No. 20-1298

IN THE
Supreme Court of the United States

DEMETREUS KEAHEY,

Petitioner,

v.

DAVE MARQUIS,

Respondent.

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

REPLY BRIEF IN SUPPORT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

INTRODUCTION

The issue in this case is whether this Court's precedents establish *any* constitutional limit on the ability of state courts to deny a self-defense jury instruction. The state and the Sixth Circuit say there is no such limit. Under this view, in cases decided under AEDPA, the Constitution *always* permits courts to deny a self-defense instruction—regardless of how overwhelming the evidence of self-defense is and how clearly the defendant is entitled to a self-defense instruction. This startling position misunderstands this Court's Sixth Amendment and due process precedents, and creates a split with the Second and Ninth Circuits.

This Court's precedents clearly establish that the Constitution guarantees a criminal defendant (1) the right to have a meaningful opportunity to present a complete defense, (2) the right to have factual issues regarding guilt decided by a jury, and (3) the right to a trial that is conducted in a fundamentally fair manner. All of these principles are at their apex in the self-defense context because the Founders recognized the right to self-defense as fundamental. Accordingly, denying a defendant the right to assert self-defense to a jury when the defendant has introduced evidence of self-defense is an egregious violation of these constitutional principles.

Furthermore, as the state all but admits, there is a clear circuit split on this issue. *See* Br. in Opp. 12–13 (acknowledging a "difference" in how the Second and Sixth Circuits apply AEDPA to "similar facts"). And this case is a perfect vehicle for addressing the split: indeed, the state does not even purport to

identify any vehicle problems. This Court should grant this petition to resolve the circuit split and safeguard a defendant's right to have a jury—not a judge—decide whether he acted in self-defense.

ARGUMENT

I. THE DECISION BELOW CREATES A CIRCUIT SPLIT ON AN IMPORTANT QUESTION.

As established in the petition, circuits disagree about the precise question at issue here: whether, on AEDPA review, there are any constitutional limits on a state court's ability to refuse a self-defense instruction.

The Second Circuit has held that, under AEDPA's standards, a petitioner had "a clear right" to a self-defense instruction and "the trial in which he was denied that right was egregiously at odds with the standards of due process propounded by the Supreme Court in *Cupp* [*v. Naughten*, 414 U.S. 141 (1973)]." *See Davis v. Strack*, 270 F.3d 111, 133 (2d Cir. 2001). Similarly, the Ninth Circuit has applied AEDPA and held that a failure to give a self-defense instruction denied a defendant "a meaningful opportunity to present a complete defense" and was "an unreasonable application of clearly-established Supreme Court precedent." *See Lockridge v. Scribner*, 190 F. App'x 550, 551 (9th Cir. 2006). In contrast, the Sixth Circuit panel in this case reasoned that a refusal to give a self-defense instruction was not—and could not be—an unreasonable application of this Court's precedents under AEDPA. *See Keahey v. Marquis*, 978 F.3d 474, 480 (6th Cir. 2020) ("No clearly established Supreme Court precedent gives an

answer [regarding what evidence is necessary to entitle a defendant to a self-defense instruction], confirming that the state courts did not unreasonably apply the relevant precedent.").

The conflict between these opinions is clear. In the Second and Ninth Circuits, a defendant like Keahey may obtain habeas relief based on the denial of a self-defense instruction when that denial precludes him from presenting a complete defense and ensures his conviction. But under the Sixth Circuit's approach, a defendant can *never* obtain habeas relief based on a denial of a self-defense instruction, regardless of the evidence. That means that, even if a trial court denied a self-defense instruction to a defendant who had introduced a video recording unmistakably showing that he acted in self-defense, that defendant still would not be entitled to habeas relief.

The state's efforts to deny or downplay the split are unavailing. The state's discussion of the Second Circuit's decision, in particular, has a markedly self-defeating quality. After a lengthy analysis of that decision, the state ultimately *admits* that the Second and Sixth Circuits would reach opposite conclusions on similar facts. *See* Br. in Opp. 12 (conceding there "is a difference [among the circuits] in applying [AEDPA] . . . to state court decisions involving . . . similar facts"); *id.* at 12–13 (noting that "the Second and Sixth Circuits *might* reach different outcomes when presented with the same constellation of state law and facts").

