

No. 26-5711

In the
SUPREME COURT OF THE UNITED STATES

BRENDA EVERS ANDREW,

Petitioner,

-vs-

KELSEY FISHER, 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

Gentner F. Drummond
Attorney General of Oklahoma
Jennifer L. Crabb
Capital Supervisory Asst. Attorney General
Counsel of Record
Oklahoma Office of the Attorney General
313 NE Twenty-First St.
Oklahoma City, OK 73105
jennifer.crabb@oag.ok.gov
(405) 522-4418

October 29, 2026

CAPITAL CASE QUESTIONS PRESENTED

In *Andrew v. White*, this Court held that its prior cases established the general rule that evidence introduced in a criminal trial may be so unduly prejudicial that it renders the trial fundamentally unfair in violation of due process. 604 U.S. 86, 87 (2025) (per curiam). On remand, the Tenth Circuit held that the Oklahoma Court of Criminal Appeals' application of that general rule to the claim Petitioner raised in state court was reasonable. Pet. App. 20a-55a.

The claim Petitioner presents to this Court is an entirely different claim than the one the courts below addressed. This case is not a good vehicle for Petitioner's questions presented and her purported circuit split is illusory.

The questions presented are:

- 1. Whether federal courts may grant habeas relief under 28 U.S.C. § 2254(d)(1) for a claim that rests on legal and factual grounds not asserted in state court.**
- 2. Whether the Tenth Circuit correctly declined to address a cumulative error claim Petitioner chose not to present on remand.**

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
INTRODUCTION	1
STATEMENT OF THE CASE.....	2
REASONS FOR DENYING THE PETITION.....	9
I. THE PETITION IS A POOR VEHICLE FOR PETITIONER’S QUESTIONS PRESENTED	11
<i>A. Petitioner’s Claim is Unexhausted.....</i>	<i>11</i>
<i>B. Petitioner’s Current Claim was Waived in Federal Court</i>	<i>24</i>
II. PETITIONER’S ASSERTED CIRCUIT SPLIT IS ILLUSORY AND DOES NOT PRESENT A COMPELLING REASON TO GRANT CERTIORARI	25
III. THE TENTH CIRCUIT’S DECISION IS CORRECT	28
<i>A. The Tenth Circuit Correctly Refused to Consider Arguments the OCCA was not Given the Opportunity to Address</i>	<i>29</i>
<i>B. Petitioner Abandoned Her Other Claims</i>	<i>31</i>
<i>C. Petitioner Asked the Tenth Circuit to apply Buck v. Davis; She Cannot Now Complain that the Court Relied on it to Deny Relief.....</i>	<i>33</i>
IV. A CAPITAL DEFENDANT’S CHARACTER IS ALWAYS AT ISSUE	34
CONCLUSION	40

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Abdul-Kabir v. Quartermann</i> , 550 U.S. 233 (2007)	37
<i>Allen v. Zavaras</i> , 568 F.3d 1197 (10th Cir. 2009)	31
<i>Anderson v. Harless</i> , 459 U.S. 4 (1982)	21
<i>Andrew v. Moham</i> , No. CIV-08-832-R, 2015 WL 5254525 (W.D. Okla. Sept. 9, 2015)	8
<i>Arizona v. Evans</i> , 514 U.S. 1 (1995)	28
<i>Ashcroft v. al-Kidd</i> , 563 U.S. 731 (2011)	9
<i>Batson v. Kentucky</i> , 476 U.S. 79 (1986)	26, 28
<i>Buck v. Davis</i> , 580 U.S. 100 (2017)	2, 33
<i>California v. Carney</i> , 471 U.S. 386 (1985)	28
<i>Castille v. Peoples</i> , 489 U.S. 346 (1989)	12
<i>Clark v. Sweeney</i> , 607 U.S. 7 (2025)	30
<i>Cuesta-Rodriguez v. Carpenter</i> , 916 F.3d 885 (10th Cir. 2019)	25
<i>Cullen v. Pinholster</i> , 563 U.S. 170 (2011)	27, 29, 31, 33
<i>Cutter v. Wilkinson</i> , 544 U.S. 709 (2005)	23

<i>Donnelly v. DeChristoforo</i> , 416 U.S. 637 (1974)	32
<i>Dunn v. Reeves</i> , 594 U.S. 731 (2021)	29
<i>Entek GRB, LLC v. Stull Ranches, LLC</i> , 840 F.3d 1239 (10th Cir. 2016)	32
<i>Ex parte Royall</i> , 117 U.S. 241 (1886)	24
<i>Glossip v. State</i> , 604 U.S. 226 (2025)	32
<i>Gray v. Netherland</i> , 518 U.S. 152 (1996)	11
<i>Harrington v. Richter</i> , 562 U.S. 86 (2011)	29
<i>Harris v. Sharp</i> , 941 F.3d 962 (10th Cir. 2019)	24
<i>Higgins v. Cain</i> , 720 F.3d 255 (5th Cir. 2013)	26
<i>Jackson v. Conway</i> , 763 F.3d 115 (2d Cir. 2014)	23
<i>Jamerson v. Runnels</i> , 713 F.3d 1218 (9th Cir. 2013)	26
<i>Johnson v. Williams</i> , 568 U.S. 289 (2013)	34
<i>Kansas v. Carr</i> , 577 U.S. 108 (2016)	34
<i>Klehr v. A.O. Smith Corp.</i> , 521 U.S. 179 (1997)	9
<i>Kyles v. Whitley</i> , 514 U.S. 419 (1995)	32

<i>Le v. Mullin</i> , 311 F.3d 1002 (10th Cir. 2002)	10
<i>Loc. No. 8-6, Oil, Chem. & Atomic Workers Int'l Union, AFL-CIO v. Missouri</i> , 361 U.S. 363 (1960)	9
<i>Lockyer v. Andrade</i> , 538 U.S. 63 (2003)	2, 34
<i>Lucio v. Lumpkin</i> , 987 F.3d 451 (5th Cir. 2021)	23
<i>McDaniels v. Kirkland</i> , 813 F.3d 770 (9th Cir. 2015)	26
<i>Miller-El v. Dretke</i> , 545 U.S. 231 (2005)	26, 27
<i>Miranda v. Arizona</i> , 384 U.S. 436 (1966)	8, 9, 31, 33
<i>Picard v. Connor</i> , 404 U.S. 270 (1971)	11, 12
<i>Romano v. Oklahoma</i> , 512 U.S. 1 (1994)	24, 34
<i>Rose v. Lundy</i> , 455 U.S. 509 (1982)	21
<i>Sexton v. Beaudreaux</i> , 585 U.S. 961 (2018)	Passim
<i>Shinn v. Ramirez</i> , 596 U.S. 366 (2022)	24
<i>Spencer v. Texas</i> , 385 U.S. 554 (1967)	24
<i>State v. Day</i> , 754 P.2d 1021 (Wash. App. 1988)	39
<i>State v. Diaz</i> , 900 N.E.2d 565 (Ohio 2008)	38

<i>State v. Hand</i> , 840 N.E.2d 151 (Ohio 2006)	39
<i>United States v. Fruehauf</i> , 365 U.S. 146 (1961)	9
<i>Vazquez v. Hillery</i> , 474 U.S. 254 (1986)	21
<i>Wagner v. Smith</i> , 581 F.3d 410 (6th Cir. 2009)	23
<i>Wellmon v. Colo. Dep’t of Corr.</i> , 952 F.3d 1242 (10th Cir. 2020)	25, 29
<i>White v. Woodall</i> , 572 U.S. 415 (2014)	34
<i>Wood v. Ryan</i> , 693 F.3d 1104 (9th Cir. 2012)	11, 12, 23
<i>Yarborough v. Alvarado</i> , 541 U.S. 652 (2004)	34

STATE CASES

<i>Cuesta-Rodriguez v. State</i> , 241 P.3d 214 (Okla. Crim. App. 2010)	40
<i>Dodd v. State</i> , 100 P.3d 1017 (Okla. Crim. App. 2004)	40
<i>Eizember v. State</i> , 164 P.3d 208 (Okla. Crim. App. 2007)	40
<i>Mayes v. State</i> , 887 P.2d 1288 (Okla. Crim. App. 1994)	12
<i>Moore v. State</i> , 443 P.3d 579 (Okla. Crim. App. 2019)	40
<i>Pavatt v. State</i> , 159 P.3d 272 (Okla. Crim. App. 2007)	1

<i>Phillips v. State</i> , 989 P.2d 1017 (Okla. Crim. App. 1999)	12
<i>Scott v. State</i> , 163 So.3d 389 (Ala. Crim. App. 2012)	38
<i>Turrentine v. State</i> , 965 P.2d 985 (Okla. Crim. App. 1998)	23

FEDERAL STATUTES

28 U.S.C. § 2254	Passim
------------------------	--------

STATE STATUTES

Okla. Stat. tit. 12, § 2403	37
Okla. Stat. tit. 21, § 701.13	23

FEDERAL RULES

Fed. R. Evid. 403	37
-------------------------	----

STATE RULES

Rule 3.5, <i>Rules of the Oklahoma Court of Criminal Appeals</i> , Okla. Stat. tit. 22, Ch. 18, App. (2003)	13
--	----

INTRODUCTION

Petitioner faces execution for the premeditated murder of her husband, Rob Andrew. Overwhelming evidence supports her convictions for first-degree murder and conspiracy to commit first-degree murder. Petitioner has none of the mitigating evidence that is typical in a capital case. She was not mentally ill, and there was no evidence she was abused or had brain damage. (Tr. XIX 4277; O.R. 2836). She had a loving, supportive family, an education, the ability to work, and a background that should have taught her right from wrong. (Tr. XIX 4221-23, 4240-41, 4245, 4261-62, 4266, 4277, 4298-99, 4321, 4368-70).

