No. 20-1298

In the Supreme Court of the United States

DEMETREUS A. KEAHEY,

Petitioner,

v.

DAVE MARQUIS, Warden

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

DAVE YOST
Attorney General of Ohio

MICHAEL J. HENDERSHOT*
Chief Deputy Solicitor General
**Counsel of Record*
KYSER BLAKELY
Deputy Solicitor General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
michael.hendershot@
OhioAGO.gov

Counsel for Respondent
Dave Marquis, Warden

QUESTION PRESENTED

Ohio prosecuted Demetreus Keahey for shooting a man. Keahey asked the state trial court to instruct the jury on self-defense. Under then-existing Ohio law, a trial court could not give such an instruction unless the defendant established three elements with sufficient evidence. The trial court found, viewing the evidence in the light most favorable to Keahey, that Keahey failed to carry his burden. Therefore, the court did not give the self-defense instruction. The Ohio Court of Appeals agreed; under Ohio law, Keahey was not entitled to the instruction. Also, the appellate court held that the refusal to give the instruction did not violate the Sixth and Fourteenth Amendments of the United States Constitution.

Keahey sought federal habeas relief, which required him to prove that the decision of the Ohio Court of Appeals "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). Keahey relied on two lines of cases. Neither one clearly establishes a federal right to a self-defense instruction. Instead, the cases set forth general propositions of law: criminal defendants must be given a meaningful opportunity to present a complete defense, *see Crane v. Kentucky*, 476 U.S. 683 (1986), and every trial must comport with fundamental fairness, *see Cupp v. Naughten*, 414 U.S. 141 (1973). Did the Sixth Circuit correctly hold that, in light of these precedents, the Ohio Court of Appeals' decision was neither contrary to nor an unreasonable application of "clearly established Federal law, as determined by the Supreme Court of the United States"?

LIST OF PARTIES

The petitioner is Demetreus Keahey, an inmate at the Richland Correctional Institution.

The respondent is Dave Marquis, the Warden of the Richland Correctional Institution.

LIST OF DIRECTLY RELATED PROCEEDINGS

The Petition's list of directly related proceedings should include the following:

1. *Keahey v. Marquis*, No. 18-4106 (6th Cir.) (certificate of appealability granted October 11, 2019).

2. *Keahey v. Bradshaw*, No. 3:16CV1131 (N.D. Ohio) (report and recommendation entered April 17, 2018).

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARTIES ii

LIST OF DIRECTLY RELATED PROCEEDINGS iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES v

