

****THIS IS A CAPITAL CASE****

No. _____

**IN THE
SUPREME COURT OF THE UNITED STATES**

Samuel Fields, Petitioner,

v.

Laura Plappert,
Warden, Kentucky State Penitentiary, Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

This Court has held that a jury’s verdict must rest on the evidence developed at the trial. *Turner v. Louisiana*, 379 U.S. 466, 472-73 (1965). Yet during deliberations in this capital case, the jury—to test the Commonwealth’s theory of guilt—conducted an experiment in the jury room involving extrinsic evidence and then considered and relied on that extrinsic evidence to convict Samuel Fields. The extrinsic evidence went to the central issue in the case: whether someone other than Fields could have committed the murder of Bess Horton.

Under 28 U.S.C. § 2254(d)(1), a petitioner may obtain habeas corpus relief from a state-court judgment if the state court decision rejecting a constitutional claim was contrary to or unreasonable application of clearly established federal law. In this case, the warden concedes that “it is clearly established that jurors must decide a case based on the evidence at trial.” Warden’s CA6 Br. at 21. Every federal judge who has considered this habeas case, including the entire Sixth Circuit en banc panel, likewise has recognized that a jury’s verdict must rest on the evidence developed at the trial. Nonetheless, a majority of the en banc Sixth Circuit determined—in contrast to decisions of other courts of appeals—that this rule does not satisfy § 2254(d)(1)’s “clearly established law” requirement because (1) the rule is too general and (2) this Court has not applied the rule to a fact pattern involving a jury experiment.

This case thus presents the following questions:

Does this Court’s rule requiring that a verdict be based only on the evidence presented in the courtroom at trial satisfy 28 U.S.C. § 2254(d)(1)’s “clearly established” requirement, and if so, can a jury’s consideration of and reliance on extrinsic evidence as part of a jury experiment violate this rule?

PARTIES TO THE PROCEEDING

Samuel Fields, an indigent prisoner in the Kentucky State Penitentiary, is the petitioner.

Laura Plappert, Warden of the Kentucky State Penitentiary, is the respondent.

RELATED PROCEEDINGS

- *Fields v. Com.*, No. 1997-SC-0424-MR, Supreme Court of Kentucky. Judgment entered Feb. 24, 2000 (opinion on direct appeal vacating conviction and sentence in part because “evidence of [Samuel Fields]’s guilt of murder was not overwhelming[.]”).
- *Fields v. Com.*, No. 2004-SC-000091-MR, Supreme Court of Kentucky. Judgment entered Oct. 23, 2008 (opinion on direct appeal affirming convictions and sentences).
- *Fields v. Com.*, No. 2013-SC-000231-TG, Supreme Court of Kentucky. Judgment entered Dec. 18, 2014 (opinion affirming denial of state post-conviction petition).
- *Fields v. White*, No. 15-38-ART, U.S. District Court for the Eastern District of Kentucky. Judgment entered Jun. 23, 2016 (opinion denying 28 U.S.C. § 2254 petition for habeas corpus relief).
- *Fields v. Jordan*, No. 17-5065, U.S. Court of Appeals for the Sixth Circuit. Judgment entered Dec. 1, 2022 (opinion reversing district court denial of relief and granting conditional habeas relief).
- *Fields v. Jordan*, No. 17-5065, U.S. Court of Appeals for the Sixth Circuit. Judgment entered Nov. 3, 2023 (en banc opinion affirming district court denial of habeas relief).

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PETITION FOR WRIT OF CERTIORARI

Samuel Fields respectfully petitions for a writ of certiorari to review the final order of the Sixth Circuit Court of Appeals.

OPINIONS BELOW

The opinion and judgment of the panel of the Sixth Circuit granting conditional habeas relief is reported at *Fields v. Jordan*, 54 F.4th 871 (6th Cir. 2022), and reproduced in the appendix at 53a-72a. The order of the Sixth Circuit granting en banc rehearing is unpublished and included in the appendix at 192a-193a. The opinion and judgment of the en banc Sixth Circuit affirming the denial of habeas relief is reported at *Fields v. Jordan*, 86 F.4th 218 (6th Cir. 2023), and reproduced in the appendix at 1a-52a.

JURISDICTION

The en banc Sixth Circuit entered judgment on November 3, 2023. App. 52a. This petition is timely under Rule 13.1, and this Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment of the United States Constitution states:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . , and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Fourteenth Amendment of the United States Constitution states in relevant part, “nor shall any state deprive any person of life, liberty, or property,

without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

28 U.S.C. § 2254 states, in relevant part:

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

. . .

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States[.]

STATEMENT OF THE CASE

The Sixth Amendment and the Due Process Clause guarantee the right to a trial by jury. *Sullivan v. Louisiana*, 508 U.S. 275, 277 (1993). More than 100 years ago, this Court recognized that “[t]he theory of our system is that the conclusions to be reached in a case will be induced *only by evidence and argument in open court*[] and not by any outside influence” *Patterson v. Colorado*, 205 U.S. 454, 462 (1907) (emphasis added). In *Irvin v. Dowd*, this Court again identified that a “verdict must be based upon the evidence developed at the trial.” 366 U.S. 717, 722 (1961). Likewise, in *Turner*, this Court recognized that “[i]n the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the ‘evidence developed’ against a defendant shall come from the witness stand in a

public courtroom where there is full judicial protection of the defendant’s right of confrontation, of cross-examination, and of counsel.” 379 U.S. at 472-73. In *Parker v. Gladden*, the Court (quoting *Turner*) again identified that the evidence against a defendant must come from the courtroom and further recognized the “undeviating rule,” as established by this Court’s precedent, “that the rights of confrontation and cross-examination are among the fundamental requirements of a constitutionally fair trial.” 385 U.S. 363, 364-65 (1966) (internal quotation omitted).

In 1996, Congress enacted 28 U.S.C. § 2254 (“AEDPA”). AEDPA permits a petitioner to potentially obtain habeas corpus relief from a state-court judgment due to a constitutional violation. 28 U.S.C. § 2254(a). When a state court has adjudicated a constitutional claim on the merits, § 2254(d)(1)’s standard of review requires the petitioner to show that the state-court decision “resulted in a decision that 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). “[C]learly established Federal law’ under § 2254(d)(1) is the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision.” *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003).

This case squarely presents the question, which is now the subject of an entrenched circuit split, of whether this Court’s rule requiring a verdict to be based on the evidence at trial constitutes clearly established federal law under § 2254(d)(1).

A. Trial and Direct Appeal

After the Commonwealth charged and tried Petitioner Samuel Fields for the intentional murder of Bess Horton and obtained a conviction and death sentence, the Kentucky Supreme Court held that multiple legal errors occurred at Fields's trial and reversed the judgment. App. 293a. One of these errors was the jury's consideration of inadmissible evidence (the audio narration of a crime scene video). App. 302a. The court found that this error was not harmless because "evidence of Appellant's guilt of murder was not overwhelming[.]" App. 300a.

