UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRENDA EVERS ANDREW,

Petitioner-Appellant

vs.

SCOTT TINSLEY, Warden,

Respondent-Appellee

Case No. 15-6190

W. District of Oklahoma
D. Ct. No. 08-CV-00832-R

BRIEF OF *AMICUS CURIAE* FAIR TRIAL ANALYSIS, LLC IN PARTIAL SUPPORT OF PETITIONER AND PARTIAL SUPPORT OF RESPONDENT

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I. STATEMENT OF IDENTITY, INTEREST, AUTHORITY TO FILE

Amicus curiae, Fair Trial Analysis, is a research and consulting organization founded by Barry Edwards, J.D., Ph.D., a legal scholar and researcher specializing in quantitative analysis of criminal trials. Dr. Edwards graduated from Stanford University. He received his J.D. from New York University School of Law and a Ph.D. from the University of Georgia. He was a faculty member at the University of Central Florida where he taught research methods, pre-law courses, and American politics electives. He continues to occasionally teach for the University of Georgia. Dr. Edwards has written five textbooks on research methods for political science. The core textbook, The Essentials of Political Analysis, co-authored with Professor Philip Pollock III and published by Sage Publications, 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.

Fair Trial Analysis has no stake in the outcome of this litigation. It has not received any compensation for this analysis. Fair Trial Analysis independently funded its research. *Amicus* does not seek to prove a trial was fair or unfair; rather, it aims to provide objective analysis of trial errors and omissions to aid the pursuit of justice. No part of this brief was written or funded by any party or party's counsel. Amicus files this brief by leave of court.

II. SUMMARY OF ARGUMENT AND KEY FINDINGS

The key issue in this case is whether the improper admission of irrelevant and prejudicial evidence ("improper evidence") denied the petitioner a fundamentally fair trial. *Amicus* estimated the causal effect of improper evidence in both the guilt and sentencing

phases of trial by conducting a double-blind randomized experiment involving 1,128 jury-qualified adults, representative of Oklahoma County, Oklahoma, the trial venue. This analysis yields the following key findings:

- Improper evidence did not substantially increase support for a guilty verdict or the probability of a guilty verdict.
- Petitioner's death sentence was a low probability event. Improper evidence increased support for a death sentence in the jury pool from 35.1% to 43.1%, increasing the probability of a death verdict from 11.2% to 22.4%, effectively doubling the death sentence probability.
- A fairminded jurist would reject the assumption that the sentencing phase of petitioner's trial was fundamentally fair. The data show, with a high level of certainty and conservative assumptions, that the improper evidence had a substantial and intolerable effect on the probability of a death sentence.
- 21.9% of jury-qualified adults who support a death sentence in a trial with improper evidence change their votes to life imprisonment in a trial without improper evidence. Respondent comments confirm the influence of improper evidence on perceptions of the petitioner and whether she deserves the death penalty.

III. SCIENTIFIC ANALYSIS OF TRIAL ERRORS

In 2023, this Court expressed its concerns about improper evidence admitted by the trial court and how it was used to prosecute Ms. Andrew but did not assess prejudice based on its interpretation of federal law. *See Andrew v. White*, 62 F.4th 1289, 1316 n. 15 (10th Cir. 2023). Subsequently, the U.S. Supreme Court vacated that judgment and asked

this Court to assess the effect of improper evidence in the guilt and sentencing phases of petitioner's trial:

> On remand, the Court of Appeals should [consider] … the question … 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."
>
> The Court of Appeals must ask that question separately for the guilt and sentencing phases. As to each phase, it might consider the relevance of the disputed evidence to the charges or sentencing factors, the degree of prejudice Andrew suffered from its introduction, and whether the trial court provided any mitigating instructions. The ultimate question is whether a fairminded jurist could disagree that the evidence "so infected the trial with unfairness" as to render the resulting conviction or sentence "a denial of due process."

Andrew v. White, 145 S.Ct. 75, 83 (2025) (citations omitted).

