

No. 26-_____
(CAPITAL CASE)

IN THE
Supreme Court of the United States

BRENDA EVERS ANDREW, PETITIONER,

v.

KELSEY FISHER, 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 again seeks relief from this Court due to the pervasive bias that rendered her capital trial fundamentally unfair. Armed only with a circumstantial case against a defendant with no prior convictions, the State of Oklahoma hinged its case on harmful stereotypes of women, infecting every day of Ms. Andrew's trial with evidence and argument "to focus the jury's attention on . . . Ms. Andrew's allegedly unwomanly and unmotherly behavior." App. 4a (Federico, J., dissenting).

The evidence sending Ms. Andrew to the execution chamber includes:

- Testimony and argument that she was a "hoochie" and a "slut."
- Detailed testimony about where, when, and how she had sex.
- Testimony about her previous relationships going back two decades.
- Testimony about her "cleavage," "short skirt[s]" and "sexy outfits."
- A prosecutor's reenactment with a witness of an intimate interaction between Ms. Andrew and her co-defendant.
- The "thong underwear" she wore after the shooting, which the prosecutor dangled before the jury to argue that Ms. Andrew was not a "grieving widow."

"Altogether, Oklahoma put forward a scene at trial that would make Nathaniel Hawthorne blush." App. 7a (Federico, J., dissenting).

On remand, the Tenth Circuit panel again affirmed, determining that in habeas it could only consider evidence explicitly cited in the briefing before the state court, thereby splitting with two other circuit courts. The panel also applied a novel prejudice standard not used by any other federal court: requiring irrelevant evidence to relate to a "central question" for it to be harmful, then focusing on a central question that excluded Ms. Andrew's humanity from consideration. Altogether, the panel ignored this Court's remand instructions and jurisprudence to avoid assessing how a month of evidence reducing Ms. Andrew to an archetype affected the ultimate question before jurors: whether Ms. Andrew should live or die.

This petition presents the following questions:

1. Whether a federal habeas court is empowered to review the same record that the state court reviewed when it assessed the fundamental fairness of a capital trial.
2. Whether a court must assess the impact of unduly prejudicial evidence and argument grounded in sex-based stereotyping in light of (a) the whole trial record and (b) as it relates to penalty, its effect on the jury's ultimate decision.

PARTIES TO THE PROCEEDING

The petitioner is Brenda Evers Andrew.

The respondent is Kelsey Fisher, Warden.¹

¹ Scott Tinsley was warden while the case was pending at the Tenth Circuit. The current warden is Kelsey Fisher. Thus, Kelsey Fisher is now substituted as the Respondent. *See* S. Ct. Rule 35.4.

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 rehearing, 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 August 25, 2023.

Andrew v. White, No. 23-6573, 604 U.S. 86, Supreme Court of the United States. Judgment entered January 21, 2025 and as modified on February 26, 2025.

Andrew v. Tinsley, No. 15-6190, 164 F.4th 789, Tenth Circuit Court of Appeals, Judgment entered January 13, 2026.

Andrew v. Tinsley, No. 15-6190, __ F.4th __, Tenth Circuit Court of Appeals, denying petition for rehearing and rehearing en banc, August 14, 2026.

Andrew v. State, No. _____, Oklahoma Court of Criminal Appeals. Petition filed September 25, 2026.

Cases Involving Ms. Andrew's Co-defendant, James Pavatt

Pavatt v. State, No. D-2003-1186, 159 P.3d 272 (Okla. Crim. App. 2007).

Judgment entered May 8, 2007.²

Pavatt v. Trammell, No. CIV-08-470-R, Western District of Oklahoma.

Judgment entered on May 1, 2014.

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, 589 U.S. 1180 (2020) (mem.). Judgment entered January 27, 2020.

² Ms. Andrew was charged jointly with James Pavatt, but their cases were severed for trial.

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<i>Glossip v. Oklahoma</i> , 604 U.S. 226 (2025)	37
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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 Court of Appeals for the Tenth Circuit.

INTRODUCTION

Brenda Andrew faces execution for her perceived failures as a woman, wife, and mother. Two years ago, in this very case, this Court reiterated that the admission of “unduly prejudicial evidence” can “render a trial . . . fundamentally unfair” in violation of the Due Process Clause. App. 63a. The State of Oklahoma introduced a flood of unduly prejudicial evidence every single day of Ms. Andrew’s capital trial. From eliciting days of testimony about her sex life, clothing, and “cleavage,” to calling her a “slut” and holding up pairs of her “thong underwear” in closing argument, prosecutors invited jurors to condemn Ms. Andrew to die for being a bad woman. Indeed, “these were not stray comments elicited in the heat of trial; they were part of a trial strategy to draw the jury’s attention to Andrew’s concededly irrelevant but, the state argued, unwomanly and unmotherly behavior.” App. 6a (Federico, J., dissenting). This case asks whether the State can weaponize such appeals to gender-based stereotypes to send a woman to her death.

Ms. Andrew is back before this Court because the Tenth Circuit again took an unduly parsimonious view of the due process violation infecting Ms. Andrew’s conviction and death sentence. On remand, the circuit court declined to consider any challenged testimony that was not specifically cited in the direct appeal briefing and

notwithstanding the state court’s averment it had reviewed the entire record. The panel’s approach is at odds with this Court’s remand instructions and jurisprudence, as well as the practice of other circuit courts. The Tenth Circuit also distorted this Court’s precedent on prejudice analysis and the reality of how juries make sentencing decisions by manufacturing a novel requirement that all of the challenged evidence—including concededly irrelevant evidence—be related to a “central question.” And the panel ignored the impact of other trial errors, including the improper exclusion of multiple defense witnesses. As a result, the panel could not carry out this Court’s instructions on remand: to assess whether “the trial court’s mistaken admission” of unduly prejudicial evidence “render[ed Ms. Andrew’s] trial ‘fundamentally unfair.’” App. 65a.

Against the “extreme record in this case,” no fairminded jurist could conclude that Ms. Andrew was convicted and sentenced to death after a fair process. App. 4a (Federico, J., dissenting). The Tenth Circuit was only able to do so by blinkering its analysis. Indeed, if marshalling gendered slurs, reenacting an intimate scene with a witness, and displaying a woman’s underwear to jurors to secure a death sentence do not render a trial fundamentally unfair, then it is difficult to imagine any case worthy of the due process protection that this Court reiterated in *Andrew v. White*, 604 U.S. 86 (2025) (per curiam). Brenda Andrew again asks this Court to prevent her execution for being “a bad wife, a bad mother, and a bad woman.” App. 304a (Johnson, J., dissenting).

OPINIONS BELOW

The January 13, 2026 decision of the Tenth Circuit Court of Appeals is published, *Andrew v. Tinsley*, 164 F.4th 789 (10th Cir. 2026); App. 19a–55a, as is the order denying rehearing or rehearing en banc. *Andrew v. Tinsley*, __ F.4th __, (10th Cir. 2026); App. 1a–18a.

JURISDICTION

The Tenth Circuit Court of Appeals entered judgment on January 13, 2026 and denied the petition for rehearing and rehearing en banc on August 14, 2026. App. 1a; App. 19a. 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 . . . shall not be granted . . . unless the adjudication of the claim resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law.”

Section One of the Fourteenth Amendment to the United States Constitution provides, in relevant part: “No state shall . . . deprive any person of life, liberty, or property, without due process of law.”

STATEMENT OF THE CASE

“To recite the facts is to state the fundamental unfairness of the trial that sent Andrew to death row.” App. 5a (Federico, J., dissenting).