Petitioner claims she was sentenced to death because she is a woman. But her co-conspirator, James Pavatt, was tried separately and sentenced to death for this same murder.¹ *Pavatt v. State*, 159 P.3d 272 (Okla. Crim. App. 2007). Like Petitioner, Mr. Pavatt had no criminal record. And in both cases, the jury found the same two aggravating circumstances. *Id.* at 276; Pet. App. 245a. The fact that Mr. Pavatt was sentenced to death for the same murder is extremely strong evidence that Petitioner was not sentenced to death because she is a woman.

The claim Petitioner presses here first appeared in her Tenth Circuit opening brief *twelve years* after her trial. If the trial were as prejudicial as the Petition (inaccurately) describes, the claim was obvious. Yet, Petitioner did not raise it on direct appeal, in her state post-conviction application, or in her federal habeas petition. Only in her habeas appeal did Petitioner decide to argue for the first time

¹ Mr. Pavatt was denied clemency on October 14, 2026, and is scheduled to be executed on November 12, 2026.

that the State had used sexual stereotypes against her. Even then, the claim was not as full-throated as it is now.

Petitioner argues the Tenth Circuit “took an unduly parsimonious view of the due process” claim. Pet. at 1. But the Tenth Circuit was not directly reviewing Petitioner’s conviction and sentence. In this habeas case, “the only question that matters” is “whether [the] state court decision is contrary to, or involved an unreasonable application of, clearly established federal law.” *Lockyer v. Andrade*, 538 U.S. 63, 71 (2003).

Petitioner ignores, or scarcely mentions, the following impediments to review of her claim: (1) the claim is not exhausted; (2) the claim was waived by her failure to raise it in federal district court; (3) the claim was abandoned by her failure to fully raise it in her Tenth Circuit opening brief (it has expanded greatly since then); and (4) her reliance on *Buck v. Davis*, 580 U.S. 100 (2017) is prohibited by 28 U.S.C. § 2254(d).

Petitioner does not argue that she can satisfy § 2254(d)(1) as to the claim that was raised in state court. For all of these reasons, certiorari should be denied.

STATEMENT OF THE CASE

Petitioner was convicted of first-degree murder and sentenced to death in the District Court of Oklahoma County, State of Oklahoma, Case No. CF-2001-6189.² The

² Petitioner was also convicted of conspiracy to commit first degree murder and sentenced to ten years’ imprisonment. Pet. App. 244a-245a. For the murder, the jury found the existence of two aggravating circumstances: (1) Petitioner committed the murder for remuneration or the promise of remuneration; and (2) the murder was especially heinous, atrocious, or cruel. Pet. App. 245a.

following facts found by the OCCA on direct appeal are unchallenged by Petitioner and, therefore, correct. *See* 28 U.S.C. § 2254(e)(1).

Petitioner was married to the victim, Rob Andrew, but was having an affair with Mr. Pavatt. Pet. App. 245a, 248a. Mr. Pavatt, who was an insurance agent, helped Mr. Andrew acquire a life insurance policy with a payout of approximately \$800,000. Pet. App. 248a. The State presented evidence at trial that in the months preceding the murder, Petitioner and Mr. Pavatt forged Mr. Andrew's signature to a change-of-ownership form, attempting to transfer ownership of the policy to Petitioner. Pet. App. 249a. This evidence included recordings of telephone calls Petitioner and Mr. Pavatt made to the insurance company asking about the policy and trying to convince the company that the owner of the policy had been changed. Pet. App. 249a n.4. A witness testified that Petitioner said she could sign Mr. Andrew's name better than Mr. Andrew could. Pet. App. 249a n.4.

Mr. Pavatt's daughter, Janna Larson, testified that in late October of 2001, her father told her that Petitioner had asked him to murder Mr. Andrew. Pet. App. 248a. On the night of October 25-26, 2001, someone cut the brake lines on Mr. Andrew's car. Pet. App. 248a-249a. On the morning of October 26, Mr. Pavatt had Ms. Larson place two calls to Mr. Andrew to tell him Petitioner was in the hospital and needed him. Pet. App. 249a. Mr. Andrew discovered the tampering. Pet. App. 249a. Petitioner later told Mr. Andrew that she had read in the newspaper that his brake lines had been cut, but the incident had not been reported in the media. Pet. App. 249a.

On November 20, 2001, Mr. Andrew was shot to death in the garage of the family home when he went to pick up the couple's children for Thanksgiving. Pet. App. 245a. During the murder, the Andrew children were in a bedroom, with the volume on the television very high. Pet. App. 246a. Petitioner was also shot but, unlike Mr. Andrew, her wound was superficial. Pet. App. 246a. Petitioner was shot with a .22 caliber bullet that was apparently fired at close range, contrary to her claim that "she was shot at some distance." Pet. App. 247a. Experts for both the State and the defense believed the wound was staged. Pet. App. 250a, 277a. Mr. Pavatt had purchased a .22 caliber handgun approximately one week before the murder. Pet. App. 247a. Observers found Petitioner's demeanor after the murder "uncharacteristically calm[.]" Pet. App. 246a.

The murder weapon was a 16-gauge shotgun. Pet. App. 246a. Mr. Andrew owned a 16-gauge shotgun which he told friends Petitioner had possession of and refused to let him have. Pet. App. 246a. The gun was not found in the Andrew home, or elsewhere, after the murder. Pet. App. 246a. A witness saw Petitioner doing target practice eight days before the murder. Pet. App. 246a. The witness found 16-gauge shotgun shells at the location Petitioner used for target practice. Pet. App. 246a.

On the day of the murder, Mr. Pavatt borrowed Ms. Larson's car for the ostensible purpose of having it serviced; he returned it unserviced, with a live round of .22 caliber ammunition on the floorboard. Pet. App. 247a. That same day, Mr. Pavatt ordered Ms. Larson to throw the bullet away, and he threatened to kill her if she told anyone that Petitioner had asked him to kill Rob Andrew. Pet. App. 247a.

Petitioner had a key to the home of her next-door neighbors, the Gigstads, who were out of town on the day of the murder. Pet. App. 247a. When the Gigstads returned, they found in their home a spent 16-gauge shotgun shell (of the same brand, and with similar markings, as a shell recovered from the murder scene) and several .22 caliber bullets of the same brand as the bullet in Ms. Larson's car. Pet. App. 247a-248a. These bullets appeared consistent with the bullet that struck Petitioner and they could have been fired from Mr. Pavatt's .22, which was never located. Pet. App. 247a-248a. There was no sign of forced entry into the Gigstads' home. Pet. App. 247a.

After the murder, Petitioner and Mr. Pavatt asked Ms. Larson to help create a document, with Mr. Andrew's forged signature, giving Petitioner permission to take the children out of the country. Pet. App. 250a. Petitioner also asked Ms. Larson to transfer funds from Petitioner's bank account to Ms. Larson's account so that Ms. Larson could send money after the pair left the country. Pet. App. 250a. Petitioner did not attend Mr. Andrew's funeral; rather she traveled to Mexico with Mr. Pavatt and her children. Pet. App. 250a.

A county jail inmate named Teresa Sullivan testified that Petitioner confided in her that she and Mr. Pavatt had killed Mr. Andrew and that Mr. Pavatt had shot Petitioner in the arm so she would appear to be an innocent witness. Pet. App. 250a.

The Tenth Circuit said ten times in its first opinion that the evidence of Petitioner's guilt was overwhelming. Pet. App. 111a, 113a, 117a, 119a, 132a & n.30, 141a, 146a, 171a, 172a n.56. That court further recited the following evidentiary conclusions:

- [Petitioner] stated that she wished Rob Andrew was dead so she could go on with her life and get his life-insurance money; “she would see him dead” [Trial Vol. 3 at 136]; and she was going to kill Rob Andrew or have him killed.

- [Petitioner] told [her former lover James] Higgins that she hated Rob “and wished that she didn’t have to stay with him.” Trial Vol. 2 at 88.

- Rob Andrew repeatedly expressed fear of [Petitioner] and Pavatt and said he believed that they would murder him over his life-insurance policy.

- [Petitioner] and Pavatt attempted to murder Rob Andrew by cutting his car’s brake lines and luring him to the hospital.