In other words, the Sixth Circuit denied relief, but the Second Circuit would have granted it (as it did on strikingly similar facts in *Davis*). That, of course, is

what a split *is*. For the same reason, this case is an ideal vehicle for resolving the split. Indeed, the government does not even attempt to identify any vehicle problems.

The state is thus left to argue that this split—which concerns the vital question of when, if ever, defendants are constitutionally entitled to have a jury consider a self-defense claim—is somehow unworthy of this Court's review. These arguments miss the mark.

First, the state suggests the Second Circuit decision should be disregarded because it purportedly "disposed of the issue in just one sentence." *See id.* at 13. That is simply wrong. After acknowledging that the state court identified the relevant legal standards, the Second Circuit spent several pages explaining how the court wrongly applied those standards by construing the evidence against the defendant when deciding whether to give a self-defense instruction. *Davis*, 270 F.3d at 128–31; *see id.* at 131 n.7 (noting that "Judge Sotomayor would add" that, even under a different interpretation of the state court's decision, the state court unreasonably applied state law). It then explained that the defendant "had confessed to intentionally shooting" the victim, which meant the question of whether he was guilty was "open and shut" without a self-defense instruction. *Id.* at 131. Accordingly, by refusing that instruction, the state court "deprive[d] [the defendant] entirely of his defense" and "insur[ed] his conviction," which was an error that "seriously infected 'the entire trial,' so that its result cannot be considered fair" under *Cupp*. *Id.* at 132. The Second Circuit thus concluded the trial was "egregiously at

odds" with this Court's due process precedent and the state court's contrary conclusion was unreasonable. *Id.* at 133. The state may disagree with the Second Circuit's decision, but it cannot dismiss it as unreasoned.

Second, the state portrays the Second Circuit's position as an improbable outlier that other courts are not likely to adopt. *See* Br. in Opp. 13. This, too, is wrong. After all, as the petition also explained, the Ninth Circuit has taken the same position in *Lockridge*, which similarly granted habeas relief based on the denial of a self-defense jury instruction. 190 F. App'x at 551. The state dismisses *Lockridge* because it is unpublished. But this Court does not (and should not) ignore unpublished decisions in considering the scope of disagreement among the circuits. *See, e.g.*, *Holguin-Hernandez v. United States*, 140 S. Ct. 762, 765 (2020) (granting review "in light of differences among the Courts of Appeals" and citing both published and unpublished opinions); *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 583 n.5 (2008) (noting a circuit split and citing an unpublished opinion).

In any event, as the petition noted (at 16), the decision below also conflicts with a *published* Ninth Circuit decision, *Bradley v. Duncan*, 315 F.3d 1091 (9th Cir. 2002), to which the state offers no substantive response. *Bradley* involved a similar issue: a failure to give a jury instruction on entrapment. The Ninth Circuit held that this failure violated the defendant's "due process right to present a full defense." *Id.* at 1098. It further held that the state court's failure to recognize the defendant's "right to present a complete and meaningful defense

to the jury" was "an 'objectively unreasonable' application of federal law." *Id.* at 1100. Notably, the Ninth Circuit firmly rejected the view that relief was unavailable simply because this Court has not issued a decision specifically requiring an entrapment instruction to be given in state court. It concluded that a petitioner "need not produce a 'spotted calf' on the precise issue at hand to warrant habeas relief." *Id.* at 1101.

That sort of "spotted calf" requirement, of course, is precisely what the Sixth Circuit imposed in this case—which is why it denied relief. *See Keahey*, 978 F.3d at 478 ("[T]he Supreme Court, regrettably for Keahey, has never invoked this principle in granting relief for the failure to give a self-defense instruction."); *id.* at 479 (noting "the Supreme Court has never clearly established Keahey's alleged constitutional right to a self-defense instruction"). Moreover, the right to assert self-defense is, if anything, more clearly established and fundamental than the right to argue entrapment. As such, it cannot be seriously disputed that the Sixth and Ninth Circuits are in conflict.