A. The Trial

Brenda Andrew is convicted of killing her husband, Robert Andrew, in November 2001. During the incident, Ms. Andrew was also shot. Ms. Andrew had separated from her husband shortly before the murder and was dating her co-defendant, James Pavatt. The State’s trial theory was that either Ms. Andrew or Mr. Pavatt shot Mr. Andrew and then staged a gunshot injury to Ms. Andrew. Ms. Andrew maintains her innocence. Her defense, bolstered by a signed confession from Mr. Pavatt, was that he was responsible for the shooting without her involvement.

1. Week One

The State’s case was saturated with evidence and argument grounded in sex-based stereotypes. The prosecutors signaled their framework for the trial from the first sentence of their opening argument: “Ladies and gentlemen of the jury, our evidence will show that this case is about a controlling wife” who “liked to cheat.”³ Tr. 12, 13. Prosecutors went on to introduce evidence about Ms. Andrew’s perceived character failings as a woman every day of the month-long trial.

³ The trial transcripts are also available at the following link: <https://phillipsblack.org/andrew-v-fisher/>.

The State opened its case with two pastors, neither of whom testified about the shooting. Rather, the State elicited testimony concerning “inappropriate behavior” between Mr. Pavatt and Ms. Andrew during their service as Sunday School teachers. Tr. 125. Pastor Sinor advised that “it’s important for action to be taken because, obviously, [adultery is] against our teachings and God’s word.” Tr. 127. Meanwhile, Pastor Fetters testified that Ms. Andrew used “foul language” with her husband, including that she “used the F word” about her husband, “call[ed] him names,” and “called him a son of a bitch.” Tr. 211–13. In spite of Pastor Fetters’ discomfort with repeating such language due to his “religious convictions,” the prosecutor pressed on: “Q: And, Pastor, I know that we all know what that means, but she used the word ‘fuck?’ A: Yes. Q: In talking to her husband?” Tr. 213. The pastors also testified about Mr. Andrew’s love for his family and God. Tr. 133–34, 173–74, 208–09.

The next four days of the trial were dominated by witnesses who detailed Ms. Andrew’s sexual behavior and appearance. Two of Ms. Andrew’s former sexual partners took the stand: James Higgins and Norman Nunley. Again, neither was involved in the shooting.⁴ Mr. Higgins detailed his sexual interactions with Ms. Andrew, even though the defense had stipulated to Ms. Andrew’s affairs. Tr. 251–54, 338. Over repeated defense objections and a request for a limiting instruction,⁵ *see*,

⁴ Per the State’s own evidence, Ms. Andrew ended her relationship with Mr. Higgins over six months before the shooting and she had ended her sexual relationship with Mr. Nunley several years prior. Tr. 250, 367.

⁵ Defense counsel asked for a limiting instruction regarding the evidence of the affairs because “[s]uch evidence should not be admitted where it is a subterfuge for showing

e.g., Tr. 110, 200, 313, the State extracted testimony that Ms. Andrew “dressed sexy” and wore “short skirt[s], low-cut tops, just sexy outfits, provocative.” Tr. 247. Mr. Higgins narrated how Ms. Andrew “would . . . rub up against [him] and touch [him],” this “flirting” sometimes occurring in front of her son, and how when she handed him a motel key he was “shocked but it seemed pretty exciting.”⁶ Tr. 247–48.

Mr. Higgins further described when, where, and how he had sex with Ms. Andrew: “Q: Who paid for the motel? A: She did. . . . Q: Did you have sex with her any other places than at her house and at the motels? A: Car. . . . Several. . . . Her car.” Tr. 249–51. Between evocative sexual details, Mr. Higgins testified that Ms. Andrew disliked her husband and wanted to separate from him. Tr. 250. The prosecutor returned to Ms. Andrew’s sexual behavior with her final question to Mr. Higgins: “I hate to ask you this but I think I’m obligated to . . . did either one of [your college-age sons] ever relate to you that Brenda Andrew was coming on to them?” Tr. 278. Mr. Higgins ultimately answered affirmatively. *Id.*

Mr. Nunley also testified about his “sexual relationship” with Ms. Andrew, dating back to 1997. Over an overruled objection and a request for a limiting instruction, Tr. 431, the State questioned Mr. Nunley about how his “relationship

to the jury the Defendant is a person who deserves to be punished. It is absolutely necessary and fundamental to a fair trial that [this evidence] . . . should not be allowed.” Tr. 106–09. Judge Bragg denied the request without explanation. Tr. 110.

⁶ Ms. Andrew objected. Tr. 108–10, 200, 313. The trial judge later ruled that evidence of the affairs was admissible “as it relate[d] to [Ms. Andrew’s] ability to manipulate men.” Tr. 1396–98.

with Brenda Andrew bec[a]me something more than just a friendly relationship,” about whether Ms. Andrew was married at the time, and about how Ms. Andrew was “really hospitable” to her sexual partners. *See, e.g.*, Tr. 361, 362, 367, 419, 420. Mr. Higgins’ and Mr. Nunley’s testimony was not the last that the jury heard about Ms. Andrew’s relationships. To the contrary, the State elicited details of Ms. Andrew’s extramarital affairs on nine of the fourteen days of the State’s guilt phase case.

Alongside pastors and former sexual partners, the State presented two witnesses who testified solely about Ms. Andrew’s appearance and presentation. The State’s first question to David Ostrowe, a colleague of Mr. Andrew, prompted: “[D]escribe the way Ms. Andrew presented herself, please?” Tr. 320. The prosecutor asked eight follow-up questions about Ms. Andrew’s appearance until Mr. Ostrowe disclosed, “her dress was very tight, very short with a lot of cleavage she exposed” and she had “[v]ery Gothic, long black hair.” Tr. 320–24. Mr. Ostrowe also recalled that Ms. Andrew was called a “hoochie”—a slur the judge declined to strike. Tr. 323.

Jennifer Jones, who twice babysat for the Andrews, testified about Ms. Andrew’s appearance in 1997, four years before the shooting: “[Ms. Andrew] wasn’t wearing attire that I would consider appropriate” because she wore “a leather outfit.” Tr. 343. On another occasion, her outfit was “pretty revealing” and “provocative.” Tr. 349, 357. Ms. Jones said this was not “normal clothing” like “other mothers were wearing.” Tr. 343. Further, Ms. Jones noted that Ms. Andrew’s hair was “really, really big,” prompting the prosecutor to ask whether her “really big” hair was “different

than it appears today.”⁷ Tr. 343–44. Neither Mr. Ostrowe nor Ms. Jones testified about the homicide.

2. Week Two

Moving into the second week of trial, the State continued to elicit testimony about Ms. Andrew’s relationships with Mr. Pavatt, Mr. Higgins, and Mr. Nunley, and Mr. Andrew’s feelings about these relationships. *See, e.g.*, Tr. 444, 625, 803, 1099, 1101–02, 1109. Prosecutors asked family friend Ronald Stump no fewer than seven questions about “all these affairs” and Ms. Andrew’s “lover[s],” contrasting her with Mr. Andrew who just wanted to study his Bible. Tr. 444, 449–50, 549. Prosecutors also asked Mr. Stump about Ms. Andrew’s perceived motivation for dyeing her hair:

Q: Was there a time when Brenda Andrew had a conversation with your wife about what the color of hair that you liked on women?

A: Yes. . . .

Q: What color hair did you tell your wife that you liked on women?

A: Red.

Q: And when you saw Brenda Andrew the next time had her hair color changed?

⁷ The defense objected to both Mr. Ostrowe’s and Ms. Jones’ testimony on the grounds that it was “totally irrelevant,” “highly prejudicial,” and “not probative to any issue in this case.” Tr. 317, 336. The State acknowledged that the testimony was intended to expose Ms. Andrew’s “inappropriate” behavior and “the way she was dressed.” Tr. 318, 336. Overruling the objections, the trial judge noted “I don’t have a problem with it.” Tr. 319, 339.