...

- [Petitioner] had Pavatt tracking Rob Andrew in the month leading up to his murder.

- The night before Rob’s murder, [Petitioner] told her friend, referring to Rob: “I hate him. I hate him. I hate him.” Trial Vol. 11 at 175-76.

...

- [Petitioner] and Pavatt were seen giggling together at the hospital the morning after the murder.

- At the time of the murder, the Andrew children were in a room far from the garage, where the murder took place, with the door closed and the television turned up loud even though they were supposed to be ready to leave with Rob Andrew to spend the Thanksgiving vacation with him and his parents.

...

- [Petitioner] kept and refused to return to Rob Andrew his 16-gauge shotgun, a variety of shotgun less common than a 12- or 20-gauge shotgun, after Rob moved out in September 2001. Rob told several friends that [Petitioner]

refused to let him take it when they separated. [Petitioner] told the police she hadn't seen it since January 2001, and the shotgun was never found after the murder.

...

- [Petitioner] demonstrated no interest in planning her husband's funeral. When the funeral director asked her what she loved and would miss about Rob, she said "nothing." Trial Vol. 11 at 95. The funeral director said that her response was the most "bizarre" he had received in his twenty-five years of experience. Trial Vol. 11 at 95.

...

- Though [Petitioner] blamed two masked men for the shootings, Pavatt later claimed that he had shot [Petitioner] and that another unidentified man had murdered Rob Andrew.

Pet. App. 111a-113a (footnote 19 omitted).

On direct appeal, Petitioner argued the admission of certain evidence, some of which was sexual in nature and some of which was not, amounted to improper "bad acts" evidence. Pet. App. 364a-373a, 393a-400a. The OCCA found much of the contested evidence was properly admitted to show Petitioner's motive and intent; 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.³ Pet. App. 260a-269a. The OCCA also rejected claims regarding the exclusion of defense

³ The OCCA explained that it "struggle[d] to find any relevance to [the following] evidence," Petitioner'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, and testimony that Petitioner changed her hair color to that preferred by another man. Pet. App. 265a.

witnesses, an alleged *Miranda*⁴ violation, and cumulative error. *See* Pet. App. 271a, 275a-279a, 297a.

The federal district court, presented with the same due process claims, found the OCCA's decision reasonable under 28 U.S.C. § 2254(d). *Andrew v. Moham*, No. CIV-08-832-R, 2015 WL 5254525, at *14-19, 31-33 (W.D. Okla. Sept. 9, 2015). At the Tenth Circuit, Petitioner transformed her separate "other bad acts" claims into a single claim that she was improperly sentenced to death on the basis of her sex. The Tenth Circuit denied this claim, finding no clearly established federal law. Pet. App. 99a-106a. The court also rejected Petitioner's witness-exclusion, *Miranda*, and cumulative error claims under § 2254(d). Pet. App. 106a-123a, 133a-138a, 169a-174a.

In a petition for writ of certiorari, Petitioner asked this Court to review the Tenth Circuit's disposition of only her due process and cumulative error claims. This Court addressed the due process claim, reversing on the legal question of whether its prior decisions have clearly established that due process might be violated by the introduction of irrelevant evidence. Pet. App. 61a-66a. This Court "remand[ed] the case for further proceedings consistent with this opinion." Pet. App. 66a.

On remand, the Tenth Circuit directed the parties to "file simultaneous supplemental briefs addressing the impact, on the court of further proceedings in this appeal, of the Supreme Court's" decision. (Doc. 193).⁵ Despite the breadth of this invitation, Petitioner did not ask the panel to reconsider its previous denial of her

⁴ *Miranda v. Arizona*, 384 U.S. 436 (1966).

⁵ All citations to documents filed in the Tenth Circuit are to the electronic pagination found on the top right of the page.

witness-exclusion, *Miranda*, or cumulative error claims. (Docs. 197-1, 222-1). The court confined its consideration to the claim as it was raised on direct appeal and concluded that Petitioner had not satisfied § 2254(d). Pet. App. at 33a-35a, 46a-50a. Notably, Judge Robert E. Bacharach dissented from the court’s first opinion but wrote the opinion affirming after this Court’s remand.

On September 29, 2026, Petitioner’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 only when it can reach the questions presented in a way that matters to the outcome of the case before it. *See 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.”) (internal quotation marks omitted); *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 192 (1997) (refusing to resolve a circuit split because, *inter alia*, it would not affect the outcome of the case); *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 concreteness provided when a question emerges precisely framed *and necessary for decision*”) (emphasis added); *Loc. No. 8-6, Oil, Chem. & Atomic Workers Int’l Union, AFL-CIO v. Missouri*, 361 U.S. 363, 367 (1960) (this Court does not decide on matters that will not affect the case before it).

The answer to Petitioner’s first question presented is yes, a federal habeas court may “review the same record that the state court reviewed.” Pet. at i. The Tenth Circuit explicitly recognized that “[i]nquiry into fundamental fairness requires examination of the entire proceedings[.]” Pet. App. 38a (quoting *Le v. Mullin*, 311 F.3d 1002, 1013 (10th Cir. 2002)). However, a federal court may not grant habeas relief for an unexhausted claim, 28 U.S.C. § 2254(b), or hold that a state court unreasonably denied arguments that were not presented to it. See *Sexton v. Beaudreaux*, 585 U.S. 961 (2018) (per curiam).

Similarly, as to Petitioner’s second question presented, part (a), yes, a court must assess the impact of allegedly improper evidence in light of the entire record. But again, the Tenth Circuit did exactly that. Pet. App. 38a.

And, finally, as to part (b) of Petitioner’s second question presented, the Tenth Circuit explicitly addressed the impact of the challenged evidence on the jury’s “deci[sion] between life or death.” Pet. App. at 49a.

Petitioner’s questions presented ignore the procedural posture of her claim and the laws by which the Tenth Circuit was bound. Even she does not squarely argue that state courts are required to comb the record for additional possible errors an appellant chose not to raise. This case is a poor vehicle for addressing Petitioner’s questions presented, and the circuit split she alleges is illusory. This Court should deny certiorari.

I. THE PETITION IS A POOR VEHICLE FOR PETITIONER’S QUESTIONS PRESENTED.

Petitioner’s is asking this Court to review a claim that she has never presented in state court or federal district court, and that was not considered by the Tenth Circuit. These are insurmountable obstacles that prevent this Court from reaching the questions presented. And even if this Court were to reach them, it would make no difference to the outcome of Petitioner’s case because the Tenth Circuit correctly refused to consider Petitioner’s new claim.

A. Petitioner’s Claim is Unexhausted

A federal court may not grant habeas relief for a claim that was not exhausted in state court. 28 U.S.C. § 2254(b). However, a federal court may *deny* relief for an unexhausted claim. 28 U.S.C. § 2254(b)(2). Consequently, this Court’s “usual practice [is] to decline to review” unexhausted claims. *Gray v. Netherland*, 518 U.S. 152, 165 (1996).

Exhaustion requires the petitioner to present “the same claim” in state and federal court. *Picard v. Connor*, 404 U.S. 270, 275 (1971). Exhaustion requires both “reference to a specific federal constitutional guarantee, *as well as a statement of the facts* that entitle the petitioner to relief.” *Gray*, 518 U.S. at 162-63 (emphasis added). Thus, a claim is not exhausted if “factual allegations were made to the federal courts that were not before the state courts.” *Picard*, 404 U.S. at 275. *See Wood v. Ryan*, 693 F.3d 1104, 1117 (9th Cir. 2012) (“To fairly present a claim in state court, a petitioner must describe the operative facts supporting that claim.”).

Exhaustion also requires compliance with state law, for otherwise the state court has not been given a fair opportunity to rule on the claim. *See Castille v. Peoples*, 489 U.S. 346, 351 (1989) (a claim raised “for the first and only time in a procedural context in which its merits will not be considered” absent special reasons is not exhausted); *Picard*, 404 U.S. at 276 (the exhaustion requirement ensures state courts have the opportunity to pass on the federal claim); *Wood*, 693 F.3d at 1117 (finding claim unexhausted where it was not presented in accord with state law). As will be shown, Petitioner did not comply with state law.

Petitioner concedes that she “did not cite every example of unduly prejudicial evidence or argument” in her direct appeal briefing.⁶ Pet. at 39-40. This is an understatement.

