

Case No. 15-6190

**IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

BRENDA EVERS ANDREW,

Petitioner-Appellant,

v.

TAMIKA WHITE,
Acting Warden, Mabel Bassett Correctional Center,

Respondent-Appellee.

Appeal from the United States District Court, Western District of Oklahoma
D.C. No. 5:08-CV-00832-R

**BRIEF OF *AMICI CURIAE* PROFESSOR SUSAN SHARP, OKLAHOMA
APPLESEED CENTER FOR LAW AND JUSTICE, PROFESSOR VALENA
BEETY, AND DR. AMANDA POTTS
IN SUPPORT OF PETITION FOR REHEARING EN BANC**

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INTEREST OF *AMICI CURIAE*¹

Professor Susan Sharp teaches Sociology at the University of Oklahoma. Her areas of expertise include the death penalty, gender and crime, and women and incarceration. Professor Sharp consults with the Constitution Project Oklahoma Death Penalty Evaluation and is the founding editor of *Feminist Criminology*.

The Oklahoma Appleseed Center for Law and Justice began in 2022, and is a part of the Appleseed Network. The organization is a non-profit legal organization that fights for the rights and opportunities of Oklahomans—it has spent the last year fighting for equitable sentencing for survivors of interpersonal violence. Colleen McCarty, Esq., the Executive Director, previously served as Policy Counsel and Deputy Director of Oklahomans for Criminal Justice Reform.

Professor Valena Beety is a founding board member of the Innocence Project Indiana and a professor of Criminal Law and Women Gender & Law at Indiana University Maurer School of Law. She previously served as a federal prosecutor. She is an expert on wrongful convictions due to gender and is the author of *Manifesting Justice: Wrongly Convicted Women Reclaim Their Rights* (Kensington Books, 2022).

¹ No counsel for a party authored this brief in whole or in part. No person other than *amici curiae* or their counsel contributed money to fund this brief's preparation or submission. *See* Fed. R. App. P. 29(a)(4)(E). All parties have consented to the filing of this brief.

Dr. Amanda Potts is a Senior Lecturer in Public and Professional Discourse at Cardiff University. She has conducted research into the impact of gender bias on sentencing within the United Kingdom and has published on topics relating to gender and the criminal justice system.

Amici believe prosecutions must be free from evidence weaponizing gender bias against female defendants.

INTRODUCTION

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 expectations about how women “should” behave. Repeatedly, the prosecution elicited testimony designed to paint Andrew as a hypersexual seductress and an uncaring mother. The prosecution’s leitmotif of gendered deviance was an implicit theme and an explicit exhortation at trial: because Andrew did not behave as a “virtuous” woman should, the jury should 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 Andrew’s guilt or innocence to a referendum on Andrew’s femininity and morality.

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 Andrew’s trial, and presents scholarship demonstrating how prejudicial that evidence was. *Amici* urge this Court to grant a rehearing *en banc*.

ARGUMENT

I. Brenda Andrew’s Trial Was Tainted with Irrelevant Evidence About Her Appearance, Sexuality and Fitness as a Mother.

The prosecution’s invocation of gender bias pervaded Andrew’s trial, with multiple witnesses seemingly called for the sole purpose of labeling her an adulteress. *Amici* present the most troubling examples of this gendered evidence in three categories relating to Andrew’s: (i) appearance; (ii) sexual history; and (iii) fitness as a mother.

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

In response to specific questions by prosecutors, witnesses repeatedly commented on Andrew’s body or clothes, characterizing both as provocative. Witnesses testified that Andrew wore: clothes that were “very tight, very short with lots of cleavage exposed”;² and “short skirts, low-cut tops, [] sexy outfits.”³

At one point, a witness commented that Andrew wore nothing at all, testifying that she went skinny dipping in the hot tub at her private residence.⁴ This recurring sexualized testimony describing the way Andrew looked and dressed transformed her from a presumptively innocent woman into a sexual object worthy of scorn.

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

³ *Id.* 247.

⁴ Vol.12, 2848, 2858.

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

The prosecution also encouraged witnesses to share vivid accounts of Andrew’s sexual encounters. For example, the prosecution called James Higgins to testify in detail about Andrew’s outfits, flirtatious behavior, and the frequency and locations that the couple had sex.⁵ When Higgins testified that they met for sex at motels and at her house, the prosecution sought more 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.⁶

Other witnesses reinforced the image of Andrew as a seductress. Prosecution witness David Ostrowe testified that on the only occasion he met her, Andrew did not look like a wife should.⁷ Rather than looking “conservative,” she was wearing a tight, short dress that showed her cleavage.⁸ In addition, prosecutors:

⁵ Vol.2, 249–51.

⁶ *Id.*

⁷ *Id.* 320–21.

⁸ *Id.* 320–23.

- presented testimony from Rick Nunley about an affair he had with Andrew;⁹
- discussed how she went to a motel “several times a week” for “a couple of hours” with a sexual partner;¹⁰
- introduced evidence that Andrew’s husband would find lingerie that he never saw Andrew wear;¹¹ and
- elicited testimony that Andrew changed her hair color because she heard a man liked redheads.¹²

Shockingly, the prosecution *itself* conceded on appeal that pieces of this evidence were “irrelevant to any issue in [Andrew’s] case.” *Andrew v. State*, 164 P.3d 176, 192 (Okla. Crim. App. 2007).