Judge Susan Bragg later intervened to offer her own opinion on Ms. Andrew’s appearance. Midway through the trial, Judge Bragg determined that she would no longer permit Ms. Andrew to wear pantyhose and makeup, out of fairness to “the other people who are incarcerated” and because “she’s pretty and she doesn’t need makeup.” This led to a lengthy discussion among the parties and court about whether Ms. Andrew should be allowed to wear makeup to her trial. Tr. 1128–30, 1145.

. . . To what?
A: Red.

Tr. 498–99.

Another family friend was asked about Ms. Andrew’s underwear and intimate relationship with her husband. The witness testified that Ms. Andrew had “new lingerie” at home and that Mr. Andrew hoped to see her wearing it but never did. Tr. 1102. Prosecutors further questioned witnesses about the manner in which Ms. Andrew talked back to her husband, her use of curse words when speaking about him, and whether she was “capable of crying.” *See, e.g.*, 556, 995, 1082, 1103. And a third pastor spoke of Ms. Andrew’s adultery: Pastor McDaniel conveyed the church’s adverse “judgment about [Ms. Andrew’s] improper clothing and the relationship she was having with Jim Pavatt.” Tr. 1110, 1112.

3. Week Three

The trial stretched into a third week before the State turned to Mr. Andrew’s shooting. One by one, prosecutors asked every witness to the crime scene to comment on Ms. Andrew’s emotions, including her ability to cry. Officers testified repeatedly that she was “very calm” and “unusually calm.” Tr. 1811, 1826, 1827, 2030. An officer who interviewed Ms. Andrew at the hospital as she received treatment for her gunshot wound, mere hours after the murder, contrasted Ms. Andrew’s flat affect with the hysteria he expected: “She was very calm acting. . . . Most of them are very hysterical.” Tr. 1801. Another officer reiterated: “I thought that was odd . . . usually they’re very emotional, very distraught . . . so normally you have to calm them down.”

Tr. 2030. Further, the detective who questioned Ms. Andrew at police headquarters in the early hours of the morning—where, wounded and medicated, she was clad only in two open-backed hospital gowns—said: “She kinda had a blank stare and she said ‘but he was breathing.’ Q: And did she cry? A: No.” Tr. 2285. Indeed, in just two days of testimony, Ms. Andrew’s demeanor or lack of tears was brought up at least fourteen times. Tr. 1801, 1811, 1812, 1826, 1827, 1931, 1958, 2029, 2030, 2285.

The final days of the trial bookended the State’s case with themes of sex and sin. The prosecutors made a failed attempt to admit a book seized from Ms. Andrew’s home titled *203 Ways to Drive a Man Wild in Bed*. Tr. 2318. A fourth pastor testified for the State that Ms. Andrew was “Cold. Flat. Unemotional.” Tr. 2582. The State produced further commentary on Ms. Andrew’s attire, asking a witness who saw her receiving treatment at the hospital after the shooting about her clothing, and eliciting that she wore “awfully expensive boots.” Tr. 2715. Yet another witness speculated about the number of sexual partners Ms. Andrew had “been with” and how Ms. Andrew “trained” her children to be discreet about the affairs. Tr. 2956–59.

The State’s case-in-chief culminated with prosecutors evoking graphic imagery of Ms. Andrew’s body. A neighbor testified about a hot tub that Ms. Andrew had in her backyard, hypothesizing, with no factual basis, that she may have used it for “skinny dipping.” Tr. 2848. The State returned to this topic a short while later with a diagram of the Andrews’ property, asking the witness to point out the “hot tub . . . where the skinny dipping didn’t happen.” Tr. 2858.

One of the prosecutors later reenacted, with the neighbor, a scene that the neighbor observed on Ms. Andrew's deck between Ms. Andrew and Mr. Pavatt, drawing audible reactions from jurors. The witness described a "position" that Mr. Pavatt adopted "very close to Brenda's face" in which he "lower[ed] himself to her eye level." The prosecutor then continued:

Q: Okay. And let's just kind of pretend here for a minute. Let's pretend I'm him and you're her, okay?

A: Okay.

Q: Was he this close or closer (Indicating)?

A: Very close. About --

MR. MISKOVSKY, III: Your Honor, objection to the relevance.

THE WITNESS: About 3 or 4 inches.

THE COURT: I know. That's overruled. It's relevant. Sorry.

Q: (By Mr. Gieger) And without invading too much of your personal space, closer than this (Indicating)?

A: How about like that (Indicating).

JUROR RICHARDS: Ooh.

Q: (By Mr. Gieger) All right. You made me lose my train of thought. I'm sorry.

THE JURY: (Laughter.)

Tr. 2908–10.

4. Week Four

Tying together its core themes in closing statements, the State argued that jurors should convict Ms. Andrew because the woman in front of them "is no meek, mild woman . . . [S]he's been on her best behavior. But that's not the real Brenda Andrew." Tr. 3903–08. Rather, prosecutors argued, "she's an attractive woman" who has "been having sex with [her boyfriend] for months" and produced "no tears" during police interrogation. Tr. 4073, 4111, 4121. Returning to Ms. Andrew's relationship

history in his rebuttal argument, the prosecutor read aloud from Mr. Andrew's journal, detailing a two-decade-old relationship that a teenaged Ms. Andrew had with her high school sweetheart while she was in college—before she was even engaged to Mr. Andrew, much less married. Tr. 4124.

The prosecutor then turned to a suitcase that Ms. Andrew brought back from Mexico, where she went with Mr. Pavatt after the shooting. Plucking pairs of Ms. Andrew's "thong underwear" from the open suitcase and holding them up for the jury to inspect, the prosecutor asked jurors repeatedly whether a "grieving widow" would wear "this."⁸ Tr. 4101, 4103. Moments before jurors retired to deliberate, the prosecutors reminded jurors that Ms. Andrew had sex "behind the dead man's back," and proclaimed that she "can't be a woman of God because she's been sleeping with a married man . . . what a slut puppy she must be."⁹ Tr. 4120, 4125. The jury returned a guilty verdict.

The penalty phase began immediately following the culpability verdict. It lasted less than a day, the value of Ms. Andrew's life being put to jurors just 48 hours after they had been confronted with Ms. Andrew's physical underwear and asked

⁸ Contemporaneous news coverage reported that the prosecutor pulled "red, black and pink lingerie" from the suitcase, which "drew gasps from the crowded courtroom." *See Andrew Case in the Hands of Jury[,]* *Deliberations Will Resume Today at 9 A.M., OKLAHOMAN* (July 13, 2004).

⁹ On the third day of trial, prosecutors played a voicemail that Ms. Andrew left her husband about a woman she believed he was having an affair with. In the voicemail, Ms. Andrew called the woman a "slut puppy" for sleeping with a married man. Tr. 481–83. The State repeated this expression ten days later in its closing statement, while arguing about Ms. Andrew's affairs with married men. Tr. 4125.

whether a “slut” could be a “woman of God.” The State alleged three aggravating factors¹⁰ and, excepting a single witness, relied exclusively on guilt-phase evidence to prove them. Regarding the ultimate question before the jury, the weighing of life or death, the State rested almost entirely on guilt-phase evidence to make the case for death—prosecutors presented no new evidence beyond victim impact statements and the brief testimony of a woman who was incarcerated with Ms. Andrew. Tr. 4198.

Even in this short time span, prosecutors took the opportunity to redouble their interrogation of Ms. Andrew’s character. When the defense presented witnesses who spoke about Ms. Andrew’s selflessness, deep faith, and commitment to the church, *see, e.g.*, Tr. 4244–47; 4321–24, the State questioned them about Ms. Andrew’s “terribly profane” language, Tr. 4250, and her affairs, Tr. 4344. The State pressed two defense witnesses about Ms. Andrew’s mothering. Prosecutors asked one of those witnesses no fewer than nine questions about whether Ms. Andrew was a “good mother.” Tr. 4312–14. As for the second, the State focused on Ms. Andrew’s romantic past, asking the witness if Ms. Andrew’s sexual affairs changed her opinion of Ms. Andrew’s mothering and of Ms. Andrew as a person:

Q: Would it change your opinion if that was true, if you know, if you knew that it was true she was having an affair with her handyman would that change your opinion of her?

