9] Much of that which Andrew argues was an attack upon her feminine demeanor, *see* Pet. 12-16, was actually just the State highlighting her flat, indifferent response to her husband's shooting death at the scene of the crime, at the hospital, and at her interview. *See* (Trial Tr. 2285, 2386, 2395, 2404, 2561-62, 2581, 2713-21, 4070). *See supra*, n.4.

[10] As to this last specific argument concerning whether Andrew was a "good mother," *see* Pet. 11-12, half of the references to the allegedly improper evidence and argument arose following cross-examination of a State witness by Andrew's own trial counsel wherein he asked the witness whether she was a "good mother," thereby making the issue relevant for further redirect examination, *see* (Trial Tr. 414 ("Q. Good mother? A. Good mother."), 419-20), while the other half come from the second stage of trial after Andrew had posited to the jury that she "[wa]s a good mother, who loves her children very much," as part of her mitigation case. *See* (Tr. 4312-14, 4345-46). Given that it was Andrew who made the issue of whether or not she was a "good mother" one for the jury, it should come as no surprise that the State attempted to refute that notion with evidence and argument to the contrary.

Rather, the habeas petitioner must "provide the state courts with a 'fair opportunity' to apply controlling legal principles *to the facts bearing upon his constitutional claim*." *Id*. (quoting *Picard v. Connor*, 404 U.S. 270, 276-77 (1971)). *See also Davila*, 582 U.S. at 527 ("The exhaustion requirement [of 28 U.S.C. § 2254(b)] is designed to avoid the 'unseemly' result of a federal court 'upset[ting] a state court conviction without' first according the state courts an 'opportunity to … correct a constitutional violation[.]") (quoting *Lundy*, 455 U.S. at 518 (alteration by *Davila* Court)); *Kunkle v. Dretke*, 352 F.3d 980, 988 (5th Cir. 2003) (finding claim was unexhausted due to additional factual support not presented in state court); *Hawkins v. Mullin*, 291 F.3d 658, 670 (10th Cir. 2002) (same). A habeas petitioner is also required to "present the state courts with the same *claim* he urges upon the federal courts." *Picard v. Connor*, 404 U.S. 270, 276 (1971) (emphasis added).

Andrew has violated these principles. She asks this Court to grant habeas relief based on facts she did not rely on in state court, and on a combined "other bad acts"/prosecutorial misconduct claim that was not presented in that manner in state court. Andrew would have this Court disregard AEDPA's exhaustion requirement and the restrictions of § 2254(d)(1). *See, e.g., Beaudreaux*, 585 U.S. at 967-68 (holding the circuit court "committed fundamental errors that this Court has repeatedly admonished courts to avoid" including "consider[ing] arguments against the state court's decision that Beaudreaux never even made in his state habeas petition"); *Dunn v. Reeves*, 594 U.S. 731 (2021) ("We start, as we must, with the case as it came to the Alabama court."); *Cullen v. Pinholster*, 563 U.S. 170, 182 (2011) ("[R]eview

under § 2254(d)(1) focuses on what a state court knew and did."); *id*. at 182-83 (2011) ("It would be strange to ask federal courts to analyze whether a state court's adjudication resulted in a decision that unreasonably applied federal law to facts not before the state court."). The claim Andrew has chosen to present to this Court is simply not proper.

It is worth making special note of Andrew's claim concerning the allegedly improper nature of the prosecutors' argument based upon the contested evidence within her claim of error and her criticism of the circuit court for failing to address that matter. Pet. 18, 24-27. Andrew contends the circuit court failed in its duty to examine whether the argument of the State violated due process. Pet. 24-27. But at the same time, she fails to acknowledge that she raised only one claim of prosecutorial error in the state court that is repeated now. *See* Pet. App. 305a (considering whether "the prosecutor improperly attacked her by stating in response to mitigating evidence indicating she was a good mother, "Would she bring men into her house with her children there and her husband at work?" and finding no error because "[t]he comment was properly based on the evidence, and it was in response to the list of mitigating evidence"). Worse still, Andrew presented these as entirely separate claims in the OCCA.

