No. 23-6912

In the Supreme Court of the United States

SAMUEL FIELDS,

Petitioner,

v.

LAURA PLAPPERT, Warden,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

CAPITAL CASE

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the en banc Sixth Circuit erred by holding that the Kentucky Supreme Court did not act contrary to or unreasonably apply clearly established federal law when it rejected petitioner Samuel Fields's claim that an experiment his jury conducted during deliberations violated his constitutional rights, where this Court has never addressed the constitutionality of jury experiments and the record shows the experiment did not prejudice Fields.

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INTRODUCTION

This Court has never determined whether (and if so, to what extent) a jury experiment violates the Constitution. Samuel Fields asks the Court to take up this novel issue for the first time in one of the most deferential postures in federal law: review of a state-court decision under the Antiterrorism and Effective Death Penalty Act (AEDPA). But because this Court has no existing jurisprudence on the issue, Fields cannot show that the Kentucky Supreme Court's rejection of his jury-experiment claim was "was contrary to, or involved an unreasonable application of, clearly established Federal law." 28 U.S.C. § 2254(d)(1). It follows that the Sixth Circuit's decision denying relief under AEDPA was correct. The Court should therefore deny review.

In 2003, Fields was convicted and sentenced to death for brutally murdering 84-year-old Bess Horton. Fields's conviction was supported by, among other evidence, his multiple confessions and two witnesses who found him standing by Ms. Horton's mutilated body. During deliberations, members of the jury decided to test a prosecution theory about Fields's means of entry into Ms. Horton's house. They did so by using a blunt-tipped knife, which had been admitted into evidence, to unscrew screws from a cabinet in the jury room.

Both the Kentucky and federal courts have considered Fields's argument that the jury experiment violated his constitutional rights. And both the Kentucky and

federal courts have rejected it. As this sequence makes clear, this case comes to the Court for consideration under AEDPA. Under that statute's deferential standard, a federal court can grant relief only if the relevant state-court decision was "so lacking in justification" as to be "beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011).

Fields does not get close to meeting this strict standard. Because this Court has not addressed a constitutional challenge to jury experiments, the principle of law on which Fields relies is far too abstract to justify federal habeas relief. Moreover, Fields was not prejudiced by the jury's experiment. For these reasons and as further discussed below, the Court should deny the petition for a writ of certiorari.

STATEMENT OF THE CASE

1. Samuel Fields murdered Bess Horton in the early morning hours of August 19, 1993—more than 30 years ago. Pet. App. 233a. Fields had spent the afternoon before "drinking heavily and consuming 'horse tranquilizers'" with his girlfriend, Minnie Burton.[1] *Id.* at 234a.[2] At some point in the evening, the two began arguing, with Fields "throwing furniture, knives, and other objects." *Id.* Burton left and went home. *Id.*

[1] "Horse tranquilizers" refers to PCP, a hallucinogen. Pet. App. 5a.

[2] Throughout, internal citations are omitted from appendix quotations, unless otherwise indicated.

Ms. Horton owned the duplex in which Burton lived. At the time, Ms. Horton "was in the process of evicting Burton." *Id.* When Burton arrived at the duplex, she "was unable to gain entry" and "sat on the front porch." *Id.* at 235a. Sometime later, Fields showed up. He "was making a loud commotion" and was carrying a knife. *Id.* He "took Burton's keys and told her that he would get into the duplex, implying that he might break in." *Id.* A neighbor heard the commotion and called the police. *Id.*

Two officers responded. *Id.* at 76a. Ms. Horton lived close by, and the officers eventually found Fields in her bedroom. One of the officers saw Ms. Horton lying on the bed. *Id.* at 78a. "Her 'throat was slashed,' and a knife was jammed all the way through her skull: the knife was 'buried to the hilt in her right temple' and 'the point of the blade protruded from her left.'" *Id.* at 73a. When the police found Ms. Horton, her "hands were literally inside her throat." *Id.* at 78a.

One officer asked Fields, "What's going on? What are you doing?" *Id.* Fields responded: "I stabbed her, and I'm into it big time this time . . . . I'm going to prison for the rest of my life." *Id.* The officers arrested Fields. *Id.* at 79a. After receiving *Miranda* warnings, Fields said, "Kill me. Shoot me. I'm into it deep. I killed her." *Id.* The officers discovered several knives and razor blades on his person. *Id.* At trial, the parties referred to one of those knives—a butter knife with the tip missing—as the "twisty knife." *Id.* The Commonwealth argued that Fields used the twisty knife to remove screws on a storm window on Ms. Horton's house to break in. *Id.* at 234a.

After arresting Fields, officers took him to a hospital, where an emergency medical technician examined him. *Id.* at 79a. The EMT asked Fields "where the blood was coming from." *Id.* Fields responded "in no uncertain terms" that "if [the EMT] had killed some lady that [he] would have blood on [him] as well." *Id.*

2. The trial began on September 8, 2003, and lasted roughly four weeks.[3] Trial Vol. 1, R.30-1, PageID#3973. As the district court explained, "the prosecution emphasized three themes." Pet. App. 80a. The first theme was that two officers caught Fields in Ms. Horton's home. *Id.* The second theme hinged on timing—"there wasn't any opportunity for anyone else to have done this." *Id.* And the third theme was that the physical evidence "pointed to Fields—in particular that Fields's blood had been found at the crime scene and that the 'twisty knife' had white paint on the end of it, as did the screws used to attach the window to the house." *Id.* The prosecution "also reminded the jury repeatedly that Fields had confessed 'three different times.'" *Id.* In his closing arguments, the prosecutor urged the jury to "[b]elieve [Fields] when he told [Officer] Lindeman that he did it." *Id.* at 81a.