Some maintain that the admission of improper evidence was harmless. Others contend that it was harmful. Both sides purport to know what jurors think, but neither side subjects their claims to empirical analysis. *Amicus* conducts research to estimate prejudice. This section outlines the analytic framework *Amicus* uses, describes the survey research conducted to collect data, and presents the results of the analysis.

A. Framework For Evaluating Prejudice at Petitioner's Trial

Null hypothesis significance testing is a framework for evaluating the harmfulness of trial errors based on common scientific principles. *See* Barry C. Edwards, *A Scientific Framework for Analyzing the Harmfulness of Trial Errors*, 8 UCLA Crim. J. L. R. 1 (2024).

This analytic framework aligns the petitioner's burden of proof in post-conviction proceedings. *See Andrew*, 62 F.4th at 1319 (stating that petitioner has not provided sufficient

information to carry her burden of proof in in post-conviction litigation). The effect of improper evidence is presumed to be harmless.[1] If the analysis demonstrates, with requisite certainty, that improper evidence made the trial unfair, then reasonable, fairminded jurists would reject the assumption of harmlessness.[2] If the analysis is inconclusive, the presumption of harmlessness stands.

One estimates causal effects by comparing outcomes with and without the causal variable. The classic example, the "gold standard" of research, is a randomized experiment with treatment and control groups. To estimate the prejudice in the guilt phase, one compares guilty verdict probabilities in the actual and error-free trial conditions. For the sentencing phase, one compares the respective death sentence probabilities.[3]

Without committing a specific value, let T represent the amount of prejudice that may be tolerated without rendering a trial fundamentally unfair.[4] If the prejudicial effect is

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[1] It is not clear that any court has specifically determined that the admission of improper evidence was harmless in the sentencing phase of trial. The OCCA discussed the effect of improper evidence in guilt phase context only. *See Andrew v. State*, 164 P.3d 176, 192 (Okla. Ct. Crim. App. 2007).

[2] "An unreasonable application [of federal law] … is one with which no fairminded jurist would agree." *Andrew*, 145 S.Ct. at 80. A "fairminded jurist" is a reasonable decisionmaker who does not demand absolute certainty but is appropriately skeptical. This avoids a subjective analysis of whether individual judges are "fairminded jurists."

[3] To assess prejudice, one may also evaluate how errors and omissions influence jurors' perceptions and reasoning, recognizing that errors may harm the trial process as well as the trial result. *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 (2005) (comparing and discussing approaches to harmless error analysis). Section III.C.4 shares insights into respondents' perceptions and reasoning.

[4] In most analyses, an error constitutes intolerable harm if it creates a "reasonable probability" of a different trial outcome. *United States v. Bagley*, 473 U.S. 667, 682 (1985).

less than or equal to T, the trial was not fundamentally unfair; if the prejudicial effect is greater than T, the trial was fundamentally unfair.[5] One must define T to judge whether a prejudicial effect was fair or unfair, but it does not alter the estimated values.[6]

B. Research Design

A specially-designed randomized experiment is conducted to assess the effect of improper evidence in the guilt and sentencing phases, keeping all other factors constant. Respondents are randomly assigned either a summary of the actual trial or a hypothetical, error-free version of the trial. The assignments are double-blind: neither respondents nor the researcher know which trial condition respondents have been assigned.

Trial summaries are derived from public records, primarily the statement of fact in *Andrew*, 164 P.3d at 184-187. The actual trial summary includes improper items enumerated by Judge Bacharach. *Andrew*, 62 F.4th at 1356-57 (Bacharach, J., dissenting) (identifying nine categories of improper evidence that "the State doesn't try to defend" in this appeal). For brevity and clarity, the summary omits extraneous details and avoids legalese.[7]

A "reasonable probability" is "a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

[5] I have suggested that T = .10 based on the level of doubt that undermines confidence in a guilty verdict. *See* Edwards, *A Scientific Framework*, at 44-45. I have also suggested that T might be lower in capital cases with greater need for reliability. *See Id.* at 44 n. 188. For scientific analysis, researchers commonly adopt .05 as a tolerable Type I error rate. T = .05 may be appropriate when the outcome is a death sentence.