Andrew has thus criticized the Tenth Circuit for what she failed to do herself in the state court. Both the OCCA and the Tenth Circuit properly refused to act as an advocate for either part. *See United States v. Sineneng-Smith*, 590 U.S. ----, 140 S. Ct. 1575, 1579 (2020) (under the principle of party representation, courts act as

neutral arbiters, deciding only questions presented by, and as framed by, the parties); *State v. U.S. Env't Prot. Agency*, 989 F.3d 874, 885 (10th Cir. 2021) (same); *Cuesta-Rodriguez v. State*, 247 P.3d 1192, 1197 (Okla. Crim. App. 2011) (the OCCA will not search the record to support claims). None of the cases cited by Andrew required the Tenth Circuit to violate the principle of party presentation. Pet. 24-25. For example, in *United States v. Young*, 470 U.S. 1, 11-20 (1985), this Court held it cannot *grant* relief on a claim of prosecutorial misconduct without considering the record as a whole to include arguments made by defense counsel and the evidence of guilt. *Young* does not stand for the proposition that a court must scour the record looking for errors not raised by an appellant. The same is true of *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974) (another prosecutorial misconduct case), *Panetti v. Quarterman*, 551 U.S. 930 (2007) (a case involving neither "other bad acts" evidence nor improper argument, but only competence to be executed), and *Abdul-Kabir v. Quarterman*, 550 U.S. 233 (2007) (involving whether the jury's instructions and argument thereon deprived the prisoner of his right to have the jury consider all of his mitigating evidence). To be clear, the Respondent is not arguing that courts may not grant relief by considering the erroneous admission of evidence combined with prosecutorial argument thereon.[11] Rather, the Tenth Circuit was precluded from doing so *in Andrew's case* because of the party presentation principle, § 2254(b)'s exhaustion requirement, and § 2254(d)'s deference to the state court decision under review.

[11] Nor is the Respondent invoking non-retroactivity principles. *See* Pet. 25.

These considerations as to the differences between what Andrew presented to the OCCA and what she is pressing now should cause this Court serious concern that any review of Andrew's case would violate the principle that state courts are to be given a full and fair opportunity to resolve a federal constitutional claim before those claims are presented in the federal courts. *See Lundy*, 455 U.S. at 518.

B. Andrew cannot show no fair-minded jurist would agree with the OCCA's denial of relief.

Although Andrew acknowledges the OCCA's merits adjudication of her "other bad acts" claim,[12] she never grapples with the fact that, if there is clearly established federal law regarding "other bad acts" evidence, she must *then* show that every fairminded jurist would disagree with the OCCA's decision. That is, Andrew must show that the OCCA unreasonably found most of the challenged evidence properly admitted *and* unreasonably found the improperly admitted evidence harmless. *See* 28 U.S.C. § 2254(d); *Davis v. Ayala*, 576 U.S. 257, 276-77 (2015) (citing *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)). But the term "fairminded jurist" does not even appear in her Petition. Its absence is telling, especially considering what the State presented to the jury during Andrew's three-week trial.

Assuming there does exist some broad due process right against "other bad acts" evidence, the leeway owed to the decision of the OCCA by federal courts is at its

[12] The OCCA explained that it "struggle[d] to find any relevance to [certain] evidence," which included Andrew's flirtatious behavior with two college-aged individuals who were building a deck at her home, testimony that she dressed provocatively at a dinner several weeks before the murder and was called a "hoochie," inappropriate talk about a trip to Mexico, as well as testimony that Andrew changed her hair color to that preferred by another man. Pet. App. 279a. The OCCA went on to conclude that, "even so, the introduction of this evidence was harmless due to the overwhelming evidence in this case." *Id.*

apex given the breadth of the rule proposed by Andrew. *See Renico v. Lett*, 559 U.S. 766, 776 (2010) ("the more general the rule at issue … the more leeway state courts have in reaching outcomes in case-by-case determinations"). Andrew cannot show every fairminded jurist would have concluded her trial was rendered fundamentally unfair by the evidence of which she now complains under such a general standard.

