No. 26-5711
*** 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

BRIEF OF *AMICUS CURIAE* FAIR TRIAL ANALYSIS (FTA) IN SUPPORT OF PETITIONER

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***** CAPITAL CASE *****

QUESTIONS PRESENTED

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.

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INTEREST OF AMICUS CURIAE[1]

Fair Trial Analysis, Inc. (FTA) is a Florida 501(c)(3) nonprofit with a mission to make the criminal justice system more fair, reliable, and evidence based. FTA favors neither prosecutors nor defendants. It conducts neutral, methodologically grounded analysis. Its civic education work on the importance of jury service is supported by the Foundation of the Federal Bar Association.

FTA was founded by Barry Edwards, J.D., Ph.D., a legal scholar and researcher specializing in quantitative analysis of criminal trials. Dr. Edwards has written five textbooks on research methods for political science. The Essentials of Political Analysis, co-authored with Prof. Philip Pollock III, is one of the most widely used research-methods textbooks in political science. He has published numerous research articles in social science journals and law reviews.

Dr. Edwards's research demonstrates that the effect of prejudicial evidence on trial outcomes can be empirically estimated rather than subjectively assessed. Dr. Edwards designed and implemented a research protocol to estimate the effect of the evidentiary errors on the guilt and sentencing phases of Brenda Evers Andrew's trial. FTA's interest is to give the Court the conclusions and methodology to inform its decision whether to grant certiorari.

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[1] Counsel of record for all parties received timely notice of amicus curiae's intent to file this brief. No counsel for any party authored this brief in whole or in part, and no person or entity other than amicus or its counsel made a monetary contribution intended to fund the brief's preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Tenth Circuit did not answer the question this Court remanded. The Court asked whether a fairminded jurist could conclude that the evidentiary errors did not render Brenda Evers Andrew's trial fundamentally unfair, and it told the court of appeals to consider, for both the guilt and sentencing phases, "the degree of prejudice Andrew suffered from its introduction." Pet. App. 65a. But on the sentencing phase, the court of appeals found the aggravating circumstances well supported, held that the errors did not bear on them, and stopped there. *Id.* 47a-50a. It never asked how improper evidence about Ms. Andrew's sex life, clothing, and worth as a mother affected the jury's decision whether she should live—an entirely separate question under Oklahoma law, under which the jury must not just find evidence to support an aggravating factor but also weigh aggravation against mitigation to make the "ultimate decision" on life or death. Pet. i. For the reasons in the petition, the case warrants this Court's review.

Had the Tenth Circuit done as instructed, it should have come out the other way on the sentencing. The influence a body of evidence has on jurors deciding a particular question can be measured. Amicus measured that effect. It gave 1,128 adults, screened for jury service and weighted to represent Oklahoma County, one of two summaries of the case drawn from the Oklahoma Court of Criminal Appeals' own statement of the evidence—one with the evidentiary errors and one without. Amicus's data show that the errors did not change the likelihood of *conviction* and had nothing to do with the aggravators. But the results point the other way on whether the

jury would have found that mitigation outweighed aggravation. Removing the errors changed the sentencing verdict of roughly one participant in twelve. That shift substantially increased the probability of a death verdict. And one in five participants who favored death with the evidence chose life without it.

Part I explains what the panel decided. Part II explains how amicus's study was run and why the method is widely accepted. Part III reports the results. And Part IV explains why this is the case to decide the premise of the second Question Presented—whether a court may find an error harmless by looking at the force of the residual evidence without asking what the error did—one the Court intended to resolve in *Vasquez v. United States*, before dismissing the writ as improvidently granted. 566 U.S. 376 (2012) (per curiam).

Brenda Andrew's petition should be granted.

ARGUMENT

I. The Panel Did Not Assess the Effect of the Evidentiary Errors on the Decision that Sentenced Petitioner to Death.

As the petition explains, an Oklahoma capital jury makes two findings—whether an aggravating circumstance exists, and whether it outweighs mitigation—and the panel addressed only the first. Pet. 34-36; Pet. App. 16a-17a (Federico, J., dissenting from denial of rehearing en banc). Amicus will not repeat that showing. It adds one point about the panel's analysis, and one about what it omits.