While the jurors deliberated, one juror asked whether Fields could have used the twisty knife to remove screws from the storm window. Post-Conviction Record (PCR), R.89-3, PageID#13521. Another juror responded that it "wouldn't be that

[3] This was the second trial. In the first prosecution, the Commonwealth charged Fields with burglary and murder, and the jury convicted him on both counts before sentencing him to death. *See* Pet. App. 292a–293a. But the Kentucky Supreme Court reversed that conviction on direct appeal. *Id.* at 293a. That first conviction is unrelated to the current appeal.

hard" and used the twisty knife to remove screws from a cabinet in the jury room. *Id.* at PageID#13521–22. The juror who raised the issue later stated that the experiment "wasn't what, you know, said that [Fields] was guilty or not guilty." *Id.* at PageID#13522.

The jury convicted Fields of murder and burglary, and he was sentenced to death. Pet. App. 233a. After the Kentucky Supreme Court rejected Fields's claim regarding the jury's experiment, *id.* at 199a–204a, Fields sought relief under AEDPA. Then-District Judge Thapar denied Fields's jury-experiment claim. *Id.* at 89a–93a.

3. A panel of the Sixth Circuit reversed by a divided vote. *Id.* at 55a–71a. On rehearing en banc, however, the full Sixth Circuit affirmed the denial of relief. *Id.* at 4a. The en banc court noted that this Court "has not identified any principles to distinguish proper from improper jury experiments"; therefore, Fields could not "show that the experiment in his case violated 'clearly established' law from the Supreme Court." *Id.* Indeed, Fields "failed to get past AEDPA's first step by identifying 'clearly established' law on this topic." *Id.* at 13a. The court reasoned that none of the cases Fields cited "'clearly' appl[ied] to the jury experiment in his case." *Id.* at 17a. Furthermore, the court held, Fields's argument that the jury experiment violated his right to be convicted based on the evidence at trial rested on too "abstract" a proposition. *Id.* at 18a.

ARGUMENT

The Sixth Circuit's decision denying habeas relief does not warrant this Court's review. No decision of this Court clearly establishes that the jury experiment conducted in Fields's trial is unconstitutional. In fact, this Court has not addressed the constitutionality of jury experiments *at all*. Fields is thus left to analogize the facts here to a highly generalized rule applied in other distinct contexts. But this Court has repeatedly admonished federal courts against doing exactly that. And even if Fields could show a violation of clearly established law, it would not warrant this Court's intervention because he has not demonstrated that the jury experiment actually prejudiced him.

A few background principles govern this case. A writ of habeas corpus is an "extraordinary remedy" that guards against "extreme malfunctions in the state criminal justice system[]." *Shinn v. Ramirez*, 596 U.S. 366, 377 (2022) (citation omitted). Under AEDPA, a federal court may upset a state-court judgment only in very narrow circumstances: as relevant here, if the state decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). Under this demanding standard, federal courts do not undertake ordinary error correction or anything close to it. Relief can be granted only if the state court's decision was "so lacking in justification" as to be "beyond any possibility for fairminded disagreement." *Harrington*,

562 U.S. at 103. That the death penalty is at stake does not make AEDPA's standard any less strict. *White v. Wheeler*, 577 U.S. 73, 81 (2015) (per curiam).

I. The Sixth Circuit correctly held that the Kentucky Supreme Court's decision is not contrary to or an unreasonable application of clearly established law.

1. The Warden and Fields agree on one thing: this Court has not addressed the constitutionality of jury experiments. As the Sixth Circuit noted, that "lack of precedent makes it difficult for Fields even to pinpoint the *specific constitutional right* that the experiment implicates." Pet. App. 13a; *see* Pet. 1–2 (citing both the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment). It also resolves this case. The absence of any on-point precedent from this Court "alone suffices to establish that the Kentucky Supreme Court's conclusion was not 'objectively unreasonable.'" *White v. Woodall*, 572 U.S. 415, 423 (2014) (citation omitted). Therefore, the Sixth Circuit's decision denying relief was demonstrably correct.

2. Without an applicable decision from this Court, Fields retreats to several cases—only some of which involved a jury—to cobble together the abstract rule that "a verdict must be based on the evidence developed at trial." Pet. 18. But that rule frames matters at an extremely "high level of generality." *Lopez v. Smith*, 574 U.S. 1, 6 (2014) (per curiam) (citation omitted). Under AEDPA, such "abstract" propositions do not "establish clearly the specific rule [a prisoner] needs." *Id.* As this Court has "repeatedly explained," "the more general the federal rule, the more leeway state

courts have in reaching outcomes in case-by-case determinations before their decisions can be fairly labeled unreasonable." *Brown v. Davenport*, 596 U.S. 118, 144 (2022) (cleaned up) (citation omitted).