Evidence indicated that Andrew hated her husband, and she made no secret of her desire to see him dead, stating as much to multiple individuals in the lead up to the murder. Trial Tr. 250, 256, 261-63, 308, 499-502, 996-98 (Andrew overheard yelling at Rob, "I'm going to fucking have you killed!"), 1081-82. So strong was the sentiment that even the victim in this case, her own estranged husband, was convinced that she was seeking to take his life. Trial Tr. 176, 224-25, 1064-65, 1075, 1424. In Pavatt, Andrew finally found someone willing to make her desires come true. Trial Tr. 447 (recounting that Robert told his friend that Andrew "had finally found somebody that would kill him"), 930, 961 (Robert told police that Andrew and Pavatt were trying to kill him), 2656 (Pavatt telling Andrew that it was "easy to kill someone" and that it was "no big deal"), 2745 (Andrew explaining to another inmate that she and Pavatt killed Robert), 2966 (Pavatt's daughter testifying that Pavatt told her that Andrew had asked him to kill Robert). Not content with simply ending Robert's life, the pair tried to cash in on Robert's life insurance policy, despite Robert's attempts to remove Andrew as its beneficiary. Trial Tr. 256-57, 268-69, 365, 413, 433-34, 584, 1039-40, 1066, 1167, 1204-06, 1265-66, 1363, 1381, 1402-05, 1596-98. Their first attempt on Robert's life—cutting the brake lines to his car—was unsuccessful. Trial

Tr. 874-98, 957-71. Undeterred by their first brazen attempt, Andrew and Pavatt shot Robert in the garage of the marital home he was forced to leave when Andrew lured him in under the guise of an unlit pilot light. Trial Tr. 2287-89. Delighted by their success, Andrew skipped out on the funeral of her dead husband, taking her children with her, as she and Pavatt made for Mexico. Trial Tr. 594, 2338, 2463, 2746-47.

Based on even this limited description of the facts of her case, Andrew cannot show that every fariminded jurist would have disagreed with the OCCA's harmlessness decision. *See Ayala*, 576 U.S. at 277. The evidentiary matter is of no consequence here because the strength of the State's case ensures any error on the part of the Tenth Circuit would be rendered insignificant by a full review of the issue.

This Court has expressed its hesitancy to take up such cases that would have no practical effect on the outcome. *See*, *e.g.*, *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011) ("Courts should think carefully before expending 'scarce judicial resources' to resolve difficult and novel questions of constitutional or statutory interpretation that will 'have no effect on the outcome of the case.'") (quoting *Pearson v. Callahan*, 555 U.S. 223, 236-37 (2009)); *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 192 (1997) (refusing to resolve a split among the Courts of Appeals regarding discovery accrual rules because, *inter alia*, it would not affect the outcome of the case). Granting certiorari in Andrew's case would be a useless exercise and place a strain upon this Court's precious resources.

C. There is no circuit split on the evidentiary issue.

The Tenth Circuit flatly rejected Andrew's claim that there existed clearly established federal law by which it could analyze her claim that the OCCA's decision was contrary to or an unreasonable application of such law. Pet. App. 13a-21a. This Court has explained that "clearly established Federal law," for purposes of § 2254(d)(1), "refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decisions." *Williams v. Taylor*, 529 U.S. 362, 412 (2000). And while the holding or legal rule at issue need not have had its genesis in a closely related or similar factual context, the Supreme Court must have expressly extended the legal rule to the context at issue. *See Wright v. Van Patten*, 552 U.S. 120, 123-25 (2008) (per curiam) (consistent with *Carey v. Musladin*, 549 U.S. 70, 72-77 (2006), reversing a grant of habeas relief under the rationale that no Supreme Court decision "squarely address[ed]" the issue "or clearly establish[ed] that law from another context should apply on the facts *sub judice*"). "'[I]f a habeas court must extend a rationale before it can apply to the facts at hand,' then by definition the rationale was not 'clearly established at the time of the state court decision.'" *White v. Woodall*, 572 U.S. 415, 426 (2014) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 666 (2004)).