[6] A baseball analogy is useful. Technology can pinpoint where a pitch crosses the plate, but to call balls and strikes, the umpire must define the strike zone.

[7] The value of the life insurance policy, which was $800,000 in 2001, is updated to $1.4 million to reflect inflation (per usinflationculator.com).

The hypothetical trial summary presents the same factual narrative and attorney arguments. However, the improper items are removed, and attorneys do not use them to make arguments. It adds one item of improperly excluded evidence. *See Andrew*, 164 P. 3d at 197. Officer Warren testifies that he found Andrew deeply upset and imploring the police to help her husband when he responded to the scene. *See Andrew*, 62 F.4th at 1322.[8]

After voting in their assigned trial condition, respondents are asked to reconsider the case in the other trial condition. This crossover research design, commonly used in medical studies, increases the number of responses per condition and ensures group equivalency. *See, e.g.,* Thomas A. Louis et al., *Crossover and Self-Controlled Designs in Clinical Research*, 310 New Eng. J. Med. 24 (1984).

The validity of this research method is well documented. Surveys have long been used to study public opinion and are accepted as evidence in litigation. *See Schering Corp. v. Pfizer Inc.*, 189 F.3d 218 (2d Cir. 1999) (Sotomayor, J.). In the legal context, researchers have employed survey research methods to study how varying trial conditions affect jurors. *See, e.g.,* D. Alex Winkelman et al., *An Empirical Method for Harmless Error*, 46 Ariz. St. L.J. 1405 (2014); Cass R. Sunstein, Daniel Kahneman & David Schade, *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 107 Yale L.J. 2071 (1997). Studies have validated

[8] The Supreme Court suggests that we "might consider … whether the trial court provided any mitigating instructions," but the trial court did not provide mitigating instructions. *Andrew*, 164 P.3d at 193, 201, 206; *Andrew v. Moham*, 2015 WL 5254525, *43 (W.D. Okla. 2015). Accordingly, there are no special limiting instructions in the actual trial summary. In the hypothetical trial condition, limiting instructions are unnecessary.

the use of written vignettes for estimating jurors' verdict preferences. Additionally, researchers have demonstrated the validity of online surveys as a data collection method.

C. Results of Analysis

The survey was conducted on April 18-19, 2025. Respondents are U.S. citizens recruited using the Cloud Research platform. Initial results permitted a definitive analysis of prejudice in the guilt phase of trial. The survey was then focused on the sentencing phase decision to obtain a larger sample size in budget. Overall, 1,589 respondents participated. 96% of responses passed Qualtrics response quality checks. Study datasets are publicly available to allow independent verification of the reported results. *See* Barry C. Edwards, *Oklahoma vs. Brenda Andrew Study Files*, Harvard Dataverse (Apr. 22, 2025), https://doi.org/10.7910/DVN/VFEZGY.

1. Representativeness of Sample

Using respondents' demographic information, sampling weights were calculated based on key demographic features of Oklahoma County, the trial venue (see Table 1).[9] *See Duren v. Missouri*, 439 U.S. 357 (1979) (holding that jury pools must fairly represent distinctive groups in community).

Analysis is limited to survey respondents who meet standard jury qualifications: U.S. citizenship, English proficiency, no felony convictions or pending felony charges, and the

[9] Sampling weights adjust for the overrepresentation or underrepresentation of specific groups within a sample relative to the target population.

physical and mental ability to serve on a jury. Additionally, respondents are qualified to follow death penalty instructions. Applying these qualifications leaves 1,128 jury-qualified respondents for analysis.

Table 1. Comparison of Respondent Samples and Target Population

Demographic Characteristic	Oklahoma County	Weighted Sample	Unweighted Sample	Qualified & Weighted
College graduates	32.0%	32.4%	53.7%	32.1%
Female	51.7%	51.8%	48.9%	52.5%
Hispanic	20.4%	19.6%	10.0%	19.9%
African American	13.8%	12.3%	9.8%	11.5%
Household income $50k+	62.1%	61.7%	62.3%	61.4%
Adults aged 35+	67.6%	67.3%	63.0%	67.7%
Number of adults	605,015	1,525	1,525	1,128

Note: For comparability, target population statistics are based on adults over age 18, U.S. Census Bureau, American Community Survey, 5-Year Estimates for 2023 (Tables S1501, DP05, S1901).