An examination of Fields's favored cases shows that he reasons from the most general of legal propositions. For example, he cites *Turner v. Louisiana*, 379 U.S. 466 (1965). The issue there was whether it was permissible for the officers who stayed with the jury during sequestration to serve as the principal prosecution witnesses. *Id.* at 467–68. In that unique context, *Turner* said that the "'evidence developed' against a defendant shall come from the witness stand in a public courtroom." *Id.* at 472–73. The officers' interactions with the jury transgressed that principle because their credibility was critical to the case. *See id.* at 473. Merely describing *Turner*'s facts shows how different it is from this case. The same is true of *Irvin v. Dowd*, 366 U.S. 717 (1961). In that case, this Court found that "[e]ight out of the 12" jurors who convicted the petitioner "thought [he] was guilty" based on public reporting before they heard any evidence; on that basis, the Court vacated the petitioner's conviction. *Id.* at 727. Again, that fact-specific holding does not clearly establish a rule for this case.

Fields's remaining cites to this Court's decisions also implicate distinct principles that do not apply to the situation here. For example, he cites *Parker v. Gladden*, 385 U.S. 363 (1966) (per curiam). *Parker* had nothing to do with jury experiments. It

involved a bailiff making disparaging comments about the defendant to the jury. *Id.* at 363–64. Fields cites *Parker* for the "undeviating rule" that the "rights of confrontation and cross-examination are among the fundamental requirements of a constitutionally fair trial." *Id.* at 364–65 (citation omitted). The Warden has no quarrel with this general statement of law, but it does not clearly establish that the jury experiment here was unconstitutional.

Another case on which Fields relies, *Patterson v. Colorado*, did not even involve a jury trial. 205 U.S. 454 (1907). Instead, it concerned imposing contempt for publishing articles and a cartoon "intended to embarrass the court in the impartial administration of justice." *Id.* at 458–59. As Fields notes, *Patterson* said that "conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print." *Id.* at 462. But a holding at such "a high level of generality" simply "cannot supply a ground for relief" under AEDPA. *See Brown*, 596 U.S. at 136. In sum, as the Sixth Circuit put it, "by framing *Parker*, *Turner*, *Irvin*, and *Patterson* at a sky 'high level of generality,' Fields overlooks what matters: their holdings." Pet. App. 18a (quoting *Lopez*, 574 U.S. at 6). Those holdings are much too narrow and fact-specific to provide a basis for habeas relief here.

3. With no jury-experiment caselaw, Fields is left with only a highly generalized principle about the jury considering the evidence presented to it. But that rule

is much too abstract to supply a ground for AEDPA relief here. This Court's *Woodall* decision illustrates the point. The issue there was whether the Constitution requires a no-adverse-inference instruction when a defendant chooses not to testify during the penalty phase. *Woodall*, 572 U.S. at 418–19. This Court had already addressed a similar question during the guilt phase and had said that, generally speaking, "the privilege against self-incrimination applies to the penalty phase." *Id.* at 420–21. But no prior decision of this Court squarely addressed the question presented. *Id.* So the prisoner was left to argue that Supreme Court precedent, taken "together," left only one reasonable conclusion. *See id.* at 420 (citation omitted). That was not good enough. Under AEDPA, federal courts cannot extend Supreme Court precedent even when doing so may be the "logical next step." *Id.* at 426–27. "'[I]f a habeas court must extend a rationale before it can apply to the facts at hand,' then by definition the rationale was not 'clearly established at the time of the state-court decision.'" *Id.* at 426 (citation omitted).

Woodall is far from the only decision to so hold. For example, in *Lopez*, the prisoner sought AEDPA relief on the theory that he did not receive constitutionally adequate notice of the charges against him because of "a prosecutorial decision to focus on another theory of liability at trial." 574 U.S. at 5. The lower court, however, could not identify a Supreme Court decision "holding as much." *Id.* Instead, the lower

court relied on "three older cases that stand for nothing more than the general proposition that a defendant must have adequate notice of the charges against him." *Id.* at 5–6. Such a general proposition, this Court explained, "is far too abstract to establish clearly the specific rule [the prisoner] needs." *Id.* at 6. The Court underscored that "[n]one of our decisions . . . addresses, even remotely, the specific question presented by this case." *Id.*

The Court applied this principle yet again in *Nevada v. Jackson*, 569 U.S. 505 (2013) (per curiam). There, the Court reversed the Ninth Circuit's grant of habeas relief to a defendant convicted of rape, who argued that the state court improperly excluded "evidence of prior sexual assault complaints" that he wished to use to impugn the victim's credibility. *Id.* at 510. The Court held that by purporting to apply "Supreme Court decisions holding that various restrictions on a defendant's ability to *cross-examine* witnesses violate the Confrontation Clause," the appeals court had improperly "elided the distinction between cross-examination and extrinsic evidence by characterizing the cases as recognizing a broad right to present evidence bearing on a witness's credibility." *Id.* at 511–12 (cleaned up) (citation omitted). That expansive approach ran afoul of AEDPA. Viewing precedents so broadly, the Court observed, "could transform even the most imaginative extension of existing case law into 'clearly established Federal law, as determined by the Supreme Court.'" *Id.* at 512 (citation omitted).

