

****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

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

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Re: Case No. 17-5065, *Samuel Fields v. Scott Jordan*
Originating Case No. : 7:15-cv-00038

Dear Counsel,

The court today announced its decision in the above-styled case.

Enclosed is a copy of the court's published opinion together with the judgment which has been entered in conformity with Rule 36, Federal Rules of Appellate Procedure.

Yours very truly,

Kelly L. Stephens, Clerk

Cathryn Lovely
Deputy Clerk

cc: Mr. Robert R. Carr

Enclosures

Mandate to issue.

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

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UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

SAMUEL FIELDS,

Petitioner-Appellant,

v.

SCOTT JORDAN, Warden,

Respondent-Appellee.

No. 17-5065

On Petition for Rehearing En Banc

United States District Court for the Eastern District of Kentucky at Pikeville.

No. 7:15-cv-00038—Karen K. Caldwell, District Judge.

Argued En Banc: June 14, 2023

Decided and Filed: November 3, 2023

Before: SUTTON, Chief Judge; BATCHELDER, MOORE, CLAY, GIBBONS,
GRIFFIN, KETHLEDGE, STRANCH, BUSH, LARSEN, NALBANDIAN,
READLER, MURPHY, DAVIS, and MATHIS, Circuit Judges.*

COUNSEL

ARGUED EN BANC: Daniel E. Kirsch, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Kansas City, Missouri, for Appellant. Matthew F. Kuhn, OFFICE OF THE KENTUCKY ATTORNEY GENERAL, for Appellee. **ON SUPPLEMENTAL BRIEF:** Daniel E. Kirsch, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Kansas City, Missouri, for Appellant. Matthew F. Kuhn, Jenna M. Lorence, OFFICE OF THE KENTUCKY ATTORNEY GENERAL, for Appellee. **ON AMICUS BRIEF:** J. Matthew Rice, OFFICE OF THE TENNESSEE ATTORNEY GENERAL, Nashville, Tennessee, for Amicus Curiae.

MURPHY, J., delivered the opinion of the court, in which SUTTON, C.J., and BATCHELDER, GIBBONS, GRIFFIN, KETHLEDGE, BUSH, LARSEN, NALBANDIAN, and

*Judge Batchelder, who sat on the original panel, participated in this decision pursuant to 6 Cir. I.O.P. 35(c), Judge Thapar recused himself, and Judge Bloomekat, who was confirmed on July 18, 2023, did not participate.

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READLER, JJ., joined. MOORE, J. (pp. 36–49), delivered a separate dissenting opinion, in which CLAY, STRANCH, DAVIS, and MATHIS, JJ., joined.

OPINION

MURPHY, Circuit Judge. A state jury convicted Samuel Fields of breaking into an elderly woman’s home, slashing her throat, and stabbing a knife through her head. The police found Fields next to the woman’s body, and he confessed to killing her. At trial, the prosecution argued that Fields got into the woman’s home by unscrewing a porch window with a certain knife that was admitted into evidence; the defense countered that Fields could not have conducted this feat because he was intoxicated at the time of the crime. During deliberations, the jury used this knife to unscrew the screws on a jury-room cabinet. It found Fields guilty and sentenced him to death. Fields later alleged that the jury’s “experiment” with the knife violated the Constitution. The Kentucky Supreme Court disagreed, and a federal district court denied Fields habeas relief.

Fields renews this jury-experiment claim, among others, on appeal. For well over a century, lower courts have debated when jury experiments of this type violate state or federal law. But one court has yet to enter this debate: the U.S. Supreme Court. That fact dooms Fields’s claim in these proceedings. Under the Antiterrorism and Effective Death Penalty Act (AEDPA), we may not grant habeas relief unless a state court has unreasonably applied “clearly established Federal law, as determined by the Supreme Court[.]” 28 U.S.C. § 2254(d)(1). Because the Court has not identified any principles to distinguish proper from improper jury experiments, Fields cannot show that the experiment in his case violated “clearly established” law from the Supreme Court. His other claims also cannot overcome AEDPA’s standards. We thus affirm the denial of habeas relief.

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I

A

In the summer of 1993, Fields was 21 years old. He lived with his mother and brother at an apartment in Grayson, a small town in eastern Kentucky. That August, Fields began dating Minnie Burton. Burton lived a short distance from Fields in a duplex apartment.

Bess Horton, an 84-year-old widow, owned the duplex where Burton lived. Horton allowed Burton to act as her “driver” and run errands for her in lieu of paying rent. Yet Burton repeatedly took Horton’s car without permission—one reason why the two women had a falling out. By mid-August, Horton had started the process of evicting Burton and asked Elmer Pritchard, the neighbor in the duplex’s other apartment, to change the locks.

On August 18, Fields and Burton spent the day driving around eastern Kentucky with friends, including Phyllis Berry. Most of the group, including Fields, drank beer throughout the day. But Berry, who joined the group late, did not participate in the drinking because she took over as the primary driver. With Berry behind the wheel in the evening, the group made two more beer stops.

After the first stop, Berry drove the group to her brother’s home. While there, witnesses saw Fields take “horse tranquilizers,” a slang term for the hallucinogen PCP.

Around 11:30 p.m. or so, Berry drove Fields and Burton back to Fields’s apartment. Fields and Burton continued to drink beer with Fields’s brother. Berry described Fields as “intoxicated” at this time; Fields’s brother said that Fields “had a good buzz going” and seemed “rowdy” and “ready to fight[.]” Berry Tr., R.30-17, PageID 6584; J. Fields Tr., R.30-19, PageID 6831, 6839. Berry soon left, and Fields’s brother went to bed shortly after.

While alone with Burton, Fields suddenly “freaked out,” claiming to lack “control” of his conduct. Burton Tr., R.30-18, PageID 6685. He started throwing things. Fields, for example, threw a knife from his location in the kitchen close to where Burton stood in the living room. His erratic behavior scared Burton, so she decided to leave for her duplex apartment. Burton could not recall the specific time that she departed.

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Fields's brother made out the sounds of an argument between Fields and Burton while trying to sleep in his upstairs bedroom. He thought Burton had left around midnight. After later hearing shattering glass, Fields's brother went downstairs to investigate. The apartment was in disarray. A table had been flipped over, a storm-glass window had been broken, and the walls had holes in them. Fields remained at the apartment. He held a large butcher knife and started "rubbing it up and down [his brother's] arm." J. Fields, R.30-19, PageID 6823–24. Fields eventually walked off toward Burton's duplex. His brother gave contradictory answers about when Fields left. At points, he suggested that Fields left 10 to 20 minutes after Burton; at other points, he suggested that Fields did not leave until 1:30 a.m.

In the meantime, Burton had made it back to her apartment. Burton found herself locked out. Though she had the keys to her apartment, she could not get in because the storm door was locked. Rather than ask Pritchard in the other duplex apartment for help, she decided to pass the time smoking on the front porch. She later began to check her windows to see if any were unlocked. When doing so, she heard someone "hooting and hollering" and banging on street signs. Burton Tr., R.30-18, PageID 6691–92. Fields materialized out of the thick fog, handed her a knife, and claimed (falsely) to have killed his brother. He took Burton's keys and vowed to get inside her apartment. She dropped the knife and fled to a relative's home. Fields then punched out a window of Burton's apartment—cutting himself and leaving his blood on the window.

Around 1:55 a.m., Pritchard heard this window shatter. He feared that somebody was breaking into Burton's apartment. Looking outside, Pritchard saw Fields cussing and yelling "Minnie, why did you run for?" Pritchard Tr., R.30-19, PageID 6880. Pritchard called the police to report the break-in and watched Fields leave in the general direction of Bess Horton's home.

Officer Larry Green with the Grayson Police Department quickly reached the scene. Pritchard let Green into Burton's apartment, and they searched it together. The pair found nobody inside but spotted the bloody, broken window. Green called for backup and met Sergeant Ron Lindeman at 2:23 a.m. Pritchard told the officers that Burton was renting the apartment from Horton and that Fields had walked off in the direction of Horton's home.

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The officers started to search the area. Retracing Fields's path, they eventually found themselves near Horton's home. One of the garage doors to her standalone garage was up. Nobody was in the garage, but the regular door out the back appeared to have been kicked open. The officers walked through this door to the back of Horton's home. Lights were on. Growing increasingly alarmed, Lindeman could not "recall [Horton's] lights ever being on that late at night." Lindeman Tr., R.30-14, PageID 6039. The officers looked through the enclosed back porch and saw an "L-shaped cut" on the screen to Horton's bedroom window. *Id.*, PageID 6040.

Instructing Green to stay put, Lindeman headed to the front of the house. While looking into a lighted room in the back, Green spotted Fields rummaging through something. Now at the front of the house, Lindeman saw a large "aluminum window laying up against the pillar of the porch" with its screws scattered nearby. *Id.*, PageID 6044. He entered Horton's home through the opening where this window had been.

Lindeman slowly moved to the back of the house. As he approached Horton's bedroom, he saw her brutalized body on the bed. "Her throat was slashed, and she was stabbed in the head with such force that the knife buried to the hilt in her right temple and the point of the blade protruded from her left temple." *Fields v. Commonwealth*, 12 S.W.3d 275, 277 (Ky. 2000). Lindeman called for Green and more backup.

Lindeman then entered Horton's bedroom where Fields was "going through" a drawer. Lindeman Tr., R.30-14, PageID 6046. He told Fields to put his hands up. Fields responded nonchalantly: "Hi Ron. How you doing?" *Id.* But Fields soon frantically confessed, exclaiming: "Kill me, Ron, just kill me. . . . I stabbed her, and I'm into it big time this time." *Id.*, PageID 6048. Lindeman asked Fields how he could do such a thing. Fields stated: "I don't know. I just did it. Kill me. I'm going to prison for the rest of my life." *Id.* Green reached the room in time to hear Fields's confession. He recalled Fields telling Lindeman: "Kill me. Shoot me. I'm into it deep. I killed her." Green Tr., R.30-13, PageID 5950.

Although Fields first appeared calm, he "got into a scuffle" with the officers once they tried to handcuff him. Lindeman Tr., R.30-14, PageID 6048. Lindeman "could smell a strong odor of alcohol" and found Fields "pretty tough to handle." *Id.* Fields had blood on him and

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jewelry in his pockets. The officers also noticed that he possessed many knives and straight razors. Critically for this appeal, one of these knives was a “butter knife” with a “missing” tip—what the prosecutors would call the “twisty knife” at Fields’s trial. Green Tr., R.30-13, PageID 5953; Opening Tr., R.30-13, PageID 5908.

The police took Fields to a hospital. An emergency medical technician treated Fields in the emergency room. This technician asked Fields where the blood had come from. Fields responded “in no uncertain terms” that if the technician “had killed some lady that [he] would have blood on [him] as well.” Dobson Tr., R.30-15, PageID 6163. As it turns out, however, DNA testing identified only Fields’s own blood (not Horton’s) on his clothes.

B

Kentucky charged Fields with murder and first-degree burglary. A jury convicted Fields and sentenced him to death. *Fields*, 12 S.W.3d at 277. But the Kentucky Supreme Court reversed on two grounds. First, the trial court had wrongly admitted a “dramatic videotaped reenactment” that Lindeman made to summarize his investigation. *Id.* at 278–82. And second, the trial court had wrongly refused to give a lesser-included-offense instruction about second-degree manslaughter. *Id.* at 282–83. The Kentucky Supreme Court remanded for a new trial. *Id.* at 285.

At Fields’s second trial, the parties debated whether Fields or Burton committed Horton’s murder. The prosecution presented a simple case. The officers “caught” Fields right next to Horton’s body while burglarizing her home. Opening Tr., R.30-13, PageID 5887. Fields also confessed to the murder three times. The prosecution surmised that Fields got into Horton’s home by unscrewing 17 screws from the window on her front porch. It suggested that Fields used the “twisty knife” to unscrew the screws because both had white paint on them. *Id.*, PageID 5908–09. The prosecution also offered testimony from Burton’s relatives—who corroborated her story that she had visited them around 1:45 a.m. worried that Fields might have killed his brother.

The defense responded with three main reasons why Fields did not commit the crime. Reason One: The defense asserted that a “very intoxicated” Fields could not have walked to

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Horton's home, unscrewed many screws with the twisty knife, and murdered her in the 35 or so minutes between when he left Burton's apartment (around 1:55 a.m.) and when the officers found him (around 2:30 a.m.). *Id.*, PageID 5923. The defense added that the knife did not "fit into the Phillips head" screws. *Id.* Reason Two: The defense relied on the blood evidence. Although Fields's blood and Horton's blood were both at the crime scene, Fields's blood was not found on Horton and Horton's blood was not found on Fields. According to the defense, "it is more likely than not that the person who did this had some blood on them." *Id.*, PageID 5917. Reason Three: The defense argued that Burton had a motive to kill Horton because Horton was evicting her. And while Burton denied the claims, some witnesses said that she had solicited them to rob Horton. The defense also noted that Burton was "unaccounted for" between when she left Fields's apartment and when she showed up at a relative's house—a gap in time that could have lasted almost two hours. *Id.*, PageID 5918, 5924.

Fields's arguments failed to convince his second jury. It too convicted him of both counts and sentenced him to death. *Fields v. Commonwealth*, 274 S.W.3d 375, 391 (Ky. 2008). Fields again appealed. This time, the Kentucky Supreme Court affirmed. *Id.* at 420.

Fields next pursued postconviction relief in state court. *Fields v. Commonwealth*, 2014 WL 7688714, at *1 (Ky. Dec. 18, 2014) (per curiam). After holding a hearing, the trial court rejected Fields's arguments. *Id.* at *2. The Kentucky Supreme Court again affirmed. *Id.* at *15.

Having exhausted all state avenues for relief, Fields turned to federal court. He filed a habeas petition asserting 30 claims for relief under 28 U.S.C. § 2254. Then-District Judge Amul Thapar denied relief in a comprehensive opinion. *Fields v. White*, 2016 WL 3574396, at *8–54 (E.D. Ky. June 23, 2016).

Our court and the district court granted Fields a certificate of appealability on five claims. *See Fields v. Jordan*, 54 F.4th 871, 876 (6th Cir. 2022). On appeal, Fields first argued that his jury had conducted an unconstitutional "experiment" during deliberations. He next argued that his trial lawyers had provided ineffective assistance in three ways: by failing to interview a witness who saw him in the hours before the murder; by failing to introduce expert testimony on his intoxicated state; and by failing to present mitigating evidence at the penalty phase. Lastly,

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Fields argued that the trial court should have allowed him to introduce evidence at the penalty phase showing the low likelihood that he would ever get released if sentenced to life imprisonment. *See id.*

A panel of our court granted Fields relief on the jury-experiment claim. *Id.* at 877–82. Judge Batchelder dissented. *Id.* at 883–84. We voted to rehear this case en banc, *Fields v. Jordan*, 60 F.4th 1023, 1024 (6th Cir. 2023) (en banc), and now consider these five claims in turn.

II. Jury-Experiment Claim

Fields primarily argues that his jury violated the Constitution by experimenting with the “twisty knife” during deliberations in the jury room. Because the Kentucky Supreme Court rejected this claim on the merits, Fields may obtain relief only if he meets AEDPA’s standards. But he has failed to identify any “clearly established” Supreme Court precedent in this jury-experiment context that could permit relief under AEDPA. 28 U.S.C. § 2254(d)(1).

A. Background

The state trial court allowed the jurors to possess various pieces of evidence, including the twisty knife, in the jury room during their deliberations. *See Fields*, 2014 WL 7688714, at *3. Fields had no objection to this approach. During opening statements, one of his lawyers told the jury: “You will get to hold this knife, and feel this knife and look at this knife[.]” Opening Tr., R.30-13, PageID 5923. As part of his post-conviction motion, however, Fields provided the affidavits of two jurors who revealed that the jury had conducted an “experiment” with the knife. The jury tried “using the knife to unscrew screws that were part of a wall of cabinets in the jury room.” Aff., R.33-1, PageID 8928. “The knife easily unscrewed the screws.” *Id.*

Fields called these two jurors to testify at his post-conviction hearing. The prosecution objected that Fields could not introduce this evidence under Kentucky Rule of Criminal Procedure 10.04. That rule provides: “A juror cannot be examined to establish a ground for a new trial, except to establish that the verdict was made by lot.” Ky. R. Crim. P. 10.04. The trial court “sustained” this objection. Tr., R.89-3, PageID 13510.

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The court nevertheless allowed Fields to proffer the jurors' testimony. One of the jurors testified that the jury experiment "was probably [her] fault." *Id.*, PageID 13521. During deliberations, she pondered whether Fields could have unscrewed the screws on Horton's window using the knife. Someone responded that it "wouldn't be that hard." *Id.* Another juror then used the knife to take screws out of a jury-room cabinet door. It "didn't take long" to remove the screws. *Id.*, PageID 13523. The testifying juror recalled that the experiment occurred at the penalty phase while the jury debated whether to sentence Fields to death. She did not view the experiment as about Fields's guilt or innocence, but it did give her peace of mind because "a man's life [hung] in the balance[.]" *Id.*, PageID 13522. Fields's counsel attempted to impeach this juror with a statement from her affidavit (which someone in counsel's office had drafted) suggesting that the experiment had occurred at the guilt phase. But she stood firm, noting that she was "almost sure" it had happened at the penalty phase. *Id.*, PageID 13526.

The other testifying juror agreed that one of the others had unscrewed a jury-room cabinet with the twisty knife. She opined that the jury engaged in this activity "just to see if you could do it." *Id.*, PageID 13516. Unlike the other testifying juror, she recalled that the experiment occurred during the guilt phase.

In his post-conviction motion, Fields argued that this experiment violated his rights to confront witnesses, to due process, and to a fair trial. Rejecting this claim after the hearing, the trial court reiterated that it had "sustained" the "objection to juror testimony on this issue" under Kentucky law. *Op.*, R.33-2, PageID 9503. Regardless, the court held that the experiment did not show any "juror misconduct" that violated the Constitution. *Id.*

The Kentucky Supreme Court affirmed. *Fields*, 2014 WL 7688714, at *2–4. Unlike the trial court, it chose to "assume" that Kentucky's procedural rules allowed the jurors to testify about the experiment. *Id.* at *3. Even so, the court held that the experiment did not violate the Constitution. It interpreted various circuit decisions to hold that jurors may "use their own senses, observations, and experiences to conduct an experiment or reenactment with already admitted evidence." *Id.* at *4. Applying this rule, it saw no error in the experiment in Fields's case. *Id.*

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B. Merits

1. The Kentucky Supreme Court’s decision triggers AEDPA. As relevant here, that law bars a federal court from granting habeas relief to a state prisoner on a “claim that was adjudicated on the merits in State court” unless the state proceedings “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)(1). The Supreme Court has regularly “reminded” courts that this text adopts a “difficult to meet” test. *White v. Woodall*, 572 U.S. 415, 419 (2014) (quoting *Metrish v. Lancaster*, 569 U.S. 351, 358 (2013)).

State prisoners must show two basic things. See *Bergman v. Howard*, 54 F.4th 950, 957 (6th Cir. 2022). First, they must identify a “clearly established” principle of “Federal law” that the “Supreme Court” has pronounced. 28 U.S.C. § 2254(d)(1). This language allows prisoners to seek relief based on just one source: “Supreme Court” decisions. *Id.* Even more narrowly, prisoners must rely on the “holdings” of those decisions; the Court’s “dicta” does not clearly establish binding law. *Woodall*, 572 U.S. at 419 (citation omitted). By requiring federal courts to identify a Supreme Court holding to grant relief, AEDPA bars us from grounding that relief in other sources, such as our own decisions. See *Kernan v. Cuero*, 583 U.S. 1, 8 (2017) (per curiam). Prisoners thus may not make up for the lack of an on-point Supreme Court decision in a specific context by claiming that the circuit courts have all extended the Court’s general principles to that context. See *Marshall v. Rodgers*, 569 U.S. 58, 64 (2013) (per curiam). Conversely, disagreement in the lower courts on how the Court’s general principles apply in the relevant area will show the absence of clearly established law. See *Carey v. Musladin*, 549 U.S. 70, 76–77 (2006).

Likewise, prisoners may not sidestep the lack of Supreme Court precedent on a legal issue by raising the “level of generality” at which they describe the Court’s holdings on other issues. See *Woods v. Donald*, 575 U.S. 312, 318 (2015) (per curiam); *Lopez v. Smith*, 574 U.S. 1, 6 (2014) (per curiam); *Nevada v. Jackson*, 569 U.S. 505, 512 (2013) (per curiam). So, for example, a decision that the Confrontation Clause limits a court’s ability to restrict a defendant’s cross-examination of a witness does not count as “clearly established” law on the distinct question whether the court may restrict the defendant’s use of *extrinsic evidence* to impeach the

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witness. See *Stewart v. Winn*, 967 F.3d 534, 537 (6th Cir. 2020). And prisoners cannot argue that clearly established law exists on the extrinsic-evidence issue merely by reframing the Court’s narrow “cross-examination holding” as a broad ruling about the “right to present ‘evidence bearing on [a witness’s] credibility.’” *Id.* (quoting *Jackson*, 569 U.S. at 512).

Second, once a prisoner has identified a clearly established Supreme Court holding with specificity, the prisoner must show that a state court’s denial of relief was “contrary to” or an “unreasonable application” of this holding. 28 U.S.C. § 2254(d)(1); *Bergman*, 54 F.4th at 957. A state decision cannot be “contrary to” a Supreme Court holding unless it adopts a conflicting legal rule or reaches the opposite result in a case with materially identical facts. See *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003). And a state decision cannot be an “unreasonable application” of that holding unless it commits “an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.” *Harrington v. Richter*, 562 U.S. 86, 103 (2011). A federal court thus may not grant relief simply because it believes that the state court reached a mistaken (or even clearly erroneous) result. See *Shinn v. Kayer*, 141 S. Ct. 517, 523–24 (2020) (per curiam). Rather, it may grant relief only for those rare state-court decisions that count as “extreme malfunctions in the state criminal justice systems[.]” *Donald*, 575 U.S. at 316 (quoting *Richter*, 562 U.S. at 102).

2. Fields has shown no extreme malfunction here. He argues that the jury violated the Constitution by examining evidence that the prosecution admitted at trial (the twisty knife) using jury-room items that it did not admit (the cabinet and its screws). But he has failed to get past AEDPA’s first step by identifying “clearly established” law on this topic. 28 U.S.C. § 2254(d)(1). Fields cites not a single Supreme Court case that has ever “addressed” the propriety of jurors experimenting with evidence during deliberations—let alone one that has found these experiments unconstitutional. *Donald*, 575 U.S. at 317. This lack of precedent makes it difficult for Fields even to pinpoint the *specific constitutional right* that the experiment implicates. His briefing interchangeably suggests that the experiment violated his Sixth Amendment right to confrontation, his Sixth Amendment right to a jury trial, or his Fourteenth Amendment right to due process. Because the Court has never considered jury experiments,

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however, we are left to guess how it would distinguish lawful experiments from unlawful ones under any of these constitutional guarantees.

First consider the Court’s precedent on the Confrontation Clause. The clause gives defendants the right “to be confronted with the witnesses against” them. U.S. Const. amend. VI. For present purposes, the key word in this text is “witnesses.” This word clarifies that courts must permit a defendant to have a “face-to-face meeting” with certain individuals. *Coy v. Iowa*, 487 U.S. 1012, 1016 (1988). More specifically, it covers individuals who “bear testimony”—that is, those who make a “solemn declaration or affirmation . . . for the purpose of establishing or proving some fact.” *Crawford v. Washington*, 541 U.S. 36, 51 (2004) (quoting 2 Noah Webster, *An American Dictionary of the English Language* (1828)). Fields, for example, supports his claim with a decision about a bailiff’s out-of-court statements. *See Parker v. Gladden*, 385 U.S. 363, 363–65 (1966) (per curiam). The bailiff in *Parker* privately told jurors that the “wicked” defendant was guilty and that the Supreme Court would fix any errors in a guilty verdict. *Id.* at 363–64. The Court held that these comments violated the Confrontation Clause. *Id.* at 364–65. It treated the bailiff as a “witness” who made testimonial statements that the defendant could not confront. *See id.*

But Fields does not tell us how these precedents interpreting the Confrontation Clause would apply to the jury experiment in his case—let alone show that they “clearly” control. 28 U.S.C. § 2254(d)(1). Unlike in *Parker*, Fields’s counsel conceded that his claim does not involve out-of-court statements by “witnesses.” Oral Arg. 12:09–:11. Instead, he complains that the jury used unadmitted tangible objects (a cabinet and screws) to test the twisty knife. But no Supreme Court decision has ever suggested that the Confrontation Clause applies to physical evidence. And many lower courts have held that the clause does not reach this type of nontestimonial evidence. *See United States v. Miller*, 982 F.3d 412, 437 (6th Cir. 2020); *see also State v. Williams*, 913 S.W.2d 462, 465 (Tenn. 1996). Indeed, “how could one cross-examine [a cabinet]?” *United States v. Moon*, 512 F.3d 359, 362 (7th Cir. 2008). At the least, *Parker*’s “holding” that the bailiff’s statements violated the Confrontation Clause—“the only aspect of the decision relevant here”—does not clearly apply to the physical items in this case. *Woodall*, 572 U.S. at 424.

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Next consider the Court’s precedent on the Sixth Amendment “right” to a “trial, by an impartial jury.” U.S. Const. amend. VI. The Constitution does not further specify the protections that accompany this right. See *Ramos v. Louisiana*, 140 S. Ct. 1390, 1395 (2020). To determine the right’s “content,” then, the Court has long relied on what a jury trial historically looked like, examining such sources as “the common law, state practices in the founding era, or opinions and treatises written soon afterward[.]” *Id.* As one example, the Court invoked these sources to hold that the jury-trial right requires jurors to reach unanimous verdicts. See *id.* at 1395–97. As another example, the Court invoked these sources to hold that the jury-trial right requires a jury to find any fact that increases the defendant’s punishment above the statutory maximum that would otherwise apply without that fact. See *Apprendi v. New Jersey*, 530 U.S. 466, 476–83 (2000).

Fields supports his claim with two decisions holding that this general jury-trial right also includes a specific guarantee against juror bias. See *Irvin v. Dowd*, 366 U.S. 717, 721–28 (1961); *Turner v. Louisiana*, 379 U.S. 466, 471–74 (1965). The defendant in *Irvin* was charged with committing six murders near a small town. 366 U.S. at 719. The local media extensively publicized his crimes. *Id.* at 720, 725. This publicity made it impossible to find unbiased jurors, and eight of the twelve people who sat on the defendant’s jury had decided that he was guilty before hearing any evidence. *Id.* at 727–28. The Court held that these biased jurors violated the defendant’s right to an “impartial” jury. See *id.* at 721–28. It reasoned that the jury-trial right required “a panel of impartial, ‘indifferent’ jurors” who will base their verdict on the “evidence developed at the trial” rather than a preconceived opinion about the defendant’s guilt. *Id.* at 722 (citing *Reynolds v. United States*, 98 U.S. 145, 155 (1879)). This aspect of the right has deep roots: “In the language of Lord Coke, a juror must be as ‘indifferent as he stands unsworne.’” *Id.* (quoting 1 Edward Coke, *Institutes of the Laws of England* 155b (1628)).

The Court extended *Irvin* in *Turner*. There, the prosecution relied on the testimony of two deputy sheriffs as its main evidence in the defendant’s murder trial. 379 U.S. at 467. The trial court had sequestered the jurors and placed them in the sheriff’s care. *Id.* at 467–68. So the testifying deputies had a “close and continual association with the jurors,” eating meals with them and mingling with them throughout the trial. *Id.* at 468. The Court held that the jury’s

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association with key prosecution witnesses violated the jury-trial guarantee. *Id.* at 471–74. Although the deputies had not talked with the jurors about the case, their credibility was critical. *Id.* So their “intimate association” with the jury—in which they “renew[ed] old friendships and [made] new acquaintances”—effectively biased the jurors in favor of prosecution witnesses. *Id.* at 473–74.

For a second time, however, Fields does not explain why these decisions about the Sixth Amendment right against jury bias “clearly” apply to the jury *experiment* in his case. 28 U.S.C. § 2254(d)(1); *see Jackson*, 569 U.S. at 511–12. As a specific matter, Fields does not argue that his jurors were “biased” against him. He, for instance, does not claim that his jurors had “formed an opinion” about his guilt before trial—like the jurors in *Irvin*. 366 U.S. at 722 (quoting *Reynolds*, 98 U.S. at 155). Nor does he claim that they had an “intimate association” with prosecution witnesses—like the jurors in *Turner*. 379 U.S. at 473. Indeed, we fail to see how Fields’s jury-experiment claim even implicates the specific jury-trial requirement that *Irvin* and *Turner* enforced: the requirement of an “impartial” jury. U.S. Const. amend. VI.

As a general matter, the Supreme Court’s other jury-trial decisions would instruct us to examine the “historical foundation” for Fields’s claim that a jury may not test admitted evidence using unadmitted jury-room objects. *Apprendi*, 530 U.S. at 477. If, say, the “common law” or “state practices in the founding era” barred this type of jury-room experiment, perhaps the jury-trial right would incorporate that rule (as it has incorporated the jury-unanimity rule). *Ramos*, 140 S. Ct. at 1395. But Fields does not identify any common-law authorities, treatises, or other sources to help answer this question. That is for good reason. If Fields must build his claim’s legal foundations from the ground up in this fashion, he could not possibly show that the Supreme Court has *already* “clearly established” that the jury experiment violated the jury-trial right. 28 U.S.C. § 2254(d)(1). Just as our own precedents cannot qualify as “clearly established” law, neither can “state-court decisions, treatises, or law review articles.” *Cuero*, 583 U.S. at 8.

Lastly, consider the Court’s precedent on the Due Process Clause. That clause prohibits a State from “depriv[ing]” defendants of their “life” or “liberty” “without due process of law[.]” U.S. Const. amend. XIV, § 1. The Supreme Court has long held that this general text has

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“limited operation” in criminal contexts because of the many other guarantees that the Bill of Rights gives to criminal defendants. *Medina v. California*, 505 U.S. 437, 443 (1992) (quoting *Dowling v. United States*, 493 U.S. 342, 352 (1990)). If these express protections do not apply, due process bars only those practices that “offend[] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.” *Id.* at 445 (quoting *Patterson v. New York*, 432 U.S. 197, 202 (1977)). And, as Justice Kagan has explained, the Court again looks to “historical practice” to identify these “fundamental” principles. *Kahler v. Kansas*, 140 S. Ct. 1021, 1027 (2020) (citations omitted). When, for example, the Court held that due process required the prosecution to prove its case beyond a reasonable doubt, it noted that this specific standard “date[d] at least from our early years as a Nation.” *In re Winship*, 397 U.S. 358, 361 (1970); *see also Perry v. New Hampshire*, 565 U.S. 228, 237 (2012); *Deck v. Missouri*, 544 U.S. 622, 626 (2005).

For a third time, however, Fields fails to show that any of these due-process decisions “clearly” apply to the jury experiment in his case. 28 U.S.C. § 2254(d)(1). He identifies no specific due-process precedent on jury experiments. And the Court’s generic due-process test (which examines our country’s “fundamental” “principles”) lacks the required specificity to “supply a ground for relief” under AEDPA. *Brown v. Davenport*, 596 U.S. 118, 136 (2022); *see Stewart*, 967 F.3d at 539–40. Again, perhaps there is a traditional “common law” principle that would bar jury experiments like the one in this case. *See Deck*, 544 U.S. at 626. But Fields correctly makes no effort to identify that principle in these AEDPA proceedings.

In sum, we need not take a position on how these three constitutional rights should apply to Fields’s jury-experiment claim in this case. To resolve that claim, we need only say that “no Supreme Court precedent establishes that jury experiments violate” any of the rights. *Fields*, 54 F.4th at 883 (Batchelder, J., dissenting). AEDPA thus forecloses relief on the claim.

3. In response, Fields argues that *Irvin*, *Turner*, *Parker*, and one earlier decision clearly establish “a constitutional right to have the jury determine guilt or innocence based only on evidence presented at trial.” Appellant’s Suppl. Br. 1; *Parker*, 385 U.S. at 364–65; *Turner*, 379 U.S. at 472; *Irvin*, 366 U.S. at 722; *Patterson v. Colorado*, 205 U.S. 454, 462 (1907). And because the prosecution did not offer the jury-room cabinet and screws into evidence, Fields’s

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argument goes, the Kentucky Supreme Court unreasonably applied this bright-line rule by allowing his jurors to use that “extrinsic evidence” during their deliberations. Appellant’s Suppl. Br. 8–9.

This line of reasoning bears the hallmarks of circuit decisions the Supreme Court has seen fit to summarily reverse under AEDPA: Fields articulates a *broad rule* based on *narrow holdings* in order to “transform” an “imaginative extension of existing case law into ‘clearly established Federal law, as determined by the Supreme Court.’” *Jackson*, 569 U.S. at 512 (quoting 28 U.S.C. § 2254(d)(1)). His line of reasoning makes two mistakes.

To begin with, Fields wrongly treats as clearly established law a “general proposition” that originates with a few quotations from far-afield decisions. *Lopez*, 574 U.S. at 5–6. *Irvin*, for example, noted that a “verdict must be based upon the evidence developed at the trial.” 366 U.S. at 722. Similarly, *Turner* stated that “[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.” 379 U.S. at 472; see *Parker*, 385 U.S. at 364–65. But this principle that a defendant’s guilt must rest on the evidence is just as “abstract” as others that the Court has held cannot serve as clearly established law—such as the principle that a defendant has the right to “adequate notice of the charges,” *Lopez*, 574 U.S. at 5–6, or “to present ‘evidence bearing on [a witness’s] credibility,’” *Jackson*, 569 U.S. at 512 (citation omitted).

Next, by framing *Parker*, *Turner*, *Irvin*, and *Patterson* at a sky “high level of generality,” Fields overlooks what matters: their holdings. *Lopez*, 574 U.S. at 6 (citation omitted); see *Woodall*, 572 U.S. at 419. None of these cases “addresses, even remotely, the specific question presented by this case.” *Lopez*, 574 U.S. at 6. As we have explained, the holdings in *Parker*, *Irvin*, and *Turner*—that the Confrontation Clause bars a bailiff from telling jurors that the defendant is guilty, *Parker*, 385 U.S. at 364–65; that the jury-trial right bars individuals from sitting on a jury if they have already decided that the defendant is guilty, *Irvin*, 366 U.S. at 721–28, and that this right bars jurors from intimately associating with prosecution witnesses, *Turner*, 379 U.S. at 471–74—say nothing about whether jurors may “test” an admitted exhibit using objects in the jury room.

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Patterson also had nothing to do with jury experiments—or even the constitutional rights that Fields invokes. Fields quotes this sentence from that decision: “The 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, whether of private talk or public print.” 205 U.S. at 462. But the Court was addressing a *free-speech* challenge to a state court’s decision to hold a publisher in contempt for articles that ridiculed the court’s earlier rulings. *Id.* at 458–59. The Supreme Court rejected this speech claim, opining that the First Amendment might protect only against prior restraints. *Id.* at 462–63. We very much doubt that *Patterson* sets forth the free-speech rules that govern today. *Cf. Garrison v. Louisiana*, 379 U.S. 64 (1964). Regardless, an opinion about a right to speak under the First Amendment contains only irrelevant “dicta” on whether a jury experiment violates the Sixth or Fourteenth Amendment. *Donald*, 575 U.S. at 316 (citation omitted).

To be sure, the notion that a jury’s verdict must rest on “the evidence developed at the trial” may well go back centuries. *Turner*, 379 U.S. at 472. Blackstone, for example, suggested that it would “vitiate the verdict” if jurors “speak with either of the parties or their agents, after they are gone from the bar; or if they receive any fresh evidence in private[.]” 3 William Blackstone *Commentaries on the Laws of England* 376 (1768) (emphasis added); see also James B. Thayer, *The Jury and Its Development*, 5 Harv. L. Rev. 295, 311 (1892); 2 Matthew Hale & Charles Runnington, *The History of the Common Law* 147–48 (5th ed. 1794). But, as then-District Judge Thapar explained, this 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”? *Fields*, 2016 WL 3574396, at *9. Stated differently, when does a jury experiment change from a (valid) “examination of proper evidence” into a (perhaps impermissible) “production of new evidence”? Carroll J. Miller, Annotation, *Propriety of Juror’s Tests or Experiments in Jury Room*, 31 A.L.R.4th 566, § 2[a], Westlaw (database updated 2023). The line between the two has been “difficult to draw,” so lower courts have developed “few, if any, general rules” to guide the inquiry. *Id.*

Indeed, the wide divergence that has existed on this issue for over a century (whether as a matter of state or federal law) confirms that the Supreme Court has not adopted a clear federal

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rule to cover the field. *Carey*, 549 U.S. at 76–77. Compare *Taylor v. Commonwealth*, 17 S.E. 812, 815–16 (Va. 1893), with *Forehand v. State*, 11 S.W. 766, 766 (Ark. 1889) (per curiam). On the one hand, in addition to the Kentucky Supreme Court’s decision here, many cases conflict with Fields’s proposed legal rule that jurors may not experiment with admitted exhibits using “extrinsic evidence” from the jury room. Take *Fletcher v. McKee*, 355 F. App’x 935 (6th Cir. 2009). There, the prosecution charged the defendant with murdering his pregnant wife, Leann. *Id.* at 936. The defense claimed that Leann accidentally shot herself. *Id.* The jurors experimented with the gun during deliberations. *Id.* While holding the gun, a juror fell off a jury-room table in the way that the defense hypothesized Leann had fallen off her bed after she shot herself. *Id.* Other jurors then examined where the gun landed. *Id.* The jury convicted the defendant partly because the experiment’s results did not match the defense’s theory. *Id.* In this AEDPA context, we held that the experiment did not produce “extrinsic evidence” that might create a constitutional problem. *Id.* at 940.

Fletcher is on all fours with Fields’s case. Both involved a mix of admitted evidence (the gun or twisty knife) and unadmitted objects (the jury-room table or cabinet). And many of Fields’s criticisms of the jury experiment here would apply just as well to the experiment there. Fields notes that the jury-room conditions were far different from those at night outside Bess Horton’s home. The cabinet had universal screws, not Phillips screws. The jury room was light, not dark. And the juror who conducted the experiment was sober, not intoxicated. Yet one could have made similar critiques in *Fletcher*. Was the jury-room table the same height as the bed? Was the juror the same size as Leann? Did the juror fall with the same force as Leann would have fallen after being shot? The generic principle from *Parker* or *Turner* that jurors should rely only on the trial evidence does not “clearly establish” a specific legal rule that would allow us to find the experiment in *Fletcher* proper but the experiment in this case improper.

Countless other cases have likewise found no federal or state error when jurors conducted experiments using “extrinsic evidence” from the jury room. Courts, for example, have rejected challenges to jury experiments with a “personal pocket knife” or “cardboard knife” to reenact a fight. *United States v. Abeyta*, 27 F.3d 470, 477 (10th Cir. 1994) (White, Senior Associate J.); *Kurina v. Thieret*, 853 F.2d 1409, 1413 (7th Cir. 1988); *People v. Kurena*, 410 N.E.2d 277, 282

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(Ill. Ct. App. 1980); *cf. State v. Balisok*, 866 P.2d 631, 632–34 (Wash. 1994). They have similarly rejected challenges to: an experiment in which a juror covered his head and wore sunglasses to see if other jurors could recognize him, *United States v. Hephner*, 410 F.2d 930, 936 (7th Cir. 1969); an experiment in which jurors hit a jury-room “leather chair” with an admitted “wooden rod,” *Mitchell v. State*, 726 N.E.2d 1228, 1233, 1237 (Ind. 2000), *abrogated on other grounds by Bealtie v. State*, 924 N.E.2d 643 (Ind. 2010); and an experiment in which jurors estimated a bullet’s trajectory using a string from a juror’s jacket and a jury-room protractor, *People v. Collins*, 232 P.3d 32, 89–91 (Cal. 2010). Courts have also rejected challenges to experiments in which jurors pricked or inked their fingers (to see how long it takes for blood to clot or to confirm that their fingerprints differed from the fingerprints in evidence). *See State v. Graham*, 422 So. 2d 123, 132–33 (La. 1982); *State v. Jackson*, 596 N.W.2d 262, 266 (Minn. Ct. App. 1999). None of these decisions comports with Fields’s purported “clearly established” legal rule that jurors categorically may not use jury-room objects to conduct experiments.

On the other hand, Fields does identify some decisions that may support his rule (at least as a matter of state law). He, for instance, highlights the Kentucky Supreme Court’s decision in *Smith v. Commonwealth*, 645 S.W.2d 707 (Ky. 1983). There, the prosecution alleged that the defendant’s belt buckle had left a mark on a plasterboard wall. *Id.* at 709. After the jury was given a piece of the wall that had not been admitted into evidence, jurors conducted experiments on it using the belt buckle. *Id.* at 710. The court reversed based on the principle that the jury may consider only the trial evidence. *Id.* Similarly, another state court reversed 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 had not been) to see if the defendant could remove drugs from his pocket while handcuffed. *Ex Parte Thomas*, 666 So. 2d 855, 857–58 (Ala. 1995); *see also, e.g., State v. Sanders*, 68 Mo. 202, 206 (1878). But these lower-court decisions do Fields no good in this AEDPA context. *See Cuero*, 583 U.S. at 8. At best, they confirm the tension in the caselaw on this topic—tension that shows the *absence* of clearly established law. *See Carey*, 549 U.S. at 76–77. That fact forecloses relief for Fields under AEDPA.

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Fields lastly argues that our court has already held that his rule qualifies as “clearly established” law under AEDPA. *See Doan v. Brigano*, 237 F.3d 722, 733 & n.7 (6th Cir. 2001). He is correct that, although circuit decisions cannot create clearly established law, circuit courts must follow their own decisions holding that the Supreme Court has clearly established a principle for AEDPA purposes. *See Rodgers*, 569 U.S. at 64. And he is correct that our court in *Doan* held that the Supreme Court in *Parker* and *Turner* had clearly established the general rule that a “defendant be afforded the right to confront the evidence and the witnesses against him, and the right to a jury that considers only the evidence presented at trial.” *Doan*, 237 F.3d at 733 n.7; *see Moore v. Mitchell*, 708 F.3d 760, 805–06 (6th Cir. 2013); *Fletcher*, 355 F. App’x at 937. But we issued *Doan* only five years after AEDPA. At that time, the Supreme Court had yet to interpret the phrase “clearly established” law to exclude “abstract” principles, *Lopez*, 574 U.S. at 6, or rules “that speak only at a high level of generality,” *Davenport*, 596 U.S. at 136. *Doan* conflicts with this recent guidance. So we now reject *Doan*’s holding for the reason Judge Batchelder suggested at the panel stage: “that the Supreme Court has abrogated *Doan* and that we are no longer bound to follow it.” *Fields*, 54 F.4th at 884 (Batchelder, J., dissenting). Because the Supreme Court has issued no guidance on jury experiments like the one here, it lacks “clearly established” law on the topic.

One final point. All the evidence about the jury’s experiment in this case came from the jurors themselves. And the state trial court seemingly denied Fields’s claim on the alternative ground that a Kentucky procedural rule barred jurors from testifying about their deliberations. Ky. R. Crim. P. 10.04. This type of “no-impeachment rule” has a long history. “At common law jurors were forbidden to impeach their verdict, either by affidavit or live testimony.” *Peña-Rodriguez v. Colorado*, 580 U.S. 206, 215 (2017). The Court has adopted a constitutional exception to the no-impeachment rule when jurors exhibit racial animus. *See id.* at 225. And many federal and state legislators or rule-makers have made other exceptions to the rule, including when jurors use “extraneous” or “outside” evidence. *Id.* at 215–17. Did the Constitution also require an exception to the no-impeachment rule in Fields’s case and thus render the trial court’s alternative ruling invalid? We merely flag this (unbriefed) question to clarify that we have not impliedly resolved it by considering the jurors’ testimony about the

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experiment. We may save the issue for another day given our holding that Fields cannot meet AEDPA's standards even accepting that testimony.

III. Ineffective-Assistance Claims

In three ways, Fields next argues, his attorneys made such grave mistakes during his trial that they deprived him of his Sixth Amendment right to counsel. Yet the Kentucky Supreme Court resolved these three ineffective-assistance claims on their merits too, so AEDPA's standards again apply. And Fields has not shown that the state court engaged in an "unreasonable application" of the Supreme Court's test for evaluating his counsel's performance, 28 U.S.C. § 2254(d)(1), or made an "unreasonable determination of the facts" about their conduct, *id.* § 2254(d)(2).

A. Ineffective Assistance in the AEDPA Context

AEDPA has "special importance" when defendants allege that their counsel performed ineffectively. *Kayer*, 141 S. Ct. at 523. The combination of the Supreme Court's normally demanding test for ineffective-assistance claims with its even more demanding test for AEDPA relief creates a "doubly deferential" review framework for federal courts. *Roger v. Mays*, 69 F.4th 381, 389 (6th Cir. 2023) (en banc). We presume the reasonableness of both the strategic decisions of Fields's attorneys and the Kentucky Supreme Court's holding that these attorneys performed adequately. *See Dunn v. Reeves*, 141 S. Ct. 2405, 2410–11 (2021) (per curiam).

Even outside the AEDPA context, a defendant like Fields faces a tall task to prove that his lawyers performed so incompetently that they deprived him of his Sixth Amendment right "to have the Assistance of Counsel for his defence." U.S. Const. amend. VI; *Richter*, 562 U.S. at 105. Since *Strickland v. Washington*, 466 U.S. 668 (1984), this claim has required a defendant to prove two elements. *Id.* at 687. The defendant's attorneys must have performed incompetently. *Id.* And their deficient performance must have prejudiced the defendant's chances at trial. *Id.*

Only the first element matters in Fields's case. This element requires him to prove that his lawyers made objectively unreasonable decisions when considered under all of the circumstances. *See id.* at 687–88. Fields cannot meet this test simply by showing that the

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lawyers' decisions "deviated" from the "best" or "common" course. *Richter*, 562 U.S. at 105. Rather, their decisions must have reached such a level of "incompetence" that we can say that Fields lacked the "'counsel' guaranteed [him] by the Sixth Amendment." *Id.* at 104–05 (quoting *Strickland*, 466 U.S. at 687). And when deciding whether Fields's counsel performed incompetently, we start with a "strong presumption" that their performance fell "within the wide range" of adequate representation. *Strickland*, 466 U.S. at 689. We also undertake a "highly deferential" review of their decisions, avoiding the unfair "hindsight" bias that often infects after-the-fact assessments. *Id.*

This "high bar" reaches even higher levels when, as in Fields's case, a state court triggers AEDPA by rejecting a defendant's claim that counsel provided ineffective assistance. *Richter*, 562 U.S. at 105 (citation omitted). At this point, it is no longer enough for Fields to show that his attorneys made a decision that no reasonable lawyer would have made. He now must show that "every 'fairminded juris[t]' would agree that every reasonable lawyer would have made a different decision." *Reeves*, 141 S. Ct. at 2411 (quoting *Richter*, 562 U.S. at 101). And *Strickland*'s "general" standard for evaluating counsel's performance increases the burdens on Fields further still. *Davis v. Carpenter*, 798 F.3d 468, 473 (6th Cir. 2015). Under AEDPA, "the more general the rule, the more leeway state courts have" when applying the rule to a defendant's specific facts. *Kayer*, 141 S. Ct. at 523 (quoting *Sexton v. Beaudreaux*, 138 S. Ct. 2555, 2560–61 (2018) (per curiam)). So the Kentucky Supreme Court has even more "latitude" to reject Fields's ineffective-assistance claims without our second guessing its decision as an "unreasonable application" of *Strickland*'s performance prong. *See id.* (citation omitted); 28 U.S.C. § 2254(d)(1).

To the extent that Fields also challenges the state trial court's factual findings about his counsel's conduct (apart from the Kentucky Supreme Court's legal conclusion about their performance), AEDPA requires him to meet another demanding test. He must show that the trial court made "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). To meet this test, Fields must do more than convince us that we would have reached a different conclusion in the first instance. *See Burt v. Titlow*, 571 U.S. 12, 18 (2013). He instead must show not just that the state court's

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determination was debatable or incorrect, but also that it was unreasonable—“a substantially higher threshold” for obtaining relief. *Shoop v. Twyford*, 142 S. Ct. 2037, 2043 (2022) (citation omitted); see *Burt*, 571 U.S. at 18; *Wood v. Allen*, 558 U.S. 290, 301–03 (2010).

Fields says he can meet these rigorous legal and factual standards for three different reasons. He is wrong on all three fronts.

B. Testimony of James Berry

1. Fields first asserts that his trial attorneys performed incompetently by failing to interview and introduce the testimony of a witness who saw him on the evening before the murder. The trial evidence showed that, while driving around with their friends that evening, Fields and Burton stopped at the home of Phyllis Berry’s brother—a man named James Berry (whom we will refer to as “Berry” from this point). At Fields’s post-conviction hearing, Berry testified that Fields was already drunk when the group reached his house. Fields was “staggering” and speaking incoherently. J. Berry Tr., R.89-4, PageID 13703. Berry also watched Fields take “some kind of pills.” *Id.*, PageID 13702. Berry’s sister allegedly told him later that Fields had ingested “horse tranquilizers” (the street name for PCP) and that this drug explained Fields’s hallucinations. *Id.*, PageID 13710.

In his postconviction motion, Fields argued that his lawyers performed deficiently by failing to interview Berry and offer his testimony at trial. *Fields*, 2014 WL 7688714, at *8. According to Fields, Berry’s testimony about his extreme intoxication would have helped prove two defenses: that he could not have removed 17 screws from Horton’s window late at night or, at the least, that he could not have formed the mental state required for murder. *Id.*

The Kentucky Supreme Court affirmed the state trial court’s rejection of this claim. *Id.* at *8–9. It initially held that the trial court’s findings of historical fact “were not clearly erroneous.” *Id.* at *9. The trial court had found that Fields’s lawyers “conducted an extensive pre-trial investigation.” Op., R.33-2, PageID 9498. They knew of Berry’s “existence” and “evaluated whether he had any valuable testimony to present.” *Id.* But counsel decided that Berry should not testify. *Id.* Fields vigorously asserted his innocence and did not want counsel to put on an “intoxication defense at trial.” *Id.* And his lawyers believed that Berry would have

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been a “problematic witness” because he was “a convicted felon with a history of psychiatric issues and drug abuse.” *Id.*, PageID 9498, 9505. They also believed that Berry’s testimony would have merely duplicated what other individuals at his house party had to say. *Id.*, PageID 9505. Based on these factual findings, the Kentucky Supreme Court held that counsel reasonably decided not to interview Berry both because his testimony would have been cumulative and because he would not have been a compelling witness. *Fields*, 2014 WL 7688714, at *8–9.

2. This decision did not unreasonably apply *Strickland*’s performance prong. Admittedly, there is no legal dispute that Fields’s counsel had a “duty to investigate” Fields’s case. *Strickland*, 466 U.S. at 690. There is also no factual dispute that Fields’s counsel did not interview Berry. So the Kentucky Supreme Court needed to ask whether counsel made “a reasonable decision” that this interview was “unnecessary” under “all the circumstances”—giving “a heavy measure of deference to counsel’s” investigative choices. *Id.* at 691.

Fields’s claim fails under AEDPA because a “fairminded jurist” could conclude that a reasonable lawyer could have chosen not to interview Berry or put him on the stand. *Kayer*, 141 S. Ct. at 524. From a bird’s eye view, when reviewing “all the circumstances” of counsel’s decision, *Strickland*, 466 U.S. at 691, we must consider the other steps that counsel took to prepare for trial. Fields does not challenge the trial court’s finding that his lawyers extensively investigated his case before trial. And there are only so many hours in the day. So it is generally for lawyers, not courts, to decide how best to “balance” their “limited resources” against the many potential investigative paths to follow. *Richter*, 562 U.S. at 107.

From a ground-level view, a “fairminded jurist” could hold that Fields’s counsel reasonably chose not to interview Berry for the two reasons that the Kentucky Supreme Court identified. *Kayer*, 141 S. Ct. at 524. For one thing, the state court could properly decide that lawyers can refrain from interviewing a witness who has information that could “reasonably be expected to be only cumulative” of other testimony. *Bobby v. Van Hook*, 558 U.S. 4, 11 (2009) (per curiam); *Fitchett v. Perry*, 644 F. App’x 485, 491–92 (6th Cir. 2016). And here, Berry’s information was largely cumulative. Several others testified that Fields consumed alcohol for most of the day and was drunk on the evening of the murder. Berry’s sister Phyllis described

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Fields's drinking and opined that he was "intoxicated" when she dropped him off at his apartment. Berry Tr., R.30-17, PageID 6577–79, 6584, 6591–95. Another witness who drove around with Fields referred to him as "intoxicated" when the two parted ways, adding that Fields took "the rest of the beer with him." Trent Tr., R.30-18, PageID 6646. Fields's brother likewise said that he was "drunk" back at their apartment. J. Fields Tr., R.30-19, PageID 6832. And Burton presumed that Fields started acting strangely at this location because he was "high" or "drunk." Burton Tr., R.30-18, PageID 6685.

For another thing, Fields identifies no Supreme Court precedent that would have barred the Kentucky Supreme Court from concluding that counsel could reasonably prioritize other witnesses over Berry in light of his credibility issues. Counsel knew that Berry was in "prison at the time" of trial. Lytle Tr., R.89-3, PageID 13548. Counsel also had never called a witness with the types of "psychological" issues that Berry suffered from. *Id.*, PageID 13565–66.

At best, Berry would have provided a firmer foundation that Fields was on PCP and not just drunk before the murder. Burton testified that Fields "pass[ed] a bowl of pills around" and referred to them as "horse tranquilizers" while at Berry's home, but she equivocated over whether she saw Fields take the pills. Burton Tr., 30-18, PageID 6753, 6755; Burton Tr., R.30-19, PageID 6802. Even on this factual issue, however, Fields overlooks that his counsel sought to elicit the PCP testimony for a narrow purpose. They sought to establish a "factual predicate" for a penalty-phase argument that the jury should not impose a death sentence because Fields had murdered Horton while under the influence of a hallucinogenic drug. *Fields*, 2014 WL 7688714, at *9. Burton's testimony accomplished that goal. And any greater emphasis on Fields's use of PCP could have harmed rather than helped his defense. *See Richter*, 562 U.S. at 108–09. After all, this drug could have caused "a psychotic episode" that would explain why Fields would "stab an elderly woman in the head" with such force that the knife came out the other side. *Fields*, 2014 WL 7688714, at *11. Laying the groundwork for the prosecutor to make this powerful point would have undercut Fields's innocence defense. *See id.*

Fields's responses do not change things. He argues that the Kentucky Supreme Court could not presume that his counsel made a strategic decision where, as here, they did not interview a "known" witness. Appellant's Br. 46. Fields derives this categorical rule—that

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counsel must interview all known witnesses—from two decisions. See *Towns v. Smith*, 395 F.3d 251, 258 (6th Cir. 2005); *Workman v. Tate*, 957 F.2d 1339, 1345–46 (6th Cir. 1992). But AEDPA did not apply in these cases. See *Towns*, 395 F.3d at 257; *Workman*, 957 F.2d at 1344–46. So we cannot use them to “sharpen” *Strickland*’s general standard into the “specific legal rule” that he proposes. *Rodgers*, 569 U.S. at 64. Besides, neither decision adopts Fields’s rule. We faulted counsel in both cases because they disregarded people who counsel should have reasonably known were “the only witnesses” with crucial information. *Workman*, 957 F.2d at 1345; see *Towns*, 395 F.3d at 253, 259. That is not true here—or at least the Kentucky Supreme Court reasonably could have so found.

Fields next claims that one of his attorneys conceded that she performed ineffectively when she noted that she “probably should have tracked” Berry down. Lytle Tr., R.89-3, PageID 13552. Not so. *Strickland*’s prohibition on evaluating counsel’s choices in “the harsh light of hindsight” applies just as much to conscientious defense lawyers as to federal habeas courts. *Richter*, 562 U.S. at 107 (citation omitted). Even “experienced” lawyers often second-guess themselves when a jury finds their client guilty. *Id.* at 109. *Strickland*’s test thus considers their investigative steps from an “objective” perspective, not their “subjective” perspective. *Id.* at 110.

Fields lastly challenges the trial court’s findings of fact. He argues that the trial court invented “*post hoc* rationalization[s]” for counsel’s failure to investigate Berry and highlights evidence suggesting that counsel simply overlooked this witness. *Richter*, 562 U.S. at 109 (quoting *Wiggins v. Smith*, 539 U.S. 510, 526–27 (2003)). One of his attorneys testified, for example, that she was “praying” that Burton would mention his PCP use, a statement that conflicts with the claim that she reasonably decided that Berry’s testimony would duplicate Burton’s. Lytle Tr., R.89-3, PageID 13537. The evidence on which Fields relies may well create a dispute of fact over whether counsel acted strategically or negligently in failing to interview Berry.

But this argument ignores our standard of review. Fields must show that the state court’s finding that counsel acted strategically was not just wrong but also “unreasonable.” 28 U.S.C. § 2254(d)(2). And his evidence “does not suffice” to create such a one-sided record that every

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reasonable adjudicator would have to find that counsel acted negligently. *Wood*, 558 U.S. at 301. As for evidence cutting the other way, Fields’s counsel recalled Berry, knew that Berry was in prison, testified that she would have known of his mental-health problems at the time of trial, and remembered Berry’s general (tangential) involvement. Lytle Tr., R.89-3, PageID 13548, 13552–53. Although counsel could not recall a specific strategic reason why she did not interview Berry, that omission did not compel the state court to find that no such reason existed. The omission is equally consistent with a finding that counsel merely could not recall the reason given the seven-year gap between the trial and post-conviction hearing. *Fields*, 2014 WL 7688714, at *9. How many lawyers will remember minute details of a lengthy trial from seven years in the past? And this time gap justifies the Supreme Court’s “‘strong presumption’ that counsel’s attention to certain issues to the exclusion of others reflects trial tactics rather than ‘sheer neglect.’” *Richter*, 562 U.S. at 109 (citation omitted). The state courts reasonably applied that presumption here.

C. Testimony of Dr. Robert Adams

1. Fields next argues that his attorneys wrongly failed to call an expert psychiatrist—Dr. Robert Adams—at the guilt phase. The post-conviction hearing revealed that one of Fields’s attorneys had consulted with Adams “about the effects of PCP on an individual” and asked Adams to prepare a “PowerPoint presentation” summarizing these effects. Baker Tr., R.89-3, PageID 13588, 13590. According to counsel, Adams would have explained that PCP can cause “gruesome crime scenes” in which a “hallucinat[ing]” defendant acts violently while under a “psychotic break” from this drug. *Id.*, PageID 13590. But Fields’s counsel decided not to use Dr. Adams at the guilt phase because his testimony could have harmed Fields’s main defense that he did not murder Horton. *Id.*, PageID 13591–92. As counsel reasoned, “Dr. Adams’ testimony would be consistent” with Fields’s guilt by “explaining why someone would shove a knife through an elderly woman’s head and cut her throat”—namely, because the person was “under some form of . . . drug-induced psychotic break.” *Id.*, PageID 13622. And a “competent prosecutor” would have developed this theory if the defense chose to use Adams at the guilt phase. *Id.*, PageID 13654.

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In his post-conviction motion, Fields nevertheless argued that his attorneys should have presented Dr. Adams at that phase for the same reasons they should have presented Berry. Testimony that Fields may have been in a PCP-induced hallucinogenic state could have weakened the prosecution's argument that Fields unscrewed Horton's window or shown that Fields lacked the mental capacity required for a murder conviction. *See Fields*, 2014 WL 7688714, at *11.

The Kentucky Supreme Court also rejected this ineffective-assistance claim. *Id.* The court reiterated that Fields's main defense was that "he was innocent," so Fields objected to counsel presenting any evidence that "made him appear guilty, including an intoxication defense." *Id.* And the court held that counsel reasonably decided not to call Adams because his testimony could have undercut this innocence defense. *Id.*

2. We can make short work of Fields's claim that the Kentucky Supreme Court's logic unreasonably applied *Strickland*. *Strickland* described a lawyer's "strategic choices" as "virtually unchallengeable" if the lawyer made them after a "thorough investigation of law and facts relevant to plausible options[.]" 466 U.S. at 690. A "fairminded jurist" could decide that this principle controls here. *Kayer*, 141 S. Ct. at 523. Fields's counsel ensured Dr. Adams's availability for "both" stages of trial, so the lawyers could have called him at the guilt phase if they "needed" him. Baker Tr., R.89-3, PageID 13591. But counsel decided that Adams's testimony would have made the jury "more likely" to "believe that [Fields] committed the offense" given its double-edged nature. *Id.*, PageID 13655; *see Carter v. Mitchell*, 443 F.3d 517, 532 (6th Cir. 2006). And as this type of informed "strategic choice[]" is "virtually unchallengeable" even on de novo review, *Strickland*, 466 U.S. at 690, it is certainly unchallengeable in proceedings subject to AEDPA.

Fields responds that his lawyers did not engage in a "thorough" enough "investigation" to trigger *Strickland*'s deferential rule for "strategic" decisions. *Id.* One of the attorneys noted, for example, that they "never seriously discussed interjecting the PCP into the guilt phase[.]" Baker Tr., R.89-3, PageID 13592. Yet this attorney spoke with Dr. Adams before trial. The attorney also learned the information that Adams might convey—both the good (that Fields's PCP use may have made it less likely that he could unscrew Horton's window) and the bad (that Fields's

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PCP use made it more likely that Fields committed the gruesome murder). Given how damaging Adams's testimony might have been, the Kentucky Supreme Court could reasonably hold that counsel objectively did enough to make further "investigation[]" into this issue "unnecessary." *Richter*, 562 U.S. at 106 (quoting *Strickland*, 466 U.S. at 691).

D. Penalty-Phase Mitigation Evidence

1. Fields switches to the penalty phase, arguing that his counsel wrongly failed to introduce enough evidence in mitigation to avoid the death penalty. One of his attorneys developed a large amount of mitigating evidence before trial. This lawyer thoroughly investigated Fields's childhood. He spoke with Fields's mother, brothers, and neighbors and tracked down Fields's records from a child-welfare agency. Counsel uncovered that Fields had suffered a "fairly significant" amount of abuse from his father. Baker Tr., R.89-3, PageID 13581. His father, for example, threw him through a wall. Fields's brothers likewise had abused him by, among other things, locking him in a refrigerator and hanging him by a noose. His mother also had a substance-abuse problem and abandoned Fields at times in his youth. And Fields had developed his own substance-abuse problem by the age of 12.

Apart from the investigation into Fields's background, counsel retained two experts: Drs. Peter Schilling and Adams. Schilling, a psychologist, would have discussed how Fields's "traumatic" childhood could explain the murder of Horton. *Id.*, PageID 13578–79. As noted, Adams would have discussed the effects of Fields's PCP use.

At trial, however, Fields's counsel chose to present only a fraction of this evidence. Fields insisted that his lawyers offer "[a]bsolutely nothing" in terms of mitigation because he believed it would make him "look guilty." *Id.*, PageID 13611–12. And although the trial court had ruled that counsel—not Fields—had the decision-making authority over whether to introduce mitigating evidence, counsel sought to respect their client's wishes as much as they could. In addition, the jury had deliberated for eight hours before finding Fields guilty. So counsel believed that Fields could put on a "lingering doubt" defense. *Id.*, PageID 13595, 13616. But much of the mitigating evidence sought to explain why Fields committed the murder and would have cut against this defense. As a "hybrid solution," then, counsel decided to have only

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Fields's mother and brother testify about his abusive childhood to humanize him before the jury without implying his guilt. *Id.*, PageID 13617.

In his post-conviction motion, Fields argued that the lawyer in charge of his penalty phase had provided ineffective assistance by failing to present all of the mitigating evidence that he had gathered, including the testimony of Drs. Schilling and Adams and additional lay witnesses. *See Fields*, 2014 WL 7688714, at *13–15. The Kentucky Supreme Court rejected this third ineffective-assistance claim. *See id.* To do so, the court found it necessary to “explain the situation [Fields's counsel] was placed in.” *Id.* at *13. The attorney had developed a significant case in mitigation, but Fields adamantly opposed this evidence. *Id.* “In an attempt to compromise,” the attorney thus chose to limit the mitigating evidence “to that which was reasonably necessary.” *Id.* The court found counsel's compromise “reasonable under the circumstances.” *Id.* at *14.

2. The Kentucky Supreme Court did not unreasonably apply *Strickland* or its progeny by holding that counsel reasonably presented minimal mitigating evidence. Most notably, the U.S. Supreme Court has repeatedly faulted trial lawyers who failed to adequately *investigate* for the penalty phase and thereby overlooked substantial mitigating evidence. *See, e.g., Andrus v. Texas*, 140 S. Ct. 1875, 1881–83 (2020) (per curiam); *Porter v. McCollum*, 558 U.S. 30, 39–40 (2009) (per curiam); *Wiggins*, 539 U.S. at 521–34; *Williams v. Taylor*, 529 U.S. 362, 395–96 (2000); *see also Goodwin v. Johnson*, 632 F.3d 301, 323–26 (6th Cir. 2011). But this caselaw has no application here. As the state trial court noted, Fields's penalty-phase lawyer “prepared to present an extensive mitigation” case. *Op.*, R.33-2, PageID 9499. Indeed, this attorney developed the very evidence on which Fields now relies to argue his ineffectiveness.

Rather than implicate counsel's investigation, Fields's claim implicates counsel's choice not to introduce the known mitigating evidence. And a “fairminded jurist” could hold that counsel decided not to introduce this evidence for a “strategic” reason that courts must treat as “virtually unchallengeable” under *Strickland*. *Kayer*, 141 S. Ct. at 524; *Strickland*, 466 U.S. at 690. As an initial matter, Fields identifies no Supreme Court precedent holding that counsel performs deficiently by considering a client's informed wishes not to present a case in mitigation. If his counsel had put on a robust mitigation case conceding that Fields murdered

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Horton, Fields may well have argued that this lawyer violated his right to make this major decision. See *McCoy v. Louisiana*, 138 S. Ct. 1500, 1507–09 (2018). But as far as we can tell, the Supreme Court has yet to decide whether an attorney or a client decides whether to present a case in mitigation. Cf. *Schriro v. Landrigan*, 550 U.S. 465, 469–70, 476–77 (2007). But many lower courts have held that a defendant can voluntarily “waive the presentation of mitigating evidence.” *Soto v. Commonwealth*, 139 S.W.3d 827, 855 (Ky. 2004) (citing cases). So the Kentucky Supreme Court could reasonably conclude that counsel’s efforts to broker a “compromise”—in which counsel would present evidence from Fields’s mother and brother about his traumatic background without implying his guilt—was a valid strategy. *Fields*, 2014 WL 7688714, at *13.