INTRODUCTION 1

STATEMENT 1

REASONS FOR DENYING THE WRIT 6

A. The asserted split does not exist 7

B. To the extent any split exists, it is not worthy of this Court's review 12

C. The Sixth Circuit did not err. 13

CONCLUSION 19

TABLE OF AUTHORITIES

Cases **Page(s)**

Crane v. Kentucky,
476 U.S. 683 (1986) .... *passim*

Cupp v. Naughten,
414 U.S. 141 (1973) .... *passim*

Davis v. Strack,
270 F.3d 111 (2d Cir. 2001) .... *passim*

Early v. Packer,
537 U.S. 3 (2002) 15

Gilmore v. Taylor,
508 U.S. 333 (1993) 6

Harrington v. Richter,
562 U.S. 86 (2011) 14, 16

Lockridge v. Scribner,
190 F. App'x 550 (9th Cir. 2006) 8

Marshall v. Rodgers,
569 U.S. 58 (2013) 18

Nevada v. Jackson,
569 U.S. 505 (2013) 17

Parker v. Matthews,
567 U.S. 37 (2012) 4

Renico v. Lett,
559 U.S. 766 (2010) 14

Shinn v. Kayer,
141 S. Ct. 517 (2020) 13

Taylor v. Withrow,
288 F.3d 846 (6th Cir. 2002) 4

Torres v. Madrid,
141 S. Ct. 989 (2021) 8

White v. Woodall,
572 U.S. 415 (2014) 14, 17, 18

Williams v. Taylor,
529 U.S. 362 (2000) 14, 15

Yarborough v. Alvarado,
541 U.S. 652 (2004) 12, 14

Statutes and Rules

28 U.S.C. §2254 .... *passim*

9th Cir. R. 36-3 8

Ohio Rev. Code §2901.05 3

S. Ct. Rule 10 13

INTRODUCTION

Demetreus Keahey's federal habeas petition claims that an Ohio court reached "a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court." 28 U.S.C. §2254(d)(1). The Sixth Circuit held that the state court committed neither error, and it denied relief. Keahey thinks the Sixth Circuit erred. But Keahey knows that the Court typically does not intervene to correct case-specific errors. So, he claims circuit split. He says that the Sixth Circuit split from two Circuits on the following question: "whether clearly established federal law guarantees a defendant the right to a self-defense jury instruction when he presents evidence he acted in self-defense." Pet.14. Keahey's asserted circuit split does not exist. For starters, this Court has "never clearly established Keahey's alleged constitutional right to a self-defense instruction." Pet.App.9a (per Sutton, J.). Moreover, the two Circuits that the Sixth Circuit supposedly split from do not disagree.

At the end of the day, Keahey seeks pure error correction of a habeas decision in which the Sixth Circuit faithfully applied AEDPA and properly denied relief. The Court should deny his petition.

STATEMENT

1. Kindra McGill had three children with two men: Demetreus Keahey and Prince Hampton. One day, Hampton stabbed Keahey in the back with a knife. Pet.App.3a. Despite suffering a collapsed lung, Keahey chose not to report Hampton to the authorities. *Id.*; Pet.App.97a. Keahey desired to retaliate, instead. Pet.App.4a.

Keahey obtained a gun. Weeks later, Keahey made an unexpected visit to McGill's residence. As Keahey waited outside, Hampton pulled onto the driveway. *Id.* Hampton exited the vehicle and Keahey shot at him. Hampton ran away. Keahey kept shooting. Then Keahey left. The police found Hampton lain on the street with two bullet wounds: one in the arm and another in the leg. The police found more bullet holes elsewhere: one in the door of Hampton's car and another in the wall of a neighbor's house. Pet.App.97–98a. The police also found a "locked and closed" pocket knife on the driveway. Pet.App.4a.

2. The State charged Keahey with attempted murder, among other things. Pet.App.98a–99a. At trial, the prosecution presented evidence showing that Keahey initiated the conflict. For example, Keahey dropped by McGill's residence without prior notice, he brought a gun (which he was not allowed to have due to his criminal history), and he fired at an unarmed Hampton. The prosecution also showed that Keahey "gave up an opportunity" to retreat "when he decided to chase a fleeing Hampton." Pet.App.4a; *see also* Pet.App.99a–107a. On the other side, Keahey testified that he shot Hampton because Hampton rushed him with a knife. Keahey also said that he continued shooting because he heard a shot and saw Hampton with a gun. Keahey would have been murdered, so he claimed, had he not been so quick on the trigger. Pet.App.5a, 108a–10a.

Keahey asked for a jury instruction on self-defense. Under then-existing Ohio law, a jury, if so instructed, could have acquitted Keahey if he proved by a preponderance of the evidence that he (1) did not create the confrontation,

(2) believed he was in imminent danger and the use of deadly force was the only means of escape, and (3) did not violate his duty to retreat. Pet.App.113a–14a. (The Ohio legislature has since amended the law to place the burden of proof on the prosecution. *See* Ohio Rev. Code §2901.05 (effective Mar. 28, 2019).) But Keahey first needed to establish that he was entitled to that instruction. Self-defense is an affirmative defense in Ohio. And under then-existing law, a trial court could not instruct the jury on self-defense when the defendant failed to introduce "sufficient evidence which, if believed, would raise a question in the minds of reasonable people concerning the existence of that defense." Pet.App.113a. The trial court found, viewing the evidence in the light most favorable to Keahey, that Keahey failed to present sufficient evidence as to the first and third elements. The court thus declined to instruct the jury on self-defense. Pet.App.5a, 110a–11a.

