"More Law, Less Justice": How AEDPA Has Thwarted Enforcement of the Constitutional Right to a Self-Defense Jury Instruction

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Marcus Cicero used the phrase "[m]ore law, less justice" to describe how complex legal schemes interfere with the law's ability to protect people's rights.[1] *While the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) went into effect centuries after Cicero's death, its habeas corpus provisions exemplify his principle by turning the writ of habeas corpus into a complex legal instrument that undermines the enforcement of constitutional rights. Indeed, one right that AEDPA has weakened is the very right that Cicero championed: the right to assert self-defense.*

As this Note will explain, AEDPA's procedural hurdles have forced federal district and circuit courts to sidestep the important question of whether criminal defendants have a constitutional right to receive a self-defense jury instruction. Instead, AEDPA requires federal courts faced with that question to focus on a subordinate question: whether the United States Supreme Court has clearly established that right. With the detrimental effect of detracting from the constitutional question, courts have struggled to answer even this derivative, procedural question. Specifically, the Second, Sixth, and Ninth Circuits are split about whether a federal court can grant a state petitioner habeas relief on the grounds that a state court's failure to charge the jury with a self-defense instruction violated clearly established law. The Second and Ninth Circuits have said yes, while the Sixth Circuit has said no.

On the procedural question, Part II of this Note argues that the Sixth Circuit is correct. Since the Supreme Court has never "clearly established" a constitutional right to a self-defense jury instruction in state court, a federal court cannot grant habeas relief on that basis. But this Note recognizes that the Sixth Circuit's opinion stops short of addressing the primary issue: When, if

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1. MARCUS TULLIUS CICERO, DE OFFICIIS 1.10.33 (Walter Miller trans., London, William Heinemann 1913) (ebook updated Feb. 2, 2022).

ever, does a criminal defendant have a federal, constitutional right to a self-defense jury instruction in state court?

Part III of this Note analyzes Supreme Court precedent and the original public meaning of the Sixth Amendment to reveal that the Constitution requires state judges to instruct juries on self-defense when: (1) a criminal defendant requests the instruction; and (2) a reasonable jury could find for the defendant on self-defense. This permissive standard requires a self-defense jury instruction in many homicide prosecutions.

Part IV of this Note addresses the tension between these two findings. That the constitutional right to a self-defense jury instruction exists in many circumstances but that federal district and circuit courts cannot vindicate that right might seem fundamentally at odds with our country's principles of justice. As a result, pointing fingers at AEDPA is a common and understandable response. But as this Note highlights, Congress has not rendered the Supreme Court helpless in giving effect to constitutional rights for criminal defendants who are tried in state courts. While it rarely exercises it, the Supreme Court has the power to grant petitions for certiorari in cases that allege violations of a state criminal defendant's constitutional rights on direct appeal. Ultimately, this Note seeks to highlight the importance of the Supreme Court prioritizing direct, appellate review of criminal convictions that allege constitutional violations—and namely, the right to a self-defense jury instruction. While AEDPA may decrease the chances that federal remedies are available to vindicate a criminal defendant's constitutional rights, the Supreme Court has the power to make sure no fundamental right goes unprotected.

Introduction

Imagine this scene: An individual has threatened physical harm to you before. You know that this individual carries a weapon. And perhaps they've even used that weapon to severely injure you in the past. One day, you find yourself in the path of this individual, and they follow you. Or maybe they even charge at you. Trying to buy time to flee from the scene, you shoot at the individual whom you perceived to be a threat.

At your trial in state court, you admit to shooting the alleged victim. Instead of denying the facts, you build your defense around the argument that you acted in self-defense. You present evidence that the individual who threatened you had a weapon on them at the time of the incident, and the court admits that evidence without objection. Accordingly, you spend the entirety of your constitutionally protected jury trial trying to convince the jury that you acted appropriately to spare your own life. You believe that you have made a strong case for your acquittal when the defense rests. But then, the judge makes a decision that surprises you. Unconvinced by your evidence of self-defense, the judge unilaterally decides not to instruct the jury on self-defense. Instead of asking the jury to consider whether they believe that you acted legally—shooting the alleged victim because you reasonably believed it necessary for your own protection—the judge merely asks the jury whether you shot the individual and whether you did so with the requisite intent for the crime you are accused of. The jury convicts you without hesitation.

