

No. 23-6573

IN THE
Supreme Court of the United States

BRENDA EVERS ANDREW,
Petitioner,

v.

TAMIKA WHITE, WARDEN,
Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit**

**BRIEF OF A FORMER FEDERAL JUDGE,
FAIR AND JUST PROSECUTION,
17 LAW PROFESSORS, AND 4 DOMESTIC
VIOLENCE RESEARCHERS AND ADVOCATES
AS *AMICI CURIAE* IN SUPPORT OF PETITIONER**

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	ii
INTEREST OF <i>AMICI CURIAE</i>	1
SUMMARY OF THE ARGUMENT.....	3
ARGUMENT	4
I. Invocation of Gender Bias Can Severely Prejudice Female Defendants.	4
II. Brenda Andrew’s Trial Was Tainted with Irrelevant Evidence About Her Appearance, Sexuality, and Fitness as a Mother.....	8
A. The Prosecution’s Focus on Ms. Andrew’s Appearance.	8
B. The Prosecution’s Focus on Ms. Andrew’s Sexual History.	9
C. The Prosecution’s Focus on Ms. Andrew’s Fitness as a Mother.....	13
III. Ms. Andrew Was Severely Prejudiced by the Gender Bias the Prosecution Invoked.....	15
A. The Prosecution’s Focus on Ms. Andrew’s Sexuality Inflamed the Jury Against Her.	16
B. The Prosecution Prejudiced Ms. Andrew by Painting Her as an Unfit Mother.	17
CONCLUSION	20

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Andrew v. State</i> , 164 P.3d 176 (Okla. Crim. App. 2007)	4, 8
<i>Berger v. United States</i> , 295 U.S. 78 (1935).....	7
<i>Buck v. Davis</i> , 580 U.S. 100 (2017).....	4
<i>Lesley v. State</i> , 606 So. 2d 1084 (Miss. 1992)	16, 17
<i>People v. Cerda</i> , 223 N.E.3d 308 (N.Y. 2023)	17
<i>Timm v. Delong</i> , 59 F. Supp. 2d 944 (D. Neb. 1998).....	4
<i>Turner v. Murray</i> , 476 U.S. 28 (1986).....	4
<i>United States v. Agurs</i> , 427 U.S. 97 (1976).....	7
Other Authorities	
Atwell, <i>Wretched Sisters: Examining Gender and Capital Punishment</i> (2d ed. 2014)	16
Baker, <i>Women and Capital Punishment in the United States: An Analytical History</i> (2016).....	17

Carroll, <i>Images of Women and Capital Sentencing Among Female Offenders: Exploring the Outer Limits of the Eighth Amendment and Articulated Theories of Justice</i> , 75 Tex. L. Rev. 1413 (1997).....	19
Cassidy, <i>(Ad)ministering Justice: A Prosecutor's Ethical Duty to Support Sentencing Reform</i> , 45 Loy. Univ. Chi. L.J. 981 (2014).....	8
Collins, <i>Too Feminine for Execution?: Gender Stereotypes and the Media's Portrayal of Women Sentenced to Death</i> , University of South Carolina Scholar Commons (2022).....	6
Colquitt, <i>Evidence and Ethics: Litigating in the Shadows of the Rules</i> , 76 Fordham L. Rev. 1641 (2007)	17
De Sanctis, <i>Bridging the Gap Between the Rules of Evidence and Justice for Victims of Domestic Violence</i> , 8 Yale J.L. & Feminism 359 (1996).....	5
Du, <i>The Effect of Defendant Gender on Jurors' Decision-Making</i> , 52 U. Balt. L. Rev. 1 (2023)	6
Epstein & Goodman, <i>Discounting Women: Doubting Domestic Violence Survivors' Credibility and Dismissing Their Experiences</i> , 167 U. Pa. L. Rev. 399 (2019).....	5
Farr, <i>Defeminizing and Dehumanizing Female Murderers: Depictions of Lesbians on Death Row</i> , 11 Women & Crim. Just. 49 (2000)	6