So too here. Fields requests AEDPA relief under the general rule, developed outside the jury-experiment context, that juries must base their decisions on record evidence. As Fields tells it, the jury's experiment here involved extrinsic evidence—the screws from the filing cabinet. But for Fields to prevail, the Court would have to extend its precedent in at least two ways. The Court would first have to extend Fields's abstract rule to jury experiments. Then, the Court would have to extend that precedent to hold that the jury experiment here was impermissible.

Fields's request that the Court do so here requires drawing jurisprudential lines that may not be drawn on AEDPA review. For example, jurors are routinely told to rely on their common sense and life experience to evaluate witness credibility and other evidence. *See, e.g.*, 6th Cir. Pattern Jury Instructions 1.05(1) (Mar. 1, 2023). Yet a juror's common sense and life experience are not subject to cross-examination. For instance, say that instead of conducting the experiment with the twisty knife, a juror who was a handyman told the jury that in his experience the twisty knife could have easily removed the screws from the storm window. Would that conduct violate Fields's general rule that "jurors must decide a case based on the evidence at trial"? If not, what case from this Court says that a juror's reliance on his common sense and life experience is permissible but that the jury experiment here is not? The bottom line is that Fields's general rule has not been extended to jury experiments, and there

are a host of details that need to be clarified before AEDPA relief could be appropriate here.

The Sixth Circuit pinpointed this problem perfectly in discussing whether the jury's experiment here violates Fields's abstract rule:

> [T]his general idea does little to help answer the specific question that matters here: Do jurors "decide guilt based on something other than 'the evidence presented' when they conduct an experiment using the evidence presented"? Stated differently, when does a jury experiment change from a (valid) "examination of proper evidence" into a (perhaps impermissible) "production of new evidence"?

Pet. App. 19a. As Judge Thapar further illustrated when denying Fields's claim:

> [T]he jurors did in some sense rely on "the evidence presented"—they simply examined the twisty knife, which was in fact in evidence. And thus one might say that the jurors simply examined the evidence—albeit in an unusual way—but ultimately "based" their verdict on the evidence itself. Meanwhile, we actively encourage juries to use their "common sense" and we at least tolerate them using their own "life experiences"—both of which are not formally admitted as evidentiary exhibits during the course of a trial. . . . [O]nce we start quibbling with the reasoning process that jurors use during deliberation, it is hard to know where to stop.

Id. at 93a. Wrestling with the proper boundaries of the "evidence presented" is not an exercise suitable for AEDPA review.

To be clear, the Warden is not arguing that all jury experiments are permissible. There might be reasons for drawing some lines and not others when jurors con-

sider extrinsic information during their deliberations. But this Court has never articulated a rule stating under what circumstances—or even whether—a jury experiment in the jury room is unconstitutional. On AEDPA review, that ends the matter.

4. Fields argues that the Sixth Circuit improperly declined to find a clearly established rule on the basis that "this Court has not considered a factually identical case involving a jury experiment." Pet. 23. And he cites several decisions for the notion that "the lack of a Supreme Court decision on nearly identical facts does not by itself mean that there is no clearly established federal law." Pet. 27 (quoting *Marshall v. Rodgers*, 569 U.S. 58, 62 (2013)); *see id.* at 27–28 (citing *Woodall*, 572 U.S. at 427; *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 246–64 (2007); *Williams v. Taylor*, 529 U.S. 362, 391 (2000)). Of course, lower courts need not wait for a "nearly identical factual pattern" before granting AEDPA relief. *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007) (citation omitted). But that rule has no purchase here. This Court has yet to consider as a matter of law whether and to what extent jury experiments are impermissible. Only if this Court had taken those threshold steps could Fields's fact-based criticism have merit.

The caselaw Fields relies on demonstrates as much. In *Panetti*, the defendant argued that he had been denied "certain procedures" required by one of this Court's earlier decisions. *Id.* at 948. That prior decision arose in the same context as *Panetti*—a prisoner claiming incompetency. And the earlier decision specifically "identifie[d]

the measures a State must provide when a prisoner alleges incompetency to be executed." *Id.* No such preexisting jurisprudential framework exists here.

Fields also argues that the Sixth Circuit improperly relied on the lower courts' "divergence" on the subject of jury experiments. Pet. 30. However, he misunderstands both the court's decision and the applicable law. In the first place, the Sixth Circuit discussed the lower-court cases after it had already thoroughly examined this Court's precedents and concluded that they supplied no clearly established law on jury experiments. Pet. App. 13a–19a. The differences in opinion among the lower courts did not drive the decision. Instead, that divergence further demonstrated the lack of on-point caselaw from this Court.

Moreover, Fields does not help his cause when he asserts that *Carey v. Musladin* treated lower-court disagreements as an indication of a reasonable application of law rather than an absence of clearly established law. Pet. 30 (citing 549 U.S. 70, 77 (2006)). Either way, *Carey* supports the Sixth Circuit's decision. In that case, the Court addressed a state court's finding that the petitioner was not prejudiced by the victim's relatives' wearing buttons with the victim's picture. *Carey*, 549 U.S. at 72. The Court noted it had "never addressed a claim that such private-actor courtroom conduct was so inherently prejudicial that it deprived a defendant of a fair trial." *Id.* at 76. After citing numerous lower-court decisions going both ways on the question,

the Court concluded: "Given the lack of holdings from this Court regarding the potentially prejudicial effect of spectators' courtroom conduct of the kind involved here, it cannot be said that the state court unreasonably applied clearly established Federal law." *Id.* at 77 (cleaned up) (citation omitted).