On direct appeal, Keahey argued that the trial court's ruling violated Ohio law, and the Sixth and Fourteenth Amendments of the United States Constitution. Pet.App.5a, 43a. On the state-law claim, the Ohio Court of Appeals reviewed *de novo* whether Keahey established his entitlement to a self-defense instruction. The court affirmed, because Keahey failed to produce sufficient evidence showing that he was not at fault for creating the conflict, and that he could not have retreated. Pet.App.112a–15a. The court also held that, given the evidence, the trial court did not abuse its discretion by declining to give the instruction. *Id.* With respect to the constitutional claims, the court held that the jury-instruction ruling neither

usurped the role of the jury nor denied Keahey his right to a fair trial. Pet.App.117a–18a, 120a.

The Supreme Court of Ohio declined jurisdiction. Pet.App.94a. This Court denied *certiorari*. Pet.App.93a. Keahey sought collateral relief in state court, to no avail. Pet.App.5a, 15a.

3. Keahey filed a federal habeas petition, asserting the same constitutional claim that he raised on direct appeal in state court: the trial court, by refusing to instruct the jury on self-defense, violated the Sixth and Fourteenth Amendments. Pet.5a. The magistrate judge recommended denying the petition, primarily because there is no Supreme Court decision that clearly establishes a constitutional right to a self-defense instruction. Pet.App.62a–65a. The District Court denied the petition for the same reason, and it declined to issue a certificate of appealability. Pet.App.31a–32a, 35a.

At Keahey's request, the Sixth Circuit issued a certificate of appealability. Pet.App.28a. It did so by pointing *only* to non-binding dicta in one of its own cases, even though circuit precedent "cannot form the basis for habeas relief under AEDPA." *Parker v. Matthews*, 567 U.S. 37, 48–49 (2012) (*per curiam*); *see* Pet.App.16a–17a (citing *Taylor v. Withrow*, 288 F.3d 846 (6th Cir. 2002); *see also* Pet.App.10a–11a (explaining how the Sixth Circuit "has treated *Taylor*'s language as non-binding dicta over and over" (internal citations omitted)). But even if dicta in circuit precedent could be sufficient, "[w]hat *Taylor* said then could not satisfy AEDPA today," as it expressly "noted that there is no Supreme Court decision unmistakably setting

down the precise rule over what to do with a denied self-defense instruction under state law." Pet. App. at 11a (alteration adopted; internal quotation marks and citation omitted).

On the merits, the Sixth Circuit explained why Keahey's habeas petition had to be denied. Keahey needed to show that the state court decision was contrary to, or an unreasonable application of, clearly established Supreme Court precedent. *See* 28 U.S.C. §2254(d)(1). Keahey cited just two cases, along with their progeny. The panel unanimously held that neither precedent entitles him to relief under AEDPA. Pet.App.7a–9a.

The first case was *Crane v. Kentucky*, 476 U.S. 683 (1986). *Crane* held that "the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." *Id.* at 690. The Court has applied this general principle in a handful of specific contexts. But, as the Sixth Circuit noted, "the Court has never invoked this principle to 'squarely establish' a federal right to a self-defense instruction." Pet.App.7a (alteration adopted; quotation omitted).

The second case was *Cupp v. Naughten*, 414 U.S. 141 (1973). *Cupp* dealt with a jury instruction establishing a rebuttable presumption that all witnesses tell the truth. The Court held that the instruction, despite being "universally condemned," did not "so infect[] the entire trial that the resulting conviction violate[d] due process." *Id.* at 142, 146, 147. Once again, the Sixth Circuit pointed out that the Court has "never invoked" this "fundamental fairness" principle in the context of a "failure to give a self-defense instruction." Pet.App.7a–8a.