Henry, <i>Smoke but No Fire: When Innocent People Are Wrongly Convicted of Crimes That Never Happened</i> , 55 Am. Crim. L. Rev. 665 (2018)	19
Herzog & Oreg, <i>Chivalry and the Moderating Effect of Ambivalent Sexism: Individual Differences in Crime Seriousness Judgments</i> , 42 Law and Society Review 45 (2008).....	5, 7
Kelsey Collins, <i>Too Feminine for Execution?: Gender Stereotypes and the Media's Portrayal of Women Sentenced to Death</i> , University of South Carolina Scholar Commons (2022).....	16
Kennedy, <i>Eve Was Framed</i> (1992).....	3
Lang, <i>The Intersection of Wrongful Convictions and Gender in Cases Where Women Were Sentenced to Death or Life in Prison Without Parole</i> , 27 Mich. J. Gender & L. 403 (2020)	16
Lewis & Sommervold, <i>Death, but Is It Murder? The Role of Stereotypes and Cultural Perceptions in the Wrongful Convictions of Women</i> , 78 Alb. L. Rev. 1035 (2015).....	7, 18
Miller, <i>Inherent (Gender) Unreasonableness of the Concept of Reasonableness in the Context of Manslaughter Committed in the Heat of Passion</i> , 17 Wm. & Mary J. Women & L. 249 (2010)	5

Mogul, <i>The Dykier, the Butcher, the Better: The State's Use of Homophobia and Sexism to Execute Women in the United States</i> , 8 N.Y.C. L. Rev. 473 (2005)	18
Newby, <i>Evil Women and Innocent Victims: The Effect of Gender on California Sentences for Domestic Homicide</i> , 22 Hastings Women's L.J. 113 (2011)	6, 19
Potts & Weare, <i>Mother, Monster, Mrs, I: A Critical Evaluation of Gendered Naming Strategies in English Sentencing Remarks of Women Who Kill</i> , 31 Int'l J. Semiotics L. 21 (2018)	16
Roberts, <i>Motherhood and Crime</i> , 79 Iowa L. Rev. 95 (Oct. 1993)	18, 19
Simon-Kerr, <i>Unchaste and Incredible: The Use of Gendered Conceptions of Honor in Impeachment</i> , 117 Yale L.J. 1854 (2008)	6
Swent, <i>Gender Bias at the Heart of Justice: An Empirical Study of State Task Forces</i> , 6 S. Cal. Rev. L. & Women's Studies 1 (1996)	4
Tasca et al., <i>The Role of Parental Status and Involvement in Sentence Length Decisions: A Comparison of Men and Women Sentenced to Prison</i> , 65 Crime & Delinquency 1899 (2019)	18
Tillyer et al., <i>Differential Treatment of Female Defendants</i> , 42 Crim. Just. & Behav. 705 (2015)	6

Trougako & Baker, *Andrew Case in the Hands of Jury Deliberation Will Resume Today at 9 A.M.*, *Oklahoman* (July 9, 2023)..... 13

Weis, *The “Fool’s Gold” Standard of Confession Evidence: How Intersecting, Disadvantaged Identities Heighten the Risk of False Confession*, 22 *Nev. L.J.* 1179 (2022)..... 18

INTEREST OF AMICI CURIAE¹

Amici curiae are one retired federal judge, a non-profit organization that works with elected prosecutors, seventeen law professors with expertise in gender and the law, habeas corpus, and criminal law, and four domestic violence researchers and advocates.

While *amici* are not formally affiliated with each other and come from a variety of professional fields, they are all keenly aware of the pernicious effects of gender bias against female defendants in American courtrooms. Each is deeply familiar with the toll that gender bias exacts not only on the individual women whose interactions with the criminal legal system are tainted by it, but also on the quality, reliability, and fairness of the criminal legal system. Together they have a distinct interest in ensuring that inflammatory and prejudicial gendered stereotypes about how women should look, act, and comport themselves are eradicated from criminal prosecutions.

- The Honorable Judge Mark Bennett (ret.) of Drake University Law School;
- Fair and Just Prosecution, a nonprofit project of the Tides Center that brings together elected prosecutors from around the nation as part of a network of leaders committed to a justice system grounded in fairness, equity, compassion, and fiscal responsibility.

¹ *Amici* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for the parties received timely notice of *amici*'s intent to file this brief.