On direct appeal, state law required Petitioner to specify, with citations to the record, the exact nature of her legal argument and the facts supporting it. *Phillips v. State*, 989 P.2d 1017, 1036 n.6 (Okla. Crim. App. 1999) (“It is well established this Court will not search the record to support the appellant's unsupported assignments of error[.]”); *Mayes v. State*, 887 P.2d 1288, 1321 (Okla. Crim. App. 1994), *as corrected*

⁶ Petitioner offers only *one* example of evidence the Tenth Circuit disregarded that was purportedly part of the claim before the OCCA: “the panel’s list does not include testimony about Ms. Andrew’s perceived poor mothering . . . as an example of evidence that ‘served purposefully to humiliate’ her.” Pet. at 30 n.11. Petitioner cites page 371a of her appendix. Pet. at 30 n.11. Page 371a says nothing about Petitioner’s “mothering,” and the reference to humiliating evidence refers to the testimony about the way she dressed at a restaurant. Pet. App. 371a. Petitioner may be referring to her direct appeal prosecutorial misconduct claim (raised as Proposition 13). Pet. App. 428a. When she reached the Tenth Circuit, Petitioner included this prosecutorial misconduct allegation within the evidentiary due process claim, which Respondent argued was improper. (Doc. 196 at 20). In any event, this single example does not change the exhaustion analysis.

on denial of reh’g (Aug. 4, 1994) (“A brief must state the precise error and a sufficient record for this Court to understand the issue presented. It is the duty of counsel to give the page of the record at which the matter in controversy can be found and clearly present the argument and cite authority in support thereof. Consequently, this portion of his complaint is deemed waived.”); Rule 3.5(A)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Okla. Stat. tit. 22, Ch. 18, App. (2003) (an appellant’s brief must “set[] forth *all* assignments of error, supported by citations to the authorities, statutes and parts of the record. Failure to list an issue pursuant to these requirements constitutes waiver of alleged error” (emphasis added)).

Petitioner raised two propositions of error in which she asserted that various pieces of “other crime and bad act” evidence, including evidence of her extramarital affairs but also including evidence entirely unrelated to sex (e.g., that she made a prior, unsuccessful attempt to kill Mr. Andrew), violated her right to due process. Pet. App. 364a-373a, 393a-400a. Within those propositions, Petitioner challenged the introduction of nine items of evidence related to her interactions with men, as well as testimony about her uncaring demeanor when planning Mr. Andrew’s funeral. Pet. App. 33a-34a (listing the “ten testimonial passages” at issue on direct appeal). Petitioner did not alert the OCCA to any claim that there was “pervasive bias” in her trial, or that the State relied on “harmful stereotypes of women.” *Compare* Pet. at i with Pet. App. 370a (arguing the State presented evidence that Petitioner had affairs with two men “only to show that [Petitioner] was a bad *person* because she had affairs”) (emphasis added), 371a (describing evidence regarding Petitioner’s revealing

manner of dress and “com[ing] on to” men as “evidence that did nothing but show bad aspects of [Petitioner’s] character”).

When she reached the federal district court, Petitioner raised these same two claims with the same general due process “other crime and bad act evidence” legal theory and the same factual support. (ROA 121-40, 262-76).

In her Tenth Circuit opening brief, Petitioner combined the two propositions into one and abandoned numerous items of previously challenged evidence, choosing instead to focus almost exclusively on evidence pertaining to her relationships with men. 12/27/2016 Opening Brief (“Opening Br.”) at 28-53. For the first time, she focused on arguments about her sex. *See* Opening Br. at 28 (the State introduced “facts that exposed intimate details of [Petitioner’s] private life and portrayed her as a woman possessed of a wanton, nearly uncontrollable sexuality”); Opening Br. at 29 (“The prosecution signaled at the very outset of trial that a sexual-shaming strategy would be no sideshow.”); Opening Br. at 45-46 (the State persuaded jurors to sentence her to death by “portray[ing] her as evil in a uniquely feminine way, as a heretic who has defiled society’s notions of womanhood and lost the protection that femininity typically affords them in the jury room”) (internal quotation marks omitted). As the Tenth Circuit recognized, Petitioner also “rel[ie]d on federal courts’ recognition of the prejudicial effects of stereotyping.” Pet. App. 42a. Thus, Petitioner changed her legal theory. The claim also expanded to include additional evidence, as well as the prosecutors’ opening and closing arguments. Opening Br. at 29, 37-39, 44-45.

Petitioner continued to expand the claim in her certiorari petition and post-remand briefing. Her brief on remand added the following:

- “[T]wo pastors condemned Ms. Andrew’s adultery” (Doc. 197-1 at 7, 28);
- The State tried every day “to prove that Ms. Andrew was culpable because she failed to conform to society’s expectations of women” (Doc. 197-1 at 7);
- Petitioner’s “failure to cry made her ‘different’” (Doc. 197-1 at 7);
- “Ms. Andrew’s sharp language with her husband, her ‘awfully expensive’ clothing, and a hot tub on her property that neighbors speculated was for ‘skinny dipping’” (Doc. 197-1 at 7);
- Prosecutorial argument “that Ms. Andrew ‘can’t be a woman of God,’ [and] branded her a ‘slut puppy’” (Doc. 197-1 at 7, 14-15);
- Evidence of her affair with Mr. Pavatt (Doc. 197-1 at 8);
- Pastor Michael Feters’ testimony about Petitioner’s cursing at Mr. Andrew (Doc. 197-1 at 8);
- Petitioner’s “[v]ery Gothic, long black hair [alteration adopted]” (Doc. 197-1 at 10, 29);
- Mr. Andrew’s devotion to God and Petitioner (Doc. 197-1 at 11);
- A “third pastor” who “conveyed the church’s adverse ‘judgment about [Ms. Andrew’s] improper clothing and the relationship she was having with Jim Pavatt’ [alteration adopted]” (Doc. 197-1 at 11);

- Petitioner’s demeanor after the murder which was “brought up 14 times” “in just two days of testimony” “and at least 25 times over the course of the guilt phase” (Doc. 197-1 at 12);
- Petitioner’s assertion that Mr. Andrew was abusive, offered as an explanation for her unemotional demeanor (Doc. 197-1 at 12 & n.4);
- Petitioner’s demeanor was unusual “for a wife” (Doc. 197-1 at 12);
- The “filthy” state of Petitioner’s house (Doc. 197-1 at 13);
- The State’s final guilt stage witnesses “knitted together the common threads of its trial strategy” including testimony about Petitioner’s “awfully expensive boots” and the way Mr. Pavatt looked at Petitioner in a hot tub (Doc. 197-1 at 13);
- Prosecutorial argument that Ms. Andrew “is no meek, mild woman” who is attractive, had sex with Mr. Pavatt for months, and did not cry when questioned by police (Doc. 197-1 at 14);
- A newspaper article to support the claim the prosecutor held up a pair of Petitioner’s thong underwear—a claim Petitioner has previously admitted was not supported by the record, Pet. App. 100a n.10, and for which she had never previously cited this article (Doc. 197-1 at 14 n.5);
- Defense argument regarding the State’s trial strategy (Doc. 197-1 at 15-16);
- The excluded trial witnesses who are not part of Petitioner’s Ground I (Doc. 197-1 at 15-16);

- Prosecutorial opening statement that the State’s evidence “will show that this case is about a controlling wife” (Doc. 197-1 at 6-7, 25);
- “[T]he penalty phase saw prosecutors renew their interrogation of Ms. Andrew’s character” by talking about Mr. Andrew’s faith, referencing Petitioner’s “‘terribly profane’ language”, and her affairs, and her relationship with her children (Doc. 197-1 at 16-17);
- During sentencing “the State asked a single defense witness to condemn Ms. Andrew’s parenting” “[n]ine times” (Doc. 197-1 at 16);
- Questions to another witness were an “invitation to connect Ms. Andrew’s motherhood and sexual history with her culpability” (Doc. 197-1 at 17);
- Prosecutorial argument that “‘this woman [Petitioner]’ had people around her ‘under the spell’” and asking how jurors could mitigate the murder of a loving husband (Doc. 197-1 at 17);
- Prosecutorial argument that Petitioner “was ‘not like you and me’”, showed “‘No emotion. No remorse. No grief. And that’s because she’s different.’”, and that Petitioner is “different and she deserves that different kind of punishment that’s reserved for people exactly like her” (Doc. 197-1 at 17-18);
- An argument that the State’s evidence was intended to “paint Ms. Andrew as subversive to the social order” (Doc. 197-1 at 20);
- “The State cast Ms. Andrew’s sexual history as deviant, subversive, and in sinful contrast to Mr. Andrew’s piety.” (Doc. 197-1 at 29);

- “The State contrasted her ‘improper’ clothing and hair with expectations of appropriately modest and ‘normal’ attire.” (Doc. 197-1 at 29);
- “[T]he State condemned her impious demeanor as counter to stereotypical expectations of a good, chaste, and feminine wife.” (Doc. 197-1 at 29);
- “[T]he State called on jurors to infer that Ms. Andrew’s rebuking of gendered social norms rendered her a threat to social stability and safety.^[7] Jurors were thus primed to interpret Ms. Andrew’s subversion of social expectations placed on women and wives” as proof of her guilt (Doc. 197-1 at 29-30);
- Petitioner also relies on cases and argument regarding “sex-based stereotypes”, “decision-making on the basis of an immutable characteristic, like sex”, “traditional concepts of men’s and women’s roles”, and “racial stereotypes” that were not presented in her opening brief and, more importantly, comprise an argument that she did not make in state court (Doc. 197-1 at 23-24);
- Petitioner claims the State’s case was “premised on” Petitioner’s behavior “contrasted with behavior expected of all ‘normal’ women and the religious values guiding Mr. Andrew and his community” and that its “narrative lacked a meaningful focus on the facts underlying the offense itself—facts unpolluted by gender bias.” (Doc. 197-1 at 25-26);
- “State-introduced sex-stereotypes tainted every piece of evidence, every credibility determination, and every argument.” (Doc. 197-1 at 28);

⁷ Notably, the jury rejected the continuing threat aggravating circumstance. Pet. App. 244a-245a.