Next, Fields identifies no Supreme Court precedent holding that counsel acts unreasonably by omitting known mitigating evidence that could have conflicted with the decision to pursue a “lingering doubt” defense at the penalty phase. *Id.* at *14; cf. *Lockhart v. McCree*, 476 U.S. 162, 181 (1986). To the contrary, circuit decisions have credited this residual-doubt theory. See, e.g., *Franks v. GDCP Warden*, 975 F.3d 1165, 1177 (11th Cir. 2020); *Cox v. Ayers*, 613 F.3d 883, 898 (9th Cir. 2010). And much of the testimony from Drs. Schilling and Adams would have sought to “justify[] the crime” rather than support the theory that Fields did not do it. *Fields*, 2014 WL 7688714, at *14. As counsel explained, this testimony could have harmed a residual-doubt defense. The jurors might have looked unfavorably on the contradictory penalty-phase claim that “I’m innocent, but oh, now, let me tell you why I did it.” Baker Tr., R.89-3, PageID 13595.

In response, Fields cites counsel’s testimony that “residual doubt” was not his “mitigation theory.” Appellant’s Br. 102. Fields takes counsel’s testimony out of context. Yes, residual doubt was not the *original* theory. That is why counsel developed substantial mitigating evidence. But counsel changed to this residual-doubt theory based on a combination of Fields’s insistence not to present mitigating evidence and the jury’s lengthy deliberations at the guilt phase.

Fields next argues that the testimony from the two experts did not necessarily conflict with a residual-doubt defense. As we have noted, Adams’s testimony about Fields’s PCP use

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might have made it less likely that Fields could unscrew Horton's window. And Dr. Schilling's testimony about Fields's childhood might have had only a "sympathetic effect" on the jury. Baker Tr., R.89-3, PageID 13583. But the jury also could have viewed the testimony from both experts as explaining why Fields violently murdered Horton. As counsel noted with respect to Dr. Schilling: "Having been through a traumatic background, much like post-traumatic stress, that would be an explanation of why this event happened on this day[.]" *Id.*, PageID 13584. And a state court could reasonably hold that the decision not to present this "double-edged" evidence was a "virtually unchallengeable" strategic choice. *Id.*, PageID 13620; *Strickland*, 466 U.S. at 690.

Fields also argues that the state trial court had decided that counsel (not Fields) had the ultimate call on what mitigating evidence to present. And once counsel chose to introduce some mitigating evidence, Fields says, counsel had a duty to present the "best possible mitigation case" with the expert testimony. Appellant's Br. 105. Yet Fields cites no Supreme Court precedent that would have required counsel to adopt this "in for a penny, in for a pound" approach to mitigating evidence. *See Neder v. United States*, 527 U.S. 1, 17 n.2 (1999). It is not at all clear that the state trial court correctly decided who controls this defense. And a fairminded jurist could have found counsel's "compromise" solution eminently reasonable given the "situation" in which counsel found himself. *Fields*, 2014 WL 7688714, at *13. So we have no basis to overturn the Kentucky Supreme Court's rejection of this claim under AEDPA.

IV. Parole-Statistics Claim

Fields lastly alleges that the state trial court violated his constitutional rights at the penalty phase by prohibiting him from introducing statistics showing the low likelihood that he would ever get paroled if sentenced to life imprisonment. Yet again, however, the Kentucky Supreme Court rejected this claim. And yet again, Fields cannot satisfy AEDPA's demanding standards.

At the time of Fields's trial, Kentucky law allowed his jury to choose from four possible punishments: 20 years in prison; a life sentence with no statutory limits on his parole eligibility; a life sentence without the possibility of parole for 25 years; and a death sentence. Before trial,

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Fields moved the state trial court to allow him to present statistics at the penalty phase that would have shown how often Kentucky's parole board had released other convicted murderers sentenced to life imprisonment. In the experience of Fields's counsel, jurors often wrongly believe that a defendant will quickly get paroled if they impose a life sentence. But Kentucky's parole board has historically granted parole to less than 25% of murderers sentenced to life. Although the trial court agreed that jurors "are often confused about this parole issue," it felt bound by existing state law to deny the motion. Tr., R.29-10, PageID 3633–35. The Kentucky Supreme Court affirmed. *Fields*, 274 S.W.3d at 419. It reasoned that Fields's statistics had "little relevancy" to his case. *Id.*

According to Fields, the Kentucky Supreme Court's decision unreasonably applied two separate lines of Supreme Court cases. But neither line clearly applies here.

Start with the first line of cases on which Fields relies. The Supreme Court has often considered cases in which the prosecution requests a death sentence based on a defendant's future dangerousness. See *Simmons v. South Carolina*, 512 U.S. 154, 157 (1994) (plurality opinion). To minimize a jury's future-dangerousness concerns, defense attorneys have often sought to respond that state law would bar the defendant from ever getting paroled if given a life sentence. See *id.* at 158–59. At one time, a few States barred the jury from learning of this accurate information about state parole law. See *id.* at 167. Beginning in *Simmons*, the Court has repeatedly held that due process requires a court to instruct a jury that state law makes the defendant parole ineligible once prosecutors put the defendant's future dangerousness at issue. See *id.* at 161–66; *id.* at 176–78 (O'Connor, J., concurring in the judgment); see also *Kelly v. South Carolina*, 534 U.S. 246, 251–58 (2002); *Shafer v. South Carolina*, 532 U.S. 36, 48–51 (2001).

Here, however, the Kentucky Supreme Court did not unreasonably apply *Simmons* and its progeny for a simple reason: Kentucky law did not make Fields ineligible for parole. If the jury had imposed a life sentence, Fields would have become eligible in 25 years at the latest. So the argument that *Simmons* accepted (that defendants have a right to tell the jury that they are *legally ineligible* for parole) differs from Fields's argument (that he had a right to tell the jury that he was *practically unlikely* to receive parole). And AEDPA bars any theory that the Kentucky

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Supreme Court wrongly refused to “extend” *Simmons*’s formalistic rule to cover Fields’s pragmatic argument. *Woodall*, 572 U.S. at 425–26; see *Atkins v. Crowell*, 945 F.3d 476, 479 (6th Cir. 2019).

Indeed, the Supreme Court has already made this point. In the AEDPA context, it refused to read *Simmons* as adopting a “functional approach” that would require state courts to predict “whether it looks like the defendant will turn out to be parole ineligible.” *Ramdass v. Angelone*, 530 U.S. 156, 169 (2000) (plurality opinion); see *id.* at 180–81 (O’Connor, J., concurring in the judgment). The plurality instead read *Simmons* to create a clear “rule” requiring courts to notify a jury of a defendant’s parole ineligibility “only when, assuming the jury fixes the sentence at life, the defendant is ineligible for parole under state law.” *Id.* at 166 (plurality opinion). The alternative approach would impractically force courts to consider anything that might affect a prisoner’s release, including the prisoner’s “age or health[.]” *Id.* at 169. After *Ramdass*, then, many courts have refused to accept “functional” claims that defendants have the right to convince juries that they are “effectively” ineligible for parole. *Campbell v. Polk*, 447 F.3d 270, 287–89 (4th Cir. 2006); see *Bates v. Sec’y, Fla. Dep’t of Corrs.*, 768 F.3d 1278, 1300–06 (11th Cir. 2014); *People v. Bannister*, 902 N.E.2d 571, 587–89 (Ill. 2008). *Ramdass* and these other decisions confirm that “fairminded jurists” could reject Fields’s argument that *Simmons* applied to his case even though he could have been paroled if given a life sentence. *Kayer*, 141 S. Ct. at 524.

Turn to the second line of cases on which Fields relies. The Supreme Court has held that the Eighth Amendment allows capital defendants to introduce “all relevant mitigating evidence” at the penalty phase of their trials. *Eddings v. Oklahoma*, 455 U.S. 104, 117 (1982); *Lockett v. Ohio*, 438 U.S. 586, 608 (1978) (plurality opinion). *Eddings* thus found that a state court wrongly refused to consider the defendant’s “difficult family history” and “emotional disturbance” when deciding whether to sentence him to death. 455 U.S. at 115. And a plurality in *Lockett* found a state statute unconstitutional because it did not permit sentencers to consider evidence about the “defendant’s character or record” or the “circumstances of the offense” when deciding whether to impose the death penalty. 438 U.S. at 604 (plurality opinion).

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But the Kentucky Supreme Court did not unreasonably apply this rule requiring courts to admit all “relevant mitigating evidence” at the penalty phase. *Eddings*, 455 U.S. at 117. Fields ignores a critical word in this command: “relevant.” The Supreme Court’s holding that a defendant’s “family history” and the “circumstances” of the defendant’s “offense” are relevant mitigating factors says nothing about whether a parole board’s decision to deny parole to *other* defendants is also relevant. *Eddings*, 455 U.S. at 115; *Lockett*, 438 U.S. at 604 (plurality opinion). And the Kentucky Supreme Court could reasonably conclude the contrary. A parole decision in any given case is “inherently individualized,” so general statistics about the “average” resolution say little about a “particular” defendant’s chances. *Young v. Commonwealth*, 129 S.W.3d 343, 345 (Ky. 2004). In addition, the legal rule from *Eddings* and *Lockett* stems from the need for an “individualized decision” that accounts for the “uniqueness” of the defendant. *Lockett*, 438 U.S. at 605 (plurality opinion); *Eddings*, 455 U.S. at 110. But Fields’s general statistics could have turned his penalty phase into a trial about different murders. The statistics also could have led the jury to engage in speculative comparisons between Fields and other defendants and thus “distracted” it from the main issue of whether Fields’s unique crime and background warranted the ultimate punishment. *Ramdass*, 530 U.S. at 169 (plurality opinion); see *Bates*, 768 F.3d at 1306. At the least, “fairminded jurists” could reach these conclusions. *Kayer*, 141 S. Ct. at 524.

* * *

Fields brutally murdered Bess Horton 30 years ago. A jury convicted him of this murder a second time 20 years ago. The Kentucky courts have given him substantial process in the ensuing decades. Their conscientious consideration of Fields’s many claims does not remotely reveal the type of “extreme malfunction[]” in Kentucky’s criminal-justice system that could permit us to grant relief under AEDPA. *Donald*, 575 U.S. at 316 (citation omitted).

We affirm.

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DISSENT

KAREN NELSON MOORE, Circuit Judge, dissenting. A jury condemned Samuel Fields to death for killing Bess Horton in a small eastern Kentucky town during the summer of 1993. Although police discovered Fields covered in blood in the home where Horton was killed, the blood on Fields was his own, the product of an injury sustained earlier in the night, and none of it was found on Horton, even though Fields had trailed it on the sidewalk, back steps, and porch handle leading to Horton’s house. Horton’s blood was not found on Fields either, yet Horton’s medical examiner testified that because Horton died of stab wounds to her carotid artery and jugular vein, the person who killed her should have had her blood on them. Fields did confess to the crime when police confronted him at the scene, but he did so while apparently undergoing hallucinations caused by PCP. The same night, he also confessed to killing his brother—a verifiably false claim because his brother was alive and well. Ever since, Fields has strenuously maintained his innocence, doing so with such adamance that he even forbade his legal team from pursuing an intoxication defense at trial, a strategy that could have mitigated his culpability of first-degree murder or helped him avoid the death penalty for a crime he was accused of committing while suffering a drug-induced psychotic break at the age of twenty-one. Meanwhile, two witnesses testified that Fields’s girlfriend at the time also confessed to killing Horton, and the evidence adduced at trial showed that she had both motive and opportunity to commit the crime.

The questions raised by these gaps in the evidence against Fields weighed so heavily on the jurors’ minds that they decided to conduct an experiment in the jury room to test the prosecution’s theory of the case. The crux of Fields’s trial revolved around the prosecution’s theory that Fields broke into Horton’s home in the middle of the night using a butter knife with a twisted tip—known as the “twisty knife”—to unscrew seventeen paint-covered screws from a storm window in the span of less than seventeen minutes while he was severely intoxicated. Using the twisty knife, the jurors unscrewed the door from a cabinet in the jury room. After

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confirming through this experiment that the prosecution's theory was plausible, the jury found Fields guilty of murder and sentenced him to death.

The majority decides that such experiments, involving the consideration of extrinsic evidence, are constitutionally permissible. Because it is clearly established that jurors cannot rely on extrinsic evidence in reaching their verdict, I cannot agree. The result of the majority's opinion is that juries may 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. Such a result is constitutionally intolerable. Because Fields suffered prejudice from this grave error, I would reverse the district court's denial of habeas relief as to Fields's jury-experiment claim and remand to the district court with instructions to conditionally grant Fields's petition for writ of habeas corpus as to that claim. I therefore respectfully dissent.

I. JURY-EXPERIMENT CLAIM

A. Standard of Review

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a federal court may grant a writ of habeas corpus "with respect to any claim that was adjudicated on the merits in State court proceedings" if the state-court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). A state-court decision is contrary to clearly established federal law if "the state court applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases" or "if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at a result different from [Supreme Court] precedent." *Williams v. Taylor*, 529 U.S. 362, 405–06 (2000). A state-court decision unreasonably applies clearly established federal law if it "correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case." *Id.* at 407–08. "[C]learly established Federal law" . . . refers to the holdings, as opposed to the dicta, of [Supreme Court] decisions as

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of the time of the relevant state-court decision.” *Id.* at 412 (quoting 28 U.S.C. § 2254(d)). The Supreme Court has cautioned that “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 the judgment)). Thus, the fact “[t]hat the standard is stated in general terms does not mean the application was reasonable.” *Id.*

B. Violation of Fields’s Due Process, Confrontation, and Fair Trial Rights

1. AEDPA Deference

Fields argues that the Kentucky Supreme Court unreasonably applied clearly established federal law in its review of his challenge to the jury’s use of extrinsic evidence in the experiment conducted by jurors during deliberations. It is clearly established that jurors may not consider extrinsic evidence in reaching their verdict. *See Turner v. Louisiana*, 379 U.S. 466, 472–73 (1965) (“In 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.”); *Parker v. Gladden*, 385 U.S. 363, 364–65 (1966) (per curiam). The Supreme Court has long held that a defendant’s Sixth and Fourteenth Amendment rights are violated when jurors consider extrinsic evidence, because the jury’s “verdict must be based upon the evidence developed at the trial.” *Irvin v. Dowd*, 366 U.S. 717, 722 (1961); *see also Turner*, 379 U.S. at 472–73; *Parker*, 385 U.S. at 364–65. As the Court has explained, “[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).

We have long recognized that it is clearly established Supreme Court law that a defendant’s federal constitutional rights are violated by jurors’ consideration of extrinsic evidence. *Doan v. Brigano*, 237 F.3d 722, 733–34 n.7 (6th Cir. 2001). In *Doan*, a juror “conducted an experiment in her own home during the trial to see if [the defendant] was telling the truth” about being unable to see bruises on his girlfriend’s daughter’s body on the night of

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her death. *Id.* at 726–27. The juror “put lipstick on her arm to simulate a bruise, and attempted to view the ‘bruise’ in a room lit similarly to the rooms that [the child] was in that evening.” *Id.* at 727. The juror then informed the rest of the jury that the bruise was visible in her experiment, thus contradicting the defendant’s testimony. *Id.* Concluding that the experiment violated the rule of *Parker* and *Turner*, this court held that such “an out-of-court experiment, however, conflicts with [the defendant’s] constitutional right to a fair and impartial jury that considers only the evidence presented at trial.” *Id.* at 733. Thus, “as a matter of law, clearly established Supreme Court precedent requires that a criminal defendant be afforded the right to confront the evidence and the witnesses against him, and the right to a jury that considers only the evidence presented at trial.” *Id.* at 733–34 n.7.

As the *Doan* court explained, this rule is among the most “undeviating” and “fundamental requirements of a constitutionally fair trial.” *Id.* at 731 (quoting *Parker*, 385 U.S. at 364–65). The Sixth Amendment right to “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.” *Id.* (quoting *Turner*, 379 U.S. at 472–73). These safeguards are essential because, in the words of Judge Friendly, to “the greatest extent possible all factual material must pass through the judicial sieve, where the fundamental guarantees of procedural law protect the rights of those accused of crime.” *Id.* at 734 (brackets omitted) (quoting *United States ex rel. Owen v. McMann*, 435 F.2d 813, 818 (2d Cir. 1970)). “Several circuits” have agreed, recognizing “that a jury’s consideration of extraneous material violates a defendant’s constitutional rights.” *Id.* at 735.

This court has repeatedly reaffirmed the central holdings of *Doan*. See *Fletcher v. McKee*, 355 F. App’x 935, 937 (6th Cir. 2009); *Mammone v. Jenkins*, 49 F.4th 1026, 1045–46 (6th Cir. 2022). Citing *Doan*, *Fletcher* held that “under clearly established federal law, jury exposure to extrinsic evidence or other extraneous influence violates a defendant’s Sixth Amendment rights, and a state court decision that conflicts with this rule may justify habeas relief under the standard set forth in the AEDPA.” 355 F. App’x at 937 (citation omitted). And recently, this court reiterated that “[a] jury’s verdict must be based on the evidence introduced at

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trial, not extraneous information.” *Mammone*, 49 F.4th at 1045–46 (citing *Morgan v. Illinois*, 504 U.S. 719, 727 (1992); *Smith v. Phillips*, 455 U.S. 209, 217 (1982); *Thompson v. Parker*, 867 F.3d 641, 647 (6th Cir. 2017)). *Mammone* also approvingly cited *Doan* for the proposition that “a juror’s injection of extraneous evidence conflict[s] with Supreme Court precedent recognizing a defendant’s constitutional right to confront the witnesses and evidence against him.” *Id.* at 1045. I would therefore continue to adhere to our long line of precedent holding that such consideration of extrinsic evidence by jurors violates a defendant’s federal constitutional rights.

The warden criticizes *Fields* for relying on *Doan* and *Fletcher*, arguing that under 28 U.S.C. § 2254(d), only Supreme Court precedent constitutes clearly established federal law. Appellee Suppl. Br. at 11; Appellee Br. at 39. Although it is true that prior decisions by federal courts of appeals do not constitute clearly established federal law within the meaning of AEDPA, it is perfectly permissible under AEDPA to rely on “prior Sixth Circuit determinations that a rule has been clearly established [by the Supreme Court].” *Tolliver v. Sheets*, 594 F.3d 900, 916 n.6 (6th Cir. 2010). The Supreme Court has long confirmed that this practice comports with the requirements of AEDPA. *See Marshall v. Rodgers*, 569 U.S. 58, 64 (2013) (per curiam). That is because “an appellate panel may, in accordance with its usual law-of-the-circuit procedures, look to circuit precedent to ascertain whether it has already held that the particular point in issue is clearly established by Supreme Court precedent.” *Id.*

Unlike the warden, the majority recognizes *Doan*’s binding force, but it “reject[s] *Doan*’s holding” for speaking at too high a “‘level of generality.’” Maj. Op. at 20 (quoting *Brown v. Davenport*, 596 U.S. 118, 136 (2022)). Although it agrees “that a jury’s verdict must rest on ‘the evidence developed at the trial,’” it identifies a “wide divergence” in lower courts’ application of this general rule against extrinsic evidence to the specific context of jury experiments. *Id.* at 17 (quoting *Turner*, 379 U.S. at 472). It therefore concludes that the Supreme Court cannot have clearly established a rule prohibiting juries from experimenting with extrinsic evidence. *Id.* at 17–18.

The Supreme Court has explained, however, that it may articulate clearly established law in the form of “a general standard.” *Marshall*, 569 U.S. at 62 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). Just as lower courts may not “transform” a “narrow holding[]” into

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“a broad” one, Maj. Op. at 16 (emphasis omitted) (quoting *Jackson*, 569 U.S. at 512), neither may they whittle general principles into overly specific rules, see *Marshall*, 569 U.S. at 62. Construing the right to a verdict based only upon the evidence developed at trial as a general one does not license lower courts to narrow it. Indeed, the Supreme Court has been “undeviating” in enforcing the right, *Parker*, 385 U.S. at 364 (quoting *Sheppard v. Maxwell*, 384 U.S. 333, 351 (1966)), and so must we, under our duty to apply “clearly established Federal law, as determined by the Supreme Court.” See 28 U.S.C. § 2254(d)(1). Accordingly, I would adhere to our prior holding in *Doan* that the Supreme Court has clearly established a right to be convicted only upon the evidence introduced at trial—a right that a conviction based upon jury experimentation with extrinsic evidence violates.

The warden next suggests that because the Kentucky Supreme Court relied on this court’s decisions in *Fletcher* and *United States v. Avery*, 717 F.2d 1020 (6th Cir. 1983), its conclusion cannot be an unreasonable application of clearly established federal law. Appellee Suppl. Br. at 13–15. But there is a critical distinction between the facts of those cases and what occurred during jury deliberations at Fields’s trial: the jurors in *Fletcher* and *Avery* were not exposed to extraneous evidence, while the jurors that convicted Fields and sentenced him to death *were* exposed to such evidence. In *Avery*, the defendant did “not allege that the jurors were exposed to any extraneous materials during their deliberations,” but instead simply contended that it was prosecutorial misconduct for the prosecutor to suggest in closing argument that jurors attempt an experiment. 717 F.2d at 1026. And in *Fletcher*, the jury-room reenactment did “not result in the creation of extrinsic evidence.” 355 F. App’x at 939. The decisions in *Avery* and *Fletcher* are therefore inapposite here, where the jury conducted an experiment using evidence that was not admitted and thus was not subject to the procedural safeguards of trial.

Indeed, the Kentucky Supreme Court’s decision is unreasonable precisely because it ignored the dispositive issue: that jurors had relied on extrinsic evidence in deliberations. Citing *Fletcher*, the state court held “that jurors are free to use their own senses, observations, and experiences to conduct an experiment or reenactment with already admitted evidence.” *Fields v. Commonwealth* (“*Fields II*”), 2013-SC-000231-TG, 2014 WL 7688714, at *4 (Ky. Dec. 18, 2014). The Kentucky Supreme Court thus concluded that “[t]his is exactly what the jury did in

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conducting its experiment.” *Id.* That conclusion constitutes an unreasonable application of clearly established Supreme Court law because there is a clear difference between merely examining evidence that is already in the record and using unadmitted objects in the jury room as part of an experiment to prove the commonwealth’s theory of the case.

The jurors in Fields’s case did not simply “conduct an experiment . . . with already admitted evidence.” *Id.* The 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. If Fields had removed the screws from the storm window, he did it in the dark, at night, with a blood alcohol content greater than .14, after an evening of smoking marijuana and, the evidence suggests, ingesting PCP. Presumably none of those conditions were present during the jury’s experiment. And there is no evidence to suggest—among other considerations—whether the cabinet door was hanging at a similar height to the storm window, whether screws in a cabinet door are installed with the same tension as the screws in a storm window, or whether the screws were fastened to the cabinet door in a different manner than the screws in the storm window.

“[S]tate courts must reasonably apply the rules ‘squarely established’ by th[e] [Supreme] Court’s holdings to the facts of each case.” *White v. Woodall*, 572 U.S. 415, 427 (2014) (quoting *Knowles v. Mirzayance*, 556 U.S. 111, 122 (2009)). The Kentucky Supreme Court failed to do so. Instead, I conclude that it unreasonably applied clearly established federal law by failing to address the fact that the jury was unconstitutionally exposed to extraneous evidence that Fields had no opportunity to refute.

2. Merits

Once a petitioner’s claim overcomes the relitigation bar imposed by 28 U.S.C. § 2254(d), federal courts apply de novo review, because no deference is owed to a state-court decision premised upon an unreasonable application of clearly established federal law. *See Rice v. White*, 660 F.3d 242, 252 (6th Cir. 2011). Reviewing Fields’s claim de novo, it is plain that Fields’s confrontation, due-process, and fair-trial rights were violated by the jury’s improper consideration of extrinsic evidence during the jury-room experiment.

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It is undisputed that the jury considered extrinsic evidence during the experiment. See Appellee Br. at 12, 21; Appellee Suppl. Br. at 7. The parties agree that the jurors conducted the experiment on the jury-room cabinet, which had not been admitted into evidence. It is also undisputed that Fields did not have the opportunity to confront that evidence. And as explained above, there were several material differences between the extrinsic evidence used in the jury experiment and the facts alleged by the prosecution in its theory of the offense.

The warden suggests that the rule of *Parker* and *Turner* is too generalized to apply to the facts of this case. Appellee Suppl. Br. at 6. But 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.” *Lockyer v. Andrade*, 538 U.S. 63, 76 (2003). This is a straightforward application of a general principle to the facts of the case. The Supreme Court has clearly established that jurors may not consider extrinsic evidence in reaching their verdict. See *Turner*, 379 U.S. at 472–73; *Parker*, 385 U.S. at 364–65. The jurors in Fields’s case considered extrinsic evidence when they conducted the experiment in the jury room. Doing so violated Fields’s rights under the Sixth and Fourteenth Amendments.

C. Prejudice

Fields is entitled to relief on his claim only if he can demonstrate prejudice, which in turn requires that he meet two separate tests. First, as the Supreme Court recently explained in *Davenport*, if the state court has adjudicated the harmless error question on the merits, AEDPA deference applies and the petitioner “must satisfy § 2254(d)(1) to secure federal habeas relief.” 596 U.S. at 127. Because the Kentucky Supreme Court addressed this issue on the merits, Fields must demonstrate that “that court applied *Chapman* [v. *California*, 386 U.S. 18 (1967),] ‘in an “objectively unreasonable” manner.’” *Davis v. Ayala*, 576 U.S. 257, 269 (2015) (quoting *Mitchell v. Esparza*, 540 U.S. 12, 18 (2003) (per curiam)). Second, Fields must satisfy the requirements of *Brecht v. Abrahamson* by showing that the error had a “substantial and injurious effect or influence in determining the jury’s verdict.” 507 U.S. 619, 637 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). Under *Brecht*, a petitioner must establish that the error “resulted in ‘actual prejudice.’” *Id.*

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1. AEDPA Deference

The Kentucky Supreme Court's harmless-error determination was contrary to clearly established federal law because it "applie[d] a rule that contradicts the governing law set forth in [the Supreme Court's] cases." *Williams*, 529 U.S. at 405. Instead of applying the correct standard under *Chapman*, the Kentucky Supreme Court reversed the standard, and imposed a test that was substantially more burdensome to Fields.

Under *Chapman*, the burden falls on "the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." 386 U.S. at 24; *see also Brecht*, 507 U.S. at 630 (confirming that under *Chapman*, "[t]he State bears the burden of proving that an error passes muster"). In other words, because the commonwealth benefitted from the violation of Fields's federal constitutional rights, the Kentucky Supreme Court ought to have placed the burden on the commonwealth to prove beyond a reasonable doubt that the jury experiment did not contribute to the verdict. It did not. Instead, the state court placed the burden on Fields, concluding that "we cannot say beyond a reasonable doubt that the jury experiment contributed to the verdict." *Fields II*, 2014 WL 7688714, at *4. The burden should not have been placed on Fields to prove beyond a reasonable doubt that the error did contribute to the verdict obtained. By applying a test for harmless error that contradicted *Chapman*, the Kentucky Supreme Court's analysis was contrary to clearly established federal law.

2. Brecht Analysis

Applying the *Brecht* standard, I believe that Fields suffered actual prejudice resulting from the jury's consideration of extrinsic evidence during the jury-room experiment. At trial, the commonwealth's theory of the offense was that Fields unscrewed seventeen paint-covered screws from the storm window with the twisty knife, broke into Horton's home, and then stabbed Horton to death, all within a very short period of time. *Fields II*, 2014 WL 7688714, at *2. The defense theory was that "given his intoxicated state, Fields would not have been able—during the timeframe in question—to break into the house, sneak up on Ms. Horton, and commit the murder," and that he instead entered the home to rob it after Horton was already dead. *Fields v.*

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White (“*Fields III*”), No. 15-38-ART, 2016 WL 3574396, at *5 (E.D. Ky. June 23, 2016). The issue of Fields’s ability to unscrew the screws on the storm window was therefore central to the commonwealth’s case against him at trial.

The importance of this issue is demonstrated by the prosecution’s repeated focus on the timeline of events throughout Fields’s trial. During opening statements, the commonwealth emphasized how long Fields would have had to unscrew the storm window:

I’d like for all of us to just see how long a minute can be. And when the secondhand gets to the 10, I’m going to stop talking. Now. And that’s been about thirty seconds. Do you think that’s enough time to take a screw, a little Phillips head screw, a little short Phillips head screw, out of a piece of wood? Forty seconds. Fifty seconds. That’s a minute. And I don’t mean to be melodramatic here or, you know, playacting or anything, but it’s important for us to keep how long one minute can be.

R. 30-13 (Trial Tr. at 1845) (Page ID #5888). The commonwealth again raised this theme in closing arguments:

This is the window through which the Defendant went. And you know we have heard, and you’re going to hear—you get to look at these screws, seventeen screws. That’s a lot of screws. To do it with a knife, sure. That—You know, that’s one of the things about this case. We don’t get to make up the facts, but these are the facts. It takes a person who really wants to get in to use this knife. You know, remember my overdramatic, let’s wait a minute and see how long a minute is, in the opening statement that I gave so many—so long ago. Well, I think you now—you understand what I was talking about in that. A minute is a long—can be a long period of time. And let’s say—let’s give the Defendant seventeen minutes from let’s say 2 o’clock. That gives him five minutes to get from the front—from the street there on Second Street across the parking lot to Ms. Horton’s and around the house and up to the front. So, let’s start that clock at 2 o’clock. And let’s give him a minute per screw. That gets him in the house at 2:17.

R. 30-23 (Trial Tr. at 3393) (Page ID #7478). At the heart of the commonwealth’s theory of events was the idea that, given the short timeframe, “there wasn’t any opportunity for anyone else to have done this [offense].” R. 30-13 (Trial Tr. at 1844) (Page ID #5887).

The record shows that this issue weighed heavily on jurors’ minds throughout the trial. During the trial, a juror asked the judge to pose the following question to a defense witness:

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“How long does it usually take to install a large storm window?” R. 57-10 (Juror Questions) (Page ID #11862). A juror later testified at Fields’s postconviction hearing that the purpose of the experiment was to test the commonwealth’s theory and “see if it was possible to be done.” R. 89-3 (Postconviction Hr’g Tr. at 14) (Page ID #13515). Another juror testified at the postconviction hearing “that [the experiment] wasn’t what, you know, said that he was guilty or not guilty, but it just satisfied my mind that it was possible that you could have done that.” *Id.* at 21 (Page ID #13522). The juror further explained that “I knew a man’s life hanged in the balance, and I wanted to be sure of everything.” *Id.* The same juror stated in an affidavit that the “experiment helped prove that Mr. Fields could have committed the crime.”¹ R. 33-1 (Hall Aff. ¶ 4) (Page ID #8928). Thus, 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 commonwealth’s timeline of events and explanation for how Fields would have committed the murder.

The warden argues that the juror’s testimony “that [the experiment] wasn’t what . . . said that he was guilty or not guilty,” R. 89-3 (Postconviction Hr’g Tr. at 21) (Page ID #13522), undermines Fields’s prejudice arguments, Appellee Suppl. Br. at 19–20. But a juror’s subjective evaluation of the impact that the experiment had on jury deliberations bears minimal weight on this court’s prejudice analysis. That is because whenever a due-process error “‘involves such a probability that prejudice will result . . . ,’ little stock need be placed in jurors’ claims to the contrary.” *Holbrook v. Flynn*, 475 U.S. 560, 570 (1986) (quoting *Estes v. Texas*, 381 U.S. 532, 542–43 (1965)) (internal citation omitted). Thus, “[e]ven though a practice may be inherently prejudicial, jurors will not necessarily be fully conscious of the effect it will have on their attitude toward the accused.” *Id.* “[T]he question must be not whether jurors actually articulated a consciousness of some prejudicial effect, but rather whether ‘an unacceptable risk is presented of impermissible factors coming into play.’” *Id.* (quoting *Estelle v. Williams*, 425 U.S. 501, 505 (1976)). Such an unacceptable risk was presented here, given the highly prejudicial nature of the experiment.

¹The Kentucky Supreme Court considered both the jurors’ affidavits and their testimony at the post-conviction hearing. *Fields II*, 2014 WL 7688714, at *3.

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The warden further argues that Fields was not prejudiced because “the evidence of Fields’s guilt was substantial.” Appellee Suppl. Br. at 20. But both the state trial court and the Kentucky Supreme Court disagree with that assessment. On direct appeal following Fields’s first trial, the Kentucky Supreme Court stated that “the evidence of [Fields’s] guilt of murder was not overwhelming.” *Fields v. Commonwealth* (“*Fields I*”), 12 S.W.3d 275, 281 (Ky. 2000). And after the culpability phase of Fields’s second trial, the trial court commented that “[i]t would not have totally surprised me if the result had c[o]me out different.” R. 54-1 (Ex Parte Hr’g Tr. at 5) (Page ID #11221).

Those courts are correct. Fields’s presence in Horton’s home was the only physical evidence that connected him to the murder. It is undisputed that Fields was bleeding that night—he had shattered a glass window with his hand and the officers found his blood on the sidewalk, the back porch steps, and the front porch handle of Horton’s residence. *Fields III*, 2016 WL 3574396, at *4. And the medical examiner testified that, because one of Horton’s wounds transected her right carotid artery and jugular vein, it was probable that the person who inflicted Horton’s wounds would have her blood on them. R. 30-21 (Trial Tr. at 3019) (Page ID #7095). Despite those facts, subsequent testing revealed that none of Fields’s blood was found on Horton and none of Horton’s blood was found on Fields. R. 30-16 (Trial Tr. at 2367–69, 2373–76) (Page ID #6422–24, 6428–31); R. 30-17 (Trial Tr. at 2414–16, 2437–38) (Page ID #6474–76, 6497–98).

There was also no physical evidence supporting the commonwealth’s theory that Fields used the twisty knife to break into Horton’s home through the storm window. The commonwealth’s own expert testified that the paint on the twisty knife did not match the paint on the painted screws on Horton’s storm window. R. 30-16 (Trial Tr. at 2332) (Page ID #6387). And another of the commonwealth’s experts testified that Fields’s fingerprints were not found on the storm window. R. 30-17 (Trial Tr. at 2479–80) (Page ID #6539–40).

The main remaining evidence against Fields is his confessions. The Supreme Court has cautioned lower courts to be wary of convictions that rely solely on confessions. As the Court explained, “[w]e have learned the lesson of history, ancient and modern, that a system of criminal law enforcement which comes to depend on the ‘confession’ will, in the long run, be

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less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation.” *Escobedo v. Illinois*, 378 U.S. 478, 488–89 (1964) (footnotes omitted).

There is good reason to be suspicious of the reliability of Fields’s confessions. Fields was extremely intoxicated at the time of his confessions, with a blood alcohol content of at least .14.² Fields had smoked marijuana earlier in the day, and there is some evidence that he consumed PCP, also referred to as “horse tranquilizers,” which can have hallucinogenic effects. *Fields II*, 2014 WL 7688714, at *1. Less than an hour before law enforcement found him in Horton’s home, Fields falsely confessed to Burton that he had killed his brother and needed to dispose of the alleged murder weapon. *Fields III*, 2016 WL 3574396, at *2. But Fields had not murdered his brother, and this supposed confession was false. *Id.* Likewise, Fields’s confession to the EMT contained provably false statements that are uncorroborated by the physical evidence. The EMT testified that Fields stated “in no uncertain terms that if [the EMT] had killed some lady that [the EMT] would have blood on [him] as well.” R. 30-15 (Trial Tr. at 2112) (Page ID #6163). But, again, none of Horton’s blood was found on Fields. R. 30-16 (Trial Tr. at 2367–69, 2373–76) (Page ID #6422–24, 6428–31); R. 30-17 (Trial Tr. at 2414–16, 2437–38) (Page ID #6474–76, 6497–98). Fields’s confessions are therefore suspect given his heavily impaired mental state. Once sober, Fields has continued to maintain his innocence.

Fields’s confessions are particularly dubious given that he was not the only person to confess to Horton’s murder. Two witnesses testified that Burton had confessed to killing Horton. R. 30-22 (Trial Tr. at 3198, 3207) (Page ID #7279, 7288). In the words of one of the witnesses, Burton “said, ‘I was tired of that Son of a Bitch a telling me who I can have in my apartment and who I can’t.’, said, ‘I killed her, and she can’t tell me nothing.’” *Id.* at 3198 (Page ID #7279). And Burton had both the opportunity and the motive to murder Horton. *Fields III*, 2016 WL 3574396, at *5.

²Because Fields’s blood alcohol content likely would have decreased during the time that he was in custody, his blood alcohol content was likely even higher at the time of his confessions. See *Missouri v. McNeely*, 569 U.S. 141, 152 (2013).

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Thus, 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." *Brecht*, 507 U.S. at 637 (quoting *Kotteakos*, 328 U.S. at 776). I conclude that Fields has demonstrated that actual prejudice resulted from the jury experiment, and I would therefore hold that Fields is entitled to relief on this claim.

II. CONCLUSION

The majority's opinion wrongfully approves of Fields's conviction and death sentence, even though Fields's jury reached its verdict after considering evidence that was not in the record and that Fields had no opportunity to challenge or rebut. Accordingly, I would reverse the district court's judgment denying habeas relief as to Fields's jury-experiment claim and remand to the district court with instructions to conditionally grant Fields's petition for a writ of habeas corpus as to that claim. Because I believe that the Constitution cannot tolerate criminal verdicts and death sentences imposed after the jury's consideration of prejudicial extrinsic evidence, I respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 17-5065

SAMUEL FIELDS,

Petitioner - Appellant,

v.

SCOTT JORDAN, Warden,

Respondent - Appellee.

FILED
Nov 03, 2023
KELLY L. STEPHENS, Clerk

Before: SUTTON, Chief Judge; BATCHELDER, MOORE, CLAY, GIBBONS,
GRIFFIN, KETHLEDGE, STRANCH, BUSH, LARSEN, NALBANDIAN,
READLER, MURPHY, DAVIS, and MATHIS, Circuit Judges.

JUDGMENT

On Petition for Rehearing En Banc
United States District Court for the Eastern District of Kentucky at Pikeville.

UPON CONSIDERATION of the petition for rehearing en banc and the supplemental briefs and arguments of counsel,

IT IS ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT



Kelly L. Stephens, Clerk

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

Deborah S. Hunt
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Re: Case No. 17-5065, *Samuel Fields v. Scott Jordan*
Originating Case No. : 7:15-cv-00038

Dear Counsel,

The court today announced its decision in the above-styled case.

Enclosed is a copy of the court's published opinion together with the judgment which has been entered in conformity with Rule 36, Federal Rules of Appellate Procedure.

Yours very truly,

Deborah S. Hunt, Clerk

Cathryn Lovely
Deputy Clerk

cc: Mr. Robert R. Carr

Enclosures

Mandate to issue.

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 22a0256p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

SAMUEL FIELDS,

Petitioner-Appellant,

v.

SCOTT JORDAN, Warden,

Respondent-Appellee.

No. 17-5065

Appeal from the United States District Court for the Eastern District of Kentucky at Pikeville.
No. 7:15-cv-00038—Karen K. Caldwell, District Judge.

Argued: May 18, 2022

Decided and Filed: December 1, 2022

Before: BATCHELDER, MOORE, and DONALD, Circuit Judges.

COUNSEL

ARGUED: Daniel E. Kirsch, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Kansas City, Missouri, for Appellant. Brett R. Nolan, OFFICE OF THE KENTUCKY ATTORNEY GENERAL, Frankfort, Kentucky, for Appellee. **ON BRIEF:** Daniel E. Kirsch, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Kansas City, Missouri, for Appellant. Brett R. Nolan, Matthew F. Kuhn, OFFICE OF THE KENTUCKY ATTORNEY GENERAL, Frankfort, Kentucky, for Appellee.

DONALD, J., delivered the opinion of the court in which MOORE, J., joined. BATCHELDER, J. (pp. 15–17), delivered a separate dissenting opinion.

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OPINION

BERNICE BOUIE DONALD, Circuit Judge. This case stems from the nearly thirty-year-old murder of Bess Horton. The commonwealth’s theory of prosecution was that Samuel Fields broke into Horton’s residence through a storm window, brutally murdered her in the bedroom, and started burglarizing the residence shortly before law enforcement arrived at the scene. To test the plausibility of the commonwealth’s theory, the jury conducted an experiment using a flat-tipped knife submitted into evidence to remove a cabinet door in the jury room (in place of the storm window). Satisfied with the outcome of their experiment, the jurors convicted Fields of intentional murder and sentenced him to death. Fields now seeks a federal writ of habeas corpus, arguing in part that the jury improperly considered extrinsic evidence in violation of the Fifth and Sixth Amendments. For the following reasons, we REVERSE the district court’s judgment and CONDITIONALLY GRANT a writ of habeas corpus, unless the commonwealth retries Fields within six months.

I.

On August 18, 1993, Fields started consuming alcohol when he woke up and continued throughout the day. *Fields v. Commonwealth*, No. 2013-SC-000231-TG, 2014 WL 7688714, at *1 (Ky. Dec. 18, 2014) (“*Fields I*”). In the evening, Fields and several others—including Minnie Burton (his girlfriend), Phyllis Berry, Scott Trent, and William Sloas—drove to James Berry’s house. *Id.* The group sat in Berry’s living room drinking alcohol and smoking marijuana. *Id.* Fields eventually became so intoxicated that Berry asked the group to leave. *Id.*

Approximately 11:30 p.m. Fields and Burton went to an apartment occupied by Fields’ mother and brother. *Id.* Fields and Burton soon got into a fight, prompting Fields to throw furniture, knives, and other objects around the living room. *Fields v. White*, No. 15-38-ART, 2016 WL 3574396, at *1 (E.D. Ky. June 23, 2016) (“*Fields II*”). Fields then started crying and saying that “he didn’t have any control over his self.” *Id.*

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Approximately midnight. Fearful of Fields' behavior, Burton went home. *Id.* Burton lived in a duplex owned by Horton. *Id.* Horton allowed Burton to live rent-free in the duplex in return for running Horton's errands and chauffeuring her around. *Id.* However, their relationship had recently soured, and Horton had shut off the utilities in an attempt to force Burton out. *Id.* When Burton returned home that night, she was locked outside. *Id.*

Approximately 1:35 a.m. Fields left his mother's apartment to look for Burton. *Fields I*, 2014 WL 7688714, at *1. As Burton sat on her front porch, she heard "a lot of hooting and hollering and what sound[ed] [like] somebody hitting [street] signs real hard" *Fields II*, 2016 WL 3574396, at *2. Fields then appeared with a knife in his hand. *Id.* He pushed the knife toward Burton and said, "take this. I've killed my brother, John." *Id.* (Fields had, in fact, not killed his brother.) Burton took the knife and dropped it into some nearby bushes.

Approximately 1:55 a.m. When Fields learned that Burton was locked out, he slammed his hand through her apartment window. *Fields I*, 2014 WL 7688714, at *1. Burton's neighbor, Elmer Pritchard, heard the noise and called the police to report a break-in at the duplex. *Fields II*, 2016 WL 3574396, at *2. Officer Larry Green responded to the scene less than two minutes later, but neither Burton nor Fields was there; Burton had fled to a nearby relative's house, and Fields had walked to Horton's house approximately one block over. *Fields I*, 2014 WL 7688714, at *1-2.

Approximately 2:11 a.m. Green called for backup to help conduct a search, and Sergeant Ron Lindeman responded. *Fields II*, 2016 WL 3574396, at *2. The officers searched various buildings in the area to no avail. *Id.*

Approximately 2:23 a.m. The officers noticed a light on and the external garage door open at Horton's residence. *Id.* Upon further investigation, the officers found a storm window and seventeen screws lying on the porch. *Id.*; *Fields I*, 2014 WL 7688714, at *2. Lindeman entered the house through the window and saw blood on a curtain and comforter. *Fields II*, 2016 WL 3574396, at *3. He proceeded down the hallway and into the back bedroom where he saw Fields rummaging through a drawer next to Horton's body. *Id.* Fields had blood on his shirt and pants, and Horton had a knife buried in her right temple with the point of the blade protruding

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from the opposing temple. *Id.*; *Fields I*, 2014 WL 7688714, at *2. Horton also had defensive wounds on her hands, which were stuffed inside her throat. *Fields II*, 2016 WL 3574396, at *3. Her throat was slashed almost to the point of decapitation. *Id.*; *Fields I*, 2014 WL 7688714, at *2. Lindeman asked Fields, “What’s going on? What are you doing?” *Fields II*, 2016 WL 3574396, at *3. Fields stated, “Kill me, Ron, just kill me. I stabbed her, and I’m into it big time this time.” *Id.* When Lindeman asked Fields why he did it, Fields replied, “I don’t know. I just did it. Kill me. I’m going to prison for the rest of my life.” *Id.* Fields was immediately arrested and found to be in possession of Horton’s jewelry, two razor blades, and a butter knife with the point missing and the tip twisted in an unusual way. *Id.* at *3-4; *Fields I*, 2014 WL 7688714, at *2. (This knife became known as the “twisty knife” throughout trial.)

Approximately 5:17 a.m. The officers took Fields to a hospital approximately thirty minutes away. *Fields II*, 2016 WL 3574396, at *4. An EMT examined Fields and inquired “where the blood was coming from.” *Id.* According to the EMT, Fields responded, “in no uncertain terms[,] that if [the EMT] had killed some lady that [the EMT] would have blood on [him] as well.” *Id.* Subsequent testing revealed that none of the blood on Fields’ clothing was traceable to Horton and none of the blood in Horton’s bedroom was traceable to Fields. At the hospital, the emergency department ordered a blood alcohol test, and the report indicated that Fields had a blood alcohol content of 0.14.

In 2003, Fields stood trial for a second time on one count of murder and one count of first-degree burglary.¹ *Fields I*, 2014 WL 7688714, at *2. At trial, the commonwealth argued that Fields used the twisty knife to unscrew seventeen paint-covered screws, remove the storm window, and break into Horton’s home. *Id.* Defense counsel conversely argued that Fields was too intoxicated to unscrew the storm window and commit the murder within the short timeframe. *Id.* During deliberations, the jurors decided to conduct their own experiment by using the twisty knife, introduced into evidence by the commonwealth, to unscrew and remove a cabinet door in the jury room. *Id.* at *3. After eight hours, the jury found Fields guilty as charged. The matter

¹Fields was originally tried and convicted in 1998. However, the Kentucky Supreme Court found that reversible errors occurred during the trial, reversed the convictions, and remanded the matter for a new trial.

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then proceeded to the penalty phase, and after twelve hours of deliberations, the jury sentenced Fields to death. The Kentucky Supreme Court affirmed.

Fields then moved for post-conviction relief in the state trial court. *See Fields I*, 2014 WL 7688714, at *2. Following a three-day evidentiary hearing, the trial court denied the motion. *Id.* The Kentucky Supreme Court again affirmed. *Id.* Fields then filed the underlying petition for a writ of habeas corpus, alleging thirty claims for relief. *See Fields II*, 2016 WL 3574396, at *1. The district court denied the petition but certified for appeal one of the requested grounds for relief: the trial court improperly excluded from the sentencing phase evidence of parole-eligibility statistics. *Id.* at *54. We expanded the certificate of appealability to include four additional claims: (1) the jury’s experiment involving evidence not in the record violated Fields’ constitutional rights to confrontation, due process, and a fair trial; (2) trial counsel were ineffective for failing to investigate and present the testimony of James Berry; (3) trial counsel were ineffective for failing to present expert testimony regarding the effects of drugs and alcohol on Fields’ ability to commit the alleged crimes; and (4) trial counsel were ineffective for failing to present additional mitigating evidence at the penalty phase. Because we resolve the jury experiment claim in Fields’ favor, and it is dispositive of the case, we address only that claim herein.

II.

We review a district court’s decision regarding a writ of habeas corpus *de novo*. *Ege v. Yukins*, 485 F.3d 364, 371 (6th Cir. 2007) (citing *Wolfe v. Brigano*, 232 F.3d 499, 501 (6th Cir. 2000)). “Because the district court did not conduct an evidentiary hearing but rather relied on the trial transcript in making its fact findings, we must review the district court’s factual findings *de novo*.” *Burton v. Renico*, 391 F.3d 764, 770 (6th Cir. 2004) (citing *Bugh v. Mitchell*, 329 F.3d 496, 500 (6th Cir. 2003)).

The Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) governs our review of this case. As relevant here, a federal court may grant habeas relief only if the state court’s decision on the merits “was contrary to, or involved an unreasonable application of, clearly established Federal law[.]” 28 U.S.C. § 2254(d)(1). A state court decision is ““contrary

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to’ clearly established federal law if ‘the state court arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law or if the state court decides a case differently than [the Supreme Court] on a set of materially indistinguishable facts.’” *Lundgren v. Mitchell*, 440 F.3d 754, 762-63 (6th Cir. 2006) (quoting *Williams v. Taylor*, 529 U.S. 362, 413 (2000)). An “unreasonable application” occurs when “the state court identifies the correct governing legal rule from [the Supreme Court’s] cases but unreasonably applies it to the facts of the particular state prisoner’s case.” *Williams*, 529 U.S. at 407. Legal rules that are stated in general terms can still be applied in an unreasonable manner, because “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)).

“A federal court’s collateral review of a state-court decision must be consistent with the respect due state courts in our federal system.” *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003). AEDPA thus requires federal courts to review state court decisions with a degree of “deference and latitude.” *Harrington v. Richter*, 562 U.S. 86, 101 (2011). To obtain habeas relief in federal court, a state prisoner must show that the state court’s ruling “was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.” *Id.* at 103.

A.

Fields contends that the Kentucky Supreme Court unreasonably applied *Patterson v. Colorado*, 205 U.S. 454 (1907), *Irvin v. Dowd*, 366 U.S. 717 (1961), *Turner v. Louisiana*, 379 U.S. 466 (1965), and *Parker v. Gladden*, 385 U.S. 363 (1966), in denying his challenge to the jury’s experiment during deliberations.

Through 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. At the turn of last century, the Court noted, “The 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*, 205 U.S. at 462. Faced with the

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development of “swift, widespread and diverse methods of communication” over the following decades, the Court reinforced that theory and held that the constitutional right to an impartial jury requires the verdict to “be based upon the evidence developed at the trial.” *Irvin*, 366 U.S. at 722 (holding that eight jurors’ predisposed opinions as to guilt based on adverse pre-trial publicity violated the defendant’s right to an impartial jury). Shortly thereafter, the Court expounded on that concept to require “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.” *Turner*, 379 U.S. at 472-73 (holding that the testifying officers’ continuous and intimate association with the jurors outside of the courtroom violated the defendant’s constitutional rights). The Court further reiterated this foundational principle the following year. *See Parker*, 385 U.S. at 364-66 (citing *Turner* and holding that a bailiff’s prejudicial comments to jurors during deliberations violated the defendant’s constitutional rights).

The warden argues that *Fields* frames the rule of law at an exceptionally high level of generality. He contends that none of the cases cited by *Fields* “purported to apply that rule in the context of a jury experimenting with evidence during deliberations,” and as a result, the broad rule does not meet the constraints of AEDPA. However, applying the standards from *Parker* and *Turner*, the Sixth Circuit has twice recognized in the context of jury experiments that “jury exposure to extrinsic evidence or other extraneous influence violates a defendant’s Sixth Amendment rights, and a state court decision that conflicts with this rule may justify habeas relief under the standard set forth in the AEDPA.” *Fletcher v. McKee*, 355 F. App’x 935, 937 (6th Cir. 2009) (internal citations omitted); *Doan v. Brigano*, 237 F.3d 722, 729-36 (6th Cir. 2001).

In *Doan*, a juror conducted an at-home experiment to test the defendant’s credibility and reported the results to the rest of the jury during deliberations. During her experiment, the juror applied lipstick to her arm to replicate a bruise and attempted to view the “bruise” in a room lit similarly to the defendant’s bathroom. *Doan*, 237 F.3d at 727. The juror then informed the other members of the jury that the bruises were visible, in direct contradiction of the defendant’s testimony. *Id.* at 726-27. This Court found that the experiment and its results injected

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extraneous evidence into the jury's deliberations which the defendant had no chance to refute. *Id.* at 733. Accordingly, we concluded that the juror's experiment conflicted with the defendant's constitutional rights under *Parker* and *Turner*. *Id.*

In *Fletcher*, the jurors conducted an experiment during deliberations to determine where the gun would have fallen if the victim had accidentally shot herself as the defense claimed. One juror held the gun and fell off a table, as the victim supposedly would have fallen off the bed, while the other jurors watched the trajectory of the gun. *Fletcher*, 355 F. App'x at 936. Based partly on this reenactment, the jury concluded that the victim had not accidentally shot herself and thus rejected the defendant's theory of the case. *Id.* This Court acknowledged that "[a]s a matter of law, clearly established Supreme Court precedent requires that a criminal defendant be afforded the right to confront the evidence and the witnesses against him, and the right to a jury that considers only the evidence presented at trial." *Id.* at 937 (quoting *Doan*, 237 F.3d at 733 n.7 (citing *Parker*, 385 U.S. at 364-65; *Turner*, 379 U.S. at 472-73)). However, we ultimately held that the jurors' recreation of the crime scene involved no extrinsic evidence, and thus, did not subject them to extraneous influence in violation of the defendant's constitutional rights. *Id.* at 940.

Although circuit precedent itself does not constitute clearly established federal law, "[w]e are bound by prior Sixth Circuit determinations that a rule has been clearly established [by the Supreme Court]." *Tolliver v. Sheets*, 594 F.3d 900, 916 n.6 (6th Cir. 2010) (citing *Smith v. Stegall*, 385 F.3d 993, 998 (6th Cir. 2004)); see also *Marshall v. Rodgers*, 569 U.S. 58, 64 (2013) ("[A]n appellate panel may, in accordance with its usual law-of-the-circuit procedures, look to circuit precedent to ascertain whether it has already held that the particular point in issue is clearly established by Supreme Court precedent."). Thus, despite the factual differences, these cases bind us to the general determination that Supreme Court precedent, namely *Parker* and *Turner*, has clearly established that jury experimentation that brings extrinsic evidence to the jury's attention violates the Fifth and Sixth Amendments.

The Kentucky Supreme Court identified in its opinion that Fields had a constitutional right to a fair and impartial jury that considered only the evidence presented at trial. *Fields I*, 2014 WL 7688714, at *3-4. However, the court took a very narrow view of the issue and

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ignored the role of the cabinet and its components in the experiment. The court held that “jurors are free to use their own senses, observations, and experiences to conduct an experiment or reenactment with already admitted evidence.” *Id.* at *4 (citing *Fletcher*, 355 F. App’x at 935). Based on this rationale alone, the court determined that the jurors permissibly conducted a reenactment with the twisty knife. The court thus concluded that the jury did not decide guilt based on something other than the evidence presented at trial.

There is a stark difference between examining evidence in the record and using tangible objects in the deliberation room as an integral part of an experiment to prove the prosecution’s theory. Here, the jurors conducted an experiment, which may have been flawed in its methodology, on material that was not admitted and thus not subject to the procedural safeguards of trial. The jury used the twisty knife to remove screws of a different nature than the screws in the storm window. The cabinet contained unpainted, universal screws while the storm window contained Phillips head screws, fourteen of which were coated with paint.² No evidence established whether the screws in the jury room were installed with the same tension and force as the screws in the storm window, or whether the cabinet door was fastened to the cabinet in the same manner as the storm window was fastened to the window frame. In addition, the jury removed the cabinet door under potentially different circumstances than Fields would have removed the storm window. No evidence established whether the cabinet hung at a similar height to the window, or whether the jurors conducted the experiment in the dark with a blood alcohol content greater than .14—an issue that itself would be equally, if not more, concerning than the glaring problems already posed herein. Under these circumstances, we find that the experiment exposed the jurors to extraneous evidence which Fields had no chance to refute.

Therefore, it is “beyond any possibility for fairminded disagreement” that the Kentucky Supreme Court unreasonably applied clearly established federal law in failing to address the jurors’ consideration of evidence not admitted into the record. *Harrington*, 562 U.S. at 103.

²In support of Fields’ actual innocence claim, a Department of Public Advocacy Investigator averred that “the juror room universal screw would have been much easier to remove with the flat broken tip of the ‘twisty knife’ than removing a standard Philips head screw with the same knife.”

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B.

A habeas petitioner is entitled to relief only if the trial error “had substantial and injurious effect or influence in determining the jury’s verdict.” *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). Under this standard, the petitioner must show “actual prejudice.” *Id.* The petitioner must establish “not merely that the errors at his trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.” *United States v. Frady*, 456 U.S. 152, 170 (1982) (emphasis in original).

The Supreme Court recently clarified that “satisfying *Brecht* is only a necessary, not a sufficient, condition to relief.” *Brown v. Davenport*, 142 S.Ct. 1510, 1520 (2022). Where, as here, the state court reached the merits of a harmlessness determination, a petitioner must also demonstrate that the court “applied *Chapman* [v. *California*, 386 U.S. 18 (1967)] in an objectively unreasonable manner.” *Davis v. Ayala*, 576 U.S. 257, 269 (2015) (internal quotation marks omitted).

In *Chapman*, the Supreme Court announced that “before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.” 386 U.S. at 24. The Court placed the burden on “the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” *Id.* Here, the Kentucky Supreme Court did the exact opposite. The court concluded, “we cannot say beyond a reasonable doubt that the jury experiment contributed to the verdict.” *Fields I*, 2014 WL 7688714, at *4. By this language, the 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. Because the Kentucky Supreme Court applied a rule of law that contradicted *Chapman*, we must now apply the *Brecht* standard.

At trial, the commonwealth theorized that Fields committed the murder by unscrewing seventeen screws with the twisty knife, gaining access to the house, and inflicting fatal stabs to

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Horton, all within a fourteen-minute timeframe. *Fields I*, 2014 WL 7688714, at *2; *Fields II*, 2016 WL 3574396, at *4. In contrast, Fields claimed that he arrived through the already open window to rob Horton after the murder, and that it would have been impossible for him to break in and commit the murder in such a limited timeframe given his intoxicated state. *Fields II*, 2016 WL 3574396, at *4-5. Thus, Fields' ability to unscrew the window was a central issue at trial.

During opening statements, the prosecutor demonstrated how much time Fields would have had to break into the residence. The prosecutor stated,

. . . I'd like for all of us to just see how long a minute can be. And when the secondhand gets to the 10, I'm going to stop talking. Now. And that's been about thirty seconds. Do you think that's enough time to take a screw, a little Phillips head screw, a little short Phillips head screw, out of a piece of wood? Forty seconds. Fifty seconds. That's a minute. And I don't mean to be melodramatic here or, you know, playacting or anything, but it's important for us to keep how long one minute can be.

The prosecutor revisited this demonstration during closing arguments:

This is the window through which the Defendant went. And you know we have heard, and you're going to hear—you get to look at these screws, seventeen screws. That's a lot of screws. To do it with a knife, sure. That—You know, that's one of the things about this case. We don't get to make up the facts, but these are the facts. It takes a person who really wants to get in to use this knife. You know, remember my overdramatic, let's wait a minute and see how long a minute is, in the opening statement that I gave so many—so long ago. Well, I think you now—you understand what I was talking about in that. A minute is a long—can be a long period of time. And let's say—let's give the Defendant seventeen minutes from let's say 2 o'clock. That gives him five minutes to get from the front—from the street there on Second Street across the parking lot to Ms. Horton's and around the house and up to the front. So, let's start that clock at 2 o'clock. And let's give him a minute per screw. That gets him in the house at 2:17.

The commonwealth argued that given the short timeframe of events, “there wasn't any opportunity for anyone else to have done this.”

At the close of evidence, the jury deliberated for eight hours. A review of the record shows that the jurors extensively questioned whether Fields could “have unscrewed those screws.” During trial, one juror asked the judge to pose the following question to a defense

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witness: “How long does it usually take to install a large storm window?” During deliberations, the jurors conducted the experiment to test the commonwealth’s theory and “see if it was possible to be done.” At the post-conviction hearing, one of the jurors testified “that wasn’t what, you know, said that he was guilty or not guilty, but it just satisfied my mind that it was possible that you could have done that[.]” According to the juror, “I knew a man’s life hanged in the balance, and I wanted to be sure of everything[.]” The same juror stated in an affidavit that the “experiment helped prove that Mr. Fields could have committed the crime.”³ Under these circumstances, we find that the jury’s experiment directly challenged the central issue at trial, vitiated Fields’ key defense arguments, and substantially bolstered the commonwealth’s theory of how Fields committed the murder.

At oral argument, the warden heavily relied on the juror’s testimony that the experiment alone did not determine guilt. However, the juror’s subjective testimony about the effect the experiment had on them bears little weight. Whenever a due process error “‘involves such a probability that prejudice will result . . .,’ little stock need be placed in jurors’ claims to the contrary.” *Holbrook v. Flynn*, 475 U.S. 560, 570 (1986) (citations omitted) (quoting *Estes v. Texas*, 381 U.S. 532, 542-43 (1965)). “Even though a practice may be inherently prejudicial, jurors will not necessarily be fully conscious of the effect it will have on their attitude toward the accused.” *Id.* “[T]herefore, the question must be not whether jurors actually articulated a consciousness of some prejudicial effect, but rather whether ‘an unacceptable risk is presented of impermissible factors coming into play.’” *Id.* (quoting *Estelle v. Williams*, 425 U.S. 501, 505 (1976)). Balancing the inherently prejudicial nature of the experiment with the weight of the evidence against Fields, we find that such an unacceptable risk was present.

The evidence of guilt was sparse. The only physical evidence tying Fields to the murder was his presence at the scene. The commonwealth alleged that Fields used the twisty knife to remove an external storm window and climbed into Horton’s residence. However, the commonwealth’s own experts testified that the paint on the twisty knife did not match the paint on the screws, and that Fields’ fingerprints were not found on the storm window. Also, it is

³The Kentucky Supreme Court considered both the jurors’ affidavits and their testimony at the post-conviction hearing. *Fields I*, 2014 WL 7688714, at *3.

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undisputed that Fields was bleeding that night—he had shattered a glass window with his hand and the officers found his blood on the sidewalk, the back porch steps, and the front porch handle of Horton’s residence. *Fields II*, 2016 WL 3574396, at *4. But, as we noted earlier, subsequent testing revealed that none of his blood was found on Horton and none of Horton’s blood was found on him.

All we are left with then are Fields’ confessions. “We have learned the lesson of history, ancient and modern, that a system of criminal law enforcement which comes to depend on the ‘confession’ will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation.” *Escobedo v. Illinois*, 378 U.S. 478, 488-89 (1964) (footnotes omitted). The confessions here are particularly suspect due to the impaired mental state of Fields at the time he gave them. For example, earlier that same night, Fields declared that he had “killed” his brother and needed to dispose of the alleged murder weapon. *Fields II*, 2016 WL 3574396, at *2. This “confession” later proved to be false. *Id.* In addition, Fields’ statements do not comport with the physical evidence. An EMT testified that Fields had implied the blood on his clothing resulted from killing “some lady.” *Id.* at *4. But we know that the blood testing does not corroborate such an implication. Furthermore, the medical records show that Fields had a blood alcohol content of .14—nearly twice the legal limit—at the time of his third confession and more than two hours after the other two confessions.⁴ It is undisputed that Fields adamantly maintained his innocence once sober.

Finally, it should be noted that Fields is not the only person who allegedly confessed to the murder. At least two witnesses testified that Burton confessed, “I was tired of that Son of a Bitch telling me who I can have in my apartment and who I can’t. . . . I killed her, and she can’t tell me nothing.” Burton also had both the opportunity and the motive to murder Horton. *Fields II*, 2016 WL 3574396, at *4.

⁴ “[T]he percentage of alcohol in an individual’s blood typically decreases by approximately 0.015 percent to 0.02 percent per hour once the alcohol has been fully absorbed. More precise calculations of the rate at which alcohol dissipates depend on various individual characteristics (such as weight, gender, and alcohol tolerance) and the circumstances in which the alcohol was consumed.” *Missouri v. McNeely*, 569 U.S. 141, 152 (2013) (citing Stripp, Forensic and Clinical Issues in Alcohol Analysis, in *Forensic Chemistry Handbook* 435, 437-41 (L. Kobilinsky ed. 2012)).

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Given the centrality of the issue, the inherently prejudicial nature of the experiment, and the lack of overwhelming evidence of guilt, we find that the jury experiment had a “substantial and injurious effect or influence in determining the jury’s verdict.” *Brecht*, 507 U.S. at 637 (quoting *Kotteakos*, 328 U.S. at 776). Based on this record, we cannot say that the jury’s consideration of extrinsic evidence was harmless. Fields is therefore entitled to a writ of habeas corpus unless the commonwealth retries him within six months.⁵

III.

For the foregoing reasons, we **REVERSE** the district court’s judgment and **CONDITIONALLY GRANT** Fields’ petition for a writ of habeas corpus, unless the commonwealth retries him within six months.

⁵There was some confusion in the record regarding the timing of the jury experiment—*i.e.*, whether it took place during the guilt or penalty phase. Although no court before us has expressly resolved this factual determination, it is “plain from [its] opinion” that the Kentucky Supreme Court implicitly found the experiment occurred during the guilt phase. *Townsend v. Sain*, 372 U.S. 293, 314 (1963), *overruled on other grounds by Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992). The Kentucky Supreme Court addressed whether the jury experiment violated Fields’ constitutional rights, and thus, entitled him to a new trial. *Fields I*, 2014 WL 7688714, at *3. After reviewing the record, the court held that the experiment “did not contribute to the[] verdict because it simply proved that it was possible to remove the screws using the knife, *not that [Fields] murdered the victim.*” *Id.* at *4 (emphasis added). In its harmless error analysis, the court doubled down on its reasoning and found that the experiment only determined a collateral issue raised in the guilt phase. *Id.* We must afford a presumption of correctness “to those implicit findings of fact that are inherent in [the state court’s] resolution of conflicting evidence.” *McPherson v. Woods*, 506 F. App’x 379, 387 (6th Cir. 2012) (citing *Marshall v. Lonberger*, 459 U.S. 422, 433 (1982)).