A: Well, if I knew it to be true, possibly . . .

Q: If you knew she was having an affair with her insurance salesman would that change your opinion of her?

¹⁰ The State alleged (1) that the murder was for remuneration; (2) that the murder was especially heinous, atrocious, or cruel; and (3) that Ms. Andrew presented a continuing threat to society. Jurors returned the first two aggravating factors.

A. Well, I don't feel I have the right to judge her.

Tr. 4342–44.

The State brought these themes to a head in its closing argument for death. The prosecutor recalled evidence from the “first stage of the trial” to argue that jurors simply could not mitigate the death of a pious husband at the hands of his wife: “He wanted to love God, to love his wife and to have her love him. That’s really not very much for him to ask. How do you mitigate that kind of murder? I submit to you that you don’t.” Tr. 4402.

Further drawing on the guilt and penalty phase evidence presented over the course of a month, the State twice claimed that “this woman” had people around her “under the spell.” Tr. 4410–11. The prosecutor reminded jurors to “consider . . . everything that you heard in the first stage of this trial as well” when “arriving at your determination as to what sentence is appropriate under the law.” Tr. 4412. Further, the prosecutor reminded the jury to consider “sympathy or sentiment” in their holistic determination of whether Ms. Andrew should live or die, arguing that Ms. Andrew was a woman who deserved no sympathy and “no mercy.” Tr. 4413.

Concluding its case, the State emphasized to jurors that Ms. Andrew was “different” and “not like you and me” because she showed “[n]o emotion. No remorse. No grief.” Tr. 4493–94. The state concluded that the punishment for such difference was death: “She’s different and she deserves that different kind of punishment that’s reserved for people exactly like her.” Tr. 4494. After four weeks of testimony and

argument about Ms. Andrew's affairs, attire, and lack of ability to cry, the jury returned a death verdict.

B. The Appeal

Ms. Andrew appealed. She presented fifteen points of error, including three claims that presented due process violations at both phases of trial based on improper evidence and argument. *See* App. 369a–73a, 393a–98a, 426a–30a. Ms. Andrew's briefing before the Oklahoma Court of Criminal Appeals (OCCA) raised Fourteenth Amendment due process violations stemming from witness testimony about: her relationships with Mr. Higgins and Mr. Nunley, App. 369a–71a; her “com[ing] on to” Mr. Higgins' sons, App. 371a; how she “liked” the workmen at her house, App. 371a, her underwear and how frequently she had sex with her husband, App. 359a–60a; a witness' speculation regarding how many men Ms. Andrew had slept with, App. 372a; Ms. Andrew's clothing, the length of her skirts, and her cleavage, App. 371a; her being referred to as a “hoochie” on the stand, App. 371a; her hair color, including speculation about her dying it red to please a man, App. 371a–72a; her language, including when speaking to her husband, App. 371a–72a, 398a–99a; her flat, unhysterical affect in the wake of Mr. Andrew's murder, App. 372a, 376a–77a; witnesses' perceptions that Ms. Andrew manipulated her children and had them “well trained” about her affairs, App. 372a; and whether a “good mother” would dress or behave as Ms. Andrew had. App. 395a–96a, 428a.

Ms. Andrew's briefing also raised due process violations relating to the court's admission of her underwear into evidence. She argued at the OCCA that the prosecutor's decision to "hold pairs of underwear aloft "while he argued to the jury that these items of clothing showed that she had [not] intended to . . . grieve for her husband" was "highly prejudicial" and in error, reasoning that "all women must have underwear whether they are grieving or not, [and] the underwear and the use to which it was put by the prosecutor served no purpose other than to humiliate Brenda Andrew." App. 397a–98a.

In raising this unduly prejudicial evidence at the OCCA, Ms. Andrew argued that it drew on sex-based stereotypes to condemn her. Various throughout her brief, Ms. Andrew contended that the State's argument proposed "such an antiquated belief about the 'appropriate behavior' of women [which] was an inflammatory, derogatory, and prejudicial attack on Appellant." App. 428a. She argued that "the State presented this evidence only to show that Brenda Andrew was a bad person because she had affairs." App. 370a. Regarding a witness using the slur "hoochie," Ms. Andrew urged that this "testimony served purposefully to humiliate Brenda Andrew." App. 371a. Ms. Andrew also argued that the State introduced "pure bad character evidence intended to humiliate and dehumanize Brenda Andrew and to reduce her to a venal caricature in the eyes of the jury," referring to evidence presented about her appearance, demeanor, and sex life. App. 373a. Summarizing her argument, Ms. Andrew's briefing explained that "[t]he sheer volume of [unduly prejudicial] evidence

in this case made the trial more a referendum on Appellant's life than a meaningful attempt to determine her guilt." App. 373a.

Aside from the due process evidentiary errors, Ms. Andrew also challenged the trial court's refusal to give a limiting instruction on the permissible use of the above-mentioned evidence, in spite of defense counsel's multiple requests for one. App. 418a. She challenged the admission of her un-*Mirandized* statements to the police the night of the shooting, explaining the constitutional violation presented when officers signed her hospital discharge papers, took her from her hospital bed to the police station while she was unclothed and medicated, told her she was required to submit to an interview, told her repeatedly that she was not free to leave, and yet did not inform her of her *Miranda* rights. App. 404a–08a. Further, Ms. Andrew challenged the trial court's exclusion of over half of the defense witnesses. App. 343a–52a. Among the excluded witnesses were a law enforcement witness, who would have explained that Ms. Andrew requested increased security patrols in her neighborhood shortly before the shooting because she was afraid of home invasions, and two neighbors who would have testified about the timing of the gunshots that night, rendering the State's theory that Ms. Andrew staged her own wound all but impossible. App. 343a–53a. She also raised a claim of cumulative error. App. 430a–31a.

A divided OCCA affirmed Ms. Andrew's conviction and sentence. Regarding some of Ms. Andrew's challenged evidence relating to her appearance, behavior with men, and the use of a gendered slur, the three-judge majority wrote:

This Court is struggling to find any relevance to this evidence, other than to show Appellant's character. The State agrees that most of this evidence was irrelevant to any issue in this case; however, even so, the introduction of this evidence was harmless due to the overwhelming evidence in this case.

App. 265a. The OCCA determined that other portions of challenged evidence, such as the testimony about Ms. Andrew's prior affairs, were relevant to show motive. App. 263a. Likewise, the OCCA concluded that the display of Ms. Andrew's underwear in closing argument was "to show the extent and nature of the relationship between Pavatt and Appellant, and their intentions in fleeing to Mexico – not as a grieving widow, but as a free fugitive living large on a Mexico beach." App. 268a–69a.

Ms. Andrew's other points of error met a similar fate. The OCCA ruled that Judge Bragg erred by withholding a cautionary instruction, though it found the error harmless; determined that there was no *Miranda* violation by concluding that Ms. Andrew was not in custody; and determined that the exclusion of Ms. Andrew's defense witnesses was an abuse of discretion but was ultimately harmless. App. 271a, 277a, 286a–87a. The OCCA majority looked at "the entire record" to determine the appropriateness of Ms. Andrew's death sentence, finding that the capital penalty was "not imposed because of any arbitrary factor, passion, or prejudice." App. 297a–98a.