Despite the Kentucky Supreme Court's finding regarding the sparse evidence of Fields's guilt, the Commonwealth retried Fields. Fields adamantly maintained his innocence. Other than being in Horton's home after her death, no physical evidence linked Fields to Horton's murder. Police found Horton with a knife embedded in her temple and deep slashes to her neck, App. 234a, and the Commonwealth's medical examiner testified it was probable the person who severed Horton's carotid artery would have gotten blood on him or herself. App. 49a. However, none of Horton's blood was on Fields's clothing or body. App. 8a, 9a. 49a, 296a.¹ Similarly, even though it was undisputed that Fields had been bleeding before entering Horton's home, none of his blood was on Horton or the murder weapon(s). App. 6a. 9a, 49a, 296a; Trial 2 Tr., R. 30-16 6442-44, R. 30-17 6507-08.

¹ Officer Gary Stevens conceded Fields had not been able to clean up anything in Horton's home and law enforcement did not find any gloves on Fields. Trial 2 Tr., R. 30-16 6350. And even though Fields had items from Horton's home in his pants pockets, his pockets did not have any blood on them. *Id.* at 6146, 6454.

Nor did DNA evidence implicate Fields. *See* App. 8a, 296a. The state forensic lab conducted DNA testing “to determine if [the DNA on the murder weapon(s)] could or could not have come from a particular individual.” Trial 2 Tr., R. 30-17 6497. This testing showed that the DNA could not have come from Fields. *Id.* at 6498, 6507-08.

According to the arresting officers, Fields made inculpatory statements regarding Horton’s death. App. 7a, 250a. But Fields also said that he killed his brother, which was untrue.² App. 23a. At the time of each of these statements, Fields was intoxicated and under the influence of “horse tranquilizers” and alcohol. App. 5a, 50a.

During the afternoon and evening prior to his arrest, Fields was drinking heavily, smoking marijuana, and ingesting horse tranquilizers. App. 5a, 196a, 234a. At the time of Fields’s arrest, he exhibited a “strong odor of alcohol.” Trial 2 Tr., R. 30-14 6048. Approximately three hours later, medical staff measured his blood alcohol content at 0.14, App. 44a, 50a, which is nearly twice the legal limit for operating a motor vehicle. Once sober, Fields unquestionably denied killing Horton. App. 38a, 50a, 230a, 234a.

² About a year after the offense, an EMT reported that Fields confessed that evening to having Horton’s blood on him. Trial 2 Tr., R. 30-15 6172. However, the forensic evidence showed this “confession” also was untrue. Fields did not have the victim’s blood on him. App. 8a.

Credible evidence established Fields's whereabouts until around 1:57 a.m.,³ and officers found Fields in Horton's home around 2:30 a.m. App. 9a. Thus, in its attempt to convict Fields, the Commonwealth theorized that Horton's murder only could have occurred after Fields was last seen around 1:57 a.m., after Fields took at least five minutes to walk to Horton's home and circle it at least once, after Fields then took at least 17 minutes to use a broken-tipped knife to unscrew 17 Phillips screws from a storm window—at least 14 of which were covered with paint. Trial 2 Tr., R. 30-23 7478-79. Furthermore, because law enforcement officers began investigating the area shortly after receiving the dispatch call at 1:57 a.m.—and were on and around Main Street near Horton's home shortly after 2:11 a.m. and across the street from Horton's home at 2:23 a.m.—this theory required Fields to

³ From around 11:30 p.m. to 1:35 a.m., Fields was at his brother's apartment. Trial 2 Tr., R. 30-19 6836-37, 6847, 6852, R. 30-23 7456. Fields then walked to the former duplex apartment of his then-girlfriend, Minnie Burton, and found Burton outside it. App. 235a. Fields was making a loud commotion, and he broke a window to assist Burton in gaining entry. App. 235a; Trial 2 Tr., R. 30-23 7461. In the process, he cut his arm and left blood in several places in her apartment and on the sidewalk. Trial 2 Tr., R. 30-23 7461-62. One of the occupants of the other side of the duplex, Elmer Pritchard, heard the glass shatter at 1:55 a.m., and when Pritchard looked outside, he saw Fields cussing and yelling. App. 6a. Unbeknownst to Fields, the commotion led Pritchard to call the police. App. 235a.

A police officer received the dispatch call at 1:57 a.m. and arrived a minute later to begin actively searching the area. Trial 2 Tr., R. 30-13 5970. Due to the cut on his arm, Fields left a trail of blood behind him. *Id.* at 5908. The officer investigated the area between Burton's former apartment and Horton's home (on Main Street). *Id.* at 5975, 5978-84. He did not hear a sound except perhaps an air conditioner, and at 2:23 a.m., he met another officer on Main Street, across the street catty-corner to Horton's home. *Id.* at 5983-84.

have completed all of this without alerting the nearby officers. App. 6a, 197a, 233a; Trial 2 Tr., R. 30-13 5975, 5978-84.

The heart of the Commonwealth's theory was that, given the timeline of events, "there wasn't any opportunity for anyone else to have done this." App. 47a; *see also* App. 80a.⁴ However, if someone else removed the storm window before Fields even entered Horton's home, as Fields maintained, then someone else had been in Horton's home before Fields. App. 235a. Accordingly, there would have been an opportunity for someone other than Fields to have committed the murder. App. 235a.

The Commonwealth's own evidence refuted its theory that only Fields could have murdered Horton. Fields's fingerprints were not on the storm window. Trial 2 Tr., R. 30-23 7460. Moreover, the Commonwealth's chemical analysis showed that the white paint on the end of the broken-tipped knife *was not the same white paint that was on the screws in the storm window*. Trial 2 Tr., R. 30-16 6387-88. Nonetheless, the Commonwealth argued to the jury that that because both paints were white, the jury should conclude that the paint evidenced Fields's guilt of intentional murder. App. 8a, 80a; Trial 2 Tr., R. 30-23 7479.

Fields argued that due to his extreme intoxication, he could not within the Commonwealth's time frame have used the broken-tipped knife to unscrew the 17

⁴ In support, the prosecution focused on Fields's alleged ability to use the knife as a screwdriver: "In particular, the prosecution emphasized that Fields *would* have had time to take the screws out of the window and thereby secure entry into the house." App. 80a.

Phillips screws in the storm window, especially without marking up the screws or transferring paint from the screws to the knife. App. 38a, 200a; Trial 2 Tr., R. 30-23 7459-60, 7465. The height of some of the screws made the Commonwealth's theory even more unbelievable. Fields is only five feet, six inches tall, yet the storm window measured six feet by two and a half or three feet. Trial 2 Tr., R. 30-23 7461, 7466.