Andrew's Petition relies almost exclusively upon *Payne v. Tennessee*, 501 U.S. 808 (1991), to argue the existence of clearly established federal law on the matter, just as she did before the Tenth Circuit. But the Tenth Circuit rejected that argument, concluding, as it had years before in the case of *Holland v. Allbaugh*, 824

F.3d 1222, 1228 (10th Cir. 2016), that the *Payne* decision only "established that the Eighth Amendment did not erect a '*per se* bar' to the introduction of victim-impact statements in capital cases." Pet. App. 17a. Andrew relies on *Payne*'s broad pronouncement (in dicta) that when "evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." *Id*. (quoting *Holland*, 824 F.3d at 1228). But that broad statement was only applicable to circumstances in which "some victim impact statements will be so unfairly prejudicial, that their introduction will violate the Constitution notwithstanding the Eighth Amendment." *Id*. (quoting *Holland*, 824 F.3d at 1228). Thus, the Tenth Circuit saw *Payne* as not "clearly establish[ing] the applicable legal framework for wrongfully-admitted evidence," both then and now. *Id*. at 1315 (quoting *Holland*, 824 F.3d at 1229). Such a general legal principle involving the factually specific scenario of victim-impact evidence could therefore not be seen as creating the type of clearly established federal law necessary to sustain her "other bad acts" claim. *Id*. at 1314-16.[13]

[13] The Tenth Circuit went on to explain how Andrew's citation to additional cases such as *Brown v. Sanders*, 546 U.S. 212 (2006), *Estelle v. McGuire*, 502 U.S. 62 (1991), *Chambers v. Mississippi*, 410 U.S. 284 (1973), and *Lisenba v. California*, 314 U.S. 219 (1941), likewise did not establish the type of clearly established federal law by which a federal habeas court could review her claim. Pet. App. 18a-21a. In her Petition, Andrew has abandoned her reliance on most of these cases. Andrew continues to rely on *Kansas v. Carr*, 577 U.S. 108 (2016). However, the Tenth Circuit properly refused to consider a decision that post-dated the OCCA's opinion in Andrew's case. Pet. App. 18a. *See Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003). Moreover, *Carr* involved a joint sentencing trial rather than the admission of "other bad acts" evidence during the guilt stage of trial. 577 U.S. at 123-26. And this Court's pronouncements, in *Lisenba v. California*, 314 U.S. 219, 228-29 (1941), that this Court does not "sit to review state court action on questions of the propriety of the trial judge's action in the admission of evidence," and that the due process clause is not violated simply because "evidence admitted as relevant by a court is shocking to the sensibilities of those in the

Andrew notes that the Tenth Circuit is joined in its thinking on this front by the Sixth and Ninth Circuits. Pet. 28 (citing *Stewart v. Winn*, 967 F.3d 534, 539 (6th Cir. 2020)[14]; *Holley v. Yarbrough*, 568 F.3d 1091, 1101 (9th Cir. 2009)). But she claims the First and Fifth Circuits conflict with them on this point, arguing that both circuit courts found clearly established federal law existed by which the state court evidentiary decision could be assessed. Pet. 28. She is mistaken as to both.

Andrew contends that the First Circuit has "held that habeas relief may be available where an 'erroneous evidentiary ruling results in a fundamentally unfair trial.'" Pet. 28 (citing *Lyons*, 666 F.3d at 55-56). While the First Circuit does make this broad declaration early on in its assessment of the petitioner's evidentiary claim concerning the admission of autopsy photographs, Andrew neglects to provide what followed. "Lyons has failed to bring to our attention any clearly established Supreme Court precedent holding that the admission of autopsy photographs violates due process rights." *Id.* at 56. Thus, the First Circuit was concerned by the exact same shortcoming identified by the Tenth Circuit in this case.