Crane and *Cupp*, the Sixth Circuit explained, do not clearly establish Keahey's alleged constitutional right to a self-defense instruction. *Crane* and *Cupp* also do not involve a set of facts that are materially indistinguishable from Keahey's case. Additionally, the Ohio Court of Appeals did not apply a rule that contradicts *Crane* and *Cupp*. The Sixth Circuit thus held that the state court's decision was not "contrary to" clearly established Supreme Court precedent. Pet.App.8a.

The Sixth Circuit also held that the state court did not "unreasonably apply" *Crane* and *Cupp*. The relevant standards from those cases lack specificity, which means the state appellate court had "considerable leeway" in making its decision. Pet.App.8a–9a (quotation omitted). For example, it is unclear by what measure courts should "gauge whether the state criminal defendant introduced enough evidence to have a federal right to a self-defense instruction." Pet.App.10a. "Would it be a 'mere scintilla' of evidence supporting the defendant's theory? Adequate evidence to raise a factual question for a reasonable jury? Would 'some evidence' do the trick?" *Id.* (citations omitted). There is also the rule "that instructional errors of state law generally may not form the basis for federal habeas relief." *Gilmore v. Taylor*, 508 U.S. 333, 344 (1993). For these reasons and more, the Sixth Circuit denied relief.

Keahey timely filed his petition for a writ of *certiorari*.

REASONS FOR DENYING THE WRIT

Keahey asks the Court to grant *certiorari* "to clarify that defendants have a clearly established federal constitutional right to assert self-defense to a jury." Pet.14–15. But as the unanimous Sixth Circuit panel held, there is no such right:

"the Supreme Court has never clearly established Keahey's alleged constitutional right to a self-defense instruction." Pet.App.9. As this case is governed by AEDPA, the absence of such a right makes a world of difference. According to Keahey, the Sixth Circuit's decision created a circuit split. That assertion is dubious. And even if a split does exist, it is shallow and undeveloped, meaning review by this Court at this time is unwarranted. Moreover, the Sixth Circuit did not err. The Court should deny Keahey's *certiorari* petition.

A. The asserted split does not exist.

Keahey says that the decision below opens up a new circuit split. The issue of supposed disagreement is "whether clearly established federal law guarantees a defendant the right to a self-defense jury instruction when he presents evidence he acted in self-defense." Pet.14. The problem for Keahey is that the Circuits are not split on that issue.

The Sixth Circuit denied habeas relief because the state court decision was neither contrary to, nor an unreasonable application of, clearly established Supreme Court precedent. *See* 28 U.S.C. §2254(d)(1). That holding puts two of this Court's precedents in the spotlight: *Crane v. Kentucky*, 476 U.S. 683 (1986), and *Cupp v. Naughten*, 414 U.S. 141 (1973). *Crane* says that criminal defendants must be given a meaningful opportunity to present a complete defense. *Cupp* stands for the proposition that the trial must comport with fundamental fairness. *See* Pet.App.8a. Those cases, the Sixth Circuit held, do not clearly establish a constitutional right to a self-defense instruction. And because *Crane* and *Cupp* establish only general rules that lack specificity, the Sixth Circuit explained, the state appellate court had

considerable leeway to render a decision that falls within the realm of fairminded disagreement. *See* Pet.App.8a–9a (citing *Harrington v. Richter*, 562 U.S. 86 (2011); *Yarborough v. Alvarado*, 541 U.S. 652 (2004)). The Sixth Circuit thus held that Keahey failed to show a right to habeas relief under AEDPA. Pet.App.9a–10a.