Despite that irrelevance, the prosecution consistently portrayed Andrew as a sexual aggressor, eliciting testimony that she would “rub up against” and “touch” men.¹³ The prosecution underscored this testimony by introducing into evidence, over Andrew’s objection, a book she possessed called *203 Ways to Drive a Man Wild in Bed*.¹⁴ Conversely, Andrew’s partners were portrayed as naïve men who

⁹ *Id.* 361–67.

¹⁰ *Id.* 249–51.

¹¹ Vol.4, 1101–02.

¹² Vol.3, 498.

¹³ Vol.2, 247.

¹⁴ Vol.10, 2318.

were often “shocked”¹⁵ by Andrew or “just mak[ing] conversation” with her before getting pulled into an affair.¹⁶

The prosecution’s hypersexualization of Andrew reached its zenith during closing statements at the culpability phase, when the prosecution presented the thong underwear that Andrew wore on vacation after her husband was killed.¹⁷ The prosecutor “pulled red, black and pink lingerie” from a suitcase seized from Andrew,¹⁸ suggesting that no good, grieving widow would ever wear such things. In the same breath, the prosecutor told the jury they need not consider other evidence. “You got all the evidence.... That’s enough. That’s enough.”¹⁹ The sensationalism and shamefulness of the prosecution’s tactic was quickly picked up by the local media, entrenching it in the imagination of viewers.²⁰

¹⁵ Vol.2, 248.

¹⁶ *Id.* 246.

¹⁷ Vol.17, 4101–03.

¹⁸ Trougako and Baker, *Andrew Case in the Hands of Jury Deliberation Will Resume Today at 9 A.M.*, THE OKLAHOMAN (Jun. 9, 2023) (“Gieger drew gasps from the crowded courtroom when he pulled red, black and pink lingerie from a suitcase Brenda Andrew had taken to Mexico....”).

¹⁹ Vol.17, 4101.

²⁰ *See supra* n.18.

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

At the penalty phase, the prosecution reinforced its repeated references to Andrew’s sexual transgressions by linking her sexuality to her supposed failures as a mother. The resulting attacks on Andrew’s mothering portrayed her as an uncaring mother who prioritized her sexuality over her children. Over and over, the prosecution asked different witnesses whether Andrew behaved like a “good mother” when she spent time with men who were not the children’s father. For example, after asking Higgins to describe 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 the son was there while that was going on.”²¹ In questioning state’s witness Nunley, the prosecution repeatedly elicited his opinion that “good mothers” don’t have affairs.²² 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]?”²³ After Andrew’s neighbor, Alma Garrison, testified that Andrew was a generous neighbor who had a wonderful relationship with her

²¹ Vol.2, 248.

²² Vol.2, 420 (“Does a good mother invite her boyfriends over while the children are in the home?”).

²³ Vol.12, 2958.

children, the prosecution questioned her about Andrew’s intimate partners, asking if it “[w]ould [] change [her] opinion” of Andrew if she knew Andrew was having “an affair with her handyman” or “insurance salesman?”²⁴ And then, “Do you believe a good mother would run off with her boyfriend five days after her husband is killed?”²⁵

Consistent with that theme, a prosecution witness testified that Andrew taught her children to be discreet about men visiting her home.²⁶ The intent of the prosecution’s rhetoric was clear: the prosecution invited the jury to pass judgment on Andrew’s character explicitly through the lens of allegedly deficient motherhood.²⁷

II. Andrew Was Irreparably Prejudiced by the Gender Bias the Prosecution Invoked.

Andrew’s trial was replete with irrelevant and highly prejudicial evidence depicting her as “a bad wife, a bad mother, and a bad woman.” *Andrew v. State*, 164 P.3d 176, 206 (Okla. Crim. App. 2007) (Johnson, concurring in part and dissenting in part). The sheer volume of this sexualized evidence renders Andrew’s trial remarkable. But in order to appreciate the extent of the damage this evidence had on

²⁴ Vol.19, 4344.

²⁵ *Id.* 4346.

²⁶ Vol.12, 2959.

²⁷ Vol.2, 419–420; Vol.19, 4312–14, 4345–46.

Andrew's ability to receive a fair trial, it must be placed in the context of scholarship that sheds light on the dangers gender bias poses in the criminal justice system.

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 Studies 1, 35 (1996). The prosecution leveraged gender bias to influence the jury against Andrew, creating a grave risk of substantial prejudice. This is precisely the sort of evidence that heightens the risk of wrongful convictions and death sentences. Empirical studies conducted across more than 30 jurisdictions in the United States demonstrate that women routinely receive “unfavorable substantive outcomes in cases because of their gender, and men do not.” *Id.* at 55. Often when women are accused of crime, their gender is “at the heart of the treatment they receive.” Kaukinen, *Women lawbreakers constructed in terms of traditional definitions of femininity: The sentencing of women in conflict with the law*, Electronic Theses and Dissertations at 77 (1995) <https://scholar.uwindsor.ca/etd/4584>.