- Jamie Abrams of the American University Washington College of Law, Valena Beety of Indiana University Bloomington Maurer School of Law, Leigh Goodmark of the University of Maryland Francis King Carey School of Law, Aya Gruber of the University of Southern California Gould School of Law, Mallika Kaur of the University of California Berkeley Law School, Carla Laroche of Tulane Law School and The Murphy Institute, Cortney E. Lollar of the Georgia State University College of Law, Nancy Lemon of the University of California Berkeley Law School, Benjamin Levin of Washington University in St. Louis School of Law, Justin Marceau of the University of Denver Strum College of Law, Daniel S. Medwed of the Northeastern University School of Law, Joan S. Meier of the George Washington University Law School, Priscilla Ocen of Loyola Law School, Maybell Romero of Tulane Law School, Dan Simon of the University of Southern California Gould School of Law, Jonathan Simon of the University of California Berkeley Law School, and Greg Swygert of Northwestern Pritzker School of Law; and
- Jacquelyn Campbell of Johns Hopkins School of Nursing, Mindy Mechanic of the California State University, Fullerton, Amanda Potts of Cardiff University, and Susan Sharp of the University of Oklahoma.

SUMMARY OF THE ARGUMENT

Brenda Andrew's capital murder prosecution was tainted with irrelevant and prejudicial evidence that spoke not to her criminal culpability, but to her failure to comply with society's gender-biased expectations about how women should and should not behave. Repeatedly, the prosecution elicited testimony designed to paint Ms. Andrew as a hypersexual seductress and an uncaring mother. The prosecution's leitmotif of gender deviance was an implicit theme and an explicit exhortation at trial: because Ms. Andrew did not behave as a "virtuous" woman should, the jury should convict her and subject her to the harshest punishment possible. By the time the case was submitted to the jury, the prosecution had deflected the jury's focus from an inquiry into Ms. Andrew's guilt or innocence to a referendum on Ms. Andrew's femininity and morality.

Ms. Andrew's case is an exceptional example of the Oklahoma County District Attorney's office weaponizing gender bias to poison proceedings against a female defendant who had no prior criminal record, in a case that involved no allegation of torture or exceptional cruelty. This brief includes a portion of the trove of sexualizing evidence in Ms. Andrew's trial, and presents scholarship demonstrating how prejudicial that evidence was. Until these prosecutorial tactics are eradicated from American courtrooms, "[j]ustice is likely to remain a lottery while so much depends on the woman's fulfillment of society's expectations." Kennedy, *Eve Was Framed* 215 (1992). *Amici* urge this Court to grant Ms. Andrew's petition for a writ of certiorari.

ARGUMENT

When it comes to racial prejudice, this Court has recognized that “[t]he risk of racial prejudice infecting a capital sentencing proceeding is especially serious.” *Turner v. Murray*, 476 U.S. 28, 35 (1986). In referring to the use of a racial stereotype in a capital murder sentencing proceeding, the Court acknowledged that “[s]ome toxins can be deadly in small doses.” *Buck v. Davis*, 580 U.S. 100, 122 (2017).

A broad array of scholarship makes clear that the risk of prejudice at a capital trial—which is made irreparable by the “complete finality of the death sentence,” *Turner*, 476 U.S. at 35—is just as great for gender bias as it is for racial bias. And here, the gender bias the prosecution injected into Ms. Andrew’s trial did not come in a “small dose.” The prosecution’s case was dripping with inflammatory, irrelevant, and prejudicial evidence depicting Ms. Andrew as “a bad wife, a bad mother, and a bad woman.” *Andrew v. State*, 164 P.3d 176, 206 (Okla. Crim. App. 2007) (A. Johnson, J., concurring in part and dissenting in part). To fully appreciate the ability of this evidence to deprive Ms. Andrew of a fair trial, it must be placed in the context of scholarship that sheds light on the dangers gender bias poses to female defendants.

I. Invocation of Gender Bias Can Severely Prejudice Female Defendants.

There is “overwhelming evidence that gender bias permeates the court system.” *Timm v. Delong*, 59 F. Supp. 2d 944, 959–60 (D. Neb. 1998) (citation omitted). Gender bias has been defined as “sex stereotypes, the perceived relative worth of women . . . and misconceptions about their economic and social positions,” Swent, *Gender Bias at the Heart of Justice: An Empirical Study of State Task Forces*, 6 S. Cal. Rev.