2. Improper Evidence Did Not Significantly Affect the Guilt Phase

92.0% of respondents (n = 105) support a guilty verdict in a trial with improper evidence, compared to 90.9% without it. It is estimated that improper evidence increased support for a guilty verdict by 1.2 ± 6.3 percentage points.

Despite small sample size, one is confident that improper evidence did not cause substantial harm in the guilt phase. When support for a guilty verdict is high, as is the case here, there is a very high probability of conviction, and additional support for a guilty verdict has very little effect on the probability of conviction.[10] It is estimated that improper

[10] Aggregating and analyzing decades of research on jury deliberation allows us to precisely estimate the probability of a death sentence based on the number of jurors who initially favor it. *See* Barry C. Edwards, *If the Jury Only Knew: The Effect of Omitted*

evidence increased the probability of a guilty verdict by 0.3 ± 1.9 percentage points. *See* Barry C. Edwards, *Measuring Fairness*, 77 Ala. L. Rev. (forthcoming 2025) (identifying relationship between juror preferences and verdict probabilities). Therefore, a fairminded jurist would disagree with the claim that improper evidence made the guilt phase fundamentally unfair. These results support this Court's determination that the admission of improper evidence was harmless in the guilt phase due to "overwhelming evidence" of the petitioner's guilt. *See Andrew* 62 F.4th at 1319, 1321, 1323, 1324, 1331, 1135, 1338, 1352.

3. Improper Evidence Made Sentencing Phase Fundamentally Unfair

While this Court and others have discussed the guilt phase in detail, there has been relatively little consideration of the sentencing phase. Even if there was overwhelming evidence "in support of aggravating factors" *Id.*, 62 F.4th at 1338, to make petitioner eligible for a death sentence, it does not follow that aggravating factors so overwhelmed mitigating factors that jurors would still select petitioner for a death sentence, regardless of improper evidence.[11] As many have observed, death is different.

The analysis indicates that improper evidence made the sentencing phase fundamentally unfair. 43.1% of respondents (n = 1,128) in the actual trial condition vote for a death sentence compared to 35.1% in the hypothetical condition. It is estimated that

Mitigation Evidence on the Probability of a Death Sentence, Va. J. Soc. Pol'y & Law (forthcoming 2025). This relationship follows an S-shaped curve, as shown in Figure 1.

[11] If the defendant offered no mitigation factors, then a reviewing court could say that irrelevant and prejudicial evidence used to support aggravating factors was harmless because the only difference is how much the aggravators outweigh the mitigators.

improper evidence increased support for the death penalty by 8.0 ± 3.4 percentage points (see Table 2). Approximately 1 in 12 respondents changed sentence preferences.

Table 2. Effect of Improper Evidence on Respondents' Sentencing Preferences

	With Improper Evidence	Without Improper Evidence	Estimated Causal Effect
Favor Death Sentence	43.1%	35.1%	+8.0%
Margin of Error	2.4%	2.3%	3.4%

To further assess the effect of improper evidence, we estimate its effect controlling for sentencing preference in the actual trial condition (see Table 3). 21.9% of those who vote for a death sentence in the actual trial condition switch to life imprisonment when they choose a sentence in the error-free condition.[12]

Table 3. Comparing Sentence Preferences in Actual and Hypothetical Trials

		Choice in Actual Trial	
		Death	**Life**
Choice in Hypothetical Trial	**Death**	78.1% (379.1)	2.6% (16.4)
	Life	21.9% (106.5)	97.4% (625.4)