Judge Arlene Johnson dissented as to penalty, concluding that "[t]he second stage of Brenda Andrew's trial was fundamentally unfair." App. 307a. She 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,"

adding that “a defendant must be convicted, if at all, of the crime charged and not of being a bad woman.” App. 304a. Judge Johnson explained that “one effect [of this evidence] was to trivialize the value of [Ms. Andrew’s] life in the minds of the jurors,” so she could not agree that the “jury was unaffected by that evidence in deciding whether this defendant should live or die.” App. 305a–06a. Judge Charles Chapel, in summary fashion, would have reversed and remanded for a new guilt-phase trial because of the State’s admission of unduly prejudicial evidence about Ms. Andrew’s affairs, appearance, and affect, among other errors. App. 303a.

C. Federal Habeas

On federal habeas review, Ms. Andrew again presented the due process claim at issue here, along with a *Miranda* claim, a claim of cumulative error, and other claims not relevant to the instant proceedings. The District Court denied relief. *Andrew v. Moham*, No. CIV-08-832-R, 2015 WL 5254525 (W.D. Okla. 2015).

A panel of the Tenth Circuit affirmed, holding that there was no clearly established federal law concerning the due process violation presented by the evidentiary claims. App. 86a. Judge Bacharach dissented. While not challenging the majority’s holding on clearly established federal law, he would have granted guilt- and penalty-phase relief due to the prejudice Ms. Andrew suffered from the trial court’s erroneous admission of sex-shaming evidence, the admission of her un-*Mirandized* statement, and the erroneous exclusion of her defense witnesses. As Judge Bacharach explained, “The [stereotyping] evidence not only lacked relevance

but also cast Ms. Andrew as a woman fixated on seducing nearby men. In my view, the state appellate court correctly condemned the State's broadside on Ms. Andrew's sex life." App. 183a. Judge Bacharach understood this evidence to affect jury decision-making, especially given its greater concentration at the start and end of the trial:

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 drumbeat on Ms. Andrew's sex life continued in closing argument, plucking away any realistic chance that the jury would seriously consider her version of events.

Id. at 205a.

Ms. Andrew sought relief, and this Court reversed, holding: "By the time of Andrew's trial, this Court had made clear 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.'" App. 57a (quoting *Payne v. Tennessee*, 501 U.S. 808, 825 (1991)). This Court remanded the case to the Tenth Circuit to apply the clearly established federal law at each stage of trial and assess the impact of a lack of mitigating instructions. App. 65a–66a.

D. On Remand

On remand, the Tenth Circuit panel ordered simultaneous briefing on "the impact, on the course of further proceedings in this appeal, of the Supreme Court's" decision. Dkt. 193. Ms. Andrew delineated the scope of the sex-stereotyping evidence across the whole trial record and the harm she suffered from it, particularly when combined with other, conceded trial errors. Dkt. 197-1. The State argued that Ms.

Andrew's arguments to the state appellate court were not about sex-role stereotyping and, in any event, that Ms. Andrew only presented isolated examples of this type of evidence to the OCCA. Dkt. 196.

The Tenth Circuit panel affirmed. Judge Bacharach's opinion reduced the scope of the panel's guilt-phase review to "ten testimonial passages" that were cited before the OCCA. App. 33a–34a. With regard to the penalty phase, the panel only discussed a *single* quotation from the state court briefing when addressing the scope of the challenged evidence. App. 47a (determining that "[i]n the state-court appeal, Ms. Andrew pointed to the prosecution's closing argument at the sentencing phase, insisting that Ms. Andrew had been a poor mother because she brought men into the home while the children were there."). The panel looked at the whole trial record to consider evidence in support of the aggravating factors but simultaneously declined to consider the whole record as to the disputed evidence, meaning that they assessed the fairness of the penalty phase by weighing the impact of that single phrase against the entirety of the evidence supporting the aggravators. App. 47a.

The panel also held that Ms. Andrew's capital proceedings were not fundamentally unfair because the State also introduced other, unchallenged evidence concerning the shooting and because the irrelevant, sex-stereotyping evidence did not pertain to a "central jury issue[]." App. 42a–45a. As to the penalty phase, the panel determined that the only "central question" was whether the aggravating factors

were present. App. 47a–50a. The panel also declined to consider the impact of other trial errors on the fairness of Ms. Andrew’s trial. App. 39a n.4.

The panel and the en banc court denied rehearing, with Judge Federico dissenting. Judge Federico identified three errors that would have led him to grant rehearing en banc. First, he explained that under this Court’s precedent, a federal habeas court is “free to consider the same record evidence” that was before the state court. App. 10a. Highlighting jurisprudence from other circuits relying on this same principle, Judge Federico noted that “no federal court has so narrowly confined federal habeas review to the specific record citations found in the briefs before the state court. . . . Instead, we may have now split with both the Fifth and Ninth Circuits and did so without the benefit of a district court decision on this point.” App. 10a.

Second, Judge Federico would have granted “rehearing en banc to also consider whether cumulative error was preserved for our review,” given that Ms. Andrew raised her cumulative error claim before this Court and that her briefing on remand was responsive to the Tenth Circuit’s instructions. App. 12a.

Third, Judge Federico faulted the panel’s novel interpretation of the constitutional standard for determining when a criminal proceeding is fundamentally unfair due to improperly admitted prejudicial evidence. Pointing out the panel’s paradoxical holding that irrelevant evidence must concern a central jury question in order to factor into the prejudice analysis, he explained that “[i]rrelevant evidence carries the risk of prejudice precisely because it *never* tracks the central jury issues

at trial” and instead “tempts the jury into judgment on a prohibited ground, such as race or sex.” App. 14a. Further, Judge Federico’s dissent faulted the panel’s misconstrued reliance on *Buck v. Davis* to support its “central jury question” holding, because “[t]o the contrary, the Supreme Court sensibly held that even a quantitatively small amount of irrelevant, prejudicial evidence put before the jury can be unconstitutional when its quality . . . supports such a conclusion.” App. 15a. Judge Federico concluded that in light of the “extreme record” here, “there is a real risk that the death penalty will be carried out based on a replete record of inadmissible sex-stereotyping evidence and argument.” App. 4a, 18a.

This petition follows.

REASONS FOR GRANTING THE PETITION

I. The Panel Erred

This Court charged the panel on remand with assessing “whether a fairminded jurist reviewing this [trial] record could disagree . . . that the evidence so infected the trial with unfairness as to render the resulting conviction or sentence a denial of due process.” App. 65a–66a (cleaned up). The answer is no.

The panel erred in two critical ways in order to sidestep the remand instructions. First, the panel concluded that the strictures of habeas review meant it could not consider vast swaths of the trial transcript—the very same record that the OCCA reviewed in deciding Ms. Andrew’s due process claim—thereby blinkering its assessment of fundamental fairness in a manner contrary to this Court’s

jurisprudence. Second, the panel’s outcome-driven opinion inverted decades of precedent on prejudice analysis to avoid assessing the effect of sex-based stereotyping on the jury’s decision-making—particularly as to the value of Ms. Andrew’s life.

A. The Panel Manufactured an Unduly Parsimonious Habeas Rule to Avoid Considering the Full Scope of the Prejudicial Evidence

When assessing Ms. Andrew’s due process claim on remand, the panel held that it would not consider any of Ms. Andrew’s challenged evidence beyond “ten testimonial passages” that Ms. Andrew specifically cited in her briefs before the OCCA. App. 33a–34a. The panel expressly declined to consider much of the unduly prejudicial evidence that—in its view—had not been cited in Ms. Andrew’s OCCA briefs, reasoning that it had not been properly preserved for federal review. App. 33a–34a. For the second time, then, the panel’s overly parsimonious adjudication of the due process claim at the heart of Ms. Andrew’s capital trial has violated this Court’s jurisprudence—including the very decision remanding the case. The panel’s distorted approach makes a mockery of this Court’s remand instructions, flatly contradicts “what the state court knew and did” in this case, and is in conflict with this Court’s jurisprudence. *Cullen v. Pinholster*, 563 U.S. 170, 182 (2011).