- The State denigrated Petitioner by “weaponizing sex-based stereotypes about . . . women’s roles as wives and homemakers.” (Doc. 197-1 at 31);
- “The State’s own gendered characterization of its case and its relentless use of stereotypes to discredit and demonize Ms. Andrew ultimately exposed the trial as a modern-day witch hunt aimed to reduce Ms. Andrew to a villainous trope on whom the jury could readily pin the crime—the archetypal adulterer, the wicked Jezebel, the irresistible and deadly siren whom the jury needed to punish.” (Doc. 197-1 at 31);
- The State’s “tactic of overwhelming jurors with sex-stereotyping evidence [in second stage] blinded them to Ms. Andrew’s humanity[.]” (Doc. 197-1 at 31);
- “In casting Ms. Andrew as a woman who subverts the rules of womanhood, of society, and of God, the State invited jurors to conclude that she posed a danger to society and was a threat to be eradicated.”⁸ (Doc. 197-1 at 31);
- In second stage, the State asked witnesses about her “profane” language, her “capabilities as a mother and pressed her family’s pastor to condemn her behavior[.]” (Doc. 197-1 at 32);
- In second stage, “the State argued that jurors simply could not mitigate the death of a pious husband at the hands of his sinful wife . . . and in language reminiscent of a seventeenth-century Salem courtroom, the prosecution twice claimed that ‘this woman’ had people around her ‘under [a] spell.’” (Doc. 197-1 at 32);

⁸ Once again, the jury rejected the continuing threat aggravating circumstance.

- The State convinced the jury to return a death sentence based on “Ms. Andrew’s deviance from the norm, her non-conformity to sex-based stereotypes”, “strip[ping her] of her humanity” and “direct[ing] the jury to condemn [her] transgressions as an unfeminine, unchaste, ungodly woman[.]” (Doc. 197-1 at 33); and
- “At sentencing, the State argued that Ms. Andrew was less human and therefore less deserving of life, because she failed to conform to expectations of what it means to be a ‘good’ woman.” (Doc. 197-1 at 33).

By way of contrast, the direct appeal brief contains one use of the word “woman” in a potentially pejorative manner (that is, making Petitioner’s gender relevant to the claim), in a quote from Mr. Pavatt *within a different claim alleging the admission of hearsay*. Pet. App. 380a (“nuttier than a fruit cake woman”) (emphasis removed). Petitioner’s supplemental brief was replete with such references. *E.g.*, (Doc. 197-1 at 14, 17, 18, 24, 26, 28, 29, 31, 32). Even the word “sex” (or some derivation thereof) barely appears in the direct appeal brief; it is used only three times and only once in a relevant proposition of error. *See* Pet. App. 360a, 369a, 378a. There were *fifty-five* uses of the word in Petitioner’s supplemental Brief. (Doc. 197-1 at 6-9, 11, 13-15, 17-25, 27-31, 33-34). While Petitioner’s direct appeal brief (barely) preserved a challenge to her sentence, she made no argument regarding the possible effect of the challenged evidence on the jury’s sentencing determination. Pet. App. 364a-373a, 393a-400a. Finally, Petitioner argued below that the OCCA’s

decision was unreasonable in light of “the law governing the use of sex-based stereotyping.” (Doc. 197-1 at 20). But she had provided no such law to the OCCA.

Petitioner did not give the OCCA a fair opportunity to rule on the claim she now presses. Petitioner’s suggestion that the claim is exhausted because the OCCA had the entire record before it, Pet. at 39, is foreclosed by *Rose v. Lundy*, 455 U.S. 509 (1982). There, “[a]pparently in an effort to assess the ‘atmosphere’ of the trial, the District Court reviewed the state trial transcript and identified 10 instances of prosecutorial misconduct, only five of which the respondent had raised before the state courts.” 455 U.S. at 511. The district court recognized the exhaustion requirement but concluded that “there is such a mixture of violations that one cannot be separated from and considered independently of the others.” 455 U.S. at 512 (internal quotation marks omitted). This Court’s dissenting Justice believed, as Petitioner does, that the district court “properly evaluated the respondent’s two exhausted claims *in the context of the entire trial*.” *Id.* at 519 (internal quotation marks omitted, emphasis added). This Court disagreed: “Unquestionably, however, the District Court erred in considering unexhausted claims” in violation of § 2254(b). *Id.*; accord *Anderson v. Harless*, 459 U.S. 4, 6 (1982) (“It is not enough that all the facts necessary to support the federal claim were before the state courts[.]”).

Without acknowledging *Lundy*, Petitioner asserts that “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).” Pet. at 40.

It is unclear what Petitioner means. The words, “relate back,” do not appear in the *Hillery* opinion. *Hillery* did not overrule *Lundy*.

Hillery argued in state court that black potential jurors were systematically excluded from his grand jury. 474 U.S. at 255-56. When he raised the same claim on habeas, the district court ordered the warden to provide additional information. *Id.* at 257-59. The warden argued the additional evidence rendered the claim unexhausted. *Id.* at 257. This Court stated that it had “never held that presentation of additional facts to the district court, *pursuant to that court’s directions*, evades the exhaustion requirement *when the prisoner has presented the substance of his claim to the state courts.*” *Id.* at 257-58 (emphasis added). This Court concluded that the new evidence did not “fundamentally alter” the claim presented in state court so as to render it unexhausted. *Id.* at 258-60. This Court “emphasize[d] that the District Court’s request for further information was evidently motivated by a responsible concern that it provide the meaningful federal review of constitutional claims that the writ of habeas corpus has contemplated throughout its history.” *Id.* at 260. Hillery did not attempt to go beyond what the district court ordered. *Id.* Thus, “the circumstances present no occasion for the Court to consider a case in which the prisoner has attempted to expedite federal review by deliberately withholding essential facts from the state courts.” *Id.*

Lundy controls here. Alleged instances of error that are not raised in state court are unexhausted, even if they fall under the same due process umbrella as other exhausted errors. But even under *Hillery*, Petitioner has fundamentally altered her

claim, as shown above. The limited due process claim she raised on direct appeal was insufficient to exhaust the expansive, sex-focused claim she raises now. *See Lucio v. Lumpkin*, 987 F.3d 451, 480 (5th Cir. 2021) (“[B]ecause Lucio changed her argument over time, we must analyze each claim as it existed at the time Lucio presented it to the state courts. That is hornbook law. The dissenters appear to believe that a state prisoner can raise different claims at different times with different facts in the state court, then smush them all together into a single claim in federal court. This belief has no basis in law.”) (citation omitted); *Jackson v. Conway*, 763 F.3d 115, 143-44 (2d Cir. 2014) (finding a portion of a prosecutorial misconduct claim unexhausted); *Wood*, 693 F.3d at 1117 (“a general allegation that a prosecutor engaged in pervasive misconduct is not sufficient to alert a state court to separate specific instances of purported misconduct”); *Wagner v. Smith*, 581 F.3d 410, 415–18 (6th Cir. 2009) (finding claim unexhausted where “it did not present the *prosecutorial misconduct* claim to the state court in the same legal and factual terms as Petitioner did before this Court”) (emphasis adopted).⁹

⁹ *Lundy*, and these other cases, foreclose Petitioner’s suggestion that the OCCA’s statutory mandatory sentence review, which requires it to assess in every capital case whether the sentence was “imposed under the influence of passion, prejudice, or any other arbitrary factor,” was sufficient to permit the Tenth Circuit to address her claim. *See* Okla. Stat. tit. 21, § 701.13(C)(1). A court’s broad review for fundamental fairness does not suffice to exhaust a habeas petitioner’s specific claims. By Petitioner’s logic, every claim that might affect a death sentence is exhausted by the OCCA’s mandatory sentence review. The OCCA does not see it that way. *Cf. Turrentine v. State*, 965 P.2d 985, 987 n.1 (Okla. Crim. App. 1998) (finding prosecutorial misconduct claims not raised on direct appeal to be waived). Moreover, Petitioner did not make this argument below. *See Cutter v. Wilkinson*, 544 U.S. 709, 719 n.7 (2005) (“Because these defensive pleas were not addressed by the Court of Appeals, and mindful that we are a court of review, not of first view, we do not consider them here.”).