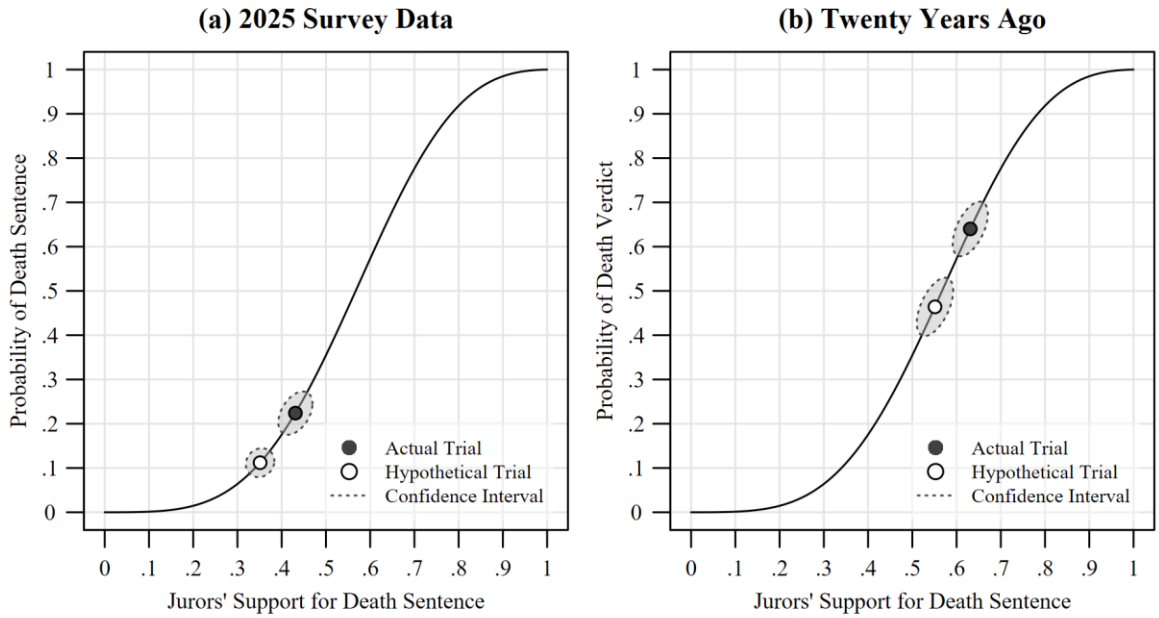
While the dynamics of jury deliberation dampen the effect of improper evidence in the guilt phase, they amplify its effect in the sentencing phase.[13] When the percentage

[12] Only 2.6% of "life" voters in the actual trial change their vote to death in the hypothetical trial. Unfortunately, none of this group offered explanatory comments.

[13] When the "scales of justice" are "delicately poised" between potential verdict, then an otherwise harmless error "cannot be brushed aside as immaterial, since there is a real chance that it might have provided the slight impetus which swung the scales" against the defendant. *Glasser v. United States*, 315 U.S. 60, 67 (1942).

in favor of a death sentence increases from 35.1% to 43.1%, the probability of a death verdict increases from 11.2% to 22.4%, an increase of 11.2 ± 4.9 percent points, effectively doubling the probability of a death sentence.[14]

Figure 1. Change in Death Sentence Probabilities



Petitioner's death sentence was a low probability event. Based on 2025 survey data, improper evidence increased the probability of a death sentence from 11.2% to 22.4%, effectively doubling the probability of a death sentence because of improper evidence. Thus, there is a 50% chance that petitioner's death sentence was caused by improper evidence. Petitioner is unlikely to receive the death penalty in a new sentencing conducted without improper evidence. Based on these results, no fairminded jurist would maintain the belief that petitioner's sentencing was fair.

[14] Given estimation uncertainty due to finite sample size, the lowest plausible increase in the probability of a death sentence is 6.3 percentage points. A larger sample would permit a narrower margin of error.

It is reasonable to think that the same shift in sentencing preferences had greater effect 20 years ago due to changing social norms about capital punishment. General support for a death sentence was considerably higher 20 years ago.[15] *See* Jeffery M. Jones, *Drop in Death Penalty Support Led by Younger Generations*, Gallup (Nov. 14, 2024), https://news.gallup.com/poll/653429/drop-death-penalty-support-led-younger-generations.aspx. In the Figure 1(b) scenario, the same 8.0 percentage point shift increases the probability of a death sentence from 46.4% to 64.0%, an increase of 17.6 ± 7.4 percentage points.[16] The effect of improper evidence in the sentencing phase is conservatively estimated.[17] Improper evidence increased the probability of a death sentence by 11.2 to 17.6 percentage points, depending on assumptions about the trial context.