The defense further asserted that Fields—given his loud behavior and the Commonwealth's contention that it would have taken Fields at least 17 minutes to remove the screws (in addition to the time it took to walk to Horton's house and circle it)—could not have removed the storm window and murdered Horton without alerting the nearby investigating officers, who by this time were across the street from or nearby the victim's home and on "very high alert." *Id.* at 7459-60, 7465, R. 30-13 5982-84, R. 30-14 6116. After all, Fields's loud behavior was the reason the officers were investigating in the first place. App. 235a.

Furthermore, Fields was bleeding before entering Horton's home and left a trail of blood behind him. App. 38a; Trial 2 Tr., R. 30-13 5908. Thus, if he had been at the window for 17 minutes unscrewing the screws, as the Commonwealth contended, blood should have pooled on the porch underneath the window. But the porch did not have such a pool of Fields's blood. Trial 2 Tr., R. 30-14 6044-45, 6063-64; Com. Exs. 16, 17.

Fields pointed out that unlike him, Minnie Burton—Horton's ex-employee and former tenant—had both the motive and opportunity to have committed the

murder. As payment for acting as a chauffeur for Horton and running errands for her, Burton had been living rent-free in a duplex apartment Horton owned. App. 234a. But the relationship between the two women had recently “turned sour,” and Horton was in the process of evicting Burton. App. 234a. Horton had “turned off the power and water in the duplex in an attempt to force Burton out.” App. 234a. After these events, Burton had reason to be angry with Horton or to get even with her. App. 235a.

Moreover, unlike Fields, Burton’s whereabouts were unknown for a period of about an hour and 45 minutes during the early morning hours of the day Horton’s body was found. Trial 2 Tr., R. 30-23 7455-56, 7459, 7469-71. Shortly afterward, (after first going to her former apartment), Burton went to her aunt’s home, a nearby place on a hill Burton did not recall ever visiting before. Trial 2 Tr., R. 30-18 6766. This vantage point provided a direct line of sight to Horton’s residence. Trial 2 Tr., R. 30-22 7309-14; Trial 2 Def. Exs. 11-14. Around the time that officers convened at Horton’s residence with flashing blue lights, Burton left again. Trial 2 Tr., R. 30-23 7469-70; see also R. 30-22 7321 (testimony of former Kentucky State Police officer explaining that blue lights are visible even in foggy conditions). Burton’s neighbors testified that later that morning, Burton borrowed their phone and made a call asking the person on the other end to vouch for her whereabouts last night or earlier that morning. Trial 2 Tr., R. 30-19 6888, 6898, R. 30-23 7470.

On top of this evidence, two witnesses testified that Burton confessed to killing Horton. App. 254a. Burton told one witness, “I was tired of that Son of a

Bitch a telling me who I can have in my apartment and who I can't.' [and] 'I killed her, and she can't tell me nothing.'" Trial 2 Tr., R. 30-22 7279.

During trial, a juror submitted a question to the judge to pose to a defense witness, asking, "How long does it usually take to install a large storm window?" Juror Questions, Sealed R. 57-10, p. 31. The Commonwealth objected to posing the question, and the trial court sustained the objection.⁵ Trial 2 Tr., R. 30-21 7225.

The jury deliberated for eight hours in the guilt phase and 12 hours at sentencing. App. 31a; 229a; Trial 2 Tr., R. 30-24 7649, 7653. The jury ultimately convicted Fields of intentional murder and first-degree burglary and sentenced him to death. App. 233a. Regarding the culpability phase, the trial court commented: "It would not have totally surprised me if the result had come out different" Ex Parte Tr., R. 54-1 11221. Fields appealed his conviction and sentence, and the Kentucky Supreme Court affirmed. App. 233a.

B. State Post-Conviction Proceedings

Unknown to Fields at trial, during deliberations the jury—to prove the Commonwealth's theory—used the broken-tipped knife to unscrew a cabinet door in the jury room. PCR Tr., R. 89-3 13515-16.⁶ One juror specifically admitted that "[t]his experiment helped prove that Mr. Fields could have committed the crime." Juror 55 Aff., R. 33-1 8928; *see also* PCR Tr., R. 89-3 13528. She further

⁵ In the district court, the warden contended that this question was improper because "there [would be] no accounting for variables such as lighting conditions, the tightness of screws, *et cetera*." Return, R. 41 10067 (emphasis in original).

⁶ The purpose of the experiment was for the jurors "to find out for themselves whether the prosecution's story made sense." Mem. Op. & Order, R. 73 13301.

testified that the experiment “satisfied [her] mind” that it was possible that Fields “could have done that[.]” PCR Tr., R. 89-3 13522.

Although the broken-tipped knife was in evidence, the screws the jurors unscrewed were not part of the case, nor were the cabinet door, cabinet, or hinges. Furthermore, the cabinet screws, which were universal screws, were not the same as the Phillips screws in the storm window. App. 44a. No evidence at trial established that the screws in the jury room were installed with the same tension and force as the screws in the storm window, or that the cabinet door was fastened to the cabinet in the same manner as the storm window was fastened to the window frame. App. 44a.

In state post-conviction proceedings, Fields asserted that the jury’s consideration of this evidence violated his rights to confrontation, due process, and a fair trial as guaranteed by the Fifth, Sixth, and Fourteenth Amendments. App. 200a. The Kentucky Supreme Court recognized that the alleged use of the broken-tipped knife as a screwdriver was central to the Commonwealth’s theory of guilt and Fields’s defense. App. 199a-200a.

The court also considered affidavits of jurors and their post-conviction testimony. App. 201a. However, the court did not address the jury’s consideration of the cabinet and its components and the role of this evidence in the experiment. The court focused solely on the fact that the jury experiment used one item of already admitted evidence (the broken-tipped knife); it ignored the jury’s consideration of the physical evidence outside the record. App. 203a. Instead, the court simply held

that “jurors are free to use their own senses, observations, and experiences to conduct an experiment or reenactment with already admitted evidence.” App. 203a. The court determined on this rationale that no constitutional error occurred. App. 203a.

The state court also determined that the jury’s actions did not prejudice Fields. App. 203a-204a. In this analysis, the court required Fields to establish beyond a reasonable doubt that the jury experiment contributed to the verdict. App. 203a. The court concluded that Fields did not meet this standard and thus was not entitled to relief. App. 203a-204a.

C. Federal Habeas Corpus Proceedings

1. District Court

Fields next raised his constitutional claim in federal habeas corpus proceedings. The district court concluded that Fields could not show that the jury’s actions violated clearly established United States Supreme Court precedent. App. 90a. The court acknowledged it is “true that jurors should decide guilt or innocence based on the evidence presented. The Supreme Court has made that point quite clear.” App. 92a. However, the district court determined that because this Court has not applied this rule to a fact pattern involving a jury experiment, Fields could not satisfy § 2254(d)(1). App. 91a-93a.