Exhaustion is never a “distraction.” It is a doctrine this Court adopted long before Congress enacted § 2254(b). *See Ex parte Royall*, 117 U.S. 241 (1886). But it is particularly important in cases like this one because evaluating the admissibility of evidence is almost exclusively the province of state courts. *See Romano v. Oklahoma*, 512 U.S. 1, 10 (1994) (“That the evidence may have been irrelevant as a matter of state law, however, does not render its admission federal constitutional error.”); *Spencer v. Texas*, 385 U.S. 554, 563-64 (1967) (“Cases in this Court have long proceeded on the premise that the Due Process Clause guarantees the fundamental elements of fairness in a criminal trial. But it has never been thought that such cases establish this Court as a rulemaking organ for the promulgation of state rules of criminal procedure.”) (internal citations omitted). Petitioner’s claim assumes the inadmissibility of a lot of evidence (and prosecutorial argument) that she never gave the OCCA a chance to evaluate.

“[I]t would be unseemly in our dual system of government for a federal [habeas] court to upset a state court conviction without [giving] an opportunity to the state courts to correct a constitutional violation, and to do so consistent with their own procedures.” *Shinn v. Ramirez*, 596 U.S. 366, 379 (2022) (internal quotation marks and citations omitted, second alteration adopted). This Court should deny the Petition.

B. Petitioner’s Current Claim was Waived in Federal Court

The Tenth Circuit generally refuses to consider claims and arguments not raised in district court, and/or not raised in the opening brief on appeal. *Harris v.*

Sharp, 941 F.3d 962, 975, 1002 (10th Cir. 2019); *Cuesta-Rodriguez v. Carpenter*, 916 F.3d 885, 902 n.19 (10th Cir. 2019). As explained above, Petitioner’s claim in federal district court was nearly identical to the claim raised on direct appeal. Further, Petitioner’s claim has changed even since her Tenth Circuit opening brief. *See* (Doc. 220 at 10-17); *Brief in Opposition to Petition for Writ of Certiorari*, No. 23-6573 at 13-14. If this Court grants review and remands for further consideration, these procedural hurdles will continue to bar consideration of Petitioner’s claim.

For the foregoing reasons, Petitioner’s case is not a good vehicle for her questions presented. Certiorari should be denied.

II. PETITIONER’S ASSERTED CIRCUIT SPLIT IS ILLUSORY AND DOES NOT PRESENT A COMPELLING REASON TO GRANT CERTIORARI.

While declining to address exhaustion, the Tenth Circuit nonetheless recognized that Petitioner “challenge[d] the introduction of evidence [in her habeas appeal] that she didn’t challenge in the state-court appeal.” Pet. App. 34a-35a. The court further recognized that the OCCA (and, for that matter, the Tenth Circuit) “relies on the evidence identified by the parties rather than search the record to find support for a defendant’s claim.” Pet. App. 35a. Accordingly, the Tenth Circuit included within its analysis only the alleged errors Petitioner had identified on direct appeal. Pet. App. 33a-35a, 47a-48a. In doing so, the court applied its precedents which require it to “review the reasonableness of a state court’s ruling ‘in light of the arguments the petitioner raised in the state court.’” Pet. App. 33a (quoting *Wellmon v. Colo. Dep’t of Corr.*, 952 F.3d 1242, 1249 (10th Cir. 2020)).

Petitioner claims the Tenth Circuit has created a circuit split, but she is incorrect. Petitioner cites a footnote from this Court’s decision in *Miller-El v. Dretke*, 545 U.S. 231, 241 n.2 (2005) and claims the Tenth Circuit’s approach conflicts with three cases from two circuits. Pet. at 27-29. *Miller-El* and the three circuit cases each involved a claim under *Batson v. Kentucky*, 476 U.S. 79 (1986).¹⁰ See *McDaniels v. Kirkland*, 813 F.3d 770, 780-81 (9th Cir. 2015) (en banc); *Higgins v. Cain*, 720 F.3d 255, 262 (5th Cir. 2013); *Jamerson v. Runnels*, 713 F.3d 1218, 1227 (9th Cir. 2013). These cases are distinguishable and the claimed circuit split is illusory.

In *Miller-El*, the majority rejected the dissent’s argument that, under § 2254(d)(2), it should not consider the State’s disparate questioning of potential jurors as evidence of racial discrimination because *Miller-El* had not pointed to that questioning in state court. 545 U.S. at 241 n.2. The majority stated that the dissent “conflate[d] 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.” *Id.*

Miller-El is distinguishable on at least three grounds. First, it was undisputed that the claim there had been fairly presented in state court. *Id.* Petitioner has not fairly presented her claim. Second and relatedly, *Miller-El* involved arguments *in support of the* claim; i.e., *Miller-El*’s claim was racial discrimination and he offered another theory to prove said discrimination. Here, Petitioner’s new evidence and

¹⁰ One of the cases involved a claim that counsel was ineffective for failing to raise a *Batson* claim. *Higgins v. Cain*, 720 F.3d 255, 259-60 (5th Cir. 2013). However, the court’s analysis of the scope of the evidence it could consider discussed only the underlying *Batson* claim. *Id.* at 262-63.

argument *are* the claim; i.e., Petitioner once said due process was violated by evidence of two affairs and the way she dressed and acted around men, she now says due process was violated by, *inter alia*, evidence of three affairs, her use of foul language, her hot tub use, her poor housekeeping, her rebuking of social norms, etc.

Third, *Miller-El* involved § 2254(d)(2). Petitioner waived any argument under that provision. Pet. App. 29a-31a. As will be discussed in detail below, a different rule applies under § 2254(d)(1). See *Beaudreaux*, 585 U.S. 961. *Miller-El* did not require the Tenth Circuit to address Petitioner’s new evidence and arguments.

Nor is there a circuit split. The three cases Petitioner cites address whether *Cullen v. Pinholster* prevented a federal court from considering evidence that was before the state trial court when it found no racial discrimination but was not before the state appellate court. See 563 U.S. 170, 180-81 (2011) (review under § 2254(d)(1) “is limited to the record that was before the state court”). Here, the Tenth Circuit did not rely on *Pinholster*. In fact, Respondent concedes that the holding of *Pinholster* does not control here.¹¹ But that concession does not help Petitioner because she is comparing apples and oranges.

Petitioner wanted the Tenth Circuit to address evidence and arguments *no* state court had ruled on. Petitioner cites no case in which a circuit court has held that, under § 2254(d)(1), a federal court must address evidence and arguments that were not passed on by any state court.

¹¹ As will be explained, the *reasoning* of *Pinholster* does, however, support the Tenth Circuit’s approach.

Finally, Petitioner is not raising a *Batson* claim, which is a singular claim that the prosecutor discriminated in jury selection. Rather, Petitioner is arguing that the admission of certain items of evidence violated due process. An adjudication of that claim requires analysis of the allegedly improper evidence.

There is no circuit split. But even if there were, it deserves further percolation. *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 courts “to debate and evaluate the different approaches to difficult and unresolved questions of constitutional law”). If this is a compelling question—and the paucity of law from lower courts suggests it is not—then the lower courts should continue to grapple with it. And they should be given time to address the applicability of this Court’s decision in *Beaudreaux*, which is discussed below and was decided after the three cases Petitioner cites.

Any split is shallow and, as described above, not directly on point. Accordingly, the lower courts should have the opportunity to consider this issue in more cases, and in cases that bear a closer resemblance to this one. Certiorari should be denied.

III. THE TENTH CIRCUIT’S DECISION IS CORRECT.

Finally, this Court should deny certiorari because the Tenth Circuit’s decision is correct.

A. The Tenth Circuit Correctly Refused to Consider Arguments the OCCA was not Given the Opportunity to Address

Section 2254(d) is designed to “ensure that state proceedings are the central process, not just a preliminary step for a later federal habeas proceeding.” *Harrington v. Richter*, 562 U.S. 86, 103 (2011). Thus, habeas review is “backward-looking.” *Pinholster*, 563 U.S. at 182; see *Dunn v. Reeves*, 594 U.S. 731, 740 (2021) (per curiam) (“We start, as we must, with the case as it came to the Alabama court.”); *Pinholster*, 563 U.S. at 182 (“review under § 2254(d)(1) focuses on what a state court knew and did”). “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.” *Id.* at 182-83.

While the facts Petitioner currently relies upon were, in one sense, before the OCCA, the Tenth Circuit was correct that, under § 2254(d)(1), federal courts should not “expect state courts to address arguments the parties do not raise.” Pet. App. 33a (quoting *Wellmon*, 952 F.3d at 1249). In fact, the Tenth Circuit would have erred had it done otherwise.

In *Beaudreaux*, the Ninth Circuit granted habeas relief after concluding the state court unreasonably denied an ineffective assistance of counsel claim. This Court reversed, concluding that the lower court “ignored well-established principles.” 585 U.S. at 961-62. Its “opinion was not just wrong. It also committed fundamental errors that this Court has repeatedly admonished courts to avoid.” *Id.* at 967. “First, the Ninth Circuit effectively inverted the rule established in *Richter*. Instead of considering the ‘arguments or theories [that] could have supported’ the state court’s

summary decision, the Ninth Circuit considered arguments against the state court’s decision *that Beaudreaux never even made in his state habeas petition.*” *Id.* at 967-68 (alteration adopted, internal citation omitted, emphasis added).