Whether this sentencing phase was *fundamentally unfair* depends on our tolerance for prejudice (T). To provide some context for the results in this case, Figure 2 plots the estimates for this case against reference cases where the harm/prejudice caused by trial

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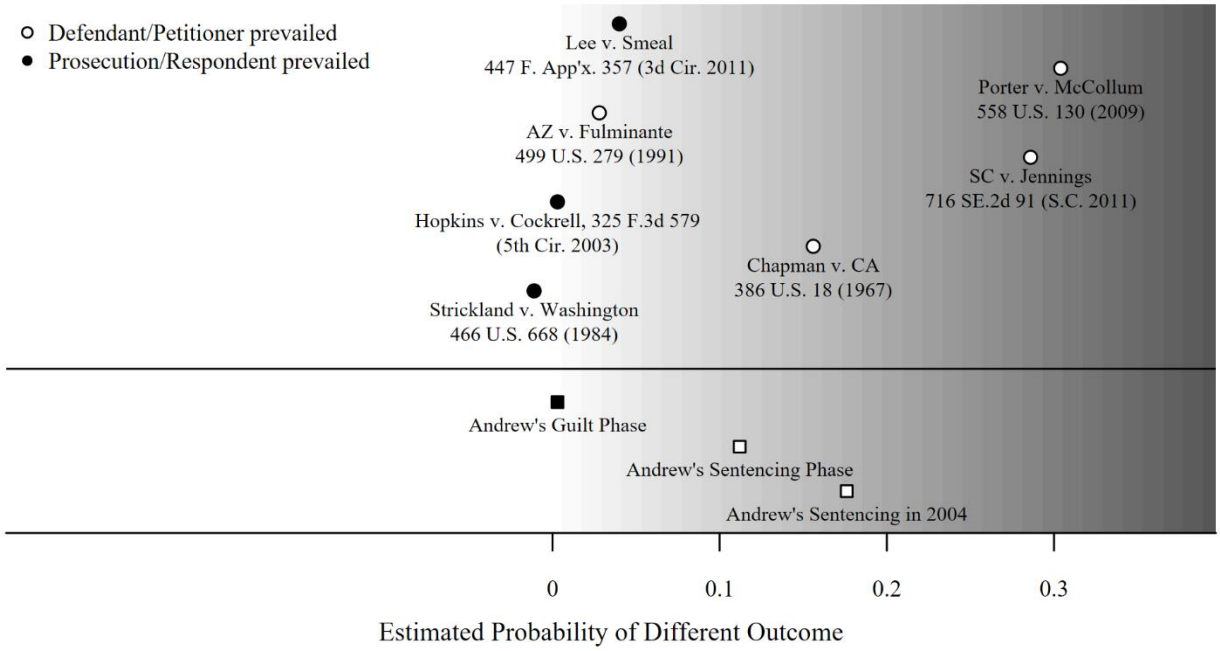
[15] Additionally, some of respondents choose life imprisonment as a harsher punishment than death: "Let her rot in prison and think about her choices that put her there. The death penalty would be the easy way out." In deliberation, this group would be more likely to join the death verdict faction than support a more lenient sentence.

[16] Interestingly, assuming higher general support for the death penalty in both conditions results in larger absolute increase in death sentence probability, 17.6 percentage points, but a smaller relative increase in that probability, 38 percent.

[17] If the exclusion of improper evidence causes 21.9% of those who support a death sentence in the Figure 1(b) scenario to instead favor life imprisonment, the effect of improper evidence on sentencing preferences would be greater than 8.0 percentage points and the change in verdict probabilities could exceed the 17.6 percentage point shift depicted in Figure 1(b).

errors and omissions were estimated empirically. *See* Edwards, *Measuring Fairness*, *supra*; Winkelman et al., *supra*. Comparison to other cases shows the degree of prejudice observed in the sentencing phase here is not generally tolerated by appellate courts. In the death penalty context, where reliability is a paramount concern, this degree of prejudice seems intolerable. (Conclusion: Prejudicial effect in sentencing phase greater than T).