Keahey's first attempt to show a circuit split misses the mark. He points to an unpublished Ninth Circuit decision. Pet.15–16 (citing *Lockridge v. Scribner*, 190 F. App'x 550 (9th Cir. 2006)). That case is no foundation for a split because it is not binding precedent in the Ninth Circuit. "Unpublished dispositions and orders of [the Ninth Circuit] are not precedent." 9th Cir. R. 36-3(a). What is more, litigants in the Ninth Circuit are not even allowed to cite unpublished decisions issued before 2007, except in three circumstances not relevant here. 9th Cir. R. 36-3(c). So *Lockridge*, an unpublished memorandum disposition from 2006, is not the law in the Ninth Circuit. *Lockridge* is no more binding than dicta. A circuit split does not arise whenever one Circuit disagrees with dicta from another Circuit. That is because dicta, however helpful it might be in explaining a holding, has many shortcomings. For instance, dicta "may not be fully considered." *Torres v. Madrid*, 141 S. Ct. 989, 1005 (2021) (Gorsuch, J., dissenting). That is precisely why *Lockridge* is not the law in the Ninth Circuit. The unpublished disposition barely lays out the facts, and the court's one-paragraph analysis drew a dissenting judge's criticism as "terribly mistaken" and "puzzling." 190 F. App'x at 552 (Silverman, J., dissenting). In sum, *Lockridge* is not law. With no law to conflict with, there can be no circuit split. (Keahey cites another Ninth Circuit case, but as the "*cf.*" signal indicates,

that case supports a different legal proposition. *See* Pet.16. It therefore cannot be the basis for a split.)

Keahey also says the Sixth Circuit's decision conflicts with a decision from the Second Circuit. Pet.16. That is not quite correct. The case is *Davis v. Strack*, 270 F.3d 111 (2d Cir. 2001). New York tried Davis for fatally shooting someone. Davis claimed self-defense. *Id.* at 116–20. Self-defense under New York law "is a defense, not an affirmative defense." *Id.* at 124. That means Davis was entitled to a jury instruction on self-defense, and the prosecution bore the burden of disproving self-defense beyond a reasonable doubt, so long as the evidence could reasonably support such an instruction. *Id.* at 124–25. The trial court refused to instruct the jury on self-defense because, in the trial court's view, Davis "failed to retreat when he had the opportunity." *Id.* at 120. A jury convicted Davis of manslaughter. *Id.* In a subsequent and separate case, the New York Court of Appeals clarified *when* the duty to retreat arises in self-defense cases. In light of that intervening decision, the trial court's rationale for denying Davis a self-defense instruction "could not stand." *Id.* at 121. The state appellate court upheld the conviction anyway, because Davis "had no reasonable basis for believing [that his victim] was about to use deadly force against him," and because Davis "offered no convincing reason for his failure to retreat from the scene at the time of the actual shooting," the new duty-to-retreat standard. *Id.* (quotation omitted).

Davis filed a federal habeas petition, arguing that the trial court's failure to instruct the jury on self-defense violated his due-process rights. The Second Circuit

began by conducting an exhaustive analysis of the state-law issue: whether the facts supported a self-defense instruction under New York law. The Second Circuit disagreed with the state courts' application of state law to the facts, holding that, under New York law, Davis was entitled to have the jury instructed on self-defense. *Id.* at 124–31. The Second Circuit then analyzed whether the state-law error "so infected the entire trial that the resulting conviction violate[d] due process." *Id.* at 131 (citing *Cupp*, 414 U.S. at 147). Notably, the Second Circuit did not hold that the failure to give a self-defense instruction is a *per se* due-process violation. In fact, the court cited to an earlier case in which it denied habeas relief to a prisoner who also had been denied a self-defense instruction under New York law. *Id.* (citing *Blazic v. Henderson*, 900 F.2d 534 (2d. Cir. 1990)). Given the unique facts of Davis's case, however, the court held that the failure to give the self-defense instruction met the *Cupp* standard. *Id.* at 131–32. Last, the Second Circuit turned to AEDPA. In a single sentence, the court explained why the state court's decision was unreasonable: "On the basis of the evidence presented, Davis had a clear right under New York law to have the jury consider his defense, 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*." *Id.* at 133.

Set to the side, for a moment, whether *Davis* even applied AEDPA correctly. Notice what the Second Circuit *did not* hold. It *did not* hold that the Constitution, as interpreted by the Supreme Court, guarantees criminal defendants a right to a self-defense instruction. It *did not* hold that habeas petitioners are entitled to relief

whenever a state court fails to give such an instruction under state law. It *did not* hold that the state court decision was "contrary to" *Cupp*. (The court held the exact opposite: "In this case, a writ cannot be justified under the 'contrary to' clause of §2254(d)(1)." *Id.* at 133.) And it *did not* cite *Crane* or discuss whether Davis was deprived a meaningful opportunity to present a complete defense.