Petitioner told the OCCA her right to a fair trial was violated by evidence of certain specified other “bad acts” with no emphasis on the sexual or “gendered” nature of that evidence. It would have been a fundamental error for the Tenth Circuit to conclude that the OCCA unreasonably denied relief because, as Petitioner now argues, the State “hinged its case on harmful stereotypes of women, infecting every day of [Petitioner’s] trial with evidence and argument ‘to focus the jury’s attention on . . . [Petitioner’s] allegedly unwomanly and unmotherly behavior.’” Pet. at i (quoting Pet. App. 4a).

This conclusion is bolstered by state law. As discussed *supra*, the OCCA requires appellants to provide argument and citations to the record, and it will not search the record to find error not raised by, or properly supported by, an appellant’s brief. This Court does not require otherwise.

“In our adversarial system of adjudication, we follow the principle of party presentation.” *United States v. Sineneng-Smith*, 590 U.S. 371, 375, 140 S.Ct. 1575, 206 L.Ed.2d 866 (2020). The parties “frame the issues for decision,” while the court serves as “neutral arbiter of matters the parties present.” *Ibid.* (quoting *Greenlaw v. United States*, 554 U.S. 237, 243, 128 S.Ct. 2559, 171 L.Ed.2d 399 (2008)). To put it plainly, courts “call balls and strikes”; they don’t get a turn at bat. *Lomax v. Ortiz-Marquez*, 590 U. S. —, —, 140 S.Ct. 1721, 207 L.Ed.2d 132 (2020).

Clark v. Sweeney, 607 U.S. 7, 9 (2025) (per curiam).

Setting aside exhaustion and the fact that *Pinholster*'s ban on extra-record evidence does not apply, the Tenth Circuit was nonetheless correct. Under § 2254(d), state courts must be given the benefit of the doubt. *Pinholster*, 563 U.S. at 181. The OCCA cannot be faulted for failing to anticipate arguments Petitioner waited almost a decade after its opinion to make. Certiorari should be denied.

B. Petitioner Abandoned Her Other Claims

Petitioner criticizes the Tenth Circuit for not considering other claims she raised in her opening brief but did not reassert when the case was remanded. Pet. at 36-38. But Petitioner abandoned these claims. The Tenth Circuit's order for briefing after this Court's remand was very broad: "file simultaneous supplemental briefs addressing the impact, on the court of further proceedings in this appeal, of the Supreme Court's" decision. (Doc. 193). Despite the breadth of this invitation, Petitioner did not ask the panel to reconsider its previous denial of her witness-exclusion, *Miranda*, or cumulative error claims. (Docs. 197-1, 222-1); see (Doc. 221-1 at 6 (Petitioner stating "[t]he *only* question before the Court is whether the State's introduction of irrelevant evidence" rendered her trial unfair) (emphasis added)). Petitioner's failure is fatal under the Tenth Circuit's precedent. See *Allen v. Zavaras*, 568 F.3d 1197, 1199 (10th Cir. 2009) ("We do not consider the issues raised by Allen in his original filing. By not including those issues in his supplemental brief, Allen has abandoned them.").

The cases Petitioner cites do not apply. Pet. at 37. In two of them, this Court simply held that all complained-of instances of prosecutorial error must be

considered. *See Kyles v. Whitley*, 514 U.S. 419, 436 (1995); *Donnelly v. DeChristoforo*, 416 U.S. 637, 645 (1974). Petitioner did not raise these other claims on remand. Thus, the Tenth Circuit was not obliged to consider them.

In *Glossip v. State*, 604 U.S. 226, 251 (2025), the petitioner raised, and the State conceded, other errors that this Court held supported its de novo review (it was not a habeas case). Here, and only as to guilt but not as to her sentence, Petitioner fleetingly referenced these other alleged errors in a single line. (Doc. 197-1 at 33). The State did not (and does not) concede that relief should be granted. And § 2254(d)(1) controls. *See* Pet. App. 23a. *Glossip* is inapplicable.

Moreover, Petitioner’s claims were barred by law-of-the-case doctrine. *See Entek GRB, LLC v. Stull Ranches, LLC*, 840 F.3d 1239, 1242 (10th Cir. 2016) (a legal decision made at one stage of proceedings and unchallenged in a later stage is generally law of the case). In its cumulative error review, the Tenth Circuit, evaluating Petitioner’s cumulative error claim, found it “evident that [Petitioner’s] trial was fundamentally fair” even though that court: (1) considered arguments Petitioner had not made in state court, Pet. App. 100a n.11; (2) “share[d] the OCCA’s concerns about some of the ‘sexual and sexualizing’ evidence admitted at trial, and the use to which it was put by the government”, Pet. App. 106a n.15; (3) considered every error found by the OCCA to include admission of some of the evidence at issue on remand¹², the trial court’s exclusion of defense witnesses, and the trial court’s

¹² Although the majority initially refused to consider this evidence because it found no constitutional error, it later considered this evidence when it discussed the dissent’s finding of cumulative error. Pet. App. 172a n.56.

failure to instruct the jury regarding the proper use of evidence of other bad acts committed by Petitioner, Pet. App. 170a-174a; and (4) concluded that even if every error considered by the dissent (including the alleged *Miranda* violation) were included in its cumulative error analysis the majority “would still rule that the overwhelming evidence of Ms. Andrew’s guilt would outweigh any harm from the dissent’s combined constitutional violations,” Pet. App. 172a n.56.

In its initial opinion, the Tenth Circuit considered every error that was properly before it and held that, even considered cumulatively, they did not deprive Petitioner of a fair trial. Remand would serve no purpose.

C. Petitioner Asked the Tenth Circuit to apply Buck v. Davis; She Cannot Now Complain that the Court Relied on it to Deny Relief

Petitioner complains that the Tenth Circuit analyzed her claim by comparing it to this Court’s decision in *Buck v. Davis*, 580 U.S. 100 (2017). Pet. at 31-36. But the court was acting on Petitioner’s invitation. (Doc. 197-1 at 24-25). *Buck* was decided after the OCCA’s decision and was, therefore, irrelevant to the § 2254(d)(1) analysis. *See Pinholster*, 563 U.S. at 182 (“State-court decisions are measured against this Court’s precedents as of the time the state court renders its decision.”) (internal quotation marks omitted). Nonetheless, the Tenth Circuit did as Petitioner requested and considered her argument “that the trial was fundamentally unfair” in light of “federal courts’ recognition of the prejudicial effects of stereotyping.” Pet. App. 42a-45a, 47a-50a. The court distinguished *Buck* because the evidence there related to “the central issue at sentencing,” *Buck*, 580 U.S. at 113, 121, which is not true of Petitioner’s case. Pet. App. 42a-50a.

The Tenth Circuit did not hold that due process may never be violated by the admission of improper evidence that does not pertain to the central issue. It merely held that the caselaw Petitioner asked it to consider did not compel relief.

Moreover, Petitioner does not explain how this alleged error would entitle her to relief in this case. She bears the burden of proving that the OCCA's 2007 decision was an unreasonable application of this Court's cases as of 2007. This Court has not set forth any particular test for this type of claim. *See* Pet. App. 78a (Thomas, J., dissenting) (this Court's precedent "on due process does not establish a test for determining when a trial is so infected by prejudicial evidence as to be fundamentally unfair"). Petitioner's failure to address the broad discretion owed to the OCCA is fatal to her quest for habeas relief. *Cf. White v. Woodall*, 572 U.S. 415, 424 (2014) (quoting *Lockyer v. Andrade*, 538 U.S. 63, 76 (2003)) ("where the 'precise contours' of [a] right remain 'unclear,' state courts enjoy 'broad discretion' in their adjudication of a prisoner's claims"); *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004) ("The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations.").¹³ Certiorari should be denied.

¹³ Petitioner's complaint that the Tenth Circuit relied on the strength of the evidence against her is foreclosed by this Court's cases. *See Kansas v. Carr*, 577 U.S. 108, 122-24 (2016) (denying defendants' due process claim related to the admission of prejudicial evidence in their joint capital sentencing trial as "beyond the pale" in light of the strength of the evidence and the jury instructions); *Romano v. Oklahoma*, 512 U.S. 1, 13 (1994) (denying due process claim because, *inter alia*, "the other relevant evidence presented by the State was sufficient to justify the imposition of the death sentence in this case"). And her complaint that the Tenth Circuit said too little about her sentence properly reflects how little argument she presented in state court on that question. Pet. App. 47a-48a, 364a-373a, 393a-400a. *Cf. Johnson v. Williams*, 568 U.S. 289, 299 (2013) (recognizing that courts may not provide extensive analysis of claims a litigant makes in passing).