Did you really benefit from the Sixth Amendment right to a jury trial? Or was a judge the ultimate fact finder in your case? And if the latter is true, can a federal court demand a new trial on your behalf? Or has the Antiterrorism and Effective Death Penalty Act of 1996's bar on relitigating cases decided on the merits in state court blocked your ability to obtain relief from a federal court?

This is not just a hypothetical. This is the story of the trials of Demetreus Keahey,[2] Ronald Davis,[3] and Bryan Lockridge.[4] And the questions posed—(1) Does this factual scenario violate a defendant's constitutional right to a jury trial? and (2) Can a federal court vacate and remand a defendant's conviction in light of these circumstances?—have split the Second, Sixth, and Ninth Circuits.

I. AEDPA Background

Under both statutory and constitutional law, detainees can file for a writ of habeas corpus, which orders a prisoner to be released from illegal

2. Keahey v. Marquis, 978 F.3d 474, 476–77 (6th Cir. 2020).
3. Davis v. Strack, 270 F.3d 111, 133 (2d Cir. 2001).
4. Lockridge v. Scribner, 190 F. App'x. 550, 550 (9th Cir. 2006).

confinement.[5] However, Congress placed limits on how federal courts can apply the writ when it passed the Antiterrorism and Effective Death Penalty Act (AEDPA) in 1996.[6] Specifically, 28 U.S.C. § 2254(d) limits the ability of federal courts to grant habeas relief to state petitioners for claims that have been adjudicated on the merits in state court.[7] The relevant section of the statute reads:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, *as determined by the Supreme Court of the United States*; or (2) 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.[8]

If neither of these conditions are met, AEDPA prohibits federal courts from granting habeas relief to a state petitioner whose claim has been decided on the merits in state court.[9]

II. The AEDPA Circuit Split

A. Identifying the Circuit Split

The Second, Sixth, and Ninth Circuits disagree over whether a federal court can grant habeas relief to a state petitioner under 28 U.S.C. § 2254(d)(1) when a state court refuses to instruct a jury on self-defense in cases where the defendant has presented some evidence supporting the defense.[10] As stated in Part I of this Note, a federal court can only grant habeas relief to a state petitioner under 28 U.S.C. § 2254(d)(1) when the state court's adjudication of the claim resulted in a decision that was (1) contrary to clearly established Federal law, as determined by the Supreme Court; or

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5. Lee Kovarsky, *AEDPA's Wrecks: Comity, Finality, and Federalism*, 82 TUL. L. REV. 443, 446–47 (2007).

6. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No 104-132, §§ 101–08, 110 Stat. 1214, 1217–26 (1996) (codified at 28 U.S.C. §§ 2244–2266).

7. 28 U.S.C. § 2254(d). AEDPA's restrictions on a federal court's ability to grant habeas relief when there has been a merits adjudication in state court are consistent with the statute's purpose of promoting federalism. *See* Williams v. Taylor, 529 U.S. 420, 436 (2000) (stating that AEDPA exists to "further the principles of comity, finality, and federalism"). Before AEDPA's enactment, "a federal court's exercise of habeas corpus jurisdiction did not require that it pay any special heed to the underlying state court decision." O'Brien v. Dubois, 145 F.3d 16, 20 (1st Cir. 1998).

8. 28 U.S.C. § 2254(d) (emphasis added).

9. *Id.*

10. *See supra* notes 2–4 and accompanying text.

(2) involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court.[11]

In *Keahey v. Marquis*,[12] the Sixth Circuit denied a writ of habeas corpus to a petitioner who alleged that an Ohio state court violated his Sixth and Fourteenth Amendment rights when it failed to instruct the jury on self-defense.[13] Reviewing the defendant's petition under 28 U.S.C. § 2254(d)(1), the court reasoned that the state court's failure to give a self-defense jury instruction did not warrant federal habeas review because it did not violate "clearly established Federal law, as determined by the Supreme Court of the United States."[14] The Sixth Circuit did not reach the question of whether the defendant had a constitutional right to the jury instruction. Instead, the court stated that since the Supreme Court had never specifically established that there is a constitutional right to a self-defense jury instruction, the Sixth Circuit's hands were tied by AEDPA.[15] In other words, the Sixth Circuit held that since there is no "clearly established" law concerning the right to a self-defense jury instruction, the state court decision could not be "contrary to" or "an unreasonable application of" such law.[16]

The Second and Ninth Circuits, on the other hand, have not been so faithful to a restrictive reading of AEDPA. In *Davis v. Strack*,[17] the Second Circuit found that a federal district court was wrong to deny a writ of habeas corpus to a defendant who requested one after a New York state trial court failed to give a self-defense jury instruction in compliance with that state's law.[18] The Second Circuit reasoned, in relevant part, that the violation of state law "had a profound effect on the trial, and resulted in a denial of due process under the test of *Cupp v. Naughten*."[19] The circuit court claimed that its holding was compliant with the restrictions of AEDPA, as laid out in 28 U.S.C. § 2254(d)(1), because the state court's decision was an "unreasonable application" of the Supreme Court's decision in *Cupp*—which established that an error in jury instructions violates the Fourteenth

11. 28 U.S.C. § 2254(d)(1).