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DISSENT

ALICE M. BATCHELDER, Circuit Judge, dissenting.

The Kentucky Supreme Court did not unreasonably apply clearly established federal law by finding that the jury’s “twisty knife” experiment did not violate the Sixth Amendment. No U.S. Supreme Court case states a rule that prohibits the jury, in its entirety, from experimenting with admitted evidence during deliberations in the jury room. Moreover, the Kentucky Supreme Court—relying on three analogous cases—reasonably applied the U.S. Supreme Court’s broad precedent concerning extrinsic evidence, extraneous information, and jury experiments. Therefore, Fields has not satisfied AEDPA, and the district court properly denied his petition. Because I would affirm the district court, I must respectfully dissent.

I.

AEDPA requires that before a federal court grants a writ of habeas corpus, it must find that the State court 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). This dooms Fields’ claim because no Supreme Court precedent establishes that jury experiments violate the Sixth Amendment. Circuit precedent cannot fill in gaps or extend Supreme Court cases to establish new legal rules. *White v. Woodall*, 572 U.S. 415, 426 (2014) (“Section 2254(d)(1) provides a remedy for instances in which a state court unreasonably *applies* this Court’s precedent; it does not require state courts to *extend* that precedent or license federal courts to treat the failure to do so as error.”) (emphasis in original). And the Supreme Court has repeatedly warned against “framing [Supreme Court] precedents at such a high level of generality.” *Lopez v. Smith*, 574 U.S. 1, 6 (2014) (quoting *Nevada v. Jackson*, 569 U.S. 505, 512 (2013)); see also *Brown v. Davenport*, 142 S. Ct. 1510, 1525 (2022) (“This Court’s dicta cannot supply a ground for relief. Nor can holdings that speak only at a high level of generality.”) (internal citations omitted). Otherwise, circuit courts “could transform even the most

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imaginative extension of existing case law into ‘clearly established Federal law as determined by the Supreme Court.’” *Jackson*, 569 U.S. at 512 (quoting 28 U.S.C. § 2254(d)(1)).

In *Smith*, 574 U.S. at 3-4, the Ninth Circuit had extended the general principle that a defendant must have notice of the charges against him, to require that a defendant must have notice of the theory of liability the government intends to pursue. In *Jackson*, 569 U.S. at 510, the Ninth Circuit had extended general holdings that certain restrictions on cross-examination were unconstitutional, to entitle a criminal defendant to present extrinsic evidence on a collateral matter of a witness’ credibility. The Supreme Court reversed the Ninth Circuit in both *Smith* and *Jackson*, admonishing the Ninth Circuit for its extension of precedent via application of abstract principle to new legal context. *Smith*, 574 U.S. at 9; *Jackson*, 569 U.S. at 512.

Doan v. Brigano, 237 F.3d 722, 732 (6th Cir. 2001), committed similar error. It found that the lipstick/bruise jury experiment violated “clearly established federal law” as set forth under *Turner v. Louisiana*, 379 U.S. 466 (1965), and *Parker v. Gladden*, 385 U.S. 363 (1966). Those Supreme Court cases did not hold that jury experiments were unconstitutional but merely 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.” *Turner*, 379 U.S. at 472-73. What *Turner* and *Parker* actually *did* hold is that a jury’s prejudicial discussion of a trial with non-jurors outside of the jury room violates the Sixth Amendment. *See Turner*, 379 U.S. at 467-69 (police officers who testified for prosecution also oversaw jurors during trial and conversed freely during mealtimes); *Parker*, 385 U.S. at 363-64 (bailiff who shepherded jurors told jurors the defendant was guilty).

Doan, like *Smith* and *Jackson*, extended a general jurisprudential principle to a new legal context, thereby creating a new rule of constitutional law. *Doan* was decided in 2001, a mere five years after AEDPA’s passage and before the Supreme Court’s warnings against imaginative extensions of high-level principles. Considered in the light of *Smith* and *Jackson*, I must conclude that the Supreme Court has abrogated *Doan* and that we are no longer bound to follow it.

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II.

The Kentucky Supreme Court reasonably applied the general principle that Fields' trial must be fair and decided by an impartial jury. It identified three cases, all decided after *Parker* and *Turner*, which held or implied that jury experiments do not violate the Sixth Amendment. See *United States v. Avery*, 717 F.2d 1020, 1026 (6th Cir. 1983); *Banghart v. Origoverken*, 49 F.3d 1302, 1306 (8th Cir. 1995); *Fletcher v. McKee*, 355 F. App'x 935 (6th Cir. 2009). These holdings demonstrate the reasonableness of the Kentucky Supreme Court's analysis. Unless it is "so obvious that a clearly established rule applies to a given set of facts that there could be no fairminded disagreement on the question," a state court does not unreasonably apply federal law. *White v. Woodall*, 572 U.S. 415, 427 (2014) (internal quotation marks omitted). Because the Kentucky Supreme Court reasonably applied federal law, Fields is not entitled to relief.

III.

For the foregoing reasons, I would affirm the judgment of the district court and must respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 17-5065

SAMUEL FIELDS,
Petitioner - Appellant,

v.

FILED
Dec 01, 2022
DEBORAH S. HUNT, Clerk

SCOTT JORDAN, Warden,
Respondent - Appellee.

Before: BATCHELDER, MOORE, and DONALD, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Eastern District of Kentucky at Pikeville.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION THEREOF, it is ORDERED that the judgment of the district court is REVERSED. IT IS FURTHER ORDERED that Samuel Fields' petition for a writ of habeas corpus is CONDITIONALLY GRANTED unless the Commonwealth of Kentucky retries him within six months of the issuance of this judgment.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION
PIKEVILLE

SAMUEL FIELDS,

Petitioner,

Civil No. 15-38-ART

V.

RANDY WHITE, *Warden,*

MEMORANDUM OPINION AND ORDER

Respondent.

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*** *** *** ***

More than twenty years ago, a woman named Bess Horton was murdered in her bed. She was eighty four. 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.” *Fields v. Commonwealth*, 12 S.W.3d 275, 277 (Ky. 2000). When police officers arrived at the scene, they found Samuel Fields standing next to Ms. Horton’s body, rummaging through her valuables. *Id.* at 278. Fields immediately confessed to the officers. *Id.* He had her jewelry in one pocket, knives and razor blades in the others. *Id.* An hour or so later, he confessed to an EMT as well. *Id.* at 279. A jury eventually convicted him of murder and burglary and sentenced him to death. *Id.* at 277. Over the last two decades, Fields has exhausted his available means of state-court relief, and he is currently awaiting execution on Kentucky’s death row. Turning to the federal courts, he has now filed a petition for a writ of habeas corpus, in which he brings thirty claims for relief. R. 6. For the reasons explained below, none of those claims have merit. His petition is therefore denied.

I.

This case begins on August 18, 1993. That afternoon, Fields and several of his friends—including Minnie Burton, Elmer Pritchard, and Phyllis Berry—were driving around eastern Kentucky and “consuming large amounts of alcohol, mostly beer.” *Fields*, 12 S.W.3d at 278. Fields, who was twenty-one years old at the time, had previously been married to Burton’s niece, and he and Burton had been in a relationship “for a few days” during August of 1993. R. 30-18 at 2607. Pritchard, on the other hand, was one of Burton’s neighbors. *Id.* at 2610.

“The group made two separate trips to Ashland to purchase several cases of beer,” stopped at Berry’s brother house in Boyd County, “drank some whiskey,” “ingested some ‘horse tranquilizers[,]’” and “finally returned to Grayson with the intention of spending the night at a residence occupied by [Fields’s] mother and brother.” *Fields*, 12 S.W.3d at 278. There the party got even rowdier. The group “continued drinking with [Fields’s] brother, John Fields, who also lived at the [residence].” *Fields v. Commonwealth*, 274 S.W.3d 375, 390 (Ky. 2008). Burton and Sam Fields eventually got into a fight, prompting Fields to throw “furniture, knives, and other objects” around the living room. *Id.* At around the same time, Fields “started crying”—Burton would later say that she thought he might have been “high[] or drunk”—and saying that “he didn’t have any control over his self.” R. 30-18 at 2621.

At this point, Burton left to go home “because [Fields’s] behavior scared her.” R. 32-1 at 413; R. 30-18 at 2621–22. She thought he was “acting crazy,” and of course she had good reason to think so: he had just thrown a knife “through to the living room from the

kitchen.” R. 30-18 at 2622.¹ Burton lived in Grayson as well, at a duplex owned by Ms. Horton. The duplex was about a five-minute walk from the house where the group had been drinking. *Id.* at 2624. Burton had been living rent-free in the duplex for some time, a privilege she received in return for running Horton’s errands and chauffeuring her around. *Fields*, 12 S.W.3d at 277; *see* R. 30-18 at 2668–89. But the relationship between the two women had recently “turned sour” and Horton had “turned off the power and water in the duplex in an attempt to force Burton out.” *Fields*, 274 S.W.3d at 390. “Thus, on the evening of August 18th, Burton was unable to gain entry into her apartment.” *Id.* So she sat down on a chair on the front porch of the duplex and “smoked a cigarette or something.” R. 30-18 at 2625–26.

As Burton sat there on the porch, she heard “a lot of hooting and hollering and what sound[ed] [like] somebody hitting [street] signs real hard and hollering.” *Id.* at 2627. It was “real foggy that night.” *Id.* (A police officer would later describe the atmosphere, in southern-gothic fashion, as “a soupy type fog, kind of rolling thick fog, the kind that just kind of sticks on your windshield.” R. 30-14 at 1980.) And thus, Burton could not see who was doing the hooting and hollering, at least initially. Fields then “came out of the fog.” *Id.* at 2627–28. He had a knife in his hand. *Id.* at 2628. He “kindly² pushed [the knife] to [Burton]” and said “take this. I’ve killed my brother, John.” *Id.* (He hadn’t. *Fields*, 274 S.W.3d at 391 (“[I]n fact, [Fields] had not killed his brother.”)) Shortly after this

¹ During Fields’s trial, Burton testified that she didn’t “know if he was throwing [the knife] at [her] or just throwing it.” R. 30-18 at 2622. She said that the knife “probably hit the wall” but that she didn’t “remember if it stuck in [the] wall or” not. *Id.* at 2623.

² In the vernacular of eastern Kentucky, “kindly” means not only “gently” but also “kind of.” That appears to be the sense in which Burton used the word “kindly” here—*i.e.*, she was saying that Fields “kind of” pushed the knife toward her, not that he pushed the knife toward her in a gentle way.

conversation, Burton left the porch. *Id.* at 2630. It was now sometime after midnight, the morning of August 19th.

“Unbeknownst to either Burton or [Fields], Elmer Pritchard had heard the noise outside and had called the police.” R. 32-1 at 414. Officer Larry Green received the call and arrived at the scene. R. 30-13 at 1889–90. Pritchard had reported a break-in at the duplex. *Id.* at 1891. Based on Green’s conversation with Pritchard, Green believed that Fields was responsible for the break in, so Green began to look for Fields. Again, “[i]t was real foggy,” he would later say, “[v]isibility was about probably ten feet, but it was a—it was a rolling fog,” so Green called for backup to help him conduct the search. R. 30-18 at 103. Sergeant Ron Lindeman responded. R. 30-14 at 1979. Lindeman had apparently been in bed asleep—it was, after all, around two in the morning—and thus he arrived clad in an unusual outfit: he was wearing a t-shirt, a pair of jogging shorts, flip flops, and a police hat. *Id.* He was carrying his service revolver. *Id.*

The two officers searched various buildings in the area—which was difficult given the fog, as the officers would later recall over and over again—and then noticed that the garage door was up on Ms. Horton’s residence. *Id.* at 1990. Lindeman said to Green: “There’s a door open on the garage. There may be someone there. Stay tight where you’re at.” *Id.* Lindeman “made a wide sweep around the back of [the garage],” *id.* at 1990, and the two officers eventually went inside, R. 30-13 at 1898. They looked inside some vehicles to “satisfy [themselves] [that] there was no one in the garage.” R. 30-14 at 1991.

The officers then went behind the house, at which point they noticed “that the lights were on in the backend section of the house.” *Id.* at 1992. This was unusual, Lindeman thought, because he could not recall Ms. Horton’s “lights ever being on that late at night.”

Id. Around this time, the officers noticed a screen “tore down off the window.” R. 30-13 at 1900; *see* R. 30-14 at 1993. “It looked like an L-shaped cut on the screen on the window.” R. 30-14 at 1993. Upon seeing this, the officers became “real alarmed.” *Id.*

Soon after, Green looked in a window and saw “Sammy Fields inside [the] room walking towards the window that [he] was looking through.” R. 30-13 at 1901. Green knew Fields “by name when [he’d] see him.” *Id.* Green radioed Lindeman: “Ron, come back here. He’s in the house. Come back here. He’s in the house.” *Id.* at 1994. The two officers looked through the window at Fields. They saw “a high bed,” a “dresser drawer,” and “Sammy Fields on his knees in front of the window.” *Id.* at 1995–96. At this point, the officers could not see Ms. Horton.

Lindeman told Green “to stay at the southeast corner [of the house] watching through the window to keep an eye on Mr. Fields.” *Id.* at 1996. Lindeman himself went “to investigate the front end of the house to see if there was any other way that anyone could have gotten into the home.” *Id.* On the front porch, he saw “a window up on the porch laying up against the brick pillar.” *Id.* at 1997. Lindeman took his flip flips off to avoid making noise. *Id.* He saw some screws lying on the porch and noticed that “the middle section window was the one that was removed and was laying against the pillar.” *Id.* at 1997.

As Lindeman entered the house—through the window—he saw “a spot of blood on a curtain” as well as on a comforter. *Id.* at 1998. So he “squatted down” into a “duck walk position” just in case “someone did see [him] and they fired a round or something or threw something at [him].” *Id.* He crept down the hallway and toward the bedroom in the back. *Id.* There, he saw “Sammy Fields in the [bedroom] going through a drawer.” *Id.*

When Fields turned around, Lindeman told him “to put his hands on his head and not to move.” R. 30-14 at 1999. Fields responded, “Hi, Ron. How you doing?” *Id.* With his service revolver still trained on Fields, Lindeman called for immediate backup—“everyone that I could get to come in there.” *Id.* at 2000. Fields “had some spots of blood on him, and he had some blood on his shirts and some blood on his pants.” *Id.* At this point, Lindeman noticed Ms. Horton. She was “laying on the bed with a knife through her head.” *Id.* Lindeman “radioed for Officer Green to come back through the front of the house, come through the window and assist [him] in the bedroom[.]” *Id.* at 2000. As Lindeman was waiting for Green, he asked Fields “What’s going on? What are you doing?” *Id.* at 2001. In response, Fields confessed to the crime: “Kill me, Ron, just kill me,” he said, “I stabbed her, and I’m into it big time this time.” *Id.* Lindeman asked Fields why he had done it. “I don’t know,” he said, “I just did it. Kill me. I’m going to prison for the rest of my life.” *Id.*

“At that time, Officer Green finally got to [Lindeman].” *Id.* at 2001. When Green entered the room, he “could see Ms. Horton.” R. 30-13 at 1912. “She was laying in the bed and there was a knife sticking out of her hea[d]. And there was a dresser with the drawers out [that] looked like [it] had been ransacked.” *Id.* at 1912. On her hands, the medical examiner would later find defensive wounds, which the prosecutor would describe as “cuts on her hands from protecting herself from her attacker.” *Id.* at 1868–69. When the police found her, her “hands were literally inside her throat.” *Id.* at 1869. Her head “was nearly cut off.” *Id.* at 1868.

Green read Fields his *Miranda* rights. Fields apparently was “quoting [the rights] right along with [Green] as [he] read them,” *i.e.*, “parroting what [Green was] saying.” *Id.* at 1906; *see also* R. 30-14 at 2003 (“He was quoting them right along with us. He said ‘I know

them[,]’ and he was cussing; he was very mad.”).³ Fields said he understood his rights, R. 30-14 at 2003, then “made a statement” to the officers, R. 30-13 at 1907. He said “Kill me. Shoot me. I’m into it deep. I killed her.” *Id.* “He was calm.” *Id.* “His voice was loud.” *Id.* In Green’s judgment, Fields “wasn’t intoxicated.” *Id.* “He was looking straight at Sergeant Lindeman.” *Id.* at 1907.

Shortly thereafter, Lindeman “saw a bunch of knives and things sticking out of [Fields’s] pocket.” *Id.* at 1908. “There were knives, and there were razor[]blades still in their cases or boxes”— “[o]ld-fashioned straight razor[s].” *Id.* at 1908–09. One of the knives was a “butter knife or a silver knife. The point was missing off of it.” *Id.* at 1910. (Throughout trial, this object became known as the “twisty knife” because the tip was twisted in an unusual way.) The officers also noticed “some other things bulging in his pants” and “some jewelry fell out of his pockets.” R. 30-14 at 2002.

The officers placed Fields under arrest, then took him to the hospital in Ashland, about thirty minutes away. He was handcuffed by this point and “had some blood on him”— particularly on his pants. R. 30-15 at 2109. An EMT asked Fields “where the blood was coming from.” *Id.* at 2112. Fields responded “in no uncertain terms,” as the EMT would later put it, “that if [the EMT] had killed some lady that [the EMT] would have blood on [him] as well.” *Id.* The EMT then emptied Fields’s pockets. *Id.* at 2116. Among other things, he found “two keys,” a “safety pin,” “necklaces,” a “velvet bag of pearl jewelry,” and “earrings.” *Id.* at 2116–17.

³ Cf. *Dickerson v. United States*, 530 U.S. 428, 443 (“*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture.”).

Fields was eventually indicted for murder and burglary, and a Rowan County jury found him guilty on both counts. *Fields*, 12 S.W.3d at 277.⁴ The jury sentenced him to death. *Id.* Fields appealed his conviction to the Kentucky Supreme Court, which reversed and remanded the case for a new trial. *Id.* at 285. The state court gave two reasons for its reversal: first, that the “jury was permitted to hear the recorded narrative of a staged videotape reenactment” of the crime scene investigation; and second, that “the trial judge erroneously failed to instruct the jury on manslaughter in the second degree as a lesser included offense of murder.” *Id.* at 277.

Following a change of venue, Fields was retried for murder and first-degree burglary. *Fields*, 274 S.W.3d at 390. During the second trial, the prosecution emphasized three themes. First, that Fields “was caught in [Ms. Horton’s] home by two police officers.” R. 30-13 at 1844. Second, that given the time-line of events, “there wasn’t any opportunity for anyone else to have done this.” *Id.* at 1844.⁵ And third, that the physical evidence in the case 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.* at 1844, 1865–66; R. 30-23 at 3394 (“The facts are, the Defendant’s blood is found on this knife in which ultra-white paint is found.”). The prosecutor also reminded the jury repeatedly that Fields had confessed “three different times” to “murdering Ms. Horton” and “burglarizing her home.” R. 30-13 at 1845; *see also* R. 30-

⁴ The details of what happened during this first trial are more or less irrelevant for the purposes of this habeas petition, given that the first conviction was reversed. The Court will therefore not recite those details. The record of the first trial can be found at R. 28.

⁵ 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. R. 30-13 at 1845. During opening statements, the prosecutor remained silent for thirty seconds to show the jury how “long a minute can be,” then asked the jury rhetorically whether that was “enough time to take a screw, a little Phillips head screw, a little short Phillips head screw, out of a piece of wood?” *Id.*

23 at 3389–90 (making a similar argument during summations). “Believe him,” the prosecutor said during closing arguments, “[b]elieve [Fields] when he told Ron Lindeman that he did it.” R. 30-23 at 3425.

The defense’s theory, on the other hand, was that “Ms. Horton was dead before Sam Fields ever entered that house.” R. 30-13 at 1874. In support of that theory, the defense argued that the true murderer would have “had some blood on them.” *Id.* Fields himself was bleeding, of course. “We know that he was leaving blood,” counsel said, “just about every place that he was in”: “blood on [the] sidewalk,” “blood on the back steps,” “blood on the front screen porch handle,” and so on. *Id.* at 1879. But none of his blood was found on Ms. Horton. *Id.* And none of Ms. Horton’s blood was found on Fields. *Id.* Thus, the defense argued, he could not have committed the murder.

Defense counsel would later characterize this line of reasoning as the “where’s the blood?” argument. It was the main pillar of the defense.⁶ It was the “[f]irst thing[,] out of my mouth in the opening,” counsel said during closing arguments. R. 30-23 at 3367. The other pillar was that, given his intoxicated state, Fields would not have been able—during the timeframe in question—to break into the house, sneak up on Ms. Horton, and commit the murder. *See, e.g., id.* at 3373–80 (“No time. . . . Mr. Fields had less than an hour. . . . [N]o time to hide any evidence[,] no chance to clean up a crime scene[,] no chance to wash any blood off anything[,] your face[,] change your clothes, your hands, hide a screwdriver to remove screws from a window; no time—nothing. . . . [W]hat we have here is a man who has

⁶ The prosecution’s response to this argument was that Ms. Horton’s blood was not found on many other things in her house, so it was no real surprise that the police found none of it on Fields, either. R. 30-23 at 3392, 3397 (“She doesn’t [even] have her own blood on her arms. She has it right around the area that she’s being attacked.”). As for why none of Fields’s blood was found on Ms. Horton, the prosecution essentially argued that he just was not bleeding that badly by the time he got to Ms. Horton’s bedroom. *Id.* at 3396.

been a loud, obnoxious, aggravating man, banging glass, breaking windows, thumping inside apartments, waking the neighbors up, out in the street yelling. All the sudden becomes quiet like a stealth.”). Fields’s indictment, counsel argued, was the result of a police department that rushed to judgment and concluded that Fields had killed Ms. Horton—he had confessed, after all—then failed to follow up on leads that would have led them to the true murderer. *See id.* at 3373 (“Yes, it looks bad. And that’s exactly what the police thought when they walked in and saw that. [Whoa], cut and dr[ied]. This is a cut and dr[ied] case. But it’s not. It’s not at all.”).

Of course, that argument has a bit more force to it if the lawyer can say who he thinks the true murderer is. Defense counsel here chose Minnie Burton. “Minnie Burton is not the whitewashed character that has been portrayed so far,” counsel said during his opening statement, “[and t]he evidence is going to show that Minnie Burton is the individual that had the opportunity to case the home.” R. 30-13 at 1875. Counsel pointed out that Burton was “unaccounted for for almost two hours on the night in question that Ms. Horton was murdered,” *id.*, that she had given inconsistent statements to the police—“[i]t’s hard to keep a story straight,” counsel said, *id.* at 1876—that she had a clearer motive than Fields did, R. 30-24 at 3381, and that she had tried to conceal the fact that Ms. Horton had kicked her out of the duplex, R. 30-13 at 1878. *See also* R. 30-23 at 3369 (“Minnie Burton was mad. Her gravy train was over. We know that she had thought it would be an easy target to rob Ms. Horton[.]”). In the end, the defense’s argument was that Fields was “acting as a scavenger, not a predator,” and, although that was “nothing to be proud of,” it nevertheless did not make him a murderer. R. 30-13 at 1880.

The jury again convicted Fields and again sentenced him to death. This time, the Kentucky Supreme Court affirmed the conviction. *Fields*, 274 S.W.3d at 390, 420. Fields petitioned the United States Supreme Court for a writ of certiorari, but the Court denied the petition. *Fields v. Kentucky*, 558 U.S. 971 (2009).

A year later, Fields filed a motion for post-conviction relief in the state trial court. *See Fields v. Commonwealth*, No. 2013-SC-000231-TG, 2014 WL 7688714, at *2 (Ky. May 14, 2015). The court held an evidentiary hearing over the course of three days, received written evidence, and considered the parties' briefs. *Id.* In January 2013, the trial court denied the motion and likewise denied Fields's petition for rehearing. *Id.* at *15. Fields again filed a certiorari petition with the United States Supreme Court, which denied the petition earlier this year. *Fields v. Kentucky*, 136 S. Ct. 798 (2016). Around the same time that he was petitioning for certiorari, Fields filed this petition for a writ of habeas corpus. R. 6. That petition is now before this Court.

II.

A. Legal standard

The Antiterrorism and Effective Death Penalty Act (AEDPA), which Congress passed in 1996, substantially limits a federal court's ability to grant a writ of habeas corpus to prisoners held in state custody. *See* 28 U.S.C. § 2254. "[T]he purpose of AEDPA is to ensure that federal habeas relief functions as a guard against extreme malfunctions in the state criminal justice systems, and not as a means of error correction." *Greene v. Fisher*, 132 S. Ct. 38, 43–44 (2011) (internal quotation marks omitted). But AEDPA applies only to claims that the state courts have already adjudicated "on the merits." 28 U.S.C. § 2254(d). Otherwise, the federal court reviews the claim *de novo*. *See, e.g., Porter v. McCollum*, 558

U.S. 30, 39 (2009) (“Because the state court did not decide whether [the prisoner’s] counsel was deficient, we review this element of [his] claim *de novo*.”); *Wiggins v. Smith*, 539 U.S. 510, 534 (2003) (“[O]ur review is not circumscribed by a state court conclusion with respect to prejudice, as neither of the state courts below reached this prong of the *Strickland* analysis.” (discussing the standard for ineffective assistance of counsel set by *Strickland v. Washington*, 466 U.S. 668 (1984)); *McKenzie v. Smith*, 326 F.3d 721, 727 (6th Cir. 2003) (holding that, if AEDPA does not require deference to the state court decision, then a court “‘exercise[s] [its] independent judgment’ and review[s] the claim *de novo*” (quoting *Hain v. Gibson*, 287 F.3d 1224, 1229 (10th Cir. 2002))); *Cox v. Miller*, 296 F.3d 89, 101 (2d Cir. 2002) (noting that habeas claims are either subject to the AEDPA standard or else reviewed *de novo*). The first question in this case is therefore whether the Kentucky courts adjudicated “on the merits” the claims that Fields now raises in his habeas petition.

For the purposes of § 2254(d), a state court adjudicates a claim “on the merits” when it decides the petitioner’s right to relief on the basis of the substance of the claim rather than on the basis of a procedural rule. *See, e.g., Muth v. Frank*, 412 F.3d 808, 815 (7th Cir. 2005) (“An adjudication on the merits is perhaps best understood by stating what it is not: it is not the resolution of a claim on procedural grounds.”); *Neal v. Puckett*, 286 F.3d 230, 235 (5th Cir. 2002) (“[A]djudication ‘on the merits’ is a term of art that refers to whether a court’s disposition of the case was substantive as opposed to procedural.”); *see also Ballinger v. Prelesnik*, 709 F.3d 558, 561 (6th Cir. 2013); *Sellan v. Kuhlman*, 261 F.3d 303, 311 (2d Cir. 2001). A federal court must “presume[]” that “the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary.” *Harrington v. Richter*, 562 U.S. 86, 99 (2011).

Fields raised before the Kentucky Supreme Court on direct appeal nearly all of the claims he raises now in his habeas petition. (The only exception is his eighteenth claim, which the Court has already dismissed via a separate opinion. See R. 58.). The Kentucky Supreme Court rejected each of those claims either on direct appeal or on appeal from the trial court's denial of Fields's motion for post-conviction relief. *Fields*, 12 S.W.3d at 275; *Fields*, 274 S.W.3d at 375. And the state court gave no indication in either of those opinions that it was rejecting any of Fields's claims on procedural grounds. Because "[t]he state court did not say it was denying the claim for any other reason," this Court must presume that the Kentucky Supreme Court denied each of those claims "on the merits." *Harrington*, 562 U.S. at 99. AEDPA's gatekeeping requirements therefore apply to each of Fields's remaining claims. 28 U.S.C. § 2254(d).

When AEDPA applies to a claim, a federal court generally must deny habeas relief. 28 U.S.C. § 2254(d). There are only three exceptions to that rule. First, a federal court may grant habeas relief if the state court's adjudication "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *Id.* § 2254(d)(2). Alternatively, a federal court may grant habeas relief if the state court's adjudication "resulted in a decision that was contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States[.]" *Id.* § 2254(d)(1). Finally, a federal court may grant habeas relief if the state court's adjudication "resulted in a decision" that "involved an unreasonable application of . . . clearly established Federal Law, as determined by the Supreme Court of the United States." *Id.* If a prisoner cannot show at least one of those things, however, then his habeas petition must be denied.

Here, Fields argues that he has shown all three of these things—that the state court acted “contrary to” clearly established federal law as determined by the Supreme Court of the United States, that the state court “unreasonably applied” that law, and that the state court “unreasonably determined” the facts. Fields develops his “unreasonable application of Supreme Court law” argument with at least some detail with respect to each of his claims. But he makes his “unreasonable determination of the facts” arguments and “contrary to Supreme Court law” arguments only in boilerplate fashion. To take a typical example, with respect to his first claim, he spends five pages explaining why the Kentucky Supreme Court, in his view, unreasonably applied clearly established federal law. He then concludes by stating—without citation or further argument—that “the state courts’ decisions on this issue are . . . contrary to United States Supreme Court precedent, and/or an unreasonable application of the facts.” R. 6 at 31.

Under Sixth Circuit law, “issues averred to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.” *Leary v. Livingston County*, 528 F.3d 438, 449 (6th Cir. 2008). Fields sufficiently develops his arguments that the state courts “unreasonably applied” clearly established federal law. Closely related are his arguments that the state courts acted “contrary to” such law.⁷ The Court will therefore consider those arguments. Fields’s arguments that the state courts “unreasonably determined the facts,” on the other hand, are averred to only in a “perfunctory manner.” And they are accompanied by no “effort at developed argumentation.” *Leary*, 528 F.3d at 449. Those arguments are therefore waived. *Id.*

⁷ After all, if a state court acted “contrary to” a holding of the United States Supreme Court, the state court’s decision must be an “unreasonable application” of such a holding as well. See *Bell v. Cone*, 535 U.S. 685, 694 (2002) (discussing the “contrary to” standard); *Williams v. Taylor*, 529 U.S. 362, 405 (2000) (same).

To obtain habeas relief, therefore, Fields must show that, when the Kentucky Supreme Court rejected his claims, its decision “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). In attempting to show that, Fields has a peculiarly narrow universe of law on which to draw. He must show that the Kentucky courts unreasonably applied a Supreme Court case, rather than one from a lower court. *See Renico v. Lett*, 559 U.S. 766, 779 (2010). He must show that the Kentucky courts unreasonably applied a “holding[]” of the Supreme Court, “as opposed to the dicta.” *Lockyer v. Andrade*, 538 U.S. 63, 71 (2003); *Williams v. Taylor*, 529 U.S. 362, 412 (2000). He must show that the holding in question is about a constitutional rule applicable to the states, rather than about some other kind of rule. *Early v. Packer*, 537 U.S. 3, 10 (2002). And it is not enough for him to show that the state court merely failed to extend such a holding to the facts of his case—even if that failure to extend was an unreasonable one. *See White v. Woodall*, 134 S. Ct. 1697, 1706 (2014). In sum, “it is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that has not been squarely established by [the Supreme Court].” *Harrington*, 562 U.S. at 101.

“If this standard is difficult to meet, that is because it was meant to be.” *Id.* at 102. Federal courts are to give decisions of state courts “the benefit of the doubt.” *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002). “[A] state prisoner must show that the state court’s ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.” *Harrington*, 562 U.S. at 103. Thus, “[u]nder § 2254(d), a habeas court must determine what arguments or theories supported [or] could have supported the

state court’s decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court.” *Id.* at 102. Put “more simply and maybe a little more clearly: if some fairminded jurists could agree with the state court’s decision . . . federal habeas relief must be denied” even though “other[] [jurists] might disagree.” *Loggins v. Thomas*, 654 F.3d 1204, 1220 (11th Cir. 2011).

The task before the Court is therefore as follows: to examine each of Fields’s remaining twenty-nine claims and determine whether a “fairminded jurist” could believe that the Kentucky Supreme Court’s decision rejecting those claims was consistent with the holdings of the United States Supreme Court (concerning constitutional issues that apply to the states). If a fairminded jurist could believe that, then this Court need go no further: Fields is not entitled to habeas relief.

B. Discussion of claims

The Court will address Fields’s claims in the order in which he presented them in his habeas petition. R. 6. This structure will lead to some repetition in parts, especially with respect to the standard of review for ineffective-assistance of counsel claims. But Fields seems to have grouped the claims in roughly this way when he filed for post-conviction relief in the Kentucky courts. *See* R. 33-1 at 163; R. 33-2 at 40009. And the Kentucky courts seem to have roughly maintained that same grouping. *See* R. 32-1 at 412; R. 33-2 at 621. It would probably be more confusing to break that grouping now—even if it would lead to a shorter opinion—so the Court will consider each claim in the order presented.

1. Claim 1

Fields's first claim is based on the fact that, in his view, "the jury conducted an improper experiment to determine whether th[e twisty] knife could in fact be used to unscrew screws." R. 6 at 26.⁸ During Fields's post-conviction proceedings, two of the jurors testified by affidavit that "[d]uring the jury deliberations concerning Mr. Fields's guilt, members of the jury did an experiment with the knife that the prosecution said Mr. Fields used to unscrew [the] storm window. This experiment consisted of using the knife to unscrew screws that were part of a wall of cabinets in the jury room." R. 33-1 at 67, 69. The knife apparently "easily unscrewed the screws," and according to the two jurors "[t]his experiment helped prove that Mr. Fields could have committed the crime." *Id.* at 67.

"This experiment," Fields argues, "violated [his] rights to confrontation, due process, and a fair trial." R. 6 at 26. His argument seems to run as follows: if a jury conducts an experiment with the evidence, then that experiment violates a defendant's rights under the constitution—his Fifth Amendment right to due process, his Sixth Amendment right to confrontation, or perhaps his Sixth Amendment right to a jury trial. Thus, the argument seems to go, when the state courts affirmed his conviction, they acted contrary to—or unreasonably applied—clearly established law as determined by the Supreme Court of the United States. *See* 28 U.S.C. § 2254(d)(1).

The problem with that argument is that AEDPA "requires federal habeas courts to deny relief that is contingent upon a rule of law not clearly established by United States

⁸ Fields raised this claim in his motion for post-conviction relief in Kentucky state court. *See* R. 33-1 at 4–10. The trial court addressed the merits of that claim, then ruled against Fields. R. 33-2 at 369–70. The Kentucky Supreme Court affirmed the trial court's ruling. R. 33-2 at 623–25. Neither state court gave any indication that they were denying his claim on procedural grounds. Thus, for the purposes of AEDPA, the state courts adjudicated Fields's first claim "on the merits." *See Harrington*, 562 U.S. at 99.

Supreme Court precedent at the time the conviction became final.” *Williams*, 529 U.S. at 380. And the rule of law that Fields posits here—that juries must not conduct experiments in the jury room—is one that the United States Supreme Court has never recognized. The Court has never even suggested that juries should not play *12 Angry Men*, as it were, and the Court has certainly never held that a jury violates a defendant’s constitutional rights if it does so.⁹ Thus, Fields has failed to show that, when the Kentucky courts rejected his first claim, they acted contrary to—or unreasonably applied—any holding of the United States Supreme Court. Under AEDPA, that means this Court cannot grant him habeas relief based on that claim.

Fields makes two arguments in response. First, he cites several cases suggesting that juries should not conduct experiments in the jury room. *See* R. 6 at 27–28 (citing *United States v. McKinney*, 429 F.2d 1019, 1023 (5th Cir. 1970); *United States v. Beach*, 296 F.2d 153, 158–59 (4th Cir. 1961); *Wilson v. United States*, 116 F. 484, 484 (9th Cir. 1902)). The problem with that argument is apparent from the captions of the cases themselves: they are from the federal circuit courts of appeals. To obtain habeas relief, it is not enough for a prisoner to show that the state courts acted contrary to—or unreasonably applied—a decision of one of those courts. *Renico*, 559 U.S. at 779 (“[A circuit court decision] does not constitute ‘clearly established Federal law, as determined by the Supreme Court,’ . . . so any failure to apply that decision cannot independently authorize habeas relief under AEDPA.” (citing 28 U.S.C. § 2254(d)(1))); *see also Bowles v. Dep’t of Corrections*, 608 F.3d 1313, 1316 (11th Cir. 2010) (“Nor can anything in a federal court of appeals decision, even a holding directly on point, clearly establish federal law for § 2254(d)(1) purposes.”). Instead,

⁹ *See generally 12 Angry Men* (Orion-Nova Productions 1957).

he must show that the state courts flouted a decision of the United States Supreme Court—and that Court alone. 28 U.S.C. § 2254(d)(1). Decisions from the lower courts, of course, do not help him show that.

Second, Fields cites four Supreme Court cases—*Parker*, *Skilling*, *Irvin*, and *Turner*—that in his view the Kentucky courts acted contrary to (or perhaps unreasonably applied). R. 6 at 27, 27, 83; see *Irvin v. Dowd*, 366 U.S. 717 (1961); *Turner v. Louisiana*, 379 U.S. 466 (1965); *Parker v. Gladden*, 385 U.S. 363 (1966); *United States v. Skilling*, 561 U.S. 358 (2010). The holding in *Irvin* was that a defendant may not be constitutionally sentenced to death by a jury “in which two-thirds of the members admit, before hearing any testimony, to possessing a belief in [the defendant’s] guilt.” *Irvin*, 366 U.S. at 728. The holding in *Parker* is that a defendant’s due-process rights are violated when a bailiff tells the jury that the defendant is “wicked,” that the defendant is “guilty[,]” and that “[i]f there is anything wrong (in finding petitioner guilty) the Supreme Court will correct it.” *Parker*, 385 U.S. at 363–64. The holding in *Turner* is that a defendant’s due process rights are violated when the jury is left in the care of two sheriff deputies who just so happen to be the prosecution’s star witnesses. *Turner*, 379 U.S. at 473 (“[I]t would be blinking reality not to recognize the extreme prejudice inherent in this continual association throughout the trial between the jurors and these two key witnesses for the prosecution.”). And there are many holdings in *Skilling*, and Fields does not explain which one he is relying upon. In any event, the conclusion in *Skilling* was that in spite of any error, Skilling received a fair trial. 561 U.S. at 399. As these summaries make clear, the holdings of these cases are narrow and fact bound, and the facts there look nothing like the ones here. Nowhere in those cases did the Supreme Court come anywhere close to suggesting that the Constitution forbids a jury to perform an

experiment in the jury room. Thus, the Kentucky courts did not act contrary to—or unreasonably apply—any of those holdings when they rejected Fields’s claim that the jurors’ experiment violated his constitutional rights.

Perhaps recognizing this problem, Fields falls back on some broad language that the Supreme Court employed in these cases. The gist of that language is that jurors must “decide guilt or innocence based on the evidence presented in court.” *Skilling*, 561 U.S. at 438 (Sotomayor, J., concurring in part and dissenting in part) (internal quotation marks omitted); *see also Parker*, 385 U.S. at 364–65 (“[T]he 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.” (internal quotation marks omitted)); *Irvin*, 366 U.S. at 729 (“[T]he State has the burden of establishing guilt solely on the basis of evidence produced in court and under circumstances assuring an accused all the safeguards of a fair procedure.”) (Frankfurter, J., concurring); *Turner*, 379 U.S. at 472 (“[A juror’s] verdict must be based upon the evidence developed at the trial.”). But that “rule”—to the extent it can be called that—is stated at an exceptionally high level of generality. And “[t]he more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations.” *Davis v. Carpenter*, 798 F.3d 468, 473–74 (6th Cir. 2015) (citing *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). It is, of course, true that jurors should decide guilt or innocence based on the evidence presented. The Supreme Court has made that point quite clear. What the Court has not made clear, however, is whether jurors in fact decide guilt based on something other than “the evidence presented” when they conduct an experiment using the evidence presented.

Admittedly, one might argue that the answer should be “yes.” After all, Fields did not have the chance to subject these “experimenters” to cross examination in open court. And thus one might say that the jury relied on something other than “the evidence” in reaching their verdict. But one might also argue that the answer should be “no.” After all, the 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. Finally, once we start quibbling with the reasoning process that jurors use during deliberation, it is hard to know where to stop. May a juror tell his peers “in my experience, I don’t think it could have happened that way?” May a juror say “he seemed like the kind of liars I’ve met in my life?” Were the jurors in *12 Angry Men* really violating the Constitution when they tried to recreate the crime?

Thankfully, this Court need not address those questions; it is enough to say that the Supreme Court has not answered them yet, either. The Court has “not yet taken [the next] step” of saying that a jury experiment violates a defendant’s constitutional rights, “and there are reasonable arguments on both sides—which is all Kentucky needs to prevail in this AEDPA case.” *Woodall*, 134 S. Ct. at 1707. “The appropriate time to consider the question as a matter of first impression would be on direct review, not in a habeas case governed by § 2254(d)(1).” *Id.* Fields is therefore not entitled to habeas relief on the basis of his first claim.

2. Claim 2

In Fields's second claim, he argues that he is entitled to habeas relief because the trial court forbade a witness to testify about how long it would take to remove the storm window. R. 6 at 31. During trial, Fields called Murrie O'Brien to testify for the defense. R. 30-21 at 3122. O'Brien was a carpenter who had some experience with storm windows and dealing with the kinds of screws used to hold such windows in place. *Id.* at 3123–24. The trial court allowed O'Brien to give rather extensive testimony about the screws. After this general testimony, defense counsel zeroed in on a few specifics, asking O'Brien "[h]ow long does it generally take you to remove screws from a large storm window[,]" "[h]ave you ever tried to remove any Phillips Head screws with something like [the twisty knife,]" and a few questions about the markings that a tool would leave on the screws. *Id.* at 3128–30. A juror also asked a question of his own: "[h]ow long does it usually take to install a large storm window?" R. 6 at 32; R. 30-21 at 3149. The trial court forbade O'Brien to answer any of these questions. R. 30-21 at 3149. In Fields's view, these rulings deprived him of his right to present a complete defense and thus violated the Constitution's Due Process Clause.

Fields made this same argument in his direct appeal, and the Kentucky Supreme Court flatly rejected it. R. 32-1 at 444–45. Thus, the AEDPA gatekeeping requirements apply to this claim.¹⁰ To obtain habeas relief, therefore, Fields must show that the state

¹⁰ Fields seems to concede this point in his opening brief: he argues that "[t]he state courts' treatment of the claim is contrary to and/or an unreasonable application of clearly existing Supreme Court authority," R. 6 at 34—an argument that would be irrelevant if AEDPA did not apply. In Fields's reply, however, he seems to argue that this Court should instead review his claim *de novo*. If Fields wished to argue that AEDPA does not apply to this claim, he should have done so in his opening brief. Kentucky did not have the opportunity to respond to that argument in its own brief, and thus the argument is waived. In any event, it is clear that AEDPA does indeed apply to this claim. It is true, as Fields points out, that the Kentucky Supreme Court analyzed his claim as an evidentiary claim rather than a constitutional one. But AEDPA applies so long as the state courts adjudicated a claim based on its "substance" rather than on procedural grounds. *See, e.g., Muth*, 412 F.3d at 815 ("An adjudication on the merits is perhaps best understood by stating what it is not: it is not the resolution of a claim on procedural grounds.").

court's decision was contrary to—or an unreasonable application of—clearly established law as determined by the Supreme Court of the United States. 28 U.S.C. § 2254(d)(1). In an attempt to show that, Fields points to a series of Supreme Court cases that recite the following language: “the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense.” *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (internal quotation marks omitted); *see also California v. Trombetta*, 467 U.S. 479, 485 (1984); *Washington v. Texas*, 388 U.S. 14, 19 (1967); *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973). The Kentucky Supreme Court unreasonably applied the holdings of these cases, Fields argues, when it rejected his claim.

It goes without saying that a trial judge does not violate the Due Process Clause every time he sustains a prosecutor's objection. Indeed, as the Supreme Court has recognized, in most cases “the accused . . . must comply with established rules of procedure and evidence designed to ensure both fairness and reliability in the ascertainment of guilt and innocence.” *Chambers*, 410 U.S. at 302. And “state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials.” *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006). Thus, “[o]nly rarely” has the Court held that “the right to present a complete defense was violated by the exclusion of defense evidence under a state rule of evidence.” *Nevada v. Jackson*, 133 S. Ct. 1990, 1992 (2013). Those rare cases have

Whatever else might be said of the Kentucky Supreme Court's adjudication of the claim, it is certainly not a “procedural” decision. Moreover, Fields raised the constitutional issues in his briefs before the Kentucky Supreme Court—he cited the same cases he cites now. *See* R. 32-1 at 89–90. Thus, when the Kentucky Supreme Court held that the trial court had not abused its discretion, it implicitly rejected Fields's argument that the trial court's rulings ran afoul of those cases and thus violated the Constitution. That holding was therefore a “merits” holding even though the Kentucky Supreme Court did not discuss the cases that Fields cited. *See Early*, 537 U.S. at 8 (holding that a state court need not even be “aware[]” of the Supreme Court's cases “so long as neither the reasoning nor the result of the state-court decision contradicts them”); *Miller v. Straub*, 299 F.3d 570, 578 (6th Cir. 2002) (“Although the Michigan Court of Appeals did not mention either *Hill* or *Strickland* by name, it did apply the law of those cases.”). AEDPA therefore applies to this Claim.

involved state evidentiary rules that “did not rationally serve any discernible purpose,” were “arbitrary,” “could not be rationally defended,” or were left totally unexplained by the state court. *Id.* (citing *Rock v. Arkansas*, 482 U.S. 44, 61 (1987); *Chambers*, 410 U.S. at 302–03; *Washington*, 388 U.S. at 22).

Here, in contrast, the trial court excluded O’Brien’s testimony on the basis that it would not “assist” the jury and was “irrelevant.” *Fields*, 274 S.W.3d at 407 (characterizing the trial court’s rulings). *Fields* does not seem to quarrel with the rules themselves, nor could he. If a witness’s testimony is irrelevant or unhelpful, then the jury is not entitled to hear that testimony and a defendant’s rights are not violated when a judge excludes it. Instead, *Fields*’s argument seems to be that the Kentucky evidentiary rules were unconstitutional as applied to him—*i.e.*, that in his particular case, due process required the trial court to let O’Brien answer those questions.¹¹

Under AEDPA, however, “a federal habeas court may overturn a state court’s application of federal law only if it is so erroneous that ‘there is no possibility fairminded jurists could disagree that the state court’s decision conflicts with [the Supreme] Court’s precedents.’” *Jackson*, 133 S. Ct. at 1992. And the Supreme Court opinions at issue here—*Chambers*, *Rock*, and so on—say only that a defendant is constitutionally entitled to present a defense that is “meaningful.” The trial court here allowed *Fields* to argue to the jury that he would not have had time to commit the crime. And he did so. R. 30-23 at 3374. The trial

¹¹ It is possible that *Fields* is really arguing that, if a trial court excludes evidence based on an erroneous interpretation of a state’s evidentiary rules, then the trial court likewise deprives a defendant of his constitutional right to present a complete defense. To the extent that is his real argument, it is likewise meritless. As the Sixth Circuit has held, “errors in application of state law, especially with regard to the admissibility of evidence, are usually not cognizable in federal habeas corpus.” *Walker v. Engle*, 703 F.2d 959, 962 (6th Cir. 1983); *see also Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991) (“[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions.”); *Bey v. Bagley*, 500 F.3d 514, 519 (6th Cir. 2007); *Coleman v. Mitchell*, 244 F.3d 533, 542 (6th Cir. 2001).

court also allowed Fields to argue more specifically to the jury that he could not have removed the screws from the storm window in the time required. And he did that, too. See *id.* at 3380. Thus, notwithstanding the trial court’s evidentiary ruling, it seems that Fields nevertheless had a meaningful chance to present his chosen defense.

Fields responds that O’Brien’s testimony—about how long it usually takes O’Brien to perform similar work—would have further strengthened his defense. And perhaps it would have. But the question before the Court is only whether a “fairminded jurist” could believe that Fields was able to put on a “meaningful” defense even without O’Brien’s testimony. See *Harrington*, 562 U.S. at 101; *Chambers*, 410 U.S. at 294. Such a jurist could agree with the Kentucky Supreme Court that “how long it takes to remove a window screw” is a topic “well within the average juror’s common knowledge and understanding,” especially given that “the jury was shown the screws and the window itself and, thus, had the opportunity to make such an assessment.” R. 32-1 at 445. Thus, a fairminded jurist could believe that the trial court allowed Fields to present his “not enough time” defense in a “meaningful” way even though the trial court forbade some of O’Brien’s testimony. Such a jurist could likewise agree with the Kentucky Supreme Court that, because “O’Brien stated that he had never worked on that particular storm window and had never handled [the twisty] knife,” his testimony would have been “irrelevant.” *Id.* For this reason as well, a fairminded jurist could believe that the trial court did not deprive Fields of a meaningful defense when it excluded some of O’Brien’s testimony. Fields has therefore failed to show that the Kentucky Supreme Court unreasonably applied any holding of the United States Supreme Court when it rejected his second claim. Thus, Fields is not entitled to habeas relief on the basis of that claim.

3. Claim 3

In his third claim, Fields argues that he is entitled to habeas relief because the prosecutor withheld exculpatory evidence from him, thus running afoul of the Supreme Court's holding in *Brady v. Maryland*, 373 U.S. 83 (1963). "There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is [itself] exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281–82 (1999). A defendant is entitled to *Brady* materials even if he has not asked for them specifically. *United States v. Agurs*, 427 U.S. 97, 107 (1976). And a prosecutor must turn over any exculpatory evidence, even if the defendant could obtain it independently without the prosecutor's help. *Banks v. Dretke*, 540 U.S. 668, 695–96 (2004).

Here, Fields contends that the prosecutor should have told the defense team about a man named James Berry, who was Phyllis Berry's half-brother. Video Record, 12/15/11, 9:02. Berry had been interviewed in 2009 by the defense's post-conviction mitigation expert, Heather Drake. During that interview, Berry told Drake that a representative from the state Attorney General's office had contacted him but had declined to speak with him further after Berry told the representative what he wanted to testify about. R. 33-2 at 633–34; Video Record, 12/15/11, 9:11-9:12; Video Record, 12/15/11, 12:38 ("He told us 'the A.G. came and saw me.'").¹² In fact, Berry told Drake that a representative from the

¹² Berry's testimony about his interactions with the A.G.'s office was hard to follow. For example, it is not even clear from the record whether Berry believes that this secret phone call occurred before or after Fields was convicted and sentenced. In fact, at the post-conviction hearing—which was in 2011—he testified that he could not remember whether the attorney general's office had called him more than ten years ago or fewer than ten years ago. Video

Attorney General's office had visited him "multiple times." Video Record, 12/15/11, 12:38-39. But Berry told a very different story during the post-conviction hearing. There, he testified that he had spoken with the Attorney General's office only via telephone and stated flat out that representatives from that office had never visited him. Video Record, 12/15/11, 9:08-9:15.

Berry apparently would have testified that "Mr. Fields ingested drugs the night Ms. Horton was killed, was extremely intoxicated, and was behaving strangely." R. 6 at 34.¹³ According to Fields, that testimony would have bolstered Fields's defense theory that he was too intoxicated to remove the screws securing the storm window (or, perhaps, that he was too intoxicated to form the specific intent to kill—or perhaps both). Fields also says that Berry's testimony would have helped him during the penalty phase. *Id.* at 40. The Commonwealth "suppressed the evidence," Fields says, and he argues that there is a reasonable probability that the jurors would have acquitted him (or perhaps sentenced him to life in prison rather than death) if only they had heard Berry's testimony. *Id.* Thus, Fields concludes, the prosecutors violated *Brady*. *Id.*

Of course, it is not enough for Fields to show a *Brady* violation *simpliciter*. The Kentucky Supreme Court adjudicated this claim on the merits during Fields's post-conviction appeal, see R. 33-2 at 631, and thus Fields must show that the state court applied *Brady* in an unreasonable way when it rejected his claim. Thus, he must show that all

Record, 12/15/11, 9:10. To the extent that this phone call occurred after Fields's second trial, of course, then there was certainly no *Brady* violation.

¹³ During the post-conviction hearing, Berry testified that Fields had been "pretty on his way" on the night in question, specifically that he had been "pretty intoxicated" and "pretty messed up" as a result of drinking and "eating pills." Video Record, 12/15/11, 9:04-9:06.

“fairminded jurists” would believe that the prosecutors violated *Brady*. *Harrington*, 562 U.S. at 102.

A fairminded jurist could certainly take a different view here. As an initial matter, the Supreme Court has made clear that, to show a *Brady* violation, a defendant must show that the undisclosed evidence was “known to the prosecution” at the time of trial. *Agurs*, 427 U.S. at 103; *see also Apanovitch v. Houk*, 466 F.3d 460, 474 (6th Cir. 2006) (“[*Brady*] only applies to evidence that was known to the prosecution, but unknown to the defense, at the time of trial[.]”); *United States v. Mullins*, 22 F.3d 1365, 1371 (6th Cir.1994) (explaining that “*Brady* is concerned only with cases in which the government possesses information which the defendant does not”).¹⁴ And a fairminded jurist could believe that the prosecutors here were not, in fact, aware that Berry was willing to testify that Fields was intoxicated.

After all, the only person who testified that the prosecutors had spoken to Berry was Berry himself. R. 33-2 at 633. Berry made that statement some ten years after the alleged conversation. He is “a convicted felon suffering from paranoid schizophrenia.” *Id.* at 633. He apparently “hears voices sometimes.” Video Record, 12/15/11, 9:06-07. And his testimony during the post-conviction hearing differed sharply from the testimony that he had previously given to Heather Drake about his conversation with the Attorney General’s office.

¹⁴ As discussed above, a defendant cannot obtain habeas relief merely by showing that the state court decision conflicts with holdings from the federal courts of appeals. *See Mitchell v. Esparza*, 540 U.S. 12, 17 (2003) (“A federal court may not overrule a state court for simply holding a view different from its own, when the precedent from the [Supreme] Court is, at best, ambiguous.”). Nor may a federal court “canvass circuit decisions to determine whether a particular rule of law is so widely accepted among the Federal Circuits that it would, if presented to [the Supreme Court], be accepted as correct.” *Marshall v. Rodgers*, 133 S. Ct. 1446, 1451 (2013). That said, the decisions of the lower federal courts are sometimes relevant even in an AEDPA case. Specifically, those decisions might be useful to the state, something of a one-way ratchet. If the “lower courts have diverged widely” on the question presented, for example, that divergence might “reflect the lack of guidance from [the Supreme] Court” and thus support the idea that “the state court’s decision was not contrary to or an unreasonable application of clearly established federal law.” *Carey v. Musladin*, 549 U.S. 70, 76–77 (2006). Moreover, the federal courts of appeals are populated with “fairminded jurists.” And thus if they have interpreted the Supreme Court’s holdings in a certain way, it would not be “objectively unreasonable” for the state courts to follow their lead. *Williams*, 529 U.S. at 365.

Most troublingly, Berry had told Drake that the Attorney General’s representative had visited him in person “multiple times.” Video Record, 12/15/11, 12:38-39. But during the post-conviction hearing, he testified that the Attorney General’s office had only called him by telephone and had not visited him at all. Video Record, 12/15/11, 9:09:58 (“Q: Did they ever actually come to see you in prison? A: No, they didn’t ever come to see me.”).

Put plainly, a fairminded jurist could conclude that Berry was lying—or at the very least that he was mistaken—when he said that the Attorney General’s office had contacted him. And thus, a fairminded jurist could likewise believe that the prosecutor did not know about Berry’s testimony at all. It was therefore not “unreasonable” for the Kentucky Supreme Court to conclude that the prosecution had not “concealed” Berry from the defense team. And if it was not unreasonable for the state court to conclude that, then it was not unreasonable for the state court to hold that no *Brady* violation had occurred.

Moreover, to prove a *Brady* violation, a defendant must show that the undisclosed evidence was “known to the prosecution but *unknown to the defense*.” *Agurs*, 427 U.S. at 103 (emphasis added); *see also Fautenberry v. Mitchell*, 515 F.3d 614, 629 (6th Cir. 2008). And a fairminded jurist could agree with the Kentucky Supreme Court that defense counsel knew full well about Berry and what he had to say. One of Fields’s defense attorneys, Rebecca Lytle, testified during the post-conviction hearing that she knew that Berry was in jail and could have “tracked him down” if she had wanted to talk to him. Video Record, 12/14/11, 10:19:50, 10:21:40. And defense counsel meanwhile had another witness, Burton, who suggested in her own testimony that Fields was intoxicated that night. *See* R. 30-19 at 2734. Thus, a fairminded jurist could believe that the defense team was already fully aware of the relevant facts that Berry allegedly possessed—namely that Fields had been intoxicated

on the night in question. Such a jurist could therefore hold that the prosecutor had not concealed those facts.

Finally, to show a *Brady* violation, the defendant must show that the undisclosed evidence was material, *i.e.*, that “there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” *Strickler*, 527 U.S. at 280–82 (quoting *United States v. Bagley*, 473 U.S. 667, 676 (1985)). And a fairminded jurist could believe that Fields failed to show a reasonable probability that the jury would have reached a different verdict (or sentence) if only Berry had testified. Again, Berry was not the only witness to suggest that Fields was intoxicated on the night in question. Burton testified to that fact, too, and thus the jury had before it evidence that Fields had been drinking and using drugs on the night in question. Despite Burton’s testimony, the jury evidently concluded that Fields was sober enough to have committed the crime. A fairminded jurist could believe that the jury would have reached that same verdict if Berry had also testified. In short, it is at least reasonable to think that, if Burton’s testimony was not enough, Berry’s testimony would not have been enough, either.¹⁵ For all three of these

¹⁵ The Kentucky Supreme Court did not explicitly decide whether Berry’s testimony was “material” for the purposes of *Brady*. See R. 33-2 at 631–34. It held only that Fields had failed to show that the prosecution knew about Berry, and that Fields had failed to show that his defense counsel did not know about the information Berry had. *Id.* Thus, one might argue—by analogy to the Supreme Court’s decisions in *Porter*, *Wiggins*, and *Rompilla v. Beard*—that this Court should make the materiality determination *de novo* rather than through the lens of AEDPA. See *Porter*, 558 U.S. at 39 (2009) (“Because the state court did not decide whether Porter’s counsel was deficient, we review this element of Porter’s *Strickland* claim *de novo*.”); *Wiggins*, 539 U.S. at 534 (holding much the same thing); *Rompilla v. Beard*, 545 U.S. 374, 390 (2005) (“Because the state courts found the representation adequate, they never reached the issue of prejudice[,] and so we examine this element of the *Strickland* claim *de novo*.”). It is not clear, however, how those decisions interact with the Court’s later decision in *Harrington*, in which the Court held that “[w]here a state court’s decision is unaccompanied by an explanation, the habeas petitioner’s burden still must be met by showing there was no reasonable basis for the state court to deny relief. This is so whether or not the state court reveals which of the elements of a multipart claim it found insufficient, for § 2254(d) applies when a ‘claim,’ not a component of one, has been adjudicated.” 562 U.S. at 98. Thus, if a state court provides no reasons at all when denying a multi-prong claim, then the habeas court must consider only whether a fairminded jurist could agree with the state court’s ultimate decision denying the claim: any prong will do. It would be strange that, if the state court provides reasons for some of the prongs but not others, then the habeas court must review *de novo* any prong that

reasons, Fields has failed to show that the Kentucky Supreme Court unreasonably applied *Brady* and related cases from the United States Supreme Court. And thus Fields is not entitled to habeas relief based on his third claim.

4. Claim 4

In his fourth claim, Fields argues that his defense attorneys were ineffective for failing to interview two witnesses and call them to the stand: James Berry and his girlfriend, Cindy Mosley. As just discussed, Berry apparently would have testified that Fields was quite intoxicated on the night in question, thus lending support to the defense's theory that Fields could not have unscrewed the storm window or formed the necessary intent. R. 6 at 42. As for Mosley, Fields says that she would have "provided further evidence of Mr. Fields's intoxication and would have undermined any testimony to the contrary." R. 6 at 44. She apparently "would have testified that everyone at Berry's apartment, including Mr. Fields, was intoxicated." *Id.* Thus, the argument seems to go, when counsel failed to have Berry and Mosley testify at trial, he provided constitutionally ineffective assistance of counsel.

The Kentucky Supreme Court addressed this claim on the merits, R. 33-2 at 637–41, which means AEDPA applies to this claim. It is especially difficult to prevail on an ineffective-assistance claim governed by AEDPA. "The standards created by *Strickland* and

the state court fails to mention. Still, that is indeed what Sixth Circuit law seems to require, at least with respect to the two prongs of a *Strickland* claim. See *Rayner v. Mills*, 685 F.3d 631, 638 (6th Cir. 2012) ("When a state court relied only on one *Strickland* prong to adjudicate an ineffective assistance of counsel claim, AEDPA deference does not apply to review of the *Strickland* prong not relied upon by the state court. The unadjudicated prong is reviewed de novo."). In any event, the Court believes that Fields has failed to show that Berry's testimony was material even under de novo review. During Fields's trial, defense counsel argued that Fields was intoxicated and cited Burton's testimony in support. There is no reasonable probability that the jury would have returned a different verdict if only he would have been able to cite Berry's testimony—which would have covered similar territory, and would have come from a witness who suffered from schizophrenia—as well. See *Brooks v. Tennessee*, 626 F.3d 878, 894 (6th Cir. 2010) (holding that evidence was not "material under *Brady*" because it was "cumulative to the evidence already in the record"); *Bell v. Bell*, 512 F.3d 223, 236 (6th Cir. 2008) (holding that evidence was not material for *Brady* purposes when it would have provided only "modest" assistance to the defense).

§ 2254(d) are both highly deferential . . . and when the two apply in tandem, review is doubly so.” *Harrington*, 562 U.S. at 105 (internal quotation marks and citations omitted). “Federal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d).” *Id.* Thus, “[t]he question . . . is not whether counsel’s actions were reasonable, but whether there is any reasonable argument that counsel satisfied *Strickland*’s [already] deferential standard.” *Id.* at 89.

There are a few such arguments here. With respect to Berry, one might argue that counsel did not call him to the stand because he would have testified to the same things that Burton testified to, and thus, would have provided only cumulative testimony. *Robins v. Fortner*, 698 F.3d 317, 330 (6th Cir. 2012) (“While [a certain witness’s] testimony may have strengthened [the defendant’s] alibi defense—a point which itself is debatable given [the witness’s] ill and elderly state—it was cumulative to the testimony given by [the defendant’s] mother and sister.”); *Jells v. Mitchell*, 538 F.3d 478, 489 (6th Cir. 2008) (“[T]he failure to present evidence which is merely cumulative to that which was presented at trial is, generally speaking, not indicative of ineffective assistance of trial counsel.”). One might also argue that counsel did not call Berry because he was a convicted felon who suffered from schizophrenia, had been drinking on the day in question, and thus, would not have made for a compelling defense witness. R. 33-2 at 633. Or one might argue that counsel did not call Berry because the gist of his testimony—that Fields was extremely intoxicated—could have hurt Fields more than it helped. After all, the jury might have concluded that Fields was sober enough to remove the storm window, but high enough to commit a brutal murder. See *Yarborough v. Gentry*, 540 U.S. 1, 7 (2003) (noting that an attorney is not constitutionally deficient when he fails to pursue a strategy that “might well have

backfired”). One might disagree with each of these arguments, but all three are surely “reasonable” arguments for why a constitutionally competent attorney would choose not to call Berry to the stand. *Harrington*, 562 U.S. at 105. And that is all the Commonwealth needs to prevail here. *Id.* Thus, Fields has failed to show that the Kentucky Supreme Court unreasonably applied *Strickland* when it determined that his counsel’s performance was not constitutionally deficient.¹⁶

As for Mosley, the Kentucky Supreme Court assumed, *arguendo*, that counsel was deficient for not calling Mosley to the stand, but held that Fields had nevertheless failed to show prejudice. R. 33-2 at 641 (“Clearly, this testimony would have made no difference in [Fields’s] trial.”). Specifically, the state court pointed out that Mosley could testify only that Fields “seemed drunk,” could not “comment on the extent of his intoxication,” and did not “witness [Fields] consume any pills.” R. 33-2 at 641. Given that another witness—Burton—did testify at trial that Fields was indeed drunk and suggested that he might also have taken pills, Mosley’s testimony seems cumulative, or at least arguably so. *See Brooks.*, 626 F.3d at 894. For these purposes, however, it is enough to say that a fairminded jurist could agree with the Kentucky Supreme Court that Mosely’s testimony would probably not have changed the outcome of Fields’s trial—*i.e.*, a fairminded jurist could believe that there is no “reasonable probability” that Fields would have been acquitted or sentenced to life in prison if only counsel had called Mosley to the stand. Thus, Fields has failed to show that the

¹⁶ Fields also seems to argue that his counsel was ineffective for failing to interview Berry. R. 6 at 40 (“Mr. Fields’[s] counsel were ineffective for failing to interview James Berry and Cindy Mosley.”). Interviews are not evidence, of course; they are simply ways to gather evidence. The decision at issue, therefore, is counsel’s failure, in the end, to call Berry to the stand to testify in court. Since counsel apparently did not interview Berry before deciding not to call him, the Court will of course assume that, if counsel had done so, he would have learned all of the information that Berry had to offer. Even with that information, however, there is a reasonable argument—for reasons explained above—that a competent attorney would have ultimately decided not to call Berry to the stand.

Kentucky Supreme Court unreasonably applied *Strickland* when it rejected Fields's claim that his counsel's failure to call Mosley violated his right to an attorney under the Sixth Amendment. Fields is therefore not entitled to habeas relief on the basis of his fourth claim.