2. Sixth Circuit (panel opinion)

A panel of the Sixth Circuit reversed the district court’s decision. App. 59a-63a. The panel examined this Court’s decisions in *Patterson*, *Irvin*, *Turner*, and

Parker and found that “[t]hrough this long line of cases, the Supreme Court has recognized that the jury’s receipt of evidence outside the courtroom may violate a criminal defendant’s Fifth and Sixth Amendment rights.” App. 60a. Accordingly, the panel concluded—like prior decisions of the Sixth Circuit—that this Court’s rule requiring a verdict to be based on the evidence presented at trial was “clearly established” for § 2254(d)(1) review. App. 60a-62a.

The court then conducted § 2254(d)(1) review. App. 62a-63a. It determined that because the Kentucky Supreme Court failed to address the jurors’ consideration of evidence not admitted into the record, it is beyond any possibility for fair-minded disagreement that the Kentucky Supreme Court unreasonably applied clearly established federal law. App. 62a-63a.

Regarding the Kentucky Supreme Court’s prejudice analysis, the panel determined that the state-court decision was contrary to *Chapman v. California*, 386 U.S. 18 (1967). App. 64a. The panel found that the state court “inverted the *Chapman* standard and required Fields to prove beyond a reasonable doubt that the error did contribute to the verdict obtained. Instead, the court properly should have required the state to prove beyond a reasonable doubt that the jury experiment did not contribute to the verdict.” App. 64a.

Because the Kentucky Supreme Court “applied a rule of law that contradicted *Chapman*,” the panel then applied the *Brecht* standard. App. 64a-68a. The panel determined that due to “the centrality of the issue, the inherently prejudicial nature of the experiment, and the lack of overwhelming evidence of

guilt, . . . the jury experiment had a substantial and injurious effect or influence in determining the jury's verdict.” App. 64a (internal quotation omitted). The court concluded that Fields therefore was entitled to a writ of habeas corpus unless the Commonwealth retried him within six months. App. 64a.

One judge dissented. App. 69a-71a. The dissenting judge agreed that the Supreme Court cases the majority cited for the rule “laid down the principle that ‘trial by jury in a criminal case necessarily implies at the very least that the evidence developed against a defendant shall come from the witness stand.’” App. 70a (quoting *Turner*, 379 U.S. at 472-73). However, the judge maintained that this rule was too general to be considered clearly established law. App. 69a-70a. The judge also found that because “no Supreme Court precedent establishes that jury experiments violate the Sixth Amendment[,]” Fields could not satisfy § 2254(d)(1). App. 69a.

3. Sixth Circuit (en banc opinion)

The warden petitioned for en banc review, and the Sixth Circuit granted the petition. App. 192a-193a. A majority of the en banc court affirmed the district court’s denial of relief. App. 3a-4a. Although the majority agreed that this Court found in *Turner* that “that a jury’s verdict must rest on ‘the evidence developed at the trial[,]” App. 19a, the majority nonetheless ruled that this principle is too general and abstract to serve as clearly established law for the purposes of § 2254(d)(1). App. 18a-19a. The majority further determined the rule cannot satisfy § 2254(d)(1)’s “clearly established” requirement “[b]ecause the Supreme Court has

issued no guidance on jury experiments like the one here.” App. 22a. Thus, the majority concluded, Fields “failed to get past AEDPA’s first step by identifying ‘clearly established’ law on this topic.” App. 13a.

Five judges dissented. App. 38a-51a. The dissenting judges recognized that this Court “has long held” that the Sixth and Fourteenth Amendments require that a jury’s verdict be based upon the evidence developed at the trial, not extrinsic evidence. App. 40a (citing *Irvin*, 366 U.S. at 722; *Turner*, 379 U.S. at 472-73; *Parker*, 385 U.S. at 364-65; and *Patterson*, 205 U.S. at 462). The judges concluded that under this Court’s precedent, the general nature of this rule does not preclude § 2254(d)(1) review of a state-court decision involving it. App. 39a-40a, 42a-43a. As to whether § 2254(d)(1) requires identical facts, the judges recognized that “the Supreme Court has held that AEDPA ‘permits a federal court to grant habeas relief based on the application of a governing legal principle to a set of facts different from those of the case in which the principle was announced.’” App. 45a (quoting *Lockyer*, 538 U.S. at 76). Accordingly, the dissenting judges concluded—consistent with previous Sixth Circuit precedent and decisions in several other circuits—that for the purposes of § 2254(d)(1) review, this Court has clearly established a right to be convicted only upon the evidence introduced at trial. App. 40a-43a.

The dissent then analyzed whether the state-court decision was an unreasonable application of this clearly established federal law. App. 43a-45a. The dissent explained that jurors did not simply “conduct an experiment ... with already admitted evidence.” App. 44a. Rather, “[t]he cabinet on which the jurors conducted

the experiment was not admitted into evidence. The screws on the cabinet were unpainted, universal screws, whereas the screws on the storm window were painted Phillips head screws.” App. 44a.⁷ The dissent concluded that the Kentucky Supreme Court’s decision was an unreasonable application of the rule because the state court “fail[ed] to address the fact that the jury was unconstitutionally exposed to extraneous evidence that Fields had no opportunity to refute.” App. 44a.

Given that Fields satisfied § 2254(d)(1)’s exacting standard, the dissenting judges next conducted de novo review: “a straightforward application of a general principle to the facts of the case.” App. 44a-45a. The judges found that the jurors’ consideration of extrinsic physical evidence during deliberations violated Fields’s rights under the Sixth and Fourteenth Amendments. App. 45a.

In assessing the potential prejudice resulting from this constitutional violation, the dissent first applied AEPDA deference to the Kentucky Supreme Court’s decision. App. 45a-46a. The dissent found that instead of placing the prejudice burden on the Commonwealth, as the clearly established federal law of *Chapman* requires, the state court placed that burden on Fields. App. 46a. In so doing, the state court applied a rule that contradicted the governing Supreme Court

⁷ The dissenting judges further noted that no evidence suggested that similarities existed between the height of the cabinet door to the storm window, the tension of the screws in the cabinet versus the screws in the storm window, nor whether the screws in the cabinet door were fastened to the door in a manner like the storm window. App. 44a. The conditions also were different in that presumably the jurors did not remove the screws in the dark, at night, with a blood alcohol content greater than 0.14, after smoking marijuana and ingesting horse tranquilizers. App. 44a.

law. App. 46a. Thus, the dissent concluded that the state court's harmless-error determination was contrary to clearly established federal law. App. 46a.

The dissenting judges next applied the *Brecht* prejudice standard. App. 46a-51a. The judges found that given the Commonwealth's theory of guilt and Fields's defense, "Fields's ability to unscrew the screws on the storm window was therefore central to the [C]ommonwealth's case against him at trial." App. 47a. The judges further found that the record shows that "the jury's experiment was plainly intended to resolve the central issue at trial, and the 'results' of the experiment undermined the defense's theory and credibility while bolstering the [C]ommonwealth's timeline of events and explanation for how Fields would have committed the murder." App. 48a.