12. 978 F.3d 474 (6th Cir. 2020).

13. *Id.* at 476.

14. *Id.* at 477 (quoting 28 U.S.C. § 2254(d)(1)).

15. *See id.* at 479 ("Because the Supreme Court has never clearly established Keahey's alleged constitutional right to a self-defense instruction and because the state court did not unreasonably apply the most relevant Supreme Court holdings, he has no basis for habeas relief under § 2254(d)(1).").

16. *Id.*

17. 270 F.3d 111 (2d Cir. 2001).

18. *Id.* at 116.

19. *Id.* (citing Cupp v. Naughten, 414 U.S. 141 (1973)).

Amendment when it "so infect[s] the entire trial that the resulting conviction violates due process."[20]

Similarly, in a short memorandum opinion in *Lockridge v. Scribner*,[21] the Ninth Circuit held that it was appropriate to grant a criminal defendant habeas relief after a California state court denied that defendant the opportunity to present a self-defense instruction to a jury.[22] The circuit court reasoned that habeas relief was warranted under AEDPA because the state court's "refusal to instruct [the] jury on the law of self-defense was an unreasonable application of clearly-established Supreme Court precedent."[23] But, instead of relying on *Cupp*—as the Second Circuit did when articulating the same finding in *Davis* five years prior[24]—the Ninth Circuit relied on two principles from other cases to support its finding. First, the court said that the state court's failure to give a self-defense jury instruction violated the Supreme Court's holding that "the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'"[25] Further, the Court maintained that "[i]t is equally well-established that 'a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor.'"[26]

When considered together, the Second Circuit's decision in *Davis v. Strack*, the Sixth Circuit's decision in *Keahey v. Marquis*, and the Ninth Circuit's decision in *Lockridge v. Scribner* raise two critical questions regarding a defendant's rights in criminal proceedings. First, and most directly, these conflicting decisions beg the question: is it "clearly established Federal law"[27] that a defendant is guaranteed a constitutional right to a self-defense jury instruction in state court? The answer to this question controls whether federal habeas relief is available *as a matter of law*.[28] Second, the opinions in *Davis* and *Lockridge* also highlight a narrower question: under what circumstances, if any, does a criminal defendant have a federal,

20. *Id.* at 116, 123, 133 (quoting *Cupp*, 414 U.S. at 147); *Cupp*, 414 U.S. at 146–47. The court also stated that the state court's reasoning satisfied 28 U.S.C. § 2254(d)(2) because it resulted in a "decision that was based on an unreasonable determination of the facts in the [sic] light of the evidence." *Davis*, 270 F.3d at 133 (quoting 28 U.S.C. § 2254(d)(2)). This holding is not discussed in greater detail because it is not relevant to the circuit split at issue in this Note.

21. 190 F. App'x 550 (9th Cir. 2006).

22. *Id.*

23. *Id.* at 551.

24. *Davis*, 270 F.3d at 133.

25. *Lockridge*, 190 F. App'x at 551 (quoting Crane v. Kentucky, 476 U.S. 683, 690 (1986)).

26. *Id.* at 551 (quoting Mathews v. United States, 485 U.S. 58, 63 (1988)).

27. 28 U.S.C. § 2254(d)(1).

28. As noted in Part I, a federal court may still grant a habeas petition to a state defendant who was deprived of the opportunity for a jury to consider self-defense if the state court's proceedings "resulted in a decision that was based on an unreasonable determination of the *facts*." 28 U.S.C. § 2254(d)(2) (emphasis added).

constitutional right to a self-defense jury instruction in state court?[29] This Note will address the first of these questions in subpart II(B) before analyzing the second question in Part III.