---

courtroom," *support* the Tenth Circuit's holding that this Court's cases do not clearly establish a right to relief based on the admission of prejudicial evidence.

[14] Andrew oddly suggests that the Sixth Circuit "has narrowed its ruling somewhat" since its decision in *Stewart*, 967 F.3d 534, though; she notes this by citing a case decided eight years prior in *Moreland v. Bradshaw*, 699 F.3d 908, 923 (6th Cir. 2012). Pet. 28. Making the suggestion even more bizarre is the fact that the Sixth Circuit cited the *Moreland* decision in *Stewart* as support for its holding. *Stewart*, 967 F.3d at 538 (citing *Moreland*, 699 F.3d at 923) ("We have held that a habeas petitioner's challenge to an evidentiary ruling cannot satisfy § 2254(d)(1) unless the petitioner identifies a Supreme Court case establishing a due process right with regard to the *specific kind of evidence* at issue." (internal quotations omitted and emphasis adopted)).

Andrew cites the Fifth Circuit decision of *Gonzalez v. Thaler*, 643 F.3d 425 (5th Cir. 2011), claiming it "held that the Due Process clause may 'afford relief where the challenged evidence … was the principal focus at trial and the errors … permeated the entire atmosphere of the trial.'" Pet. 28 (citing *Gonzales*, 643 F.3d at 430-31) (alterations adopted). But Andrew fails to acknowledge that the circuit court in *Gonzales* was not limited by the AEDPA's deferential standards because it determined the state courts never adjudicated the petitioner's due process claim. 643 F.3d at 430. As such, the issue of whether clearly established federal law existed was never addressed. And the language Andrew cites from *Gonzales* to set forth her evidentiary due process principle cites only to other Fifth Circuit precedent, as opposed to Supreme Court decisions. *See Gonzales*, 643 F.3d at 430-31 n.18-26 (citing multiple circuit court decisions, mainly out of the Fifth Circuit). So, Andrew has failed to identify any split between the Tenth Circuit's determination that clearly established federal law does not exist by which to measure her claim and the Fifth Circuit. Without any split, there is no issue warranting this Court's resolution amongst the circuits.

II. NO CLEARLY ESTABLISHED FEDERAL LAW EXISTS BY WHICH ANDREW MAY SEEK RELIEF UNDER A THEORY OF CUMULATIVE ERROR, MUCH LESS ONE THAT RELIES UPON CLAIMS THAT WERE REASONABLY DENIED BY THE STATE COURT.

Andrew's final question presented urges this Court to take up her case on the basis that she is entitled to relief due to the cumulative effect of the alleged errors occurring at her trial. Pet. 29-35. But this claim is nothing more than a thinly

disguised request for error-correction as to the Tenth Circuit's holdings that the OCCA reasonably rejected these alleged errors. Further, similar to Andrew's "other bad acts" claim, there is no clearly established federal law by which to measure *any* cumulative error claim. Finally, to the extent Andrew relies upon the dissenting opinion—which considered every alleged error de novo under the guise of cumulative error—Andrew's view finds no support in this Court's precedent and should be rejected as an improper end run around AEDPA deference. Seen for what it is, Andrew is asking this Court to engage in simple alleged-error correction, a basis which finds no support for the grant of certiorari under this Court's rules.

A. Andrew's claim of cumulative error relies on a self-serving re-evaluation of her *Miranda* claim that is supported by neither the facts nor the law.

Despite the cited shortcomings of the nature of her cumulative error claim, the inclusion of her *Miranda* claim into the mix of harmless errors evaluated by the circuit court is simply unsupported by the facts and the law applicable to her case. The majority found her *Miranda* claim lacked merit, as it could not "say that every fairminded jurist would conclude that the OCCA unreasonably applied *Miranda*. Pet. App. 52a-53a. Noting that *Miranda* provides merely a general rule, which in turn grants state courts considerable leeway in their evaluation of these types of claims, the majority applied the relevant objective facts to conclude that the OCCA's determination that Andrew was not in custody when she made her contested statements was not unreasonable. Pet. App. 53a (citing *Thompson v. Keohane*, 516 U.S. 99, 112 (1995)). Key among those objective facts were findings that Andrew

