

No. 23A _____
(CAPITAL CASE)

IN THE
Supreme Court of the United States

BRENDA EVERS ANDREW, APPLICANT,

v.

TAMIKA WHITE, WARDEN, RESPONDENT.

**APPLICATION FOR AN EXTENSION OF TIME
TO FILE A PETITION FOR A WRIT OF CERTIORARI
TO THE TENTH CIRCUIT COURT OF APPEALS**

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October 13, 2023

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APPLICATION

To the Honorable Neil M. Gorsuch, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Tenth Circuit Court of Appeals:

Pursuant to Rule 13.5 of the Rules of this Court and 28 U.S.C. § 2101(c), applicant Brenda Evers Andrew respectfully requests a 60-day extension of time, to and including February 21, 2024, within which to file a petition for a writ of certiorari to review the judgment of the Tenth Circuit Court of Appeals in this case.

1. The Tenth Circuit Court of Appeals issued its decision on March 21, 2023. *See Andrew v. White*, 62 F.4th 1299 (10th Cir. 2023) (Appendix A) *as corrected* (May 1, 2023). Ms. Andrews petitioned for rehearing en banc, which was denied on August 25, 2023. *See Order, Andrew v. White*, No. 15-6190 (10th Cir. Aug. 25, 2023) (Appendix B). Unless extended, the time to file a petition for certiorari will expire on November 23, 2023. This application is being filed more than ten days before the petition is currently due and is supported by good cause, as set forth below. *See Sup. Ct. R. 13.5*. The jurisdiction of this Court would be invoked under 28 U.S.C. § 1257(a).

2. This case presents an important question of federal law on which the United States courts of appeals are divided and which conflicts with this Court's precedents: whether the federal courts lack jurisdiction to consider the prosecution's use of a woman's plainly irrelevant sexual history to assess guilt and punishment because no clearly established federal law prevents it.

3. Ms. Andrew was convicted of murdering her husband on November 20, 2001. *See Andrew v. State*, 164 P.3d 176, 184 (Okla. Crim. App. 2007) *as corrected* (July 9, 2007). The Oklahoma Court of Criminal Appeals (OCCA) affirmed her conviction and sentence on direct appeal in 2007. *Id.* On June 17, 2008, the OCCA denied her application for post-conviction relief. *See Andrew v. State*, No. PCD-2005-176 (Okla. Crim. App. Jun. 17, 2008) (unpublished). Ms. Andrew then petitioned for a writ of habeas corpus in the Western District of Oklahoma, which denied relief and declined to issue a certificate of appealability (COA). *See Andrew v. Moham*, No. CIV-08-832-R, 2015 WL 5254525, at *58 (W.D. Okla. Sept. 9, 2015). Ms. Andrew appealed, and the Tenth Circuit issued a COA on ten issues, including the issue Ms. Andrew intends to present to this Court. App. A at 8a–9a.

4. Among the issues the Tenth Circuit addressed was whether “the admission of Ms. Andrew’s sex life rendered the guilt and penalty phases of the trial unfair.” App. A at #[7]. The Tenth Circuit denied this claim on jurisdictional grounds, holding that as a “threshold matter” no clearly established federal law prevented admission of what the Tenth Circuit considered irrelevant and “concern[ing]” evidence relied upon by the State. Appendix A at 9a, 21a n.15 (internal quotations omitted).

5. As highlighted in Judge Bacharach’s dissent, the circuit’s decision is directly contrary to this Court’s precedents prohibiting the government from deploying sexist stereotypes to degrade and punish—and ultimately kill—its

citizens. *See, e.g., Darden v. Wainwright*, 477 U.S. 168, 179 n.7, 180 n.12 (1986); *Lawrence v. Texas*, 539 U.S. 558, 569–70 (2003); *Payne v. Tennessee*, 501 U.S. 808 (1991). Judge Bacharach explained that Ms. Andrew was only convicted after “a slew of of errors—many of which were recognized by the state’s appellate court.” App. A at [#89]. He condemned “the State’s broadside on Ms. Andrew’s sex life,” and would have reversed the District Court. App. A at 98a.

6. That same broadside, and the Tenth Circuit’s failure to correct it, implicates a split of authority on whether clearly established federal law (CEFL) countenances irrelevant and prejudicial evidence can be marshalled to obtain a conviction and sentenced of death. *Compare* App. A at 15 (citing *Holland v. Allbaugh*, 824 F.3d 1222, 1228 (10th Cir. 2016) (admission of evidence of irrelevant racial animus does not violate CEFL)); *with Mooreland v. Bradshaw*, 699 F.3d 908, 923 (6th Cir. 2012) (noting habeas relief may exist where this Court has prohibited reliance on the “specific kind of evidence” as a matter of due process of law); *Gonzales v. Thaler*, 643 F.3d 425, 430–31 (5th Cir. 2011) (explaining due process violated and habeas relief available where evidence of admission of irrelevant evidence was “so pronounced and persistent that it permeates the entire atmosphere of the trial.”); *see also Lyons v. Brady*, 666 F.3d 51, 55–56 (1st Cir. 2012) (holding habeas relief available for violation of due process in light of admission of irrelevant evidence where “the state court’s application of state law [was] so arbitrary or capricious as to constitute an independent due process

violation.”). This Court’s review is warranted to resolve this split, which affects Ms. Andrew and scores of others, including other women on death row.

7. Applicant has recently retained undersigned counsel, John R. Mills of Phillips Black, Inc. to file a petition for a writ of certiorari. Mr. Mills was not involved in the proceedings below. He must therefore familiarize himself with the proceedings, including the record and arguments presented in the Tenth Circuit Court of Appeals.

Mr. Mills has multiple competing obligations in capital cases that make it impossible to competently complete the petition in the given timeframe. In capital cases, Mr. Mills is responsible for the preparation of a petition in three separate state-court matters, an undertaking that consumes most of his time. He also has primary responsibility for directing the litigation of many more other capital cases in various postures in the state and federal court. He is also serving as lead counsel in this Court in *Glossip v. Oklahoma*, No. 22-6500 (U.S.) and *Glossip v. Oklahoma*, No. 22-7466 (U.S.) and anticipates a ruling imminently, which, regardless of the outcome, will likely precipitate the immediate need for substantial litigation.

Accordingly, applicant respectfully requests that an order be entered extending the time to file a petition for certiorari to and including February 21, 2024.

Respectfully submitted,

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