The panel's sentencing discussion is an analysis of eligibility. Its reasons for finding no prejudice—"strong evidentiary support" for the two aggravators, and the observation that evidence of Ms. Andrew's

"affairs, appearance, and failure to conform to conventional gender roles" would not "appear to affect the jury's consideration of [the victim's] consciousness after the shooting or the existence of a financial motive," Pet. App. 49a—are confirmed by amicus's data. But they answer whether the jury *could* find Ms. Andrew eligible for death, not whether the same jury, after hearing the evidence as it should have been presented, could fairly decide whether she deserves it. That second question is the one the Court's remand order asked the Tenth Circuit to decide, *see id.* 65a, the one Question 2(b) presents, and the one the court of appeals never reached, *see id.* 47a-50a.

The jury did not deliberate with a clean slate. Everything it heard in the guilt phase was before it at sentencing, and the State told it to use everything. Pet. 14 (Tr. 4412). *Cf. Gregg v. Georgia*, 428 U.S. 153, 164 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.) (describing Georgia's procedure, under which evidence "considered during the guilt stage may be considered during the sentencing stage without being resubmitted"). And research on actual capital jurors shows that many settle on a punishment during the guilt phase, before any sentencing evidence is presented. William J. Bowers, Marla Sandys & Benjamin D. Steiner, *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience, and Premature Decision Making*, 83 Cornell L. Rev. 1476, 1477, 1488-98 (1998).

On remand, amicus filed a brief in partial support of each party. Brief of Amicus Curiae Fair Trial Analysis, LLC in Partial Support of Petitioner and Partial Support of Respondent, *Andrew v. Tinsley*, No. 15-6190 (10th Cir. Apr. 28, 2025) (Doc. 216) ("Tenth Cir. Br."). Amicus's study, described in Part II, found that the evidentiary errors did not measurably change

the probability that a jury would convict. Support for a conviction was 92.0% with the evidence and 90.9% without it, a difference within the margin of error. *Id.* at 10-11. By that measure, amicus told the court of appeals that a fairminded jurist could conclude the guilt phase was fair.[2] Amicus also does not dispute the panel's conclusion that the errors would not appear to affect whether the murder was committed for money. *See* Pet. App. 49a.

But the same study found that on the one question the panel did not address—whether aggravation outweighed mitigation—the errors moved one in twelve jury-qualified Oklahoma County adults from life to death, doubling the probability that a jury would return a death sentence. Tenth Cir. Br. 11-13. Amicus reported that finding to the panel, *ibid.*, and again in support of rehearing en banc, Brief of Amicus Curiae Fair Trial Analysis in Support of Petition for Panel Rehearing and Rehearing En Banc, *Andrew v. Tinsley*, No. 15-6190 (10th Cir. May 21, 2026) (Doc. 253) ("Reh'g Br."). The panel did not assess that probability. Pet. App. 19a-55a.

That omission is why amicus files here. The data that support the panel on guilt and eligibility condemn its silence on punishment.

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[2] Amicus's study measures the effect of the errors on the probability of a particular verdict or sentence. It does not measure whether the evidence distorted the jury's understanding of the case or the integrity of the process, which some courts treat as a distinct inquiry. *See generally* Jason M. Solomon, *Causing Constitutional Harm: How Tort Law Can Help Determine Harmless Error in Criminal Trials*, 99 Nw. U. L. Rev. 1053, 1067-71 (2005). Amicus takes no position on whether the guilt phase of Ms. Andrew's trial was fundamentally unfair under that measure. *See infra* p.23.

II. Amicus Measured the Effect the Panel Did Not Assess.

Judges who must decide whether improper evidence changed a verdict ordinarily have only their own judgment about how jurors think. But that judgment can be checked. The question—did adding a body of evidence change how a population of jurors would decide an issue—is the kind of question that controlled experiments were designed to answer. This Part explains how amicus answered it here, and why its method is reliable.

A. The survey design

The logic of amicus's survey is the logic of a clinical trial. *See* David H. Kaye & Hal S. Stern, *Reference Guide on Statistics and Research Methods*, in Reference Manual on Scientific Evidence 463, 475 (4th ed. 2025) ("If subjects are assigned to treatment and control groups at random, a difference in the outcomes between the two groups can usually be accepted, within the limits of statistical error, as a good measure of the treatment effect."). Under that model, one draws a large group from the relevant population, randomly divides it in two, and gives each half the same case, identical except for the evidentiary errors. Participants are then asked how they would vote in the guilt and sentencing phases. Because assignment is random, the groups are otherwise alike, and any difference in their answers measures the prejudice of the one thing that differed.