IV. A CAPITAL DEFENDANT'S CHARACTER IS ALWAYS AT ISSUE.

Finally, Respondent will briefly address Petitioner's (unexhausted) argument that she was sentenced to death because she is a woman. First, the Petition's description of Petitioner's trial is grossly inaccurate. As mentioned, the Tenth Circuit stated ten times in its initial opinion that there was overwhelming evidence establishing Petitioner's guilt. Petitioner ignores the evidence on which her conviction was based, assumes evidence was improperly admitted when it was not, and assumes evidence was intended as a comment on her sex when it was not.

For example, on direct appeal, Petitioner admitted that evidence of her affair with Mr. Pavatt "was arguably relevant[.]" Pet. App. 369a. Of course it was relevant. The affair was part of the motive for the murder. Petitioner and Mr. Pavatt planned to marry but needed the \$800,000 insurance payout on Mr. Andrew's life because Petitioner did not want to work and Mr. Pavatt was deeply in debt. (Tr. II 256; Tr. III 627; Tr. X 2333-34; Tr. XII 2959).

Petitioner now includes evidence of that affair in her description of the allegedly improper evidence. *See e.g.* Pet. at 5 ("the State elicited testimony concerning 'inappropriate behavior' between Mr. Pavatt and [Petitioner]"), 7 ("the State elicited details of Ms. Andrew's extramarital affairs on nine of the fourteen days of the State's guilt phase case"). Only by including this proper evidence can Petitioner claim that the State introduced improper evidence "every single day" of her trial. *See* Pet. at 1.

In reality, as found by the OCCA (and not disproven by Petitioner), almost all of the challenged evidence was relevant. Petitioner's implication that the State presented two weeks of irrelevant, prejudicial evidence before finally turning to the murder of Rob Andrew, Pet. at 9 ("[t]he trial stretched into a third week before the State turned to Mr. Andrew's shooting"), is simply false. Almost all of the challenged evidence was introduced in the first two days of trial. *E.g.*, (Tr. II 246-51 (Petitioner's affair with James Higgins), 319-25 (David Ostrowe's testimony about Petitioner's dress/behavior at dinner), 341-49 (the babysitter's testimony), 361-67 (Petitioner's affair with Rick Nunley). Yet, in those same two days, the evidence also established: the affair between Petitioner and Mr. Pavatt and the ensuing divorce (motive); the animosity Petitioner and Mr. Pavatt had towards Mr. Andrew (motive); Mr. Andrew's fear (based on his brake lines being intentionally cut) that Petitioner and Mr. Pavatt were trying to kill him (motive and identity); Mr. Andrew's concern that Petitioner and Mr. Pavatt were trying to fraudulently obtain control over the life insurance (motive and identity); Petitioner's lack of grief after Mr. Andrew's murder (identity); the existence of a bitter custody battle between Petitioner and Mr. Andrew (motive); a threat Mr. Pavatt made against Mr. Andrew (motive and identity); Petitioner's anger that Mr. Andrew was going to have an extended visit with the children at Thanksgiving (motive); Petitioner's relationship with Mr. Higgins, whom she told she wished Mr. Andrew was dead but that she needed his money, who helped Mr. Andrew move out and confirmed Mr. Andrew did not take his shotgun (which eventually became the murder weapon), who established that Petitioner had a key to her

neighbors' home (where evidence of the murder was later found), to whom Mr. Pavatt claimed he used to kill people for the CIA, who was with Petitioner and Mr. Pavatt just hours before the murder helping move Mr. Pavatt's appliances into the Andrew family's garage, and who testified regarding Petitioner's unusual behavior that day (motive, opportunity, identity); and Petitioner's affair with Rick Nunley who remained her close friend at the time of the murder, to whom she expressed her concern about the life insurance, to whom she did not express grief when she called to tell him Mr. Andrew was killed, and with whom Petitioner placed the responsibility of trying to get Mr. Pavatt's written confession to her attorneys. (Tr. I 124-57; Tr. II 173-460). Petitioner's account of a trial nearly devoid of evidence of murder is fictional.

All evidence presented by the State in a criminal trial should be prejudicial to the defendant; if it is not prejudicial, it is not relevant. The question is whether evidence is *unfairly* prejudicial. *See* Fed. R. Evid. 403 (relevant evidence may be excluded if its probative value is substantially outweighed by the danger of "*unfair* prejudice") (emphasis added); Okla. Stat. tit. 12, § 2403 (same). In this case, Petitioner chose to place her character at issue in guilt stage, and character is always at issue at sentencing. *See* (Tr. I 55-80 (describing Petitioner as a good Christian, mother, and wife)); *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 247 (2007). So, as in every capital case, the State presented plenty of prejudicial (but almost all relevant) evidence about Petitioner. Petitioner is choosing to view evidence of her conduct through the lens of her sex, but that is not how the State presented it.

For instance, Petitioner points to the prosecutor's opening statement, which began, "This case is about a controlling wife." Pet. at 4. The prosecutor began the trial of Mr. Pavatt with those exact words: "Ladies and gentlemen of the jury, this case is about a controlling wife. . . ." (Pavatt Tr. V 1299). Petitioner's character as a wife was relevant because she was accused of murdering her husband. No one would bat an eye if a husband were on trial for killing his wife and the prosecutor said in opening statement, "This case is about a controlling husband."

The same is true of Petitioner's lack of grief. Pet at 9-10. In her brief on remand, Petitioner stated that a "detective opined that [Petitioner]'s 'display of emotion was unusual' *for a wife*." (Doc. 197-1 at 12) (quoting Tr. XI 2561) (emphasis added). Petitioner added the words, "for a wife." This addition is emblematic of the distortions Petitioner relies upon to make her trial appear unfair. The witness actually said, "having been married to somebody for 17 years I thought that her display of emotion was unusual and I didn't understand it." (Tr. XI 2561). This was gender-neutral testimony and it was proper.

A defendant's reaction to the murder of a person close to them is highly relevant, irrespective of the defendant's sex. *See* Pet. App. 266a (OCCA's opinion finding evidence of Petitioner'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 actions after the fire and the death of her son was relevant to Scott's guilt and was properly 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).

This is also true of Petitioner's extramarital affairs, which supply an obvious motive for murder.¹⁴ Petitioner remained very close to Mr. Higgins and Mr. Nunley at the time of the murder. Each man provided important, relevant evidence about her motive and state of mind. (Tr. II 255-65, 308, 365-88). The fact that both men had an intimate relationship with Petitioner enhanced their credibility regarding her behavior. See Instruction No. 10-8, Oklahoma Uniform Jury Instructions (Supp. 2000) (the jury may use "the relation of the witness to the parties" to help determine credibility).

Respondent respectfully submits that, because it is relatively uncommon for women to be sentenced to death, it is easy—but not accurate—for Petitioner to attempt to frame the evidence as being about her sex rather than about her motive, intent, identity, and preparation (in first stage) and character (in second stage). The State presents prejudicial evidence in capital trials, regardless of the sex of the

¹⁴ Petitioner states more than once that the State introduced evidence of "how" she had sex. Pet. at i, 6. Petitioner provides no citation because there was no such evidence. Similarly, the prosecutor did not proclaim that Petitioner was a "slut puppy" who could not be a woman of God. Compare Pet. at 12 with (Tr. XVII 4125 (explaining the irony that Petitioner accused another woman of having an affair with Mr. Andrew while Petitioner was having an affair)). And Petitioner has previously conceded that there is no record evidence that prosecutors "dangled" her "thong underwear" before the jury. Compare Pet. at i with Pet. App. 100a n.10.

defendant. *See, e.g., Moore v. State*, 443 P.3d 579, 583-85 (Okla. Crim. App. 2019) (evidence of two violent batteries committed by the male defendant while in jail awaiting trial was properly admitted); *Eizember v. State*, 164 P.3d 208, 230-31 (Okla. Crim. App. 2007) (evidence of male defendant's affair with a married woman, his history of deceit, a burglary he committed, and "his inability to retain control over" his affair partner and intended victim was properly admitted); *Cuesta-Rodriguez v. State*, 241 P.3d 214, 226 (Okla. Crim. App. 2010) ("Evidence of previous altercations between spouses is relevant to the issue of intent."); *Dodd v. State*, 100 P.3d 1017, 1035 (Okla. Crim. App. 2004) (evidence was properly admitted that male defendant had a collection of lethal weapons, a copy of "The Anarchist Cookbook," a collection of magazines about murder, and was very violent from a young age).

Petitioner's male co-conspirator was sentenced to death for the same murder. Her contention that she was sentenced to death because she is a woman is contrary to the evidence and, more to the point, has never been raised in state court. Petitioner has failed to present a compelling question for this Court's review.

CONCLUSION

The Petition for Certiorari should be denied.

Respectfully submitted,

Gentner F. Drummond
Attorney General of Oklahoma

Jennifer L. Crabb
Supervisory Asst. Attorney General
Counsel of Record
Oklahoma Office of the Attorney General
313 NE Twenty-First St.
Oklahoma City, OK 73105
jennifer.crabb@oag.ok.gov
(405) 522-4418

Counsel for Respondent