All this raises the question: what is the circuit split? According to Keahey, the "Sixth Circuit created a circuit split on a question of substantial importance: whether clearly established federal law guarantees a defendant the right to a self-defense jury instruction when he presents evidence he acted in self-defense." Pet.14. Keahey is wrong. The Sixth Circuit correctly held that "the Supreme Court has never clearly established Keahey's alleged constitutional right to a self-defense instruction." Pet.App.9a. That holding in no way conflicts with *Davis*, which *did not* hold, let alone suggest, that the Supreme Court has clearly established a federal right to a self-defense instruction whenever a defendant invokes that defense. Keahey's asserted circuit split does not exist.

One final note. In the part of Keahey's brief in which he tries to explain why the Sixth Circuit is "on the wrong side" of an imaginary split, Keahey does not cite the circuit decisions on the "right" side. Pet.17–34. It is curious why. If those circuits have the better view of Supreme Court precedent, one would think that Keahey would use their logic to show the how the Sixth Circuit erred. Keahey chose not to. That is telling.

B. To the extent any split exists, it is not worthy of this Court's review.

Keahey's asserted circuit split does not live up to its billing. To be sure, the outcome below, a denial of habeas relief, does differ from the outcome in *Davis*, which granted habeas relief. That difference, however, is not so much a split on what the law requires as it is a difference in applying AEDPA's "deferential standard" of review to state court decisions involving a general due-process rule and similar facts. *Yarborough*, 541 U.S. at 664.

To fully appreciate why there is no split, remember what the split is *not*. The split is *not* about the "contrary to" prong of §2254(d)(1). The Second Circuit held that Davis was not entitled to relief on that ground. *Davis*, 270 F.3d at 133. The split is *not* about *Crane*, 476 U.S. 683. The Second Circuit did not cite *Crane* and it did not rely on the general rule that criminal defendants must be given a meaningful opportunity to present a complete defense. The split is *not* about whether a state court's refusal to give a self-defense instruction under state law is a *per se* deprivation of due process, such that habeas relief is mandatory. That is because the Second Circuit cited a prior holding in which it denied habeas relief in those exact circumstances. *Davis*, 270 F.3d at 131–32. And the split is *not* about whether the Supreme Court has clearly established a federal right to a self-defense instruction, for the reasons just discussed.

All of that leaves a split so tenuous as to not deserve the title. The best that can be said for a circuit-to-circuit difference is that the Second and Sixth Circuits *might* reach different outcomes when presented with the same constellation of state

law and facts, and when asked to determine whether the state court unreasonably applied the general rule that every trial must comport with fundamental fairness, as established in *Cupp*.

To the extent *that* is the divide, it is shallow and undeveloped. The Sixth Circuit provided ample reasons for holding that a state court's decision finding no due-process problem with declining a self-defense instruction passes muster under AEDPA's "modest" and highly deferential requirements. *See* Pet.App.8a–13a. The Second Circuit, on the other hand, disposed of the issue in just one sentence. *See* *Davis*, 270 F.3d at 133. The court simply tacked "on a perfunctory statement at the end of its analysis asserting that the state court's decision was unreasonable." *Shinn v. Kayer*, 141 S. Ct. 517, 523–24 (2020) (*per curiam*) (quotation omitted). Such analysis, as this Court has explained, is "fundamentally inconsistent with AEDPA." *Id.* Whatever divide may exist, it is unlikely that other courts will follow the Second Circuit's erroneous application of AEDPA. Indeed, for the past twenty years, no court has. There is thus no need for the Court to review this issue.

C. The Sixth Circuit did not err.

Because Keahey's promised circuit split does not measure up, all that remains is a request for error correction. The Court does not generally hear cases to correct case-specific errors. *See* S. Ct. Rule 10. In any event, the Sixth Circuit did not err.