Amicus ran that experiment on April 18 and 19, 2025. Tenth Cir. Br. 9. The survey instrument, both case summaries, the participant-level data, and the analysis code are archived and open to the public. Barry C. Edwards, *Oklahoma vs. Brenda Andrew* Study Files, Harvard Dataverse (Apr. 22, 2025),

https://doi.org/10.7910/DVN/VFEZGY. The software that converts the results into verdict probabilities is published as an open-source package. Barry C. Edwards, sate: Scientific Analysis of Trial Errors (R package version 3.1.0, Nov. 5, 2025), https://cran.r-project.org/package=sate.

Who was surveyed. Participants were recruited through CloudResearch, an online research platform whose registered participants are compensated to complete surveys. Tenth Cir. Br. 9. Of the 1,589 adults who participated, 96% passed the survey software's response-quality checks. *Ibid.* Amicus then screened for jury qualifications. Participants who were not citizens, not proficient in English, had felony convictions or pending charges, could not serve, or could not follow death-penalty instructions were excluded. *Id.* at 9-10. That left 1,128 jury- and death-qualified participants. *Id.* at 10. Their responses were weighted to match the adult population of Oklahoma County (the trial venue) using Census Bureau figures. *Id.* at 9-10 & n.9. The results are shown below:

	Oklahoma County	**Study sample**
College graduates	32.0%	32.1%
Female	51.7%	52.5%
Hispanic	20.4%	19.9%
African American	13.8%	11.5%
Household income $50k+	62.1%	61.4%
Adults aged 35+	67.6%	67.7%
N	605,015	1,128

See Tenth Cir. Br. 10, tbl. 1 (Census Bureau, American Community Survey 5-Year Estimates for 2023, Tables S1501, DP05, S1901).

What they read. Each participant read a written summary of the case. The summary was built from the Oklahoma Court of Criminal Appeals' own statement of the evidence, Pet. App. 245a-50a (*Andrew v. State*, 164 P.3d 176, 184-87 (Okla. Crim. App. 2007)), simplified for lay readers, with one disclosed adjustment (the $800,000 insurance policy was restated as $1.4 million to reflect inflation), *see* Tenth Cir. Br. 7 & n.7. The treatment version included the nine categories of sexual-conduct evidence that Judge Bacharach identified in his 2023 dissent. Pet. App. 181a-82a; *see* Tenth Cir. Br. 7. The control version omitted them. Because the control condition was designed to reproduce the trial Ms. Andrew should have had, it also restored one item of defense evidence the OCCA held the trial court wrongly excluded: Officer Warren's testimony that he found Ms. Andrew kneeling over her husband, trying to aid him and asking the officers to help. Pet. App. 278a (exclusion of this evidence an abuse of discretion); *see id.* 184a-85a (Bacharach, J., dissenting); Tenth Cir. Br. 8. The comparison is therefore between the trial as it was and the trial as it should have been.

What they were asked. Participants were first asked whether they would find the defendant guilty of murder, then, told to assume guilt, whether the aggravating circumstances outweighed the mitigating evidence (the selection question an Oklahoma jury answers). Reh'g Br. 11-12 & n.8. That sequence mirrors a capital trial, in which jurors reach the sentencing question with the guilt-phase evidence already in mind. *See* Bowers et al., *supra*, at 1494-98. Each participant then read the other version and

answered again—a crossover design, common in clinical research, that doubles the responses per condition and lets each responder serve as his or her own control. Tenth Cir. Br. 8 (citing Thomas A. Louis et al., *Crossover and Self-Controlled Designs in Clinical Research*, 310 New Eng. J. Med. 24 (1984)). Participants who changed their answers were invited to say why. *Id.* at 15.

Three features of the study make the estimate conservative.

First, the study tested the nine categories of sexual-conduct evidence Judge Bacharach identified, Pet. App. 181a-82a—a subset of the evidence petitioner challenges, *see* Pet. 4–15—plus Officer Warren's wrongly excluded testimony.

Second, the study presented the wrongly included evidence once, within the summary. The jury heard it every day, Pet. 1, 4-14, in the words of pastors and former lovers, and again in closing when the prosecutor held up Ms. Andrew's underwear. Whatever a month of repetition added, the study does not capture.

Third, both conditions used the OCCA's recitation of the facts, which Justice Thomas has characterized as "overwhelming evidence" of guilt. Pet. App. 68a (Thomas, J., dissenting). The measured effect is thus the effect of the errors on people already given every reason to convict.