5. Claim 5

In Fields's fifth claim, he again argues that he is entitled to habeas relief on the basis of ineffective assistance of counsel. This time, he contends that his defense attorneys were deficient when they failed to call Officer Roger Jessie and Jailer Michael Stanaford to the stand at trial. According to Fields, Jessie could have testified that Fields "appeared to be intoxicated" on the way to the hospital, "smelled of alcohol," was "unsteady on his feet," and was "acting strange." See Video Record, 12/15/11, at 11:02-11:03, 11:04, 11:06-11:08. Jessie also apparently could have testified that Minnie Tolliver [also known as Burton] was acting suspiciously on the night in question. See Video Record, 12/15/11, 11:01-11:02.¹⁷

Stanaford, on the other hand, apparently could have testified that "there was something wrong with Fields" when he was at the jail—specifically, that he was "dead on his feet," that the jailers needed to prop him up just to get him into his cell, that he was placed in the "mental room," that he could not take his own clothes off, that he was uncommunicative, and that he did not make eye contact with anyone. See Video Record, 12/14/11, 1:14:56, 1:15-1:17, 1:17:10-1:17:38.¹⁸ The testimony of these two men, Fields argues, would have bolstered one aspect of his defense, namely his contention that he was too intoxicated to use the twisty knife in the manner suggested by the prosecution. R. 6 at 47. Thus, Fields

¹⁷ Defense counsel did interview Officer Jessie, as one of counsel's memos indicates. See R. 54-1 at 15.

¹⁸ Defense counsel interviewed Stanaford as well. See R. 54-1 at 17.

concludes, his attorneys rendered constitutionally ineffective assistance by failing to call these men to testify during his trial.

Fields made this argument before the Kentucky Supreme Court, and it was rejected on the merits. *See* R. 33-2 at 641–44.¹⁹ Thus, the question is again whether there is any “reasonable argument” that counsel satisfied the *Strickland* standard. *Harrington*, 562 U.S. at 89. With respect to Stanaford, defense counsel testified during the post-conviction hearing that she thought that Stanaford’s testimony might be irrelevant. R. 33-2 at 642. After all, Stanaford first saw Fields several hours after the murder and thus could not testify as to Fields’s condition at the time of the crime. *Id.* Moreover, counsel said, calling Stanaford risked opening the door to Fields’s criminal past: Stanaford knew that Fields had been in and out of the county jail since he was eighteen years old. *Id.* Admittedly, that risk seems like a small one. Why would a trial judge allow a prosecutor to delve into a defendant’s criminal past simply because the defense called the jailer to the stand? But it was certainly a risk, however small.

Meanwhile the value of Stanaford’s testimony seems slight. He did not observe Fields near the time of the crime and the defense already had witnesses—Burton, John Fields, and Pritchard—who could testify as to Fields’s intoxication. Indeed, they did testify to exactly that during Fields’s trial. And they did so in some detail. *See, e.g.*, R. 30-18 at 2618 (testimony that Fields was “pretty high, you know”); *id.* at 2628 (testimony that Fields

¹⁹ Fields is correct that the Kentucky Supreme Court determined only that his defense attorneys had provided effective assistance even though they did not call Stanaford. R. 33-2 at 642–43. The state court did not reach the prejudice question. *Id.* And that means this Court is entitled to evaluate the prejudice question de novo. *Wiggins*, 539 U.S. at 534 (“In this case, our review is not circumscribed by a state court conclusion with respect to prejudice, as neither of the state courts below reached this prong of the *Strickland* analysis.”). As explained below, however, the Kentucky Supreme Court did not unreasonably apply *Strickland* when it determined that counsel’s performance was constitutionally effective. And thus this Court need not reach the prejudice question at all. The Kentucky Supreme Court reached both the performance and prejudice question with respect to Jessie. R. 33-2 at 643. Thus, AEDPA applies in full to that portion of the claim.

falsely told Burton that he had “killed [his] brother, John”); R. 30-19 at 2734 (testimony that Fields and others were “passing these pill bottles around” and that Fields had “poured” something into his hand and lifted it to his mouth); *id.* at 2762 (testimony that it was “fair to say” that Fields “had on a buzz” on the night in question); *id.* at 2763 (testimony that Fields was “[f]it to be tied I guess, you know, he had a good buzz going”); *id.* (testimony that Fields was “wired up and ready to fight”); *id.* at 2764 (testimony that Fields was “just drunk, had a good buzz on, you know”); *id.* at 2755 (testimony that Fields was “rubbing” a [butcher knife] “up and down [John Fields’s] arm”); *id.* at 2796 (testimony that Fields was “probably feeling good”); *id.* at 2773 (testimony that Fields was standing outside in a parking lot, without a shirt or shoes, with a “silly look on his face,” “being loud”).

Deciding which witnesses to call is a strategic matter. *Boykin v. Webb*, 541 F.3d 638, 649 (6th Cir. 2008). Thus, courts allow counsel wide deference in deciding which witnesses to present in their case. *See id.* (“The decision not to call a particular witness is typically a question of trial strategy that appellate courts are ill-suited to second-guess.” (quoting *United States v. Luciano*, 158 F.3d 655, 660 (2d Cir. 1998))). Because other witnesses testified that Fields was intoxicated on the night in question, there is, at the very least, a “reasonable argument” that Fields’s defense attorneys provided constitutionally effective assistance even though they decided not to call Stanaford as well. *Harrington*, 562 U.S. at 89. Thus, the Kentucky Supreme Court reasonably applied *Strickland* when it rejected Fields’s claim. He is therefore not entitled to habeas relief on the grounds that counsel did not call Stanaford to the stand.

With respect to Jessie, things are even more straightforward. According to Jessie himself, Fields made a damaging statement soon after he was arrested. He apparently called

Jessie a “son of a bitch” and then asked him whether he wanted to “die too.” R. 33-2 at 643. When one asks another whether he wants to “die too,” one, at least arguably, implies that he has made others die in the past. And when one asks someone whether he wants to “die too” just hours after being found next to a dead body with a knife wound in the head, one, at least arguably, implies that he had some role in creating that wound. Put plainly, such a statement is, at least arguably, a straight-up confession to murder.

When defending a murder charge, a lawyer might not want the jury to know that his client had, at least arguably, confessed to the murder (again)—to rather understate the point—and thus a lawyer might choose not to call a witness who had heard his client do so. *See Gentry*, 540 U.S. at 7 (noting that an attorney is not constitutionally deficient when he fails to pursue a strategy that “might well have backfired”); *Tosh v. Lockhart*, 879 F.2d 412, 414 (8th Cir. 1989) (holding that the decision not to use testimony may “reflect the reasonable exercise of judgment in view of the attorney’s concern that the testimony would be conflicting . . . or otherwise unfavorable.”). Thus, there is a reasonable argument—a very reasonable one—for why counsel did not call Jessie to the stand here. *See Harrington*, 562 U.S. at 89. That means Fields cannot show that the Kentucky Supreme Court unreasonably applied *Strickland*. *Id.* The Court therefore cannot grant habeas relief on the basis of Fields’s fifth claim.

6. Claim 6

In Fields’s sixth claim, he argues that his defense attorneys provided constitutionally ineffective assistance when they failed to call an expert witness to testify about the intoxicating effects of the drug phencyclidine, commonly known as PCP. The jury had heard testimony that Fields was intoxicated and might have taken “horse tranquilizers” (a street

name for PCP). Fields argues that an expert could have informed the jury that PCP can “have an effect like LSD,” *i.e.*, it can cause psychotic reactions and hallucinations. R. 6 at 49 (citing Video Record, 12/15/11, 12:48-12:49). “Having proceeded with a theory that Mr. Fields was too intoxicated to commit the crimes,” Fields says, “counsel should have presented expert testimony to support that defense.” *Id.* at 51. Indeed, Fields goes so far as to say that “prevailing professional norms required [counsel] to present expert testimony in support of Mr. Fields’s defenses.” *Id.* at 52. Because counsel had “no reasonable strategic reason for their failure,” Fields argues, “their conduct is deficient performance.” *Id.* at 52–53. In Fields’s view, that deficiency was prejudicial as well. If the jurors had only heard expert testimony, he says, “there is a reasonable probability that the jury would have found [him] not guilty of murder.” *Id.* at 53.²⁰ Thus, Fields concludes, his defense attorneys were constitutionally ineffective and he is therefore entitled to habeas relief.

“Even [on direct] review, the standard for judging counsel’s representation is . . . most deferential[.]” *Harrington*, 562 U.S. at 105. The question under *Strickland* is not whether Fields’s attorneys “deviated from best practices or most common custom,” but whether their “representation amounted to incompetence under prevailing professional norms.” *Id.* “[O]n habeas review the standard is more deferential still.” *Carpenter*, 798 F.3d at 473. Given that Fields raised this claim before the Kentucky Supreme Court—which rejected it on the merits—the question here is whether any “fairminded jurist” could agree with the state court

²⁰ Fields seems to advance two prejudice theories that are mutually exclusive. On the one hand, he argues that the jury might have found him “guilty of second-degree manslaughter” if an expert had testified. The theory there, one supposes, is that the jury might have found that he killed Ms. Horton but was too high to form the specific intent to kill her. On the other hand, he argues that the jury might have acquitted him altogether. The theory there is that the jury might have believed that he was too intoxicated to unscrew the window—and thus might have found that Fields did not have enough time to kill Ms. Horton in the first place.

that counsel satisfied the reasonableness standard set forth in *Strickland*. *Harrington*, 562 U.S. at 101.

“That standard is a general one, governing a great blue-water of attorney conduct: from pre-trial discovery to plea-bargaining, from in-court trial tactics to post-verdict motions, from direct appeals to post-conviction challenges. The Supreme Court has charted only parts of that expanse.” *Carpenter*, 798 F.3d at 473. The Supreme Court’s *Strickland* cases

serve as navigation buoys, marking the points on which courts have foundered in the past—and thus should not approach again. .If a defendant shows that his attorney failed to tell him about a potential plea deal, for example, then a state court should know [because of the Supreme Court’s holding in *Missouri v. Frye*, 132 S. Ct. 1399 (2012)] that it cannot hold that counsel’s performance was reasonable nonetheless. . . . And if a state court were to take that course anyway, we would say that no fairminded jurist would have done the same.

Id.

“But here the [Kentucky] courts found themselves in open water.” *Id.* “The Supreme Court has never reached the specific question[],” *id.*, that the Kentucky Supreme Court answered in this case: namely, whether a defense attorney must call an expert to tell the jury about the effects of a drug when the defense theory is that the defendant is intoxicated. The Supreme Court has never said that a defense attorney need not call such an expert; nor has the Court said that he must. The Court has simply never said. Thus, when the Kentucky Supreme Court was adjudicating Fields’s claim, “[t]he only buoy in sight, far off on the horizon, was the Court’s guidance in *Strickland* itself that counsel’s efforts must be within ‘the wide range of reasonable professional assistance[.]’” *Id.* (citing *Strickland*, 466 U.S. at 689).

That rule is “as general as they come.” *Id.* And “[t]he more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations.” *Alvarado*,

541 U.S. at 664. For “[a]pplying a general standard to a specific case can demand a substantial element of judgment.” *Id.* The question is therefore whether there is “any reasonable argument” why defense counsel did not call an expert witness to testify about the effects of the drug PCP. *Harrington*, 562 U.S. at 89.

There is such an argument, of course. As the Kentucky Supreme Court pointed out, PCP “can induce a psychotic episode, consistent with causing an otherwise non-violent individual to stab an elderly woman in the head.” R. 33-2 at 645. A “seasoned prosecutor” might have “twisted [an expert’s] testimony to stand for the proposition that [Fields] was capable of brutally murdering [Ms.] Horton after ingesting PCP.” *Id.* That is a perfectly valid reason not to call the expert. Indeed, not calling one might well have been the correct decision. After all, a jury might have concluded that Fields was sober enough to use the twisty knife—and sober enough to form the necessary intent—but high enough to be capable of shoving a kitchen knife through an elderly person’s skull.

For these purposes, however, it is enough to say that there is at least a “reasonable argument” that defense counsel’s representation did not fall below objectively reasonable standards when he failed to call an expert to tell the jury about the effects of PCP. *Harrington*, 562 U.S. at 89. Thus, the Kentucky Supreme Court did not unreasonably apply *Strickland* when it rejected Fields’s sixth claim. *Id.* He is therefore not entitled to habeas relief on the basis of that claim.

7. Claim 7

In Fields’s seventh claim, he argues that he is entitled to habeas relief on the basis of a faulty jury instruction. During his trial, Fields asked the court to give the following instruction:

Even though Sam Fields might otherwise be guilty of Murder under Instruction No. ____, you shall find him not guilty under that instruction, if at the time Sam Fields committed the act he was so intoxicated that he did not form the intention to commit the offense.

If you believe from all the evidence beyond a reasonable doubt that he did act wantonly as defined under Instruction No. ____ then you shall find him guilty of Second-Degree manslaughter under Instruction No. ____.

R. 32-1 at 222. The trial court instead gave the jury the following instruction:

Even though the Defendant might otherwise be guilty of Intentional Murder and/or First Degree Burglary, you shall not find him guilty under those Instructions if at the time he committed the offenses, if he did so, he was so intoxicated that he did not form the intention to commit the offenses.

R. 30-23 at 3364.

The trial court's decision to give the second instruction rather than the first one, Fields says, "failed to adequately protect Mr. Fields'[s] right to present his intoxication defense." R. 6 at 55. Specifically, he contends that the "[given] instruction failed to reflect Kentucky law that Mr. Fields's intoxication could contribute to a viable lesser included offense of murder, second degree manslaughter." *Id.* Thus, he concludes, the "omission of the second paragraph" increased "the risk the jury would find Mr. Fields guilty of murder and burglary, thus enhancing the risk he would be convicted of an offense making him eligible for the death penalty." *Id.* at 56.

In his reply brief, Fields is a bit clearer about what, exactly, he finds objectionable about the jury instruction. He says that the trial court's instruction did not "make clear that a finding of voluntary intoxication as a defense [would] not result in an acquittal." R. 59 at 74. Instead, he contends, the trial court should have told the jury that "a voluntary intoxication finding should result in a conviction on a lesser charge such as second degree manslaughter." *Id.* The argument thus seems to run as follows: Fields wanted the trial court to tell the jury

that, if they found that he was intoxicated, they could find him guilty of second-degree manslaughter rather than acquitting him of all homicide charges. In his view, the given instruction put the jury to a starker choice: convict him of murder or let him go free. Thus, he seems to argue, the instructions increased the chance that the jury would convict him.

There are at least two problems with this argument. The first is that Fields has his facts wrong: the trial court did instruct the jury on the lesser-included offense of second-degree manslaughter. Indeed, the court told the jurors that, if they were to “find the Defendant not guilty under [the murder instruction],” then they should “find the Defendant guilty of Second-Degree Manslaughter” if they believed that he had killed Ms. Horton and had done so “wantonly[,] as that term is defined under Instruction No. 2.” R. 30-23 at 3363. Instruction No. 2 in turn provided that a person acts “wantonly” if he creates a “substantial and unjustifiable risk” but is “unaware [of that risk] solely by reason of voluntary intoxication.” *Id.* at 62. Thus, Fields is simply wrong when he faults the trial judge for failing to tell the jury that “a voluntary intoxication finding should result in a conviction on a lesser charge such as second degree manslaughter.” R. 59 at 74. The trial court told the jurors precisely that, in no uncertain terms.

Thus, the trial court gave every bit of the substance that Fields requested—the court simply broke the instruction up into multiple parts. Breaking up a unified jury instruction into smaller parts is certainly permissible under the Due Process Clause. After all, we review those instructions as a whole rather than instruction by instruction. *See Estelle*, 502 U.S. at 73 (“It is well established that the instruction ‘may not be judged in artificial isolation,’ but must be considered in the context of the instructions as a whole and the trial record.” (quoting *Cupp v. Naughten*, 414 U.S. 141, 147 (1973))); *United States v. Park*, 421 U.S. 658,

674 (1975) (“Turning to the jury charge in this case, it is of course arguable that isolated parts can be read as intimating that a finding of guilt could be predicated solely on respondent’s corporate position. But this is not the way we review jury instructions, because ‘a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge.’”); *Boyd v. United States*, 271 U.S. 104, 107 (1926). The Court would therefore reject Fields’s claim even if it was raised on direct review.

The second problem is that this case does not, in fact, come on direct review: this is a habeas case. The Kentucky Supreme Court adjudicated this claim on the merits during Fields’s actual direct appeal, R. 32-1 at 457–58, and thus AEDPA applies to this claim. To obtain habeas relief, therefore, Fields must show that the Kentucky Supreme Court’s application of the United States Supreme Court’s case law was “objectively unreasonable.” *Lockyer*, 538 U.S. at 75. The only Supreme Court case that Fields identifies is *Beck v. Alabama*, 447 U.S. 625, 637–38 (1980). There, the Court held that a jury in a capital case must be permitted “to consider a verdict of a lesser included non-capital offense” so long as “the evidence would have supported such a verdict.” *Id.* at 627, 635–38. As discussed above, the trial court here did indeed instruct the jury that they could render a guilty verdict on a “lesser included non-capital offense”—namely second-degree manslaughter—and thus the trial court in no way ran afoul of the Supreme Court’s holding in *Beck*. Fields has therefore failed to show that the Kentucky Supreme Court unreasonably applied “clearly established law, as determined by the Supreme Court of the United States.” 28 U.S.C. § 2254(d)(1). Fields is therefore not entitled to habeas relief on the basis of his seventh claim.

8. Claim 8

In Fields's eighth claim, he argues that his defense attorney was ineffective "for failing to argue in closing that [Fields] took pills." R. 6 at 57. As discussed at length above, part of Fields's defense was that he was too intoxicated to unscrew the storm window (and perhaps too intoxicated to form the specific intent to kill Ms. Horton). During closing arguments, defense counsel said that "[w]e've heard testimony that drugs may or may not have been ingested. But, certainly, we have testimony that for sure drinking occurred." R. 30-23 at 3368. According to Fields, that language was not punchy enough. In his view, counsel should have told the jurors that Fields had taken pills for sure, rather than telling them that Fields "may or may not have" done so. *Id.* "To state that the evidence on this point was somehow up in the air," Fields argues, was "prejudicial" to his case. R. 6 at 59. In the end, the argument boils down to this: Fields thinks that counsel should have said "drugs were definitely ingested" rather than "drugs may or may not have been ingested." That choice of words was apparently constitutionally deficient. And if counsel had chosen better words, Fields seems to suggest, "there is a reasonable probability" that the jury would have acquitted him. *Id.*

As an initial matter, the words that counsel actually used were more accurate than the words that Fields wishes he had used. Burton did not in fact testify that "drugs were definitely ingested." What she said was that Fields poured something out of a bottle into his hand and then "went like this to his mouth." R. 30-19 at 2734. The record does not reflect in that moment what motion she made, but she apparently raised her hand to her mouth.²¹

²¹ In a later colloquy, defense counsel stated "for the record" that Burton had "moved her hand to her mouth and held it over there when she was talking about the pills." R. 30-23 at 3420.

At first glance, this testimony sounds like fairly strong evidence that Fields had taken drugs. The rub is that Burton immediately caveated her statement. She said that “I don’t know if he for a fact had a pill in his hand.” *Id.* She also said that she knew “nothing about them pills or if in fact they did take them how they was going to react.” *Id.* at 2735. And she confirmed that she had told an investigating officer that she had not seen any pills at all. *Id.* at 2734. Thus, defense counsel’s statement in closing— “[w]e’ve heard testimony that drugs may or may not have been ingested”—was a perfectly fair characterization of the evidence in the record.

Fields’s response is essentially this: forget the record; a defense attorney should just say whatever sounds strongest for the defense. Counsel’s job, Fields says, was to “advocate” rather than “equivocate,” and counsel’s closing argument about the pills, in his view, “was not advocacy.” R. 59 at 76, 77. “There is no strategic reason,” Fields concludes, “not to argue the evidence in the best possible light for your client.” R. 59 at 77.

Few lawyers could quibble with that conclusion as stated. The question, however, is what light is the “best possible” one for one’s client. Any seasoned trial lawyer knows that credibility is king in the courtroom. “Credible lawyers are the ones the jurors increasingly look to as the reliable source of information as the trial progresses.” Thomas A. Mauet, *Trials: Strategy, Skills, and the New Powers of Persuasion* 11 (2005). And “[c]redible lawyers never misstate or overstate the facts or law[;] [they] candidly concede a point when the facts or the law are against them.” *Id.*

Thus, as one treatise puts it, “[i]t is easy to state the basic rules of final argument[.] [The first is that] you may not misstate the evidence or the law.” James W. McElhaney, *McElhaney’s Trial Notebook* 479 (2d ed. 1987); see also Stewart Edelstein, *How to Succeed*

as a Trial Lawyer 178 (2013) (“Do not misquote or exaggerate any testimony or evidence.”) (emphasis added). The reason for this rule is that jurors are only too willing to discount arguments from lawyers who try to overstate their case. See *id.* at 493 (“Overstatement in final argument is usually a needless withdrawal from your personal credibility account. It takes away without giving you anything in return. If the case is truly close—and everyone knows it—it is an opportunity for genuine candor. It is more effective than any gimmick, and can make a difference[.]”). On the other hand, trial lawyers who deal with all the facts in an evenhanded way—even the damaging ones—find that juries are more likely to trust their interpretation of the facts most important to their client’s case. See *Gentry*, 540 U.S. at 9–10 (“[I]f you make certain concessions showing that you are earnestly in search of the truth, then your comments on matters that are in dispute will be received without the usual apprehension surrounding the remarks of an advocate.” (quoting J. Stein, *Closing Argument* § 204, p. 10 (1992-1996))). And once a jury finds a lawyer to be less than fully credible, the lawyer might as well say nothing at all.

Of course, there are times to push the boundaries of the record to argue a disputed factual point. See *McElhaney* at 483 (“[M]ere exaggeration is not necessarily improper.”) (citing *Nashville Ry. & Light Co. v. Owen*, 11 Tenn. App. 19 (1929)). But there is a time, too, for laying out the facts in a more objective manner so as not to oversell. Cf. *Ecclesiastes* 3:1-8. Knowing which time is which is perhaps the quintessential example of a “strategic” decision that a trial lawyer must make. See *Gentry*, 540 U.S. at 5–6 (“[C]ounsel has wide latitude in deciding how best to represent a client, and deference to counsel’s tactical decisions in his closing presentation is particularly important because of the broad range of legitimate defense strategy at that stage.”). Fields’s counsel made such a decision here when

he decided to concede that Burton had not testified conclusively that Fields had taken drugs on the night in question. And strategic decisions are “virtually unchallengeable.” *Akwai v. Mitchell*, 613 F.3d 629, 641 (6th Cir. 2010); *see also Strickland*, 466 U.S. at 690.

Could counsel have decided to be more aggressive with the facts during closing? Perhaps. But the Constitution does not guarantee that a defendant will have a perfect lawyer. It does not guarantee that he will have a good lawyer. It does not even guarantee that he will *not* have a “really bad one.” *Storey v. Vasbinder*, 657 F.3d 372, 374 (6th Cir. 2011) (“[T]he Supreme Court has gone out of its way to make clear that, in order to obtain a new trial on ineffective-assistance grounds, the petitioner must do more than show that he had a bad lawyer—even a really bad one.”). And it certainly does not guarantee a defendant the right to an attorney willing to exaggerate the evidence in his favor—one willing to toe the line between proper argument and misstating the record. The Kentucky Supreme Court hardly applied *Strickland* in an unreasonable manner when it rejected Fields’s claim that his attorney should have played faster and looser with the record. He is therefore not entitled to habeas relief on the basis of his eighth claim.

9. Claim 9

In Fields’s ninth claim, he argues that he is entitled to habeas relief because the court sustained three of the prosecution’s objections during trial. Before going into more detail about the specific facts underlying this argument, it is important to define clearly the question before the Court. The question is not whether the trial judge should have sustained or overruled the prosecution’s objections to these three pieces of testimony. “[E]rrors in application of state law, especially with regard to the admissibility of evidence, are usually not cognizable in federal habeas corpus.” *Walker*, 703 F.2d at 962. For “a state court’s

violation of its own evidentiary law does not, *ipso facto*, provide a basis upon which a federal court may grant habeas relief.” *Bey*, 500 F.3d at 519. Instead, “[i]n conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States.” *Estelle*, 502 U.S. at 68. Thus, to form a basis for habeas relief—even in a non-AEDPA case—the evidentiary ruling in question must be “so fundamentally unfair” as to violate due process. *Bey*, 500 F.3d at 519–20.

Of course, this is an AEDPA case, so the question is not whether this Court would hold on direct review that the trial court violated Fields’s Due Process rights. The reason is that the Kentucky Supreme Court considered Fields’s claim when it performed its own direct review, and it rejected that claim on the merits. R. 32-1 at 442–444. The question before the Court is thus a narrow one: could a fairminded jurist believe that, when the Kentucky Supreme Court affirmed the trial court’s evidentiary rulings, it rendered a decision that was “[consistent] with the holding in a prior decision of [the Supreme] Court” about the meaning of the Due Process Clause in the context of evidentiary rulings? *Harrington*, 562 U.S. at 102. If so, then Fields is not entitled to habeas relief.

The Supreme Court has given little guidance in this area. It goes without saying, of course, that the Due Process Clause does not give a defendant the right to enter any and all evidence that he believes will help his case. If this were so, a trial court would violate the Constitution every time the court said “sustained” in response to a prosecutor’s objection. The Supreme Court has rejected such a freewheeling interpretation of the Due Process Clause, holding that “the right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process.” *Chambers*, 410 U.S. at 295. Still, there are limits on the kinds of evidence that a

state may constitutionally prevent a defendant from presenting. The rule seems to be as follows: “[T]he Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense.” *Crane*, 476 U.S. at 690 (internal quotation marks omitted).²² If a state court’s evidentiary ruling deprives a defendant of that “meaningful opportunity,” then the ruling likewise violates the Due Process Clause. If not, then the evidentiary ruling does not violate the Constitution and is therefore not a basis for a habeas claim in federal court.

First, Fields argues that the trial court deprived him of such a “meaningful opportunity” when it forbade him to question the investigating officer, Detective Gary Stevens, about a conversation that he had with Detective Hill from the Grayson Police Department. Stevens admitted that he had “become angry” with the Grayson police when they made “comment[s] about how [Stevens was] doing the investigation.” R. 30-16 at 38. And Fields wanted to explore this anger further by asking Stevens whether he had “confronted” Hill at a local restaurant, “telling him to stay out of [Stevens’s] case and telling him to quit telling [Stevens] what to do with [his] case.” *Id.* The trial court sustained the prosecution’s objection to this further questioning, telling defense counsel to “move on.” *Id.* at 40.

Part of Fields’s defense theory was apparently that the police had rushed to judgment in his case, a theory that defense attorneys often employ. He argued at trial that “the police did not do a thorough job in investigating the murder of Ms. Horton” because “the police

²² The Supreme Court has stated the rule in slightly different ways over the years. The Court has said that a defendant has “the right to a fair opportunity to defend against the State’s accusations.” *Chambers*, 410 U.S. at 294. It has said that defendant has the right to have the prosecutor’s case encounter and “survive the crucible of meaningful adversarial testing.” *United States v. Cronin*, 466 U.S. 648, 656 (1984). And it has said that the exclusion of evidence violates a defendant’s due process rights when it “significantly undermine[s] fundamental elements of the defendant’s defense.” *United States v. Scheffer*, 523 U.S. 303, 315 (1998). All of these appear to be nothing more than different ways of stating the same general rule. *Crane*’s formulation is clearest; hence this Court will use *Crane*’s formulation.

thought they had gotten their man when they found Mr. Fields looting Ms. Horton's bedroom." R. 6 at 60. Thus, Fields argued, the police "failed to properly investigate the possibility that someone else actually murdered Ms. Horton." *Id.* Fields says that the trial court "hampered" his ability to present this theory when it "refused to allow counsel to ask [Stevens] about any conversations that [Stevens] had with Grayson Police [Detective] Hill." *Id.*

Earlier in the Stevens cross examination, however, counsel had already forced Stevens to admit that he believed "it looked like a strong case," that he "had in [his] mind" what another sergeant had told him about what happened at the crime scene, and that he was "focusing pretty much on one person at the time when [he] started investigating this case, and that person was Mr. Sam Fields." R. 30-16 at 37. Counsel even asked Stevens whether he thought he "had a slam-dunk [case] on [his] hands." *Id.* And of course Stevens had already admitted that he was indeed "angry" with the Grayson police for criticizing his investigation.

True, counsel wanted to go a bit further and explore the details of Stevens's confrontation with the Grayson police. But a fairminded jurist could nevertheless believe that Fields had a "meaningful" opportunity to present his chosen defense—that the police had rushed to judgment—even though the trial court forbade him to ask Stevens more detailed questions about his confrontation with Detective Hill. Put plainly: a fairminded jurist could believe that Fields had already made his point—earlier in the cross—and that the trial court, therefore, did not violate his right to defend himself merely by asking him to move on.

Second, Fields argues that the trial court should have allowed him to offer additional testimony that Murrie O'Brien "was able to enter through the back door of the crime scene and exit out the front door without encountering any police officers or being barred by police tape" on the morning after the murder. R. 59 at 81. In his view, "[a]llowing O'Brien to testify that he was able to walk right through the middle of the crime scene just hours after [the murder] without being stopped by an officer demonstrates the officers did not maintain the integrity of the crime scene." *Id.* at 83. According to Fields, this testimony would have shown that the police failed to "preserv[e] crime scene evidence and maintain[] crime scene integrity during their investigation." *Id.* at 82.

During trial, however, O'Brien testified in open court that he entered the crime scene through "the back door" and exited out of "the front door." R. 30-21 at 3148. He testified that "some police officers and detectives" were there at the scene when he was. *Id.* And he testified that he did not cross "any yellow tape" to get into the house. *Id.* Thus, it is hard to know why Fields is complaining that O'Brien was not allowed "to testify that he was able to walk right through the middle of the crime scene" without "being stopped by an officer." R. 30-21 at 3148. O'Brien in fact testified to those facts.

Fields responds that the trial court should also have allowed O'Brien to answer the following question that a juror wanted to ask: "[w]hen you arrived & came through the back [way/why] did any officers try to stop you from coming into a crime scene." R. 57-10 at 32; R. 30-21 at 3151–52. As an initial matter, the parties dispute the precise wording of the question that the juror wanted to ask. It appears that the trial court believed that the bracketed word was a "why" rather than a "way." Thus, the trial court thought that the juror wanted to ask the following question: "[w]hen you arrived & came through the back why did

any officers try to stop you from coming into a crime scene.” R. 57-10 at 32. The trial court said that “[h]e wouldn’t have any—he wouldn’t have the answer to that question, although it’s a good question. I mean he just simply wouldn’t have the answer to why? Wouldn’t be within his knowledge.” R. 30-21 at 3151. The Court thus refused to give the juror’s proposed question, holding that the question “is not permitted under the rules.” *Id.* at 3152.

The Kentucky Supreme Court seemed to accept the trial court’s interpretation of the question. *See* R. 32-1 at 443 (“Though the record does not reflect the exact wording of the proposed question, it appears that the juror wanted to ask O’Brien why the police did not stop him from entering Horton’s home.”). As a result, the Kentucky Supreme Court held that the question was “speculative and outside O’Brien’s knowledge” and therefore upheld the trial court’s ruling. *Id.* The respondent seems to agree with that interpretation as well. *See* R. 41 at 76 (“A witness can only give testimony as to matters within their personal knowledge. Mr. O’Brien could not give testimony explaining why the police officers did or did not stop him from entering Ms. Horton’s home.”).

Fields, on the other hand, maintains that the scribbled word was a “way” rather than a “why” and that the juror was therefore asking only *whether* the police had tried to stop O’Brien rather than *why* they did so. As far as this Court can tell, Fields is correct. The juror who wrote this question wrote another question in which she used the word “way,” and it looks nearly identical to this disputed word. *Compare* R. 57-10 at 34, *with id.* at 32. And meanwhile the state court’s interpretation of the juror’s question does not make much sense. Under their interpretation, the juror wished to ask “why did any officers try to stop you from coming into a crime scene?” But O’Brien never testified that the officers had tried to stop him in the first place, so it would be strange for a juror to want to ask him “why” they did so.

Finally, the word just looks like a “way” rather than a “why.” Thus, for these purposes, the Court will assume that Fields’s interpretation of the question is the correct one and that the Kentucky courts misconstrued the juror’s question.

It follows that the Kentucky courts were mistaken when they characterized the juror’s question as “speculative.” R. 32-1 at 443; R. 30-21 at 3151. After all, O’Brien certainly had personal knowledge of *whether* any police officers tried to stop him from coming into the house that day. And thus, it seems like the trial court misapplied the state’s evidentiary code when it refused to ask the juror’s proposed question. The problem for Fields, though—as explained above—is that “it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions.” *Estelle*, 502 U.S. at 67–68. Even in a non-AEDPA case, a prisoner can obtain habeas relief only if the evidentiary ruling in question is “so fundamentally unfair” as to violate due process, *Bey*, 500 F.3d at 519–20, *i.e.*, if it deprives him of a “meaningful” opportunity to present a complete defense, *Crane*, 476 U.S. at 690.

Here, O’Brien had already answered the juror’s question, at least implicitly. As noted above, he explained that he entered “the back door,” that he exited out of “the front door,” that “some police officers and detectives” were there at the scene when he was, and that he did not cross “any yellow tape” to get into the house. R. 30-21 at 3148. Fields apparently wished to argue that O’Brien “was able to walk right through the middle of the crime scene” without “being stopped by an officer.” *Id.* And given the testimony that O’Brien gave, Fields was fully able to do so. Perhaps the juror’s proposed question would have further clarified Fields’s point, but he nevertheless had a “meaningful” opportunity to present his

chosen defense. He is therefore not entitled to habeas relief on the grounds that the trial court refused to ask the juror's proposed question.²³

Third, Fields says that the trial court violated his rights by limiting testimony from Johnny Rayburn, the man who bought Ms. Horton's house after she died. R. 6 at 63. Rayburn had apparently given the police free access to the house—which he had converted into a real-estate office—while the prosecution was preparing for Fields's first trial. R. 30-22 at 3279–80. According to Rayburn's testimony, the state's lead investigator—Gary Stevens—had encouraged Rayburn to take the stand and lie on behalf of the prosecution. *Id.* at 3289–90. Rayburn testified that Stevens said, "I need you to go and be a witness" and "testify that you [put] the same two windows . . . on the house that came off." *Id.* at 3290. Rayburn had apparently replaced the original windows with ones he had purchased himself, and thus Rayburn told Stevens that he couldn't "testify to that because that's not the truth." *Id.* Rayburn went on to say that he had called the *Herald-Leader*—the flagship newspaper in Lexington, Kentucky—to report Stevens's misconduct. *Id.* Defense counsel went on to ask Rayburn *why* he had called the *Herald-Leader*, at which point the prosecution objected. The trial court sustained the objection. That ruling, Fields says, violated his due process rights.

²³ Given that the Kentucky courts seem to be plainly mistaken in their interpretation of the juror's question, those courts arguably made a decision that "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). It is at least arguable, therefore, that AEDPA should not apply to this portion of Fields's claim. Thus, in an abundance of caution, this Court has analyzed this portion of the claim *de novo* rather than applying the deference that AEDPA requires. As shown above, Fields's claim fails even under *de novo* review and thus he is not entitled to habeas relief. See *Ben-Yisrayl v. Buss*, 540 F.3d 542, 550 (7th Cir. 2008) ("Despite a conclusion that the Indiana Supreme Court's finding was unreasonable, [he] still must establish that he is entitled to habeas relief."); *Harrison v. McBride*, 428 F.3d 652, 665 (7th Cir. 2005) ("[E]ven when the AEDPA standard does not apply—either because the state court's opinion was unreasonable or because the state judiciary did not address the constitutional claim—[a] prisoner still must establish an entitlement to the relief he seeks." (internal quotation marks omitted)). The reason is that a federal court may grant habeas only if a prisoner is "in custody pursuant to the judgment of a State court . . . in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). AEDPA imposes additional hurdles, of course, but it does not remove that fundamental one.

As the Kentucky Supreme Court pointed out, however, “counsel was given great leeway in its examination of Rayburn and was able to fully develop Rayburn’s allegations of police misconduct.” R. 32-1 at 444. The trial court did allow Rayburn to testify, after all, that the investigator had asked him to lie. And the court likewise allowed Rayburn to testify that, in response to Stevens’s urging, he had called the Lexington newspaper to ask them to “investigate.” R. 30-22 at 3290.

Fields, of course, contends that the trial court should have allowed him to go even further and ask Rayburn *why* he called the newspaper. By that point, however, Rayburn’s reasons were plainly obvious: Rayburn had just said that a police officer had asked him to perjure himself on the stand and that he wanted a major state newspaper to “investigate.” A fairminded jurist could therefore conclude, as the Kentucky Supreme Court did, that the trial court’s “minor limitation” on Fields’s questioning “did not prejudice [Fields] or unduly impair his ability to develop his defense.” R. 32-1 at 444. And a fairminded jurist could easily conclude that the trial court did not deprive Fields of a “meaningful” opportunity to present a complete defense when it forbade Rayburn to tell the jury explicitly why he called the *Herald-Leader*. Fields is therefore not entitled to habeas relief on the basis of his ninth claim.

10. Claim 10

In Fields’s tenth claim, he argues that “the trial court improperly limited his ability to cross examine” two of the prosecution’s witnesses: Officer Lindeman, the arresting officer, and James Dobson, an EMT who treated Fields at the hospital. R. 59 at 85. Specifically, Fields says that the trial court should have allowed him “to ask Officer Lindeman about his conviction for official misconduct based upon an improper relationship with an underage

girl[.]” and should have allowed him “to ask Dobson about his fourth degree assault conviction that resulted from hitting a patient in his care.” *Id.* Both of these offenses were misdemeanors under Kentucky law. *Id.* at 429 (describing Lindeman’s charge as one for “misdemeanor” counts of official misconduct, unlawful transaction with a minor, and harassment”); *id.* at 431 (describing Dobson’s conviction as one for “misdemeanor” assault). Fields raised this claim on direct appeal, and the Kentucky Supreme Court denied it. R. 32-1 at 429–31. Thus, to obtain habeas relief, Fields must show that the state court unreasonably determined the facts or reached a decision that was either contrary to or an unreasonable application of clearly established law as determined by the Supreme Court of the United States. 28 U.S.C. § 2254(d).

Fields does not seem to argue that the state court made any factual error. Instead, he contends that the state court’s decision was “contrary to and/or an unreasonable application” of the Supreme Court’s decision in three cases, *Chambers*, *Crane*, and *Davis*. R. 6 at 66–67 (citing *Davis v. Alaska*, 415 U.S. 308, 317 (1974); *Chambers*, 410 U.S. at 294; *Crane*, 476 U.S. at 683). Even when these cases are read in the light most favorable to Fields, however, they stand only for the broad propositions, respectively, that due process gives a defendant the right to a “fair opportunity” to defend himself, *Davis*, 415 U.S. at 317; that the Constitution gives a defendant a “meaningful opportunity to present a complete defense,” *Crane*, 476 U.S. at 683; and that jurors are “entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place” on the evidence. *Davis*, 415 U.S. at 317.

What the Supreme Court has never said, however, is that the Constitution requires a trial court to allow a defendant to impeach testifying witnesses with prior convictions.

Indeed, as the Sixth Circuit pointed out, “[t]he Supreme Court has not held” that a defendant must “be permitted to cross-examine using a *crimen falsi* conviction,” *i.e.*, a conviction for a crime involving deceit or dishonesty. *Olson v. Little*, 604 F. App’x 387, 399 (6th Cir. 2015). And if a defendant has no clearly established right to impeach a witness who has—say—committed perjury in the past, it would be odd that he would have the right to impeach using the convictions at issue here—sexual misconduct and assault—which have less bearing on the witness’s honesty than perjury does.

After all, even the federal rules give the defendant no such right. A defendant may impeach a witness if the witness has been convicted of a felony. Fed. R. Evid. 609(a)(1). And he may impeach a witness if the witness has been convicted of a crime involving dishonesty or falsity. Fed. R. Evid. 609(a)(2). But the federal rules do not provide that a defendant may impeach a testifying witness using a conviction for more pedestrian forms of misdemeanors. *See* Fed. R. Evid. 609. Thus, to accept Fields’s argument, one would have to believe that the federal rules themselves—at least the impeachment provisions—are unconstitutional. Suffice it to say that a “fairminded jurist” could reject that argument and hold that a defendant has no constitutional right to impeach a witness using the misdemeanor convictions at issue here. Fields has therefore failed to show that the Kentucky Supreme Court unreasonably applied any holding of the United States Supreme Court, which means he is not entitled to habeas relief on the basis of his tenth claim.

11. Claim 11

In his eleventh claim, Fields argues that he is entitled to habeas relief because the trial court refused to let him play for the jury the tape-recorded testimony of Vince Kimmel, a proposed witness for the defense. R. 6 at 67. Kimmel had given an earlier statement in

which he stated (stated, not testified, for he was not under oath at the time and was not subject to any form of cross examination) that Burton had confessed to killing Ms. Horton. R. 57-20 at 7 (“[S]he came straight out and come told me that she . . . nailed the bitch. She snuffed her out just for the simple fact that she thought she was a regular bitch and that’s exactly what she said.”); R. 57-13 at 2. After giving that statement, Kimmel was involved in a car accident that left him seriously injured. *Id.* at 1. Both parties agreed before trial that he was incompetent to testify and thus unavailable for the purposes of Kentucky’s hearsay rules. R. 29-17 at 4. The defense therefore moved to admit the taped statement in lieu of Kimmel’s live testimony. *Id.* The trial court denied that motion on the grounds that Kimmel was not under oath when he made the statement and that the prosecution had not been given the opportunity to cross examine Kimmel. *Id.* at 15 (“The motion to introduce the taped statement of Vincent Kimmel is OVERRULED for the basis that it’s not subject to cross examination.”).

That ruling forms the basis of Fields’s claim. He first made that claim before the Kentucky Supreme Court, however, and the state court denied it on the merits. R. 32-1 at 432–33. Hence AEDPA applies. To obtain habeas relief, therefore, Fields must show that, when the Kentucky Supreme Court affirmed the trial court’s ruling, it rendered a decision that was contrary to, or an unreasonable application of, clearly established law as determined by the Supreme Court of the United States. 28 U.S.C. § 2254(d).

As the Kentucky Supreme Court quite correctly pointed out, a “criminal defendant’s due process rights are not violated by every limitation placed on the admissibility of evidence.” R. 32-1 at 432–33. For “state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials.” *Holmes*, 547

U.S. at 324. “Only rarely” has the Supreme Court “held that the right to present a complete defense was violated by the exclusion of defense evidence under a state rule of evidence.” *Jackson*, 133 S. Ct. at 1992. And thus, once again, the only Supreme Court decisions even remotely on point are *Chambers* and its follow-on cases. And, once again, outside the specific factual contexts of those cases, all those decisions stand for is the general proposition that a state court may not use its evidentiary code to deprive a defendant of the right to present a “meaningful” defense. See *Chambers*, 410 U.S. at 294; *Crane*, 476 at 690–91; *Scheffer*, 523 U.S. at 315. In this habeas case, the question is therefore whether any “fairminded jurist” could conclude that the trial court allowed Fields to present a meaningful defense even though it excluded Kimmel’s statement.

The answer to that question is, of course, “yes.” It is true that a defendant has the right to present evidence, but a fundamental premise of our justice system is that witnesses must give their testimony in open court and subject to cross examination. Moreover, Kimmel’s testimony here would have been mostly cumulative: two other witnesses had already testified that Burton had confessed to the murder. Fields concedes as much. R. 59 at 90. Thus, Fields is wrong to say that the trial court denied him the “right to introduce evidence that another person committed the offense with which he is charged.” R. 6 at 71. Fields presented such evidence through the two other witnesses who testified that Burton had confessed.

Fields responds in a couple of ways. First, he says that “[w]hile the Kentucky Supreme Court quite accurately noted two others indicated Burton confessed, a third unbiased, disinterested witness corroborating those other witnesses would have been dramatic.” R. 59 at 90. “Indeed,” Fields goes on to say, “three strikes and you’re out—and

this would have been a third strike in the juror's eyes.” *Id.* Thus, Fields says, it was unreasonable for the state courts to conclude that his defense was not undermined when the trial court forbade him to enter Kimmel's statements. “Obviously, Fields[’s] defense was undermined,” he concludes, “because he was found guilty.” *Id.*

Where to begin? As an initial matter, that a defendant “was found guilty” of course does not imply that the trial court's rulings “undermined” his right to present a certain defense theory. Sometimes a jury just isn't buying a theory no matter how artfully or completely a lawyer presents it. “Three strikes and you're out” is of course a rule of baseball, but there is no legal rule requiring a jury to accept a fact just because it is said in open court three times rather than two. And, of course, the Supreme Court has never said that a state must allow a defendant to present cumulative testimony just because it would be more “dramatic.” And thus, a fairminded jurist could believe that the Kentucky Supreme Court reasonably applied Supreme Court case law when it rejected Fields's claim. So this argument fails.

Second, Fields quibbles with the Kentucky Supreme Court's reasoning. R. 59 at 90. He says the state court unreasonably determined that Kimmel's statement was hearsay, unreasonably held “that there was available cross [examination] to lessen the weight to be afforded this statement,” and “unreasonably held that these statements bore ‘little indicia’ of reliability.” *Id.* Those arguments are simply not relevant in a habeas case like this one—especially one in which AEDPA provides the standard of review. The question is not whether the Kentucky Supreme Court's decision was unreasonable *simpliciter*, *i.e.*, whether it is internally consistent, whether the premises are sound, whether the conclusions logically

follow, and so on. The purpose of habeas review is not for federal courts to critique the state courts' reasoning abilities: we sit as judges, not as law professors or writing instructors.

The question is also not whether the Kentucky Supreme Court unreasonably applied Kentucky's hearsay rules. *Estelle*, 502 U.S. at 67–68 (“[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions.”); *Early*, 537 U.S. at 10 (holding that a petitioner must show that the Supreme Court holding in question is about a *constitutional* rule applicable to the states, rather than about some other kind of rule). After all, there is no clearly established law from the federal courts interpreting the evidentiary code of the Commonwealth of Kentucky—how could there be?—much less federal law from the Supreme Court of the United States.

Instead, the reasonableness question is far narrower: did the Kentucky Supreme Court reasonably apply *the holdings of the United States Supreme Court*? As explained above, nothing in that Court's cases suggest that a defendant has the right to offer unsworn, uncrossed testimony just because it would be helpful to his defense or just because it would be more “dramatic.” And thus, it was not “unreasonable” for the state court to conclude that the holdings from those cases simply do not apply to this one. Fields is therefore not entitled to habeas relief on the basis of his eleventh claim.

12. Claim 12

In Fields's twelfth claim, he argues that he is entitled to habeas relief because the trial court refused to transport him to two pre-trial hearings involving evidentiary motions. The reason for the court's refusal was that Fields was “housed in the Rowan County jail, not in Floyd County [where the trial was held], and that [Fields] was a security risk due to a prior conviction for escape.” R. 32-1 at 455 n.12; *see also* R. 29-7 at 3–4; R. 29-14 at 2–3.

According to Fields, a defendant has a right to “be present” at “any and all proceedings.” R. 6 at 72–73. This right, he says, comes from the Sixth Amendment—as interpreted by the Supreme Court’s decision in *Faretta v. California*, 422 U.S. 806 (1975)—and the trial court violated that amendment when it excluded Fields from the hearings. *Id.*

As an initial matter, the parties dispute whether Fields procedurally defaulted this claim.²⁴ “The extent to which th[is] claim[] [is] procedurally defaulted is a nettlesome question; the extent to which [it is] meritless, much less so.” *Storey*, 657 F.3d at 380 (citation omitted). Thus, the Court will “cut to the merits here.” *Id.*

Fields first raised this claim in the Kentucky Supreme Court, albeit in a single paragraph. The state court denied that claim on the merits, holding that neither of the hearings were a “critical stage” in Fields’s trial. R. 32-1 at 455–56. That means AEDPA applies to this claim. Fields must therefore show that the state court’s decision was contrary to or an unreasonable application of United States Supreme Court case law. *See* 28 U.S.C. § 2254(d).

Under the Supreme Court’s precedents, a defendant does not have a constitutional right to be present at all hearings that might concern his trial. Instead, he has a right to

²⁴ The dispute is over whether Fields properly preserved his argument that the trial court committed “structural error” when it refused to transport Fields to the courthouse for the hearings. *Compare* R. 6 at 73 (“This is a structural defect.”), *with* R. 41 at 87 (“In his petition, Fields presents essentially the same perfunctory, one paragraph, argument he presented to the Kentucky Supreme Court The only difference is he no[w] makes an assertion that ‘this is structural defect.’” No such claim was presented to the Kentucky Supreme Court in his direct appeal.”), *and* R. 59 at 93 (arguing that the state has waived any procedural-default argument). The argument that this is structural error, however, is meritless even under de novo review. When a court commits structural error—for example, by denying a defendant the right to counsel altogether—then the defendant is entitled to a new trial, no questions asked. *See, e.g., Gideon v. Wainwright*, 372 U.S. 335 (1963); *Johnson v. United States*, 520 U.S. 461 (1997). The opposite of a “structural” error is one subject to “harmless error analysis.” *See generally Neder v. United States*, 527 U.S. 1, 8–9 (1999) (discussing this distinction). And the Supreme Court has made clear that when a trial court deprives a defendant of his right to be present, that error is nevertheless subject to “harmless error” analysis. *Rushen v. Snyder*, 464 U.S. 114, 118 n. 2 (1983). Thus, the error about which Fields complains is not in fact a “structural” one. *See United States v. Riddle*, 249 F.3d 529, 535 (6th Cir. 2001) (“[T]he right to be present at voir dire is not one of those structural rights whose violation constitutes per se error. Rather, there must be prejudice in the absence to warrant reversal.”).

present only if “his absence might frustrate the fairness of the proceedings.” *Faretta*, 422 U.S. at 819 n.15. As the Court put it in another case, “[s]o far as the Fourteenth Amendment is concerned, the presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, *and to that extent only*.” *Snyder v. Massachusetts*, 291 U.S. 97, 107–08 (1934) (emphasis added); *see also Kentucky v. Stincer*, 482 U.S. 730, 745 (1987) (“[A] defendant is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure.”). Fields is thus plainly mistaken when he says that “the right to be present extends to *any and all proceedings*.” R. 6 at 72–73 (emphasis added).

The “proceedings” at issue here were two hearings concerning evidentiary motions. During the first hearing, the parties discussed whether certain evidence would be admissible under Kentucky’s version of the character-evidence rule. R. 29-7 at 3. As the trial court pointed out, the hearing concerned a purely “legal argument” and “didn’t concern [the facts of the case].” *Id.* During the second hearing, the parties discussed whether Kimmel should be deemed “available” to testify. R. 29-14 at 4–5. The trial court noted, again, that nothing was done “on the merits of the case whatsoever” during this hearing. *Id.* at 3. Fields argues that, if he was allowed to attend those hearings, he could have helped his attorney.

As an initial matter, it is hard to see how Fields could have done so. Neither of the issues discussed during these hearings involved factual disputes, and it is unclear how Fields—who had no legal training—could have assisted his attorney in making purely legal arguments. Fields does not tell us. And without such knowledge, it is hard to imagine what sort of “assistance” he could have provided in this legal setting.

More to the point, though, the question whether Fields *could* have helped his attorney during the hearings was not the question before the Kentucky Supreme Court. And it is certainly not the question before this Court now. The question in the state court was whether Fields's absence "thwarted" the "fair[ness]" and "just[ice]" of those two hearings. *Snyder*, 291 at 105–06; *see also United States v. Gibbs*, 182 F.3d 408, 436 (6th Cir. 1999). The question here is whether a fairminded jurist could believe that these hearings were fair and just despite Fields's absence.

Of course, a fairminded jurist could believe exactly that. Such a jurist could believe that fairness and justice—as those terms have been interpreted by the Supreme Court—do not require that a defendant be present during purely legal arguments. After all, the Supreme Court has never suggested that a defendant must be present during such arguments. And meanwhile, the operative terms—fairness and justice—are fuzzy enough that fairminded jurists could disagree as to what, precisely, they require. *See Alvarado*, 541 U.S. 652 at 664 ("The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations.").

Without more specific guidance from the Supreme Court as to what those terms mean in this context, this Court has no basis on which to conclude that the state courts' interpretation of those terms was "objectively unreasonable." *Lockyer*, 538 U.S. at 75. What language in the Supreme Court's cases would allow this Court to say that? And what language would allow this Court to say that no fairminded jurist could take a different view than Fields does as to the importance of his presence at these hearings? Fields does not say, of course, and thus he has failed to show that the Kentucky Supreme Court unreasonably

applied the Supreme Court's cases when it denied Fields's claim. That means he is not entitled to habeas relief on the basis of claim twelve.

13. Claim 13

In his thirteenth claim, Fields argues in his opening brief that the trial court erred by ordering a second competency hearing before his second trial. R. 6 at 73. In his reply brief, however, Fields states that he "withdraws this Ground for Relief." R. 59 at 96. Thus, the Court will not address the merits of claim thirteen.

14. Claim 14

In his fourteenth claim, Fields argues that the trial court should have excluded certain testimony from Detective Stevens. During trial, the prosecutor asked Stevens about why he had not saved the section of the bed sheet that was around Ms. Horton's throat. R. 30-22 at 3262-64. Stevens responded that he had not saved the sheet because he had assumed that the blood on the sheet was Ms. Horton's—the sheet was, after all, next to the open neck wound on Ms. Horton's body. *Id.* at 3263. The prosecutor then asked Stevens whether, "based on [his] training[,] education[,] and experience," he would have expected "to find one or two drops of [one person's] blood in a gallon" of someone else's blood. *Id.* In response to this question, Stevens first caveated that he was "not a serologist." *Id.* He then specified the source of his knowledge: "in-service classes that we had and training." And he finally answered that if the blood had been "coagulated"—by which it seems he meant "mixed" rather than "clotted"—then "you're not going to have a satisfactory result on that." *Id.*

In Fields's view, that testimony "required scientific or other specialized knowledge that [Stevens] was not qualified to give." R. 6 at 77. Fields points out that "Stevens was never qualified as an expert in anything related to blood evidence." *Id.* And he contends that

there was therefore “insufficient evidence to support a finding [that] Stevens was qualified to give such opinion testimony.” *Id.* Thus, Fields goes on to conclude, the trial court “erred to [his] substantial prejudice” and indeed “denied him due process.” *Id.*

Again, Fields raised this claim on direct review. R. 32-1 at 445–47. Again, the Kentucky Supreme Court adjudicated it “on the merits,” noting that Stevens was “a twenty-two year veteran of the Kentucky State Police who had also worked four years in the crime lab,” that he had not “testif[ied] to the scientific process of blood examination,” and that “his response was limited to an explanation for his own actions at the crime scene and his motivations for such actions.” *Id.* at 446. And again, the claim concerns whether the trial court violated the Due Process Clause when it allowed Stevens to answer the prosecutor’s questions. Thus—again—AEDPA applies, *Chambers* controls (along with its progeny), and the question presented is whether any fairminded jurist could conclude that Fields had a “meaningful” opportunity to present a complete defense despite Stevens’s testimony.

Here, Fields points out that “[o]ne question the Commonwealth struggled throughout the trial to answer was ‘where is the blood?’” R. 59 at 98. Fields had apparently cut his hand before going to Ms. Horton’s house that night and was “dripp[ing] blood everywhere he went” but “none of [his] blood was found on Ms. Horton or her bed.” *Id.* Thus, one key argument that defense counsel made was that Fields’s blood would have been found on the bed if Fields were the real killer. In Fields’s view, “Stevens’[s] testimony was an improper, inadmissible attempt to explain away the lack of blood evidence,” thus depriving Fields—the argument seems to go—of the ability to present a meaningful defense. *Id.*²⁵

²⁵ Fields says that “the Commonwealth sought to use Stevens’s testimony to explain a negative with a negative.” R. 59 at 98. It is not clear to the Court what that sentence means.

The problem with that argument is that Stevens's testimony did not explain away the lack of blood evidence. Stevens did not testify that Fields's blood was found at the scene. Indeed, nobody said that. He testified only that he had not kept the sheet because he believed that it would not contain a detectable amount of Fields's blood. Even that testimony was half-hearted at best, and the prosecution offered it only to rehabilitate Stevens after Fields himself attacked the integrity of Stevens's testimony on direct examination. R. 30-22 at 3250-51 ("To the best of your recollection, you never sent any of those sheets, bedspreads, or clothing Ms. Horton may have had on at the time, into evidence for any type of evaluation?"). Thus, it seems like the prosecution was merely asking Stevens *why* he did what he did, rather than attempting to introduce scientific testimony.

In the end, though, Stevens failed to present any evidence that—or even suggest that—Fields's blood was *in fact* present at the crime scene.²⁶ Fields was left free to argue—and argue he did—that the prosecution had failed to answer the question: "where is the blood?" A fairminded jurist could therefore conclude that, notwithstanding Stevens's testimony, the trial court gave Fields the opportunity to present a "meaningful" defense. *Crane*, 476 U.S. at 690; *Chambers*, 410 U.S. at 294; *Trombetta*, 467 U.S. at 485; *Washington*, 388 U.S. at 19. This is especially true given that Stevens explicitly pointed out that he was not an expert witness, thus encouraging the jury to give his testimony the appropriate significance, *i.e.*, an explanation for why he did what he did while investigating

²⁶ One might respond that Stevens's testimony provided a reason why no blood was found at the scene: namely that it would not have been possible to detect Fields's blood on the sheet given the large quantity of Ms. Horton's blood also present on the sheet. That argument might have some teeth if the sheet had been tested and found not to have any of Fields's blood on it. In that case, perhaps Stevens's testimony could have been thought to "explain" why Fields's blood was absent. But that is not what happened. The police never tested the sheet at all. And if the sheet wasn't tested, then the fact that a test might not have detected any blood in no way suggests that there was blood. That fact at most suggests that the police had a valid reason not to test the sheet. And that does seem to be the purpose for which the prosecution used Stevens's testimony.

the case. In sum, Fields has failed to show that the Kentucky Supreme Court unreasonably applied *Chambers* (and the Supreme Court cases saying roughly the same thing as *Chambers*) when it rejected Fields's fourteenth claim. He is therefore not entitled to habeas relief on the basis of that claim, either.

15. Claim 15

In Fields's fifteenth claim, he argues that the trial court erred when it excused three jurors for cause after they equivocated about their ability to impose the death penalty. Fields made this argument in the Kentucky Supreme Court, R. 32-1 at 422–24, the state court rejected it on the merits, *id.*, and thus AEDPA's gatekeeping requirements apply, 28 U.S.C. § 2254(d). The question is therefore whether the state court unreasonably applied any Supreme Court cases when it affirmed the trial judge's decision to excuse those three jurors.

In *Witherspoon v. Illinois*, the Supreme Court “set forth the rule for juror disqualification in capital cases.” *White v. Wheeler*, 136 S. Ct. 456, 460 (2015) (discussing *Witherspoon v. Illinois*, 391 U.S. 510 (1968)). “*Witherspoon* recognized that the Sixth Amendment's guarantee of an impartial jury confers on capital defendants the right to a jury not ‘uncommonly willing to condemn a man to die.’” *Id.* (quoting *Witherspoon*, 391 U.S. at 521). “But the Court with equal clarity has acknowledged the State's ‘strong interest in having jurors who are able to apply capital punishment within the framework state law prescribes.’” *Id.* (quoting *Uttecht v. Brown*, 551 U.S. 1, 9 (2007)). “To ensure the proper balance between these two interests, only ‘a juror who is substantially impaired in his or her ability to impose the death penalty under the state-law framework can be excused for cause.’” *Id.* (quoting *Uttecht*, 551 U.S. at 9).

The question whether a juror is “substantially impaired in his ability to impose the death penalty” is of course a tightly fact-bound one. To answer that question, a trial court must evaluate the juror’s demeanor, credibility, tone of voice, and so on. The trial court must determine, for example, whether a juror “means it” when he says that he could (or could not) impose the death penalty, or whether he is instead “faking good” (or “faking bad”). That is a determination that must be made on “the front lines,” as it were, rather than “back in a headquarters tent.” *United States v. Clay*, 667 F.3d 689, 703 (6th Cir. 2012) (Kethledge, J., dissenting) (discussing deference to a trial court in a different context). After all, “many veniremen simply cannot be asked enough questions to reach the point where their bias has been made ‘unmistakably clear’; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings.” *Wainwright v. Witt*, 469 U.S. 412, 424–25 (1985).

Even on direct review, therefore, “reviewing courts owe deference to a trial court’s ruling on whether to strike a particular juror” on the grounds that he is “substantially impaired in his or her ability to impose the death penalty.” *White*, 136 S. Ct. at 460. Thus, “a trial court’s ‘finding may be upheld even in the absence of clear statements from the juror that he or she is impaired[.]’” *Id.* (quoting *Uttecht*, 551 U.S. at 7). When a federal court “review[s] a state-court ruling under the constraints imposed by AEDPA,” the court “must accord an additional and ‘independent, high standard’ of deference” to the trial judge’s determination about whether a juror can exercise his duties. *White*, 136 S. Ct. at 460 (quoting *Uttecht*, 551 U.S. at 10). And thus when AEDPA applies—as it does here—the petitioner is not entitled to relief so long as “there is ambiguity in the prospective juror’s

statements” about whether he would be substantially impaired in his ability to impose the death penalty. *Id.* at 461 (citing *Uttecht*, 551 at 7) (quoting *Witt*, 469 U.S. at 434).

Here, the prosecution asked juror 26 whether he “just [did not] feel like [he] could consider imposing the death penalty” and he responded “yeah.” R. 30-1 at 162. The trial court asked juror 27 whether he was “saying that [he] could not even consider imposing [death] as a penalty” and he responded “[n]o I could not.” R. 30-2 at 260. And juror 86 stated flat out: “I don’t believe I could do it”—the “do it” being “impose the death penalty.” R. 30-9 at 1235. It is true, as Fields points out, that these jurors waffled a bit under further questioning about whether they could impose the death penalty. On occasion, they made statements suggesting that they could perform their duties and consider a death sentence. *See* R. 30-1 at 125–26, 128–29; R. 30-2 at 262; R. 30-9 at 1228. But given the statements quoted above, there was at the very least “ambiguity” as to whether these jurors would be “substantially impaired” in their ability to impose the death penalty. And under *White v. Wheeler*, that ambiguity requires this Court to deny Fields habeas relief on the basis of claim fifteen.

16. Claim 16

In his sixteenth claim, Fields argues that the trial court erred by refusing to exclude, for cause, two jurors—juror 17 and juror 43—thus violating, in his view, the Supreme Court’s holdings in *Morgan v. Illinois*, 504 U.S. 719 (1992) and *Lockhart v. McCree*, 476 U.S. 162 (1986). The problem is that Fields used two of his peremptory strikes to excuse jurors 17 and 43, and thus in the end they did not participate in Fields’s trial. “Individuals who do not actually sit on the jury that renders a verdict have no impact on a defendant’s right to an impartial jury.” *Bowling v. Haeberlin*, No. CIV. 03-28-ART, 2012 WL 4498647,

at *23 (E.D. Ky. Sept. 28, 2012) (citing *Ross v. Oklahoma*, 487 U.S. 81, 85 (1988)). As the Supreme Court has made clear, “peremptory challenges are not of constitutional dimension. They are a means to achieve the end of an impartial jury.” *Ross*, 487 U.S. at 88 (citations omitted).

Thus, to show a constitutional violation, a defendant must show that an impartial juror was actually “empaneled.” *Morgan*, 504 U.S. at 729. “So long as the jury that sits is impartial,” the Court held, “the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated.” *United States v. Martinez-Salazar*, 528 U.S. 304, 780 (citing *Ross*, 487 U.S. at 88); *see also Skilling*, 561 U.S. at 395 n.31 (holding that defendant was not deprived of “any constitutional right” where no partial juror sat on the jury); *Rivera v. Illinois*, 556 U.S. 148, 160 (2009) (rejecting the argument that “the deprivation of a state-provided peremptory challenge requires reversal as a matter of federal law”). Fields does not dispute that the actually empaneled jury was a constitutionally impartial one, and thus he has failed to show that the state courts violated his constitutional rights. He is therefore not entitled to habeas relief.

17. Claim 17

In his seventeenth claim, Fields argues that the trial court erred when it excluded juror 34 from the jury. Fields raised this claim on direct review, and the Kentucky Supreme Court denied it on the merits. R. 32-1 at 422–23. Thus AEDPA, applies. 28 U.S.C. § 2254(d). And as explained in great detail while addressing claim fifteen, when AEDPA applies to a juror-exclusion claim like this one—which the Supreme Court calls a “*Witherspoon-Witt*” claim—the federal habeas court must be “doubly deferential” in its review. *White*, 136 S. Ct. at 460 (citing *Burt v. Titlow*, 134 S. Ct. 10, 13 (2013)). The petitioner is not entitled to relief

so long as “there is ambiguity in the prospective juror’s statements” about whether he would be substantially impaired in his ability to impose the death penalty. *Id.* (citing *Uttecht*, 551 U.S. at 7 (quoting *Witt*, 469 U.S. at 434)).

During voir dire, juror 34 said, “I couldn’t live with myself sending a person to the pen. . . . It would weigh heavy on my conscience.” R. 30-5 at 582. She also said, “[w]hether they’re guilty or not guilty, I just don’t think I could [send someone to prison].” *Id.* at 583. Indeed, as the Kentucky Supreme Court correctly pointed out, she repeated this statement—or something like it—“no less than five times.” R. 32-1 at 422. As for the death penalty in particular, she said, “[t]o tell you the truth, I don’t know . . . I just don’t know if I could or not.” *Id.* at 584.

Fields responds that some of juror 34’s answers suggested that she might be able to perform her duties as a member of the jury. After all, Fields says, she also “expressed that she could follow the law even if she disagreed with it,” said that she “realized the importance of following the law,” and “acknowledged an understanding, from her previous jury experiences, of what an admonishment was.” R. 59 at 119 (citing R. 30-5 at 571, 576, 578). Fair enough, but what about her earlier statements about not being able to send someone to prison—much less impose a sentence of death—“[w]hether they’re guilty or not guilty[?]” R. 30-5 at 582–83. Those statements are of course not consistent with a citizen prepared to serve as a juror in a criminal case of any kind, much less a capital case like this one. What to do in light of those statements?