B. Resolving the Circuit Split

The Sixth Circuit was correct to hold that a federal court cannot grant federal habeas relief to a state petitioner under 28 U.S.C. § 2254(d)(1) on the grounds that the state court denied the petitioner's request for a self-defense jury instruction at trial. As referenced in subpart II(A), the Supreme Court has interpreted 28 U.S.C. § 2254(d) as placing substantial limits on the ability of federal courts to grant habeas relief to state petitioners for claims that have been adjudicated on the merits in state court.[30]

Within 28 U.S.C. § 2254(d)(1), there are three questions to consider before determining whether a state court decision satisfies this provision. First, what is considered clearly established law for the purposes of the statute? Second, what makes a state court decision "contrary to" clearly established law? And third, what makes a state court decision an "unreasonable application of" clearly established law?

Turning to the first question, the Supreme Court has held that "clearly established Federal law" refers to Supreme Court law that existed at the time of the relevant state court decision.[31] In addition, the Court has clarified that for a rule to be considered "law" by the Supreme Court, it must form a holding; dicta from the Court's decisions are insufficient.[32] Nevertheless, the Court has recognized that clearly established law is not limited to that which the Supreme Court has explicitly stated.[33] Even if the law that a defendant seeks to rely on has not been directly stated by the Supreme Court when the defendant is convicted, the Court may find that the law was clearly established if it was implied by previous precedent.[34] Similarly, the Court has recognized that rules of law may qualify as clearly established law for habeas

29. This Note does not address the legality of any substantive requirements to state self-defense laws (i.e., whether state self-defense laws can include stand-your-ground provisions or other qualifiers). For the purposes of this analysis, I have presumed that all state self-defense laws are constitutional and that if a federal constitutional right to a self-defense jury instruction exists, any instruction that properly describes the state in question's self-defense laws will satisfy the constitutional requirement.

30. *See supra* note 7 and accompanying text.

31. Williams v. Taylor, 529 U.S. 362, 412 (2000).

32. Lockyer v. Andrade, 538 U.S. 63, 71–72 (2003) (quoting *Williams*, 529 U.S. at 412).

33. *See* Roe v. Flores-Ortega, 528 U.S. 470, 484–85 (2000) (finding that a newly articulated rule "breaks no new ground" because the Court's earlier decisions implicitly established the rule).

34. *Id.*

purposes even when they are expressed in terms of a generalized standard.[35] Further, while it may be obvious that lower court decisions cannot satisfy the 28 U.S.C. § 2254(d)(1) requirement that clearly established law is "determined by the Supreme Court of the United States,"[36] the Court has held that it is appropriate to turn to the decisions of appellate courts for evidence of whether Supreme Court law has been clearly established.[37] Indeed, the Supreme Court has held that when there is significant debate amongst lower courts concerning a Supreme Court ruling, law establishing the correct interpretation is new.[38]

With this understanding of clearly established law in mind, we can now move to the "contrary to" prong of AEDPA's § 2254(d)(1) test: a state court decision is contrary to federal law when it (1) applies a rule that directly opposes Supreme Court precedent; or (2) applies the correct standard to a set of facts that is nearly identical to the facts in the controlling Supreme Court decision but interprets that standard incorrectly.[39] The Supreme Court has not issued an opinion in any case ascertaining whether a self-defense jury instruction is required.[40] Accordingly, it is not possible that any of the state courts in *Keahey*, *Davis*, or *Lockridge* could have issued an opinion that directly opposed Supreme Court law on the issue in violation of the contrary to prong of section 2254(d)(1).[41] Indeed, the circuits responsible for the *Keahey* and *Davis* decisions agree that a state court's failure to instruct a jury on self-defense is not contrary to clearly established Federal law.[42]

The final component of AEDPA's § 2254(d)(1) test is where the true disagreement among the Second, Sixth, and Ninth Circuits exists. As explained in subpart II(B), the Second and Ninth Circuits each held, for different reasons, that a state court's failure to allow a self-defense jury

35. *See* Yarborough v. Alvarado, 541 U.S. 652, 663–64 (2004) (recognizing that the Court's evaluation of the reasonableness of rule applications will depend on the specificity of those rules and distinguishing specific legal rules and general standards).

36. 28 U.S.C. 2254(d)(1).

37. Price v. Vincent, 538 U.S. 634, 643 & n.2 (2003) (citing appellate court decisions that interpreted a question of law inconsistently with the way the Supreme Court would have to support the Court's proposition that a question of law was not clearly established).

38. *See* Butler v. McKellar, 494 U.S. 407, 415 (1990) (explaining that a rule is new if there is a "significant difference of opinion on the part of several lower courts that had considered the question previously").