That holding maps onto this case. Indeed, *Carey* indicates that a divergence among lower courts shows *both* the lack of a clearly established rule *and* the reasonableness of differing interpretations of the Court's precedents. The landscape is just as varied here as it was in *Carey*. *See* Pet. App. 20a–21a (citing "[c]ountless" decisions that "found no federal or state error when jurors conducted experiments using 'extrinsic evidence' from the jury room" as well as "some decisions that may support [Fields's] rule (at least as a matter of state law)"). There is simply no basis in this Court's precedents for finding the Kentucky court's decision unreasonable or the Sixth Circuit's decision incorrect.

Nor is this case the proper vehicle for the Court to address jury experiments in the first instance. Doing so in an AEDPA posture would make little sense given this Court's precedents emphasizing that "clearly established law" consists of "the holdings, as opposed to the dicta, of this Court's decisions *as of the time of the relevant state-court decision*." *Yarborough v. Alvarado*, 541 U.S. 652, 660–61 (2004) (emphasis added) (citation omitted). Even if this Court determined for the first time that such

experiments implicate a constitutional guarantee, that would not change the correctness of the Sixth Circuit's decision here.

II. The circuits are not split regarding the constitutionality of jury experiments.

1. With no Supreme Court precedent about jury experiments, Fields retreats to a number of decisions from lower courts to argue that petitioners "potentially may obtain habeas relief due to the jury's consideration of extrinsic evidence." Pet. 19. But lower-court decisions cannot supply clearly established law to fill the gap in this Court's precedents. *See Glebe v. Frost*, 574 U.S. 21, 24 (2014) (per curiam). Moreover, the decisions Fields cites involved facts so different that they do not set up a clear split of authority. Even assuming a rule could be divined from this Court's precedents on the propriety of jury experiments, the lower-court decisions cited by Fields simply do not disagree over that rule.

Take *Loliscio v. Goord*, for example. 263 F.3d 178 (2d Cir. 2001). Fields cites it for the notion that a "defendant's Sixth Amendment rights are implicated when a jury considers incriminating evidence that was not admitted at trial." Pet. 19 (quoting *Loliscio*, 263 F.3d at 185). But that case involved "the jury's consideration of . . . rumors concerning [a prisoner's] prior bad acts." *Loliscio*, 263 F.3d at 185. Specifically, two jurors had heard information outside the record containing "unsubstantiated rumors" about the petitioner and the victim. *Id.* at 182. That is a far cry from what happened in this case—a jury experiment during deliberations involving admitted

evidence. Moreover, the Second Circuit ultimately rejected the petitioner's habeas claim, finding "that the jury did not consider the rumors in any meaningful way." *Id.* at 190–91.

Several of Fields's other decisions that arose outside the context of a jury experiment likewise denied relief for claims based on an extra-record influence on the trial. In *Black v. Workman*, a juror made a statement about "his personal knowledge of the roadway." 682 F.3d 880, 906 (10th Cir. 2012). Although acknowledging this Court's statement "that a 'verdict must be based upon the evidence developed at the trial,'" the Tenth Circuit held that the state court did not unreasonably apply this Court's precedents in finding an "absence of evidence that the jury considered the information and the fact that the information duplicated trial testimony." *Id.* at 906–07 (quoting *Irvin*, 366 U.S. at 722). And in *Wood v. Secretary, Department of Corrections*, the petitioner alleged "that two jurors watched news coverage during his trial" and "obtained extrinsic evidence about his case." 793 F. App'x 813, 819 (11th Cir. 2019). However, the Eleventh Circuit applied AEDPA deference and upheld the state court's decision denying relief, noting that "[t]he state court could have decided that" the alleged extrinsic evidence "did not sufficiently establish the presumption of prejudice under [circuit precedent]" or that it "was harmless." *Id.* at 820. These decisions have nothing to say about clearly established law vis-à-vis the jury experiment in this case.

Hurst v. Joyner, a Fourth Circuit case on which Fields relies, also did not involve jury experiments. 757 F.3d 389 (4th Cir. 2014). Instead, a juror asked for, and received, advice from her father about finding guidance in the Bible for making a penalty decision. *Id.* at 392. The Fourth Circuit remanded for an evidentiary hearing, applying a "presumption of prejudice . . . when the defendant presents a credible allegation of communications or contact between a third party and a juror concerning the matter pending before the jury," based on this Court's decision in *Remmer v. United States*, 347 U.S. 227 (1954). *Id.* at 397 (citation omitted). Here, of course, no third-party contact occurred. *Oliver v. Quarterman* was another case about jurors consulting a Bible. 541 F.3d 329, 340 (5th Cir. 2008). Again, nothing of the sort happened in Fields's case.