L. & Women's Stud. 1, 35 (1996) (citation omitted), and has been repeatedly linked to sexism, which "involves . . . discrimination based on hostility toward, and negative stereotyping of, women," Herzog & Oreg, *Chivalry and the Moderating Effect of Ambivalent Sexism: Individual Differences in Crime Seriousness Judgments*, 42 L. & Soc'y Rev. 45, 50 (2008). Some degree of gender bias is effectively baked into the "many layers of the male-dominated legal system, from the prevalence of male decision-makers, to the inherent sex-bias in jury selection, to . . . male-oriented laws." Miller, *Inherent (Gender) Unreasonableness of the Concept of Reasonableness in the Context of Manslaughter Committed in the Heat of Passion*, 17 Wm. & Mary J. Women & L. 249, 249–50 (2010) (footnotes omitted). And its effects are especially pernicious on the witness stand, where finders of fact often consider women to be "less rational," "less trustworthy," and "more willing to exaggerate" than men. De Sanctis, *Bridging the Gap Between the Rules of Evidence and Justice for Victims of Domestic Violence*, 8 Yale J.L. & Feminism 359, 373 (1996); see also Epstein & Goodman, *Discounting Women: Doubting Domestic Violence Survivors' Credibility and Dismissing Their Experiences*, 167 U. Pa. L. Rev. 399, 405 (2019) ("gatekeepers unjustly discount women's personal trustworthiness, based on inaccurate interpretations of survivors' courtroom demeanor, as well as negative cultural stereotypes about women and their motivations for seeking assistance" (emphasis omitted)). But the repercussions of gender bias are at their most devastating when they are weaponized against female criminal defendants.

While womanhood can be a talisman for female defendants who are presented as delicate members of the "gentler sex," shielding them from the harshest

punishments, *see, e.g.*, Tillyer et al., *Differential Treatment of Female Defendants*, 42 *Crim. Just. & Behav.* 705 (2015), it is a millstone around the neck of women who are painted as failing to meet societal expectations for proper femininity.

Abundant scholarship has shown that any “advantage conferred by femininity,” Newby, *Evil Women and Innocent Victims: The Effect of Gender on California Sentences for Domestic Homicide*, 22 *Hastings Women’s L.J.* 113, 120 (2011), is afforded only to women who “conform to traditional gender roles” and stereotypes, Tillyer at 705, which dictate that a woman should be “kind and loving,” Du, *The Effect of Defendant Gender on Jurors’ Decision-Making*, 52 *U. Balt. L. Rev.* 1, 16–27 (2022), raise children, “remain chaste, . . . [and] remain true to her husband,” Simon-Kerr, *Unchaste and Incredible: The Use of Gendered Conceptions of Honor in Impeachment*, 117 *Yale L.J.* 1854, 1862 (2008). No such advantage is given to women perceived to be “evil,” Newby at 119, because they deviate from cultural expectations of motherhood, sexuality, and fidelity, and are instead portrayed as “representing the evil side of heterosexual female nature—ruthless, manipulative, seductive and often lustful,” Farr, *Defeminizing and Dehumanizing Female Murderers: Depictions of Lesbians on Death Row*, 11 *Women & Crim. Just.* 49, 56 (2000). In fact, women who fail to adhere to gendered expectations “will . . . be treated more severely” than men. Tillyer at 706. And the “harshes sentence, capital punishment,” is reserved for female defendants who fail to “embody traditional feminine ideals.” Collins, *Too Feminine for Execution?: Gender Stereotypes and the Media’s Portrayal of Women Sentenced to Death*, University of South Carolina Scholar Commons, at 8 (2022).

The noxious effects of gender bias pack a powerful punch in the courtroom—and prosecutors know it. Some prosecutors, including those that tried Ms. Andrew, deliberately invoke gender bias, strategically emphasizing a woman’s departure from feminine ideals “to turn jurors against female defendants,” rather than meeting their burden of proof with actual evidence. Lewis & Sommervold, *Death, but Is It Murder? The Role of Stereotypes and Cultural Perceptions in the Wrongful Convictions of Women*, 78 Alb. L. Rev. 1035, 1048 (2015). In so doing, prosecutors “perpetuate [gender] stereotypes to juries,” *id.*, by presenting for “consideration not only what the woman has done but also who she is with respect to her position in the family and in society,” Herzog & Oreg at 49 (emphasis omitted).

When prosecutors stoop to weaponizing gender discrimination to ensure convictions, they violate their duties as public servants. A prosecutor “is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.” *Berger v. United States*, 295 U.S. 78, 88 (1935); see also *United States v. Agurs*, 427 U.S. 97, 110–11 (1976) (prosecutors “must always be faithful to [their] client’s overriding interest that ‘justice shall be done’”) (quoting *Berger*, 295 U.S. at 88). Prosecutors sacrifice public trust in inflaming juries with gender bias and these tactics should not be tolerated. Prosecutors have a duty as “‘ministers of justice’ to go beyond seeking convictions and legislatively authorized sentences in individual cases, and to think about the delivery of criminal justice on a systemic level, promoting criminal justice policies that further

broader societal ends.” Cassidy, *(Ad)ministering Justice: A Prosecutor’s Ethical Duty to Support Sentencing Reform*, 45 Loy. Univ. Chi. L.J. 981, 983 (2014).