Furthermore, the dissent found—like the Kentucky Supreme Court and the trial court—that the evidence of Fields's guilt was not overwhelming. App. 49a-51a. The judges noted that "Fields's presence in Horton's home was the *only* physical evidence that connected him to the murder." App. 49a (emphasis added). Furthermore, there was "no physical evidence supporting the commonwealth's theory that Fields used the [broken-tipped] knife to break into Horton's home through the storm window." App. 49a.

As to Fields's alleged "confessions," the dissent found "good reason to be suspicious" of their reliability. App. 50a. At the time, Fields had a heavily impaired mental state due to his blood alcohol content of at least 0.14. App. 50a. He also had smoked marijuana earlier and evidence indicated that he also had ingested horse

tranquilizers. App. 50a. His “confession” that he killed his brother was untrue. App. 50a. Similarly, although he supposedly confessed to an EMT that he had the victim’s blood on him, that was untrue as well; “none of Horton’s blood was found on Fields.” App. 50a. The dissent further found these confessions particularly dubious given Burton’s two confessions to killing Horton, in one of which Burton specifically stated her motive for doing so. App. 50a.; Trial 2 Tr., R. 30-22 Page ID# 7279. In addition to motive, Burton also had the opportunity to murder Horton. App. 50a, 82a.

The dissenting judges concluded that “because the jury experiment was highly prejudicial to Fields and concerned the central issue at trial, and because the other evidence of Fields’s guilt was sparse, the jury’s consideration of extrinsic evidence had a substantial and injurious effect or influence in determining the jury’s verdict.” App. 51a (internal quotations omitted). Accordingly, the judges found that Fields was entitled to habeas relief. App. 51a.

This petition follows.

REASONS FOR GRANTING THE WRIT

The Sixth Circuit’s deeply divided en banc decision establishes an entrenched split among the federal courts of appeals. Since AEPDA’s enactment, the First, Second, Fourth, Fifth, Seventh, Ninth, Tenth, and Eleventh Circuits have concluded that, for the purposes of § 2254(d)(1), this Court has clearly established that a verdict must be based on the evidence developed at trial. *See, e.g., Owens v. Duncan*, 781 F.3d 360, 365 (7th Cir. 2015) (holding “there’s no question that the

right to have one's guilt or innocence adjudicated on the basis of evidence introduced at trial satisfies [§ 2254(d)(1)'s] exacting standard.”).

However, in cases in the Sixth Circuit involving the jury's consideration of extrinsic evidence, the *same rule* requiring a verdict to be based on the evidence developed at trial now cannot satisfy 28 U.S.C. § 2254(d)(1). Under this interpretation of AEDPA, because the rule is a general rule and this Court has not applied it to identical facts, the rule cannot be considered “clearly established” for purposes of § 2254(d)(1) review. App. 13a.

This Court should resolve this conflict among the courts of appeals regarding this important question of federal law.

A. The federal courts of appeals are divided on whether this Court's rule requiring a verdict to be based on the evidence presented at trial may provide a potential basis for federal habeas relief under 2254(d)(1).

The First, Second, Fourth, Fifth, Seventh, Ninth, Tenth, and Eleventh Circuits each have concluded that, under § 2254(d)(1), this Court has squarely established “that a jury's verdict must be based upon the evidence developed at the trial[.]” *Turner*, 379 U.S. at 472 (internal quotation marks omitted). In these circuits, provided that a petitioner shows that the state-court decision involving this rule was contrary to or an unreasonable application of the rule, the petitioner potentially may obtain habeas relief due to the jury's consideration of extrinsic evidence.

For example, in *Loliscio v. Goord*, the Second Circuit determined during § 2254(d)(1) review of a claim involving the jury's review of extra-record information

that this Court had clearly established the rule requiring a verdict to be based on the evidence at trial. 263 F.3d 178, 185 (2d Cir. 2001). The court found that under *Turner*, “at the very least the ‘evidence developed’ against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant’s right of confrontation, of cross-examination, and of counsel.” *Id.* (quoting *Turner*, 379 U.S. at 472-73). Hence, the court concluded, “a criminal defendant’s Sixth Amendment rights are implicated when a jury considers incriminating evidence that was not admitted at trial[,]” and a violation of this rule may provide the basis for habeas relief. *Id.*

The Fourth Circuit has found under *Turner* that, “[a]t its core,” the Sixth Amendment ensures “that the evidence developed against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant’s right[s].” *Hurst v. Joyner*, 757 F.3d 389, 394 (4th Cir. 2014) (internal quotations omitted). The Fifth Circuit similarly has concluded “that the Supreme Court has clearly established a constitutional rule forbidding a jury from being exposed to an external influence.” *Oliver v. Quarterman*, 541 F.3d 329, 336 (5th Cir. 2008). The First and Ninth Circuits agree. *Bebo v. Medeiros*, 906 F.3d 129, 135 (1st Cir. 2018) (finding that the rule requiring a verdict to be based upon the evidence developed at the trial is clearly established under § 2254(d)(1)); *Gonzales v. Adams*, 370 F. App’x 867, 868 (9th Cir. 2010) (same).⁸ Thus, in these circuits, this

⁸ Although the Ninth Circuit found that the rule requiring a verdict to be based upon the evidence developed at the trial is clearly established, it concluded under

Court's precedent requiring a jury verdict to be based on the evidence presented at trial is clearly established under § 2254(d)(1), and a jury's consideration of extrinsic evidence may provide the basis for habeas relief.

The Tenth Circuit also has concluded during § 2254(d)(1) review that this Court “has declared that a ‘verdict must be based upon the evidence developed at the trial.’” *Black v. Workman*, 682 F.3d 880, 906 (10th Cir. 2012) (quoting *Irvin*, 366 U.S. at 722). The Tenth Circuit determined that this Court further explained that principle in *Turner*. *Id.* Accordingly, in the Tenth Circuit, a violation of this rule may provide the basis for habeas relief. *Id.* The Eleventh Circuit likewise has determined that it is “clearly established that juror misconduct, including juror contact with extrinsic evidence, is a basis for habeas relief.” *Wood v. Sec’y, Dep’t of Corr.*, 793 F. App’x 813, 819 (11th Cir. 2019).