In short, a defendant's constitutional right to a self-defense instruction currently depends on the happenstance of which circuit the claim arises in. This Court should restore uniformity on this crucial question.

II. THE DECISION BELOW IS MISTAKEN.

The Sixth Circuit's position is that, at least on AEDPA review, this Court's due process and Sixth Amendment cases have nothing at all to say about a defendant's right to argue self-defense to a jury. The

consequences of this extreme position would be intolerable and unjust; state courts would be free to deny defendants a self-defense instruction regardless of how overwhelming the evidence of self-defense is. It was precisely to avoid those sorts of abuses that the Founders enshrined in the Constitution both the right to self-defense and the right to have a jury decide issues related to one's guilt.

The state attempts to rehabilitate the Sixth Circuit decision in three ways: it downplays this Court's precedents, it glosses over the state court's analysis, and it mischaracterizes petitioner's position. Each tactic fails.

1. Like the Sixth Circuit, the state dwells on the fact that this Court has not expressly established a federal right to a self-defense instruction. *See* Br. in Opp. 16 (arguing "the state court could not have unreasonably applied such nonexistent precedent"). This is unresponsive to petitioner's argument, which proceeds in two basic steps. First, this Court's due process and Sixth Amendment cases set forth broad principles that are implicated in this case; second, those principles are at their apex in the self-defense context.

This Court's decisions have clearly established that defendants have the constitutional right to have:

- "a meaningful opportunity to present a complete defense," *California v. Trombetta*, 467 U.S. 479, 485 (1984); *Crane v. Kentucky*, 476 U.S. 683, 690 (1986);
- a jury—not a judge—make factual findings regarding guilt, *Sullivan v. Louisiana*, 508 U.S. 275, 277 (1993), with jurors being the "the

judges of the credibility of testimony offered by witnesses," *United States v. Bailey*, 444 U.S. 394, 414–15 (1980); and

- "a constitutionally fair trial," including a jury instruction that does not "so infect[] the entire trial that the resulting conviction violates due process." *Cupp*, 414 U.S. at 144, 147.

These broad principles constitute "clearly established federal law," even if there is a "lack of a Supreme Court decision on nearly identical facts." *Marshall v. Rodgers*, 569 U.S. 58, 62 (2013). And although courts have leeway in applying general standards, they cannot simply ignore them. *See* Pet. 17–18. After all, these "general standard[s] may be applied in an unreasonable manner," including in a case that involves different facts than the case announcing the principles. *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007). A proper AEDPA analysis thus does not end, as the Sixth Circuit's analysis did, upon concluding that this Court has not applied these principles in this precise factual context.

Moreover, these principles are at their apogee as they relate to self-defense. That is because the Second Amendment, history, tradition, and early case law all demonstrate that the right to use self-defense, to assert it as a defense to a prosecution, and to have a jury decide the issue is fundamental. *See* Pet. 22–31. The state notably does not contend otherwise, or indeed offer any direct response to these arguments. Accordingly, if there is any context in which denying a jury instruction violates the principles noted above, this is it. In denying a warranted self-defense instruction, a court deprives the defendant of an

opportunity to present a complete defense, usurps the jury's fact-finding function, and undermines the fundamental fairness of the trial.

2. This case is a prime example of such a constitutional violation (which is presumably why the state glosses over the particulars in its brief). As the state does not (and could not) dispute, Keahey presented evidence to support every element of self-defense. *See* Pet. 5–8. Even the state appellate court detailed evidence that supported every element before deciding the trial court could nevertheless deny a self-defense instruction based on its consideration of other potential "motives" for Keahey's actions and its own "preliminary determinations." Pet.App. 114a–15a, 117a–18a; *see* Pet. 11–12.