Figure 2. Probability of Different Outcome Compared to Other Cases



4. Illustrative Comments from Respondents

The research conducted by *Amicus* offers a unique opportunity to examine the thought processes of a representative sample of jury-qualified adults—as if we could listen in on jurors' deliberations—by reading comments they volunteered to explain their reasoning. Respondents initially assigned to the actual trial condition explain why they change their minds in the hypothetical trial condition.

> The revised version made me view the defendant more sympathetically, focusing on her emotional reaction and the complexity of the situation. It softened the portrayal of her as simply a villain and made me consider her potential for change and rehabilitation.
>
> In the first version, the prosecution painted a picture of a morally repugnant person, making the death penalty feel more like a deserved punishment for a 'bad woman.' In the revised version, by focusing more on the crime itself and presenting a slightly more nuanced (or at least less demonized) image of the defendant, the argument for life imprisonment becomes more compelling.

Respondents initially assigned to the hypothetical trial condition explain why they change sides in the actual trial condition.

> I mainly wanted to keep her alive for her children, so I voted against the death of the first time. However, when I found out 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.
>
> So this version made her seem not just guilty, but incredibly manipulative and unremorseful which made it much harder to feel any sympathy for her.
>
> In the first scenario I was thinking about her kids … but the second scenario painted her as such a bad person/wife/mother that her children are better off without her and can hopefully reset the cycle and make something of themselves.

For some respondents, Officer Warren's testimony tips the scales in favor of life imprisonment. "The wife was acting remorseful is what made me change my mind and not give her the death penalty[.]" Many respondents vote the same way in the actual and hypothetical trial conditions, but respondents in this group also feel differently about the petitioner. The improper evidence creates even stronger support for the death penalty: "The additional details in this different version solidifed [sic] my stance on the defendant."

And removing the improper evidence strengthens support for life imprisonment: "I gave life last time, and this situation only makes it more appropriate to give her life instead of the death sentence."

IV. CONCLUSION

It is important to give proper respect to convictions and sentences upheld by state courts. Accordingly, the framework for this analysis holds petitioner's claims to a very high standard. Improper evidence did not cause substantial prejudice in the guilt phase, but it did make the sentencing phase fundamentally unfair, confirming Judge Johnson's wise opinion. *See Andrew*, 164 P.3d at 206-208 (concurring in part and dissenting in part). The Court should not vacate a state court's death sentence without proof of prejudice, but when the Court's concerns about sexual and sexualizing evidence are substantiated by "gold standard" research, *Amicus* prays the Court will order a new sentencing.

To assist the court, *Amicus* is willing to clarify the methodology and technical terminology used in this analysis, conduct additional analyses to assess the robustness of the findings, and undertake further research to evaluate the effect of improper evidence under alternative conditions.

Respectfully submitted, this 25th day of April, 2025.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing **BRIEF OF AMICUS CURIAE FAIR TRIAL ANALYSIS, LLC IN PARTIAL SUPPORT OF PETITIONER AND PARTIAL SUPPORT OF RESPONDENT** compiles with the page length limitation set forth in Fed. R. App. P. 29(a)(5). It is 15 pages (not including table of contents and table of authorities), one-half the maximum length authorized for a party's principal brief. It uses proportionally spaced 14-point font. All required privacy redactions have been made. ECF submissions have been scanned for viruses with the most recent version of commercial virus-scanning programs and are virus-free.

This 25th day of April, 2025

/s/ Barry C. Edwards

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **BRIEF OF AMICUS CURIAE FAIR TRIAL ANALYSIS, LLC IN PARTIAL SUPPORT OF PETITIONER AND PARTIAL SUPPORT OF RESPONDENT** using the CM/ECF system, thereby causing it to be electronically transmitted to counsel for all parties of record.

This 25th day of April, 2025

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