1. When a petitioner is in custody because of a state-court adjudication, AEDPA prohibits courts from awarding relief unless the petitioner can show that the state court's judgment "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 standard is "difficult to meet." *White v. Woodall*, 572 U.S. 415, 419 (2014) (quotation omitted).

Start with the phrase "contrary to." A state-court decision is "contrary to" Supreme Court precedent in only two circumstances: (1) if the decision rests on a "rule that contradicts the governing law set forth in [the Court's] cases," or (2) if the decision involves "a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from [its] precedent." *Williams v. Taylor*, 529 U.S. 362, 405, 406 (2000).

The "unreasonable application" prong is just as strict. A petitioner must show that the state court's decision 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. This difficult-to-meet standard is that much harder to satisfy when the "clearly established Federal law, as determined by the Supreme Court," is a general principle as opposed to a specific rule. "The more general the rule, the more leeway [state] courts have in reaching outcomes in case-by-case determinations." *Yarborough*, 541 U.S. at 664. In other words, the potential for fairminded disagreement grows and the chance of winning habeas relief shrinks. *See Renico v. Lett*, 559 U.S. 766, 776 (2010).

2. The Sixth Circuit faithfully applied these settled principles of habeas law. Given the nature of Keahey's constitutional claim, AEDPA prohibited the court from granting relief.

Contrary to federal law. The "clearly established Federal law, as determined by the Supreme Court," is twofold. *First,* criminal defendants are guaranteed a meaningful opportunity to present a complete defense. *Crane*, 476 U.S. at 690. *Second*, trials must comport with fundamental fairness; an instructional error that "infect[s] the entire trial" can result in a conviction that violates due process. *Cupp*, 414 U.S. at 147.

As the Sixth Circuit explained, the Ohio Court of Appeals did not apply a rule that contradicts the governing law set forth in *Crane* and *Cupp*. Pet.App.8a. True, the state court did not cite these cases. But that is irrelevant. Under AEDPA, State courts are not required to cite, or even be aware of, the applicable precedent. *See Early v. Packer*, 537 U.S. 3, 8 (2002) (*per curiam*). Nothing in the state court's decision suggests that its judgment rested on a rule that "contradicts" this Court's precedents. *Williams*, 529 U.S. at 405. Moreover, *Crane*, *Cupp*, and their progeny do not involve "facts that are materially indistinguishable" from Keahey's case. *Id.* at 406. "[T]he Court has discussed the denial of a state self-defense instruction in the context of constitutional rights only once—as a hypothetical possibility and in a dissent no less." Pet.App.9a (citing *Gilmore v. Taylor*, 508 U.S. 333, 359 (1993) (Blackmun, J., dissenting)). That means the state court could not have arrived at a result different from this Court's precedent. *See Williams*, 529 U.S. at 406. The state appellate court's decision is therefore not "contrary to … clearly established Federal law, as determined by the Supreme Court." 28 U.S.C. §2254(d)(1).

Unreasonable application of federal law. The standards set forth in *Crane* and *Cupp* lack "specificity." *Harrington*, 562 U.S. at 101. The relevant rules—that a criminal defendant must be given a meaningful opportunity to present a complete defense and that the trial must comport with fundamental fairness—could not be more general. Therefore, under textbook habeas law, the "possibility for fairminded disagreement" as to the reasonableness of the state court's decision is at its zenith. *Id.* at 101, 103. "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 this Court." *Id.* at 101 (alteration adopted; quotation omitted).

The Sixth Circuit correctly held that the Ohio Court of Appeals' decision passes these "modest requirements." Pet.App.9a. For one thing, this Court has not "squarely established" a federal right to a self-defense instruction. That means the state court could not have unreasonably applied such nonexistent precedent. For another thing, the state court's decision is entirely reasonable. It was reasonable for the state court to conclude that Keahey, who testified at trial as to self-defense, had been given a meaningful opportunity to present a complete defense. It was also reasonable for the state court to conclude that Keahey's failure to carry his burden of proof under state law did not render his trial fundamentally unfair. And at the very least, "fairminded jurists could disagree." *Harrington*, 562 U.S. at 101 (quotation omitted). Indeed, the fact that the Second Circuit might have ruled differently

"illustrate[s]" the possibility for fairminded disagreement." *White*, 572 U.S. at 422 n.3. The Sixth Circuit did not err in denying habeas relief.