II. Ms. Andrew’s Trial Was Tainted by Irrelevant Evidence About Her Appearance, Sexuality, and Fitness as a Mother.

The prosecution’s invocation of gender bias pervaded Ms. Andrew’s trial, with multiple witnesses seemingly called for the sole purpose of labeling her a temptress, an adulteress, and an unfit mother. This evidence was entirely irrelevant to the case presented against her. Indeed, the prosecution itself conceded on appeal that pieces of this evidence were “irrelevant to any issue in [Ms. Andrew’s] case.” *Andrew v. State*, 164 P.3d 176, 192 (Okla. Crim. App. 2007).

Amici present the most troubling examples of this irrelevant, extremely prejudicial evidence in three categories relating to Ms. Andrew’s: (A) appearance; (B) sexual history; and (C) fitness as a mother.

A. The Prosecution’s Focus on Ms. Andrew’s Appearance.

Though the jury was not asked to resolve any question relating to the identification of Ms. Andrew, the prosecution repeatedly invoked her physical appearance at trial. In response to specific questions by prosecutors, witnesses repeatedly commented on Ms. Andrew’s body or clothes, characterizing both as provocative. Witnesses testified that Ms. Andrew wore:

- clothes that were “very tight, very short with a

lot of cleavage . . . exposed”;²

- “short skirt[s], low-cut tops, just sexy outfits, provocative”;³
- revealing clothing to a restaurant, where she was called a “hoochie”;⁴
- a leather skirt and a leather button-up top while running errands.⁵

At one point, a witness commented that Ms. Andrew wore nothing at all, testifying that she went skinny dipping in the hot tub at her private residence.⁶ This recurring sexualized testimony describing the way Ms. Andrew looked and dressed transformed her from a presumptively innocent woman into a sexual object.

B. The Prosecution’s Focus on Ms. Andrew’s Sexual History.

In addition to eliciting descriptions of Ms. Andrew’s clothing and cleavage, the prosecution also prompted witnesses to share vivid accounts of her sexual encounters with multiple men. Prosecutors repeatedly asked witnesses to provide details of Ms. Andrew’s sexual history, including her extra-marital affairs and flirtations. For example, the prosecution called James Higgins, an assistant manager at a store where Ms. Andrew shopped, to testify in detail about Ms. Andrew’s outfits, flirtatious behavior, and the

² Trial Transcript, Volume 2 (“Vol.” throughout), 323.

³ *Id.* 247.

⁴ *Id.* 323.

⁵ *Id.* 353.

⁶ Vol.12, 2848, 2858.

frequency and locations that the couple had sex despite the fact that Ms. Andrew had not had sex with Mr. Higgins at least half a year prior to Rob Andrew's death.⁷ When Higgins testified that they met for sex at motels and at her house, the prosecution chose to pry further, seeking utterly irrelevant details:

Q. Did you have sex with her any other places than at her house and at the motels?

A. Car.

Q. How many occasions did you have sex with her in her car?

A. Several.

Q. Was it her car or your car?

A. Her car.⁸

Other witnesses reinforced the image of Ms. Andrew as a seductress. The prosecution repeatedly asked its witness, David Ostrowe, about how Ms. Andrew presented herself on the only occasion he met her. Eventually, the prosecution was able to get the witness to say that Ms. Andrew did not look "conservative" like a wife should.⁹ The prosecution questioned witness Rick Nunley, who testified about a "sexual relationship" with Ms. Andrew.¹⁰ In addition, prosecutors:

- discussed how Ms. Andrew went to a motel "several times a week" for "[a] couple of hours"

⁷ Vol.2, 249–51.

⁸ *Id.*

⁹ *Id.* 320–24.

¹⁰ *Id.* 361–67.

with a sexual partner;¹¹

- elicited testimony that Ms. Andrew “[a]lmost always”¹² paid for those motel rooms;¹³
- asked a witness whether Ms. Andrew had an affair with the witness’s sons over objections of the defense;¹⁴
- introduced evidence that Ms. Andrew’s husband would find lingerie that he never saw Ms. Andrew wear;¹⁵ and
- elicited testimony that Ms. Andrew changed her hair color because she heard a man liked redheads.¹⁶

This repeated testimony about Ms. Andrew’s sexuality had no bearing on her guilt or innocence in the case against her and yet was offered to convict her.