B. The methodology is well established.

Courts have long accepted that properly designed surveys measure what a population believes. *See Schering Corp. v. Pfizer Inc.*, 189 F.3d 218, 225-30 (2d Cir. 1999) (Sotomayor, J.) (properly conducted surveys of respondents' present impressions are admissible;

methodological soundness goes to weight). The Reference Manual's guide to survey evidence asks whether the survey defines the relevant population, draws a sample that represents it, asks neutral questions, and discloses its data and methods. Shari Seidman Diamond et al., *Reference Guide on Survey Research*, in Reference Manual on Scientific Evidence, *supra*, at 681-748. Amicus's study did all these things.

Research also shows that people who read a case summary decide just like jurors who sit through the trial do. The leading review of jury-simulation validity examined studies comparing written summaries, transcripts, audio, video, and live presentation and found that the medium rarely changes the outcome. Brian H. Bornstein, *The Ecological Validity of Jury Simulations: Is the Jury Still Out?*, 23 Law & Hum. Behav. 75, 82-84 (1999). More recent work designed to test whether online studies using written materials can substitute for richer formats reached the same result. *See* Evelyn M. Maeder, Susan Yamamoto & Logan Ewanation, *Quality-Checking the New Normal: Trial Modality in Online Jury Decision-Making Research*, 20 J. Experimental Criminology 1079, 1079 (2024) ("no significant differences between modalities in terms of verdict" between participants who watched trial video and those who read transcript).

To be sure, jurors deliberate, whereas survey responders do not. The step from "43% of eligible jurors favor death" to "the probability a twelve-person jury returns a death verdict" is therefore a modeling step, and the headline figures in Part III rest on it. The model simply quantifies known aspects of jury deliberation: A changed vote's effect is greater when the "scales of justice" are "delicately poised" than when a strong majority favors one outcome. *Glasser v. United States*, 315 U.S. 60, 67 (1942). The parameters

rest on five decades of research observing how initial juror votes become final jury verdicts, initially compiled from 24 deliberation studies and since extended to 29, encompassing about 2,300 observed deliberations. Barry C. Edwards, *Measuring Fairness*, 77 Ala. L. Rev. 621, 639, 646, 648 (2026); Dennis J. Devine et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 Psychol. Pub. Pol'y & L. 622 (2001).

Two findings from that research drive the model. First, the initial vote is highly predictive: The verdict favored by a majority on the first ballot becomes the jury's verdict over 90% of the time. Devine et al., *supra*, at 623; *Measuring Fairness*, 77 Ala. L. Rev. at 645 & n.121. Second, the relationship is neither linear nor symmetric: Juries that begin evenly split acquit far more often than they convict, a "leniency shift" that reflects the burden of proof. *Id.* at 645; Robert J. MacCoun & Norbert L. Kerr, *Asymmetric Influence in Mock Jury Deliberation: Jurors' Bias for Leniency*, 54 J. Personality & Soc. Psychol. 21 (1988). Tested against the observed deliberations, the model predicts the actual jury verdict correctly 86.7% of the time. *Measuring Fairness*, 77 Ala. L. Rev. at 649 & tbl. 3. The S-shaped curve illustrating the change in probability is what turns an eight-point shift in juror preferences into the doubling reported below, and it is why that result is not an artifact of how the question was asked. *See infra* p.15.

The model's uncertainty is captured in every margin of error amicus reports.

The study was not before the OCCA, and amicus does not offer it as record evidence. *See Cullen v. Pinholster*, 563 U.S. 170, 181-82 (2011). It is offered for a narrower purpose. The federal habeas question on

remand was whether a fairminded jurist "reviewing this record" could find the sentencing fair, Pet. App. 65a, and a judgment about prejudice is a judgment about how jurors respond to evidence. The jury exists to give a "commonsense judgment of the community" as a hedge against the "overzealous or mistaken prosecutor" and the "over-conditioned or biased response of a judge." *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975). A reviewing court that estimates how the community would have weighed the evidence is assessing a fact about the community; it "should not transform the inquiry into a subjective one." *Williams v. Taylor*, 529 U.S. 362, 409-10 (2000). Amicus's study is offered as an objective reference point to evaluate whether the panel's conclusion was reasonable.