Indeed, some of Fields's cases simply underline the impropriety of his attempts to define a clearly established principle based on broad statements in lower-court decisions. In *Bebo v. Medeiros*, the court found it "cause for concern" that a book by a legally educated author containing "commentary about defense attorneys lying and murderers disclaiming responsibility for stabbings they committed" was in the jury's deliberation room. 906 F.3d 129, 136 (1st Cir. 2018). However, the court denied relief because the state court's "decision that the book did not qualify as 'extraneous' material was not objectively unreasonable." *Id.* at 138. The court reasoned that this Court's relevant caselaw "involved either communications relating to the specific case sub

judice or contacts between the jurors and individuals or entities involved in that particular trial." *Id.* at 138 (citations omitted). Without those factors, AEDPA did not permit relief.

One of Fields's favored cases did not involve a jury at all. In *Owens v. Duncan*, the petitioner was convicted in a bench trial by a judge who based his verdict on a factual finding about motive that "had *no basis* in the record." 781 F.3d 360, 364 (7th Cir. 2015) (emphasis added). The Seventh Circuit found that, given "the scantiness of the actual evidence of [the prisoner's] guilt," the trial judge's finding prejudiced the verdict and violated "the right to have one's guilt or innocence adjudicated on the basis of evidence introduced at trial." *Id.* at 365. Thus, the petitioner's due-process rights had been violated. Although Fields quotes the opinion, he ignores the court's explanation that "[t]he Supreme Court has made clear . . . that a judge or a jury may not convict a person on the basis of a belief that has no evidentiary basis whatsoever." *Id.* Nothing of the kind occurred in this case. Fields was convicted based on a large amount of evidence, including eyewitness testimony placing him at the scene of the murder as well as his three confessions. *Owens* has no bearing here.[4]

[4] Fields describes *Owens*'s subsequent consideration and dismissal by this Court as an additional reason the Court should grant review here. Pet. 22–24. However, the Court's decision to dismiss as improvidently granted an entirely different case more than eight years ago has no bearing on the present case. Contrary to Fields's argument, this case does not present the question this Court "was unable to resolve in *Owens*." *Id.* at 24.

2. Of the lower-court cases Fields cites that did involve jury-experiment claims, none even suggests a clearly established principle that would support granting relief here. For example, in *Gonzales v. Adams*, the Ninth Circuit denied habeas relief where the jury "test[ed] the sharpness of [a] knife." 370 F. App'x 867, 868 (9th Cir. 2010). More specifically, "one of the jurors took a cardboard box of Triscuit crackers, which had been brought into the jury room as a snack, and stabbed the Triscuit box in order to illustrate that the knife could pierce the box only when given a 'heavy thrust.'" *People v. Gonzales*, No. B156607, 2003 WL 551090, at *3 (Cal. Ct. App. Feb. 27, 2003). In considering whether this Court's decision in *Turner* justified AEDPA relief, the Ninth Circuit explained that *Turner* "does not bar jurors from manipulating an object in evidence during deliberations to test its properties." *Gonzales*, 370 F. App'x at 868.

Fields also relies on *Banghart v. Origoverken, A.B.*, a products-liability action. 49 F.3d 1302, 1303 (8th Cir. 1995). In that case, there was a question about how items would burn in a stove, and the stove was admitted into evidence. *Id.* at 1306. The jurors first used toothpicks and then matches "to duplicate a portion of the testing" an expert had done. *Id.* The toothpicks and the matches were not admitted into evidence. *See id.* at 1306 & n.7. The Eighth Circuit found that "neither the wooden matches and toothpicks used in the experiment, nor the experiment itself were extrinsic evidence." *Id.* at 1307. In reasoning similar to the Kentucky Supreme Court's

reasoning as to Fields, the Eighth Circuit explained that "[t]he matches and toothpicks used in the testing were not evidence considered by the jurors in reaching their decision, but merely objects used in scrutinizing the physical piece of evidence upon which the case turned." *Id.* at 1306; *see* Pet. App. 203a.

Fields also cites *Smith v. Commonwealth*, a direct-appeal decision from the Kentucky Supreme Court about a jury experiment. 645 S.W.2d 707, 708, 710 (Ky. 1983). Although *Smith* could perhaps have been relevant when Fields was before Kentucky's high court, it has no bearing on whether this Court has clearly established a rule applicable here.[5] In any event, *Smith* involved an experiment on an item that "ostensibly" came from the crime scene, even though no evidence established that it actually had. *Id.* at 710. Here, no one disputes that the twisty knife was properly admitted into evidence, and the jurors of course were not confused about whether the cabinet in the jury room was actually the storm window from Ms. Horton's home. *See* PCR, R.89-3, PageID#13522 ("I mean, it was a cabinet. There wasn't a storm window in there.").

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[5] The same goes for the cases cited in Fields's footnote 11. That a state court or lower federal court has found a jury experiment impermissible is not, without more, relevant to whether such an experiment warrants AEDPA relief. Indeed, only three of the cases in Fields's footnote cite this Court's decisions as support for their jury-experiment conclusions. *See United States v. Navarro-Garcia*, 926 F.2d 818, 821–23 (9th Cir. 1991); *United States v. Castello*, 526 F. Supp. 847, 849 (W.D. Tex. 1981); *Carter v. State*, 753 S.W.2d 432, 435 (Tex. App. 1988). These three cases are all pre-AEDPA and do not contribute to Fields's purported split of authority.