The Seventh Circuit similarly has determined during § 2254(d)(1) review that this Court has clearly established “the right to have one’s guilt or innocence adjudicated on the basis of evidence introduced at trial[.]” *Owens*, 781 F.3d at 365. The court recognized “that only clearly established violations of a defendant’s constitutional rights permit us to reverse a state court decision challenged in a federal habeas corpus proceeding.” *Id.* (citing *Nevada v. Jackson*, 569 U.S. 505 (2013)). But, the court concluded, “there’s no question that the right to have one’s

circuit precedent that this rule does not bar the examination of an object in evidence, such as with a magnifying glass. *Gonzales*, 370 F. App’x at 868.

guilt or innocence adjudicated on the basis of evidence introduced at trial satisfies that exacting standard.” *Id.*

The Seventh Circuit further recognized that this Court had not decided a case with identical facts. *Id.* However, the Seventh Circuit concluded, such identity was not required under § 2254(d)(1). *Id.* Rather, the relevant question was whether this Court has clearly established the right to a verdict based on the evidence at trial. *Id.* Because this Court unquestionably has done so, the right is clearly established for the purposes of § 2254(d)(1) review. *Id.*

After the Seventh Circuit decided *Owens*, this Court initially granted Warden Duncan’s petition for a writ of certiorari, considered merits briefs, and conducted oral argument. *Duncan v. Owens*, No. 14-1516. However, after oral argument, the Court dismissed the petition as improvidently granted. *Duncan v. Owens*, 577 U.S. 189, 189 (2016). In so doing, the Court left intact the Seventh Circuit’s decision finding that the rule unquestionably satisfies AEDPA’s exacting standard.

The Sixth Circuit’s ruling in this case directly conflicts with *Owens* and the other appellate cases cited above. Although the Sixth Circuit agreed that this Court found in *Turner* that “that a jury’s verdict must rest on ‘the evidence developed at the trial[,]” App. 19a, the court nonetheless ruled that this principle is too general and abstract to be clearly established law under § 2254(d)(1). App. 18a-19a (citing *Nevada v. Jackson*; *Lopez v. Smith*, 574 U.S. 1, 6 (2014); and *Woods v. Donald*, 575

U.S. 312, 318 (2015)).⁹ The court further determined the rule in question cannot be considered clearly established under § 2254(d)(1) because this Court has not considered a factually identical case involving a jury experiment. App. 22a. Thus, the Sixth Circuit concluded, the rule fails to satisfy “AEDPA’s first step[.]” App. 13a.

The Sixth Circuit’s opinion creates a conflict among the courts of appeals. All the cases from other circuits cited above have concluded that this Court’s general rule requiring a verdict to be based on the evidence at trial is clearly established for the purposes of § 2254(d)(1) review and therefore satisfies AEDPA’s first step. And at least one court of appeals has specifically held that: (1) § 2254(d)(1) permits a federal court to grant habeas relief based on the application of a governing legal principle to a set of facts different from those of the cases in which the principle was announced, and (2) the general rule at issue, even after *Nevada v. Jackson* and *Lopez*, satisfies § 2254(d)(1)’s exacting standard. *Owens*, 781 F.3d at 365.¹⁰

This circuit split regarding AEDPA’s requirements warrants this Court’s intervention. The conflict results in an impermissible situation. In most circuits, this Court’s rule requiring the verdict to be based on the evidence produced in the

⁹ The majority recognized that in several prior cases, panels of the Sixth Circuit had determined under 2254(d)(1) that this Court had clearly established that a jury’s verdict must rest on the evidence developed at trial. App. 22a. However, the court found this Court’s decisions in *Lopez* and *Brown v. Davenport*, 596 U.S. 118, 136 (2022) abrogated these decisions. App.22a. The court’s reasoning was that *Lopez* and *Davenport* interpreted 2254(d)(1) to exclude this Court’s general rules from qualifying as clearly established federal law. App. 22a.

¹⁰ This Court issued *Woods* seven days after the Seventh Circuit decided *Owens*; however, 296 days after issuing *Woods*, this Court dismissed the *Owens* writ of certiorari as improvidently granted. *Duncan*, 577 U.S. at 189.

courtroom is clearly established for § 2254(d)(1) review. But in the Sixth Circuit, that same rule cannot satisfy § 2254(d)(1) and therefore *precludes* review of a state-court decision involving the rule. Furthermore, this case squarely presents the question this Court initially reviewed but was unable to resolve in *Owens*: does this Court’s rule requiring that a verdict be based on the evidence presented satisfy § 2254(d)(1)’s “clearly established” requirement? This Court should grant review and resolve this conflict.

B. The question presented is exceptionally important because the right to a jury that considers only the evidence presented at trial is fundamental.

The right to a jury that considers only the evidence presented at trial is fundamental to our judicial system. *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1075 (1991); *Turner*, 379 U.S. at 472. Indeed, “[t]he requirement that a jury’s verdict ‘must be based upon the evidence developed at the trial’ goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury.” *Turner*, 379 U.S. at 472. Accordingly, a violation of this right threatens the fundamental integrity of a verdict. *See id.* Recognition of these safeguards is exceptionally important in capital cases. *Mattox v. United States*, 146 U.S. 140, 149 (1892) (recognizing that particularly “in capital cases[,] the jury should pass upon the case free from external causes tending to disturb the exercise of deliberated and unbiased judgment.”); *see also Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (explaining that “death is different” and a heightened standard of due process applies to capital cases).

C. This case is a particularly suitable vehicle for resolving the question presented.

Whether a habeas petitioner can obtain review of a state-court decision centered on this rule is a particularly important question in cases like this—where it is undisputed that during deliberations, the jurors relied on extrinsic physical evidence supporting the prosecution’s case, but the defendant did not have any opportunity to confront that reliance. The evidence went to the central issue: whether someone other than Fields could have committed the murder. Because Fields did not have any opportunity to confront or refute the jury’s reliance on the extrinsic evidence, the properties of which were different than the crime-scene evidence, the jury’s consideration of it unfairly bolstered the prosecution’s theory while simultaneously negating Fields’s reasonable doubt defense.

However, despite the central, yet misleading, nature of the non-record physical evidence, the state court did not address at all the jury’s consideration of it. Rather, the court focused solely on the fact that the jury experiment used one item of already admitted evidence (the broken-tipped knife); it ignored the jury’s consideration of physical evidence outside the record. App. 203a. But it is the jury’s consideration of the extrinsic tangible evidence—not the admitted evidence—that forms the basis of the constitutional violation, because the jury’s reliance on this evidence as proof of the Commonwealth’s case is what Fields did not have any opportunity to confront or refute. *See Turner*, 379 U.S. at 472-73.

This case puts into stark view the prejudice the Sixth Circuit’s decision engenders. This Court has recognized that: (1) the right in question is fundamental,

and (2) the writ of habeas corpus guards “against ‘extreme malfunctions in the state criminal justice systems.’” *Shinn v. Ramirez*, 596 U.S. 366, 377 (2022). But under the Sixth Circuit’s view, no petitioner can obtain § 2254(d)(1) review of a state proceeding addressing the fundamental right to a verdict based on the evidence presented at trial. Even when state-court “juries decide to convict defendants and sentence them to death based on evidence that is not in the record, is untested by the adversarial process, and is unable to be impeached or rebutted by the defense[,]” App. 39a, these actions are not reviewable under § 2254(d)(1). Similarly, even if a state court were to hold explicitly that juries *can* base their decision on evidence that was not part of the record, such a decision is not reviewable under § 2254(d)(1).