III. The Evidentiary Errors Substantially Increased the Probability of a Death Sentence.

1. Among jury-qualified, death-qualified adults representative of Oklahoma County, 35.1% who read the case without the evidentiary errors concluded that the aggravating circumstances outweighed the mitigation evidence.[3] With those errors, 43.1% did. Tenth Cir. Br. 11-12 & tbl. 2. The difference—8.0 percentage points, with a margin of error of 3.4—is the measured effect of the evidence on individual jurors. *Id.* at 12. Roughly one participant in twelve changed sides. *Ibid.*

One in twelve is one juror. A jury that cannot agree on a death sentence cannot impose it. *See* Okla. Stat. tit. 21, § 701.11 (if the jury "cannot, within a

[3] As explained in Part II.A, the control condition also included Officer Warren's wrongly excluded testimony, so the effect reported here is the effect of an error-free trial.

reasonable time, agree as to punishment," the court imposes a life sentence). The effect of the evidence on the probability of a death sentence is not necessarily 8.0 percentage points; the effect will be greater in a close case than in a lopsided one. *Cf. Buck v. Davis*, 580 U.S. 100, 122 (2017) ("Some toxins can be deadly in small doses."). That is the step the deliberation model supplies. *See supra* Part II.B. Its answer depends on where the jury pool starts.

Measured in 2025, the population's sentencing preferences are not delicately balanced between life and death; the probability of Ms. Andrew being sentenced to death in a new trial is low, even with evidentiary errors. But Ms. Andrew was not sentenced in 2025. She was tried in 2004 when support for capital punishment, nationally and in Oklahoma, was substantially higher than it is today.[4] In 2004, sentencing was a close case. Applied to a jury pool at 2004 levels of support, the same eight-point shift moves the probability of a death verdict from 46.4% to 64.0%—17.6 points, with a margin of error of 7.4. *Id.* at 14 & fig. 1(b).

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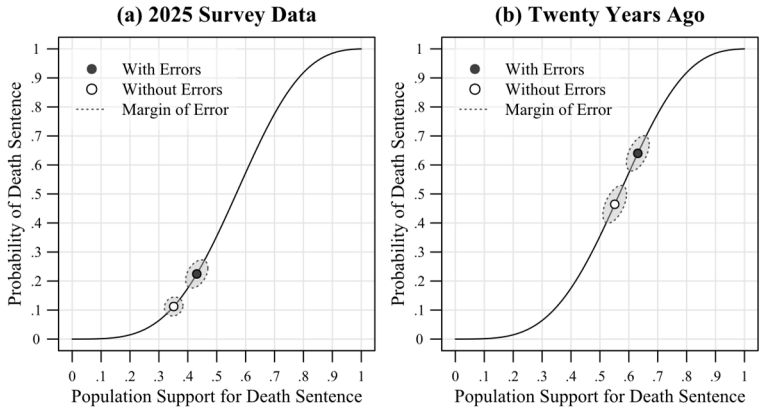
[4] To estimate the effect in 2004, amicus assumes that support for the death penalty would be higher than observed in 2025. State-level public opinion measures are noisier than national measures. Available data suggest that 83 percent of Oklahomans favored the death penalty for murder in 2004, Kenneth E. Shirley & Andrew Gelman, *Hierarchical Models for Estimating State and Demographic Trends in US Death Penalty Public Opinion*, 178 J. Royal Stat. Society Series A 1 (2015). (Oklahoma estimate for 2004 in gs_poststrat supplemental data file), while 65 percent do so today, Pat McFerron, Oklahoma Voters: Be Strong on Crime, CHS & Associates, Aug. 3, 2023 (reporting 65 percent of Oklahomans favor death penalty); *see* Reh'g Br. 13 n.10 (roughly 85% in 2004 and 65% today).

	Without evidentiary errors	With evidentiary errors	Effect
Jurors favoring death (observed, 2025)	35.1%	43.1%	+8.0 ± 3.4
Probability of death verdict (2025 support)	11.2%	22.4%	+11.2 ± 4.9
Probability of death verdict (2004 support)	46.4%	64.0%	+17.6 ± 7.4

See Tenth Cir. Br. 12-14 & tbl. 2, fig. 1. The first row is measured directly. The second and third apply the deliberation model described in Part II.B to the first; the third assumes the higher support for capital punishment that prevailed in Oklahoma in 2004.

Among participants, the eight-point shift raised the probability of a death verdict from 11.2% to 22.4%—an increase of 11.2 points, with a margin of error of 4.9. Tenth Cir. Br. 13. The evidentiary errors significantly increased the chance that Ms. Andrew would be sentenced to death.

The curves below depict the probability that a twelve-person jury returns a death verdict given the share of the jury pool favoring death, estimated from observed deliberations. The same eight-point shift in juror preferences produces an eleven-point change in verdict probability at 2025 levels of support (left) and an eighteen-point change at 2004 levels (right).



Tenth Cir. Br. 13, fig. 1 (edited for size).