39. Williams v. Taylor, 529 U.S. 362, 405 (2010); *see also* Ramdass v. Angelone, 530 U.S. 156, 165–66 (2000) (plurality opinion) (stating that "a state court acts contrary to clearly established federal law if it applies a legal rule that contradicts our prior holdings or if it reaches a different result from one of our cases despite confronting indistinguishable facts").

40. Keahey v. Marquis, 978 F.3d 474, 478 (6th Cir. 2020).

41. *See* Davis v. Strack, 270 F.3d 111, 133 (2d Cir. 2001) (agreeing that the contrary to standard is not satisfied where a state court denies a defendant's request for a self-defense jury instruction); *Keahey*, 978 F.3d at 478 (same); *see also* Lockridge v. Scribner, 190 F. App'x 550, 551 (9th Cir. 2006) (Silverman, J., dissenting) (same).

42. *Davis*, 270 F.3d at 133; *Keahey*, 978 F.3d at 478.

instruction is an "unreasonable application" of federal law.[43] Specifically, in *Davis*, the Second Circuit found that the state court's denial of the self-defense jury instruction violated the Fourteenth Amendment's Due Process Clause because the absence of the jury instruction "had a profound effect on the trial, and resulted in a denial of due process under the test of *Cupp v. Naughten*."[44] But the Second Circuit's reliance on *Cupp* was misguided because *Cupp* did not clearly establish a right to a self-defense jury instruction through either a direct statement or implication. In *Cupp*, the Supreme Court held that a trial judge did not violate a defendant's due process rights when the judge instructed the jury that testifying witnesses are "presumed to speak the truth."[45] Importantly, the Supreme Court was not asked to consider whether the absence of any jury instruction—let alone a self-defense instruction—violated due process.[46] Even if it were true that the failure to provide a self-defense jury instruction results in a denial of due process under *Cupp*, there is nothing in the *Cupp* decision—or its progeny—that clearly establishes the violation.[47]Accordingly, it was incorrect for the Second Circuit to find that any state court had "unreasonably applied" *Cupp* when answering the question of whether there is a clearly established right to a self-defense jury instruction.

Similarly, the Ninth Circuit held that a state court's failure to allow a self-defense jury instruction violates a defendant's constitutional right to a "meaningful opportunity to present a complete defense."[48] But, as Judge Silverman's dissent in *Lockridge* so aptly pointed out, the Supreme Court case that the majority relied on to make this assertion, *Crane v. Kentucky*,[49]

43. *Davis*, 270 F.3d at 133; *Lockridge*, 190 F. App'x at 551.

44. *Davis*, 270 F.3d at 116, 133 (citing Cupp v. Naughten, 414 U.S. 141 (1973)) (explaining that the state court's decision was an "unreasonable application" of the Supreme Court's decision in *Cupp*); *Cupp*, 414 U.S. at 146–47 (establishing that an error in jury instructions violates the Fourteenth Amendment when it "so infect[s] the entire trial that the resulting conviction violates due process").

45. *Cupp*, 414 U.S. at 142, 149–50.

46. *See id*. at 144 (describing the issue of the case as "whether the giving of this instruction in a state criminal trial so offended established notions of due process as to deprive the respondent of a constitutionally fair trial").

47. *See id.* at 142, 149–50 (holding only that a state judge's improper instruction regarding a presumption of truth did not violate defendant's due process rights).

48. *Lockridge*, 190 F. App'x at 551 (quoting Crane v. Kentucky, 476 U.S. 683, 690 (1986)). As the Ninth Circuit acknowledged, the Supreme Court has not established whether the right to present a complete defense is found in the Sixth Amendment of the Constitution or the Fourteenth Amendment. *Crane*, 476 U.S. at 690 ("Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" (citations omitted) (quoting California v. Trombetta, 467 U.S. 479, 485 (1984))).

49. 476 U.S. 683 (1986).

did not concern jury instructions at all.[50] The decision in *Crane* concerned whether the exclusion of certain trial testimony violated due process.[51] Falling into the error of relying on extraneous law once more, the Ninth Circuit further reasoned that "[i]t is equally well-established that 'a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor.'"[52] As Judge Silverman pointed out, this justification is insufficient to warrant habeas relief because the Supreme Court case that the majority cites to make the assertion that there is a constitutional right to a jury instruction for a recognized defense, like self-defense, was not a constitutional case itself.[53]

Having analyzed the Supreme Court's § 2254(d)(1) standard closely, it is evident that the Sixth Circuit is on the right side of the split. A state court's refusal to include a self-defense jury instruction does not currently "result[] in a decision that [is] contrary to, or involve[] an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."[54] Accordingly, the Second and Ninth Circuits were wrong to grant habeas relief to petitioners Davis and Lockridge.