1. The Panel’s Approach Ignored the Remand Instructions

On remand, this Court gave the panel clear guidance: “Specifically, the question now is whether a fairminded jurist *reviewing this record* could disagree with

Andrew that the trial court’s mistaken admission of irrelevant evidence was so ‘unduly prejudicial’ as to render her trial ‘fundamentally unfair.’” App. 65a (emphasis added) (citation omitted). Further, this Court tasked the panel with considering, for each phase of trial, “the relevance of *the disputed evidence* to the charges or sentencing factors, the degree of prejudice Andrew suffered from its introduction, and whether the trial court provided any mitigating instructions.” App. 65a–66a (emphasis added).

At the guilt phase, the panel’s decision to avoid much of “the disputed evidence” and to restrict its analysis to “ten testimonial passages” over the course of a month-long trial does not represent a good faith effort to comply with the remand order. At the penalty phase, the panel’s refusal to consider *any* of the sex-stereotyping evidence that the State elicited every day of the trial and incorporated in full at the penalty phase, aside from a single quote about Ms. Andrew’s parenting, is also at odds with this Court’s instructions. The month of degrading testimony and argument about Ms. Andrew’s character as a woman meant that she arrived at the penalty phase at a deficit, with jurors already convinced of her lack of humanity, but the panel’s three-paragraph analysis of penalty phase prejudice avoids acknowledging any of the contested guilt or penalty-phase evidence. It is impossible for the panel to assess “the degree of prejudice Andrew suffered” during her capital sentencing proceedings by looking at the impact of a single sentence in the prosecutor’s argument while ignoring all of the evidence that jurors had received until that point. App. 65a. In sum, the

panel regurgitated this Court’s remand instructions to claim compliance with them but in practice failed to engage with the holistic assessment of penalty phase prejudice required by this Court.

The panel also defied this Court’s instruction to consider the impact of any mitigating instruction as part of its analysis of each phase. App. 66a. The panel’s guilt phase assessment acknowledged the trial court’s failure to provide a limiting instruction, App. 46a, but its single, conclusory sentence of analysis provided no meaningful assessment of why the lack of instruction was supposedly harmless in the face of the flood of sex-based stereotyping. And the panel’s paper-thin penalty-phase analysis did not address the lack of instruction *at all*. App. 47a–50a. In a case so rife with noxious, dehumanizing stereotypes, it is beyond reason to suggest a limiting instruction would have had no effect on at least one juror’s ability to give mitigating value “to the diverse frailties of humankind” as required in this capital sentencing proceeding. *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976).

This Court should reverse in order to enforce its own precedent in this case.

2. The Panel’s Approach Ignored What the State Court Knew and Did

The panel’s refusal to consider any evidence from the trial transcript that was not cited in the OCCA briefing cannot be reconciled with how this Court assesses reasonableness under § 2254(d). A federal habeas court can grant relief when the state court decision on the merits is “contrary to, or involved an unreasonable

application of, clearly established Federal law.” 28 U.S.C. § 2254(d)(1). Reasonableness is the cornerstone of this inquiry. And, as this Court has repeatedly explained, reasonableness under § 2254(d)(1) “focuses on what [the] state court knew and did.” *Pinholster*, 563 U.S. at 182.

The *Pinholster* standard turns on the “record that was before the state court.” *Id.* at 181; *see id.* at 182 (“If the state-court decision ‘identifies the correct governing legal principle’ in existence at the time, a federal court assesses whether the decision ‘unreasonably applies that principle to the facts of the prisoner’s case.’”) (quoting *Williams v. Taylor*, 529 U.S. 362, 413 (2000)). Post-*Pinholster* cases clarify that § 2254(d)(1) review restricts federal courts from considering new evidence that was never part of the state court proceeding while reiterating that a federal habeas court must assess the record before the state court for reasonableness. *See Shinn v. Ramirez*, 596 U.S. 366, 378 (2022) (federal court “may review the claim based . . . on the state-court record”); *Shoop v. Twyford*, 596 U.S. 811, 819 (2022) (AEDPA “restricts the ability of a federal habeas court to develop and consider new evidence” because the state court cannot be faulted for not considering a record it lacked).

Nowhere has this Court restricted federal habeas review to only those portions of the state court record that the parties cited in their briefs. Rather, this Court has explicitly clarified that evidence on which a claim is based is properly before the state court and is therefore reviewable for reasonableness—particularly when that evidence is a trial transcript. *Miller-El v. Dretke*, 545 U.S. 231, 241 n.2 (2005)

(explaining that, regarding a *Batson* issue, “[t]here can be no question that the transcript of voir dire, recording the evidence on which Miller–El bases his arguments and on which we base our result, was before the state courts[.]”). *Cf. Dobbs v. Zant*, 506 U.S. 357, 358 (1993) (per curiam) (holding that the Court of Appeals erred when it “refused to consider the full sentencing transcript” and “emphasiz[ing] the importance of reviewing capital sentences on a complete record.”). The *Miller–El* court further explained that a reviewing court should not conflate the record—which must be before the state court—with theories about that record—which can develop in habeas proceedings. 545 U.S. at 241 n.2 (dismissing the theory that “Miller–El’s arguments about the [*Batson* violation] are not properly before this Court, not having been ‘put before the Texas courts’” because that argument “conflates the difference between evidence that must be presented to the state courts to be considered by federal courts in habeas proceedings and theories about that evidence.”).

No other court has determined that a federal habeas court is restricted to the specific record citations found in the state appellate court briefing. To the contrary, other federal courts have recognized that unduly parsimonious constructions of § 2254(d)(1) review could effectively overrule this Court’s substantive law. *See McDaniels v. Kirkland*, 813 F.3d 770, 780–81 (9th Cir. 2015) (en banc) (allowing reliance on juror trial questionnaires that were not before the state appellate court because habeas courts “may consider the entire state-court record, not merely those materials that were presented to state appellate courts,” and “*Pinholster* itself

precluded review only of evidence that was never revealed in any state court proceeding”); *Higgins v. Cain*, 720 F.3d 255, 262 (5th Cir. 2013) (allowing reliance on voir dire transcripts not before the state post-conviction court adjudicating a *Batson*-related IAC claim); *Jamerson v. Runnels*, 713 F.3d 1218, 1227 (9th Cir. 2013) (allowing the use of juror driver licenses to prove apparent race in order to assess the state court’s treatment of a *Batson* claim, because “if we were to conclude otherwise, we would have to read *Pinholster*’s evidentiary holding as implicitly overruling the substantive *Batson* requirements set forth in *Miller-El II*.”). The same is true here: failure to account for the sex-based stereotyping across the trial record distorts the prejudice analysis and thus undercuts the substantive protections that this Court announced in *Payne* and reiterated in *Andrew*.

Here, the state court record at issue is just the trial transcript. That transcript was before the OCCA in full and has not changed in the two decades that Ms. Andrew has been litigating her due process claim. Every court that has assessed the fundamental fairness of her trial, including the state appellate court, has been tasked with examining the State’s unduly prejudicial evidence against the whole record. The panel’s approach to reasonableness review under § 2254(d)(1) is an outlier.