The figure shows why the effect of prejudicial evidence in the sentencing phase was substantial. The curve relating juror preferences to jury verdicts is flat at the ends and steep in the middle. A pool in which 35% favor death produces a death verdict rarely; a pool near 50% is a coin flip; and an eight-point move across that middle region changes the outcome in nearly one case in five. In 2004, Ms. Andrew's jury was drawn from the middle of the curve.

Whichever row the Court credits, the direction is the same and the effect is substantial. Even the lowest estimate consistent with the data—6.3 points at 2025 support, 10.2 points at 2004 support—is far from acceptable. *See* Tenth Cir. Br. 13 n.14, 14.

2. Because every participant read both versions, the survey's crossover design reveals how many changed their minds:

Vote with the evidentiary errors	Vote switched with errors removed
Death	21.9% (to life)
Life	2.6% (to death)

See Tenth Cir. Br. 12, tbl. 3 (weighted).

Of participants who would have sentenced Ms. Andrew to death after reading the trial as it occurred, 21.9% chose life when the evidentiary errors were removed. Tenth Cir. Br. 12, tbl. 3. The reverse almost never happened: Only 2.6% moved from life to death. *Id.* & n.12. Put another way, for about one out of five death voters, the evidentiary errors motivated their decision to vote for death.

Participants who changed their answers were asked to explain why. Their responses—in the public dataset, and quoted to the Tenth Circuit, Tenth Cir. Br. 15-17—confirm that the evidentiary errors changed the perceived worth of Ms. Andrew's life.

One participant who moved from death to life explained that at trial, "the prosecution painted a picture of a morally repugnant person, making the death penalty feel more like a deserved punishment for a 'bad woman,'" and that the version without the evidentiary errors, "by focusing more on the crime itself and presenting a slightly more nuanced (or at least less demonized) image of the defendant," made "the argument for life imprisonment . . . more compelling." Tenth Cir. Br. 16. Participants who moved the other way said the same thing in reverse. One "mainly wanted to keep her alive for her children, so I

voted against the death [penalty] the first time," but when shown the invalid evidence of "what a bad person she was, I felt that she would not provide a net increase in value to her children if she was kept alive." *Ibid.* Another conveyed that the evidence "painted her as such a bad person/wife/mother that her children are better off without her." *Ibid.* To a third, the evidence "made her seem not just guilty, but incredibly manipulative and unremorseful which made it much harder to feel any sympathy for her." *Ibid.*

These lay statements echo the dissents below. Judge A. Johnson wrote that "one effect" of the evidence "was to trivialize the value of her life in the minds of the jurors." Pet. App. 305a-06a. Judge Bacharach wrote that it "portrayed Ms. Andrew as a scarlet woman, a modern Jezebel, sparking distrust based on her loose morals." *Id.* 205a.

The survey comments also show the evidentiary errors coloring how participants viewed the killing itself. Some who read the trial as it happened described the shooting as the end of a campaign to humiliate and manipulate petitioner's husband; those who read it without the errors more often described a selfish motive rather than an intent to make him suffer. *See* Reh'g Br. 14-15; Edwards, *Oklahoma vs. Brenda Andrew* Study Files, *supra*. That shift bears on the weighing even if it did not change whether the aggravators were proved.

3. No fairminded jurist could call this sentencing fair. The question on remand was "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.'" Pet. App. 65a (quoting *Payne v. Tennessee*, 501 U.S. 808, 825 (1991)).

That inquiry is objective and does not ask whether any judge finds the trial fair. *Williams v. Taylor*, 529 U.S. 362, 409-10 (2000) ("the simple fact that at least one of the Nation's jurists" reached that conclusion does not make it reasonable); *see Harrington v. Richter*, 562 U.S. 86, 101 (2011). It asks whether the conclusion can be squared with "the degree of prejudice Andrew suffered." Pet. App. 65a.

No one can know whether Ms. Andrew would have been sentenced to life at a fair trial, and the Court has never required a defendant to prove that. The question is whether the error "undermine[s] confidence in the outcome." *Strickland v. Washington*, 466 U.S. 668, 694 (1984); *see Buck v. Davis*, 580 U.S. 100, 119-20 (2017). So the question here is whether a jurist who gave the state court every benefit of the doubt could conclude that errors which substantially increased the likelihood of a death verdict and supplied the reason for one death voter in five does not undermine confidence in the sentencing decision.