3. Keahey's arguments for reversal all fail.

Keahey first says the Sixth Circuit "concluded that no clearly established law applied" to his claim. Pet.17. That is not true. The Sixth Circuit identified two lines of cases, *Crane* and *Cupp*, as the "clearly established Federal law." Then, the Sixth Circuit analyzed whether the state court's decision ran afoul of those cases, all through the lens of AEDPA deference. *See* Pet.App.7a–12a. What Keahey is really saying is that the Sixth Circuit wrongly concluded "that this Court's precedents do not clearly establish a right to assert self-defense." Pet.17. But the Sixth Circuit got it right. Keahey himself cannot point to the case clearly establishing that right. He says the federal right to a self-defense instruction is baked into the *Crane* and *Cupp* lines of cases. *See* Pet.17–21. Maybe it is. But this Court has yet to say so. And the Sixth Circuit knows that it is prohibited from framing this Court's "precedents at such a high level of generality." *Nevada v. Jackson*, 569 U.S. 505, 512 (2013) (*per curiam*). If AEDPA prohibits circuit courts from extending a constitutional rule about cross examination to also cover extrinsic evidence, *see id.* at 511–12, and from extending the rule that a no-adverse-inference instruction is required at the guilt phase to also be required the sentencing phase, *see White*, 572 U.S. at 420–24, then there was no reason for the Sixth Circuit to think that this Court would condone an attempt to extend the general rules from *Crane* and *Cupp* to mandate an absolute right to a self-defense instruction.

Next, Keahey takes a detour from AEDPA. He consults history, tradition, and early case law to show why the right to have a jury instructed on self-defense is a fundamental right safeguarded by the Constitution. *See* Pet.22–31. Whatever the merits of that argument might be on direct review, the argument is incompatible with AEDPA. Federal habeas review is cabined. The only question is whether the state court rendered "a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court." §2254(d)(1); *see Marshall v. Rodgers*, 569 U.S. 58, 64 (2013) (*per curiam*); *see also White*, 572 U.S. at 420–21. To delve any deeper is to ignore AEDPA.

Last, Keahey says the Ohio Court of Appeals, by faithfully applying Ohio law, violated federal law. Pet.31–32. Remember, under then-existing state law, Keahey needed to earn a self-defense instruction. He had to introduce sufficient evidence supporting all three elements of self-defense. The Ohio Court of Appeals reviewed the issue *de novo* and concluded that Keahey failed to carry his burden. Pet.App.112a–15a. That decision, Keahey says, violated federal law. But how? Under what federal law should the Ohio court have analyzed the issue? Keahey raised this argument below, and a typical string of Judge Sutton questions deflate it: "By what measure anyway would federal courts gauge whether the state criminal defendant introduced enough evidence to have a federal right to a self-defense instruction? Would it be a 'mere scintilla' of evidence supporting the defendant's theory? Adequate evidence to raise a factual question for a reasonable jury? Would 'some evidence' do the trick? No clearly established Supreme Court precedent gives

an answer, confirming that the state courts did not unreasonably apply the relevant precedent." Pet.App.10a (citations omitted).

CONCLUSION

The Court should deny Demetreus Keahey's petition for a writ of *certiorari*.

Respectfully submitted,

DAVE YOST
ATTORNEY GENERAL OF OHIO

<u>/s/ Michael J. Hendershot</u>
MICHAEL J. HENDERSHOT*
Chief Deputy Solicitor General
**Counsel of Record*
KYSER BLAKELY
Deputy Solicitor General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
michael.hendershot@
OhioAGO.gov

Counsel for Respondent
Dave Marquis, Warden