Fortunately, the Supreme Court has instructed courts on exactly what to do. “The judgment as to whether a venireman is biased,” the Court has held, “is based upon determinations of demeanor and credibility that are peculiarly within a trial judge’s

province.” *Uttecht*, 551 U.S. at 7 (internal quotation marks omitted). “Such determinations [are] entitled to deference even on direct review; the respect paid such findings in a habeas proceeding certainly should be no less.” *Id.* The reason is that “many veniremen simply cannot be asked enough questions to reach the point where their bias has been made ‘unmistakably clear’; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings.” *Witt*, 469 U.S. at 424–25. “Thus, when there is ambiguity in the prospective juror’s statements, the trial court, aided as it undoubtedly [is] by its assessment of [the venireman’s] demeanor, [is] entitled to resolve it in favor of the State.” *Uttecht*, 551 U.S. at 7 (citing *Witt*, 469 U.S. at 434).

In sum, juror 34 made some statements that suggested she could honor her oath as a juror. She made others that suggested she could not. The proper adjective for these statements is the word “ambiguous.” Thus, because “there [was] ambiguity in the prospective juror’s statements” about whether she could impose the death penalty, Fields is not entitled to habeas relief on the basis of claim seventeen. *White*, 136 S. Ct. at 460.

18. Claim 18

The Court has already dismissed claim 18 in a separate order. *See* R. 58.

19. Claim 19

In his nineteenth claim, Fields argues that the trial court erred by refusing to give six jury instructions that he requested. Fields made each of these arguments before the Kentucky Supreme Court, which rejected each of them on the merits. R. 32-1 at 463–65. AEDPA therefore applies to this claim. 28 U.S.C. § 2254. Fields does not argue that the state court unreasonably determined the facts, and thus to obtain habeas relief he must show

that the court rendered a decision that was contrary to, or an unreasonable application of, clearly established law as determined by the Supreme Court of the United States. *Id.*

Fields first faults the trial court for failing to define the term “mitigating circumstances” for the jury. R. 6 at 87–88. Fields had apparently asked the court to instruct the jury that such circumstances are “[a]ny facts or factors about Sam Fields, the crime, or the case which do not justify or excuse the offenses but which in fairness and mercy lessen or reduce his responsibility or moral culpability for the crime, or which demonstrate that he is someone whose past or present circumstances indicate that he should a receive a penalty other than death.” *Id.*; *see also* R. 32-1 at 241–42; R. 30-23 at 3439–41. The trial court balked at the words “fairness and mercy”; in the court’s view such language was “not what the law provides.” R. 30-23 at 3441. The court thus refused to give that instruction or otherwise define the term “mitigating circumstances,” which, in Fields’s view was, a constitutional error.

Fields cites no case from the United States Supreme Court, however, suggesting that a trial court must define the term “mitigating circumstances” for the jury. He certainly cites no Supreme Court case *holding* that a trial court must do so. In the absence of such a case, of course, it is impossible to say that the state court acted “contrary to” (or “unreasonably applied”) any clearly established law from the United States Supreme Court.

Moreover, if the trial court had defined mitigating circumstances for the jury in too narrow a fashion—or if he had simply chosen the wrong words with which to do so—then the trial court would have arguably violated language from the Supreme Court stating that a jury must be allowed to “consider[], as a mitigating factor, any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as

a basis for a sentence less than death.” *Mills v. Maryland*, 486 U.S. 367, 375 (1988) (internal quotation marks omitted); *see also Buchanan v. Angelone*, 522 U.S. 269, 276 (1998) (“[T]he sentencer may not be precluded, and may not refuse to consider, any constitutionally relevant mitigating evidence.” (citations omitted)); *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978); *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986). It is easy to see, therefore, why the trial court was not eager to say too much to the jury about mitigating circumstances. *See, e.g., United States v. Gabrion*, 719 F.3d 511 (6th Cir. 2013) (en banc) (demonstrating the problems that arise when a trial court attempts to define which circumstances are “mitigating” and which are not). Under the Supreme Court’s case law, the question of what constitutes a mitigating circumstance is, with a few exceptions, *see id.* at 521, up to the jury to decide. Mitigating evidence is any evidence that “the sentencer could reasonably find . . . warrants a sentence less than death.” *Tennard v. Dretke*, 542 U.S. 274, 285 (2004) (internal quotation marks omitted).

In sum, nothing from the Supreme Court’s cases suggests that a trial court must define the term “mitigating circumstances.” Indeed, those cases, at least arguably, suggest that a trial court should not do so. This is especially true when the proposed instruction would limit the kinds of mitigating evidence that the jury might consider—which this instruction, at least arguably, would have. Fields is therefore not entitled to habeas relief on the grounds that the trial court failed to define the term “mitigating circumstances” for the jury.

Second, Fields argues that the trial court should have told the jurors that they were “not required to sentence Sam Fields to death” even if they “found the aggravating circumstance in this case.” R. 6 at 88; *see also* R. 32-1 at 243; R. 30-23 at 3444. As an

initial matter, a court reviews jury instructions as a whole rather than instruction by instruction. See *Estelle*, 502 U.S. at 77 (“It is well established that the instruction ‘may not be judged in artificial isolation,’ but must be considered in the context of the instructions as a whole and the trial record.” (quoting *Cupp*, 414 U.S. at 147)); *Park*, 421 U.S. at 674 (“Turning to the jury charge in this case, it is of course arguable that isolated parts can be read as intimating that a finding of guilt could be predicated solely on respondent’s corporate position. But this is not the way we review jury instructions, because ‘a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge.’” (quoting *Cupp*, 414 U.S. at 146–47)); *Boyd v. United States*, 271 U.S. at 107.

Here, the jury instructions as a whole made quite clear that the jurors need not impose the death penalty even if they found an aggravating factor. The trial court told the jury that they could give Fields any one of four sentences: the death penalty, life imprisonment with no opportunity for parole within 20 years, life imprisonment, or at least 20 years imprisonment. R. 32-1 at 233. The court went on to tell the jury that they *could* impose the death penalty *only* if they found an aggravating circumstance beyond a reasonable doubt.²⁷ *Id.* Read in their entirety, these instructions make clear that the jury was allowed to impose the death penalty after finding an aggravating circumstance, but that the jury was not required to do so. Fields’s proposed instructions thus seems like mere surplusage. Moreover, Fields points to no Supreme Court case holding that the trial court must give the jurors *a separate instruction* telling them that they may decline to impose the death penalty even after finding an aggravating circumstance. For both of these reasons, Fields has failed

²⁷ The instruction also made clear that the jurors could impose one of the other sentences—namely “confinement in the penitentiary for life without benefit of probation or parole until he has served a minimum of 25 years of his sentence”—only if they found an aggravating circumstance. R. 32-1 at 233.

to show that the Kentucky Supreme Court unreasonably applied a holding of the United States Supreme Court—much less that the state court acted “contrary to” such a holding. Fields is therefore not entitled to habeas relief on the grounds that the trial court failed to give this instruction to the jury.

Third, Fields argues that the trial court needed to tell the jurors that they did “not have to agree on the existence of any of the mitigating circumstances.” R. 6 at 89; *see also* R. 32-1 at 244; R. 30-24 at 3445. The court’s refusal to do so, Fields says, violated the Supreme Court’s holding in *Mills*. In that case, the Court reiterated that, “in a capital case,” the jury must be allowed to consider “as a mitigating factor, any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.” *Mills*, 486 U.S. at 384 (first quoting *Eddings*, 455 U.S. at 110; then quoting *Lockett*, 438 U.S. at 604). The “corollary” of that rule, the Court held, was that “the sentencer may not refuse to consider or be precluded from considering any relevant mitigating evidence.” *Id.* (citations and quotations omitted). The jury in *Mills* had been given a form requiring them to mark “yes” or “no” besides each aggravating and mitigating circumstance, *id.* at 370–71, and due to the format of the form, the Court held, the jurors “well may have thought they were precluded from considering any mitigating evidence unless all 12 jurors agreed on the existence of a particular [mitigating] circumstance.” *Id.* at 384. Such a form was impermissible, the Court held, because one juror could “block” consideration of a mitigating circumstance “and consequently require the jury to impose the death penalty.” *Id.*

Here, Fields does not explain how the trial court’s refusal to give his requested instruction implicates the concern at issue in *Mills*—that an individual juror might believe he

could consider mitigating evidence only if all of his fellow jurors decided to find a mitigating factor. But in any event, the jury form here bore no resemblance to the one at issue in *Mills*, and nothing in the trial court's instructions otherwise suggested that the jury must make unanimous findings as to a mitigating circumstance.

In fact, the court's instructions suggested quite the opposite when read as a whole. The trial court instructed the jurors that, before they could sentence Fields to death, they needed to agree unanimously on the existence of an aggravating factor beyond a reasonable doubt. This instruction came in two parts. First the judge told the jurors that "you cannot fix [Fields's] sentence at death . . . unless you are satisfied from the evidence that one of the statements listed in [the aggravating-circumstances instruction] is true in its entirety." R. 32-1 at 233. The judge then told the jurors that their verdict "must be unanimous." *Id.* at 236. Thus, under those instructions, the jurors could not sentence Fields to death unless each of them was convinced beyond a reasonable doubt as to an aggravating factor.

In stark contrast, the trial court's mitigating-circumstances instruction told the jurors only that "in fixing a sentence for the defendant for the offense of murder, you shall *consider* such mitigating or extenuating facts or circumstances as have been presented to you in the evidence and you believe to be true." *Id.* at 231. Thus, "when compared with the explicit unanimity instruction on aggravating factors, silence on mitigating factors would likely cause the jury to assume that unanimity was not a requirement." *Bowling v. Parker*, No. CIV. 03-28-ART, 2012 WL 2415167, at *20 (E.D. Ky. June 26, 2012); *see also Kordenbock v. Scroggy*, 919 F.2d 1091, 1121 (6th Cir. 1990) (Kennedy, J., concurring) ("The instructions carefully stated that finding an aggravating factor required such agreement, but it cannot be reasonably inferred that silence as to finding a mitigating factor would likely cause the jury

to assume that unanimity was also a requirement. Indeed it would indicate the opposite.”). “This makes sense. If a court specifically instructs that an aggravating factor must be unanimous, but says nothing about unanimity with regards to mitigating factors, a reasonable jury would conclude that the unanimity requirement did not apply.” *Bowling*, 2012 WL 2415167, at *20.

In sum, the question under *Mills* is whether there was a “substantial probability that reasonable jurors [given the jury instructions at issue] well may have thought they were precluded from considering any mitigating evidence unless all 12 jurors agreed on the existence of [a mitigating circumstance].” *Mills*, 486 U.S. at 384. For the reasons discussed above, a fairminded jurist could believe that there was no such “substantial probability” here. And thus, the Kentucky Supreme Court did not unreasonably apply *Mills*—or render a decision contrary to that case—when it rejected Fields’s argument that the judge needed to explicitly tell the jurors that they did “not have to agree on the existence of any of the mitigating circumstances.” R. 32-1 at 244. Fields is therefore not entitled to habeas relief on the grounds that the trial court failed to give that instruction.

Fourth, Fields argues that the trial court should have given the jury more specific definitions of two of the available sentences: “life imprisonment” and “life without parole 25.” R. 6 at 89–90. In the instructions that the jury received, the trial court described these two punishments, respectively, as “confinement in the penitentiary for life” and “confinement in the penitentiary for life without the benefit of probation or parole until he has served a minimum of 25 years of his sentence.” R. 32-1 at 233. According to Fields, however, those instructions were not enough. With respect to “life imprisonment,” he says that the court also should have told the jury that “[t]here is no guarantee the defendant will

receive parole. If the defendant does not receive parole, he will remain in prison until his natural death.” R. 6 at 89; *see also* R. 32-1 at 246. With respect to “life without parole 25,” he says that the court also should have told the jury that “[a]t the end of 25 years, the defendant will be eligible for parole, but there is no guarantee the defendant will receive parole. If the defendant does not receive parole, he will remain in prison until his natural death.” R. 6 at 89; *see also* R. 32-1 at 246. The court refused to give those additional instructions. R. 30-23 at 3456. According to Fields, that refusal was contrary to the Supreme Court’s holding in *Shafer v. South Carolina* that a capital defendant has a right to inform the jury that he would not be eligible for parole if sentenced to life in prison. R. 6 at 90 (citing *Shafer v. South Carolina*, 532 U.S. 36, 39 (2001)).

The problem with that argument is a factual one: Fields would have been eligible for parole if the jury had sentenced him to “imprisonment for life.” And Fields would have been eligible for parole if the jury had sentenced him to “imprisonment for life without the benefit of probation or parole for a minimum of 25 years.” The state is correct when it says that Fields would have been “parole eligible [either immediately or after twenty-five years] under any sentence the jury consider[ed] with the exception of death.” R. 41 at 118. Indeed, even Fields’s proposed instructions stated as much. He proposed to tell the jury only that he *might* remain in prison for life—that there was “no guarantee” he would be paroled—rather than that he would never regain his freedom. *See* R. 32-1 at 246 (“At the end of 25 years, the defendant will be eligible for parole, but there is no guarantee the defendant will receive parole.”); *id.* (“There is no guarantee the defendant will receive parole.”).

The Supreme Court has flatly stated that “[t]he parole ineligibility instruction is required only when, assuming the jury fixes the sentence at life, the defendant is ineligible

for parole under state law.” *Ramdass v. Angelone*, 530 U.S. 156, 166 (2000). Here, Fields would have been eligible for parole under state law eventually. And no other Supreme Court case suggests that a defendant has the right to tell a jury that he *might* stay in prison for life if sentenced to life imprisonment. Thus, nothing in *Shaffer* or any other Supreme Court case suggests that the trial court violated the Constitution when it refused to give Fields’s proposed instruction. The Kentucky Supreme Court therefore did not act contrary to, or render a decision that was an unreasonable application of, any clearly established federal law as determined by the Supreme Court of the United States. 28 U.S.C. § 2254(d). Fields is therefore not entitled to habeas relief on the grounds that the trial court refused to give his proposed instruction.

Fifth, Fields says that the trial court should have told the jury that “[i]f you have a doubt whether or not a mitigating circumstance exists, you must find that it exists.” R. 6 at 90; R. 32-1 at 247. In support of this argument, Fields identifies not a single Supreme Court case. His claim contains not even a passing citation to the United States Reports. And this Court is aware of no Supreme Court case suggesting that the trial court must instruct the jury that they must find a mitigating circumstance exists so long as they have some “doubt” about whether it exists. Moreover, the proposed instruction seems to be a misstatement of Kentucky law, which requires the jury only to “consider” mitigating circumstances rather than make formal findings of fact. See *Tamme v. Commonwealth*, 973 S.W.2d 13, 38 (Ky. 1988). And the Supreme Court has never suggested that this aspect of Kentucky’s sentencing scheme is unconstitutional.

For both of these reasons, Fields has failed to show that, when the Kentucky Supreme Court rejected his argument, it acted contrary to any holding of the United States Supreme

Court. And he has likewise failed to show that the state court unreasonably applied any holding of the United States Supreme Court. He has therefore failed to show that he is entitled to habeas relief on the grounds that the trial court failed to instruct the jurors that they must find a mitigating circumstance so long as they had a reasonable doubt about whether it existed.

Finally, Fields argues that the trial court should have told the jury that “[n]o juror should surrender his or her honest conviction as to the weight of the evidence solely because of the opinion of other jurors, or for the mere purpose of returning a verdict” and that “[t]he inability to decide on a penalty is a lawful and legitimate verdict.” R. 6 at 90–91; *see also* R. 32-1 at 249. Those do seem like sensible things for a judge to say to a jury. But the United States Supreme Court has never held that such instructions—or anything like them—are constitutionally required.²⁸ And thus, when the Kentucky Supreme Court rejected Fields’s argument, it did not act contrary to any holding of the United States Supreme Court, nor did it unreasonably apply any such holding. Fields is therefore not entitled to habeas relief on the basis of his nineteenth claim.

20. Claim 20

Fields’s twentieth claim alleges ineffective assistance of counsel. Fields says that his attorneys should have hired two experts, one to “examine the screws from the storm window to determine whether the twisty knife could or did unscrew the storm window,” the other to

²⁸ In support of his argument, Fields does cite a case from the Supreme Court, *Lowenfield v. Phelps*, 484 U.S. 231, 241 (1988). The Court made clear in that case that a trial court should not give the jury a “coercive” instruction—though the *Lowenfield* Court actually held that the instruction in that case was not coercive. *Id.* (“We hold that on these facts the combination of the polling of the jury and the supplemental instruction was not “coercive” in such a way as to deny petitioner any constitutional right.”). But nothing in that case suggests that a trial court must affirmatively instruct a jury that “[n]o juror should surrender his or her honest conviction as to the weight of the evidence solely because of the opinion of other jurors, or for the mere purpose of returning a verdict” or that “[t]he inability to decide on a penalty is a lawful and legitimate verdict.” R. 6 at 90–91.

“explain to the jury the improbability of Mr. Fields being the person who killed Horton given that none of her blood was found on him and none of his blood was found on or near her.” R. 6 at 91, 93. Fields made both of these arguments in the Kentucky Supreme Court during post-conviction proceedings, and the state court rejected both of them on the merits. R. 33-2 at 646–47 (twisty knife expert), 647–48 (blood-spatter expert). AEDPA therefore applies to this claim and, given that Fields does not quibble with the Kentucky Supreme Court’s factual findings, the issue is whether the state court unreasonably applied Supreme Court precedent, one case in particular: *Strickland*. And since this case comes on habeas review, “[t]he question”—as explained in greater detail above when addressing claim six—“is not whether counsel’s actions were reasonable, but whether there is any reasonable argument that counsel satisfied *Strickland*’s [already] deferential standard.” *Harrington*, 562 U.S. at 89.

With respect to the twisty knife, it is not as if defense counsel failed to suggest that Fields could not have removed the window in the way suggested by the prosecution. This was a key element of his defense, and counsel vigorously cross examined the prosecution’s expert about the knife—specifically, about the fact that the paint found on the knife was of a different color and type than the paint found on the window screws. Thus, the true question is whether there is any “reasonable argument” that defense counsel made a constitutionally permissible decision when they decided to elicit the twisty knife evidence via cross examination rather than via an expert retained to testify on Fields’s behalf.

Of course there are at least two such arguments. First, one must remember that the police found Fields inside the house and standing next to Ms. Horton’s dead body. Thus, expert testimony that Fields could not have come in through the window might have discredited the prosecution’s precise timeline, but it hardly would have been a slam dunk.

After all, Fields got into the house somehow—if it was not via the window then it was by some other means. Meanwhile, expert witnesses are expensive, and resources that are spent on them cannot be deployed elsewhere. One “reasonable argument” that defense counsel provided effective assistance therefore goes as follows: counsel concluded that an expert would not have been worth the resources—time and money—needed to acquire him. This is an especially reasonable argument given that the “actual window” was apparently “not available to analyze,” and thus it would have been especially difficult to find an expert able to testify about that window. R. 33-2 at 646.

Second, juries often respond better to concessions from a prosecution witness on cross examination than to testimony “bought and paid for” by the defendant himself. Indeed, counsel testified during the post-conviction hearing that he believed there was strategic advantage in presenting this information through the testimony of an expert seemingly endorsed by the prosecution. Video Record, 12/14/11, 2:54:55. Strategic decisions like this one are “virtually unchallengeable” even on direct review. *Akwai*, 613 F.3d at 641; *see also Strickland*, 466 U.S. at 690. This is especially true when counsel’s strategy pays off, as it seems to have here. *See* R. 33-2 at 646 (noting that “trial counsel was able to obtain favorable expert testimony from the cross-examination of the Commonwealth’s expert[.]”). And on habeas review, of course, strategic decisions are even less open to attack. In sum, a fairminded jurist could believe that counsel was not constitutionally deficient for deciding not to retain an expert witness to testify about the twisty knife. And thus, Fields has failed to show that the Kentucky Supreme Court unreasonably applied *Strickland* when it rejected his argument that counsel should have called an expert to testify about that knife.

Moreover, a fairminded jurist could also believe that the failure to call a twisty knife expert did not prejudice Fields's defense. With respect to prejudice, the question before the state court is whether "there [was] a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. In this context, a "reasonable probability" is a "probability sufficient to undermine confidence in the outcome." *Id.*

Here, Fields was found next to the body and confessed to killing Ms. Horton—first to the police, and later to a paramedic—so it is hard to see how paid-for testimony about his precise method of entry would somehow have led to his acquittal. True, such testimony might have discredited the prosecution's timeline and suggested—exactly how, Fields does not say—that he could not have killed Ms. Horton. But this is habeas review. The Kentucky Supreme Court held that failure to call a twisty knife expert probably would not have saved Fields's case, and—agree or disagree—that is a holding that a fairminded jurist could make. Given the evidence against Fields, a fairminded jurist could have "confidence" in the jury's guilty verdict despite counsel's failure to call a twisty knife expert. *See id.* This is especially true given that Fields offers only speculation about what a hypothetical "tool-mark analyst" might have testified to. *See Day v. Quarterman*, 566 F.3d 527, 538 (5th Cir. 2009) ("[The defendant's] uncalled expert witness claim encounters the exact problem of speculation that the Fifth Circuit seeks to avoid. . . . [The defendant is therefore] asking the Court to take the leap of faith that counsel 'would have found something' that may have created a different result at trial had counsel performed as [the defendant] proposes."); *Bentley v. Motley*, 248 F. App'x 713, 717 (6th Cir. 2007) (upholding the state court's decision to "reject[] [the defendant's] assertions about what [a certain witness] 'might' have testified because they

were based on mere speculation.”); *Pillette v. Berghuis*, 408 F. App’x 873, 887–88 (6th Cir. 2010) (“Lacking evidence that calling [a certain witness] actually would have produced the favorable testimony he hoped for, [the defendant] cannot establish either unreasonable performance or prejudice, so his claim fails.”). For this reason as well, Fields has failed to show that the state court unreasonably applied *Strickland* when it held that he did not receive ineffective assistance of counsel. Fields is therefore not entitled to habeas relief on the grounds that his attorney failed to call a twisty knife expert.

The analysis is similar for the blood-spatter expert that Fields says his lawyers should have retained. The absence of blood—Fields’s on Ms. Horton; Ms. Horton’s on Fields—was the heart and soul of the defense that counsel presented. Video Record, 12/14/11, 9:54 (defense counsel stating that “[m]y theory of the case was: ‘where’s the blood?’”). On direct examination, the state’s medical examiner testified that Ms. Horton’s carotid artery and jugular vein had been severed, and that such injuries “do cause some spurting of blood” that “can squirt for feet[,] [t]here’s no doubt.” R. 30-20 at 2976. On cross examination, defense counsel followed up on this testimony. He first asked the medical examiner whether Ms. Horton’s carotid artery had been severed. R. 30-21 at 3018. The medical examiner responded that it had been. *Id.* Counsel forced the medical examiner to admit that, when an artery is severed, the blood can spurt out for “feet,” even “yards.” *Id.* at 3023. And counsel asked the medical examiner a “kind of point blank question,” namely, whether it was “probable” that the person who severed Ms. Horton’s carotid artery would have gotten blood on himself. *Id.* at 3019. “It’s more likely, yes, I would say,” the witness responded. *Id.*

According to the testimony given by defense counsel during the post-conviction hearing, this strategy was a deliberate one. Counsel “believed that the medical examiner had

made certain concessions during the first trial that were very likely to be repeated in the [second].” R. 33-2 at 647. And thus he “believed it would be more beneficial to present [the blood-spatter testimony] through cross examination.” *Id.* “Based on my training and experience,” counsel said, “I felt I had a good idea of what a blood spatter expert would have had to say, and [I] believed based on what we had sort of in the can[,] so to speak[,] from the prior case that we could achieve our goals via cross examination of what would at least be perceived by the jury . . . as the state’s witnesses.” Video Record 12/14/11, 11:11–12.

This seems like a reasonable strategic judgment. Again, some jurors respond better to points made via an effective cross than to those made by an expert on direct, especially when the expert in question is on the defendant’s payroll. And this cross examination was particularly effective. After all, the state’s medical examiner admitted that, if Fields were the true killer, it was “more likely than not” that he would have had blood on him, thus giving defense counsel ample ammunition with which to make his chosen argument: “where’s the blood?” And what would Fields’s hypothetical defense expert have said, exactly? Fields does not say, of course, but presumably it would have been something like: “in my opinion, if Fields were the true murderer, he would have gotten blood on him.” Of course, the state’s own expert said exactly that, so it is hard to see why it was so important that counsel pay another expert to testify to the same conclusion.

In the end, a competent attorney certainly could have chosen, as a matter of tactical judgment, to try to bring out the blood-spatter evidence via cross examination and forego expert testimony altogether. Indeed, counsel’s tactics here seem like artful ones. At the very least, a fairminded jurist could believe that a competent attorney could have chosen such tactics. That means the Kentucky jurists here did not “unreasonably apply” *Strickland* when

they rejected Fields's argument that his attorney provided ineffective assistance by failing to call a blood-spatter expert. Fields is therefore not entitled to habeas relief on the basis of his twentieth claim.

21. Claim 21

In Fields's twenty-first claim for habeas relief—another one alleging ineffective assistance of counsel—he argues that his lawyers provided constitutionally deficient assistance during the sentencing phase of his trial. Specifically, he says that counsel should have: (1) put on more evidence about his traumatic childhood; (2) called an expert to testify about the effects of neglect and abuse; (3) presented more evidence about his substance-abuse issues; and (4) called an expert to testify about the effects of drug and alcohol addiction. R. 6 at 93. Fields raised an identical claim before the Kentucky Supreme Court during post-conviction proceedings, and the state court rejected that claim on the merits. *See* R. 33-2 at 649–54. To obtain habeas relief, therefore, Fields must satisfy the double-deference standard laid out in *Harrington*. That is, Fields must show that there is no reasonable argument that counsel provided constitutionally effective assistance despite the omissions about which Fields complains. *Harrington*, 562 U.S. at 89.

There is such an argument that applies to each of these omissions, namely that pushing the mitigating circumstances argument with the jury would have undermined Fields's claim of actual innocence. If counsel had called an expert to testify, for example, that Fields's upbringing or drug abuse was to blame for the murder, that testimony might have sounded to the jury like Fields was admitting—finally—that he had killed Ms. Horton, thus undermining his residual-doubt argument. After all, “residual doubt” is something that a jury is entitled to consider when deciding whether to sentence a defendant to death. The

jury here had taken “over eight hours to return their guilty verdict,” and thus defense counsel quite reasonably believed that the jurors might “have had some residual doubt.” R. 33-2 at 651. Fields himself even went so far as to ask defense counsel not to “present any mitigating testimony” at all, as “doing so [in his view] would have been inconsistent with his defense of innocence.” *Id.*

In short, defense counsel had his work cut out for him. He needed to make sure that the jury was aware of Fields’s upbringing and substance-abuse issues without accidentally implying that Fields was, in fact, the true murderer. Quite a delicate balance to strike, to say the least. And thus, counsel decided to use two close family members—Fields’s mother and brother—to introduce evidence of Fields’s background. His mother testified, among other things, that Fields’s father had been abusive, that she herself had been a drug user and had suffered a stroke, that Fields had been shuttled back and forth between various guardians, that he had attended seven different schools, that he had run away from home, and that he—that is, Fields himself—had been in drug rehab as a child three different times. R. 30-24 at 3487-3509. His brother, on the other hand, testified that Fields’s father had thrown Fields through a wall, threatened the two sons with a pistol, pushed their stepmother’s head into a toilet, locked the children out of the house for days at a time, told Fields that he was not his son, and been a generally violent and abusive man. *Id.* at 3517-3527.

Fields now argues that counsel should have offered more evidence about his bad upbringing and more evidence about his drug use. And perhaps counsel should have done so—it is difficult to say, looking back through two decades onto a cold record. But a competent attorney could nevertheless make the strategic decision to bring in the upbringing and substance-abuse evidence via the mother and brother alone, rather than “pile on” such

evidence and thereby risk that the jury might reject Fields's residual-doubt argument. Or a competent attorney could make the strategic decision to tread carefully when presenting evidence of addiction and childhood trauma, on the theory that the jury might decide that the defendant was somehow "incurable" and thus might kill again. Or a competent attorney could make the strategic decision that the additional testimony would have merely been more of the same, especially given that the mother and brother had both testified about Fields's upbringing and substance-abuse struggles. At the very least, a fairminded jurist could believe that a competent attorney could make such strategic decisions, which is all the Commonwealth needs to prevail under AEDPA. *See Harrington*, 562 U.S. at 89. Thus, the Kentucky Supreme Court did not unreasonably apply *Strickland* when it rejected Fields's claim alleging ineffective assistance of counsel during sentencing.

22. Claim 22

In his twenty-second claim, Fields argues that he is entitled to habeas relief on the basis of prosecutorial misconduct. R. 6 at 132–35. Fields raised this claim on direct review, and the Kentucky Supreme Court rejected it on the merits. R. 33-2 at 634–36. Thus, AEDPA applies to this claim, and Fields must show that the state courts unreasonably determined the facts, acted contrary to a decision of the United States Supreme Court, or else unreasonably applied a decision from that Court. *See* 28 U.S.C. § 2254(d). Fields does not contend that the state courts made any factual error with respect to this claim, and thus, the question is whether the state courts' decision was consistent with those from the United States Supreme Court.

It is true, as Fields points out, that the prosecutor "may strike hard blows" but "he is not at liberty to strike foul ones." *Berger v. United States*, 295 U.S. 78, 88 (1935). Even on

direct review, however, prosecutorial misconduct violates a defendant's due-process rights only if it "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974); *see also Darden v. Wainwright*, 477 U.S. 168, 181 (1986); *Macias v. Makowshi*, 291 F.3d 447, 451 (6th Cir. 2002). Thus, the question in this AEDPA case is whether any fairminded jurist could believe that the prosecutor's purported misconduct did not rise to that level. If so, then Fields is not entitled to habeas relief. *See Harrington*, 562 U.S. at 86–88.

Here, Fields says that "the prosecutor committed misconduct when he stated in closing that there was no evidence [that] Mr. Fields took pills." R. 6 at 132. That statement was a false one, Fields says, because Burton had "clearly testified that Mr. Fields took pills." *Id.* Thus, Fields concludes, the prosecutor's "deliberate deception of [the] court or jurors by the presentation of argument known to be false" violated Fields's rights under the Fourteenth Amendment. *Id.*

The biggest problem with that argument is that Burton "clearly testified" to nothing of the sort. What Burton actually said was that Fields poured something out of a bottle into his hand and then "went like this to his mouth." R. 30-19 at 2734. The record does not reflect in that moment what motion she made, but she apparently raised her hand to her mouth.²⁹ Although this sounds like fairly strong evidence that Fields had taken drugs, Burton immediately caveated her statement: "I don't know if he for a fact had a pill in his hand," she said. *Id.* She also stated that she knew "nothing about them pills or if in fact they did take them how they was going to react." *Id.* at 2735. And she confirmed that she had told an

²⁹ In a later colloquy, defense counsel stated "for the record" that Burton had "moved her hand to her mouth and held it over there when she was talking about the pills." R. 30-23 at 121.

investigating officer that she had not seen any pills at all. *Id.* at 2734. Thus, the prosecutor’s characterization of the record—“that’s all we’ve heard is alcohol that this Defendant had”—was, at worst, a one-sided characterization of the actual testimony contained in the record. It was hardly “deliberate deception of [the] court or jurors by the presentation of argument known to be false.” R. 6 at 132.

The other problem with Fields’s argument is that the prosecutor immediately told the jury that they should decide the case based on their own memory of Burton’s testimony rather than based on the prosecutor’s characterization of that testimony. “You know what, you go with what you remember,” he said. R. 34-20 at 3420. “Don’t go with what the lawyers say [] happened. Go with what you recall. Minnie Burton said something about the Defendant telling her something about horse tranquilizers. My recall of Ms. Burton’s testimony is that she couldn’t say whether he did or didn’t.” *Id.* If the prosecutor’s goal was to confuse the jury by “incepting” them with false memories about the record, it is hard to imagine why he would tell them to trust their own memories—to “go with what you recall” rather than “what the lawyers say [] happened.” *Id.*

In the end, the question is whether any fairminded jurist could believe that the prosecutor’s statements did not “so infect[] the trial with unfairness as to make the resulting conviction a denial of due process.” *Donnelly*, 416 U.S. at 643. The answer to that question is obviously “yes.” Indeed, it is hard to see how the prosecutor here struck any “foul [blows]” at all. *Berger*, 295 U.S. at 88. Especially given his instruction to the jury to trust their own memories, the prosecutor’s conduct here hardly seems improper. Fields has therefore failed to show that the Kentucky Supreme Court acted contrary to precedent from

the United States Supreme Court when it rejected his claim. And he has likewise failed to show that the state court unreasonably applied any such precedent.

Fields responds that “the Commonwealth knew that, if Berry had been called to testify, he would have said Mr. Fields ingested pills.” R. 6 at 133. Berry did not testify during Fields’s trial at all, of course. Hence the *Brady* and *Strickland* claims discussed above that are premised on Berry’s absence from trial. And thus, Fields’s argument seems to be a rather unusual one: that a prosecutor has a duty not only to characterize fairly the actual record, but also to characterize fairly the record as it might have been if all available witnesses had testified. As far as this Court is aware, that argument is one that has never been accepted by any court. Unlike Burton and the other witnesses, Berry never swore to tell the truth in open court. Nor was he subject to cross examination by the prosecution. And in any event the prosecutor is, of course, entitled to disbelieve the testimony of potential defense witnesses. For this purpose, though, it is enough to point out the following: the United States Supreme Court has never suggested that a prosecutor violates the Due Process Clause when he fails to base his closing arguments on the record established during a hypothetical trial—and one hypothesized in the light most favorable to the defendant—rather than the one established during the actual trial. Fields is therefore not entitled to habeas relief on the basis of his twenty-second claim.

23. Claim 23

In Fields’s twenty-third claim for relief—another one alleging prosecutorial misconduct—he argues that, during closing arguments, the prosecutor made five statements so improper as to warrant habeas relief. R. 6 at 135–41. Fields made this argument in front of the Kentucky Supreme Court, which rejected it on the merits. R. 32-1 at 456–57. And

thus AEDPA applies to this claim. 28 U.S.C. § 2254. Fields does not make any serious argument that the state court unreasonably determined the facts—at least in the sense that this phrase is used in the AEDPA statute—so he must show that the state court rendered a decision that was contrary to, or an unreasonable application of, clearly established law as determined by the Supreme Court of the United States. 28 U.S.C. § 2254(d). The question is therefore whether any fairminded jurist could reject the idea that the prosecutor’s five comments “so infected the trial with unfairness as to make the resulting conviction a denial of due process.” *Donnelly*, 416 U.S. at 642; *see also Darden*, 477 U.S. at 181.

Fields first faults the prosecutor for making comments that in his view “shift[ed] the burden of proof” from the prosecution to the defense. R. 6 at 135. Specifically, Fields notes that the prosecutor stated that the defendant was free to obtain testing of blood found at the crime scene, that the timeline of the case “really hasn’t been disputed,” and that the jury had heard no “other explanation for why [Burton and Fields] were arguing.” R. 30-23 at 3391, 3404, 3413. In Fields’s view, the prosecutor commented on the defendant’s “refusal to testify” when he made these statements, thus violating the Supreme Court’s holding in *Griffin v. California*, 380 U.S. 609 (1965), or, perhaps, instead violating *Donnelly* and *Darden*—Fields does not identify exactly which Supreme Court opinion he wishes to rest his argument on.³⁰ *See* R. 6 at 135–41

As for *Griffin*, that case holds only that a prosecutor may not comment on a defendant’s decision not to take the stand and testify. *See* 380 U.S. at 615 (“We . . . hold that the Fifth Amendment . . . forbids either comment by the prosecution on the accused’s silence

³⁰ Fields cited *Eberhardt v. Bordenkircher*, 605 F.2d 275, 278 (6th Cir. 1979), for this proposition. That case is of course from the Sixth Circuit rather than the Supreme Court, which means that, under AEDPA, it is not enough for Fields to show that the state courts acted contrary to *Eberhardt*. Nevertheless, *Eberhardt* in turn cites *Griffin*, *id.*, and given that this is a death-penalty case, the Court will construe Fields’s legal arguments as broadly as possible.

or instructions by the court that such silence is evidence of guilt.”). It says nothing about whether a prosecutor may point out that the defendant could have commissioned forensic testing. It says nothing about whether a prosecutor may point out that the defendant failed to “dispute[]” the prosecution’s timeline. R. 30-23 at 3404. And it says nothing about whether a prosecutor may point out that a defendant failed to provide “an explanation” for particularly damning evidence. *Id.* at 3413. Thus, the Kentucky Supreme Court’s decision rejecting this portion of Fields’s claim was neither contrary to nor an unreasonable application of the United States Supreme Court’s holding in *Griffin*.

As for *Donnelly* and *Darden*,³¹ “the *Darden* standard is a very general one leaving courts ‘more leeway . . . in reaching outcomes in case-by-case determinations.’” *Parker v. Matthews*, 132 S. Ct. 2148, 2155 (2012) (quoting *Alvarado*, 541 U.S. at 664). Indeed, the “Supreme Court has clearly indicated that the state courts have substantial breathing room when considering prosecutorial misconduct claims because constitutional line drawing in prosecutorial misconduct cases is necessarily imprecise.” *Slagle v. Bagley*, 457 F.3d 501, 516 (6th Cir. 2006) (internal quotation marks omitted).

Admittedly, it is probably not the best practice for prosecutors to comment on failings in the defense’s case. The better course is to argue that the prosecution has proven its own case beyond a reasonable doubt. And thus, the prosecutor probably should not have suggested that Fields could have commissioned forensic testing, failed to present evidence to dispute the prosecution’s timeline, and so on. After all, the defendant is entitled to present no evidence at all in his own defense and instead hold the prosecution to its burden of proof.

³¹ The Court has already given a more detailed explanation of the *Donnelly/Darden* standard when addressing Claim 22. For these purposes, the Court will merely quote the operative language from those cases.

Even so, this is a habeas case governed by AEDPA, and no holding of the United States Supreme Court suggests that the prosecutor's statements here were so improper as to rise to a constitutional violation. Thus, a fairminded jurist could reject the idea that the prosecutor's comments about the defense's case "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly*, 416 U.S. at 642. That means the state courts did not unreasonably apply *Donnelly*—or any other Supreme Court holding—when they rejected Fields's claim. And the state courts certainly did not render a decision "contrary to" any such holding.

Second, Fields says that the prosecutor "referr[ed] to matters outside the record," R. 6 at 136, when he made the following statement:

This is the knife that was taken outside of Ms. Horton's head. This is the one that says Harvard Cutlery on it. And you can just feel—and you can have—you can weigh these two (2) things. This is a solid substantial knife. But as you can see, this is—this is quality. The blade goes all the way through the handle. The one doesn't. This is not quite as high quality as this. This knife, members of the jury, came from Ms. Horton's own kitchen. This knife came from Minnie Burton's home. The defendant got this knife and went over to Ms. Horton's.

R. 30-23 at 3399. In Fields's view, the prosecutor may argue to the jury only about "evidence that has been heard from witnesses" and he says that "[t]here was no evidence adduced at trial to support the prosecution's theory that one can tell where a knife originates from based on the way the knife feels." R. 6 at 136.

As an initial matter, it is not clear exactly why Fields believes this statement was prejudicial to his case; he makes this argument in nearly perfunctory manner and nowhere explains why the prosecutor's statement about the knife either helped the prosecution's case or hurt his. Moreover, it is not clear that the prosecutor was actually arguing that "one can

tell where a knife originates from based on the way the knife feels.” *Id.* The more likely explanation is that the prosecutor was merely commenting on the quality of the knives—again, for reasons that are not clear from the record—and independently arguing that the one knife came from Ms. Horton’s kitchen and the other from Burton’s house. After all, the prosecutor did not say, “this knife is not quite as high quality and *thus* this knife came from Minnie Burton’s home” and there is no reason to think that he meant to imply any logical connection between those two statements. It is therefore far from obvious that the prosecutor was in fact referring to facts outside the record. More to the point though, Fields has identified no United States Supreme Court case suggesting that a prosecutor commits a due process violation when he refers to evidence outside the record. Without such guidance, a fairminded jurist would be left free to conclude that the prosecutor’s statements did not “make [Fields’s] resulting conviction a denial of due process.” *Donnelly*, 416 U.S. at 642.

Third, Fields contends that the prosecutor misstated the evidence when he told the jury that Burton had testified “yeah, that [knife] looks like the one that might have come from my home.” R. 30-23 at 3398. He goes on to fault the prosecutor for arguing that “the knife came from Minnie Burton’s home” and that “the Defendant got this knife and went over to Ms. Horton’s.” *Id.* at 3399. But Burton had in fact admitted that she kept in her home “a set of knives” with the same symbol as the one on the knife in question “right there on them.” R. 30-18 at 2663. True, Burton also said that the knife did not “look like anything that I had,” *id.*, but a prosecutor is entitled to argue the facts in the light most favorable to the prosecution. Given Burton’s testimony, the prosecutor’s statement here—that Burton had said “yeah, that looks like the one that might have come from my home”—was, at worst, an overly zealous characterization of the evidence. But that statement was not so egregious that

no fairminded jurist could reject the notion that it deprived Fields of a fair trial. And thus, the state courts did not unreasonably apply *Donnelly* when they rejected Fields's claim based on the prosecutor's characterization of the knife.

Fourth, Fields says that the prosecutor should not have made the following statement about the window screws:

When you look at these screws, no, not all of them have marks on them. But in my opinion, and the thing is[]—if you go with your opinion and that's what counts—but when I look at some of these, I do see marks.

R. 30-23 at 3393–94. He also says that the prosecutor should not have said that “the work that the Grayson Police Department did to me epitomizes community law enforcement.” *Id.* at 3410. These statements, Fields says, were examples of the “prosecutor express[ing] his opinion as to how the jury should interpret physical evidence, and his opinion about what kind of job the police did.” R. 6 at 138–39. Perhaps so. But Fields points to no United States Supreme Court opinion suggesting that a prosecutor violates the Due Process Clause when he says the words “in my opinion” followed by an otherwise permissible bit of closing argument.

Fields does point to language from *United States v. Modica*, 663 F.2d 1173, 1173–79 (2d Cir. 1980), suggesting that prosecutors should refrain from doing so. But that case comes from a court—the Second Circuit—that is one level below the Court whose holdings matter in an AEDPA case. In the absence of more specific guidance from the United States Supreme Court, Fields has failed to show that the state courts unreasonably applied *Darden*, *Donnelly*, or any other Supreme Court case when they rejected his claim based on the prosecutor's statement of his own opinion.

Fifth, Fields takes issue with the prosecutor's statement of the relevant law. The prosecutor told the jury that "when you find the Defendant guilty of murder and burglary in the first degree[,] we move on to the second phase of the trial in which you hear more evidence. Not second degree. Not second degree manslaughter." R. 30-23 at 3415. These remarks, Fields says, "may have led the jury to believe Mr. Fields would get a 'get out of jail free card' if he was convicted of something less than murder." R. 6 at 139. The prosecutor said nothing like that, of course. Indeed, he said nothing at all about what would happen if the jury convicted Fields of something less than murder. Fields is not entitled to habeas relief because a juror might—*might*—have unreasonably understood the prosecutor to say something he plainly never said. This argument is meritless.

Fields also quibbles with the prosecutor's argument about the trial court's intoxication instruction. He says that the prosecutor made "numerous misstatements of law and facts concerning the intoxication and second degree murder instructions" and then proceeds to block quote the prosecutor's closing for more than half a page without explaining why anything in that portion of the closing was improper. R. 6 at 139–40. As far as the Court can tell, it has something to do with the underlying jury instructions on intoxication. The underlying instructions were themselves flawed—the argument seems to go, perhaps?—and thus the prosecutor committed misconduct when he recited those instructions. As an initial matter, a prosecutor of course does not commit misconduct by stating the actual jury instructions that the trial court gave. And this is true even when the court inadvertently gives erroneous instructions. An error in jury instructions is an error in jury instructions—and as is true for any error, it is best to avoid an error in jury instructions—but such an error does not automatically transform the prosecutor's closing argument into an example of misconduct

simply because he recites the erroneous instructions that the trial court gave. In any event, as explained above when addressing Fields's seventh claim, the instructions were proper ones. For both of these reasons, Fields is not entitled to habeas relief on the basis of the prosecutor's comments about the trial court's intoxication instructions.

Finally, Fields argues that the prosecutor made an "obvious misstatement of fact" when he argued that Fields was only drunk and that there had been no trustworthy testimony suggesting that he had taken drugs as well. But this Court has already explained why the prosecutor did not violate Fields's constitutional rights by making that argument. This final sub-claim is merely a rehashing of the first one. In sum, Fields has failed to show that the Kentucky Supreme Court unreasonably applied the Supreme Court's holdings when it rejected his prosecutorial-misconduct claims. He is therefore not entitled to habeas relief.

24. Claim 24

In his twenty-fourth claim, Fields argues that he is entitled to habeas relief because of the prosecutor's closing arguments during the penalty phase. He made this argument before the Kentucky Supreme Court, which rejected it on the merits. R. 32-1 at 465–66. Thus, AEDPA applies to this claim. 28 U.S.C. § 2254. Fields does not argue that the Kentucky Supreme Court unreasonably determined the facts. To obtain habeas relief, therefore, he must show that the state court's decision was contrary to, or an unreasonable application of, clearly established law as determined by the Supreme Court of the United States. 28 U.S.C. § 2254(d).

Fields takes issue with six facets of the prosecutor's closing argument. First, he argues that the prosecutor should not have told the jury that Fields had previously escaped from prison. Specifically, Fields says that the prosecutor should not have said that Fields had

been “convicted of escape, escaping jail in 1997,” that “this escape probably more [than Fields’s other crimes] gives you an indication of what that man is like as he sits here right now[,]” and that the jury should consider the proper punishment for “a murdering burglar who escapes from prison.” R. 30-24 at 3459. When the prosecutor made these statements, Fields says, he “violated his oath to the court by using Fields’[s] escape conviction as a non-statutory aggravator amounting to future dangerousness and requiring the jury to return a death sentence.” R. 6 at 142. In Fields’s view, this violated the Supreme Court’s holding in *Zant v. Stephens*, 462 U.S. 862 (1983).

As an initial matter, the prosecutor’s statements about Fields’s prior conviction for escaping prison were plainly proper—even as a matter of state law. A Kentucky statute instructs that, “[i]n all cases in which the death penalty may be imposed[,]” the court “shall resume the trial and conduct a presentence hearing before the jury.” Ky. Rev. Stat. § 532.025(1)(b). That hearing shall include “the record of any prior criminal convictions . . . of the defendant.” *Id.* Thus, although evidence that a defendant has previously escaped is not listed as an aggravating circumstance under the statute, if the defendant has been *convicted* for escaping—as Fields had been—then state law gives the prosecutor the right to tell the jury about that conviction. *See id.*

More importantly, however, nothing in *Zant* or any other Supreme Court case suggests that the Constitution forbids a prosecutor to tell a jury that the defendant has escaped—or even tried to escape—in the past. Indeed, *Zant* itself suggests quite the opposite. As that Court held, “[n]othing in the United States Constitution prohibits a trial judge from instructing a jury that it would be appropriate to take account of a defendant’s prior criminal record in making its sentencing determination . . . even though the defendant’s

prior history of noncapital convictions could not by *itself* provide sufficient justification for imposing the death sentence.” *Zant*, 462 U.S. at 888 (internal citation omitted). “There would have been no constitutional infirmity in an instruction stating, in substance: ‘If you find beyond a reasonable doubt that the defendant is a person who has previously been convicted of a capital felony, or that *he has escaped from lawful confinement*, you will be authorized to impose the death sentence[.]’” *Id.* (emphasis added). Thus, the trial court’s instruction was entirely consistent with the Supreme Court’s holding in *Zant*. When the Kentucky Supreme Court denied Fields’s claim, therefore, the court did not act contrary to any holding of the United States Supreme Court, nor did it unreasonably apply any such holding. Fields is therefore not entitled to habeas relief on the grounds that the prosecutor told the jury about his prior escape from prison.

Second, Fields says that the prosecutor should not have asked the jury to “fix a punishment that fits the crime.” R. 30-24 at 20. His opening-brief argument on this point spans a total of two sentences, so it is hard to know exactly why Fields is so sure that the state courts unreasonably applied Supreme Court precedent when they rejected this claim on direct review. Judging from the lone citation in his argument—which includes not even a pincite—it appears he thinks that there is something in *Pepper v. United States*, 562 U.S. 476 (2011), that shows he is entitled to habeas relief. That case concerns the proper application of the federal sentencing guidelines, which, of course, are not binding on the states. *Id.* at 489. It is therefore entirely unclear why Fields believes that the Kentucky Supreme Court unreasonably applied *Pepper* when it approved of the prosecutor’s statement. In any event, nothing in that case suggests that a prosecutor violates the United States Constitution when he tells the jury to “fix a punishment that fits the crime.” That means that the Kentucky

Supreme Court's decision is perfectly consistent with *Pepper*. Fields is therefore not entitled to habeas relief.

Third, Fields argues that the prosecutor should not have pointed out to the jury that Fields had apparently been "waving and winking and nodding" throughout trial. R. 30-24 at 94. According to Fields, these "comments amounted to a back door violation of Fields's right to remain silent." R. 6 at 143. Thus, Fields concludes, the Kentucky Supreme Court unreasonably applied the United States Supreme Court's decision in *Mitchell v. United States*, 526 U.S. 314 (1999).

That case stands for the proposition that a defendant does not waive his right to remain silent during his sentencing hearing just by pleading guilty to the crime itself. *See* 526 U.S. at 321 ("The Government maintains that petitioner's guilty plea was a waiver of the privilege against compelled self-incrimination with respect to all the crimes comprehended in the plea. We hold otherwise and rule that petitioner retained the privilege at her sentencing hearing."). It of course says nothing about whether a prosecutor violates a defendant's Fifth Amendment rights by pointing out that the defendant has been misbehaving during trial. Nor does any other Supreme Court case. The Constitution gives a defendant the right to refuse to take the stand and testify; it does not give him the right to stay seated at counsel table and make winky-faces without fear of repercussions. This portion of Fields's claim is meritless.

Fourth, Fields argues that the prosecutor "improperly appealed to the jurors' sense of responsibility when he told them at the beginning of his argument '[y]ou speak for the community.'" R. 6 at 143 (quoting R. 30-24 at 87). These comments apparently were "meant to appeal to the jurors' fears and prejudices," to "divert the jurors' attention from examining the facts and circumstances of the case," and to "arouse their passions and fears."

Id. In support of this argument, Fields cites not a single case from the United States Supreme Court. Nor is the Court aware of any such case holding that the Constitution forbids a prosecutor to tell jurors that they speak for the community.³² Fields is therefore not entitled to habeas relief.

Fifth, Fields argues that the prosecutor should not have asked the jury to “[i]magine what—what it was like for . . . [the] people who worked for Ms. Horton, who lived in that community.” R. 30-24 at 93. These comments were a “variation of the improper ‘Golden Rule’ argument,” Fields says, and thus, he argues, that he is entitled to habeas relief. R. 6 at 143–44. By way of background, a “Golden Rule” argument is one that asks the jurors to put themselves “in the shoes” of the victim (or the defendant—the argument takes several forms). When a lawyer makes such an argument, it is common to hear an objection “under the Golden Rule.” This language is a bit imprecise, for it makes it seem like the rule is the central—“golden”—one in all of evidentiary law. This is not true, of course—the rule forbidding irrelevant evidence is quite a bit more important. It is likewise common to hear an objection that an attorney’s argument “violates the Golden Rule.” This language is likewise imprecise. An attorney does not *violate* the Golden Rule—“do unto others as you would have them do unto you,” *Luke* 6:31; *Matthew* 7:12—when he invites the jurors to put themselves in the shoes of the victim or defendant. Quite the opposite, the attorney is

³² The Supreme Court has noted that a prosecutor should not “exhort the jury to ‘do its job’” by convicting the defendant. *United States v. Young*, 470 U.S. 1, 18 (1985); *see also United States v. Modena*, 302 F.3d 626, 634 (6th Cir. 2002) (“Statements that exhort the jury to ‘do its job’ are improper.” (quoting *Young*, 470 U.S. at 18)). And the Sixth Circuit has recognized “the cardinal rule that a prosecutor cannot make statements calculated to incite the passions and prejudices of the jurors,” *Bates v. Bell*, 402 F.3d 635, 641 (6th Cir. 2005) (internal quotations omitted), though it is not clear that this is a Constitutional rule or one that the Supreme Court has recognized. But it is far from obvious that telling the jurors that they “speak for the community” is an exhortation for the jurors to “do their job and convict” or an improper appeal to passion or prejudice. At the very least, a fairminded jurist could see a difference between the statements that the prosecutor made here and the kind of statements that the Supreme Court has forbidden. Fields is therefore not entitled to habeas relief.

inviting the jurors to *follow* the Golden Rule. And thus, the correct objection is to an argument “in the form of the Golden Rule.” See generally McCaffery, Kahneman & Spitzer, *Framing the Jury: Cognitive Perspectives on Pain and Suffering Awards*, 81 Va. L. Rev. 1341, 1383–84 (1995) (discussing the various rationales for the rule).

As an initial matter, it is far from clear that the prosecutor here made an argument in the form of the Golden Rule. He asked the jurors to “imagine what it was like” for the other people in the victim’s community. He did not ask them to “put themselves in the shoes” of the victim or to “do unto” anybody what they would have anybody “do unto” them. In any event, the parties’ dispute over whether this was a “true” Golden Rule argument—or perhaps merely a “variant” of such an argument—is of only academic interest here because this is an AEDPA case. As the Sixth Circuit has pointed out, “Supreme Court precedent does not directly address” whether a prosecutor may use “a ‘golden rule’ argument.” *Ross v. Pineda*, 549 F. App’x 444, 451–52 (6th Cir. 2013). Thus, when the Kentucky Supreme Court affirmed Fields’s conviction despite the prosecutor’s closing argument, it did not unreasonably apply, or act contrary to, any clearly established law as determined by the Supreme Court of the United States. Fields is therefore not entitled to habeas relief.

Sixth, Fields says that the prosecutor committed misconduct when he told the jury that the mitigating circumstances “may go into your decision making process; they may not. It’s up for you to decide.” R. 30-23 at 89. This statement was improper, Fields says, because the trial court instructed the jurors that they “shall consider” the mitigating circumstances. R. 32-1 at 231. And in Fields’s view, the prosecutor’s statement suggested to the jurors that they were allowed to ignore the mitigating circumstances.

The problem with this argument is that Fields quotes only part of what the prosecutor said. What he really said—in full—is that “these [mitigating circumstances] are things that you *are to consider*. They may go into your decision-making process; they may not. It’s up for you to decide.” R. 30-24 at 89 (emphasis added). Any fair reading of the prosecutor’s statement makes clear that he was merely telling the jury that the factors did not dictate a verdict—*i.e.*, that they could impose death even if they found some mitigating factors and that they could impose life imprisonment even if they found some aggravating factors. In any event, a fairminded jurist could believe that the prosecutor’s comments—which seem, at worst, to be a slip of the tongue—did not “so infect the trial with unfairness as to make the resulting [sentence] a denial of due process.” *Darden*, 477 U.S. at 181. This is especially true given that the trial court specifically instructed the jurors that they “must consider” the mitigating factors, R. 32-1 at 231, and that a “crucial assumption underlying our constitutional system [of trial by jury] is that juries will follow the instructions given them by the trial judge.” *Francis v. Franklin*, 471 U.S. 307, 324 n.9 (1985) (quoting *Parker v. Randolph*, 442 U.S. 62, 73 (1979)). Fields is therefore not entitled to habeas relief on the basis of his twenty-fourth claim.

25. Claim 25

In his twenty-fifth claim, Fields argues that he is entitled to habeas relief based on a variety of “erroneous rulings” that he says the court made during his trial. Fields raised this claim before the Kentucky Supreme Court, which rejected each component of it on the merits. R. 32-1 at 417, 427–28, 431–32, 446–47, 452–53, 459–60. Fields does not argue that the state court unreasonably determined the facts and thus, to obtain habeas relief, he must show that the state court’s decision was inconsistent with one from the United States

Supreme Court—either flatly contrary to such a decision, or else an unreasonable application of it.

Fields first says that the trial court erred during voir dire when it told the jurors that “[a]ggravating circumstance or evidence is evidence about a person’s character, background, or circumstance that may be considered as a reason for imposing a more severe punishment than might otherwise be imposed.” *E.g.*, R. 30-1 at 27, R. 30-10 at 15. As the Kentucky Supreme Court pointed out, this statement was arguably inconsistent with state law. Under a Kentucky statute, aggravating factors “relate to the defendant’s prior criminal history, the status of the victim, and the circumstances of the crime.” R. 32-1 at 428 (citing Ky. Rev. Stat. 532.025(2)). Fields argues that “the trial court’s definition, instead, gave the erroneous impression that evidence of [Fields’s] character, his *general* background, and his *personal* circumstances would be considered as aggravating circumstances.” *Id.*

“[E]rrors in application of state law,” however, “are usually not cognizable in federal habeas corpus.” *Walker*, 703 F.2d at 962. For “[i]n conducting habeas review, a federal court is limited to deciding whether a conviction”—or in this case a death sentence—“violated the Constitution, laws, or treatises of the United States.” *Estelle*, 502 U.S. at 68. And the Supreme Court has never said that it would be constitutionally improper to instruct a jury to consider a defendant’s “character, background, or circumstance” when deciding whether to impose the death penalty. It is true, as Fields points out, the Supreme Court has said that aggravating circumstances must genuinely narrow the class of persons eligible for the death penalty. *Zant*, 462 U.S. at 877. And the Court has likewise said that the jury must be able to consider mitigating evidence when deciding whether to sentence a defendant to die. *Penry v. Lynaugh*, 492 U.S. 302, 328 (1989). But the Court has never said that

“character, background, or circumstances” are invalid criteria to use when narrowing the set of defendants eligible for death. And of course instructing the jury that it may consider such criteria as aggravating circumstances says nothing about what mitigating circumstances the jury may consider.

Moreover, the trial court here did not, in fact, give the jury improper instructions before the jury left to deliberate; the court merely misstated the aggravating-circumstances definition during voir dire. The instructions in the end were perfectly accurate, even as a matter of state law. *See* Ky. Rev. Stat. 532.025. The United States Supreme Court has certainly never made clear that a trial court acts contrary to the Constitution when it misspeaks during voir dire but ultimately gives the jury a formal instruction that is entirely accurate. For all of these reasons, the Kentucky Supreme Court did not render a decision that was contrary to, or an unreasonable application of, clearly established United States Supreme Court precedent when it denied Fields’s claim. That means he is not entitled to habeas relief.

Second, Fields argues that the trial court erred by “not allowing full and fair voir dire.” R. 6 at 148. Specifically, he says that the court should have allowed him to ask jurors four additional questions about how they felt about capital punishment. The four questions—whose exact wording Fields fails to quote at all or cite in a way that would allow the Court to locate them in the record—apparently dealt with prospective jurors['] feelings about the death penalty. R. 32-1 at 129. The United States Supreme Court has never said, however, that a defendant has a constitutional right to ask potential jurors any particular questions, even in a death-penalty case like this one. Fields has therefore failed to show that, in rejecting his argument, the Kentucky Supreme Court unreasonably applied any holding of the United States Supreme Court.

True, the Supreme Court has said that “the right to an impartial jury carries with it the concomitant right to take reasonable steps designed to insure that the jury is impartial.” *Ham v. South Carolina*, 409 U.S. 524, 532 (1973). But that rule—that the trial court must take “reasonable steps”—is quite general. And “[t]he more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations.” *Carpenter*, 798 F.3d at 473 (citing *Alvarado*, 541 U.S. at 664). It is not as if the trial court here forbade voir dire altogether—it simply did not allow Fields to ask four specific questions. And without more specific guidance from the Supreme Court, a fairminded jurist could believe that the steps taken by the trial court to insure juror impartiality were “reasonable” ones. Fields is therefore not entitled to habeas relief.

Third, Fields argues that the trial court should have allowed “evidence that car keys and empty beer cans were found in Ms. Horton’s car after her death[.]” R. 6 at 152. One of Ms. Horton’s employees, James Craig, had testified during the first trial that he had found car keys, beer cans, and marijuana seeds in Ms. Horton’s car after she had died. R. 30-21 at 66 (transcript from second trial during which the parties discuss the testimony from the first trial). Craig was unavailable to testify at the second trial, however—he had died by then—so the defense moved to read his prior testimony into the record. R. 30-22 at 6. The trial court granted that motion, but redacted the portion in which Craig testified about the keys, beer cans, and marijuana seeds. R. 30-21 at 67. The defense also attempted to elicit similar testimony from another one of Ms. Horton’s employees, Elmer Pritchard, but the trial court excluded that testimony. R. 6 at 151.³³

³³ This citation is to Fields’s habeas petition, in which he asserts that Pritchard’s excluded testimony is located in the trial transcript at page 2965–66. The excluded testimony does not appear on that page, and the Court is not able to

In Fields’s view, these rulings “impaired” his “right to present a defense.” *Id.* The defense’s theory of the case was that Burton had murdered Ms. Horton, and in support of that theory, the defense argued that Ms. Horton had “bec[ome] angry with Burton when [Horton] learned [Burton] was driving [Horton’s] car around with people drinking in it” and had later “evicted [Burton] from [Horton’s] property.” *Id.* Thus, Fields argues, his “right to present a defense was impaired when the trial court disallowed evidence of empty beer cans and car keys found in Ms. Horton’s car after her death” as well as evidence “indicating Ms. Horton was not agreeable to people drinking in her car.” *Id.*

The biggest problem with that argument is that the excluded evidence—the beer cans and car keys—did not truly advance the defense’s theory—*i.e.*, that Burton had been driving Horton’s car with people drinking in it. The reason is that “multiple persons had access to Horton’s car” and the defense offered “no other evidence . . . to prove that Burton was the last person to drive [Horton’s] car or that the beer cans . . . belonged to her.” R. 32-1 at 432. As the Kentucky Supreme Court noted, “there was no evidence linking any particular individual to the vehicle, and the vehicle was in no way tied to the crime.” *Id.* And the trial court did not exclude Fields’s *defense*. The court allowed Fields to argue that Minnie Horton had committed the murder, and Fields vigorously argued exactly that. Thus, the trial court, at worst, excluded arguably irrelevant evidence that was only tangentially related to Fields’s defense. At the very least, therefore, a fairminded jurist could conclude that the trial court’s exclusion of the cans and keys did not deprive Fields of “a fair opportunity to defend against

locate the correct citation given the size of this record. Thus, the Court will assume for these purposes that Fields’s characterization of Pritchard’s proposed testimony is accurate.

the State's accusations." *Chambers*, 410 U.S. at 294. Hence, Fields is not entitled to habeas relief.

Fourth, Fields argues that the trial court should have allowed "evidence as to how Ms. Horton felt about Burton driving her car around." R. 6 at 152. The argument is similar to the one about the cans and keys: the defense theory was that Horton became upset with Burton and kicked her out of the apartment, upsetting Burton and driving her to murder Horton. Thus, Fields argues, he should have been allowed to enter evidence about how Ms. Horton felt about Burton driving the car around. But the defense introduced evidence detailing the stormy relationship between Burton and Horton. Indeed, the prosecution admitted during closing argument that Burton had been "upset," even "mad" about the fact that Ms. Horton had evicted her. Evidence that Horton was specifically upset about the car thus seems to add very little. In any event, a fairminded jurist could conclude that Fields had a fair opportunity to defend himself even though the trial court excluded evidence that Horton was upset about the car. He is therefore not entitled to habeas relief.

Fifth, Fields argues that he is entitled to habeas relief because the trial court "improperly allow[ed] the Commonwealth to present hearsay evidence." R. 6 at 152. The hearsay in question came from Kim Baker, Burton's cousin. Baker and Burton had spoken on the morning of August 19, 1993, and, in describing that conversation, Baker testified as follows: "[Burton] just wanted to leave. She said that Sammy would come out and beat the shit out of her." R. 30-20 at 34. Fields says that this statement was hearsay testimony that the trial court should have excluded. But "it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." *Estelle*, 502 U.S. at 67–68. And thus "errors in application of state law, especially with regard to the admissibility of

evidence, are usually not cognizable in federal habeas corpus.” *Walker*, 703 F.2d at 962. Fields here alleges only a violation of state law—namely the state’s hearsay code. What he has failed to allege, however, is that the trial court’s ruling violated any provision of federal law. Nor has he explained how the Kentucky Supreme Court unreasonably applied a United States Supreme Court holding when it affirmed the trial court’s ruling. Indeed, this portion of his claim contains not a single citation to the United States Reports. He is therefore not entitled to habeas relief.

Sixth, Fields argues that he is entitled to habeas relief because the trial court allowed “improper[] . . . opinion testimony” from Dr. Hunsaker, the forensic pathologist who performed the autopsy on Ms. Horton. R. 6 at 154. Specifically, he says that the court should not have allowed Dr. Hunsaker to answer “yes” to the following question: “Can the manner in which a person is murdered . . . reflect the mood of the person committing the crime?” R. 30-21 at 56–57.³⁴ But Dr. Hunsaker’s “opinion” was only that the manner of death “can” reflect the mood of “the” culprit. He did not testify, for example, that the manner of *Ms. Horton’s* death reflected *Fields’s* mood, or that the jury here should infer anything about Fields’s state of mind from the way in which Ms. Horton died. Thus, it is hard to see how Dr. Hunsaker’s testimony “violated [Fields’s] rights to confrontation, due process, a fair trial, and reliable capital sentencing.” R. 6 at 155. And a fairminded jurist could certainly conclude that Dr. Hunsaker’s testimony violated none of those rights. Fields is therefore not entitled to habeas relief.

³⁴ The prosecutor repeated this testimony during closing—reminding the jury that Dr. Hunsaker had agreed that “the [manner] in which a person was killed [can] show the mood of the attacker.” R. 30-23 at 116.