There is an even simpler understanding of “what the state court knew and did” here because the OCCA expressly laid it out. At the penalty phase, the OCCA reviewed “the entire record” to “find that the sentence of death was not imposed because of any arbitrary factor, passion, or prejudice.” App. 297–98a. At the guilt

phase, the OCCA reviewed Ms. Andrew’s due process claim, which under its own law meant that the court assessed the whole trial record. *See DeRosa v. State*, 89 P.3d 1124, 1144 (Okla. Ct. App. 2004). The panel’s decision to ignore much of the trial record—and, as regards penalty, to ignore the contested evidence almost in its entirety—flatly contravenes what the state court knew and did and is unsupported by the record.¹¹

3. The Panel’s Approach Ignored Binding Jurisprudence

The panel undermined this Court’s jurisprudence when it refused to consider the entire trial record to assess the fundamental fairness of the trial. Across decades and diverse contexts, this Court has established that whole record review is axiomatic to the fundamental fairness assessment. *See, e.g., Darden v. Wainwright*, 477 U.S. 168, 178–183 (1986) (assessing the impact of improper closing argument within the context of the whole trial); *United States v. Agurs*, 427 U.S. 97, 112 (1976) (holding that *Brady* materiality “must be evaluated in the context of the entire record.”). State courts, including the OCCA, also recognize that the entirety of the trial record is the correct basis for reviewing fundamental fairness. *See, e.g., DeRosa*, 89 P.3d at 1144.

¹¹ The panel’s determination that Ms. Andrew presented “ten testimonial passages” for review at the OCCA is not reconcilable with her briefs before that court, where she referred to evidence and argument beyond the panel’s list. For example, the panel’s list does not include testimony about Ms. Andrew’s perceived poor mothering due to her interactions with men, but Ms. Andrew’s OCCA briefing raises this as an example of evidence that “served purposefully to humiliate” her. App. 371a. Further, the OCCA’s proper assessment of the full trial record renders the OCCA majority’s conclusions all the more unreasonable, particularly as to the penalty phase.

The Tenth Circuit did away with that requirement in habeas review by holding that federal habeas courts may only review the citations to the trial record in assessing the reasonableness of the state court decision. That is contrary to this Court’s habeas jurisprudence, *supra*, and would prevent courts from considering the totality of the record when assessing the fundamental fairness of the trial, contrary to this Court’s caselaw. *Jamerson*, 713 F.3d at 1227. Neither AEDPA nor this Court’s cases require such a result, and this Court should reject the panel’s approach.

B. The Panel Turned the Correct Approach to Prejudice on Its Head

The panel erred in another significant way. It distorted this Court’s jurisprudence to manufacture a novel and internally contradictory test for assessing prejudice. Applying this incorrect test, the panel loaded the dice, making an outcome in Ms. Andrew’s favor all but impossible.

1. The Panel Assessed Guilt Phase Prejudice Incorrectly

Sex-stereotyping evidence tainted Ms. Andrew’s trial “from start to finish” with “tales of Ms. Andrew’s promiscuity.” App. 204a–5a (Bacharach, J., dissenting). The State’s evidence “ha[d] no purpose other than to hammer home that Brenda Andrew is a bad wife, a bad mother, and a bad woman.” App. 304a (Johnson, J., dissenting). But the panel concluded that this evidence did not render Ms. Andrew’s trial fundamentally unfair by applying a new approach to prejudice analysis.

To assess the impact of the evidence at the guilt phase, the panel asked whether the concededly irrelevant evidence related to a “central question,” as only

evidence relating to a “central question” could prejudice Ms. Andrew. App. 42a–43a. Concluding that some of the evidence was relevant, the panel found no prejudice because it was evidence of guilt. App. 38a, 47a. Then, for irrelevant evidence, the court found no prejudice because it was unrelated to a “central question.” App. 45a.

The panel’s approach thus created a Catch-22: it concluded that evidence could only be prejudicial if it was *both* irrelevant and related to a “central question.” App. 45a. Of course, “[i]rrelevant evidence carries the risk of prejudice precisely because it *never* tracks the central jury issues at trial, and instead lures the jury away from its appropriate task: ‘the determination of truth.’” App. 14a (Federico, J., dissenting) (citation omitted). Even where the panel conceded, as had the OCCA before it, that “much of the challenged evidence had been irrelevant to guilt or innocence,” App. 37a, the fact that it was irrelevant in turn bolstered the panel’s argument that the “evidence did not ‘coincide precisely’ with ‘the central question’ for the jury.” App. 45a.

This makes little sense. Indeed, “it is questionable that the jury would have isolated some of the sex-stereotyping evidence, appropriately considered it only for its relevance as to motive, and disregarded the remainder.” App. 16a (Federico, J., dissenting). The proper question, as this Court instructed, was whether a fairminded jurist could disagree that the evidence rendered the trial “fundamentally unfair.” App. 65a. Evidence playing on harmful stereotypes is unlikely to relate to a central issue and is particularly apt to render a trial fundamentally unfair. It is for exactly

this reason that evidence law—and the Due Process Clause—forecloses its use in criminal trials. *Payne*, 501 U.S. at 825.

The potency of evidence grounded in sex-based stereotypes is highlighted by Respondent’s concession that even in the face of overwhelming evidence of guilt, unduly prejudicial evidence can render a trial fundamentally unfair. Indeed, when asked at oral argument whether there is any “limit to the amount of inadmissible evidence, harmful, irrelevant, whatever else,” that a prosecutor can introduce, even where there is a “strong case for guilt,” Respondent was clear: “[T]here is certainly going to be a limit.” Oral Arg. 39:36–40:24 (July 27, 2017).

Regardless of the strength or weakness of the State’s evidence at trial, *see, e.g.*, App. 39a–41a, Ms. Andrew was nevertheless unduly prejudiced because the State’s presentation foreclosed any fair assessment of her guilt or innocence. As Judge Bacharach initially explained, “[i]n Ms. Andrew’s trial, the evidence of guilt was undoubtedly sufficient for a conviction; but the sufficiency of the evidence doesn’t mean that the trial was fair or the errors were harmless.” App. 202a. Rather, the evidence “spark[ed] distrust based on her loose morals” and “pluck[ed] away at any chance that jurors would seriously consider her version of events.” App. 205a.

Having been denigrated and exposed, put on trial for failing to meet the State’s view of a “good woman,” there was little hope that the jury could fairly consider Ms. Andrew’s defense. As Judge Federico put it, “irrelevant evidence [that] touches upon an issue of passion or prejudice . . . can do much worse than procure a decision on

merely other-than-permissible grounds; rather, it can induce decision-making on affirmatively prohibited grounds.” App. 13a. Indeed, it is hard to imagine a case with a more constant drumbeat of constitutionally intolerable sex-based stereotyping. No fairminded jurist could disagree that a trial so infected was fundamentally unfair.

2. The Panel Also Incorrectly Assessed Penalty Phase Prejudice

So, too, for the penalty phase. Having been thoroughly “humiliate[d]” and “dehumanize[d]” on improper bases for a month, App. 305a (Johnson, J., dissenting), subject to a guilt-phase case that was a “referendum on [her] life” as a woman, App. 373a, and exposed to evidence that “trivialize[d] the value of her life in the minds of jurors,” App. 306a (Johnson, J., dissenting), Ms. Andrew arrived at the penalty phase of her case at a deficit.

Just as at the guilt phase, the panel’s decision was distorted by applying a novel, erroneous test. The panel determined that the contested evidence could only harm Ms. Andrew’s very life if it “coincide[d] precisely” with a “central jury question,” which, at the penalty phase, was solely whether the prosecution had established the aggravating factors. The panel thus focused almost exclusively on whether there was “strong evidentiary support for [the two] aggravating factors.” App. 49a. This was the wrong test and the wrong question. Equally, the panel failed to acknowledge that the entire guilt-phase case was offered against Ms. Andrew as part of the State’s case for death, Tr. 4198, further distorting its analysis. Having applied its novel test, wrongly narrowed its central question, reached the unremarkable conclusion that aggravating

circumstances were sufficiently supported, and unsurprisingly determined that the single line of prosecutorial argument that the panel considered failed to coincide with its “central question,” the panel did not find penalty phase prejudice. App. 50a.