Fields also argues that cases cited by the Kentucky Supreme Court in its opinion "recognized that a jury experiment involving extrinsic evidence may be improper." Pet. 32. But those cases only underscore the lack of clearly established law on this subject. In *Fletcher v. McKee*, the jurors conducted an experiment "to determine where the gun would have fallen if [the defendant's wife] had accidentally shot herself as the defense had claimed." 355 F. App'x 935, 935–36 (6th Cir. 2009). More specifically, "one juror, holding the gun and pretending to be [the defendant's wife], would fall off a table as [the defendant's wife] supposedly would have fallen off the bed if she had shot herself as the defense argued had occurred." *Id.* at 936. The other jurors would "watch[] to see where the gun fell." *Id.*

The Sixth Circuit held that habeas relief was not justified.[6] It reasoned that "not all jury experiments result in extraneous influence." *Id.* at 937. In finding the experiment permissible, the court emphasized that "[t]he reenactments were conducted in the jury room, in the presence of all the jurors." *Id.* at 938. *Fletcher* distinguished cases "with experiments conducted outside the jury room by individual jurors who reported the results to the entire jury." *Id.*

The jury experiment here is analogous to that in *Fletcher*. In both cases, the jury experimented with admitted evidence in the jury room. And in both cases, the

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[6] The panel first determined, following an earlier Sixth Circuit decision that the *Fields* en banc court has now overruled, that jury experiments implicated "constitutional concerns." *Fletcher*, 355 F. App'x at 939 (citing *Doan v. Brigano*, 237 F.3d 722 (6th Cir. 2001)); *see* Pet. App. 22a (holding that *Doan* "conflicts with" this Court's decisions on the scope of "clearly established" law under AEDPA).

experiment involved an object in the jury room that had not been admitted into evidence—the table in *Fletcher* and the screws here. Because *Fletcher* recognized that AEDPA relief was not appropriate there, it follows that the Kentucky Supreme Court's similar conclusion here was not "beyond any possibility for fairminded disagreement." *See Harrington*, 562 U.S. at 103. Indeed, the Sixth Circuit held that "*Fletcher* is on all fours with Fields's case." Pet. App. 20a.

Fields also cites *United States v. Avery*, where the Sixth Circuit permitted a jury experiment on direct review. 717 F.2d 1020 (6th Cir. 1983). The prosecutor there urged the jury to experiment with several pieces of admitted evidence to test whether it was possible for the defendant to have moved the items into a crawl space within three minutes—a key fact dispute. *Id.* at 1025–26. On direct appeal, the court found no error. *Id.* at 1026. The defense had "put into issue the question of how long it would take to place the materials into the crawl space," and the jury did not act improperly by "recreat[ing] the defendant's actions." *Id.* Similar to this case, the experiment in *Avery* occurred in the jury room and involved an object that Fields would view as extrinsic (a person other than the defendant lifting and moving the items). By allowing jury experiments very similar to the one here, *Fletcher* and *Avery* confirm that there is far more than a "possibility for fairminded disagreement." *See Harrington*, 562 U.S. at 103.

In sum, none of Fields's favored cases from other courts provide any reason for this Court to grant review. What matters is what this Court has said about jury experiments, and the Court has said nothing. In any event, the lower-court decisions Fields cites unmistakably show the lack of a clearly established rule from this Court.

III. This case is a poor vehicle for the question presented because Fields was not prejudiced by the jury experiment.

Regardless of whether the Sixth Circuit's decision on the jury-experiment claim was correct, this Court should not grant review because Fields cannot show the "actual prejudice" necessary on collateral review. *See Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (citation omitted). That alternative basis for the denial of Fields's petition, which the Sixth Circuit did not have occasion to resolve, makes this case a poor vehicle.

A prisoner challenging a state-court conviction under AEDPA must show, at a minimum, actual prejudice. *Id.* That means the prisoner must show that the constitutional error had a "substantial and injurious effect or influence in determining the jury's verdict." *Id.* (citation omitted). This is a high standard. It requires the Court to have "grave doubt about whether a trial error of federal law" substantially influenced the outcome. *Davis v. Ayala*, 576 U.S. 257, 267–68 (2015) (citation omitted). Put simply, a "State is not to be put to th[e] arduous task [of retrying a defendant] based on mere speculation that the defendant was prejudiced by trial error." *Id.* at 268 (alterations in original) (citation omitted).

Fields cannot meet *Brecht*'s "actual prejudice" standard. First, he overstates the evidence that the jury experiment influenced the verdict. Two jurors made statements about the experiment. The first, Ronda Garten, testified that one of the jurors "used the knife to unscrew the screws in the cabinet to see if it was possible." PCR, R.89-3, PageID#13515. She did not explain why the jury conducted the experiment except "just to see if you could do it." *Id.* at PageID#13516. After all, as Kentucky's high court recognized, because "there is no dispute that [Fields] entered the home," "it is extraneous to debate how he managed to get in [Ms.] Horton's residence." Pet. App. 203a–204a.