freely answered questions from the police while at the hospital, voiced no objection when told that a detective wished to speak to her about her estranged husband's murder at the police station, was told she could leave and return home once the investigation was complete, was restrained at no point during her interview, and was promptly reunited with her children at the home of a friend when the interview came to an end. Pet. App. 52a-53a. The majority explained that any unmanifested, subjective feelings Andrew might have harbored during her transit to the police station and later in the interview did not impact this objective inquiry. Pet. App. 51a (citing *Stansbury v. California*, 511 U.S. 318, 323-25 (1994)). At all points throughout its consideration of this issue, the majority opinion remained tethered to the deferential § 2254(d) standard given the OCCA's identification of the appropriate legal standard for *Miranda* issues and its application of that standard to the facts. Pet. App. 48a- 53a.

The dissent, as noted above, took an altogether different approach. Assessing the claim as if on direct appeal, the dissent concluded, in its personal view, that the trial court erred when it admitted Andrew's statements from the interview. Pet. App. 95a ("*In my view*, the trial court erred…."), 109a ("*In my view*, Ms. Andrew was in custody when subjected to the two-hour interrogation…."), 109a ("Because she was not advised of her *Miranda* rights, *the trial court erred* in allowing the introduction of her statements…."), 111a ("But the appeals court did not find error, *as I would*, in the introduction of the statements….") (emphasis added as to all). At no point did the dissent assess the OCCA's decision on the *Miranda* issue within the required context

of the AEDPA's deferential standard. Pet. App. 94a-116a. The dissent's omission of such analysis is telling given the parameters of AEDPA review.

AEDPA's deferential standard is "the only question that matters[.]" *Lockyer*, 538 U.S. at 71. A federal court "may not issue a habeas writ simply because [it] conclude[s] in [its] 'independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Gipson v. Jordan*, 376 F.3d 1193, 1196 (10th Cir. 2014) (quoting *Williams*, 529 U.S. at 411). But the dissent disregarded this basic axiom of habeas review and made clear that it was independently reviewing the trial court's decision to admit Andrew's statements. Pet. App. 94a-116a. *See Andrew*, 62 F.4th at 1355-62. Had the dissent applied the proper standard to Andrew's *Miranda* claim, the conclusion of the Tenth Circuit panel assigned to her case would have been unanimous, leaving no room for Andrew's complain that her *Miranda* claim warrants a grant of certiorari by this Court. Pet. App. 86a (citing the dissent at Pet. App. 94a-96a) (noting the dissent went "beyond" Andrew's arguments in her brief to find a *Miranda* violation "despite acknowledging that the district court's affirmance under § 2254(d)(1) was correct."). Even the dissent agreed that the OCCA's decision was reasonable. That should end any discussion as to the merit of her *Miranda* claim.

In the end, Andrew is simply seeking error-correction in her case. But that is not a basis for this Court to exercise its certiorari jurisdiction. Rule 10 states: "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. *See*

Sup. Ct. R. 10; *see also Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974) ("This Court's review … is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review."); *United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.").

B. There is no clearly established federal law on the matter.

Andrew's cumulative error claim must also fail for the same reason as her "other bad acts" claim: the lack of clearly established federal law. The Fifth Circuit recently expressed as much. *Pondexter v. Quarterman*, 537 F.3d 511, 525 (5th Cir. 2008) ("[m]eritless claims or claims that are not prejudicial cannot be cumulated, regardless of the total number raised") (alteration by the court, internal quotation marks omitted). Other circuits have found similarly. *See Lorraine v. Coyle*, 291 F.3d 416, 447 (6th Cir. 2002) ("The Supreme Court has not held that distinct constitutional claims can be cumulated to grant habeas relief."); *Henderson v. Norris*, 118 F.3d 1283, 1288 (8th Cir. 1997) (quoting *Scott v. Jones*, 915 F.2d 1188, 1191 (8th Cir. 1990) ("cumulative error does not call for habeas relief, as each habeas claim must stand or fall on its own"). Even circuits which had previously determined cumulative error was a viable claim on federal habeas review have recently expressed concern as to its existence. *See, e.g., Bush v. Carpenter*, 926 F.3d 644, 686 n.16 (10th Cir. 2019) ("Although we are bound by Tenth Circuit precent on this issue, we note, in passing, that the Supreme Court has never recognized the concept of cumulative error."). Andrew's failure to demonstrate her claim is even a cognizable one in the federal