Under the Sixth Circuit’s interpretation of AEDPA, even though the writ of habeas corpus protects against extreme malfunctions in state criminal justice systems, a petitioner cannot obtain § 2254(d)(1) review of extreme malfunctions in the state court system due to the jury’s consideration of misleading extrinsic evidence. Yet in other judicial circuits, a similarly situated petitioner—relying on the same legal principle and the same AEDPA provisions—can obtain such review. This case squarely presents the opportunity for this Court to settle this conflict.

D. The Sixth Circuit’s decision conflicts with this Court’s AEDPA jurisprudence holding that the lack of a decision of this Court applying a rule to nearly identical facts does not by itself mean that the rule is not clearly established; nor does § 2254(d)(1) prohibit a general rule from qualifying as clearly established federal law.

The Sixth Circuit’s decision is also manifestly incorrect. Contrary to the Sixth Circuit’s determination that § 2254(d)(1) requires this Court to have applied the

rule to the same facts, this Court has explicitly recognized that § 2254(d)(1) “permits a federal court to grant habeas relief based on the application of a governing legal principle to a set of facts different from those of the case in which the principle was announced.” *Lockyer*, 538 U.S. at 76. In other words, “AEDPA does not ‘require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied.’” *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007) (quoting *Carey v. Musladin*, 549 U.S. 70, 81 (2006) (Kennedy, J., concurring in judgment)).

Accordingly, the “correct” understanding of § 2254(d)(1) is 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.” *Marshall v. Rodgers*, 569 U.S. 58, 62 (2013); *see also White v. Woodall*, 572 U.S. 415, 427 (2014) (reiterating that § 2254(d)(1) does not require an “‘identical factual pattern before a legal rule must be applied.’”) (quoting *Panetti*, 551 U.S. at 953); *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 246-64 (2007) (deriving clearly established law from a series of Supreme Court cases existing at the time of the state-court decision and granting habeas relief). The Sixth Circuit’s identical-fact requirement directly conflicts with this precedent.

The Sixth Circuit also wrongly concluded that the rule here is too general to be considered clearly established. “[AEDPA] recognizes, to the contrary, that even a general standard may be applied in an unreasonable manner.” *Panetti*, 551 U.S. at 953. General rules—such as *Ford*’s competency standard or *Strickland*’s deficient performance and prejudice rules—may indeed be clearly established federal law.

See, e.g., id.; Williams v. Taylor, 529 U.S. 362, 391 (2000) (“It is past question that the rule set forth in *Strickland* qualifies as ‘clearly established Federal law, as determined by the Supreme Court of the United States.’”). This Court has specifically held that general rules relating to what a jury can or cannot do may qualify as clearly established federal law. *Abdul-Kabir*, 550 U.S. at 246 (finding that this Court’s decisions requiring sentencing juries “to give meaningful consideration and effect to all mitigating evidence that might provide a basis for refusing to impose the death penalty on a particular individual, notwithstanding the severity of his crime or his potential to commit similar offenses in the future[,]” was clearly established federal law). None of the cases on which the Sixth Circuit relied abrogated this precedent, and the Sixth Circuit’s ruling directly conflicts with it.

Furthermore, the rule prohibiting jurors from relying on extrinsic evidence in reaching the verdict is not so vague that a state court would not be able to apply it. App. 45a (employing “a straightforward application of a general principle to the facts of the case.”). In fact, the Kentucky Supreme Court already applied this same rule in at least one other case involving virtually identical facts in which the jury, to test the prosecution’s theory of guilt, tested an item of admitted evidence using other physical evidence not presented at trial but purported to emulate the trial evidence. *See, e.g., Smith v. Com.*, 645 S.W.2d 707, 710 (Ky. 1983). Other courts have as well.¹¹

¹¹ Some examples include several prior decisions of the Sixth Circuit, App. 22a, 40a-42a: *United States v. Navarro-Garcia*, 926 F.2d 818, 821 (9th Cir. 1991) (finding that jurors have a duty to consider only the evidence which is presented to them in

open court and that evidence not presented at trial, acquired through jury experiments, is deemed extrinsic; remanding for consideration of the extrinsic evidence and whether a reasonable probability exists that it could have affected the verdict); *In Re Beverly Hills Fire Litigation*, 695 F.2d 207, 214 (6th Cir. 1982) (holding that a juror experiment involving extrinsic evidence was improper where it was “impossible to determine . . . whether [the] experiment duplicated what actually occurred in the case” because “highly misleading results [could] follow.”); *United States v. Beach*, 296 F.2d 153, 155, 159-60 (4th Cir. 1961) (finding prejudice where the jury experimented on a trial exhibit using extrinsic evidence because the results of the experiment negated the defendant’s defense); *Wilson v. United States*, 116 F. 484, 486 (9th Cir. 1902) (jury experiment involving extrinsic evidence was prejudicial where the defendants were “wholly deprived of the opportunity to contest the correctness of the jury’s experiments”); *Jennings v. Oku*, 677 F. Supp. 1061, 1062, 1065-66 (D. Haw. 1988) (granting habeas relief due to the jury’s consideration of extrinsic evidence during their reenactment experiment testing the most important evidence linking the defendant to the crime); *United States v. Castello*, 526 F. Supp. 847, 850-51 (W.D. Tex. 1981) (finding a jury experiment involving extrinsic evidence was prejudicial because it was “directed at a material issue at trial[,]” not conducted under conditions sufficiently similar to those at issue, unfavorable to the defendant’s theory of defense, and conducted as part of the deliberations in the case); *Bell v. State of California*, 63 Cal. App. 4th 919, 932-33 (1998), as modified (May 29, 1998) (granting a new trial when the jury, regarding a key factual determination in the case, considered the results of an experiment involving extrinsic evidence attempting to recreate the incident at issue); *Ex Parte Thomas*, 666 So. 2d 855, 857-58 (Ala. 1995) (reversing a conviction based on an experiment in which a juror put on the defendant’s pants (which had been admitted into evidence) and bound his hands with a rope (which was not in evidence) to see if the defendant could remove drugs from his pocket while handcuffed); *People v. Legister*, 552 N.E.2d 154, 154-55 (N.Y. 1990) (reversing judgment due to juror’s consideration of extrinsic evidence as part of “conscious, contrived experimentation, directly material to a critical point at issue in the trial”—whether the defendant or someone else committed the crime—“and the juror’s experiment bolstered the identification with nonrecord evidence not subject to challenge by the defendant.”); *Carter v. State*, 753 S.W.2d 432, 435-38 (Tex. App. 1988) (recognizing in a criminal case that requiring the evidence developed against a defendant to come from the witness stand is fundamental and reversing the judgment due to the jury’s consideration of extrinsic evidence during a jury experiment that “was not merely an application of everyday experience; it was a conscious and contrived experimentation that did not come from the witness stand.”); *King v. Ry. Express Agency*, 94 N.W.2d 657, 660 (N.D. 1959) (juror experiment with extrinsic evidence was prejudicial where the experiment attempted to reproduce an accident’s conditions in a way that was “so different from the actual condition . . . that the results of the experiment could well be inaccurate and misleading.”); *State v.*

To be sure, some lower courts have considered various jury experiments and found that the petitioner was not entitled to relief. App. 20a-21a. Because of this “divergence,” the Sixth Circuit reasoned—citing *Carey*—this Court must not have clearly established the rule prohibiting the jurors from relying on extrinsic evidence. App. 21a. But this reliance on *Carey* was misplaced.