Taking care to paint Ms. Andrew not as a passive participant but a sexual aggressor, prosecutors elicited testimony that she would “rub up against” and “touch” men.¹⁷ The prosecution underscored this testimony by introducing into evidence, over Ms. Andrew’s objection, a book found in her possession called *203 Ways to Drive a Man Wild in Bed*.¹⁸ Conversely, Ms. Andrew’s partners were portrayed as naïve men

¹¹ *Id.* 249–51.

¹² *Id.* 249.

¹³ *Id.* 251.

¹⁴ *Id.* 278.

¹⁵ Vol.4, 1101–02.

¹⁶ Vol.3, 498.

¹⁷ Vol.2, 247.

¹⁸ Vol.10, 2318.

who were often “shocked”¹⁹ by Ms. Andrew or “just ma[king] conversation” with her before getting pulled into an affair.²⁰

The prosecution’s hypersexualization of Ms. Andrew reached its zenith during perhaps the most critical part of the trial: closing statements at the culpability phase. At this stage, when it should have been summarizing its case to the jury, the prosecution took time to remind the jury that Ms. Andrew was “an attractive woman.”²¹ The prosecution told the jury that Mr. Andrew “wanted desperately to be a man who was committed to God,” in contrast to Ms. Andrew who “can’t be a woman of God because she’s sleeping with a married man.”²² The prosecution called Ms. Andrew a “slut puppy” who had “no twinge of conscience” after “she . . . had sex on [Mr. Andrew] over and over and over and . . . [kept] a boyfriend on the side.”²³

Astonishingly, the prosecution used its closing argument to hold up in front of the jury the thong underwear Ms. Andrew wore on vacation after her husband had been killed.²⁴ The sensational, shameful action generated media coverage, with a local newspaper noting that the prosecutor “drew gasps from the crowded courtroom when he pulled red, black and pink lingerie from a suitcase Brenda Andrew had

¹⁹ Vol.2, 248.

²⁰ *Id.* 246.

²¹ Vol.17, 4121.

²² *Id.* 4124–25.

²³ *Id.*

²⁴ *Id.* 4101–03.

taken to Mexico.”²⁵ With Ms. Andrew’s underwear on display, the prosecutor told the jury:

The grieving widow packs this to run off with her boyfriend. The grieving widow packs *this* to go sleep in a hotel room with her children and boyfriend. The grieving widow packs *this* in her appropriate act of grief. Going to the beach. . . . Going to the beach a lot.²⁶

In the same breath, the prosecutor told the jury they need not consider other evidence in the case. “You got all the evidence. That’s enough. That’s enough.”²⁷ The prosecution encouraged the jury to view Ms. Andrew’s underwear worn after her husband’s death as the single most critical piece of evidence in the case, despite its complete irrelevance to her guilt or innocence.

C. The Prosecution’s Focus on Ms. Andrew’s Fitness as a Mother.

During the penalty phase, the prosecution reinforced its repeated references to Ms. Andrew’s purported sexual transgressions by linking her sexuality to her supposed failures as a mother. The prosecution used these attacks on Ms. Andrew’s mothering to portray her as an unfit caregiver who prioritized her sexuality over her children. Over and over, the prosecution asked different witnesses whether Ms. Andrew behaved like a “good mother” when she spent time with men who were not the children’s father. A few examples demonstrate the extent to which the

²⁵ Trougako & Baker, *Andrew Case in the Hands of Jury Deliberation Will Resume Today at 9 A.M.*, Oklahoman (July 13, 2004).

²⁶ Vol.17, 4101 (emphases added).

²⁷ *Id.*

prosecution went to solidify this characterization.