The Court has never fixed the threshold in numbers.[5] But the Court's decisions mark where the line falls in practice. Amicus has applied the method described in Part II to trials this Court and others

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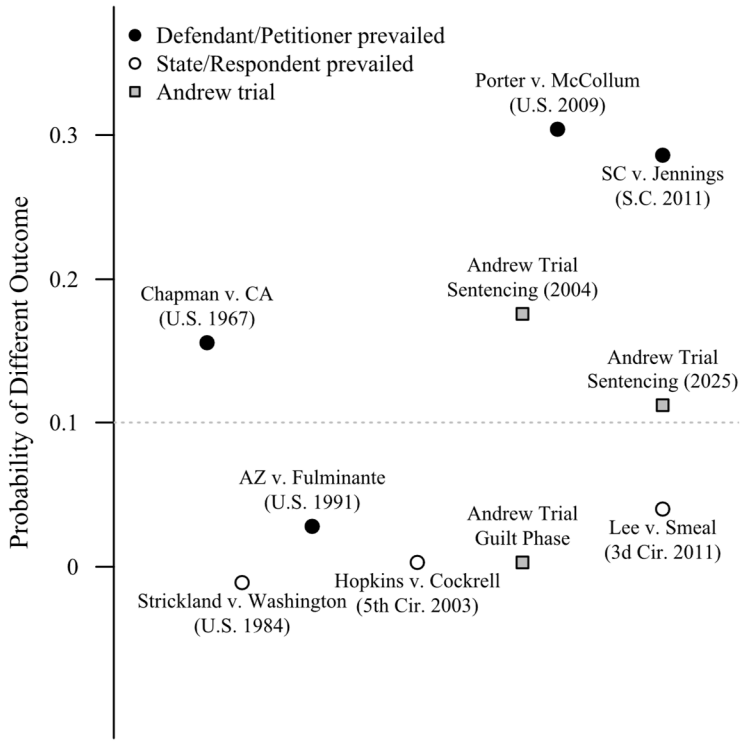
[5] General agreement on a verbal standard, such as "reasonable probability," may conceal, rather than resolve, substantial disagreement. A famous example comes from asking intelligence analysts what "serious possibility" means. Analysts' answers ranged from 20% to 80%. Sherman Kent, *Words of Estimative Probability*, 8 Stud. Intel. 49, 51-52 (1964). Judges asked to put numbers on probable cause and reasonable suspicion disagreed about as widely. *See* Richard Seltzer et al., *Legal Standards by the Numbers: Quantifying Burdens of Proof or a Search for Fool's Gold?*, 100 Judicature 56, 62-64 (2016). Amicus suggests that drawing a clearer line would reduce the opportunity to dispute whether a trial was fair.

have reviewed for prejudice. Edwards, *Measuring Fairness*, 77 Ala. L. Rev. at 661-72 & n.263. The figure below plots the result:



Tenth Cir. Br. 15, fig. 2 (edited for size).

Errors the courts found tolerable cluster below a ten-point change in outcome probability; errors on which defendants prevailed cluster above it.[6] *Ibid.* The

[6] Amicus has elsewhere proposed, as a benchmark for a probability "sufficient to undermine confidence in the outcome," *Strickland*, 466 U.S. at 694, a ten-percentage-point change in outcome probability, with a lower benchmark in capital cases. Barry C. Edwards, *A Scientific Framework for Analyzing the Harmfulness of Trial Errors*, 8 UCLA Crim. Just. L. Rev. 1, 44-45 n.188 (2024). The point estimate here exceeds the general

effect measured here falls above the line and above the midpoint of the cases in which relief was granted under the assumption that matches Ms. Andrew's jury. The panel's conclusion is not one the Court's own prejudice cases would support.

IV. This Case Is the Vehicle for a Question the Court Has Recognized but Not Resolved.

Whether a court may find an error harmless on the strength of the remaining evidence alone, without assessing the error's effect, is a question that recurs and divides the lower courts.

The Court has long held that the harmless-error "inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence." *Kotteakos v. United States*, 328 U.S. 750, 765 (1946); *see Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993) (the question "is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error").

Lower courts do not consistently apply that principle. In *Vasquez v. United States*, 566 U.S. 376 (2012) (per curiam), the Court granted certiorari to decide whether a court of appeals may find a trial error to be harmless by weighing the strength of the remaining evidence rather than the effect of the error on the jury, then dismissed the writ as improvidently granted. A decade later, Justice Sotomayor, joined by Justice Jackson, dissented from the denial of

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benchmark under both assumptions; the lower bound exceeds the capital-case benchmark under both and the general benchmark under the 2004 assumption.

certiorari in a case where a state court on direct review found a prosecutor's improper testimony harmless by reasoning "based solely on the sufficiency of the evidence that remained" after excising the testimony. *Anthony v. Louisiana*, 143 S. Ct. 29, 35 (2022) (Sotomayor, J., dissenting from denial of certiorari). "This Court has repeatedly repudiated such an approach"; the required inquiry is "[w]hat effect did [the error] . . . have on the jury's deliberations?" *Id.* at 35.