Seventh, Fields argues that the trial court erred by admitting seven pictures of Ms. Horton's dead body. These pictures were "gruesome and repetitive," Fields says, and "none of [them] . . . were necessary to prove a point in controversy," because "[t]here was no dispute [that] Ms. Horton [had] died as a result of sharp force injuries to her head and neck." *Id.* at 156. The United States Supreme Court has never held, however, that a trial court violates a defendant's constitutional rights when it allows the jury to see photographs of a murder victim—even "gruesome and repetitive" ones. And the Sixth Circuit has refused to grant habeas relief even when the trial court admitted photographs that were at least as gruesome as the ones at issue here. *See Biros v. Bagley*, 422 F.3d 379, 391 (6th Cir. 2005) (refusing to grant habeas relief even though the state trial court admitted photographs "depicting [the victim's] severed head, her severed head near her torso and severed breast, and her torso with the severed head and severed breast replaced on [her] torso"). Thus, when the Kentucky Supreme Court affirmed Fields's conviction despite the photographs, the state court did not act contrary to any holding of the United States Supreme Court, nor did it unreasonably apply any such holding. Hence Fields is not entitled to habeas relief.

Eighth, Fields argues that the trial court should not have given the jury an instruction on wanton murder. R. 6 at 156–57; R. 30-23 at 29, 32. But the jury here did not convict Fields of wanton murder; it convicted him of intentional murder. R. 32-1 at 459. Fields points to no Supreme Court case suggesting that a defendant's rights are violated when the trial court gives the jury the opportunity to convict on a lesser offense.³⁵ There is no such case, of course. After all, it would seem that a defendant's rights are enhanced, rather than abridged, when the jury is given the opportunity to convict on a lesser offense—rather than

³⁵ Again, he cites to no Supreme Court cases at all.

forced to make the binary choice between a greater conviction and outright acquittal. And in any event, the jury here convicted Fields of the greater offense: intentional murder. This argument is meritless.

26. Claim 26

In his twenty-sixth claim for relief, Fields argues that he is entitled to habeas relief because the trial court denied his request to change venue from Rowan County to Carter County. R. 6 at 158. Fields made this argument before the Kentucky Supreme Court, which rejected it on the merits, holding that the state law “prohibit[ed] an additional change of venue” and that the Rowan Circuit Court therefore “retained jurisdiction of the matter upon remand.” R. 32-1 at 453–54. Fields does not quibble with the state court’s factual findings with respect to this claim, and thus to obtain habeas relief he must show that the state courts acted contrary to clearly established Supreme Court law—or else unreasonably applied such law. 28 U.S.C. § 2254(d).

Although Fields contends that he had a “constitutional right to be tried in the county of indictment[,]” R. 6 at 158, the United States Supreme Court would be surprised indeed to learn that it has ever recognized any such right. The Kentucky Supreme Court unreasonably applied no holding of the Supreme Court, therefore, when it rejected Fields’s change-of-venue claim. At worst, the state court erred in applying state law, which—to belabor the point yet again—is simply not a basis for federal habeas relief. *Estelle*, 502 U.S. at 67–68. Fields is therefore not entitled to habeas relief on the basis of his twenty-sixth claim.

27. Claim 27

In his twenty-seventh claim for relief, Fields argues that the trial court should have “allow[ed] a jury view of Carter County.” R. 6 at 159. Fields made this argument before the

Kentucky Supreme Court, which rejected it on the merits, holding that the trial court had not abused its discretion by denying his request for a jury view. R. 32-1 at 453. Fields does not quibble with the state court's fact finding with respect to this claim, and thus to obtain habeas relief he must show that the state courts acted contrary to clearly established Supreme Court law—or else unreasonably applied such law. 28 U.S.C. § 2254(d).

Fields says that a “jury view was necessary if the jurors were to understand the proximity of the four locations to one another” and that “this, in turn, was critical for jurors to understand in order to evaluate the differing timelines advocated by the Commonwealth and by the defense.” R. 6 at 159. However true those statements might be, the United States Supreme Court has never held that a defendant has a right to a jury view. Thus, the Kentucky Supreme Court did not unreasonably apply any holding of the United States Supreme Court when it affirmed the trial court's refusal to order one. Fields is therefore not entitled to habeas relief on the basis of his twenty-seventh claim.

28. Claim 28

In his twenty-eighth claim for relief, Fields argues that, during the sentencing portion of his trial, the court should have allowed him to present to the jury “parole eligibility statistics” and “criteria relied on by the Parole Board in determining parole.” R. 6 at 160. Fields made this argument before the Kentucky Supreme Court, which rejected it on the merits, holding that the evidence “had little relevancy or direct relationship to Fields's case.” R. 32-1 at 467. Fields does not dispute the state court's fact finding with respect to this claim, and thus to obtain habeas relief he must show that the state courts acted contrary to clearly established Supreme Court law—or else unreasonably applied such law. 28 U.S.C. § 2254(d).

Fields points to no decision from the United States Supreme Court that suggests a defendant has a right to present such evidence to the jury during his sentencing hearing. Fields has therefore failed to show that the Kentucky Supreme Court unreasonably applied any holding of the United States Supreme Court when it rejected his parole-statistics claim. Hence he is not entitled to habeas relief.

29. Claim 29

In his twenty-ninth claim for relief, Fields argues that “lethal injection is cruel and unusual punishment” and thus violated his rights under the Eighth Amendment to the U.S. Constitution. R. 6 at 161. He says that lethal injection “does not comport with [Eighth Amendment] requirements because of the substantial likelihood that it will result in undue pain and suffering for the inmate.” *Id.* at 162. He made this argument before the Kentucky Supreme Court, which rejected it on the merits. R. 32-1 at 189–90. Fields does not argue that the state court made an unreasonable factual finding with respect to this claim, and thus to obtain habeas relief he must show that the state courts acted contrary to clearly established Supreme Court law—or else unreasonably applied such law. 28 U.S.C. § 2254(d).

The Supreme Court has never held that lethal injection constitutes “cruel and unusual punishment” as that term is used in the Eighth Amendment. Indeed the Supreme Court has routinely affirmed death sentences that will be carried out via lethal injection. *See, e.g., Glossip v. Gross*, 135 S. Ct. 2726 (2015); *Baze v. Rees*, 553 U.S. 35 (2008). Thus, when the Kentucky Supreme Court rejected Fields’s claim that lethal injection violated the Eighth Amendment, its decision was perfectly consistent with the current state of death-penalty law as articulated by the United States Supreme Court. Fields has therefore failed to show that

the Kentucky Supreme Court acted contrary to, or unreasonably applied, any holding of the United States Supreme Court. He is therefore not entitled to habeas relief.

30. Claim 30

In Fields's thirtieth claim for relief, he argues that he is entitled to habeas relief on the basis of "cumulative error." He says that "cumulative effect" of the errors alleged in claims one through twenty-nine "render Fields'[s] convictions and sentence arbitrary and require that they be set aside." R. 6 at 162. Fields made this argument in front of the Kentucky Supreme Court, which rejected it on the merits, holding that "[u]pon comprehensive review of the proceedings in this case, we are convinced that [Fields] received a fundamentally fair trial and penalty proceeding." R. 32-1 at 469. Fields does not argue that the state court made an unreasonable factual finding with respect to this claim, and thus to obtain habeas relief he must show that the state courts acted contrary to clearly established Supreme Court law—or else unreasonably applied such law. 28 U.S.C. § 2254(d).

"The Supreme Court has not held that distinct constitutional claims can be cumulated to grant habeas relief." *Lorraine v. Coyle*, 291 F.3d 416, 447 (6th Cir. 2002). Thus, when the Kentucky Supreme Court rejected Fields's cumulative-error claim, it did not act contrary to any holding of the United States Supreme Court. Nor did it unreasonably apply any such holding. Fields is therefore not entitled to habeas relief on the basis of cumulative error.

Conclusion

As the Supreme Court has stated, if the AEDPA "standard is difficult to meet[,] that is because it was meant to be." *Harrington*, 562 U.S. at 102. It gives federal courts the authority to "issue the writ" only if "there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the Supreme] Court's precedents." *Id.* For the

past twenty years, the Kentucky state courts have reviewed Fields's conviction and sentence. In the Kentucky Supreme Court's most recent opinion, it considered the claims that Fields raises now, and a fairminded jurist could believe that the state court's opinion was consistent with the holdings of the United States Supreme Court. Under AEDPA, that is the end of the matter. This Court cannot grant Fields habeas relief.

Accordingly, it is **ORDERED** that Fields's petition for a writ of habeas corpus, R. 6, is **DENIED**.

This the 23rd day of June, 2016.



Signed By:

Amul R. Thapar

AT

United States District Judge

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

Deborah S. Hunt
Clerk

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Re: Case No. 17-5065, *Samuel Fields v. Scott Jordan*
Originating Case No. : 7:15-cv-00038

Dear Counsel,

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Cathryn Lovely
Opinions Deputy

cc: Mr. Robert R. Carr

Enclosure

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 23a0032p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

SAMUEL FIELDS,

Petitioner-Appellant,

v.

SCOTT JORDAN, Warden,

Respondent-Appellee.

No. 17-5065

On Petition for Rehearing En Banc
United States District Court for the Eastern District of Kentucky at Pikeville.
No. 7:15-cv-00038—Karen K. Caldwell, District Judge.

Decided and Filed: February 22, 2023

Before: SUTTON, Chief Judge; MOORE, CLAY, GIBBONS, GRIFFIN, KETHLEDGE,
STRANCH, BUSH, LARSEN, NALBANDIAN, READLER,
MURPHY, DAVIS, and MATHIS, Circuit Judges.*

COUNSEL

ON PETITION FOR REHEARING EN BANC: Matthew F. Kuhn, OFFICE OF THE KENTUCKY ATTORNEY GENERAL, Frankfort, Kentucky, for Appellee. **ON RESPONSE:** Daniel E. Kirsch, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Kansas City, Missouri, for Appellant.

ORDER

A majority of the Judges of this Court in regular active service has voted for rehearing en banc of this case. Sixth Circuit Rule 35(b) provides as follows:

*Judge Thapar recused himself from participation in this decision.

No. 17-5065

Fields v. Jordan

Page 2

The effect of the granting of a hearing en banc shall be to vacate the previous opinion and judgment of this court, to stay the mandate and to restore the case on the docket sheet as a pending appeal.

Accordingly, it is ORDERED, that the previous decision and judgment of this court are vacated, the mandate is stayed, and this case is restored to the docket as a pending appeal.

The Clerk will direct the parties to file supplemental briefs and will schedule this case for oral argument as soon as possible.

ENTERED BY ORDER OF THE COURT

A handwritten signature in black ink, appearing to read "Deborah S. Hunt", is written above a horizontal line.

Deborah S. Hunt, Clerk

IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED."
PURSUANT TO THE RULES OF CIVIL PROCEDURE
PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C),
THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE
CITED OR USED AS BINDING PRECEDENT IN ANY OTHER
CASE IN ANY COURT OF THIS STATE; HOWEVER,
UNPUBLISHED KENTUCKY APPELLATE DECISIONS,
RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR
CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED
OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE
BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION
BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED
DECISION IN THE FILED DOCUMENT AND A COPY OF THE
ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE
DOCUMENT TO THE COURT AND ALL PARTIES TO THE
ACTION.

Supreme Court of Kentucky

2013-SC-000231-TG

FINAL

DATE 5-14-15 Ena G. Gentry, D.C.
APPELLANT

SAMUEL STEVEN FIELDS

V.

ON APPEAL FROM FLOYD CIRCUIT COURT
HONORABLE JOHN DAVID CAUDILL, JUDGE
NO. 01-CR-00142

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

This appeal stems from the Floyd Circuit Court's order denying Samuel Steven Fields' motion pursuant to Kentucky Rules of Criminal Procedure ("RCr") 11.42 to vacate his conviction of murder and resulting sentence of death.

In 2003, Appellant stood trial, for the second time, for the murder of an elderly woman by the name of Bess Horton. The Commonwealth's theory of prosecution was that in the early morning hours of August 19, 1993, after a long period of heavy drinking and consuming horse tranquilizers (hereinafter referred to as "PCP"), Appellant broke into Horton's residence and murdered her. Appellant knew Horton through his girlfriend, Minnie Burton. Horton allowed Burton to live practically rent free at a duplex she owned. However, Horton was in the process of constructively evicting Burton by shutting off the

apartment's power and water. Burton suggested that she and Appellant burglarize Horton's residence, as she knew Horton kept money in her home.

The relevant facts leading up to Horton's murder began the previous morning on August 18, 1993. Appellant began consuming alcohol as soon as he woke up and continued throughout the day. In the evening, Appellant, along with Burton, Phyllis Berry, Scott Trent, and Bill Sloas drove to the home of a man by the name of James Berry in Ashland, Kentucky. The group sat around Berry's living room drinking alcohol and smoking marijuana. Appellant claims that he had also consumed PCP pills while at Berry's, but testimony surrounding this fact is disputed. Burton alleged that while the group was sitting around in Berry's apartment, Appellant looked as if he had put pills in his mouth. However, Burton could not definitively say whether Appellant consumed the pills, nor could she state what type of pills they were.

Subsequently, Appellant became so intoxicated that Berry asked the group to leave. Appellant and Burton made their way back to Grayson and went to his mother's apartment shortly before midnight. Appellant's mother and brother testified that Appellant was out of control and making little sense. As Appellant's brother testified, Burton and Appellant began fighting, after which Appellant started throwing objects around the living room and breaking glass in the apartment. Burton, fearful of Appellant's behavior, decided to walk home to her apartment, but was unable to gain entry.

After midnight, Appellant went looking for Burton at her apartment and found her on the front porch. Burton informed Appellant that she was locked

out. For that reason, he decided to slam his hand through her apartment window. Burton's neighbor called the police after witnessing Appellant's actions. Meanwhile, Burton fled the area leaving Appellant behind. Burton claimed that she immediately proceeded to her aunt and uncle's home. Although Burton's aunt and uncle were able to corroborate this fact, there were discrepancies in the timing of events. Appellant then proceeded to Horton's residence, believing that he would find Burton there. Appellant claims that he entered Horton's home through an open window. He said that he noticed the bedroom had already been ransacked and began pocketing remaining items. Appellant swears that he did not know that Horton lay dead on the bed.

Shortly before 2:00 a.m., Officers Ron Lindeman and Larry Green of the Grayson Police Department were called to respond to the break in at Burton's apartment. The apartment, however, was empty upon their arrival. The officers then conducted a search of the area. Officer Green noticed the lights were on in Horton's residence. This caused Officer Green to become suspicious of criminal activity. Upon further investigation, Officer Green found that the front window had been removed and the screen torn open. He then observed Appellant rummaging through a dresser drawer located in the bedroom. Officers also found Horton in her bed, stabbed in the head so viciously that the knife protruded through the right side of her temple and came out through the other side of her head. Horton's throat was slashed as well. Appellant was immediately arrested and found to be in possession of a broken-tipped knife,

two razor blades and Horton's jewelry. Officers later alleged that Appellant confessed to the crimes when he was handcuffed.

Appellant was indicted by a Carter County Grand Jury on one count of murder and one count of first-degree burglary. On July 29, 1996, the case was transferred to the Morgan Circuit Court. Attempts to seat a jury in that county proved to be unsuccessful. The case was then transferred to the Rowan Circuit Court on December 3, 1996. After a jury trial in 1998, Appellant was found guilty of murder and burglary and sentenced to death.

This Court found reversible errors occurred during the jury trial and overturned Appellant's conviction and sentence. *Fields v. Commonwealth*, 12 S.W.3d 275 (Ky. 2000). Appellant's case was transferred to the Floyd Circuit Court on December 18, 2001 for retrial. Appellant was once again found guilty of burglary in the first degree and murder. On December 19, 2003, Appellant was once again sentenced to death. Appellant appealed his conviction and sentence as a matter of right pursuant to § 110(2)(b) of the Kentucky Constitution. Appellant brought forth forty-nine alleged errors. This Court upheld Appellant's conviction and sentence. *Fields v. Commonwealth*, 274 S.W.3d 375 (Ky. 2008) ("Fields II"), *overruled in part by Childers v. Commonwealth*, 332 S.W.3d 64, 69 (Ky. 2010).

On September 21, 2010, Appellant filed a motion pursuant to RCr 11.42, alleging violations of his constitutional rights, along with specific instances of ineffective assistance of counsel ("IAC"). An evidentiary hearing was held for three days and both parties submitted extensive post-hearing memoranda.

The trial court denied Appellant's motion and issued its findings of fact and conclusions of law on January 22, 2013 (also referred to as the "trial court's order"). The following week Appellant filed a motion to vacate the trial court's order pursuant to Kentucky Rules of Civil Procedure ("CR") 59.05 and 52.02. The very next day, the trial court denied the motion and Appellant appealed to this Court.

RCr 11.42 Standard of Review

In order to obtain relief by virtue of an RCr 11.42 motion, the movant must establish that he was deprived of a substantial right which would justify extraordinary post-conviction relief. *Dorton v. Commonwealth*, 433 S.W.2d 117, 118 (Ky. 1968). The trial court's January 22, 2013, order detailing its findings of fact and conclusions of law found that Appellant failed to meet this burden. We review the trial court's determinations of law, under the *de novo* standard of review. *Brown v. Commonwealth*, 253 S.W.3d 490, 500 (Ky. 2008) (citing *Groseclose v. Bell*, 130 F.3d 1161, 1164 (6th Cir. 1997)). We will only set aside the trial court's factual determinations if they are found to be clearly erroneous, meaning the findings are not supported by substantial evidence. *Id.* (citing CR 52.01). Furthermore, we will defer to the trial court's determinations in regards to the facts and witness credibility. See *Commonwealth v. Anderson*, 934 S.W.2d 276, 278 (Ky. 1996).

Jury Misconduct

Part of the Commonwealth's theory was that Appellant gained entry into Horton's residence by removing a large storm window located in the front of the

home. Appellant allegedly used a broken-tipped knife to unscrew from the window seventeen paint covered screws. Appellant disputed this theory by arguing that (1) it was impossible to use the knife as a screwdriver in this situation; (2) Appellant was too intoxicated to perform such a feat; and (3) even if the knife could have been used to remove the window, Appellant could not have performed such a task within the fourteen minutes that he was last seen and the point at which Officer Green arrived at Horton's residence. While the jury did hear these arguments, they did not have the benefit of witnessing an in-courtroom experiment or hearing from a tool mark analyst.

According to the affidavits of two jurors, the jury decided to conduct their own experiment during deliberations by using the broken tipped-knife, introduced into evidence as Commonwealth's exhibit 44, and attempting to unscrew the door off of a cabinet located in the jury room. Appellant argues that he is entitled to a new trial because this experiment violated his rights to confrontation, due process, and a fair trial as guaranteed by the United States and Kentucky Constitutions. See U.S. Const. amend. V, VI, XIV; Ky. Const. § 2, 11.

During the evidentiary hearing, the Commonwealth objected to allowing the two jurors to testify about the experiment. The trial court agreed and excluded both jurors testimony, finding that such testimony was incompetent. The trial court relied on RCr 10.04, which states that "[a] juror cannot be examined to establish a ground for a new trial, except to establish that the verdict was made by lot." The Court then stated that even taking into account

the jurors' allegations, there was no showing of juror misconduct. Citing cases from the Fourth, Seventh, and Eighth Federal Circuits, the trial court reasoned that juror misconduct does not occur simply because the jury, using admissible evidence, tries to "re-create circumstances discussed by those that testif[ied]."

We will assume for the purposes of our analysis that the jurors' affidavits and testimony qualified as admissible evidence. Even so, this Court does not believe the jurors' testimony demonstrated misconduct. We note that "the bar to challenge a jury verdict based upon jury misconduct during deliberations is high." *Commonwealth v. Abnee*, 375 S.W.3d 49, 56 (Ky. 2012). Like the trial court, we find guidance from the Sixth Circuit in *U.S. v. Avery*, 717 F.2d 1020 (6th Cir. 1983). The defendant in *Avery* was convicted of attempting to destroy, by the use of explosives, a building used in interstate commerce. *Id.* at 1022. The prosecution's theory alleged that the defendant moved propane canisters and milk containers full of gasoline to a crawl space beneath the building within a three minute period of time. *Id.* at 1024. The defendant sought to impute reasonable doubt into the jurors' minds by claiming that moving that amount of explosives in such a short amount of time was implausible. *Id.* The defendant even put an expert on the stand to attest to the amount of time he would have needed to move the explosives. *Id.* at 1026. In his closing argument, the prosecutor urged the jury to "try this scenario", which included attempting to hold two jugs of milk in each hand while crawling on their hands and knees. *Id.*

The Sixth Circuit found that there was no error in asking the jury to handle the milk cartons and try to recreate the defendant's actions. *Id.* The court's conclusion was based on the fact that the defendant placed the issue before the jury, utilized expert testimony to buttress his claim, and that the experiment did not expose the jurors to extraneous materials. *Id.* The court pointed out that juries must be able to use "common experiences and illustrations in reaching their verdict." *Id.*

The trial court also relied on several other cases to support its finding that the experiment did not qualify as jury misconduct. In *Banghart v. Origoverken*, 49 F.3d 1302 (8th Cir. 1995), for example, the plaintiff sued the manufacturer of a stove when his sailboat caught on fire. *Id.* The plaintiff's theory was that the boat fire occurred due to a lit wood-burning match continuing to burn after being dropped into the stove burner. *Id.* at 1303. During deliberations, the jury obtained wood matches and conducted its own experiment using the stove in question. *Id.* The purpose of the experiment was to determine if matches could in fact be dropped into the stove. The experiment's results showed that the matches would not fall into the stove. *Id.* The Eighth Circuit agreed with the lower court that the jury's experiment did not constitute misconduct. *Id.* at 1306. In doing so, the court stated the following:

The 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 nature of the piece of evidence upon which the case turned, the stove, and in evaluating the expert's testimony regarding his experiments with the stove. . .

. In conducting the experiment the jurors were not exposed to extrinsic evidence, but merely tested the truth of statements made. . . .

Id. What we garner from these two cases is that jurors are free to use their own senses, observations, and experiences to conduct an experiment or reenactment with already admitted evidence. *See Fletcher v. McKee*, 355 Fed.Appx. 935 (6th Cir. 2009) (jury did not engage in misconduct by using the admitted murder weapon and allowing it to fall to the ground, as it would have during the crime, to ascertain where it landed). This is exactly what the jury did in conducting its experiment. Moreover, the experiment did not contribute to their verdict because it simply proved that it was possible to remove the screws using the knife, not that Appellant murdered the victim. Therefore, we agree with the trial court that the jury's experiment did not constitute misconduct.

Furthermore, even assuming that the jury did engage in misconduct, we believe it to be harmless. *Gould v. Charlton Co., Inc.* 929 S.W.2d 734, 740 (Ky. 1996) ("Juror misconduct only results in a new trial when the misconduct so prejudices a party that a fair trial was not obtained."). Indeed, we cannot say beyond a reasonable doubt that the jury experiment contributed to the verdict. Looking at Juror H's testimony, she stated that witnessing the juror remove the screws satisfied her curiosity regarding whether it was possible for Appellant to remove Horton's window. Similarly, Juror G also confirmed that the experiment was conducted to determine "if it was possible and could be done." However, and as is discussed *supra*, there is no dispute that Appellant

entered the home. We believe it is extraneous to debate how he managed to get in Horton's residence. Thusly, we find no error in the trial court's ruling on this issue.

Erroneous Findings of Facts and Conclusions of Law

After the three-day RCr 11.42 evidentiary hearing, the trial judge made his ruling. He thereafter contacted the prosecutor and asked that she submit proposed findings of facts and conclusions of law. Once received, the judge reviewed the findings and believed that the proposed order touched upon all of the relevant matters. Consequently, he adopted, verbatim, the Commonwealth's proposed findings of fact and conclusions of law. In doing so, Appellant believes the trial court provided deference to the Commonwealth and violated his rights to due process, along with RCr 11.42(6). For those reasons, Appellant filed a motion to strike the trial court's order.

The record reveals that at the conclusion of the hearing, Judge John David Caudill took the matter under submission. Subsequently, Judge Caudill decided in the Commonwealth's favor. Judge Caudill then contacted the Commonwealth Attorney's office and asked the prosecutor to prepare a proposed order, including findings of fact and conclusions of law. After reviewing the proposed findings, Judge Caudill believed that all pertinent matters were correctly and adequately addressed. Accordingly, he adopted the proposed order in full.

RCr 11.42 states that "[a]t the conclusion of the hearing or hearings, the court shall make findings determinative of the material issues of fact and enter

a final order accordingly.” This rule does not forbid the trial court from adopting a party’s findings of fact and conclusions of law. *See Prater v. Cabinet for Human Res.*, 954 S.W.2d 954, 956 (Ky. 1997)(“It is not error for the trial court to adopt findings of fact which were merely drafted by someone else.”). In fact, this practice is not uncommon and by no means prevents the trial court from analyzing the evidence thoroughly. *See Bingham v. Bingham*, 628 S.W.2d 628, 629 (Ky. 1982). We do note, however, that the practice of announcing a decision and leaving it to the prevailing party to write the findings of fact and conclusions of law is frowned upon. *See Anderson v. Bessemer*, 470 U.S. 564, 572 (1985). It is more appropriate for the trial court to prepare its own findings in order to avoid an appearance of partiality. Nonetheless, the trial judge explained at the January 29, 2013, hearing that he did not have the staff to prepare an order himself. Thus, for the sake of judicial economy, the trial judge relied on the prevailing party to submit a proposed order. *See Ky. Milk Mktg. & Anti-Monopoly Comm. v. Borden Co.*, 456 S.W.2d 831, 834 (Ky. 1969)(“We do not condemn this practice in instances where the court is utilizing the services of the attorney only in order to complete the physical task of drafting the record.”). Since Judge Caudill confirmed that he “looked at [the order], it covered every item that [he] felt needed to be covered [and] was consistent with [his] decision[.]” we find no violation of the rules of criminal procedure.

Recusal of Judge Caudill

Along with Appellant's motion to strike, he also filed a motion to have Judge Caudill recuse himself so that a special judge could preside over the RCr 11.42 hearing. Appellant's argument is predicated on the above-discussed *ex parte* communication between Judge Caudill and the Commonwealth, along with an alleged instance of bias during the hearing. In support of his argument, Appellant cites *Commonwealth v. Wilson*, 384 S.W.3d 113 (Ky. 2012), wherein we held that it was improper for a defense attorney to contact the judge and have the judge set aside a warrant of arrest. Yet, in *Wilson* we clarified that "Kentucky's Judicial Canons forbid one-sided contacts relating to all judicial proceedings, except in regards to scheduling, initial fixing of bail, *administrative purposes*, or emergencies that do not deal with substantive matters or issues on the merits." *Id.* at 116 (citing SCR 4.300, Canon 3(B)(7)(a)). During the trial court's January 29, 2013 hearing on the matter, Judge Caudill explained that he considered the matter to be administrative since he did not have a law clerk to prepare an order. Again, we note that the trial court had already decided on the merits of Appellant's RCr 11.42 motion. Therefore, we are confident that Judge Caudill did not engage in a one-sided discussion on the motion's substantive issues, rather the trial court requested administrative help. This communication in no way demonstrates that Judge Caudill harbored a personal bias against Appellant. See KRS 26A.015(2)(a).

Appellant also attempts to prove bias by calling into question Judge Caudill's treatment of Appellant's counsel and his witness during the RCr

11.42 evidentiary hearing. More specifically, during the hearing, Appellant attempted to have a mitigation expert testify whether she had an opinion regarding Appellant's mental fitness. The Commonwealth objected to the witness's testimony to the extent she would offer a "diagnosis". The trial court sustained the objection and warned Appellant's counsel, on more than one occasion, not to do so. The trial judge further stated that if trial counsel attempted to procure such an answer, she would be held in contempt. After reviewing this particular part of the hearing, we do not believe the trial judge acted inappropriately. Instead, it is clear that Judge Caudill made a ruling and was stern in enforcing it. Appellant fails to provide analogous case law to support his argument; and for good reason, as a reasonable person would not find the trial court's actions to show partiality.

Expert Witness Funds

Appellant next alleges that Judge Caudill erred in refusing to approve the distribution of funds so that Appellant could obtain three expert witnesses to support his RCr 11.42 motion. Appellant argued to Judge Caudill that the expert testimony was needed to demonstrate the extent of his counsel's ineffectiveness during the trial. Thusly, the expert witness testimony Appellant sought to provide during the RCr 11.42 hearing is actually testimony that he wanted presented during his jury trial. The requested experts are as follows: (1) a mitigation expert to testify regarding the psychological, biological, and neurological aspects of drug and alcohol abuse and addiction; (2) a tool mark analyst to testify that the knife Appellant used to gain entry into the victim's

residence could not have removed the window; and (3) a blood splatter expert to testify that Appellant did not stab the victim due to a lack of blood transfer between the two.

Judge Caudill delayed ruling on the motion for funds until he could determine whether the anticipated testimony would in fact show that trial counsel was ineffective. Subsequently, Appellant requested that this Court issue a writ a mandamus ordering the trial court to allow the release of funds to obtain the experts for use in the RCr 11.42 evidentiary hearing. We denied the motion in August of 2011 due to Appellant's failure to show that he lacked an adequate remedy by appeal. *Fields v. Caudill*, 2011-SC-000252-OA (Ky. 2011). The issue now reaches us through Appellant's direct appeal of his RCr 11.42 motion.

In *Mills v. Messer*, 268 S.W.3d 366, 367 (Ky. 2008), this Court explained that "a petitioner may be entitled to state funds for the procurement of expert testimony upon a showing that such witness *is reasonably necessary for a full presentation of the petitioner's case.*" (Emphasis added). During Appellant's hearing on this motion, Judge Caudill stated the following:

I'm not going to address the issue about experts until such time I address the issue about whether or not there was in fact ineffective assistance of counsel because what [you are] alleging in your motions and your request for funding is that . . . if they done this the outcome would have been different . . . we can go on the basis of what you allege they should have done without actually hearing the experts. . . . I'm going to assume what your experts were going to say . . . and whether that would have made a difference.

This statement reveals Judge Caudill's reasoning that expert testimony was unnecessary at the RCr 11.42 hearing because he could simply rule on the

matter by making a blanket assumption that the experts would testify exactly how Appellant stated they would. This practice conserves the already limited resources and funds of the Commonwealth by first determining whether an IAC claim is even possible given the anticipated testimony. In addition, we note that Appellant may have been better served by this method, because as Appellant's counsel conceded, she did not know if the requested experts would provide favorable testimony. In any event, we can find no reason to conclude that the trial court must hear the actual testimony of an expert before it can determine whether that expert's testimony is reasonably necessary.

That determination was made by the trial court and we review it subsequently as part of the issues dealing with ineffective assistance of counsel.

Brady Violation

During the RCr 11.42 hearing, Appellant supplied the trial court with the testimony of its post-conviction mitigation expert, Heather Drake. She testified that she interviewed James Berry in October of 2009, while he was serving time in Roederer Correctional Complex. Berry told Drake that years prior he was called into the prison office and told that he had a phone call. The caller identified himself as someone from the Attorney General's Office. This individual inquired into the events Berry witnessed on the night in question.

Berry described to Drake the contents of this conversation which consisted of the following information: Berry's half-sister, Phyllis Berry, along with Appellant, Burton, Trent, and Sloas came to his home on the night in

question to have a party. Appellant was highly intoxicated and continued drinking throughout his stay. Phyllis told Berry that Appellant's behavior was due to his consumption of PCP. Berry privately traded Appellant pills for marijuana. Berry then witnessed Appellant ingest three pills that he believed to be Dilaudid, a strong opioid. Berry also detailed the extent of Appellant's intoxication, stating that he was making little sense and he even fell over the living room coffee table. Appellant was so intoxicated that Berry asked him to leave. Drake, however, could not get Berry to sign a sworn affidavit containing these alleged statements.

In *Brady v. Maryland*, 373 U.S. 83 (1963), the U.S. Supreme Court held that it is a violation of a defendant's due process rights for the prosecution to withhold material exculpatory evidence from the defense. Appellant claims that a violation of *Brady* occurred when the Commonwealth failed to disclose this secret conversation and the information contained therein. The Commonwealth denies that this interview transpired and claims that no one at the Commonwealth's office contacted or interviewed Berry. The trial court agreed that there was insufficient proof that a *Brady* violation occurred. As the trial court stated in its order, "the prosecution cannot 'suppress' information already known to the defendant or his attorney" and "there is no credible evidence that any secret interview actually occurred." For the following reasons, we believe the trial court's findings on this issue are supported by the record and relevant case law.

First, we note that there is ample evidence in the record to support the trial court's proposition that Berry is an unreliable witness, and that his accusation alone is not sufficient to prove a *Brady* violation. The only testimony that this secret interview occurred came from Berry himself. There is no evidence to corroborate his claim and we have reservations in finding his testimony credible. Besides the fact that Berry is a convicted felon suffering from paranoid schizophrenia, his testimony during the RCr 11.42 hearing differed substantially from the testimony that Drake claimed he previously told her. For example, Berry denied (1) knowing what drugs Appellant had taken; (2) trading pills with Appellant for marijuana; (3) and conversing with Appellant privately, away from the group. A *Brady* violation cannot be found without proof beyond mere speculation that this interview actually took place. *See Mills v. Commonwealth*, 2011-SC-000541-MR, 2011-SC-000585-MR, 2014 WL 2809790 (Ky. June 19, 2014)(“Without proof beyond mere speculation that this evidence exists, we cannot conclude that a *Brady* violation has occurred.”)(citing *U.S. v. Agurs*, 427 U.S. 97, 109-10 (1997)).

Secondly, we find merit in the trial court's conclusion that the Commonwealth could not have “suppressed” information that Appellant's counsel already knew. Indeed, a *Brady* violation applies to exculpatory evidence which is known by the prosecution, but not to the defense. *Agura*, 427 U.S. at 103. Appellant's counsel utilized Burton as a witness. She disclosed the same information elicited from Berry. That is, Appellant touted that he had been consuming PCP on the day of Horton's murder and that

Appellant was highly intoxicated, displaying out-of-control behavior. In addition, Burton was present while the group sat together drinking in Berry's apartment. She witnessed the same display as Berry—Appellant placed pills in his hand and then likely consumed those pills. Since the purported exculpatory evidence was already known by Appellant's counsel, the trial court did not err in concluding that a *Brady* violation did not occur.

Prosecutorial Misconduct

Appellant complains that the Commonwealth engaged in prosecutorial misconduct by making incorrect statements during its closing arguments which prejudiced Appellant to such a degree as to render his entire trial, including the penalty phase, fundamentally unfair. The incorrect statements Appellant is referring to are based on the testimony elicited from Burton that Appellant possessed and possibly ingested pills, which has since been called into question by the post-trial testimony of Berry.

In closing arguments, the Commonwealth discussed the voluntary intoxication instruction, and stated the following: "[V]oluntary intoxication, that means someone putting on a buzz, someone taking in alcohol. And that's all we've heard is alcohol that this defendant had." Appellant objected to the Commonwealth's statement, arguing that the prosecutor was misleading the jury into believing that the evidence only showed that Appellant had been drinking alcohol, not taking pills. The trial judge overruled Appellant's objection because, in his recalling of the evidence, Burton could not definitively say whether Appellant swallowed the pills, rather she saw his hand go to his

mouth. At that point, the Commonwealth resumed its argument and stated the following:

You know what, you go with what you remember, Don't go with what the lawyers say what happened, go with what you recall. Minnie Burton said something about the defendant telling her something about horse tranquilizers. My recall of Ms. Burton's testimony is that she couldn't say whether he did or didn't. . . . But, look at the evidence. Was this guy so intoxicated that he didn't know what was going on? No, he knew what was happening.

Before analyzing this issue, we note that Appellant's claim of prosecutorial misconduct, at least as it relates to Burton's instead of Berry's testimony, is one that should have been asserted in his direct appeal. Since issues that could have or should have been raised on direct appeal cannot be raised in an RCr 11.42 motion, Appellant's claim should have been barred. *See Leonard v. Commonwealth*, 279 S.W.3d 151,156 (Ky. 2009). Even so, we are in agreement with Judge Caudill that the above-referenced statements did not qualify as prosecutorial misconduct.

Parties are given wide latitude during closing arguments. *See Bowling v. Commonwealth*, 873 S.W.2d 175, 178 (Ky. 1993). As the trial court properly stated, prosecutors are entitled to draw reasonable inferences from the evidence. *Commonwealth v. Mitchell*, 165 S.W.3d 129, 131-32 (Ky. 2005). Considering that Burton would not specify if Appellant actually consumed the pills, we believe the Commonwealth made an inference that Appellant was intoxicated solely due to his alcohol use. Again, the jurors heard the same testimony and were free to imply that Appellant swallowed the pills that were in his hand. Furthermore, we have already upheld the trial court's finding that a

Brady violation did not occur. It follows then, that we cannot now conclude that the Commonwealth committed prosecutorial misconduct for making a statement in contravention of Berry's post-trial testimony, when the prosecutor was unaware of such testimony when making the closing argument. Therefore, we find no merit in Appellant's allegation that the Commonwealth committed prosecutorial misconduct.

Ineffective Assistance of Counsel

Appellant's remaining arguments allege instances of IAC. In reviewing the trial court's order, this Court must rely on the following two-part test espoused in *Strickland v. Washington*, 466 U.S. 668, 687 (1984):

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance *prejudiced the defense*. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

In regards to the first prong, we must keep in mind that "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id.* at 688. Moreover, this Court must also provide Appellant's attorneys with "a strong presumption" that their conduct fell "within the wide range of reasonable professional assistance." *Haight v. Commonwealth*, 41 S.W.3d 436, 442 (Ky. 2001), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151, 158-59 (Ky. 2009). As to the second prong, *Strickland* requires that there be a "reasonable

probability” that counsel's deficient conduct more likely than not altered the verdict. *Id.* at 694 (“[t]he result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.”). This finding does not require that the prejudice be so strong that but for it, an acquittal would have occurred. *Norton v. Commonwealth*, 63 S.W.3d 175, 177 (Ky. 2001).

We note that Appellant was represented by two different public defenders during his 2003 retrial and sentencing. Rebecca Lytle represented Appellant during the guilt phase, while Mark Baker represented Appellant during the sentencing phase.

Failure to Present Witnesses

Appellant brings forth a claim of IAC based on his attorneys’ failure to interview and place on the stand individuals who witnessed Appellant’s behavior and level of intoxication on the night in question. Appellant contends that his defense team was unreasonably deficient in not pursuing these witnesses and that prejudice resulted in the form of a guilty verdict. We will address each witness in turn.

James Berry

As discussed above, James Berry testified at the RCr 11.42 hearing that Appellant and other individuals came to his home on the night of Horton’s murder. The group sat around Berry’s living room drinking and smoking marijuana. Berry inquired as to what Appellant had consumed to cause his

level of intoxication, to which Phyllis replied that he had been drinking heavily and consumed PCP. While the group was “partying” in Berry’s living room, he witnessed Appellant consume some pills, but he could not identify what the pills were. Appellant contends that his counsel was ineffective due to their failure to interview Berry and place him on the stand. Appellant believes that if his counsel had done so, the jury would have determined that Appellant was too intoxicated to: (1) remove Horton’s window and gain access to her residence; and (2) form the *mens rea* needed to commit the crime of murder. Appellant also maintains that Berry’s testimony could have been used to lay the foundation for the use of a drug expert for mitigation purposes.

There is no doubt that Appellant’s counsel had a duty to conduct a reasonable investigation, including investigating potential defenses. *Wiggins v. Smith*, 539 U.S. 510, 521-22 (2003). With that being said, we must provide Appellant’s counsel with a presumption that their pretrial investigation was sufficient under the circumstances, and that their actions were based on “trial strategy.” See *Strickland*, 466 U.S. at 689. The burden is on Appellant to overcome this strong presumption. *Id.* After hearing testimony from both Lytle and Baker, the trial court concluded that Appellant failed to clear this high hurdle, as it believed it was trial strategy for his counsel not to call Berry to the stand. The trial court’s reasoning was that Barry was an unreliable witness who possessed information that was obtainable from other more reliable sources, namely Burton. For the following reasons, the trial court’s determinations were not clearly erroneous.

First, there was sufficient evidence to support the trial court's determination that Appellant's counsel knew of Berry and could have interviewed him if so desired. It should be noted that at the time of the RCr 11.42 hearing, over seven years had lapsed since the trial. Seven years. That reality should not be ignored when assessing the evidence at the 11.42 hearing. Consequently, Appellant's trial counsel had minimal recollection of some of the specifics of Appellant's case. Even so, when asked if Lytle remembered Berry, she responded that she did and that he was in prison at the time. Lytle also stated that she could have tracked Berry down if she so desired to interview him.

Secondly, despite never interviewing Berry, we believe there was sufficient evidence that Appellant's counsel knew of the general information Berry possessed, but had obtained that information from Burton. Lytle explained that she was aware Berry was with Appellant on the night in question, along with several other individuals, including Burton. Logically, these witnesses would have roughly the same information. In fact, Lytle testified that Burton had provided her with an adequate account of Appellant's level of intoxication on the night of Horton's murder, including that he possessed and consumed pills. We acknowledge that Lytle did not, and could not have known the extent of Berry's knowledge, but she had no reason to believe that he would have provided any additional information that had not already been obtained from Burton.

In regards to trial strategy, we agree that it was counsel's trial strategy not to call Berry to the stand. For example, when asked why she did not interview Berry, Lytle answered that she could not recall, but speculated that it was strategic. Lytle claimed that one of her many "jobs" at trial was to have Burton disclose to the jury that Appellant consumed pills, particularly PCP. The reason for this was to have a "factual predicate" so that Baker could discuss it for mitigation purposes in the penalty phase. In fact, Baker had already obtained the expert testimony of Dr. Adams to discuss the effects of PCP. Therefore, Lytle likely believed that an interview of Berry was unnecessary.

Moreover, Lytle testified that she had never before placed a witness on the stand that suffered from a psychological illness. In light of the fact that Berry was a convicted felon suffering from schizophrenia, in addition to the cumulative nature of the information he would have provided, we have little doubt that it was trial counsel's strategy not to expend their already limited resources on investigating Berry. We find it telling that Appellant's counsel in his first trial did not interview or investigate Berry either. As this Court has explained, "[d]ecisions relating to witness selection are normally left to counsel's judgment and this judgment will not be second-guessed by hindsight." *Foley v. Commonwealth*, 17 S.W.3d 878, 885 (Ky. 2000), *overruled on other grounds* by *Stopher v. Conliffe*, 170 S.W.3d 307, 310 (Ky. 2005). Consequently, we will not disturb the trial court's findings on this issue.

Cindy Mosley

Next we will focus on Appellant's IAC claim based on his trial counsel's failure to call and investigate Cindy Mosley, Berry's live-in girlfriend at the time. Mosley was present at the home when the lively group arrived. Neither the Commonwealth, nor Appellant's counsel interviewed Mosley. Appellant claims that Mosley would have provided further testimony that Appellant was intoxicated that night, which he claims would have resulted in a not guilty verdict. Appellant's claim has no merit. For the sake of argument, even if we were to assume that trial counsel was deficient in failing to call Mosley, Appellant cannot establish that but for his counsel's deficiency, the outcome of the trial would have been different. Mosley testified at the RCr 11.42 hearing and explained that when the group arrived at her home, she and her two small children went back to her bedroom where they remained until the group left. She further claimed that while Appellant seemed drunk, she could not comment on the extent of his intoxication, nor did she witness him consume any pills. Clearly, this testimony would have made no difference in Appellant's trial.

Michael Stanaford and Roger Jessie

Appellant also brings forth IAC claims based on his trial counsel's failure to call Michael Stanaford and Roger Jessie to the stand. Stanaford is a deputy jailer at the Carter County Jail and Jessie is a police officer for the City of Grayson. Appellant's trial counsel conducted pretrial interviews with both individuals, but ultimately did not call either to the stand to testify. Jessie's

pretrial interview disclosed that when he arrived on the scene, Appellant was acting strange, appeared to be intoxicated, and was unsteady on his feet. However, Jessie could not confirm that Appellant was intoxicated, as he was not close enough to smell the scent of alcohol on Appellant's person. Similarly, Stanaford also observed Appellant's strange behavior when he was brought to the jail. Stanaford explained that Appellant would not make eye contact or speak to any of the jailers. Once placed in the jail cell, Appellant immediately passed out and it was difficult to wake him up mere minutes later. Like Jessie, Stanaford could not confirm whether or not Appellant was intoxicated, but believed something was wrong with him.

Based on this information, Appellant contends that both witnesses should have been called to testify, as their claims buttressed other witnesses' testimony that Appellant was intoxicated on the night in question. The trial court concluded that it was sound trial strategy not to call Stanaford and Jessie to testify. We agree.

During the RCr 11.42 hearing, Lytle explained that she did not call Stanaford to testify because there were relevancy issues regarding his impression of Appellant's behavior as he did not see Appellant until hours after Horton's murder. More importantly, Lytle stated that Stanaford's testimony ran the risk of opening the door into Appellant's lengthy criminal past. During the RCr 11.42 hearing, Stanaford stated that he had known Appellant for quite some time, as Appellant had been in and out of the Carter County Jail since turning eighteen. Considering that Stanaford's arguably irrelevant information

was that Appellant may have been intoxicated, it was reasonable trial strategy to keep him from testifying so as to prevent the risk of Appellant's lengthy criminal past from being revealed to the jury.

In regards to Jessie, we also believe Lytle likely omitted his opportunity to testify in order to prevent damaging evidence from surfacing. Jessie disclosed in his pretrial interview that Appellant had verbally threatened him after his arrest. More specifically, Jessie claimed that Appellant said, "Roger, you son of a b****, you wanna die too." Clearly, this statement could be seen as an admission to Horton's murder. Thusly, we believe any reasonable attorney would have determined that Jessie's value as a witness was minimized by the risk of Appellant's threat being disclosed to the jury. However, when Lytle was asked why Jessie was not called to the stand, she testified that she did not recall, and that it was likely a mistake.

Assuming *arguendo*, that Lytle did make a mistake in failing to call Jessie to the stand, and assuming that failure qualifies as a deficient performance, we still do not believe that Appellant satisfied the second prong of *Strickland*. It is highly unlikely that the jury's verdict or sentence would have been different had the jury heard Jessie's testimony that shortly after his arrest, Appellant appeared to be intoxicated. As we have mentioned numerous times, Burton and other witnesses attested that Appellant was extremely intoxicated during the time frame in which he went to look for Burton at Horton's residence. For these reasons, we agree with the trial court's

conclusion that Appellant failed to demonstrate that his trial counsel was ineffective by not calling Jessie to the stand.

Drug and Alcohol Expert

Appellant's next argument alleges that his trial counsel was ineffective by failing to present testimony during the guilt stage of trial regarding the effects of ingesting PCP. Appellant called "Psycho-Pharmacologist" Dr. Robert Adams to the stand during the RCr 11.42 hearing. He testified that when used in large doses, PCP induces psychotic reactions such as psychosis, delusions and paranoia. Dr. Adams also explained that PCP can cause impaired coordination. The trial court concluded that it was reasonable trial strategy not to call Dr. Adams as a witness. In doing so, the trial court focused on Appellant's adamant opposition to presenting an intoxication defense to the jury. The trial court stated that since Appellant's defense was complete innocence, it was a reasonable trial tactic to refrain from drawing any more attention to Appellant's drug and alcohol use. The trial court further concluded that any favorable testimony elicited from Dr. Adams would have had minimal effect on the outcome of the trial. After reviewing the record, we do not find the trial court's findings to be clearly erroneous.

To begin our analysis, it is important to underscore that both Lytle and Baker conceded that Appellant's theory of defense was that he was innocent, meaning that he did not commit the crime. Implicit in this defense was the theory that Burton was the individual that had killed Horton after she awoke to find her home being burglarized. According to Baker, Appellant was

exceedingly engaged in his representation and was highly opposed to putting on evidence or testimony that made him appear guilty, including an intoxication defense. As will be discussed, Appellant was so obdurate on this point that he requested Baker not put on mitigating evidence. Of course, Baker ultimately talked Appellant into allowing him to present mitigating evidence in the sentencing phase. The point, however, is that Baker obtained Dr. Adams as an expert for the sole purpose of presenting him for mitigation purposes. Lytle even testified that there was no discussion of utilizing Dr. Adams or any drug expert in the guilt stage.

Additionally, Dr. Adams testified that PCP could prevent an individual from having control over their own actions and cause hostility and violence towards others. The proof also indicated that unlike marijuana or alcohol, PCP is the type of drug that can induce a psychotic episode, consistent with causing an otherwise non-violent individual to stab an elderly woman in the head. As Baker explained, any seasoned prosecutor would have twisted Dr. Adams testimony to stand for the proposition that Appellant was capable of brutally murdering Horton after ingesting PCP. Consequently, if Dr. Adams testified, it would have been more likely that the jury would have found that Appellant was capable of, and had in fact, committed the offense.

In light of our presumption that trial counsel's decisions regarding the presentation of witnesses are assumed to be based on trial strategy, we agree with the trial court that the decision to not utilize a drug expert was reasonable under the circumstances. *See Harper v. Commonwealth*, 978 S.W.2d 311, 315

(Ky. 1998) (trial counsel's decision not to present an expert was not unreasonable and was consistent with trial strategy); *see also*, *Mills v. Commonwealth*, 170 S.W.3d 310, 329 (Ky. 2005), *overruled on other grounds by Leonard*, 279 S.W.3d at 158-59 (counsel was not ineffective by failing to hire an expert to support his defense of intoxication because other evidence was produced which tended to support the claim).

Tool Mark Analyst

Appellant makes an additional argument that trial counsel was ineffective by not obtaining a tool mark analyst to testify during the trial. Appellant claims that an expert in this area would have opined that there was no possibility that Appellant's knife could have unscrewed the window's painted-covered screws. In rejecting Appellant's argument, the trial court explained that obtaining an expert to analyze the window would have been challenging since the actual window was not available to analyze. Also, prejudice did not result because trial counsel was able to obtain favorable expert testimony from the cross-examination of the Commonwealth's expert, thereby rendering an independent expert unnecessary.

A review of the record supports the trial court's findings on this issue. Since this case has been tried before, Baker had the benefit of knowing in advance what the Commonwealth's expert would testify to. Specifically, the Commonwealth's expert conducted a paint analysis which revealed that the white paint found on Appellant's knife was a different color and chemical compound from the white paint found on the window screws. Baker testified

that he believed this information sufficiently discredited the Commonwealth's knife theory. For that reason, Baker believed that it was unnecessary to expend resources to obtain a tool mark analyst. Furthermore, we reemphasize our previous conclusion that the method Appellant employed to gain entry into Horton's home is extraneous.

Blood Spatter Expert or Pathologist

Similar to Appellant's previous argument, he complains that his trial counsel was ineffective due to their failure to obtain a blood spatter expert or pathologist. Forensic evidence divulged that despite the massive amount of blood loss Horton experienced when she was murdered, none of her blood was found on Appellant. Likewise, Appellant deposited a significant amount of blood on various objects he touched after injuring himself while trying to gain access to Burton's apartment. Yet, Appellant's blood was not found on or near Horton. Appellant maintains that Baker—the trial attorney that was in charge of obtaining expert witnesses for Appellant's jury trial—should have obtained a blood spatter expert to testify regarding the improbability that Appellant committed the murder given the aforementioned forensic evidence, or lack thereof. The trial court made the following findings:

Mr. Baker believed that the medical examiner had made certain concessions during the first trial that were very likely to be repeated in the trial at issue. Thus, he reasonably believed that it would be more beneficial to present information through cross examination. This was a reasonable trial strategy.

Baker's testimony at the RCr 11.42 hearing supported the trial court's conclusion. Again, Baker had the benefit of utilizing the transcript from the

previous trial and therefore knew the favorable testimony that the medical examiner would provide. Moreover, Baker stated that he had met with the witness prior to trial and knew that certain evidentiary “goals” concerning blood flow and probable spurting distance would be met. Consequently, we agree with the trial court that Appellant’s trial counsel made a strategic decision to take advantage of an expert who was already endorsed by the Commonwealth. *See Harper v. Commonwealth*, 978 S.W.2d at 315 (“[T]estimony from an independent expert was unnecessary [considering that] . . . a jury would view a court-appointed expert more credibly than an expert hired to assist and testify for the defense.”).

IAC in Closing Arguments

Next Appellant alleges IAC due to Lytle’s failure to assert, during the closing arguments of the guilt stage, that Appellant was under the influence of pills on the night in question. Appellant takes specific aim at the following closing argument statement: “We do not know what happened [on the night in question]. We’ve heard testimony that drugs may or may not have been ingested. But, certainly, we have testimony that for sure drinking continued.” Appellant maintains that Lytle ignored testimony that he had consumed pills and was therefore ineffective.

We believe Appellant is taking this comment out of context. Lytle had presented an extensive closing argument, which spanned over twenty pages of court records. During her closing argument, Lytle put forth the theory of defense and summarized the weaknesses in the Commonwealth’s case.

Evidence that was not completely proven and not beneficial to Appellant's defense was that he ingested pills, namely PCP, before Horton's murder. Lytle obviously believed that Burton's testimony that Appellant consumed pills on that fateful day was equivocal. We will not allow the 'harsh light of hindsight' to manipulate Lytle's closing argument so as to make it appear as though she provided deficient legal assistance. *Strickland*, 466 U.S. at 689. Not only is Appellant's contention improper, but he also fails to demonstrate that had Lytle pointed out to the jury that he consumed pills that a different result would have occurred. We find no error.

Mitigating Evidence of Childhood Trauma

Appellant's IAC claim is also based on trial counsel's alleged failure to present sufficient evidence of Appellant's childhood trauma and abuse. During the penalty phase of the trial, the jury was presented with the testimony of Appellant's mother, Sharon Callihan, and brother, John Fields. Both Sharon and John described with specificity the abuse the family endured at the hands of Appellant's father, Ronnie Fields, Sr., a former police officer. For most of their childhood and adolescences, Appellant and his two biological brothers lived with Ronnie, his wife, and her children. John described Ronnie as a violent father who instituted a constant state of fear within the household. The family frequently worried that something would set him off into a rage.

Specific stories of Ronnie's abuse were told. For example, John stated that one time Ronnie used his gun to shoot a pan his stepmother was holding. Another illustration of Ronnie's abuse occurred during what John termed

“swirlies”, a humiliating experience whereby Ronnie would hold his step-mother’s head in the toilet while it was flushed. Ronnie’s physical abuse often extended to Appellant. In fact, John informed the jury that one time Ronnie threw Appellant into the wall so hard that he went through the drywall.

During Sharon’s testimony, she explained that she divorced Ronnie shortly before Appellant was born. Afterwards she gained custody of the children. Sharon also disclosed to the jury that she has battled drug addiction for much of Appellant’s childhood. As a result, Sharon admitted that she neglected and abandoned Appellant. Custody of the children transferred to her mother and then eventually to Ronnie. Sharon explained that Appellant had trouble in school, failing the first grade and dropping out when he was a freshman in high school. Sharon also claimed that Appellant suffered from drug addiction and attended rehabilitation three times as a child.

The jury ultimately believed that Appellant’s troubled upbringing did not mitigate the horrendous murder of the elderly victim. Appellant’s RCr 11.42 motion points to several details that trial counsel failed to procure, all of which he believes would have convinced the jury that mitigation was appropriate. One area that Appellant argues should have been better presented to the jury is the extent of his mother’s drug use. Other facts concern the death of several good friends and the abuse he suffered at the hands of his older brothers. Finally, Appellant complains that additional mitigating evidence could have been obtained had Baker placed his father and/or childhood neighbor on the stand.

The trial court correctly analyzed the issue to find that Baker's assistance was reasonable trial strategy. The trial court based its finding on Appellant's request that Baker not present any mitigating evidence. To further this point, it is necessary to explain the situation Baker was placed in. As we have already discussed, Appellant's theory of defense was that he was not the individual who murdered Horton. Since the jury took over eight hours to return their guilty verdict, Appellant believed the jury may have had some residual doubt. Consequently, Appellant requested that Baker not present any mitigating testimony, as doing so would have been inconsistent with his defense of innocence. In an attempt to compromise, Baker agreed to limit the mitigating evidence presented to the jury to that which was reasonably necessary.

In light of this agreement, Baker concluded that the testimony of Appellant's mother and brother was all that was necessary. Appellant's father did not testify to the jury because he would have likely provided testimony casting doubt or minimizing the extent of his abuse. Also, Appellant's neighbor was not pursued to testify because her testimony only indicated that the children were outside often and that she heard yelling coming from Appellant's residence.

We agree with the trial court that Baker's mitigation strategy was reasonable under the circumstances. Considering that the Commonwealth did not contest Appellant's claim that he endured a traumatic and abusive upbringing, we believe John and Sharon's testimony was adequate. *See*

Brown, 253 S.W.3d at 503 (counsel's presentation of mitigating evidence which was designed to minimize evidence defendant did not want disclosed, was sound trial strategy and, therefore, not ineffective assistance of counsel).

Evidence of Alcohol and Drug Addiction

Parallel to the preceding argument, Appellant also believes that trial counsel was ineffective for failing to present mitigating evidence of Appellant's alcohol and drug addiction. Appellant also maintains that an addiction expert should have been called to explain to the jury the psychological, biological, and neurological components of addiction. The trial court ruled that Appellant's mother and brother provided adequate reference to Appellant's substance abuse, and that an expert witness was unnecessary. We agree.

Once more, we point to Appellant's desire that trial counsel refrain from presenting evidence that contradicts his claim of innocence. It appears that Baker proceeded precisely in this fashion. Instead of overwhelming the jury with copious amounts of evidence and testimony of Appellant's substance abuse, Baker simply procured testimony from his mother and brother. Sharon, for example, testified that Appellant had been in drug rehabilitation three times. John also stated that Appellant was only twelve or thirteen when he started consuming drugs and alcohol on a daily basis. Therefore, the use of additional evidence or expert testimony was unnecessary and, at the time, unwelcomed. Similar to our ruling in *Brown*, Baker's mitigation strategy which omitted testimony to decrease culpability was "neither deficient [n]or unreasonable." 253 S.W.3d at 502. Accordingly, we find no error.

Testimony of Dr. Schilling

Baker originally intended on calling Dr. Peter Schilling, a forensic psychiatrist, to testify about the mitigating effects of trauma in childhood development. However, when the jurors took a substantial amount of time to render their guilty verdict, Appellant and Baker reevaluated the presentation of mitigating evidence. We have already detailed the agreement Appellant and Baker made with respect to mitigating evidence, so there is no need to rehash those particular facts. However, we find it important to underscore the fact that Baker revised the proposed mitigation plan at Appellant's request. The new plan ignored evidence justifying the crime, and instead exposed any lingering doubt the jurors may have had. For that reason, expert testimony regarding the effects of childhood trauma was not needed. *Id.* ("The jury simply did not need expert testimony to understand the "humanizing" evidence; it could use its common sense or own sense of mercy."). The lay jurors were well equipped to evaluate this type of mitigating evidence, which was "neither complex nor technical". *Wong v. Belmontes*, 130 S.Ct. 383, 388 (2009).

In addition, Baker pointed out during the RCr 11.42 hearing that calling Dr. Schilling may have been more harmful than beneficial. As he explained, the Commonwealth was most certainly prepared to cross-examine Dr. Schilling. If given the opportunity, the Commonwealth would have likely brought up unflattering details of Appellant's mental health, such as his history of abusing animals. Therefore, we find substantial support for the trial

court's finding that Baker's decision not to call Dr. Schilling to the stand was sensible trial strategy.

Cumulative Error

Lastly, Appellant complains that because of the cumulative effect of numerous instances of IAC, he was denied a fair trial. We will reverse for cumulative error when the "individual errors were themselves substantial, bordering, at least, on prejudicial." *Brown v. Commonwealth*, 313 S.W.3d 577, 631 (Ky. 2010). In the case before us, none of the errors were substantial enough to raise a legitimate question of actual prejudice. Consequently, there was no cumulative error.

Conclusion

For the forgoing reasons, the Floyd Circuit Court's order denying Appellant RCr 11.42 relief is hereby affirmed.

Minton, C.J.; Abramson, Cunningham, Keller, Noble, and Venters, JJ., sitting. All concur. Scott, J., not sitting.

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Supreme Court of Kentucky

2004-SC-000091-MR

DATE 2/19/09 ELIAGRAM, DC.

SAMUEL STEVEN FIELDS

APPELLANT

V.

ON APPEAL FROM FLOYD CIRCUIT COURT
HONORABLE JOHN DAVID CAUDILL, JUDGE
NO. 01-CR-00142

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION OF THE COURT BY JUSTICE CUNNINGHAM

AFFIRMING

Appellant, Samuel Steven Fields, was convicted of murder and first-degree burglary and sentenced to death. He appeals to this Court as a matter of right, Ky. Const. §110 (2)(b), raising forty-nine allegations of error. For the reasons set forth herein, we affirm the judgment.

Background

Appellant was convicted of the murder of Bess Horton. During the early morning hours of August 19, 1993, two Grayson police officers responded to a call from the duplex apartment of Elmer Pritchard. Pritchard rented the apartment from Bess Horton, whose own single-family home was located nearby.

When Officers Lindeman and Green arrived in the area, they noticed a light on at Horton's home and the garage door open. The storm window on the front porch had been removed and the window was open. The doors were locked and Lindeman went

through the open window into Horton's bedroom. Inside, he found Horton's body lying on the bed. Her throat had been slashed and a knife had been buried into her right temple. He also found Appellant in the bedroom. In his possession, he had a small knife, some jewelry, and other items belonging to Horton. The knife, a small butter knife, had a broken tip. At trial, the Commonwealth argued Appellant used this knife to remove screws from a storm window at Horton's house.

Appellant was arrested at the scene but denied killing Horton. According to Appellant, he had been drinking heavily and consuming "horse tranquilizers" throughout the afternoon of August 18, 1993. He was accompanied by his girlfriend, Minnie Burton; Phyllis Berry; and other friends. After driving around Carter and Boyd Counties for several hours, Burton and Appellant returned to Grayson and headed for Appellant's mother's apartment. They continued drinking with Appellant's brother, John Fields, who also lived at the apartment.

Eventually, Burton and Appellant began fighting and Appellant started throwing furniture, knives, and other objects around the living room. Burton left, stating that she was going to her own residence. She also lived in the duplex owned by Horton and occupied by Pritchard. The testimony concerning what transpired after this point was conflicting.

Burton testified that she left the apartment because Appellant's behavior scared her. She headed towards her duplex apartment on Horton's property, but was unable to gain entry. Pritchard had locked the door because Horton was in the process of evicting Burton. Burton had lived rent-free in the duplex in exchange for running Horton's errands and chauffeuring her. The relationship had turned sour, however, and Horton had turned off the power and water in the duplex in an attempt to force Burton out.

Thus, on the evening of August 18th, Burton was unable to gain entry into her apartment.

In light of this circumstance, Burton testified that she sat on the front porch of the duplex. Appellant arrived some time later with a knife in his hand and was making a loud commotion. He told Burton that he had killed his brother, John, though Burton also testified that she did not fully believe the claim (in fact, Appellant had not killed his brother). He then took Burton's keys and told her that he would get into the duplex, implying that he might break in. Burton left, leaving through the backyard of the duplex as Appellant went around the side to the front door. Unbeknownst to either Burton or Appellant, Elmer Pritchard had heard the noise outside and had called the police.

Burton testified that she went to the nearby home of her aunt and uncle, Bernice and Kenny Floyd, and told them about Appellant's claim that he had killed his brother. She used their telephone to call Phyllis Berry, but did not get through. She departed the Floyds' house and walked to the home of Mary Click, where she encountered her cousin, Kim Mayle. Mayle drove Burton back to Appellant's mother's apartment to see if John Fields was alright. Finding no one home, they returned to Click's house. Burton slept there until the next morning when police arrived to question her.

According to Appellant, he left the duplex and walked over to Horton's home to look for Burton. Appellant told police that Burton was angry with Horton for evicting her and that she wanted to rob her. Appellant claimed that when he arrived at Horton's residence, he saw the open window and entered the house through that opening. The bedroom had already been ransacked, so he began pocketing anything he could find. Appellant claims that he did not notice Horton's body on the bed until police arrived.

Appellant was tried before a Rowan Circuit Court jury and found guilty of murder and burglary. He was sentenced to death. On direct appeal, this Court reversed the judgment. See Fields v. Commonwealth, 12 S.W.3d 275 (Ky. 2000). Appellant was retried upon change of venue to the Floyd Circuit Court. He was again convicted of murder and first-degree burglary and sentenced to death. It is from that judgment that he now appeals as a matter of right.

Standard of Review

Appellant raises forty-nine issues for our review. In the interest of clarity, we have grouped these issues into categories. Several of these cited errors are unpreserved. Nonetheless, in light of the penalty imposed and pursuant to KRS 532.075(2), we review even unpreserved allegations of error. The standard of review for such unpreserved errors is:

Assuming that the so-called error occurred, we begin by inquiring: (1) whether there is a reasonable justification or explanation for defense counsel's failure to object, e.g., whether the failure might have been a legitimate trial tactic; and (2) if there is no reasonable explanation, whether the unpreserved error was prejudicial, i.e., whether the circumstances in totality are persuasive that, minus the error, the defendant may not have been found guilty of a capital crime, or the death penalty may not have been imposed.

Johnson v. Commonwealth, 103 S.W.3d 687, 691 (Ky. 2003), citing Sanders v. Commonwealth, 801 S.W.2d 665, 668 (Ky. 1991).

Jury Issues

Scope of Voir Dire

Appellant alleges that he was denied a fair jury selection process. To support this contention, Appellant relies on four rulings of the trial court that limited the parameters of voir dire: (1) the denial of Appellant's motion to use a juror questionnaire;

(2) the denial of Appellant's motion to ask four specific questions concerning the death penalty; (3) the failure to grant alternate questioning of potential jurors during voir dire; and (4) the failure to grant adequate peremptory challenges. Upon a thorough review of the relevant portions of the record, we conclude that the jury selection in this case satisfied due process requirements.