Critically, the presence of aggravating circumstances is but one question put to jurors during an Oklahoma capital penalty phase. The overriding issue for jurors is whether the defendant should live or die—specifically, in addition to returning aggravating factors, jurors are tasked with considering whether the mitigation outweighs the aggravation and returning an overall verdict on the death sentence. App. 16a–17a (citing Okla. Stat. tit. 21 § 701.11). Indeed, the defendant’s overriding humanity and worthiness of life is, in reality, the question that preoccupies jurors during a penalty phase proceeding. *See* Valerie P. Hans, *How Juries Decide Death: The Contributions of the Capital Jury Project*, 70 Ind. L.J. 1233, 1237 (1995); *cf. Penry v. Johnson*, 532 U.S. 782, 797 (2001) (sentencing proceedings are a “vehicle for [a jury to] express[] its ‘reasoned moral response’ to [the] evidence.”).

The proper question for a court assessing prejudice, therefore, is whether but for the error, at least one juror would have rejected a death sentence. This Court has repeatedly articulated the same when assessing the fundamental fairness of a capital sentencing trial. *See e.g., Buck v. Davis*, 580 U.S. 100, 119 (2017) (assessing whether there was a “reasonable probability that, but for counsel’s unprofessional errors, the result of the [sentencing] proceeding would have been different”) (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)); *Wiggins v. Smith*, 539 U.S. 510, 537 (2003).

An error injecting stereotype-based views into that assessment is particularly harmful to the fairness of the proceeding. *Cf. Buck*, 580 U.S. at 122 (“Some toxins can be deadly in small doses.”).

Yet the panel here applied a new, erroneous test, training its focus on the aggravating circumstances, fundamentally misconstruing how Oklahoma capital sentencing proceedings operate and contradicting this Court’s precedent. Remarkably, the panel invoked *Buck v. Davis* to justify its approach. App. 49a. As the panel notes, the challenged evidence in *Buck* related to one of the “special issues” mandated in Texas capital proceedings: whether the defendant posed a future danger. App. 42a–43a. As this Court noted, the noxious evidence in *Buck* was particularly prejudicial because it was related to a “central” jury question. However, this Court has never held—not in *Buck*, not anywhere—that prejudicial, stereotype-based evidence *must* relate to a statutory aggravating circumstance to render a trial fundamentally unfair. Surely the Tenth Circuit did not mean to suggest that race- and sex-based stereotyping is allowed as long as it does not relate to a statutory narrowing function. No other court has erred so egregiously in its reading of *Buck*, but that is the plain implication of the panel’s ruling below.

3. The Panel Failed to Consider Errors Across the Trial Record

The panel also failed to account for the other errors affecting the fundamental fairness of Ms. Andrew’s trial. At the outset of its opinion, the panel declined to consider errors related to “exclusion of [witness] testimony, a violation of *Miranda*, or

the existence of cumulative error.” App. 23a. The panel faulted Ms. Andrew for arguing before them that these errors should be considered “when assessing the prejudice from the sexual evidence.” App. 23a. But that was the panel had ordered her to do: provide briefing on “the impact, on the course of further proceedings in this appeal, of [this Court’s decision].” Dkt. 193. The focus of her brief, therefore, was the evidence implicated by the error this Court reversed on. Part of that focus included requesting that the panel assess the impact of the unduly prejudicial evidence in light of the entire record, including the record of other errors in the trial. Dkt. 197-1 at 33.

The panel fails to explain why that request was inadequate to place the other errors properly before the court. App. 39a n.4. This Court has repeatedly held that fundamental fairness analysis does not assess evidence or argument in isolation. *See, e.g., Donnelly v. DeChristoforo*, 416 U.S. 637, 645 (1974). Whole record review must account for the impact of other legal errors that undermine the fundamental fairness of the proceedings. *See Kyles v. Whitley*, 514 U.S. 419, 436 (1995) (holding that the impact of suppressed evidence is “considered collectively, not item by item”); *see also Glossip v. Oklahoma*, 604 U.S. 226, 251 (2025) (considering the prejudice of a due process error cumulatively with other errors). The panel’s failure to review the whole trial record and all of the errors it contains kept the panel from reaching the correct

answer on the core question in this case: no fairminded jurist could disagree that Ms. Andrew's trial was fundamentally unfair.¹²

II. The Panel's Errors Implicate Important Questions

The Court acknowledged a critical protection for criminal defendants in *Andrew v. White*, one that is especially important for defendants who may face bias and stereotyping because of immutable characteristics, such as sex. Nowhere is this more apparent than in Ms. Andrew's case, which asks whether a prosecutorial strategy intent on shaming her as a woman can be placed outside of the promise of the Due Process Clause by unjustified interpretations of law. This case presents an opportunity for the Court to ensure enforcement of the protection it announced.

The Court should also grant review to resolve the split of authorities the panel created. The panel's decision conflicts with the Fifth and Ninth Circuits. App. 10a. In both of those circuits, state court decisions are reviewed for reasonableness in light of the totality of the trial record—even if the full trial record was not presented to the state court of last resort. *Jamerson*, 713 F.3d at 1227; *Higgins*, 720 F.3d at 263. Ms. Andrew's request is much more modest than those put to the Fifth and Ninth Circuits. She asks only that the reasonableness of the OCCA's decision be assessed in light of the whole trial transcript before that court, which reflects what the state

¹² The errors in her case had a “substantial and injurious effect” on her convictions and sentence. *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). Moreover, properly considered, no fairminded jurist could conclude that the errors were harmless. *Chapman v. California*, 386 U.S. 18, 23 (1967).

court “knew and did.” *Pinholster*, 563 U.S. at 182. Such a holding would realign the Tenth Circuit with its sister circuits and reestablish this commonsense principle.

It is atypical, but not unheard of, for this Court to twice provide review in a single case. *Moore v. Texas*, 586 U.S. 133, 139 (2019) (per curiam); *Penry*, 532 U.S. at 786. It is appropriate to do so where the Court is called on to enforce its prior ruling to prevent an unlawful execution, *Moore*, 586 U.S. at 139, and all the more so where, as here, reversal is required to root out bias. *Miller-El*, 545 U.S. at 235. This is an important case, worthy of this Court’s full review.

III. The Questions Are Squarely Presented

The errors here go to the heart of the panel’s decision. Any of the errors detailed *supra* are individually sufficient to, if corrected, result in a reversal in the judgment below. Taken together, they make a compelling case for this Court’s intervention.

Moreover, none of the errors are foreclosed by any procedural bar or other impediment to this Court’s substantive review. Both before the panel and before this Court, Respondent has attempted to make this case about exhaustion and not about the sex-based stereotyping that pervaded Oklahoma’s prosecution of Ms. Andrew. No court has endorsed Respondent’s argument that Ms. Andrew’s claim is unexhausted. In fact, Respondent’s focus on exhaustion is a distraction. As discussed *supra*, the entirety of the record at issue was before the OCCA when it rendered its decision, and before that tribunal, Ms. Andrew briefed in detail how the evidence and arguments in her case violate the Due Process Clause. Although the briefing did not

cite every example of unduly prejudicial evidence or argument, the evidence and argument set forth in the federal courts “relate back” to the claim adjudicated on the merits before the OCCA. *See Vazquez v. Hillery*, 474 U.S. 254, 260 (1986).

Armed only with a circumstantial case, the State of Oklahoma put on a presentation that “would make Nathaniel Hawthorne blush.” App. 7a (Federico, J., dissenting). “The State focused from start to finish on Ms. Andrew’s sex life,” portraying her as “a scarlet woman, a modern Jezebel, sparking distrust based on her loose morals.” App. 205a (Bacharach, J., dissenting). This effort “pluck[ed] away any realistic chance that the jury would seriously consider her version of the events.” *Id.*

Judge Arlene Johnson at the OCCA saw Ms. Andrew’s claim for what it is: a refusal to let her identity as a woman be weaponized against her to condemn her to die. That claim was before the OCCA, the Tenth Circuit, and is presented here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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