In other words, the "particular reasons" the court gave for rejecting Keahey's constitutional claims, *Wilson v. Sellers*, 138 S. Ct. 1188, 1191–92 (2018), are a blatant example of a court weighing the evidence and making its own credibility determinations. This approach cannot be squared with this Court's precedents that reserve such fact-finding for the jury. *See, e.g.*, *Bailey*, 444 U.S. at 414–15 (concluding that, according to "[t]he Anglo-Saxon tradition of criminal justice, embodied in the United States Constitution," jurors—not courts—are "the judges of the credibility of testimony" and get "to say that a particular witness spoke the truth or fabricated a cock-and-bull story"); *Holmes v. South Carolina*, 547 U.S. 319, 330 (2006) (determinations about the "strength of the prosecution's case" involve "the sort of factual findings that have traditionally been reserved for the trier of fact"); *Crane*, 476 U.S. at 688 (a confession's

probative weight is "a matter that is exclusively for the jury to assess"); *Sullivan*, 508 U.S. at 277 (a judge "may not direct a verdict for the State, no matter how overwhelming the evidence"). Tellingly, the state makes no attempt to explain how the state court's analysis can be reconciled with these cases.

Even ignoring the state court's actual analysis, this is the paradigmatic case where the record "cannot, under any reasonable interpretation of the controlling legal standard" support the state court's ruling. *Panetti*, 551 U.S. at 953. By denying a self-defense instruction, the trial court all but precluded the jury from rendering a not-guilty verdict. After all, Keahey had testified that he intentionally shot the alleged victim in self-defense. The trial court thus effectively directed a verdict in the state's favor and deprived Keahey of a fair trial and a meaningful opportunity to present a complete defense. *See, e.g.*, *Sullivan*, 508 U.S. at 277; *Trombetta*, 467 U.S. at 485; *Crane*, 476 U.S. at 690; *Cupp*, 414 U.S. at 147. The state court's conclusion that there was no constitutional deprivation is therefore contrary to, or an unreasonable application, of this Court's rulings clearly establishing these rights. *See* Pet. 31–34.

3. Finally, the state attempts to portray Keahey's position as extreme. It asserts that, under Keahey's approach, a self-defense instruction would have to be given any time it is requested. *See* Br. in Opp. 17 (suggesting the petition seeks "to mandate an absolute right to a self-defense instruction"); *id.* at 11 (denying that this Court had established "a federal right to a self-defense instruction whenever a defendant invokes that defense"). This is not Keahey's position.

To trigger the constitutional requirement, a defendant must present some evidence as to each element of self-defense which would allow the jury to find the defendant not guilty on the basis of self-defense. *See Stevenson v. United States*, 162 U.S. 313, 315 (1896) (noting that, even if the evidence is "simply overwhelming to show that the killing was in fact murder, and not manslaughter, or an act performed in self-defense," as "long as there was some evidence," then "the credibility and force of such evidence must be for the jury"). As this Court explained when deciding whether a defendant was entitled to a duress or necessity instruction, a defendant must offer testimony "as to each element of the defense so that, if a jury finds it to be true, it would support an affirmative defense." *Bailey*, 444 U.S. at 415.

Accordingly, if a defendant's testimony could not establish all of the elements of self-defense even if it is believed, then the defendant is not entitled to a self-defense instruction. *See, e.g.*, *id.* (concluding defendants were not entitled to jury instructions when, "even under [defendants'] versions of the facts," "an indispensable element of the defense" could not be met). Keahey's position is thus a modest one, and one that is compelled by this Court's cases: where a defendant introduces evidence that, if believed, would support a self-defense claim, a court may not reject that theory based on its own credibility determinations and weighing of the evidence.

* * *

In sum, there is a clean circuit split over a fundamental issue of justice: whether there is *any* constitutional limit, under this Court's precedents, on courts' ability to deny self-defense instructions to defendants who have proffered evidence supporting such instructions. At stake are the rights to self-defense and a jury trial, which the Founders enshrined in the Constitution as indispensable guarantees of liberty.

And this case presents the issue in an especially stark way. Relying on their own weighing of the evidence, the state courts denied Keahey a self-defense instruction—even though he presented ample evidence of self-defense and even though self-defense was the essence of his defense at trial. Thus, the state courts essentially directed a verdict against Keahey based on their own fact-finding. This should not be allowed—in this case or in future cases. The Court's intervention is urgently needed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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