In *Carey*, this Court applied evidence of a divergence in the lower courts to the question of whether the state court’s decision was an unreasonable application of clearly established federal law, not the *first step* of identifying the clearly established federal law itself. *Carey*, 549 U.S. at 77 (finding that it could not “be said that the state court ‘unreasonabl[y] appli[ed] clearly established Federal law.’”) (quoting § 2254(d)(1)). Although disparate applications of a federal law might be relevant to the question of whether a state court’s decision was objectively unreasonable, a lower court’s application cannot determine whether the rule itself exists. Only this Court sets the governing legal principle or principles establishing clearly established federal law under 2254(d)(1). *Lockyer*, 538 U.S. at 71-72; App. 22a (acknowledging that “circuit decisions cannot create clearly established law[.]”). And to the extent that the Sixth Circuit interpreted *Carey* to hold the lack of a Supreme Court decision on nearly identical facts shows an absence of clearly established law, this Court subsequently has held that such an interpretation of §

Sanders, 68 Mo. 202, 205-06 (1878) (finding that in criminal case that a jury experiment involving extrinsic evidence, “with a view to ascertain a fact testified to on the trial, and to test the credibility of the witnesses who testified in regard to that fact,” warranted a new trial).

2254(d)(1) is incorrect. *Marshall*, 569 U.S. at 62. Thus, the Sixth Circuit erroneously concluded that a “divergence” of application in the lower courts shows an absence of clearly established law.

Moreover, evidence of a divergence in the lower courts does not mean that a state court’s decision automatically was reasonable. After *Carey*, this Court reiterated that AEDPA does not “prohibit a federal court from finding an application of a principle unreasonable when it involves a set of facts ‘different from those of the case in which the principle was announced[,]’” *Panetti*, 551 U.S. at 953 (quoting *Lockyer*, 538 U.S. at 76), and “state courts must reasonably apply the rules ‘squarely established’ by this Court’s holdings to the facts of each case.” *White*, 572 U.S. at 427. Evidence showing that a state court’s failure to apply the federal rule was inconsistent with the state court’s own law undermines the notion that the state court decision was reasonable. *See Panetti*, 551 U.S. at 932. Even when this Court has not applied a legal principle to identical facts, “certain principles are fundamental enough that when new factual permutations arise, the necessity to apply the earlier rule will be beyond doubt.” *White*, 572 U.S. at 427 (internal quotation marks omitted).

Here, the necessity to apply the extrinsic evidence rule was beyond doubt. There is no dispute that this Court has squarely established that “jurors must decide a case based on the evidence at trial.” Warden’s CA6 Br. at 21; App. 18a, 19a, 40a, 60a, 70a, 92a. Both this Court and the Kentucky Supreme Court have

concluded that this legal principle is fundamental. *See, e.g., Turner*, 379 U.S. at 472; *Smith*, 645 S.W.2d at 710.

The Kentucky Supreme Court recognized that Fields's ability to have used the broken-tipped knife as a screwdriver was central to the Commonwealth's theory of guilt and Fields's defense. App. 199a-200a. The court further knew that the trial court sustained the Commonwealth's objection to the jury's question of how long it would take to unscrew a storm window because the answer, which did not account for variables such as lighting conditions or tightness of screws, could be prejudicial. App. 266a. Moreover, the court knew that to prove the prosecution's theory of Fields's guilt, the jurors considered extrinsic physical evidence different from the record evidence it purportedly emulated; yet Fields did not have any opportunity to confront the jurors' reliance on that evidence. 200a-201a.

In a prior case when the jurors conducted a strikingly similar jury experiment, the Kentucky Supreme Court applied the rule.¹² And each of the cases on which the court relied on to deny relief to Fields similarly recognized that a jury experiment involving extrinsic evidence may be improper.¹³ Thus, in assessing the

¹² In addition to its ruling in *Smith*, the Kentucky Supreme Court has recognized that “[j]urors should only consider the evidence presented at trial, and extraneous materials, whether they be dictionaries, law books, or Bibles, unless properly received in evidence, are not allowed in the jury room for use by a deliberating jury.” *Talley v. Com.*, No. 2003-SC-0869-MR, 2005 WL 387443, at *8 (Ky. Feb. 17, 2005).

¹³ The Kentucky Supreme Court cited to *United States v. Avery*, 717 F.2d 1020 (6th Cir. 1983); *Banghart v. Origoverken, A.B.*, 49 F.3d 1302 (8th Cir. 1995); and *Fletcher v. McKee*, 355 F. App'x 935 (6th Cir. 2009). App. 201a-203a. In *Avery*, the Sixth Circuit explained that “[t]he defendant [did] not allege that the jurors were exposed to any extraneous materials during their deliberations” but that “other

alleged violation of Fields’s Sixth and Fourteenth Amendment rights, the Kentucky Supreme Court should have considered the jury’s reliance on extrinsic evidence. Its failure to do so was objectively unreasonable.

In any event, the Sixth Circuit did not reach the question of whether the Kentucky Supreme Court’s decision was objectively unreasonable. It only considered the preliminary question and concluded that Fields “failed to get past AEDPA’s first step by identifying ‘clearly established’ law on this topic.” App. 13a. Under this Court’s AEDPA jurisprudence, the Sixth Circuit’s conclusion is wrong. The result of this decision, that § 2254(d)(1) does not permit review of extreme malfunctions in the state court system due to the jury’s consideration of misleading extrinsic evidence, is fundamentally unfair.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

types of experiments in the jury room could create substantially prejudicial influences on the jury’s deliberations[.]” 717 F.2d at 1026. The Eighth Circuit similarly acknowledged in *Banghart* that a jury experiment may be improper when the experiment involves “a situation where the jurors considered physical evidence which was not admitted at trial.” 49 F.3d at 1307. In *Fletcher*, the Sixth Circuit recognized that “jury exposure to extrinsic evidence . . . violates a defendant’s Sixth Amendment rights[.]” 355 F. App’x at 937, and “it is the nature of the extraneous material and its likely effect on the hypothetical average jury . . . which determines whether the defendant has been prejudiced[,] and thus whether his constitutional rights were violated.” *Id.* at 939 (quoting *Doan v. Brigano*, 237 F.3d 722, 734-35 (6th Cir. 2001)).

Respectfully submitted,



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