The second juror, Lou Ellen Hall, gave a little more explanation, but her testimony undercuts Fields's claim of actual prejudice. According to Ms. Hall, she probably prompted the jury experiment because she asked whether Fields "could . . . have unscrewed those screws." PCR, R.89-3, PageID#13521. In response, another juror said it "wouldn't be that hard" and then removed the screws from the cabinet with the twisty knife. *Id.* at PageID#13521–22. Even though Ms. Hall is the juror who testified that she raised the issue, she stated that whether Fields could unscrew the storm window "wasn't what, you know, said that he was guilty or not guilty." *Id.* at

PageID#13522. Thus, the jury did not determine Fields's guilt based on the jury experiment.[7]

On the other side of the ledger, evidence of Fields's guilt was substantial. There is no question that Fields gained entry into Ms. Horton's home on the night she was murdered. After all, the two officers who first arrived at the scene testified to finding Fields in Ms. Horton's bedroom with her dead body. Trial Vol. 13, R.30-13, PageID#5944–46; Trial Vol. 14, R.30-14, PageID#6046. So a jury experiment about whether Fields could have removed the screws from the storm window was largely academic.

Shortly after being found in Ms. Horton's bedroom, Fields confessed three times to killing her. He confessed to the first officer who entered the house. Fields said: "I stabbed her, and I'm into it big time this time." Pet. App. 78a. Fields also said, "I just did it. Kill me. I'm going to prison for the rest of my life." *Id.* Then, after a second officer arrived, Fields said, "Kill me. Shoot me. I'm into it deep. I killed her." *Id.* at 79a. "He was calm" while making this second confession. *Id.* After the officers

[7] Fields cites an affidavit signed by Ms. Hall in which she characterized the experiment as having "helped prove that Mr. Fields could have committed the crime." Pet. 10 (quoting Juror 55 Aff., R.33-1, PageID#8928). The affidavit was drafted by someone employed in Fields's counsel's office. PCR, R.89-3, PageID#13526–27. Ms. Hall's testimony made clear, however, that she did not view the experiment as showing that he *did* commit the crime. There was no dispute that Fields entered Ms. Horton's home; how he did so was not critical.

arrested Fields, he was taken to a local hospital. *Id.* There, Fields told the EMT examining him that "if [the EMT] had killed some lady that [he] would have blood on [him] as well."[8] *Id.*

Fields implies that his girlfriend Minnie Burton murdered Ms. Horton. Pet. 8–10. However, Ms. Burton testified at trial about what happened that night, including about Fields's erratic and violent behavior, and she was subject to cross-examination by Fields's attorney. Trial Vol. 18, R.30-18, PageID#6670–792; Trial Vol. 19, R.30-19, PageID#6797–809. She specifically denied murdering Ms. Horton and denied admitting to doing so. Trial Vol. 18, R.30-18, PageID#6723–24, 6730, 6787–88. And Ms. Burton had an alibi for much of the evening in question. Trial Vol. 17, R.30-17, PageID#6572–73, 6582–83; Trial Vol. 18, R.30-18, PageID#6633, 6639, 6641; Trial Vol. 19, R.30-19, PageID#6815, 6818–19; Trial Vol. 20, R.30-20, PageID#6976–77, 6995, 7001. She also testified to being afraid of Fields that night, Trial Vol. 18, R.30-18, PageID#6685, 6699, because he had thrown a knife in her presence and "reached" another knife toward her, *id.* at PageID#6686, 6692, 6712–13.

Fields also points out that none of Ms. Horton's blood was found on him. Pet. 4. But the medical examiner testified that blood transfer "is not inevitable" even with

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[8] Fields minimizes his third confession because the EMT did not report it to law enforcement until a year later. Pet. 5 n.2. In fact, however, one of the officers with Fields at the hospital testified that he overheard the statement, and the EMT "came out [of the exam room] and said, 'Did you hear that?'" to the officer. Trial Vol. 15, R.30-15, PageID#6206; *see also id.* at PageID#6164.

such a gruesome crime.[9] Trial Vol. 21, R.30-21, PageID#7096. He explained that depending on "the relative position of the person wielding the offending instrument and the victim . . . it's possible that . . . minimal or no blood [was] transferred from the victim to [the offender]." Trial Vol. 20, R.30-20, PageID#7056. Finally, to the extent Fields suggests the absence of Ms. Horton's blood on him undermines his confession, Pet. 5 n.2, he is wrong. Whether or not Fields actually had her blood on him, he confessed to having killed her. In any event, the lower courts found that Fields confessed three times. *See, e.g.*, Pet. App. 8a. Any dispute Fields has with those findings counsels against certiorari. *See* Sup. Ct. R. 10 (stating that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law").

All in all, the evidence of Fields's guilt was substantial. He was found standing near Ms. Horton's dead body, and he promptly confessed three times to murdering her. And the jury experiment, which concerned only how Fields entered the home, could not have been essential to the jury's finding of guilt because Fields was found in Ms. Horton's bedroom with her body. Fields's characterization that the jury experiment "went to the central issue" is counterfactual. Pet. 25. For these reasons, Fields

[9] The lab found that Fields's "t-shirt did contain human blood on which no enzyme activity was found. In other words, [the lab technician] attempted to determine the enzyme type; but, for whatever reason unknown to [the lab technician], [he] could not type it." Trial Vol. 16, R.30-16, PageID#6423; *see also id.* at PageID#6330.

has not shown that any error as to the jury experiment had a "substantial and injurious effect or influence" on the jury's verdict. *See Brecht*, 507 U.S. at 637 (citation omitted).

CONCLUSION

The Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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