Legal scholars have described a "deep split" among the circuits and state courts over whether an "overwhelming evidence" test is permissible at all. Brief of Legal Scholars as Amici Curiae Supporting Petitioner at 5-9, *Pon v. United States*, No. 20-1709 (July 12, 2021). The most systematic study of lower court opinions found that fewer than one in five analyses cited any test for harm at all, and that whether a court weighed the remaining evidence or assessed the error's effect was strongly associated with the result. *See* Jason M. Solomon, *Causing Constitutional Harm: How Tort Law Can Help Determine Harmless Error in Criminal Trials*, 99 Nw. U. L. Rev. 1053, 1065-72 (2005).

The problem is structural. A reviewing court cannot hear from the jurors. So when a court asks itself how evidentiary errors affected the jury, it must either estimate the effect or substitute a question it can answer. The usual substitutes are two. One is whether the remaining evidence was strong—a question about the State's case, not about what the error did. The other is how the evidence would have affected the judge—a subjective reaction standing in for an empirical fact about twelve jurors. Both are easier than the question the law asks, and the first has a built-in answer on collateral review, where most

defendants were convicted on strong evidence. A test that asks only those questions will find almost every error harmless.

To be sure, a high probability of conviction without the error limits how much the error could have mattered; that is why amicus's data confirmed the panel's guilt-phase conclusion. *See supra* Part I. But the relevant question is whether the error undermines confidence in the outcome, not whether the defendant would probably have been acquitted. *Strickland*, 466 U.S. at 693-94. Even if other evidence of guilt makes conviction more likely than not, errors may make conviction a near certainty and deprive the defendant of a fair chance at trial. Simply weighing the strength of the state's other evidence, without making the necessary comparison, is not enough to assess whether the scales of justice are balanced.

The panel's sentencing analysis is the "overwhelming evidence" approach in its purest form. It consists of two findings: The aggravators were strongly supported, and the erroneous evidence did not "coincide[] precisely" with them. Pet. App. 49a-50a. It contains no assessment of the effect of the evidentiary errors on the jury's weighing of life versus death. The panel's one engagement with the remand order's instruction to consider "the degree of prejudice Andrew suffered," *id.* 65a, is *ipse dixit*: that "a fair-minded jurist could reasonably conclude that the challenged evidence hadn't infected the sentencing proceedings," *id.* 50a.

The question is thus cleanly presented. If the panel's method of analysis is not a permissible way to assess "the degree of prejudice Andrew suffered," Pet. App. 65a, the judgment cannot stand. A court directed to assess the effect of an error must assess it, and may

not substitute the strength of the untainted evidence for that evaluation. Amicus's study shows what the substituted analysis cost Ms. Andrew.

The guilt phase sharpens the point. Amicus's measure—the change in the probability of conviction—is an effect-on-verdict measure, and by that measure the guilt phase was not unfair. *Supra* Part I. Judge Bacharach applied a different measure, asking whether a month of irrelevant evidence had "pluck[ed] away any realistic chance that the jury would seriously consider [Ms. Andrew's] version of events," Pet. App. 205a, and concluded that it had, sufficiency notwithstanding, *id.* 202a. Amicus takes no position on which measure the Due Process Clause requires. *See supra* n.2. *Cf. Buck*, 580 U.S. at 121-22 (asking whether two references to race in psychologist's testimony affected the sentencing verdict, and rejecting "how much air time it received at trial or how many pages it occupies in the record" as the measure of that effect). But the two measures give different answers on this record.

The question's importance extends beyond this case. The panel's opinion is published and binding. As Judge Federico observed dissenting from the denial of rehearing en banc, "the due process holding of this case will govern a wide range of claims that recur in federal and state courts." Pet. App. 18a. Two features of that holding will recur. The first is the "central question" test—the requirement that errors track a central jury issue before they can be prejudicial—which the petition addresses and which inverts the reason that irrelevant evidence is excluded. Pet. 31-36. The second is the method: assessing prejudice at a capital sentencing by the strength of the aggravators, without assessing the effect of the evidentiary errors on the weighing.

CONCLUSION

For the reasons above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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