In capital cases, appeals to gender bias can be the difference between life or death for women defendants. For example, an analysis of death penalty cases indicates that women who are convicted of spousal homicide “may be subjected to relatively harsher treatment than their male counterparts.” Newby, *Evil Women and*

Innocent Victims: The Effect of Gender on California Sentences for Domestic Homicide, 22 Hastings Women's L.J. 113, 119 (2011). Prosecutors lean into this sexist cycle by improperly injecting evidence relating to a woman defendant's compliance with gender norms "to dehumanize ... the defendant ... understanding that such prejudices may further motivate jurors to impose a death sentence." 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. City L. Rev. 473, 483 (2005).

The instruction manual for weaponizing gender bias against a female defendant is well established. Prosecutors depict them as "evil women ... who commit shockingly unladylike behavior, [which] allow(s) the sentencing judges and juries to put aside any image of them as 'the gentler sex'" and condemn them to death as "a way for society to set the outer limits which define gender roles." Newby at 119 (citations omitted). "[W]omen who do not conform to sexist notions society has proscribed for women.... [a]re the ones who are easily portrayed as unfeminine, aggressive, possessed of poor mothering skills, or sexually promiscuous." Mogul at 482.

History proves that this tactic gets results. A 1993 survey of the 35 women on death row in the United States at the time found that, in a majority of these cases, the female defendants were 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). Another study found that in 42 cases of women sentenced to death for spousal murder from 1632–2014, 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 US: An Analytical History*, at 81, 94–99, 153 (McFarland & Company Publishers, 2016). Prosecutors in these cases presented testimony about the accused women having “several young lovers,” “leaving to be with her lover,” “having many affairs,” or having an “adulterous affair.” *Id.*

The similarities between Andrew’s trial and those cases are manifest. By making frequent references to Andrew’s suggestive clothing, sexual history, and hours spent at motels with men who were not her husband, the prosecution portrayed her as someone who commits “shockingly unladylike behavior.” Newby at 119. By holding up her lingerie before the jury, the prosecution painted Andrew as “sexually promiscuous.” Mogul at 482. This evidence served 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*, at 19 (Peter Lang Publishing, 2nd ed. 2014).

The prosecution’s depiction of Andrew as a bad mother was similarly intended to bias the jury against her. Multiple studies have shown that individuals seen as “bad parents” (particularly bad mothers) tend to be sentenced more severely. Tasca, *The Role of Parental Status and Involvement in Sentence Length Decisions: A Comparison of Men and Women Sentenced to Prison*, 65 *Crime & Delinq.*, 1899 (2019) (collecting studies). Women offenders are “judged on their capabilities to parent and care for their children.” Kaukinen at 81. They “are expected to be the care-givers” and “[w]hen they commit crime their ability to fulfill this social expectation is then placed in question.” *Id.* at 84. The prosecution capitalized on gender bias when it elicited irrelevant testimony related to whether Andrew’s sexuality made her a bad mother and whether she acted appropriately as a mother.

* * *

Like other women before her, Andrew was “on trial both for [her] legal infractions and for [her] defiance of appropriate femininity and gender roles.” Farr at 50. Instead of receiving a fair trial, she was smeared based on the way she “deviat[ed] from appropriate feminine behavior.” See 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. for the Semiotics L.* 21, at 23 (2018). The resulting gender bias permeated her trial and poisoned the jury against her, wreaking untold prejudice in her capital case.

While gender bias is deplorable in all forms, Andrew's trial stands apart in the sheer volume and unrestrained nature of the irrelevant, sexualized evidence the prosecution injected into its case. Rather than soberly directing the jury's attention to the relevant legal standards and facts, the prosecution turned the trial into a biased inquisition on Andrew's personal life, distracting the jury with salacious gossip and name calling.

CONCLUSION

Amici urge the Court to rehear this matter *en banc*.

Dated: July 10, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29, I certify that the attached brief is proportionately spaced, has a typeface of 14 points, and complies with the word count limitations set forth in Fed. R. App. P. 29(b)(4). This brief has 2,600 words, excluding the portions exempted by Fed. R. App. P. 32, according to the word count feature of Microsoft Word used to generate this brief.

I further certify that pursuant to this Court's guidelines on the use of the CM/ECF system:

- a) all required privacy redactions have been made per 10th Cir. R. 25.5 and Fed. R. App. P. 25(a)(5);
- b) the hard copies that will be submitted to the Clerk's Office are exact copies of the ECF filing; and
- c) the ECF submission was scanned for viruses with the most recent version of a commercial virus-scanning program (Symantec Endpoint Protection, version 14.3, last updated October 13, 2021) and, according to the program, is free of viruses.

Dated: July 10, 2023

By: /s/ Andrew LeGrand
Andrew LeGrand

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system on July 10, 2023. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: July 10, 2023

By: /s/ Andrew LeGrand
Andrew LeGrand