Appellant sought to elicit background information from potential jurors through the use of an expanded juror questionnaire. According to Appellant, the fourteen-question form would help to identify areas where further questioning of a juror might be necessary. It posed open-ended questions such as: "What are your feelings and beliefs about the death penalty?" and "What type of case comes to mind as appropriate for the death penalty?"

A central purpose of voir dire is to give the trial court the opportunity to visually observe the demeanor and affect of a potential juror. The use of a juror questionnaire, particularly one which poses substantive questions, defeats this purpose. "While preliminary instructions acquainting the jury with the nature of the judicial process are perfectly proper, providing jurors in advance with specific questions they will be asked so they can prepare in advance to answer such questions is an abuse of voir dire which must not be tolerated." Sanborn v. Commonwealth, 754 S.W.2d 534, 546 (Ky. 1988), overruled on other grounds by Hudson v. Commonwealth, 202 S.W.3d 22 (Ky. 2006). In denying the use of Appellant's proposed juror questionnaire, the trial court acted well within the scope of its discretion to control voir dire. See St. Clair v. Commonwealth, 140 S.W.3d 510, 531-32 (Ky. 2004).

Appellant unsuccessfully moved the trial court to ask each prospective juror four questions concerning the death penalty.¹ Though these specific questions were rejected, Appellant was afforded the opportunity to meaningfully question prospective jurors about the death penalty. During individual voir dire, the trial court informed prospective jurors of the possible penalties in the case and inquired whether they could consider the entire range. Defense counsel was permitted to ask follow-up questions specifically concerning the death penalty and mitigation, as required by RCr 9.38. While counsel is entitled to question jurors on whether they can consider the entire range of penalties should a guilty verdict be returned, there is no “affirmative right to ask certain specific questions of prospective jurors.” Thompson v. Commonwealth, 147 S.W.3d 22, 53 (Ky. 2004) (citation omitted). “The extent of direct questioning by counsel during voir dire is a matter within the discretion of the trial court.” Tamme v. Commonwealth, 973 S.W.2d 13, 25 (Ky. 1998). There was no abuse of that discretion in this case.

The trial court denied Appellant’s motion to allow the Commonwealth and the defense to ask alternate questions during voir dire. RCr 9.38 does not set forth an order in which prospective jurors should be questioned, as Appellant asserts. Rather, decisions regarding the manner and scope of voir dire lie within the sound discretion of the trial court. See Webb v. Commonwealth, 314 S.W.2d 543, 545 (Ky. 1958). There was no abuse of that discretion.

Appellant requested eighteen peremptory challenges, but was given eleven. Pursuant to RCr 9.40, he was entitled to ten. “Whether to grant additional peremptory

¹ The proposed questions were: (1) Do you have any feelings or beliefs, one way or the other about the death penalty?; (2) Have you ever discussed your feelings regarding the death penalty with your family, friend, or co-workers?; (3) Tell me briefly what your feelings are, if they are any different than what you have already said?; (4) If you are on a jury, do you have any moral or religious or conscientious objections that would prevent you from considering the death penalty as a punishment and imposing it, if you believe it appropriate?

challenges is clearly within the discretion of the trial court.” Stopher v. Commonwealth, 57 S.W.3d 787, 798 (Ky. 2001). We find no abuse of discretion in the trial court’s refusal to grant eight additional peremptory challenges.

A capital defendant is entitled to a jury that can fairly consider the entire range of punishments. Grooms v. Commonwealth, 756 S.W.2d 131 (Ky. 1988). It is well-settled that an adequate voir dire examination is mandatory to the seating of a fair and impartial jury in a death penalty case. Morris v. Commonwealth, 766 S.W.2d 58, 60 (Ky. 1989). We have thoroughly reviewed the record in this case and are satisfied that no unfair restrictions were placed on Appellant’s ability to adequately question potential jurors concerning their opinion about the death penalty.

Voir Dire on Mitigation

Appellant claims that his constitutional right to a fair and impartial jury was violated when he was unduly restricted from questioning potential jurors about intoxication as a mitigating factor. Defense counsel sought to pose the following question to prospective jurors during individual voir dire: “Under the law of Kentucky, intoxication at the time of the offense is a mitigating circumstance. A mitigating circumstance is a reason to give a less severe penalty. Is intoxication a factor you, as a juror, would be able to consider in imposing a punishment, or is that not something you would be able to consider in imposing a punishment?” The trial court determined that the question attempted to commit the juror in advance to a certain theory or result. Instead, during individual voir dire, the trial court defined mitigation generally and asked prospective jurors if they could follow the instructions to consider mitigating evidence.

However, the trial court did permit questioning about intoxication during general voir dire. Defense counsel invited the panel to share their experiences “being around

friends or family that were intoxicated.” A fairly lengthy discussion ensued, wherein the panel discussed the effects of intoxication on personality and whether intoxicated persons should be held responsible for their actions despite the impairment. Defense counsel also asked if any panel member would be unable to hear evidence about intoxication or drug use because of negative experiences in the past. Finally, defense counsel inquired whether evidence of intoxication would “in any way impair your ability to sit and listen to the evidence and consider it in a way the Judge may instruct you to consider.”

“[P]art of the guarantee of a defendant’s right to an impartial jury is an adequate voir dire to identify unqualified jurors.” Morgan v. Illinois, 504 U.S. 719, 729, 112 S.Ct. 2222, 2230, 119 L.Ed.2d 492 (1992). Nonetheless, it is within the trial court’s discretion to limit the scope of voir dire. Webb, 314 S.W.2d at 545. “The test for abuse of discretion in this respect is whether an anticipated response to the precluded question would afford the basis for a peremptory challenge or a challenge for cause.” Hayes v. Commonwealth, 175 S.W.3d 574, 583 (Ky. 2005).

A similar allegation of error was made in McQueen v. Scroggy, 99 F.3d 1302 (6th Cir. 1996). Defense counsel for McQueen sought to pose the following question to the jury panel: “Under our situation of the law on drugs and alcohol, sometimes it can be used to mitigate the punishment, reduce the crime. Could you agree with that; understand how that could be?” The trial court refused to allow the question, finding that it implicated a legal standard. However, defense counsel was able to ask other questions designed to elicit jurors’ attitudes toward alcohol and drugs, such as, “How do you feel about the use of alcohol?” and “Do you think that the use of drugs or alcohol could influence a person to do some act they otherwise would not do?” The Sixth

Circuit found no abuse of discretion in the trial court's limitations: "McQueen had the opportunity to obtain helpful information with respect to the jurors' views of intoxication as a mitigating factor." McQueen, 99 F.3d at 1329.

The permitted voir dire in this case was of the same nature as in McQueen and was sufficient to satisfy Appellant's right to make inquiry. Defense counsel asked numerous open-ended questions regarding intoxication and alcohol that successfully elicited meaningful responses from several jurors. During the discussion, many jurors candidly offered their experiences with intoxication and revealed their personal attitudes toward alcohol. The limitations imposed by the trial court did not unduly restrict Appellant's ability to identify unqualified jurors. There was no abuse of discretion.

Juror Admonition

Appellant claims that the trial court continually failed to adequately admonish the jury pool. During individual voir dire, the trial court admonished each prospective juror not to discuss the case with anyone, but did not give any specific admonition to avoid media coverage. After the first day of trial, the trial court told the empanelled jury to avoid newspaper and television coverage of the case, but did not specifically mention radio coverage. Prior to another three day recess, the trial court simply told the jury that all prior admonitions still applied. Though the issue is unpreserved, Appellant now argues that these admonitions were insufficient and in violation of the mandates of RCr 9.70.

RCr 9.70 does not apply to the jury pool; rather, the admonitions required by the rule apply "only after the jury has been selected and sworn to try the case." St. Clair, 140 S.W.3d at 532. Furthermore, it was not error for the trial court to admonish the empanelled jury by reference. RCr 9.70 specifically permits such method.

Regardless, Appellant has not provided any indication that the jury conducted itself contrary to the admonition and, therefore, any supposed error is harmless. See Salinas v. Commonwealth, 84 S.W.3d 913, 917 (Ky. 2002).² Moreover, a review of the record reveals that the trial court gave numerous, detailed admonitions throughout the course of this lengthy trial. Thus, while RCr 9.70 requires an admonition at each adjournment, “in the absence of some showing of misconduct, substantial compliance with [the rule] will suffice.” Commonwealth v. Messex, 736 S.W.2d 341, 342 (Ky. 1987). The error, if any, was undoubtedly harmless.

Mistrial on Basis of Jury Taint

Prior to the commencement of voir dire, a prospective juror asked a bailiff if “this was the case which had started the previous year.” Apparently, this juror had heard about the trial on the radio. In response, the trial court dismissed the entire group of prospective jurors who were in the courtroom. Appellant moved for a mistrial, arguing that prospective jurors from the dismissed group might discuss the case with other potential jurors still on the panel.

A mistrial is an extraordinary remedy that should be granted only when manifestly necessary. Skaggs v. Commonwealth, 694 S.W.2d 672, 678 (Ky. 1985). Appellant’s claim is highly speculative. There is no indication that any of the dismissed jurors discussed the case with other panel members. The trial court made every effort to avoid any possible taint by dismissing the entire group. A mistrial was not warranted. See Key v. Commonwealth, 840 S.W.2d 827, 830 (Ky. App.1992) (affirming denial of a mistrial where movant’s evidence was “nothing more than speculation that the juror knew [the defendant]”).

² Likewise, the fact that the trial court had been contacted by a local newspaper does not establish any misconduct or improper exposure on the part of the jury.

Strikes for Cause

Appellant challenges the trial court's rulings with respect to six jurors, claiming that it erred in striking four jurors and in refusing to strike two others. "A potential juror should be excused for cause only when the juror cannot conform his/her views to the requirements of the law and render a fair and impartial verdict." Ratliff v. Commonwealth, 194 S.W.3d 258, 266 (Ky. 2006). See also RCr 9.36(1). With respect to capital cases in particular, a prospective juror must be struck for cause if his views of capital punishment would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Adams v. Texas, 448 U.S. 38, 45, 100 S.Ct. 2521, 2526, 65 L.Ed.2d 581 (1980). The decision whether to excuse a juror for cause lies within the sound discretion of the trial court: "[D]eference must be paid to the trial judge, who sees and hears the juror, in reviewing determinations of impropriety of challenges for cause." Penman v. Commonwealth, 194 S.W.3d 237, 252 (Ky. 2006).

Juror 34

Appellant claims that Juror 34 was improperly struck for cause. We have reviewed the individual voir dire of Juror 34 and find no abuse of discretion. Juror 34 expressed substantial reservations about sentencing a defendant to a term of imprisonment, stating: "Whether they're guilty or not guilty, I just don't think I could do it," and "[I] just couldn't live with myself if I had to send somebody to the pen." She repeated this sentiment no less than five times. When asked specifically about the death penalty, Juror 34 replied: "To tell you the truth, I don't know . . . I just don't know if I could or not." Despite defense counsel's attempts to rehabilitate Juror 34, her responses, when read in their entirety, made evident her serious reservations about

sentencing a defendant to a term of imprisonment or death. At no point did Juror 34 ensure the court that she would be able to consider the full range of penalties. Accordingly, the trial court did not abuse its discretion in excusing this juror for cause. See Woodall v. Commonwealth, 63 S.W.3d 104, 120 (Ky. 2001) (juror properly struck for cause who stated that he “didn’t think” he could consider the death penalty).

Juror 26

Appellant challenges the trial court’s decision to remove Juror 26 for cause. At the outset of individual voir dire, Juror 26 stated that he could consider the entire range of penalties. However, as questioning progressed, he expressed an inability to consider the death penalty. When specifically asked by defense counsel to explain this discrepancy, Juror 26 replied: “Well, I just – I thought about it, you know, and I just don’t know. I thought about, you know, the four [penalties] that he was talking about there and the death penalty. I thought about it, and then after I thought about it, you know, I don’t think so.” After further questioning, Juror 26 again expressed his inability to impose the death penalty and stated that he would be unable to sign a verdict form recommending death should he be elected foreperson. When read in its entirety, Juror 26’s responses evidence an inability to consider the entire range of penalties that would be included in the court’s instructions. As such, he was properly excused for cause.

Juror 27

Juror 27 was properly disqualified due to his inability to consider the death penalty. He expressly stated during individual voir dire that he would “exclude [the death penalty] automatically.” When defense counsel attempted to rehabilitate this juror by explaining that he was only required to *consider* the death penalty, he stated, “We (the jury) can discuss it, but that still won’t change my mind.”

"[T]he Commonwealth is entitled to have excused for cause a person who has such conscientious objection to the death penalty that he would never, in any case, no matter how aggravated the circumstance, vote to impose the death penalty." Grooms, 756 S.W.2d at 137. Juror 27 made clear his inability to consider the death penalty in any circumstance, even if the court instructed him to do so. He was properly excused for cause.

Juror 86

Appellant argues that Juror 86 was improperly struck for cause. The trial court determined that Juror 86 was substantially impaired in his ability to consider the entire range of penalties. We agree with Appellant that Juror 86 gave contradictory responses that did not clearly articulate his feelings about the death penalty. At the outset of questioning, he told the trial court that he would be able to consider the entire range of penalties, but later responded that he "didn't believe" he could impose the death penalty. He repeated this sentiment at least three times. While this juror's responses may have been inconsistent at times, we find no abuse of discretion in the trial court's decision to disqualify this juror. See Patton v. Yount, 467 U.S. 1025, 1039, 104 S.Ct. 2885, 2893, 81 L.Ed.2d 847 (1984) ("Jurors thus cannot be expected invariably to express themselves carefully or even consistently. Every trial judge understands this, and under our system it is that judge who is best situated to determine competency to serve impartially.").

Juror 17

Appellant also claims that the trial court improperly refused to strike Juror 17 due to her inability to consider the minimum sentence. Indeed, when questioned by defense counsel about the proper punishment for an intentional murder, she stated, "I would feel

it would have to be life without parole for twenty-five years or death if it got to that point.” However, Juror 17 also stated that she would be able to follow all of the court’s instructions; that she would keep an “open mind”; and that she would “have to hear the evidence before [she] could actually pick [a punishment].” In fact, when specifically asked by defense counsel whether she would consider a punishment other than death, Juror 17 replied, “You got the options, and that’s what you’ve got them for, is to consider them all.”

When Juror 17 expressed a preference for a harsher punishment, it was in response to defense counsel’s hypothetical examples. Such responses are not determinative of a juror’s ability to be fair and impartial:

[A] juror is often presented with the facts in their harshest light and asked if he could consider imposition of a minimum punishment. Many jurors find it difficult to conceive of minimum punishment when the facts as given suggest only the most severe punishment The test is not whether a juror agrees with the law when it is presented in the most extreme manner. The test is whether, after having heard all of the evidence, the prospective juror can conform his views to the requirements of the law and render a fair and impartial verdict.

Mabe v. Commonwealth, 884 S.W.2d 668, 671 (Ky. 1994).

Juror 17’s responses throughout the voir dire examination made clear her willingness to consider all punishments, to follow the court’s instructions, and to consider all the evidence presented. The trial court did not abuse its discretion in refusing to strike this juror for cause.

Juror 43

The trial court did not err in overruling Appellant’s motion to strike Juror 43 for cause due to her employment as a paralegal in the Floyd County Commonwealth Attorney’s Office. Juror 43 was unequivocal in her willingness to follow the court’s

instructions and to consider the entire range of penalties. She stated on numerous occasions her desire to “be as fair as I know how to be.”

In Randolph v. Commonwealth, a juror failed to reveal her employment with the Commonwealth’s Attorney during voir dire, even though questions designed to elicit such information were posed by defense counsel. In reversing the conviction, we held, “[i]t is obvious that an implied bias challenge lies against juror Miller because her position as secretary for the Commonwealth’s Attorney gives rise to a loyalty to her employer that would imply bias.” 716 S.W.2d 253, 255 (Ky. 1986). Still, the trial court “must determine the existence of bias based on the particular facts of each case.” Id. In Randolph, this Court concluded there were reasonable grounds to believe that the juror could not render a fair and impartial verdict.

The facts of this case differ significantly. Juror 43 readily provided that she worked for the Floyd County Commonwealth Attorney’s Office and defense counsel was given the opportunity to question her about her employment and loyalties. Cf. Randolph, 716 S.W.2d at 256 (“A verdict is improper when a peremptory challenge is not exercised by reason of false information.”). Unlike in Randolph, Juror 43 was not employed by the Commonwealth’s Attorney who was prosecuting the case.³ She confirmed that she had absolutely no prior knowledge of Appellant’s case. Cf. Randolph, 716 S.W.2d at 255 (“In addition it is entirely possible that she may have been in a position to have known about the case prior to trial.”).

In light of these circumstances, we do not believe that Juror 43 should have been removed for cause solely due to her employment. Police officers and other law enforcement officials are not disqualified to serve as jurors in criminal cases solely on

³ The Carter County Commonwealth’s Attorney tried the case. This juror worked in the Floyd County Commonwealth Attorney’s Office.

the basis of their employment. Sholler v. Commonwealth, 969 S.W.2d 706, 708 (Ky. 1998). See also Woodall, 63 S.W.3d at 118 (juror's employment with the Kentucky State Penitentiary not cause for disqualification). Similarly, Juror 43 should not have been excused due only to her position in a Commonwealth Attorney's Office that was in no way involved in Appellant's prosecution. She gave no indication that she was unable to render a fair and impartial verdict based on the evidence or that she was unable to follow the court's instructions. As such, there was no error.

Sequestration of Jury

Appellant argues that the jury should have been sequestered during the thirty-six hour period between the return of the guilty verdict and commencement of the penalty phase proceedings. Contrary to Appellant's assertions, "RCr 9.66 does not require that jurors be sequestered between the guilt and penalty phases of the trial. Sequestration is required only after a felony case has been submitted to a jury for its verdict." Bowling v. Commonwealth, 873 S.W.2d 175, 182 (Ky. 1993). It was within the trial court's discretion not to sequester the jury between the guilt and penalty phases, which neither party requested. There was no error.

Definition of Aggravating Circumstances

During individual voir dire, the trial court gave the following definition of aggravating circumstances to each prospective juror: "Aggravating evidence is evidence about a person's character, background or circumstance that may be considered as a reason for imposing a more severe punishment than might otherwise be imposed." Though no contemporaneous objection was made, Appellant now argues that this definition is a misstatement of the law and that it impaired the jury's ability to consider his mitigating evidence.

The trial court's definition of aggravating circumstances is, at best, nebulous. The statutory aggravating factors enumerated in KRS 532.025(2)(a) relate to the defendant's prior criminal history, the status of the victim, and the circumstances of the crime. The trial court's definition, instead, gave the erroneous impression that evidence of Appellant's character, his *general* background, and his *personal* circumstances would be considered as aggravating circumstances. We have recognized that a trial court may consider nonstatutory aggravating circumstances that, under certain circumstances, might be characterized as evidence about the defendant's "character, background or circumstance." However, in this case, the jury was instructed solely on the aggravating circumstance found at KRS 532.025(2)(a)(2): "[t]he offense of murder or kidnapping was committed while the offender was engaged in the commission of . . . burglary in the first degree."

Further, we find no indication that Appellant was prejudiced by the trial court's definition of aggravating circumstances. The jury unanimously found that Appellant had murdered Bess Horton during the commission of a burglary. This finding was supported by substantial evidence, including the significant fact that Appellant was arrested in Horton's home with her valuables in his pockets. For this reason, we do not believe that the jury would have recommended a lesser punishment had the trial court provided a more accurate definition of aggravating circumstances during individual voir dire. Furthermore, we find no grounds for concluding that the jury's ability to consider Appellant's mitigating evidence would have been impaired by this error. Accordingly, reversal is not warranted. See Johnson, 103 S.W.3d at 691.

Evidentiary Claims

Limits on Cross-Examination of Lindeman and Dobson

Appellant's primary evidentiary claim is that he was improperly limited in his cross-examination of Officer Lindeman and Jason Dobson. Appellant was not permitted to question these witnesses about their criminal histories in order to attack credibility and reveal potential bias. A brief factual recitation is necessary to a full understanding of this claim.

Officer Lindeman discovered Appellant in Horton's home, arrested him, and heard his confession. After Appellant's first trial, but before his conviction was reversed by this Court, Officer Lindeman was charged in Carter District Court with misdemeanor counts of official misconduct, unlawful transaction with a minor, and harassment. The charges resulted in a pre-trial diversion agreement and the loss of his job.

Jason Dobson was employed as an EMT in Ashland and treated Appellant for abrasions to his arm immediately following his arrest. Following Appellant's first trial, but before the conviction was reversed, Dobson pled guilty to fourth-degree assault of a patient in police custody. He also lost his job.

We turn first to Lindeman's testimony, which was particularly important because Appellant made the following confession to him: "Kill me, Ron, just kill me. I stabbed her and I'm into it big time this time." Appellant argues that Lindeman's subsequent guilty plea to official misconduct reflects on his credibility. Further, because Lindeman did not enter his guilty plea until after Appellant's retrial had been ordered, one could infer that he forged a good relationship with the Commonwealth in return for favorable testimony at the retrial.

Appellant recognizes that KRE 609(a) bars the introduction of Lindeman's conviction of misdemeanor crimes, but argues that a charge of official misconduct bears upon his credibility and was, therefore, admissible pursuant to KRE 608(b). The decision to admit specific instances of conduct concerning a witness' character for truthfulness rests within the sound discretion of the trial court. See KRE 608(b). See also Purcell v. Commonwealth, 149 S.W.3d 382, 398 (Ky. 2004). That discretion was not abused in this instance. The claim that Lindeman carried favored with the Commonwealth by favorably testifying in Appellant's case is purely speculative and supported by no evidence. Furthermore, the claim is completely undermined by the fact that Lindeman's testimony did not differ from the testimony he gave at Appellant's first trial, before he was charged with the misdemeanor counts. See Davenport v. Commonwealth, 177 S.W.3d 763, 769 (Ky. 2005) ("[R]eviewing courts have found reversible error when the facts clearly support an inference that the witness was biased, and when the potential for bias exceeds mere speculation."). The trial court did not exceed its broad discretion in limiting cross-examination of Lindeman. See Commonwealth v. Maddox, 955 S.W.2d 718, 721 (Ky. 1997).

Dobson testified about statements that Appellant made to him while he was being treated for minor abrasions to his arm. According to Dobson, he asked Appellant where he was wounded and Appellant responded that he was not hurt. When Dobson asked where all the blood came from, Appellant told him "if you had killed some lady you would have blood on you too."

Defense counsel sought to cross-examine Dobson about his conviction for assaulting a patient. At his first trial, Appellant testified that Dobson physically accosted

him and “baited” him into a confession. Defense counsel argued that Dobson’s later assault conviction was admissible to support Appellant’s claim.

Again, Dobson’s misdemeanor assault conviction was not admissible pursuant to KRE 609. Furthermore, the trial court did not abuse its discretion in refusing to admit this testimony pursuant to KRE 608(b). Assault is not a crime which reflects upon “a witness’ character for truthfulness or untruthfulness[.]” KRE 608(b)(1). More important, however, is that Appellant did not testify at his second trial, nor was his prior testimony admitted. Therefore, the jury never heard Appellant’s allegation that Dobson attacked him and defense counsel had no reason to bolster this claim. For this reason, even if error occurred, Appellant was not prejudiced.

Exclusion of Testimony Regarding Contents of Horton’s Vehicle

James Craig, an employee of Horton, testified at Appellant’s first trial, but was unavailable at the second trial. His testimony was read into the record. However, over defense objection, the trial court redacted portions of the testimony concerning Horton’s vehicle. In the redacted portion, Craig testified that he found car keys, beer cans, and marijuana seeds in the vehicle after Horton’s death. Defense counsel sought to elicit the same testimony from Elmer Pritchard, another Horton employee. Again, the testimony was excluded.

Appellant now argues that the trial court’s exclusion of this testimony denied him the right to fully present his defense; that is, that Minnie Burton, who had access to Horton’s car, killed Horton. According to Appellant, this testimony tended to prove that Burton used the keys to enter Horton’s home and then threw them into the car on her way out. Also, defense counsel argued this testimony supported the theory that Horton had evicted Burton after learning that there were alcohol and drugs in her car.

We agree with the trial court that the testimony was irrelevant. Craig and Pritchard both testified that multiple persons had access to Horton's car. No other evidence was proffered to prove that Burton was the last person to drive the car or that the beer cans and marijuana seeds belonged to her. Indeed, as the trial court noted, there was no evidence linking any particular individual to the vehicle, and the vehicle was in no way tied to the crime. In short, testimony that beer cans and a set of keys were found inside Horton's car did not tend to make any relevant fact more or less likely. See KRE 401. There was no error.

Exclusion of Kimmel Testimony

Vince Kimmel was an acquaintance of Burton and Appellant who claimed that Burton once confessed to him that she had committed the murder. Prior to trial, however, Kimmel was involved in a serious car accident that rendered him incompetent to testify. In light of his unavailability, defense counsel sought to introduce a recorded statement Kimmel made to defense investigators. The trial court refused because Kimmel had not been subject to cross-examination by the Commonwealth and his statement contained hearsay.⁴

Appellant argues that this ruling unduly restricted his right to present a defense, thus, violating his due process rights. The Sixth Amendment guarantees a criminal defendant's right to present a defense, which includes evidence that someone else committed the crime. Beaty v. Commonwealth, 125 S.W.3d 196, 207 (Ky. 2003). However, evidence is not admissible simply because it would tend to prove that another person was the perpetrator; and criminal defendants' due process rights are not violated

⁴ A factual dispute arose about Kimmel's statement. According to defense counsel, Kimmel stated that Burton confessed to him. The Commonwealth indicated to the trial court that Kimmel told its investigator that he heard about Burton's confession from a third party.

by every limitation placed on the admissibility of evidence. Beaty, 125 S.W.3d at 208. Rather, the exclusion of evidence violates a defendant's constitutional rights when "it significantly undermine[s] fundamental elements of the defendant's defense." United States v. Scheffer, 523 U.S. 303, 315, 118 S.Ct. 1261, 1267-68, 140 L.Ed.2d 413 (1998).

Such was not the case here. The evidence sought to be introduced contained inadmissible hearsay evidence. See KRE 801; KRE 804. Furthermore, had Kimmel been available as a witness, the Commonwealth indicated that it would have cross-examined him regarding his criminal background, mental health issues, and substance abuse. Because the recorded statement was not subject to cross-examination, it bore little indicia of reliability. The trial court enjoys broad discretion in decisions concerning the admissibility of evidence, and we find no abuse of discretion in this instance. See Olden v. Commonwealth, 203 S.W.3d 672, 677-78 (Ky. 2006).

Nor do we believe Appellant was wholly prevented from presenting his defense theory that Burton committed the murder, and his reliance on Chambers v. Mississippi for this assertion is misplaced. 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). "Chambers holds that application of evidentiary rules cannot be applied so as to completely bar all avenues for presenting a viable defense. It does not hold that evidentiary rules cannot be applied so as to properly channel the avenues available for presenting a defense." Mills v. Commonwealth, 996 S.W.2d 473, 489 (Ky. 1999). Throughout the trial, defense counsel ably injected the possibility that Burton committed the crime. Significantly, Burton's supposed confession was elicited from two other testifying witnesses. Appellant's defense was not unduly thwarted by the trial court's ruling with respect to Kimmel's recorded statement.

Sexton Testimony

Appellant argues that the trial court improperly prohibited him from impeaching Cindy Sexton with a prior inconsistent statement. Following Horton's murder, Sexton was interviewed by Detective Stevens and revealed a conversation she once had with Appellant and Burton. During this conversation, Appellant and Burton discussed robbing Horton and even invited Sexton to participate. Later, Sexton was interviewed by Gary Sparks, an investigator for the defense. According to Sparks' notes, Sexton stated that Appellant and Burton also discussed physically harming or killing Horton during the conversation. At trial, Sexton testified that the conversation related only to robbing Horton. She further testified that she had given "pretty much the same story" to both Sparks and Detective Stevens.

Defense counsel sought to impeach Sexton's testimony that she had given the same statement to both Sparks and Detective Stevens. The trial court overruled defense counsel's motion to introduce Sparks' investigative report, determining that the report contained inadmissible hearsay. However, defense counsel was permitted to recall Sexton during its case-in-chief to refresh her memory of the conversation she had with Sparks. She testified that she did not recall telling him that Appellant and Burton discussed harming Horton. Defense counsel then called Sparks. Upon questioning, he testified: "[Sexton] stated that Minnie stated to her that on – not on one occasion, but on several occasions, that the old lady ought to be killed."

Assuming *arguendo* that the trial court erred in excluding Sparks' investigative report as substantive evidence, the error was undoubtedly harmless. An error is harmless "if there is no reasonable possibility that it contributed to the conviction." Anderson v. Commonwealth, 231 S.W.3d 117, 122 (Ky. 2007). Here, the jury was

aware that Sexton gave slightly differing statements to Sparks and Detective Stevens. The jury also learned the substance of Sexton's conversation with Sparks and her allegation that Appellant and Burton discussed harming Horton in addition to robbing her. As the substance of Sparks' report was fully revealed through his testimony, we discern no possibility that the result would have been different had the report itself been admitted. The error, if any, was harmless.

Rebuttal Testimony by Detective Cales

In 2002, following Appellant's first trial, Norma Sloas contacted the Attorney General's Office and related a conversation she had with Minnie Burton in 1996. According to Sloas, Burton stopped by her house while she was sitting on the front porch. Burton told her that she had killed Bess Horton. Burton also warned Sloas not to repeat the confession to anyone. At trial, Sloas testified to the same facts. However, she added that Burton was accompanied by her cousin, Kim Mayle, who left before Burton made the supposed confession.

At trial, the Commonwealth called Detective Cales, who had interviewed Sloas after her call to the Attorney General's Office, in an attempt to rebut Sloas' testimony. Apparently, the Commonwealth was under the impression that Sloas did not mention Mayle's presence when she was initially interviewed by Detective Cales. However, Detective Cales testified that he could not remember whether Sloas mentioned Mayle or not.

The trial court enjoys broad discretion in its determination of the admissibility of rebuttal evidence. See RCr 9.24; Chestnut v. Commonwealth, 250 S.W.3d 298 (Ky., 2008). Here, the trial court acted well within its discretion in permitting the Commonwealth to rebut Sloas' claim that Burton had confessed. In any event,

considering Detective Cales' inability to remember his conversation with Sloas, it is difficult to conceive any prejudice to Appellant. There was no error.

Bush Testimony

Jhonda Bush lived in the apartment next door to Appellant's mother and was home the night that Horton was murdered. As stated previously, Appellant and Minnie Burton were at his mother's apartment several hours before the murder and had gotten into a loud argument. Because Bush was unavailable at Appellant's first trial, she provided a written statement that was read into the record. In it, she stated that she overheard yelling and shouting in the next apartment at about 1:25 on the morning of August 19th. She heard the sound of glass shattering and then the commotion stopped. She did not actually see anyone entering or exiting the apartment next door.

During a pretrial hearing at Appellant's second trial, defense counsel moved to introduce Bush's statement from the first trial. The Commonwealth agreed to stipulate to the statement's introduction. Though the trial court requested that defense counsel prepare an order regarding the joint stipulation, none can be found in the record currently before this Court. Nonetheless, the statement was read to the jury absent an objection from either party.

Appellant now claims that the introduction of this statement violated his confrontation rights. In support, he asserts that the statement was inadmissible because the Commonwealth made no effort to locate Bush and because Appellant had no opportunity to cross-examine Bush. This argument is without merit, as Appellant waived this constitutional right.

"[A] criminal defendant may waive the constitutional right to confrontation."

Parson v. Commonwealth, 144 S.W.3d 775, 783 (Ky. 2004). "[N]o doubt the privilege

(of personally confronting witnesses) may be lost by consent or at times even by misconduct.” Illinois v Allen, 397 U.S. 337, 342-43, 90 S.Ct. 1057, 1060, 25 L.Ed.2d 353 (1970), quoting Snyder v. Massachusetts, 291 U.S. 97, 106, 54 S.Ct. 330, 332, 78 L.Ed. 674 (1934).⁵ Furthermore, contrary to Appellant’s assertions, the trial court was not obliged to obtain a personal waiver of his rights: “Federal courts have uniformly held that counsel can waive a criminal defendant’s Sixth Amendment right of Confrontation so long as the defendant does not dissent from his attorney’s decision, and so long as it can be said that the attorney’s decision was a legitimate trial tactic or part of a prudent trial strategy.” Parson, 144 S.W.3d at 783 (citations omitted). See also Palfy v. Cardwell, 448 F.2d 328, 332 (6th Cir. 1971) (stipulations containing information which established defendant’s guilt were properly admitted because defendant “knowingly and intelligently waived his right of confrontation”).

It is evident that Appellant waived his right to confront Bush. It must be emphasized that defense counsel moved the court to introduce Bush’s statement during a hearing at which defendant was present. See Parson, 144 S.W.3d at 784 (“Appellant was present and did not dissent from the waiver.”). Of course, Appellant was also present at trial when the statement was read into the record, again without objection or comment. Furthermore, admission of Bush’s statement was clearly a legitimate trial tactic. Bush’s brief statement pertained only to the time when she heard a fight in Appellant’s mother’s apartment; she did not identify the voices she heard or see anyone leaving the apartment. Both the Commonwealth and the defense relied on this statement for the limited purpose of establishing a timeline for the evening. It is reasonable to assume that defense counsel preferred the simple solution of introducing

⁵ Snyder was overruled in part on other grounds by Malloy v. Hogan, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964).

Bush's statement, rather than attempting to locate and subpoena Bush.⁶ We conclude that Appellant knowingly waived his right to confront this witness. There was no error.

Prior Bad Acts Evidence

Appellant claims that the trial court improperly admitted evidence of prior bad acts in violation of KRE 404(b). He directs our attention to nine different pieces of testimony, which we address individually below. No contemporaneous objections were made. See RCr 9.22. Thus, if an error occurred in the admission of this testimony, we determine whether the failure to object was a legitimate trial tactic. If not, we consider whether the testimony prejudiced Appellant. Johnson, 103 S.W.3d at 691. Reversal is required only if we believe that, absent the admission of the testimony, Appellant would not have been convicted or would not have been sentenced to death. Id.

Drug Use

Christopher Trent testified that he spent the afternoon of August 18th with Appellant and that they drank beer and smoked marijuana that day. Minnie Burton testified that Appellant was "pretty high" and "taking pills" when they returned to Appellant's mother's apartment on the evening of August 18th. He now complains this testimony should have been excluded.

Appellant presented a defense of intoxication. To that end, defense counsel elicited testimony from several witnesses that Appellant was intoxicated. In fact, during opening arguments, defense counsel stated that Appellant was "highly intoxicated" and had been "drinking and drugging" all day. For this reason, we see no way in which

⁶ Defense counsel's statements at the hearing support this conclusion: "[T]here was a stipulation from what I would consider a pretty unavailable witness I have no idea where she is now. Unless the Prosecution has an objection to that, I would like to renew that that be put in or else I'd have to start my search for this woman."

Appellant was prejudiced by testimony regarding his marijuana use. See Olden, 203 S.W.3d at 675.

Traffic Stop

Officer McDavid performed a traffic stop on a vehicle in which Appellant was a passenger on the evening of August 18th. McDavid testified that Appellant “made a derogatory statement toward us.” However, prior to McDavid’s testimony, defense counsel had asked another witness, Christopher Trent, if Appellant “got smart-alecky with the police.” As defense counsel had already elicited identical information from another witness, any supposed error in the admission of McDavid’s statement is harmless. See Chumbler v. Commonwealth, 905 S.W.2d 488, 494 (Ky. 1995).

James Berry’s Incarceration

When asked what she did on August 18th, Minnie Burton testified that she and Appellant drove to Ashland to visit Phyllis Berry’s brother, James, who had “just gotten out of the pen.” The fact that James Berry was incarcerated does not constitute evidence of Appellant’s character simply because they were acquainted. Moreover, as this statement was not responsive to any question posed by the Commonwealth, it was not offered to establish Appellant’s character in order to prove action in conformity therewith. This evidence does not fall within the ambit of KRE 404(b); accordingly, there was no error. See Fields, 12 S.W.3d at 284 (finding no error in admission of identical testimony at Appellant’s first trial).

Fight at Appellant’s Mother’s Apartment

In describing what occurred in the hours prior to the murder, Burton testified that she and Appellant argued while they were at his mother’s apartment and that Appellant threw a knife into the living room during this altercation. John Fields, Appellant’s

brother, also testified about what transpired in the apartment. He stated that Appellant had rubbed a large butcher knife up and down his arm.⁷ There was also testimony from both Burton and Pritchard that Appellant later attempted to break into Burton's apartment.

All of this testimony directly relates to what transpired immediately before Horton's murder. It helped to establish why Burton left Appellant's mother's apartment and why Appellant eventually went to Horton's property. See Smith v. Commonwealth, 366 S.W.2d 902, 906 (Ky. 1963) ("[A]ll evidence which is pertinent to the issue and tends to prove the crime charged against the accused is admissible, although it may also prove or tend to prove the commission of other crimes by him[.]"). This testimony was also "inextricably intertwined" with the Commonwealth's proof of Appellant's mental state at the time of the offenses. KRE 404(b)(2). There was no error in the admission of testimony describing Appellant's actions in the hours before the crime.

Jhonda Bush Stipulation

In the stipulation read to the jury, Jhonda Bush stated that she overheard an argument in Appellant's mother's apartment and that it sounded as if "they were hitting each other." She further stated that it sounded like the voices of two men, but that she could not identify either voice. Bush's statement was entered to establish a timeline of events and to possibly corroborate Burton's testimony. It was not used to prove Appellant's character or action in conformity therewith and, thus, does not fall within the category of evidence prohibited by KRE 404(b). We note also that no prejudice flowed from this testimony, as Bush did not identify Appellant's voice as one of the voices she had overheard.

⁷ Appellant's brief states that defense counsel objected to this portion of John Fields' testimony. Our review of the record reveals that counsel was objecting to a different portion of the testimony.

Burton's Fear of Appellant

Burton testified that she left Appellant's mother's apartment because he was acting "wild" and she "was afraid of him." Kim Mayle, Burton's cousin, likewise testified that Burton wanted to get away from Appellant that evening. According to Mayle's testimony, Burton feared Appellant would physically assault her. Burton's aunt, Bernice Floyd, also testified that Burton expressed a fear of Appellant. None of this testimony constitutes evidence of "other crimes, wrongs, or acts" committed by Appellant. KRE 404(b). Rather, this testimony concerns Burton's mental state. There was no KRE 404(b) violation.

Police Competency Evidence

As part of his defense theory, Appellant attempted to establish that the police did not thoroughly investigate the crime. He claims that numerous trial court rulings impaired his ability to fully develop this defense. Appellant directs our attention particularly to four rulings, which we address individually below.

Testimony of Detective Stevens

Kentucky State Police Detective Stevens was the lead investigator of Horton's murder. On cross-examination, defense counsel asked Detective Stevens if local law enforcement officers had made comments about how he was handling the investigation; he responded in the affirmative.⁸ Defense counsel then attempted to inquire about an alleged confrontation between Stevens and a detective from the Grayson Police Department. The trial court sustained the Commonwealth's objection to this question.

"The presentation of evidence as well as the scope and duration of cross-examination rests in the sound discretion of the trial judge." Moore v. Commonwealth,

⁸ Detective Stevens was called as a witness by both the Commonwealth and the defense.

771 S.W.2d 34, 38 (Ky. 1988). Here, we agree with the trial court that the testimony sought from Detective Stevens lacked relevancy. See KRE 402. Whether Stevens argued with local law enforcement officials about his handling of the investigation is not relevant to Appellant's guilt, nor does it tend to prove or disprove that the investigation was handled improperly. There was no abuse of discretion.

Appellant also complains that the Commonwealth was permitted to question Detective Stevens on cross-examination about the security of the crime scene. Specifically, the Commonwealth was permitted to ask Detective Stevens why crime scene tape was removed so quickly after Horton's murder. He explained that the police removed the crime scene tape to lessen public curiosity and interference with the investigation. Defense counsel's objection for relevancy was properly overruled. Defense counsel had elicited testimony that no crime scene tape was around Horton's home, implying shoddy police work. The Commonwealth was entirely within permissible bounds to question Detective Stevens about the decision to remove the crime scene tape.

Admission of Unidentifiable Latent Fingerprints

Appellant claims that the trial court improperly admitted latent fingerprint evidence collected from a storm window and a glass jar, both found at Horton's home. All six prints were analyzed but none were identified. Though defense counsel did not object to the introduction of these fingerprints, Appellant now argues that they were irrelevant because they were not identified. He also argues that their introduction improperly "bolstered" the Commonwealth's case. This claim is utterly without merit. The results of tests performed on fingerprints found at the crime scene are, of course, relevant to a determination of Appellant's guilt. Moreover, it also rebutted any claims of

shoddy police work. Even if improperly admitted, we are unable to fathom how Appellant was prejudiced by fingerprints that were never identified as his.

Cross-Examination of Murrie O'Brien

Murrie O'Brien, an employee of Horton who performed maintenance work on her properties, testified that he went to Horton's home on the morning of August 19th. On cross-examination, O'Brien stated that he entered the victim's home through the back door. Over the Commonwealth's objection, defense counsel also inquired whether O'Brien encountered any police at the scene. He stated that several officers and other people were present, but that no crime scene tape was around the house.

Later, a juror submitted a question for O'Brien. Though the record does not reflect the exact wording of the proposed question, it appears that the juror wanted to ask O'Brien why the police did not stop him from entering Horton's home. The trial court rejected this question as speculative and outside O'Brien's knowledge, a conclusion with which we agree. Contrary to Appellant's assertion, there was no abuse of discretion.

Limited Examination of John Rayburn

Appellant claims that the trial court improperly limited his examination of John Rayburn, who purchased Horton's home from her estate. Rayburn testified that when he purchased the home, two storm windows were missing. He attempted to retrieve the missing storm windows from the Grayson Police Department but was told that they were evidence and, therefore, unavailable. Some time later, Rayburn testified that Detective Stevens stopped by the house and asked him to be a witness in Appellant's first trial. According to Rayburn, Stevens asked him to testify that the original storm windows were returned to him and installed in the home. Rayburn refused, telling Stevens, "I

can't testify to that because that's not the truth." After this exchange, Rayburn was not called as a witness at Appellant's first trial. He later contacted the Lexington Herald-Leader, but his call was not returned.

Defense counsel called Rayburn as a witness at Appellant's second trial and asked him why he had called the Lexington Herald-Leader. The trial court sustained the Commonwealth's objection to the question on the basis of relevancy. We agree with the trial court that Rayburn's reason for calling the newspaper was irrelevant. Defense counsel was given great leeway in its examination of Rayburn and was able to fully develop Rayburn's allegations of police misconduct. This minor limitation did not prejudice Appellant or unduly impair his ability to develop his defense. There was no abuse of discretion.

Opinion Testimony

Murrie O'Brien

Appellant argues that defense counsel was unduly limited in its examination of Murrie O'Brien, Horton's longtime carpenter and handyman. Defense counsel questioned O'Brien about the storm windows at Horton's home, although O'Brien had never worked on those specific windows. In an effort to demonstrate that Appellant did not have sufficient time to remove all the screws from Horton's storm windows, defense counsel asked O'Brien how long it "generally takes you to remove screws from a large storm window if you're trying to remove them out?" The trial court sustained the Commonwealth's objection. Defense counsel was also prohibited from asking O'Brien if there were any score marks on the screws found on Horton's front porch. Finally, defense counsel showed O'Brien the broken knife found on Appellant at the time of his

arrest and asked whether he had ever tried to remove screws with such a knife. An objection to this question was also sustained.

Rulings concerning the admissibility of evidence lie within the sound discretion of the trial court and are only overturned upon a showing of an abuse of that discretion. Simpson v. Commonwealth, 889 S.W.2d 781, 783 (Ky. 1994). In each instance enumerated above, the trial court did not believe that O'Brien's testimony would assist the jury. Whether a screw has score marks, and how long it takes to remove a window screw, are topics well within the average juror's common knowledge and understanding. Furthermore, the jury was shown the screws and the window itself and, thus, had the opportunity to make such an assessment. Finally, O'Brien stated that he had never worked on that particular storm window and had never handled Appellant's knife. Accordingly, defense counsel's questions pertaining to the window and the knife were irrelevant. We see no abuse of discretion in the trial court's rulings with respect to this witness.⁹

Detective Stevens

Appellant also challenges the admissibility of testimony from Detective Stevens about blood evidence. Defense counsel called Detective Stevens to testify about Horton's bedclothes and to explain why they had not been submitted for scientific testing. Stevens explained that a cut-out portion of the sheet was tested. On cross-examination, the Commonwealth asked Stevens whether the perpetrator's blood could have been detected on the sheets in light of the high volume of Horton's blood.

⁹ A juror submitted a question asking O'Brien how long it "usually takes to install a large storm window?" The trial court rejected this question. To the extent that Appellant claims this ruling was erroneous, we find no abuse of discretion.

Defense counsel objected, claiming that Stevens was not qualified to give opinion testimony concerning scientific blood testing. The trial court overruled the objection and allowed Stevens to answer. He explained that, given his experience in crime scene investigation, testing would not be fruitful because so much of Horton's blood was present on the sheets.

Detective Stevens, a twenty-two year veteran of the Kentucky State Police who had also worked four years in the crime lab, was qualified to answer this question. He did not testify to the scientific process of blood examination. Cf. Mondie v. Commonwealth, 158 S.W.3d 203, 213 (Ky. 2005). Rather, his response was limited to an explanation for his own actions at the crime scene and his motivations for such actions. As an experienced detective, Stevens was certainly qualified to testify about what type of evidence is collected at a crime scene and why. See Bush v. Commonwealth, 839 S.W.2d 550, 555 (Ky. 1992). There was no error.

Dr. Hunsaker

Appellant next complains that Dr. Hunsaker, a forensic pathologist who testified as an expert for the Commonwealth, was improperly permitted to answer questions outside his realm of expertise. The trial court relayed the following question submitted by a juror: "Can the manner in which a person is murdered reflect the mood of the person committing the crime?" After a bit of confusion about the wording of the question, Dr. Hunsaker replied with a simple "yes." There was no contemporaneous objection.

Appellant relies on our holding in Johnson, where Dr. Hunsaker was asked questions about psychological profiling and the phenomenon of "overkill." 103 S.W.3d at 695. We agreed with the trial court's finding regarding Dr. Hunsaker's qualifications:

“Dr. Hunsaker, by his own acknowledgement, was not properly qualified to testify on ‘overkill.’ He is a forensic pathologist without special qualifications in psychological profiling.” *Id.*

Here, however, Dr. Hunsaker was not asked to give specialized testimony involving expertise in psychology. Dr. Hunsaker was asked whether the method of killing can reflect the killer’s mood, which he answered in the affirmative without explanation. He was not asked to analyze the manner of Horton’s murder, in particular, or to give an opinion about the mood of Horton’s killer. The simple *fact* that such psychological profiling does exist is well within Dr. Hunsaker’s area of expertise. There was no abuse of discretion.

Qualification of Experts

Appellant complains that the trial court improperly qualified four expert witnesses in front of the jury. Of course, trial courts must be cautious in deeming a witness an expert. “If the jury is so informed such a conclusion obviously enhances the credibility of that witness in the eyes of the jury. All such rulings should be made outside the hearing of the jury and there should be no declaration that the witness is an expert.” Luttrell v. Commonwealth, 952 S.W.2d 216, 218 (Ky. 1997). Our review of the record reveals that three of these witnesses were not referred to as “experts” by the trial court or the Commonwealth.¹⁰ In the case of Dr. Hunsaker, the Commonwealth did ask the trial court to allow him to “give his opinions and his expert testimony.” Nonetheless, we find this minor, unpreserved error to be harmless. Dr. Hunsaker’s testimony was necessary mainly to establish time of death. However, the time frame of death he

¹⁰ Instead, the Commonwealth asked the trial court that the witness be allowed to give his or her opinion or findings; e.g., “Your honor, I ask that this witness be allowed to give her observations about any analysis she’s done in this case.”

provided fit as equally into the defense theory that Burton committed the murder as it did the Commonwealth's theory. Indeed, the defense favorably referenced not only his testimony in closing arguments, but also his qualifications and reliability. For this reason, we discern no prejudice to Appellant's substantial rights. RCr 9.24.

Floyd Testimony

Barbara Floyd, the daughter of Bernice and Kenny Floyd, testified for the Commonwealth about Burton's late night visit to the Floyds' home. Floyd stated that she looked at the clock when Burton arrived and that it was 1:45 a.m. Because there was some discrepancy about the timeline of the evening, the Commonwealth posed several questions about the accuracy of Floyd's clock. Appellant's bald claim that this testimony was introduced without a proper foundation is entirely without merit. We are aware of no foundational requirements for asking a witness whether her bedroom clock is accurate. There was no abuse of discretion.

Hearsay Testimony

After Burton left her aunt's house on the night of the crimes, she encountered her cousin, Kim Mayle. Mayle gave Burton a ride back to Appellant's mother's apartment to check on John Fields. Mayle testified that Burton was really nervous and that they quickly left because Burton feared Appellant would physically assault her.

Bernice Floyd also testified about Burton's nervousness that evening. Burton told her aunt that Appellant had said he had killed his brother and that he was acting crazy. Floyd eventually called the police to relay this information.

Appellant now argues this testimony was inadmissible hearsay. However, prior to both Mayle's and Floyd's testimony, Burton related her nervousness and her fear of Appellant to the jury during her own testimony. Indeed, defense counsel cross-

examined Mayle about Burton's fear that night. As the jury had already heard an explanation for Burton's nervousness that evening, any error was undoubtedly harmless. See Chumbler, 905 S.W.2d at 494. See also Fields, 12 S.W.3d at 284 ("The fact that Minnie Burton was afraid of the Appellant logically followed the facts that Appellant had thrown knives at her while at his mother's residence and had told her that he had just killed his brother.").

Victim Impact Testimony

Appellant claims that the trial court permitted the Commonwealth to inject victim impact testimony throughout the guilt phase proceedings. He points to the testimony of several witnesses, as well as questions posed by the Commonwealth during voir dire. We address each below.

During general voir dire, the Commonwealth gave some general background information about Horton, including her residence, her community involvement, her husband's career, and the fact that her nephews are attorneys in Grayson. These questions were aimed at determining whether any veniremen had a relationship with Horton or her family that would create bias. The questions did not reference Horton's "wealth or status in the community," as Appellant contends.

Martha Harber's testimony did not constitute victim impact testimony. Harber, Horton's niece, gave brief testimony about Horton's personal background, her career, her marriage, and her community involvement. When she referenced her long and loving relationship with her aunt, it was to establish her basis of knowledge of Horton's habits and finances. Nowhere in Harber's brief testimony did she describe the personal impact of Horton's death. Her testimony humanized Horton; it did not in any way glorify her. See Cook v. Commonwealth, 129 S.W.3d 351 (Ky. 2004).

There was no error in allowing the Commonwealth to display a photograph of Horton during opening arguments. “A murder victim can be identified as more than a naked statistic[.]” Bowling v. Commonwealth, 942 S.W.2d 293, 302 (Ky. 1997). The display of one photograph of Horton was not unduly prejudicial. See Hilbert v. Commonwealth, 162 S.W.3d 921, 927 (Ky. 2005) (“The brief display of the victims’ life portraits . . . was neither excessive nor overly emotional.”).

Barbara Marshall, an employee of Grayson Utility Company, was called by the defense to testify about Horton cutting off the utilities in Burton’s duplex. On cross-examination, the Commonwealth elicited that Horton owned several properties in Grayson. This question helped to explain why Marshall knew Horton personally, through her frequent business with the utility company. Later, the Commonwealth asked if “it is fair to say that Ms. Horton was an important part of Grayson?” Defense counsel objected; the trial court allowed the question. We agree with Appellant that this question lacked relevancy. However, we believe the error was harmless. There is no indication that the Commonwealth’s brief reference to Horton’s standing in the community unduly prejudiced Appellant or denied him a fair trial.

When the Commonwealth asked James Craig if Horton was a “well-liked person” who “had people coming over,” it was to establish that she welcomed both smokers and non-smokers into her home. The Commonwealth, in inquiring whether Horton kept belongings in a safe-deposit box, referred to the bank across the street as “her” bank. Horton, in fact, did have partial ownership in the bank. There was nothing improper about the Commonwealth’s questions.

During its cross-examination of Detective Stevens, the Commonwealth questioned him about publicity surrounding the case: “You realize you got quite a case

on your hands, correct? Given the person and the way it was done, right?" These questions were asked to rebut defense counsel's inference that Detective Stevens did not adequately secure the crime scene and to explain why he was concerned about public curiosity. There was no error.

Even considering these references to Horton cumulatively, we find no indication of the type or amount of prejudicial victim information that would require reversal. None of the above-referenced witnesses were "overly emotional, condemnatory, accusative or demanding vindication[.]" Foley v. Commonwealth, 953 S.W.2d 924, 937 (Ky. 1997). The Commonwealth's references to Horton were not of an inflammatory nature and did not approach the type of prejudicial testimony condemned by this Court in Ice v. Commonwealth, 667 S.W.2d 671, 675-76 (Ky. 1984).

Marshall Testimony

During its cross-examination of Barbara Marshall, the Commonwealth elicited that she was acquainted with Appellant; although she was unaware he dated Burton. The Commonwealth then asked whether she knew "what kind of problems the Defendant may have caused for Minnie Burton, if any, with Ms. Horton before she was killed?" Marshall answered in the negative. This question was clearly in response to defense counsel's direct examination of the witness, during which Marshall was asked why Horton wanted the utilities cancelled. Furthermore, as Marshall simply replied "no," we can detect no prejudice to Appellant. The trial court did not abuse its discretion.

McDavid Testimony

There was no error in the Commonwealth's reference to Appellant's confession during its re-direct examination of Officer McDavid, to whom Appellant had made a derogatory comment during the traffic stop. The Commonwealth attempted to elicit from

McDavid, who had known Appellant for many years, whether he could tell the difference between a “smart-aleck” comment and a confession, as it was the defense’s position that Appellant’s confession was simply a sarcastic comment. Appellant’s confession was properly admitted and there was no error in the Commonwealth’s subsequent reference to it.

Images of Crime Scene

The photographic evidence of Horton’s body was neither cumulative nor unduly prejudicial. Photographs of Horton’s body and a video of the crime scene were shown to the jury, in most instances during the testimony of an investigating officer to describe the nature of the crime and the crime scene. Dr. Hunsaker referred to photographs of Horton’s body to explain the autopsy procedures and his findings, although no post-autopsy photographs were displayed. The Commonwealth used photographs of the crime scene, which included Horton’s body, during its opening and closing arguments.

The trial court conducted the requisite balancing test between the probative value of these images and their prejudicial effect. See KRE 403. The images depicted a violent crime scene and, naturally, were gruesome and disturbing. However, Horton’s wounds were critical to a full understanding of the case, particularly in light of defense counsel’s arguments that Burton had enough strength to lodge the knife into Horton’s skull and that Appellant did not have sufficient time to inflict so many wounds. Furthermore, the Commonwealth was entitled to present its case fully, even if doing so involved gruesome images, regardless of any defense stipulation as to the manner of Horton’s death. “[T]he prosecution is entitled to prove its case by competent evidence of its own choosing, and the defendant may not stipulate away the parts of the case that he does not want the jury to see.” Barnett v. Commonwealth, 979 S.W.2d 98, 103 (Ky.

1998). The photographs were not admitted to arouse passion or appall the viewer, as condemned in Funk v. Commonwealth, 842 S.W.2d 476, 478-480 (Ky. 1992). There was no abuse of discretion in the trial court's conclusion that the probative value of these images outweighed their prejudicial effect. See Roark v. Commonwealth, 90 S.W.3d 24, 37 (Ky. 2002).

Other Guilt Phase Issues

Jury View of Carter County

The trial court did not err in refusing a jury view of certain areas of Carter County, including Horton's home and Burton's duplex apartment. The aerial maps, photographs, and testimony adequately related the area of the crime and the distances between various locations in Grayson. From this evidence, the jury was able to draw conclusions about the timeline of the evening of Horton's murder. The trial court did not abuse its discretion with respect to defense counsel's motion for a jury view. See Dawes v. Commonwealth, 349 S.W.2d 191, 193 (Ky. 1961).

Venue

Appellant was originally indicted in Carter County. Defense counsel moved the Carter Circuit Court to transfer venue pursuant to KRS 452.210, after an unsuccessful attempt to seat a jury. Venue was transferred to the Morgan Circuit Court but, again, a jury was unable to be selected. The parties agreed to transfer venue to the Rowan Circuit Court.

Upon reversal of Appellant's original conviction, this matter was remanded to the Rowan Circuit Court.¹¹ Defense counsel filed a motion requesting the case be remanded to the Carter Circuit Court, the county of indictment, which was denied.

¹¹ It was by subsequent agreed order that venue was again transferred to the Floyd Circuit Court.

There was no error in this decision. The motion was made pursuant to KRS 452.290, which requires that a case be transferred back to the county of indictment when the trial court is satisfied that a “state of lawlessness” no longer exists. However, by its own language, KRS 452.290 applies only to cases in which venue was originally changed due to a state of lawlessness pursuant to KRS 452.230. In this case, venue was originally transferred from the Carter Circuit Court pursuant to KRS 452.210. Thus, KRS 452.240 prohibits an additional change of venue. The Rowan Circuit Court retained jurisdiction of the matter upon remand and, therefore, the motion was properly denied.

Second Competency Evaluation

Prior to Appellant’s first trial, a competency evaluation was conducted and a report issued. However, despite defense counsel’s successful motion for a comprehensive neurological evaluation, there is no evidence in the record that further testing was conducted or that a competency hearing was held. The Commonwealth informed the trial court of this circumstance prior to Appellant’s second trial. In light of this Court’s decision in Thompson v. Commonwealth, 56 S.W.3d 406, 408 (Ky. 2001), holding that a KRS 504.100(3) competency hearing cannot be waived, the trial court ordered a hearing. We find no error in this decision, as defense counsel’s motion at the prior proceedings created “reasonable grounds” for the trial court to question Appellant’s competency. KRS 504.100(1). Further, we conceive no prejudice to Appellant resulting from the competency hearing. No prejudicial information was obtained by the Commonwealth during its questioning of Appellant at the competency hearing. There was no error.

Right to be Present

Appellant complains that two pre-trial hearings were conducted in his absence, in violation of his Sixth Amendment rights. The first hearing was for the purpose of providing personnel records of police witnesses to counsel and to allow defense counsel to object to certain pieces of KRE 404(b) evidence. The second hearing concerned the competency of witness, Vince Kimmel, and minor administrative matters. At both, defense counsel objected to the trial court's decision to conduct the hearings in Appellant's absence. Nonetheless, the trial court proceeded in light of the expense and logistical complications of bringing Appellant to the courthouse.¹²

RCr 8.28(1) requires that the defendant "be present at the arraignment, at every critical stage of the trial including the empanelling of the jury and the return of the verdict, and at the imposition of the sentence." However, "[a] defendant is not required to be present during the argument of legal issues between court and counsel." Caudill v. Commonwealth, 120 S.W.3d 635, 652 (Ky. 2003). The first hearing mainly concerned the admissibility of Appellant's statements to Officer McDavid. There was no factual dispute about these statements, as both parties were analyzing Appellant's testimony at his first trial. The arguments to the trial court were purely legal and concerned the applicability of KRE 404(b) to the statements. The second consisted only of legal arguments concerning the unavailability of Vince Kimmel.¹³ At both, Appellant's presence would have been of little help to defense counsel. See Lester v. Commonwealth, 132 S.W.3d 857, 862 (Ky. 2004). As neither of these hearings

¹² The trial court noted on the record that Appellant was housed in the Rowan County jail, not in Floyd County, and that he was a security risk due to a prior conviction for escape.

¹³ Both parties agreed that Kimmel was incompetent to testify. The Commonwealth opposed only defense counsel's motion for a continuance. The trial court held the matter for further consideration at a date closer to the start of trial.

constituted a “critical stage” in the proceedings, Appellant’s substantial rights were not implicated. We find no abuse of discretion in the trial court’s decision to proceed with the hearings in Appellant’s absence.

Guilt Phase Closing Arguments

Appellant asserts that the Commonwealth’s guilt phase closing argument was so prejudicial and inflammatory that he was denied due process of law. He directs our attention to several instances of improper arguments, which we address individually. Having reviewed the argument in its entirety, we do not agree with Appellant’s assessment and find nothing improper about the Commonwealth’s closing statement.

In examining Burton’s actions on the evening of Horton’s death, the Commonwealth rhetorically asked the jury if it had heard “any other explanation” for Burton’s nervousness. When read in context, this statement cannot fairly be considered a comment on Appellant’s exercise of his Fifth Amendment right to remain silent. Instead, the Commonwealth is commenting on the lack of a reasonable explanation for Burton’s nervousness. This statement is qualitatively different than the type of commentary on a defendant’s silence, which was condemned in Beavers v. Commonwealth, 612 S.W.2d 131 (Ky. 1980).

The Commonwealth did not refer to matters outside the record or misstate the evidence when it discussed the knife found in Horton’s bedroom. Minnie Burton could not definitively identify the knife as one from her house, but she did testify that it had an insignia near the handle similar to knives of her own. The Commonwealth urged the jury to conclude that the knife belonged to Burton based upon her inconclusive testimony, her willingness to recognize the possibility that the knife belonged to her, and the cheap quality of the knife as compared to Horton’s own knives. The

Commonwealth's closing argument in this regard was limited to fair inferences that may be drawn from the physical evidence and Burton's testimony. See Brown v. Commonwealth, 174 S.W.3d 421, 431 (Ky. 2005).

The Commonwealth's Attorney did express his personal opinion about the presence of score marks on the screws taken from Horton's storm window. The prosecutor stated, "In my opinion . . . I do see marks." However, the prosecutor immediately followed this comment with, "But you go with your opinion and that is what counts." We see nothing improper in this comment.

The Commonwealth did not misstate the law with respect to intoxication and second-degree manslaughter. The Commonwealth's argument simply urged the jury to reject second-degree manslaughter in favor of intentional murder and to also reject a finding of voluntary intoxication. For the reasons stated *infra*, the jury instructions were proper and the Commonwealth's closing argument was tailored to these instructions. There was no error.¹⁴

Guilt Phase Instructions

Wording of Intoxication Instruction

Appellant argues that he was denied due process of law by the wording of the guilt phase instructions. With respect to the homicide, the trial court instructed the jury on murder, wanton murder, and second-degree manslaughter. It also delivered a separate intoxication instruction, which read:

Even though the Defendant might otherwise be guilty of Intentional Murder and/or First Degree Burglary, you shall not find him guilty under those Instructions if at the time he committed the offenses, if he did so, he was so intoxicated that he did not form the intention to commit the offenses.

¹⁴ Appellant's brief complaint that the Commonwealth misstated the evidence as to Appellant's level of intoxication raises no concern. The error, if any, was undoubtedly harmless as defense counsel made Appellant's level of intoxication abundantly clear during its own closing argument.

An identical intoxication instruction was approved by this Court in Mabe, 884 S.W.2d at 672. See also Brown v. Commonwealth, 575 S.W.2d 451, 452 (Ky. 1978). Appellant, however, argues that the trial court should have included the following additional language: "If you believe from all the evidence beyond a reasonable doubt that he did act wantonly as defined under Instruction No. ____ then you shall find him guilty of Second-Degree Manslaughter under Instruction No. ____." According to Appellant, the intoxication instruction as delivered gave the jury the erroneous impression that, if it believed he was voluntarily intoxicated at the time of the crimes, he would be fully acquitted.

Appellant recognizes the well-settled principle that voluntary intoxication is not an absolute defense, but rather reduces an intentional crime to one requiring a culpable mental state of wantonness. Slaven v. Commonwealth, 962 S.W.2d 845, 856-57 (Ky. 1997). In determining how to convey this premise to the jury, this Court has explained that a "separate instruction on intoxication explains to the jury how that defense affects the element of intent. It is unnecessary to repeat that explanation in the instruction on the primary offense." Slaven, 962 S.W.2d at 857 (internal citations omitted). Here, Appellant is requesting the inverse of the instruction requested in Slaven. Instead of the effect of the voluntary intoxication instruction being incorporated into the instruction on the primary offense, Appellant would like that effect explained within the voluntary intoxication instruction itself. As in Slaven, when read in their entirety, the instructions delivered in this case accurately state the law and the effect that voluntary intoxication has on a finding of intentional murder. See Bills v. Commonwealth, 851 S.W.2d 466, 471 (Ky. 1993) ("[J]ury instructions must be read as a whole."). There was no error.

Wording of Intentional Murder Instruction

Appellant makes several other claims of error with respect to the wording of the jury instructions, none of which require reversal. The language of the intentional murder instruction was not prejudicial because it required a finding that Appellant killed “Bess Horton by cutting her throat with a knife.” An identical instruction was approved by this Court in Appellant’s first trial. See Fields, 12 S.W.3d at 285 (“Except for the failure to include an instruction on second-degree manslaughter, the trial judge’s instructions accurately framed the law of the case.”). In Commonwealth v. Hager, we provided a specimen instruction that included language that the defendant killed the victim “by stabbing him with a knife.” 41 S.W.3d 828, 846 (Ky. 2001). There was no error.

Wanton Murder

Appellant argues that the trial court erred by instructing the jury on wanton murder, which he claims was unsupported by the evidence. Without specifically determining whether the evidence warranted an instruction on wanton murder, we can conclude that any supposed error was harmless. In Smith v. Commonwealth, we explained that no prejudice flows to a defendant where the jury is erroneously given an instruction on a lesser-included offense. “He cannot establish prejudice by showing that he was subjected to a greater penalty because the penalty options for intentional murder and wanton murder are the same[.]” 737 S.W.2d 683, 689 (Ky. 1987).

The jury in this case found Appellant guilty of murder beyond a reasonable doubt. Appellant was not prejudiced by the fact that the jury had the opportunity to find him guilty of wanton murder, but declined to make such a finding. There is no reasonable possibility that Appellant would not have been convicted or would not have received the

death penalty had the wanton murder instruction not been given. The error, if any, was harmless.