habeas context should lead this Court to conclude a grant of certiorari is unwarranted.

C. The deferential standards of the AEDPA prohibit Andrew's formulation of her cumulative error claim.

It must be noted that it is not entirely clear whether Andrew is embracing the view of the dissenting opinion below that AEDPA does not apply to cumulative error analysis. *See* Pet. App. 95a (Bacharach, J. dissenting) (explaining his incorporation of the *Miranda* claim into the cumulative error analysis because, "*[i]n [his] view*, the trial court also erred by allowing the State to present evidence of Ms. Andrew's incriminating statements elicited without *Miranda* warnings" (emphasis added)).

If Andrew is pursuing this theory, even assuming there exists clearly established federal law by which to assess her cumulative error claim under the strictures of the AEDPA, Andrew provides this Court with no authority whatsoever, much less authority with a genesis in this Court, to indicate that a cumulative error claim may be premised upon alleged errors that were reasonably rejected in the state court. Section 2254(d) certainly provides no exception for claims of cumulative error. As the majority noted below, such an approach would "enable [any circuit court] to treat any constitutional issue rejected by a state court and affirmed by [the circuit court] under § 2254(d)(1) as fair game for inclusion in a cumulative-error analysis. And that would cut § 2254(d)(1) deference to a stump." Pet. App. 88a. (footnote omitted). Congress surely did not enact the AEDPA's rigorous scheme only to permit federal courts to review every claim *de novo* under the guise of cumulative error. *See Lockyer v. Andrade*, 538 U.S. 63, 71 (2003) (AEDPA's deferential standard is "the only

question that matters"); *Frost v. Pryor*, 749 F.3d 1212, 1223 (10th Cir. 2014) ("AEDPA stops just 'short of imposing a complete bar on federal relitigation of claims already rejected in state proceedings.'") (quoting *Harrington v. Richter*, 562 U.S. 86, 102 (2011)); *Gipson,* 376 F.3d 1196 (10th Cir. 2014) (A federal court "may not issue a habeas writ simply because [it] conclude[s] in [its] 'independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly.'") (quoting *Williams v. Taylor*, 529 U.S. 362, 411 (2000)).

At the very least, Andrew's novel approach to this issue warrants further development in the federal district and circuit courts prior to intervention from this Court, and that is especially true when the issue appears to be a blatant end-run around AEDPA deference and is unsupported by citations to authority within the Petition. *Cf. Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (J. Ginsberg, dissenting) ("We have in many instances recognized that when frontier legal problems are presented, periods of 'percolation' in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court."); *California v. Carney*, 471 U.S. 386, 400-01 & n.11 (1985) (Stevens, J., dissenting) (discussing the value of permitting "lower federal courts to debate and evaluate the different approaches to difficult and unresolved questions of constitutional law"); *McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J., respecting denial of petitions for writs of certiorari) ("In my judgment it is a sound exercise of discretion for the Court to allow the various States to serve as laboratories in which the issue receives further study before it is addressed by this Court.").

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

Gentner F. Drummond
Attorney General of Oklahoma

Joshua L. Lockett
Asst. Attorney General
Director of General Appeals
**Counsel of Record*
Jennifer L. Crabb
Asst. Attorney General
Director of Capital Appeals
Oklahoma Office of the Attorney General
313 NE Twenty-First St.
Oklahoma City, OK 73105
joshua.lockett@oag.ok.gov
(405) 522-4418

Counsel for Respondent