- After asking Higgins to describe Ms. Andrew’s “sexy” clothing and flirtatious manner, the prosecution asked, “[w]here were the children when she was doing this rubbing against you and flirting with you?” to which Higgins responded, “I believe just the son was there when that was going on.”²⁸
- In questioning state’s witness Nunley, the prosecution repeatedly elicited his opinion that “good mother[s]” don’t have affairs.²⁹
- Later, the prosecution asked state’s witness Janna Larson, “Were you concerned about the fact that your dad and Brenda Andrew were having an affair and being around [Brenda’s children]?”³⁰
- After Ms. Andrew’s neighbor, Alma Garrison, testified that Ms. Andrew was a generous neighbor who had a wonderful relationship with her children, the prosecution questioned her about Ms. Andrew’s intimate partners, asking if it “[w]ould . . . change [her] opinion” of Ms. Andrew if she knew Ms. Andrew was having “an affair with her handyman” or “insurance salesman?”³¹ And then, “Do you believe a good mother would run off with her boyfriend

²⁸ Vol.2, 246–48.

²⁹ *Id.* 420 (“Does a good mother invite her boyfriends over while the children are in the home?”).

³⁰ Vol.12, 2958.

³¹ Vol.19, 4344.

five days after her husband is killed?”³²

Consistent with that theme, the prosecution elicited testimony from a witness that Ms. Andrew had “trained” her children to be discreet about men visiting her home.³³

The intent of the prosecution’s rhetoric was clear: the prosecution invited the jury to pass judgment on Ms. Andrew’s character explicitly through the lens of allegedly deficient motherhood³⁴ and to help free her children from the “spell” they had been put under by their mother.³⁵

III. Ms. Andrew Was Severely Prejudiced by the Gender Bias the Prosecution Invoked.

The prosecution’s repeated references to Ms. Andrew’s appearance, sexuality, and motherhood were, on their face, inflammatory. Any jury subjected to this drumbeat of sexualizing evidence would come to see Ms. Andrew not as one of their peers, entitled to fair and impartial treatment, but as a one-dimensional and callous seductress, undeserving of their compassion. A robust catalogue of scholarly research confirms this fact, and makes clear that the flames of gender bias the prosecution fed throughout trial were so prejudicial as to have deprived Ms. Andrew of a fair trial.

³² *Id.* 4346.

³³ Vol.12, 2959.

³⁴ Vol.2, 419–20; Vol.19, 4312–14, 4345–46.

³⁵ Vol.19, 4411.

A. The Prosecution's Focus on Ms. Andrew's Sexuality Inflamed the Jury Against Her.

At Ms. Andrew's trial, the prosecution set out to paint her as a "sexually deviant" woman deserving of the harshest punishment. Collins at 78. They succeeded in that goal with devastating effect. The prosecution introduced reams of inflammatory evidence about Ms. Andrew's sexuality—lurid details of her multiple affairs, her suggestive clothing and lingerie, her cleavage, and even a book on how to "Drive a Man Wild in Bed." The purpose of such testimony was to show the jury that "[Ms. Andrew] was a 'bad woman,'" *Lesley v. State*, 606 So. 2d 1084, 1090 (Miss. 1992), "promiscuous, selfish, [and] aggressive," Lang, *The Intersection of Wrongful Convictions and Gender in Cases Where Women Were Sentenced to Death or Life in Prison Without Parole*, 27 Mich. J. Gender & L. 403, 412 (2020), so as to invoke "jurors' fears of a society out of control, one where women's sexuality ran amok," Atwell, *Wretched Sisters: Examining Gender and Capital Punishment* 19 (2d ed. 2014).

Research shows that this sort of improper evidentiary attack is especially prejudicial when levelled against a married woman on trial for murder. Married women are expected to adhere to "appropriate femininity." Potts & Weare, *Mother, Monster, Mrs, I: A Critical Evaluation of Gendered Naming Strategies in English Sentencing Remarks of Women Who Kill*, 31 Int'l J. Semiotics L. 21, 52 (2018). When wives on trial do not conform to those standards, prosecutors can vilify them by arguing that their infidelity "proves a character fault[,] such as promiscuity or immorality," that the jury can rely on "to find that the wife is a person of evil nature, and thereby is more likely to

have engaged in a homicide.” Colquitt, *Evidence and Ethics: Litigating in the Shadows of the Rules*, 76 Fordham L. Rev. 1641, 1651 (2007); see also Lesley, 606 So. 2d at 1090 (“The fact that Loretta Lesley had extramarital affairs was offered to show that she was an immoral woman. The State intended to show that Loretta Lesley was an immoral woman and that she therefore tried to have her husband killed.”).