First-Degree Manslaughter

Appellant was not entitled to an instruction on first-degree manslaughter pursuant to KRS 507.030(1)(b), because no evidence was presented of an extreme emotional disturbance (EED). See Caudill, 120 S.W.3d at 667. An EED is “an enraged, inflamed, or disturbed” mental state which causes one to act uncontrollably and for which there is a reasonable explanation or excuse. McClellan v. Commonwealth, 715 S.W.2d 464, 468-69 (Ky. 1986). There is also a requirement of provocation, often referred to as the triggering event. Fields v. Commonwealth, 44 S.W.3d 355, 359 (Ky. 2001).

Here, there was no evidence of either an EED or a triggering event. While the evidence indicated that Appellant was intoxicated, substance abuse alone does not authorize a first-degree manslaughter instruction under an EED theory. See Bowling, 873 S.W.2d at 179. Furthermore, Appellant’s fight with Burton at his mother’s apartment does not constitute a triggering event. The uncontroverted testimony was that Burton left the apartment and that Appellant stayed behind for a half hour with his brother smoking cigarettes, demonstrating an interruption of the supposed triggering event. Cf. Springer v. Commonwealth, 998 S.W.2d 439, 452 (Ky. 1999). Finally, no explanation was provided as to why the fight with Burton so enraged Appellant; a simple fight with a girlfriend does not provide a reasonable excuse or explanation for an enraged or inflamed state of mind. See Caudill, 120 S.W.3d at 668 (resistance to a demand for money does not amount to a reasonable explanation for an extreme emotional disturbance). The trial court did not err in refusing this instruction.

Second-Degree Burglary and Criminal Trespass

Appellant was not entitled to a second-degree burglary instruction. The uncontroverted testimony at trial was that Appellant had a knife and razor blades on his person when he was arrested in Horton's bedroom and, therefore, the trial court instructed the jury only on first-degree burglary. The fact that the jury might not have believed this testimony does not warrant instruction on second-degree burglary; rather, it would have authorized an acquittal on the first-degree burglary charge. The trial court has no duty to instruct on theories of the case that are not supported by the evidence. Payne v. Commonwealth, 656 S.W.2d 719, 721 (Ky. 1983).

For the same reason, Appellant was not entitled to a first-degree criminal trespass instruction. There was no evidence that Appellant entered Horton's home for a lawful purpose without the intent to commit a crime. See Commonwealth v. Sanders, 685 S.W.2d 557, 559 (Ky. 1985). From the time of entry (after midnight) and the method of entry (through removal of a storm window), the jury could infer Appellant entered the home unlawfully. There was no error.

Missing Evidence Instruction

There was no need for a missing evidence instruction concerning the storm window removed from Horton's home and later lost by the Grayson Police Department. Due process is implicated only when the failure to preserve or collect evidence was intentional and the potentially exculpatory nature of the evidence was apparent at the time it was lost or destroyed. Estep v. Commonwealth, 64 S.W.3d 805, 810 (Ky. 2002). Neither condition is satisfied here. That Detective Stevens might have asked Rayburn to say the original storm windows were returned does not prove that there was intentional destruction of evidence; even if believed, it proves only that Detective

Stevens was aware the window was lost. There was no other evidence of bad faith. Furthermore, it must be remembered that, while the storm window itself was not located, fingerprint testing had already been performed and no latent fingerprints were recovered. Thus, we fail to see how the exculpatory nature of the window was evident at the time it was lost or destroyed or how the evidence was adverse to the Commonwealth and favorable to the defense. There was no error in the trial court's refusal to deliver a missing evidence instruction. See Collins v. Commonwealth, 951 S.W.2d 569, 573 (Ky. 1997) (negligence on the part of the Commonwealth in its preservation of evidence does not rise to the level of bad faith required for a missing evidence instruction).

Penalty Phase Issues

Non-Statutory Aggravating Circumstances

Appellant claims that the Commonwealth impermissibly urged the jury to consider Appellant's demeanor in the courtroom and his criminal history as nonstatutory aggravating circumstances. We disagree with this assessment. The Commonwealth's reference to Appellant's demeanor in the courtroom was permissible and did not elevate "lack of remorse" to the level of an aggravating circumstance. Johnson, 103 S.W.3d at 697.

Furthermore, the jury found the existence of an aggravating circumstance contained in KRS 532.025(2)(a)(2): "The offense of murder . . . was committed while the offender was engaged in the commission of . . . burglary in the first degree" "A statutory aggravating circumstance serves to place the appellant in the class eligible for the death penalty." Blevins v. Commonwealth, 712 S.W.2d 932, 935 (Ky. 1986). As

Appellant was already placed in the class eligible for the death penalty, any consideration of his lack of remorse was harmless.

Penalty Phase Instructions

Appellant submitted penalty phase instructions which were rejected by the trial court. He cites numerous errors in the instructions that were delivered to the jury. None support a finding of error.

“Jury instructions at the sentence stage of a capital trial need not include any particular words or phrases to define the concept of mitigation or the function of mitigating circumstances.” Tamme, 973 S.W.2d at 37-38. The trial court’s instructions adequately described the function and purpose of mitigating circumstances. The trial court acted within its discretion in rejecting Appellant’s proposed mitigation instruction, which referred to circumstances or factors that “in fairness and mercy lessen or reduce his responsibility or moral culpability.”

The trial court was not required to specifically instruct the jury that it could impose a term of imprisonment, even if it also found the presence of an aggravating circumstance. From the wording of the instructions and from counsel’s closing argument, the jury was made aware of its option to reject the death penalty. See Skaggs, 694 S.W.2d at 679. There was no reversible error.

Appellant urged the trial court to instruct the jury that it need not find the existence of mitigating circumstances unanimously. “An instruction on non-unanimous findings on mitigation is not required.” Bowling, 873 S.W.2d at 180. The instructions in this case did not misinform the jury about mitigating circumstances as in Mills v. Maryland, 486 U.S. 367, 373-75, 108 S.Ct. 1860, 1865-66, 100 L.Ed.2d 384 (1988). There was no error.

Appellant cites error where the trial court refused to give penalty phase instructions regarding his parole eligibility. “[P]arole eligibility information which is fully admissible under KRS 532.055 has no place in a death penalty hearing pursuant to KRS 532.025. Under no circumstances should parole eligibility enter into death penalty deliberations.” Perdue v. Commonwealth, 916 S.W.2d 148, 164 (Ky. 1995). There was no error.

There is no need to include a standard of proof such as “beyond a reasonable doubt” in a mitigating circumstance instruction. The jury is not required to make findings with respect to mitigation evidence. They are required only to consider such evidence. Thus, there is no need to define the standard of proof. Tamme, 973 S.W.2d at 38.

The trial court was under no duty to instruct the jury that it must not be influenced by prejudice or passion. “While such an instruction is permissible, an examination of these factors should be made by the trial court reviewing a death sentence.” Perdue, 916 S.W.2d at 169. No instruction was required in this case.

Appellant sought to instruct the jury that “no juror should surrender his or her honest conviction as to the weight or effect of the evidence solely because of the opinion of other jurors.” The instructions satisfactorily informed the jury that its verdict must be unanimous. The trial court did not err in refusing this instruction.

Appellant contends that he was entitled to a stand-alone instruction regarding “residual doubt.” The proposed instruction stated: “If any individual juror has any doubt as to the appropriate punishment, then you shall not sentence Sam Fields to death and shall instead fix his punishment at a sentence of imprisonment.” The trial court’s instructions with respect to reasonable doubt and the unanimity requirement adequately

informed the jury of its duty. This proposed instruction was properly denied. See St. Clair, 140 S.W.3d at 571.

Appellant makes two final arguments that are without merit. Appellant's complaints with respect to the composition of the verdict form are baseless. The verdict form used simple, clear language that did not mislead the jury. Also, there is no requirement that the jury make written findings with respect to mitigation. Smith v. Commonwealth, 734 S.W.2d 437, 451 (Ky. 1987).

Commonwealth's Penalty Phase Closing Argument

Appellant complains at length that the Commonwealth's penalty phase closing argument was highly improper and denied him due process of law. We have reviewed the Commonwealth's argument in its entirety and have found nothing improper. Nonetheless, we briefly address Appellant's complaints.

The Commonwealth was entitled to refer to Appellant's entire criminal history, even though some of his prior convictions are outside of the statutory list of aggravating circumstances rendering him eligible for the death penalty. KRS 532.025(1)(b) expressly permits such reference.

The Commonwealth did not use Appellant's escape conviction as a nonstatutory aggravating circumstance amounting to a claim of future dangerousness. Appellant's claim to the contrary is not supported by the record. The Commonwealth's reference to Appellant's escape conviction was a fair commentary on his criminal background.

The Commonwealth did not minimize the jury's responsibility in sentencing Appellant. Nor did it inform the jury that its decision was only "a recommendation." Cf. Ice, 667 S.W.2d at 676.

It is not error for the Commonwealth to ask the jury to “fix a punishment that fits the crime.” Likewise, the Commonwealth’s reference to Appellant’s demeanor in the courtroom was not improper, nor was it a comment on Appellant’s exercise of his right to remain silent.

The Commonwealth’s very brief statement that the jury “speak[s] for the community” was undoubtedly harmless. The comment was fleeting and did not appeal to the jurors’ fears or prejudices.

The Commonwealth did not make a “Golden Rule” argument to the jury, nor did it attempt to use sensationalizing tactics. The closing argument cannot fairly be characterized as an emotional or inflammatory appeal to the jury on behalf of the family. Cf. Clark v. Commonwealth, 833 S.W.2d 793, 797 (Ky. 1991).

Appellant claims that the Commonwealth continually misstated the law in its penalty phase closing argument. Upon review, the Commonwealth’s statements simply urged the jury to draw certain inferences from the evidence. “[T]he Commonwealth’s Attorney is allowed reasonable latitude in argument to persuade the jurors the matter should not be dealt with lightly.” Lynem v. Commonwealth, 565 S.W.2d 141, 145 (Ky. 1978). The Commonwealth did not exceed these bounds.

Trial Judge’s Report

Appellant argues that this Court should articulate clearer standards to be employed by the trial court in imposing the death penalty. Appellant directs our attention to the trial court’s failure to make findings as to specific mitigating circumstances. This argument was considered and rejected by this Court in Bowling: “[T]he trial court was within its proper discretion in upholding the jury’s sentence of

death. The contention that there is no properly articulated standard of review for the trial court in such a circumstance is without merit.” 942 S.W.2d at 306.

Statistical Evidence About Parole

Appellant sought to introduce statistical evidence about parole success and parole criteria during the penalty phase. While the trial court permitted general evidence of parole eligibility guidelines, it rejected the introduction of parole eligibility statistics relied on by the Parole Board. The trial court properly rejected this evidence as it had little relevancy or direct relationship to Appellant’s case. There was no error.

Burglary Conviction as an Aggravating Circumstance

The use of Appellant’s burglary conviction does not constitute double jeopardy. This argument was considered and rejected in Bowling: “The underlying offenses were only factors to be considered as to whether the punishment for murder should be death. Appellant was not subjected to double jeopardy or multiple punishment for the same offense.” 942 S.W.2d at 308.

Death Penalty Challenges

Appellant makes several claims of error concerning the death penalty, all of which have been continually rejected by this Court. We decline the invitation to revisit these decisions.

There is no error in the removal of jurors who cannot consider the entire range of penalties, including the death penalty. See Hodge v. Commonwealth, 17 S.W.3d 824, 838 (Ky. 2000).

The constitutionality of the death penalty has been repeatedly recognized. Thompson, 147 S.W.3d at 55. Further, KRS 532.025 provides adequate standards to guide the jury in its consideration and imposition of the death penalty. Hodge, 17

S.W.3d at 854. Finally, the death penalty is not imposed arbitrarily or capriciously in Kentucky. Tamme, 973 S.W.2d at 40-41.

Kentucky's proportionality review is constitutional and comports with statutory requirements and the federal Constitution. Sanders, 801 S.W.2d at 683.

There is no right to access this Court's KRS 532.075 review data. Ex parte Farley, 570 S.W.2d 617, 624 (Ky. 1978).

Appellant provides no evidentiary basis for the claim that there was "residual doubt" as to his guilt. Suffice to say, the evidence was sufficient to support the conviction.

Lethal injection is not cruel and unusual punishment. Baze v. Rees, ___ U.S. ___, 128 S.Ct. 1520, 1526, 170 L.Ed.2d 420 (2008).

Proportionality Review

Pursuant to KRS 532.075, we have reviewed the death sentence imposed herein. We have likewise reviewed the record, the arguments of counsel, and the evidence presented. We find no indication that the verdict or sentence was imposed under the influence of passion, prejudice, or other arbitrary factor. See KRS 532.075(3)(a). The evidence of the statutory aggravating circumstance of burglary was substantial and compelling. See KRS 532.075(3)(b).

Upon review of those cases in which the death penalty was imposed, we conclude that Appellant's sentence is neither excessive nor disproportionate. See KRS 532.075(3)(c). See also Johnson, 103 S.W.3d at 698; Mills, 996 S.W.2d at 495. We have given particular attention to those cases where a single murder occurred during the course of a burglary or robbery. See Caudill v. Commonwealth, 120 S.W.3d 635 (Ky. 2003); Meadows v. Commonwealth, 550 S.W.2d 511 (Ky. 1977); Marlowe v.

Commonwealth, 709 S.W.2d 424 (Ky. 1986). Bess Horton was murdered in a most brutal manner. Her throat was sliced from ear to ear and a knife was lodged so deeply into her right temple that it protruded from the left side. Moreover, she was ambushed in her own home as she slept. Even more significant is the complete lack of any articulable motive for the crime. See Thompson, 147 S.W.3d at 55. There was no error.

Cumulative Error

Upon comprehensive review of the proceedings in this case, we are convinced that Appellant received a fundamentally fair trial and penalty proceeding. There was insufficient harmless error to create a cumulative effect that would mandate reversal of Appellant's conviction or sentence.

For the reasons set forth herein, the judgment of the Floyd Circuit Court is affirmed.

Minton, C.J.; Abramson, Noble, Schroder, and Venters, JJ., concur. Scott, J., not sitting.

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Supreme Court of Kentucky

1997-SC-0424-MR

FINAL

DATE MAR 16 2000 John Hill, Clerk
APPELLANT

SAMUEL STEVEN FIELDS

V. APPEAL FROM ROWAN CIRCUIT COURT
HONORABLE SAMUEL C. LONG, SPECIAL JUDGE
97-CR-6

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION OF THE COURT BY JUSTICE COOPER

REVERSING AND REMANDING

During the early morning hours of August 19, 1993, Bess Horton was murdered in the bedroom of her home in Grayson, Kentucky. Her throat was slashed, and she was stabbed in the head with such force that the knife buried to the hilt in her right temple and the point of the blade protruded from her left temple. Officers Ron Lindeman and Larry Green of the Grayson Police Department were in the neighborhood investigating a suspected burglary when they saw a light in the Horton residence. Lindeman entered Mrs. Horton's bedroom through an open window and discovered her body lying in her bed. He also encountered Appellant Samuel Fields in the bedroom in possession of a knife, two razor blades, and numerous items of Mrs. Horton's jewelry. Following a trial by jury in the Rowan Circuit Court, Appellant was

convicted of Horton's murder and sentenced to death. He appeals to this Court as a matter of right. Ky. Const. § 110(2)(b). We reverse for a new trial, because (1) the jury was permitted to hear the recorded narrative of a staged videotaped reenactment of Lindeman's investigation of the crime scene, and (2) the trial judge erroneously failed to instruct the jury on manslaughter in the second degree as a lesser included offense of murder.

I. FACTS.

Appellant's girlfriend, Minnie Burton, acted as a chauffeur for Mrs. Horton and ran errands for her when requested. In exchange, Horton allowed Burton to live rent-free in a duplex apartment located near Horton's residence. There was evidence that Horton decided to evict Burton and that she cut off the water to Burton's apartment, forcing her to spend nights at the homes of friends. There was also evidence that Burton had remarked that "someone ought to kill (Horton)," and that she had told a friend, Phyllis Berry, that Horton kept a metal box containing \$4,000.00 in her bedroom. This latter information became significant when another witness testified that Berry had confessed to him that she and Minnie Burton went to Horton's residence to steal the metal box and that she (Berry) killed Horton when Horton awoke during the burglary and recognized Burton.

From about noon on August 18, 1993 until after midnight, Appellant, Minnie Burton, Phyllis 'Berry, and others drove around Carter and Boyd Counties, consuming large amounts of alcohol, mostly beer. The group made two separate trips to Ashland to purchase several cases of beer. They stopped at the residence of Phyllis Berry's brother in Boyd County, where Appellant drank some whiskey and ingested some

“horse tranquilizers.” Appellant and Burton finally returned to **Grayson** with the intention of spending the night at a residence occupied by Appellant’s mother and brother. After entering the residence, Appellant continued drinking beer and began quarreling with Burton. When he began throwing food, furniture and other objects, including knives, around the kitchen, Burton fled the residence and told Appellant she was going to her apartment. After destroying some more personal property and threatening his brother with a knife, Appellant broke the glass on the kitchen door with his fist, causing lacerations of his right arm. After retrieving several more cans of beer, Appellant proceeded to Burton’s apartment.

Burton had been unable to gain entry to her apartment, because Elmer Prichard, the other resident of the duplex, had locked the doors. Appellant arrived and told Burton that he had killed his brother (which he had not), and asked her if she would dispose of the alleged murder weapon. He gave Burton a knife, which she threw into some nearby bushes. Appellant then went into “a frenzy” and attempted to gain entry to Burton’s apartment by ripping the screens off of the windows. Burton again fled. Elmer Prichard called the police and Officers Lindeman and Green responded to the call. Appellant testified that he then proceeded to the Horton residence looking for Burton, because Burton had told him of her intention to “rob” Horton. He sat on Horton’s porch for a while drinking beer, then entered Horton’s bedroom through an open window. He turned on his cigarette lighter for illumination and saw that the room had been ransacked. However, he did not notice Horton’s body on the bed. He then began pocketing whatever he could find, including jewelry and a knife.

While investigating the attempted burglary of the duplex, Officers Lindeman and Green noticed a light inside the Horton residence. They found the garage door open,

but the inside door locked. Lindeman then discovered the open window and climbed inside, where he found both Horton's body and Appellant. Some jewelry, a knife, and two razor blades either fell from or were removed from Appellant's pockets. According to Lindeman, he offered to read Appellant his Miranda rights, but Appellant was able to recite them verbatim. Appellant then stated: "Kill me, Ron. Kill me. I stabbed her and I'm into it big this time." Lindeman testified that when he asked Appellant why he had killed Horton, Appellant replied: "I don't know. Kill me Ron. I'm going to prison for the rest of my life this time." Appellant denied uttering these statements. His version was that Lindeman jumped on him and knocked him to the floor, then put a gun to his head, accused him of killing Horton, and threatened to shoot him.

Appellant was arrested and transported by Kentucky State Trooper Roy Wolfe to King's Daughters' Medical Center in Ashland for treatment of injuries to his right arm. Wolfe testified that in his opinion, Appellant was intoxicated.

After Appellant was removed from the crime scene, Officer Lindeman and an unidentified cameraman staged a lengthy and dramatic videotaped reenactment of the investigation leading up to Appellant's arrest and alleged confession. The cameraman filmed Lindeman as he retraced his route from the duplex apartment to the Horton residence, to the open garage door, then through the open window and into the bedroom. As he led the cameraman through the reenactment, Lindeman narrated where he was, what he was doing, and why. He also described Officer Green's locations and activities. After entering the bedroom during the reenactment, Lindeman used his flashlight to demonstrate how he drew his gun on Appellant. He narrated how the jewelry, the knife, and the razor blades had either fallen or been removed from Appellant's pockets, and repeated verbatim Appellant's confession to murdering Mrs.

Horton. The camera was then panned around the bedroom to the jewelry, the knife, and the razor blades, then to some blood on the carpet which Lindeman described as Appellant's blood. Finally, the camera was focused on the bed where Mrs. Horton's body still lay, her throat slashed and the knife still buried in her right temple. The camera continued to focus on Mrs. Horton's wounds for approximately forty seconds until the video was concluded.

Appellant was treated in the emergency room at King's Daughters' Medical Center for some minor lacerations of his right arm. No stitches were required. Appellant was examined by Jason Dobson, an emergency medical technician (EMT), who opined at trial that there was too much blood on Appellant's arms and clothing to have been caused by such minor injuries. Dobson also testified that he asked Appellant how he got the blood on him and that Appellant responded: "You stupid s.o.b., if you had just killed some lady, you would be covered with blood, too." The blood on Appellant's arm was washed off at the hospital. Subsequent blood typing and DNA testing revealed that none of the blood found on Appellant's clothing was traceable to Mrs. Horton and none of the blood found on Horton's bed was traceable to Appellant.

II. VIDEOTAPED EVIDENCE.

Appellant moved in limine to suppress the videotaped reenactment of Lindeman's investigation, or, in the alternative, to suppress the audio narrative portion thereof, especially Lindeman's repetition of Appellants alleged confession. The motion was overruled and the videotape was played to the jury in its entirety, both video and

audio, not only during Lindeman's direct testimony, but also during both the prosecutor's opening statement and his closing argument.

A videotape of a crime scene, including the position of the victim's body and the location and nature of the victim's injuries, is just as admissible as a photograph, assuming a proper foundation is laid. Bedell v. Commonwealth, Ky., 870 S.W.2d 779 (1993); Milburn v. Commonwealth, Ky., 788 S.W.2d 253 (1989). If relevant and probative of an issue in the case, a videotape of a crime scene, like a crime scene photograph, is admissible even though gruesome. Mills v. Commonwealth, Ky., 996 S.W.2d 473, 489 (1999); see also Dillard v. Commonwealth, Ky., 995 S.W.2d 366, 370 (1999) and cases cited therein. While we have some reservations with respect to the propriety of focusing the camera on the victim's wounds for as long as forty seconds, we conclude that jurors would be no more inflamed by this lengthy depiction than by being exposed to a crime scene photograph for the same duration of time. Thus, we conclude that there was no error in admitting the video portion of the taped reenactment. The admission of the audio portion, however, significantly implicates the hearsay rule.

The audio narration on the videotape was undoubtedly an out-of-court statement offered to prove the truth of the matter asserted, i.e., hearsay. KRE 801(c). The narration did not fall within any exception to the hearsay rule. It was not a present sense impression, KRE 803(1), because it did not describe events as they were happening, but events which had already occurred. It was not within the recorded recollection exception, KRE 803(5), because Lindeman did not claim to have insufficient recollection of the facts as to be unable to testify without reference to the videotape. In fact, he had already testified to the exact same facts which were

repeated in the recorded narration. Appellant's brief characterizes the audio portion of the videotape as a "verbal police report," which is inadmissible under the public records exception, KRE 803(8)(A). No effort was made to qualify the videotape as a business record. KRE 803(6); Prater v. Cabinet for Human Resources, Ky., 954 S.W.2d 954, 957-59 (1997). The maker of the record, i.e., the cameraman, was never identified, and there was no proof that it was the regular practice of the Grayson Police Department to videotape reenactments of criminal investigations. Rabovskv v. Commonwealth, Ky., 973 S.W.2d 6, 10 (1998).

The audio narration-on the videotape was, in fact, a prior consistent statement offered to bolster Lindeman's in-court testimony. KRE 801A(a)(2). A prior consistent statement generally is admissible only to rebut an express or implied charge of recent fabrication or improper influence or motive, id., neither of which is present in this case. In fact, the videotape was not offered as rebuttal, but was first played during the prosecutor's opening statement, which occurred not only prior to the introduction of any evidence, but prior to defense counsel's opening statement. Professor Lawson enumerates some other circumstances when a prior consistent statement could possess "probative value beyond mere repetition," i.e., to cast doubt on whether or not an alleged prior inconsistent statement was uttered, to refute a claim of inaccurate recollection by the witness who made the prior statement, to amplify or clarify an alleged prior inconsistent statement, or to reflect upon the seriousness of alleged inconsistencies between testimony and a prior inconsistent statement. R. Lawson, The Kentucky Evidence Law Handbook § 8.10 II, at 379-80 (3d ed. Michie 1993). None of those circumstances exist in this case.

In overruling the motion to suppress the audio portion of the videotape, the trial judge relied on language from our opinion in Milburn v. Commonwealth, supra:

[Appellant] particularly objects to a portion of the tape which focused on a large pool of blood, and the simultaneous commentary of the investigating police officer.

This videotape evidence does not fall outside of the broad category of photographs which we have found admissible under a liberal approach recognized in Gall v. Commonwealth, Ky., 607 S.W.2d 97, 106 (1980), and continued through Waaer v. Commonwealth, Ky., 751 S.W.2d 28, 31 (1988). The narrative supplied in no way measures up to a grotesque “Poe-like description” as appellant has so characterized it. We uphold the competent ruling of the trial court to admit probative evidence.

Id. at 257.

The trial judge interpreted the first quoted sentence to mean that the “simultaneous commentary of the investigating police officer” was an audio recording accompanying the videotape. The Commonwealth concedes that, in fact, the videotape in Milburn was played with the audio portion muted and that the “simultaneous commentary” was provided by the investigating officer from the witness stand describing the contents of the videotape as it was being played. Milburn provides no authority for allowing a jury to hear an unsworn out-of-court narration of videotaped evidence.

The Commonwealth does not assert that the pre-recorded narration of the videotape falls within an exception to the hearsay rule, but relies solely on the cases of Lee v. State, 526 N.E.2d 963 (Ind. 1988), overruled on other grounds, Rita v. State, 674 N.E.2d 968 (Ind. 1996) and State v. Van Tran, 864 S.W.2d 465 (Tenn. 1993), cert. denied, 511 U.S. 1046 (1994) in both of which the admission of similar evidence was held not to be reversible error. That reliance is misplaced.

In Lee v. State, supra, the Indiana Supreme Court noted that, "Officer Trennerry's narration in no way connected appellant with the case nor did he draw any conclusions concerning appellant. His narration was purely factual as to what was being depicted on the tape at the time." 526 N.E.2d at 965. Here, the audio portion of the videotape included not only a description of what was being depicted on the tape, but also Lindeman's repetition of Appellant's alleged confession to the murder. In State v. Van Tran, supra, the Tennessee Supreme Court in fact found that it was error to permit the jury to hear the audio portion of a videotape which described a crime scene as it was being filmed. "The better practice would have been for the trial court to have turned off the volume and had Officer Garner narrate the tape from the witness stand." 864 S.W.2d at 477. However, the error was deemed harmless, because the narrative pertained mainly to minor matters or facts established elsewhere in the record, and because of the clear evidence of the defendant's guilt. Here, the narrative included a repetition of Appellant's alleged confession, and the evidence of Appellant's guilt of murder was not overwhelming, given the results of the blood tests and Phyllis Berry's alleged admission that she was the person who killed Mrs. Horton.

In Scott v. State, 559 So.2d 269 (Fla. Dist. Ct. App. 1990), the execution of a search warrant by police was videotaped by a national television film crew. The videotape, including the audio portion, was played to the jury during the defendant's subsequent criminal trial for trafficking in a controlled substance. The audio portion included statements by police officers that a number of complaints had been filed against the residents of the searched premises, that cocaine trafficking had occurred on the premises, and that the property was not zoned for a "supermarket for cocaine." Admission of the audio portion was held reversible error because the unsworn

statements of the officers were inadmissible hearsay. In Scott, the inadmissible hearsay occurred in a recording of events as they were occurring. Here, the inadmissible hearsay occurred in a recording of a reenactment of events which had already occurred. Either way, the legal principle is the same.

Compounding the error in this case is the fact that the videotape was played to the jury in its entirety not only during the Commonwealth's case-in-chief, but also during both the prosecutor's opening statement and his closing argument. RCr 9.42(a) states that, "[t]he attorney for the Commonwealth shall state to the jury the nature of the charge and the evidence upon which the Commonwealth relies to support it." Thus:

The only legitimate purpose of an opening statement is so to explain to the jury the issue they are to try that they may understand the bearing of the evidence to be introduced.

Lickliter v. Commonwealth, 249 Ky. 95, 60 S.W.2d 355, 357 (1933); see also Brummitt v. Commonwealth, Ky., 357 S.W.2d 37 (1962); Turner v. Commonwealth, Ky., 240 S.W.2d 80 (1951); Mills v. Commonwealth, 310 Ky. 240, 220 S.W.2d 376 (1949).

While we have allowed prosecutors to display admissible items of real evidence to the jury during opening statement, Sherlev v. Commonwealth, Ky., 889 S.W.2d 794 (1994) (photograph of the victim), Shelton v. Commonwealth, 280 Ky. 733, 134 S.W.2d 653 (1939) (bloody coat worn by the defendant), we have never sanctioned the playing of a witness's prerecorded testimony during opening statement, much less a witness's prerecorded unsworn statement. As for closing argument, attorneys are generally allowed to replay excerpts from recorded testimony, which is analogous to reading excerpts from the record. Hodaes v. State, 392 S.E.2d 262 (Ga. Ct. App. 1990); People v. Gross, 637 N.E.2d 789 (Ill. App. Ct. 1994). Here, however, the replay of the videotape was but a repetition of Lindeman's entire testimony, tantamount to recalling

Lindeman to the witness stand in the middle of summation. Compare Eaan v. Dotson, 155 N.W. 783 (S.D. 1915), overruled on other grounds, Hackworth v. Larson, 165 N.W.2d 705 (S.D. 1969), in which a pro se litigant attempted to give unsworn testimony regarding a disputed fact during his opening statement.

The right of a person to try his own case does not contemplate the privilege of giving testimony three times in the same case, viz: As an unsworn witness in the "opening statement;" as a witness under oath; and again in his closing argument.

Id. at 790.

Officer Lindeman actually testified four times with respect to his investigation and Appellant's alleged confession in this case, viz: As an unsworn witness during opening statement, both sworn and unsworn during the Commonwealth's case-in-chief, then again as an unsworn witness during closing argument. We do not decide here whether the repetition of admissible evidence could so prejudice a defendant as to entitle him to a new trial. We do decide here that the repetition of inadmissible evidence regarding a disputed fact was so prejudicial in this case as to preclude any finding of harmless error.

III. INTOXICATION DEFENSE.

There was evidence that during the hours preceding Bess Horton's murder, Appellant consumed a substantial quantity of beer, whiskey, "horse tranquilizers," and possibly marijuana. His drunken, out-of-control behavior after arriving at his mother's residence on the night of the murder was well documented. Minnie Burton testified that the two began quarreling because Appellant was attempting to cook "crazy stuff, like pickles, stuff you really don't cook," in a frying pan; and that Appellant told her that, "I don't have any control over anything I do." Phyllis Berry described Appellant as "highly

intoxicated.” Appellant’s brother testified that Appellant was “wired up and ready to fight.” Officer Wolfe described Appellant as being intoxicated when he transported him from the crime scene to King’s Daughters’ Medical Center. From this evidence, the trial judge could and did conclude that Appellant was entitled to an instruction on the defense of intoxication. Slaven v. Commonwealth, Ky., 962 S.W.2d 845, 856 (1997); Brown v. Commonwealth, Ky., 575 S.W.2d 451, 452 (1978); Jewell v. Commonwealth, Ky., 549 S.W.2d 807, 814 (1977), overruled on other grounds, Payne v. Commonwealth, Ky., 623 S.W.2d 867 (1981), cert. denied, 456 U.S. 909 (1982). However, he refused Appellant’s request to instruct the jury on second-degree manslaughter as a lesser included offense of murder.

As pointed out in Slaven v. Commonwealth, supra, at 857, the defense of voluntary intoxication does not authorize an acquittal if the jury finds the defendant was so intoxicated that he could not form the requisite intent to commit murder. Rather, its effect is to reduce the offense from the intentional crime of murder (or first-degree manslaughter) to the wanton crime of second-degree manslaughter. The definition of “wantonly” provides that a person who acts wantonly “solely by reason of voluntary intoxication also acts wantonly with respect thereto.” KRS 501.020(3). This means that if a defendant was so voluntarily intoxicated that he killed another without the intent to do so, the fact of his voluntary intoxication, itself, constituted the element of wantonness necessary to convict of second-degree manslaughter. Thus, if a jury is instructed on voluntary intoxication as a defense to intentional murder or first-degree manslaughter, it must also be instructed on second-degree manslaughter as a lesser included offense; and the failure to do so is prejudicial error. Sprinaer v. Commonwealth, Ky., 998 S.W.2d 439, 454-55 (1999); Slaven v. Commonwealth, supra at 856-57. n g

determined that Appellant was entitled to an instruction on the defense of voluntary intoxication, the trial judge's refusal to instruct on second-degree manslaughter was reversible error requiring a new trial.

IV. DOBSON'S OPINION TESTIMONY.

Appellant asserts it was error to permit the EMT, Dobson, to express an opinion that there was too much blood on Appellants arms and clothing to have resulted solely from Appellant's relatively minor injuries. The trial judge found that Dobson had sufficient training and experience to express such an opinion, KRE 104(a), KRE 702, and we conclude that his finding in that regard was not an abuse of discretion. Fugate v. Commonwealth, Ky., 993 S.W.2d 931 (1999); Ford v. Commonwealth, Ky., 665 S.W.2d 304 (1983), cert. denied, 469 U.S. 984 (1984).

V. APPELLANT'S STATEMENT TO DOBSON.

Appellant asserts it was error to permit Dobson to repeat the incriminating response which Appellant made to Dobson's inquiry about the origin of the blood on his body and clothing, because Appellant had not been readvised of his Miranda rights before the inquiry was made. We note at the outset that Miranda was concerned with "the protection which must be given to the privilege against self-incrimination when the individual is first subjected to police interrogation." Miranda v. Arizona, 384 U.S. 436, 477, 86 S.Ct. 1602, 1629, 16 L.Ed.2d 694 (1966). Miranda does not require that the warnings be repeated each time the interrogation process is resumed after an interruption. United States v. Delay, 500 F.2d 1360, 1365 (8th Cir. 1974); Evans v. Swenson, 455 F.2d 291, 296-97 (8th Cir. 1972), cert. denied, 408 U.S. 929 (1972); Miller v. United States, 396 F.2d 492, 496 (8th Cir. 1968), cert. denied, 393 U.S. 1031

(1969). “In each case, the ultimate question is: Did the defendant, with a full knowledge of his legal rights, knowingly and intentionally relinquish them?” Miller v. United States, supra, at 496. At the time of his arrest, Appellant told Officer Lindeman that he was aware of his Miranda rights and, in fact, recited them verbatim to Lindeman. He does not claim and there is no reason to assume that he suddenly forgot them while being transported from the crime scene to the hospital.

Furthermore, Dobson was not a police officer, but an employee of the hospital. There was no evidence to support a conclusion that he was a state actor as is required to support a claim of a violation of a constitutional right.

Absent police conduct causally related to the confession, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law.

Colorado v. Connelly, 479 U.S. 157, 164, 107 S.Ct. 515, 520, 93 L.Ed.2d 473 (1986); see also Burdeau v. McDowell, 256 U.S. 465, 41 S.Ct. 574, 65 L.Ed. 1048 (1921); Commonwealth v. Cooper, Ky., 899 S.W.2d 75, 76-77 (1995); cf. Coolidge v. New Hampshire, 403 U.S. 443, 487-90, 91 S.Ct. 2022, 2048-50, 29 L.Ed.2d 564 (1971); Brock v. Commonwealth, Ky., 947 S.W.2d 24, 29 (1997).

Appellant relies on Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981), in which incriminating statements made by a defendant to a psychiatrist during a competency examination were held inadmissible against him, because the statements were elicited absent preliminary Miranda warnings. The psychiatrist was deemed a state actor, because he had been appointed by the court to conduct the examination. Here, there was no evidence that EMT Dobson was requested or appointed by any state agency to interrogate Appellant about the origin of the blood on his body and clothing. The mere fact that the police transported Appellant to King’s

Daughters' Hospital for treatment of his wounds did not, ipso facto, transform Dobson from a hospital employee into a state actor.

VI. EXCLUSION OF EXCULPATORY EVIDENCE.

An arguably exculpatory investigative report was discovered in the records of the Grayson Police Department and furnished to defense counsel prior to trial. The report was unsigned and consisted primarily of hearsay information obtained by its unidentified author from witnesses who implicated Minnie Burton, Phyllis Berry and Berry's boyfriend, Scott Trent, in the murder of Mrs. Horton. The report concluded:

I, myself, believe after talking with these people and listening to their stories, that the burglary and murder took place earlier that evening and that the other people had ran off and left Sammy because he had gotten to (sic) wild for them and that Sammy had returned to Minnie Burton's apartment and broke in there looking for her. Not finding her there, he returned to the crime scene of Mrs. Horton's home.

Officer Lindeman speculated that the report had been authored by Appellant's father, Ronald Fields, a former employee of the Grayson Police Department who was employed by the Olive Hill Police Department on the date of Mrs. Horton's murder. Ronald Fields admitted that he had conducted his own investigation and prepared a report which he furnished to the Grayson Police Department, though he was never called upon to identify this particular report. The report consisted almost exclusively of the kind of "investigative hearsay" which we have consistently condemned. Slaven v. Commonwealth, supra, at 859; Bussey v. Commonwealth, Ky., 797 S.W.2d 483, 486 (1990); Sanborn v. Commonwealth, Ky., 754 S.W.2d 534, 541 (1988), cert. denied, 516 U.S. 854 (1995). This kind of evidence is no more admissible when offered by the defendant than when offered by the Commonwealth. Nor does the report fall within the business records exception to the hearsay rule, since there was no proof that the

person who prepared the report was under a business duty to do so. KRE 803(6); Rabovskv v. Commonwealth, supra, at IO; Prater v. Cabinet for Human Resources, supra, at 959; Lawson, supra, § 8.65 V, at 465-66. If it was, indeed, prepared by Ronald Fields, he did so at a time when he was not an employee of the Grayson Police Department. Finally, the author's opinion would not have been admissible under this exception. KRE 803(6)(B).

VII. MISCELLANEOUS ISSUES.

Appellant cites several instances in which he believes the Commonwealth introduced evidence of "other bad acts" in violation of KRE 404(b). We have examined each of these claims and disagree with Appellants characterization of this evidence. Specifically, the fact that Officer Lindeman knew Appellant did not imply prior bad conduct, since Appellant's father was a police officer and had formerly worked for the Grayson Police Department. The fact that Minnie Burton was afraid of Appellant logically followed the facts that Appellant had thrown knives at her while at his mother's residence and had told her that he had just killed his brother. The fact that Phyllis Berry testified that her brother was now in prison cast no reflection on Appellant's character just because Berry's brother was an acquaintance of Appellant.

The crime scene photographs were admissible for the same reasons as the video portion of the crime scene videotape. The prosecutor's inquiry of Officer Lindeman as to whether Appellant denied killing Mrs. Horton was not a comment on Appellant's silence. According to Lindeman, Appellant did not exercise his right to remain silent, but admitted killing Mrs. Horton. The trial judge did not abuse his discretion or deny Appellant a public trial by removing spectators from the courtroom

prior to hearing legal arguments concerning jury instructions, particularly in the absence of any objection. See generally Lexington Herald-Leader Co., Inc. v. Meias, Ky., 660 S.W.2d 658 (1983). Except for the failure to include an instruction on second-degree manslaughter, the trial judge's instructions accurately framed the law of the case. It was not error to admit evidence of Appellant's five prior convictions during the penalty phase of the trial. KRS 532.025(1)(b). Use of the burglary as an aggravating factor authorizing imposition of the death penalty did not constitute double jeopardy. Bowling v. Commonwealth, Ky., 942 S.W.2d 293, 308 (1997), cert. denied, ___ U.S. ___, 118 S.Ct. 451, 139 L.Ed.2d 387 (1997).

Since this case is being remanded for a new trial, there is no need to discuss the claimed errors relating to jury selection, Appellant's temporary absence from the courtroom during voir dire, or other matters which are unlikely to recur upon retrial.

Accordingly, the judgment of conviction and sentence imposed in this case are reversed and this case is remanded to the Rowan Circuit Court for a new trial in accordance with the contents of this opinion.

Lambert, C.J.; Johnstone, and Stumbo, JJ., concur.

Keller, J., dissents by separate opinion, with Graves and Wintersheimer, JJ., joining that dissent.

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Supreme Court of Kentucky

1997-SC-0424-MR

SAMUEL STEVEN FIELDS

APPELLANT

V. APPEAL FROM ROWAN CIRCUIT COURT
HONORABLE SAMUEL C. LONG, JUDGE
97-C R-6

COMMONWEALTH OF KENTUCKY

APPELLEE

DISSENTING OPINION BY JUSTICE KELLER

I dissent from the majority opinion because I disagree with the conclusions it reaches regarding both the videotaped evidence, Part II, and the intoxication defense, Part III. In my opinion, neither assignment of error justifies our reversal of Fields' conviction.

NARRATED VIDEOTAPE EVIDENCE

While I agree with the majority's conclusion that the narrated portion of the videotape was inadmissible hearsay, I cannot agree that the improper admission of this evidence was sufficiently prejudicial under RCr 9.24 to warrant reversal of the conviction. Much of the material contained in the video demonstration concerns the locations and movements of the investigating officers while on the scene, and these were not only uncontested issues, but also minor matters of the type found harmless in State v. Van Tran, 864 S.W.2d 465 (Tenn. 1993). Fields contests factually only the segment of the video demonstration where Officer Lindeman describes the encounter

between himself and Fields and where he recites Fields' alleged confession. Fields testified that Officer Lindeman jumped on him, knocked him on the floor, put a gun to his head, threatened to shoot him, and accused him of killing Bess Horton. This was contradicted by Officer Lindeman's testimony at trial. The majority opinion indicates that Fields denied telling Officer Lindeman that he had stabbed Bess Horton, but Fields admitted during his testimony that he may have made the statements in an effort to appease Officer Lindeman.

While I believe the majority is correct to describe the audio narration on the videotape as an inadmissible prior consistent statement offered to bolster Lindeman's in-court testimony, I do not feel that its introduction into evidence and the Commonwealth's presentations of the video to the jury "affected the substantial rights" of Fields. RCr 9.24.

Fields testified during the guilt/innocence phase of his trial, and, in addition to exposing himself to impeachment on the basis of his prior felony record, gave the jury an opportunity to hear his theory that his girlfriend had killed Bess Horton. Officer Lindeman testified at trial consistently with his narration on the videotape and Fields had an opportunity to cross-examine him on all of that testimony. The jury heard from an emergency room EMT, Jason Dobson, that Fields incriminated himself by explaining the large amount of blood on his arms and clothing with the statement, "You stupid s.o.b., if you had just killed some lady, you would be covered with blood, too." After deliberating on all of the evidence presented, the jury believed beyond a reasonable doubt that Fields murdered Bess Horton.

RCr 9.24 directs this Court to reverse a criminal conviction on the basis of evidentiary matters only when it appears to us that "the denial of such relief would be

inconsistent with substantial justice.” I cannot conclude that the jury was so divided over the issue of the relative credibility of Fields and Officer Lindeman that they were swayed by the number of times Officer Lindeman’s version was presented to them. Both Fields and Officer Lindeman testified in court during the trial. This afforded the jury the opportunity to assess and weigh their relative credibility. I believe the trial court’s admission of the narrated videotape was erroneous, but insufficiently prejudicial to justify reversal because I do not believe that if the audio portion of the videotape had been played fewer times, or not at all, that the jury would have reached any other conclusion.

INTOXICATION DEFENSE & SECOND-DEGREE MANSLAUGHTER

In Part III of the majority opinion, the Court holds that the trial court committed reversible error by failing to instruct the jury on the lesser included offense of second-degree manslaughter. I disagree with this conclusion because the majority’s holding represents a radical departure from precedent which holds that the trial court may only instruct on lesser included offenses when the evidence presented “[justif[ies] a doubt based on the theory that the crime committed was of a lower degree or lesser culpability.” Brown v. Commonwealth, Ky., 555 S.W.2d 252, 257 (1977). As all of the evidence concerning Bess Horton’s murder demonstrates an intentional murder devoid of any wanton component whatsoever, the majority holding creates a special rule that trial judges who instruct juries on the defense of voluntary intoxication must always also instruct on second-degree manslaughter as a “package deal.” Because I can see no principled basis or statutory support for such a rule, I must dissent.

Lesser included offenses are not an entitlement, and this Court has consistently held that trial courts should instruct on lesser included offenses “only if, considering the

totality of the evidence, the jury might have a reasonable doubt as to the defendant's guilt of the greater offense, and yet believe beyond a reasonable doubt that he is guilty of the lesser offense." Tamme v. Commonwealth, Ky., 973 S.W.2d 13, 36-7 (1998) (citing Webb v. Commonwealth, Ky., 904 S.W.2d 226 (1995)); See also, Brown v. Commonwealth, *supra*; Tipton v. Commonwealth, Ky., 640 S.W.2d 818, 820 (1982) ("[T]o support a lesser included instruction the posture of the evidence must be such as to create a reasonable doubt as to whether the defendant is guilty of the higher or lower degree." *Id.*); Moore v. Commonwealth, Ky., 771 S.W.2d 34, 37 (1989) (citing Hayes v. Commonwealth, Ky., 625 S.W.2d 583 (1982)) ("It is not proper to instruct the jury on a wanton offense when all the evidence indicates that it would be unreasonable for the jury to believe that the defendant's conduct was anything other than intentional." *Id.*); Gall v. Commonwealth, Ky., 607 S.W.2d 97, 108-109 (1980).

The United States Supreme Court, in Hopper v. Evans, 456 U.S. 605, 72 L.Ed.2d 367, 102 S.Ct. 2049 (1982) clarified that the decision as to whether to instruct a jury on lesser included offenses has a constitutional dimension: "due process requires that a lesser included offense instruction be given when the evidence warrants such an instruction. But due process requires that a lesser included offense instruction be given *only* when the evidence warrants such an instruction." *Id.* at 611; See Cox v. Commonwealth, Ky., 491 S.W.2d 834 (1973).

KRS 501.020 defines the mental states applicable in the Kentucky Penal Code:

(1) "Intentionally"---A person acts intentionally with respect to a result or to conduct described by a statute defining an offense when his conscious objective is to cause that result or to engage in that conduct.

(3) "Wantonly"---A person acts wantonly with respect to a result or to a circumstance described by a statute defining

an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. A person who creates such a risk but is unaware thereof solely by reason of involuntary intoxication also acts wantonly with respect thereto.

(4) "Recklessly"---A person acts recklessly with respect to a result or to a circumstance described by a statute defining an offense when he fails to perceive a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.

KRS 501.020.

It is important to realize that, unlike at common law', the culpable mental states defined at KRS 501.020 are fully and clearly defined so as to be mutually exclusive. In Wells v. Commonwealth, Ky., 561 S.W.2d 85, 88 (1978), we described intent and wantonness manifesting extreme indifference to the value of human life as "two distinct culpable mental states." Id. "'Culpable mental state' means 'intentionally' or 'knowingly' or 'wantonly' or 'recklessly,' as those terms are defined in KRS 501.020." KRS 501.010(1) (emphasis added). Although the draft Model Penal Code included a provision which defined less culpable mental states as fully encompassed within its' definition of "purposely" (what the Kentucky Penal Code refers to as intentional conduct in an identical definition)², the General Assembly did not adopt this subsection, and

"At common law a charge of murder embraced all the lower degrees of culpable homicide" and "the jury may find a defendant guilty of a lesser-included offense, even though there is no evidence to support the lesser than the greater crime" Smith v. Commonwealth, Ky., 737 S.W.2d 683, 688-89 (1987).

'Model Penal Code Section 2.02(5):

(continued...)

defined the culpable mental states so that a given act is undertaken either intentionally or knowingly or wantonly or recklessly.³ The trial court should only instruct the jury on both intentional murder and second-degree manslaughter, offenses with conflicting mental states, when the evidence presents a question as to whether a given act was accomplished intentionally or wantonly. However, when all of the evidence proves beyond a reasonable doubt that someone acted intentionally, as is the case here, the requirements of another competing mental state, as a matter of law, cannot be established.

In Hudson v. Commonwealth, Ky., 979 S.W.2d 106, 110 (1998), we stated that evidence of the mental state connected with a criminal act may be inferred from examining the results of that act:

Intent to kill can be inferred from the extent and character of a victim's injuries. Further, because a person is presumed to intend the logical and probable consequences of his conduct, "a person's state of mind may be inferred from actions preceding and following the charged offense.

Id. (citations deleted); See also McGinnis v. Commonwealth, Ky., 875 S.W.2d 518, 524 (1994). Some crimes cannot rationally be viewed as the product of wanton acts

²(...continued)

Substitutes for Negligence, Recklessness and Knowledge. When the law provides that negligence suffices to establish an element of an offense, such element also is established if a person acts purposely, knowingly or recklessly. When recklessness suffices to establish an element, such element also is established if a person acts purposely or knowingly. When acting knowingly suffices to establish an element, such element also is established if a person acts purposely.

³See Robert G. Lawson and William H. Fortune, Kentucky Criminal Law, Section 2-2(c)(2) (LEXIS 1998) for a discussion of inferences which can be drawn from the General Assembly's failure to include Model Penal Code Section 2.02(7) in the final legislation.

because the tangible results of those crimes demonstrate the absurdity of defining certain actions within the scope of risky behavior contemplated by the Kentucky Penal Code's definition of wantonly. See, Moore v. Commonwealth, Ky., 771 S.W.2d 34, 37 (1989) (victim was pushed down an embankment, shot at and missed, and then shot in the head four times including a contact wound to the top of the head); Foster v. Commonwealth, Ky., 827 S.W.2d 670, 677 (1991) (five victims were brutally killed over a period of four hours, each shot at close range, stabbed repeatedly, crushed by a car, and in some instances burned, then left for dead at three separate locations throughout the city); Halvorsen v. Commonwealth, Ky., 730 S.W.2d 921 (1987) ('In view of the number, location, and lethal magnitude of the gunshots, it would have been unreasonable to give a wanton murder instruction." Id. at 925);

Bess Horton's murder was the product of a criminal act which cannot rationally be described as the product of a wanton or reckless mental state. Bess Horton's murderer began by sawing open his victim's throat with multiple passes of a knife, and finished, in the words of the majority opinion, by stabbing her "in the head with such force that the knife buried to the hilt in her right temple and the point of the blade protruded from her left temple." A jury could not reasonably conclude that Bess Horton's murderer's decision to hack the victim's throat apart and plunge his blade through her skull "created a risk" that Bess Horton would die and that the murderer either ignored the risk or was too drunk to appreciate the possibility that stabbing someone through the head can kill them. The murderer could only have sawed the victim's throat open and buried his knife between her temples if "his conscious objective [was] to cause [her death]." KRS 501.020(1). The evidence in this case did not justify

a second-degree manslaughter instruction because there is no evidence from which a reasonable juror could believe that Fields unintentionally killed Bess Horton.

The majority holds, however, that the evidence of voluntary intoxication presented by Fields entitles him to a second-degree manslaughter instruction as a matter of law. While incorrect, the majority's conclusion is understandable given the haphazard and inconsistent voluntary intoxication jurisprudence in this state,⁴ particularly before the adoption of the Kentucky Penal Code⁵. Prior to today's majority

"Since the time of the American Civil War, Kentucky courts have recognized that evidence of voluntary intoxication was somehow significant to homicide prosecutions. The exact role of evidence of voluntary intoxication, however, has been far from consistent. At times courts have held that evidence of voluntary intoxication requires the trial court to instruct the jury as to the lesser included offense of voluntary manslaughter because evidence of voluntary intoxication may influence a jury's determination of the presence of malice aforethought. See, e.g., Smith v. Commonwealth, 1 Duvall 224, 227 (1864); Golliher v. Commonwealth, Ky., 2 Duvall 163, 165 (1865); Blimm v. Commonwealth, 7 Bush 320, 325 (1870); Shannahan v. Commonwealth, 8 Bush 463, 470-71 (1871); Roaers v. Commonwealth, Ky., 27 S.W. 813, 814 (1894); Bishoo v. Commonwealth, 109 Ky. 558, 60 S.W. 190 (1901); Pash v. Commonwealth, 146 Ky. 390, 142 S.W. 700 (1912); Graham v. Commonwealth, 200 Ky. 161, 252 S.W. 1012 (1923); Shorter v. Commonwealth, 252 Ky. 472, 67 S.W.2d 695 (1934); Horn v. Commonwealth, 292 Ky. 587, 167 S.W.2d 58 (1943) Other times, the courts have held that evidence of voluntary intoxication cannot reduce a crime from murder to manslaughter, but should be considered by the jury in determining whether to sentence the defendant to death or life imprisonment. Harris v. Commonwealth, 183 Ky. 542, 209 S.W. 509 (1919); Thomas v. Commonwealth, 196 Ky. 539, 245 S.W. 164 (1922); Perciful v. Commonwealth, 212 Ky. 673, 279 S.W. 1062 (1926); Lawson v. Commonwealth, 222 Ky. 614, 1 S.W.2d 1060 (1928).

⁵It is possible that some of the lingering confusion concerning the state of the law of voluntary intoxication in the Commonwealth stems from the hybrid of ill-defined statutory and common law of homicide within which the "defense" developed:

In 1974, before adoption of the Penal Code, Kentucky had nearly a dozen homicide crimes. Most were narrow in scope (e.g. lynching and mob violence, killing through the negligent operation of a motor vehicle, homicide through an act of abortion, etc.) and duplicative of the coverage provided by the more broadly defined homicides of murder, voluntary manslaughter, and involuntary manslaughter. Involuntary

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opinion, however, the law in this state has always been that, even in intentional homicide cases presenting questions of voluntary intoxication, lesser included offenses requiring unintentional mental states should be given only where justified by the evidence. This was the case both early in our Commonwealth's jurisprudence and just before the adoption of the Kentucky Penal Code. See, e.g. Marshall v. Commonwealth, 141 Ky. 222, 132 S.W. 139 (1910) (Defendant's murder conviction for decapitating his former girlfriend with a razor affirmed despite trial court's refusal to instruct on lesser included offenses); Harris v. Commonwealth, 183 Ky. 542, 209 S.W. 509, 511 (1919) (No reversible error where the trial court refused to instruct on manslaughter in light of

⁵(. ..continued)

manslaughter was defined by statute; statutes on murder and voluntary manslaughter prescribed penalties for conviction, but left definition of the offenses to common law sources and principles.

Murder was defined as a killing with malice aforethought. The words "malice" and "aforethought" were unhelpful if not confusing; the exact nature of the offense was unclear. The following homicides constituted murder before the adoption of the Code: intentional killings, "depraved heart" killings, and felony murder. Voluntary manslaughter was defined as a killing in sudden affray or sudden heat of passion upon provocation calculated to excite passion beyond control. Limited to intentional killings, voluntary manslaughter operated essentially to mitigate penalties that would ordinarily have been imposed for conviction of intentional murder. The statute on involuntary manslaughter created two degrees of the offense, one with felony penalties (below those for voluntary manslaughter) and one with misdemeanor penalties. The felony was defined as a killing with "wanton indifference to life" while the misdemeanor was defined as a killing through "reckless conduct."

Robert G. Lawson and William H. Fortune, Kentucky Criminal Law, Section 8-I(a) (LEXIS 1999) (footnotes deleted).

evidence showing the defendant purchased bullets for his pistol one afternoon, shot his wife, then bought more bullets and “fired several more shots into her lifeless body.” *Id.*); Weick v. Commonwealth, 201 Ky. 632, 258 S.W. 90, 93 (1924) (No error in refusing to instruct on manslaughter where defendant laid in wait for his victim to ride by on the victim’s bicycle and shot him once with a rifle and twice with a pistol); Richards v. Commonwealth, Ky., 517 S.W.2d 237, 240 (1975) (Conviction affirmed despite failure to instruct on voluntary manslaughter because “[i]n the case now before us there was no evidence of sudden heat of passion, sudden affray, or provocation. Therefore, Richards was not entitled to an instruction on voluntary manslaughter regardless of his drunkenness at the time he shot Carter.” *Id.*); Elmore v. Commonwealth, Ky., 520 S.W.2d 328, 331 (1975) (Conviction under voluntary manslaughter instruction given as lesser included offense in murder indictment reversed because “the giving of a voluntary manslaughter instruction is proper only in those instances where there is evidence that will support the giving of the instruction.” *Id.*). After the adoption of the Kentucky Penal Code, the law regarding when to instruct on lesser included offenses remained the same. See Jewell v. Commonwealth, Ky., 549 S.W.2d 807, 814 (1977); Salisbury v. Commonwealth, Ky.App., 556 S.W.2d 922, 925 (1977) (Conviction under voluntary manslaughter instruction given as lesser included offense to murder affirmed because “in addition to the evidence of intoxication, there is evidence that the shooting occurred in sudden affray or sudden heat of passion.” *Id.*); Slauahter v. Commonwealth, Ky., 744 S.W.2d 407, 413 (1988) (Murder conviction affirmed despite trial court’s refusal to instruct upon wanton murder and second degree manslaughter because defendant’s defense that another person committed the murder presented no evidence justifying an instruction which required a wanton mental state); McGuire v.

Commonwealth, Ky., 885 S.W.2d 931, 935 (1994) (“[Prior dicta implying that lesser included offenses should never be given when the trial court instructed on voluntary intoxication as a defense to an intent crime] is not correct where the evidence presents lesser included or other offenses involving wantonness or recklessness as a culpable mental state, because voluntary intoxication is not then a defense.” Id at 935 (emphasis added)).

Today’s majority opinion gives birth to a new principle of law that every intentional homicide case in which sufficient evidence is presented to justify a voluntary intoxication instruction pursuant to KRS 501.080 also involves questions of wantonness, and the jury must be instructed on second-degree manslaughter. I simply do not agree with this conclusion for a number of reasons.

First, the majority’s holding relies on inadequate precedential support when it cites to this Court’s opinion in Slaven v. Commonwealth, Ky., 962 S.W.2d 845 (1997) to support its conclusion that a trial court commits reversible error by failing to instruct on second-degree manslaughter as a lesser included offense to an intentional homicide prosecution when the evidence supports a voluntary intoxication instruction. Notwithstanding the fact that the language of Slaven does not reach as far as today’s majority opinion⁶, Slaven’s precedential value is no greater than the authorities upon

⁶Today’s majority describes the interaction between the voluntary intoxication defense and lesser included offense instructions in stating:

... the defense of voluntary intoxication does not authorize an acquittal if the jury finds the defendant was so intoxicated that he could not form the requisite intent to commit murder. Rather, its effect is to reduce the offense from the intentional crime of murder (or first-degree manslaughter) to the wanton crime of second-degree manslaughter.

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which it relies. A close examination of those authorities reveals that Slaven either overlooked the precedent contrary to its holding or intended to change the law in this area by silently overruling precedent suggesting that the decision of whether to instruct on lesser included offenses in intoxication cases requires examination of the evidence presented. It appears to me that the first possibility is the more probable, and I view Slaven as an aberration rather than a watershed change.

The only case cited in Slaven is Meadows v. Commonwealth, Ky., 550 S.W.2d 511, 513 (1977), which was decided twenty years before. Three years before Slaven, this Court decided McGuire, *supra* and reaffirmed the principle that the trial court should give no instructions on lesser included offenses unless they are justified by the evidence. Despite the fact that the majority today cites Slaven for a conclusion squarely contradicted by our holding in McGuire, the Court has made no attempt to distinguish or address McGuire.

The authority Slaven did address, Meadows, *supra*, is not properly cited as authority for the proposition that lesser included offenses should be given in these cases even if not warranted by the evidence. In Meadows, the defendant claimed he accidentally discharged his shotgun and killed the victim, and also alleged that he had consumed alcohol and medicine prior to the shooting. The trial court instructed the jury on intentional homicide and, apparently, on the lesser degrees of wanton and reckless

⁶(...continued)

In Slaven v. Commonwealth, Ky., 962 S.W.2d 845 (1997), the Court's language was less rigid and the holding was that the jury's belief in the intoxication defense "could reduce the offense from intentional homicide to wanton homicide . . ." Id. at 857 (emphasis added). While the Slaven version can be interpreted consistently with McGuire v Commonwealth, Ky., 885 S.W.2d 931 (1994), today's majority opinion cannot.

homicide, but did not feel that the evidence warranted a voluntary intoxication instruction, and this Court agreed. However, because the evidence relating to accidental shooting justified instructions on wanton and reckless homicide, the majority remarked in dicta: “The only tangible effect the evidence of intoxication would have had was to reduce the offense from intentional homicide to wanton or reckless homicide.” Meadows, supra at 513. In other words, the trial court in Meadows felt that there was sufficient evidence of wanton or reckless conduct, absent any consideration of the defendant’s intoxication, to justify instructions on lesser offenses, and, in that context, a separate voluntary intoxication instruction as a defense to intentional homicide would have only directed the jury to consider the lesser offenses. In the process of laundering the holding in Meadows through Slaven, this rationale is discarded, and, for the first time in Kentucky jurisprudence, this Court tells the trial courts of this state to give instructions which are not warranted by the evidence

Second, the only other authority cited in Slaven, the 1974 Commentary to the voluntary intoxication statute, KRS 501.080, explicitly contradicts the conclusion reached by today’s court. The Commentary reads:

In its definition of “wantonness,” KRS 501.020 requires as an element of this culpable mental state an awareness by the actor of a substantial and unjustifiable risk that a result will occur or that a circumstance exists. This element of “awareness” is used to distinguish “wantonness” from “recklessness.” In making this distinction KRS 501.020 expressly provides that “unawareness” of a risk, if caused solely by voluntary intoxication, does not Preclude a showing of “wantonness.” Id (emphasis added).

The Commentary indicates that while voluntary intoxication alone does not constitute wantonness, a defendant who has failed to recognize a risk by virtue of his intoxication cannot defend against a claim of wantonness on the basis of his intoxication and that

the evidence could still show he was acting wantonly as defined at KRS 501.020.

“Does not preclude” is not synonymous with “constitutes,” and the Commentary to KRS 501.080 is hardly support for the majority’s conclusion to the contrary.

Third, the majority mutates the definition of “wantonly” in KRS 501.020(3) and concludes, apparently as a matter of law, that a defendant who persuades a jury that he was sufficiently intoxicated to negate the intent element of intentional murder, has demonstrated “the element of wantonness necessary to convict of second-degree manslaughter.” In other words, the majority opinion misinterprets the parallel definition of “wantonly” in the third sentence of KRS 501.020(3) to require only voluntary intoxication. The majority discovers this incomplete definition by deleting the language “A person who creates such a risk but is unaware thereof” from the last sentence of KRS 501.020(3), quoting the remainder of that sentence out of context, and concluding that “[t]he definition of ‘wantonly’ provides that a person who acts wantonly ‘solely by reason of voluntary intoxication also acts wantonly with respect thereto.’”

This redefinition ignores KRS 501.030’s requirement that a voluntary act which creates certain risks accompany a culpable mental state. A correct reading of the third sentence of KRS 501.020(3) must recognize that it is only operative in situations where someone’s behaviors objectively and independently of intoxication would create the types of risks contemplated in the previous sentences. The language in KRS 501.020(3) concerning voluntary intoxication merely serves to “eliminate, in this one situation, the distinction between the mental states of ‘wantonly’ and ‘recklessly,’” by:

[B]ring[ing] into play a special definition of “wantonly,” one that eliminates the need for proof of awareness and conscious disregard of risk. The intoxicated actor who fails to perceive risk that would have been perceived by a sober

actor is treated as though he was aware of and consciously disregarded the unperceived risk.

Lawson and Fortune, Kentucky Criminal Law, Section 2-2(d)(3) (LEXIS 1998). See also Commentary to KRS 501.080 (quoted above). Today's majority also overlooks Todd v. Commonwealth, Ky., 716 S.W.2d 242 (1986), where this Court focused on the statutory language of KRS 501.030(3) and correctly explained the interaction of the sentences in that subsection: "A person who creates such a risk [a substantial and unjustifiable risk that a result will occur] but is unaware thereof solely by reason of voluntary intoxication also acts wantonly with respect thereto." Id. at 246 (brackets in original). We held in Todd that a proper reading of the last sentence of KRS 501.020(3) required two conditions precedent to a finding of wantonness: (1) Conduct creating the type of risk defined in this subsection, and (2) obliviousness of that risk by virtue of voluntary intoxication. Today's majority jettisons (1) and labels as wanton conduct any voluntary intoxication which is sufficient to excuse an intent crime.

Finally, I dispute the majority's conclusion: "[I]f a defendant was so voluntarily intoxicated that he killed another without the intent to do so, the fact of his voluntary intoxication, itself, constituted the element of wantonness necessary to convict of second-degree manslaughter." In other words, the majority holds that any defendant who kills another person after voluntarily ingesting quantities of alcohol or other controlled substances to the point where he is too intoxicated to form the intent necessary to commit intentional murder has, as a matter of law, committed second-degree manslaughter. KRS 507.040 defines second-degree manslaughter: "A person is guilty of manslaughter in the second degree when, including, but not limited to, the operation of a motor vehicle, he wantonly causes the death of another person."

The Court holds today that any person who drinks a large number of beers and takes some “horse tranquilizers” creates a “substantial and unjustifiable risk [that he will kill someone]. . . of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.” KRS 501.020(3). While I see no reason to applaud gross substance abuse, I cannot conclude, especially in the absence of any evidence submitted on this issue at trial, that voluntary intoxication, standing alone, creates a risk that the abuser will kill someone and that this risk is sufficient to justify a second-degree manslaughter instruction. KRS 501.060(3); See. e.g. Lofthouse v. Commonwealth, S.W.2d _____ (2000) . The jury did not find that Fields’ risky substance abusive behavior buried a knife between Bess Horton’s temples. They determined that Fields himself committed murder and they did so in the face of instructions which properly informed them they could acquit Fields if they felt he was too intoxicated to know what he was doing. There was nothing wanton about Fields’ crime and the trial court properly declined to give instructions not warranted by the evidence. I cannot agree with the majority opinion’s conclusion that an intentional crime (murder) somehow sublimates into an unintentional crime (second-degree manslaughter) when a defendant is too intoxicated to form the intent to commit the intentional crime. The trial court correctly decided it was unnecessary to instruct the jury on second-degree manslaughter.

I would affirm the conviction.

Graves, Wintersheimer, JJ., join this dissent.