The New York Court of Appeals recently described prosecutorial attempts to present female witnesses as “promiscuous” to damage their credibility as “a tactical attack based on now-rejected views of female sexuality.” *People v. Cerda*, 223 N.E.3d 308, 315 (N.Y. 2023). But some prosecutors continue to use the “evil woman” tactic for a simple reason: it works. In a study of 42 cases of women sentenced to death for spousal murder between 1632 and 2014, the accused’s “adulterous” behavior was a major component of the evidence against her, even where it bore no relation to the crime. Baker, *Women and Capital Punishment in the United States: An Analytical History* 81, 94–99, 153 (2016).

B. The Prosecution Prejudiced Ms. Andrew by Painting Her as an Unfit Mother.

In addition to deviating from society’s expectations for how a married woman should behave sexually, the prosecution also charged Ms. Andrew with failing to properly perform the ultimate stereotypical gender role: motherhood. This is in spite of the fact that Ms. Andrew was not charged with abusing or in any way harming her children—and there is no evidence to suggest she did. Even though Ms. Andrew’s role as a mother was unrelated to whether she committed the crime for which she was accused,

prosecutors repeatedly asked witnesses whether Ms. Andrew behaved like a “good mother.” Research shows that stereotypes about women’s roles as mothers prejudice female defendants during criminal investigations and at trial.

In part due to paternalistic stereotypes of mothers, women wrongfully confess to crimes at higher rates than men, Weis, *The “Fool’s Gold” Standard of Confession Evidence: How Intersecting, Disadvantaged Identities Heighten the Risk of False Confession*, 22 Nev. L.J. 1179, 1191 (2022), women are more often wrongfully convicted for “no-crime” cases involving sudden illness or death of children, *id.*; see also Lewis & Sommervold at 1050 (“No-crime cases that have been uniquely susceptible to stereotype-driven theories include arson, shaken baby syndrome, and sudden illness or death.”), and courts tend to impose more severe sentences against mothers than fathers, and against uninvolved mothers than attentive mothers, other things being equal, Tasca et al., *The Role of Parental Status and Involvement in Sentence Length Decisions: A Comparison of Men and Women Sentenced to Prison*, 65 Crime & Delinquency 1899 (2019); see also Mogul, *The Dykier, the Butcher, the Better: The State’s Use of Homophobia and Sexism to Execute Women in the United States*, 8 N.Y.C. L. Rev. 473, 482 (2005) (“The women on death row are the ones who are easily portrayed as unfeminine, aggressive, possessed of poor mothering skills, or sexually promiscuous.”). In general, the criminal legal system holds mothers to a higher standard than other defendants, as “criminal law is more likely to impose an affirmative duty on mothers than other classes of people.” Roberts, *Motherhood and Crime*, 79 Iowa L. Rev. 95, 95–96 (1993).

Juries tend to reward female defendants who can successfully portray themselves as loving and nurturing mothers. Carroll, *Images of Women and Capital Sentencing Among Female Offenders: Exploring the Outer Limits of the Eighth Amendment and Articulated Theories of Justice*, 75 *Tex. L. Rev.* 1413, 1446 (1997). But mothers who are perceived as deviating from these stereotypes receive harsher sentences. One 2019 study of convicted criminals in Arizona found that mothers who lived with their children prior to arrest received shorter sentences than mothers who were uninvolved in their children's lives. *Id.* Parental involvement did not affect fathers' sentence lengths. *Id.*

“If women are stereotyped as nurturers and natural caregivers, then women who are perceived to have violated that role are re-cast as a ‘flawed mother,’ . . . or even a ‘monster.’” Henry, *Smoke but No Fire: When Innocent People Are Wrongly Convicted of Crimes That Never Happened*, 55 *Am. Crim. L. Rev.* 665, 693–94 (2018) (citations and footnote omitted). This pervasive bias is captured in the criminal legal system's harsh treatment of women who commit so-called maternal crimes, in which women are accused of harming their own children. Roberts at 107–08. Indeed, commentators have theorized that women sentenced to death are disproportionately charged with domestic crimes in part because the legal system views crimes of mothers against their families as particularly heinous. *See* Newby at 124.

By capitalizing on deeply ingrained biases against women whose conduct deviates from the stereotype of an ideal wife and mother, prosecutors strategically turned the trial on Ms. Andrew's guilt or innocence into a referendum on Ms. Andrew's femininity and

morality. Prosecutors' invocation of inflammatory and prejudicial gendered stereotypes against Ms. Andrew tainted the jury's view of Ms. Andrew, depriving her of a fair trial.

CONCLUSION

For the foregoing reasons, *amici* urge the Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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