III. Establishing the Constitutional Right to a Self-Defense Jury Instruction

The circuit split concerning whether AEDPA allows a federal court to grant habeas relief when a state court judge fails to grant a defendant's request to have a jury consider self-defense is particularly worthy of attention if there is indeed a federal, constitutional right to the jury instruction. Accordingly, Part III of this Note analyzes the purported constitutional right to a self-defense jury instruction and where that right may be found. It ultimately argues that the Second Circuit's decision in *Davis* and the Ninth Circuit's decision in *Lockridge* were constitutionally sound because the Sixth and Fourteenth Amendments (bolstered by the purpose of the Second Amendment) work together to protect a constitutional right to a self-defense jury instruction when (1) that instruction is requested by a defendant, and (2) a reasonable jury could use the evidence presented to find for the defendant on that defense.

50. *Lockridge*, 190 F. App'x at 552 (Silverman, J., dissenting).
51. *Id.*
52. *Id.* at 551 (majority opinion) (quoting Mathews v. United States, 485 U.S. 58, 63 (1988)).
53. *Id.* at 551–52 (Silverman, J., dissenting).
54. 28 U.S.C. § 2254(d)(1).

A. Ramos v. Louisiana *and the Sixth Amendment Right to a Jury Trial*

The right to a self-defense jury instruction is most plainly found in the Sixth Amendment's right to a trial by "an impartial jury,"[55] which is incorporated against the states under the Fourteenth Amendment.[56] Specifically, the Sixth Amendment promises that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law."[57]

In *Ramos v. Louisiana*,[58] the Supreme Court acknowledged that, while not explicitly defined in the Constitution, the right to a jury trial must naturally carry with it "*some* meaning about the content and requirements of a jury trial."[59] In that case, the Court held that the Sixth Amendment right to a jury trial includes a unanimity requirement to convict a defendant.[60] To reach this conclusion, the Court considered the meaning of the term "trial by an impartial jury" at the time of the Sixth Amendment's adoption. In doing so, it found that "whether it's the common law, state practices in the founding era, or opinions and treatises written soon afterward," jury trials always required unanimity during the time leading up to and directly following the adoption of the Sixth Amendment.[61] Consequently, the Court held that the requirement was implicit in the right. It follows that the Supreme Court's test for whether the Sixth Amendment requires an element of a jury trial is whether that element was fundamental to the jury trial process at the Founding.

Applying this test to the right to assert self-defense, it is evident that criminal defendants possess the right to present a complete defense to a jury[62]—and that the history of the justice system confirms that the right to present a complete defense clearly includes the right to have a jury consider self-defense as a justification for homicide.[63]

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55. U.S. CONST. amend. VI.

56. Duncan v. Louisiana, 391 U.S. 145, 149–50 (1968).

57. U.S. CONST. amend. VI.

58. 140 S. Ct. 1390 (2020).

59. *Id.* at 1395.

60. *Id.*

61. *Id.* at 1395–96.

62. Notably, the Supreme Court explicitly affirmed a criminal defendant's right to present a complete defense in Mathews v. United States, 485 U.S. 58, 63 (1988). While *Mathews* addressed a statutory issue instead of a constitutional one, the Court stated that "a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." *Id.*

63. Importantly, the analysis in *Ramos* suggests that there is a natural limit on what the Sixth Amendment right to a jury trial includes. *See Ramos*, 140 S. Ct. at 1434 (Alito, J., dissenting) ("[The

B. Confirming the Right to Self-Defense as Fundamental: From Cicero to McDonald v. City of Chicago

The right to act in self-defense is a natural right[64] first asserted by Marcus Cicero in his defense of T. Annius Milo, who was on trial for murder in 52 B.C.[65] Relatedly, the codification of the right dates back to the Magna Carta.[66] Specifically, section sixty-one of the charter provided that if King John did not follow its provisions, "the Barons should have a right to correct the King by force until the King should begin to follow the articles of the charter."[67] While this clause describes a more institutionalized form of self-defense than we are accustomed to today, some have opined that the right to revolt—as established in section sixty-one of the Magna Carta—was one of the primary reasons that the right to bear arms made it into the English Constitution.[68] Further, the right to assert self-defense as an excuse *for using deadly force* finds support in thirteenth-century England. Under the Statute of Gloucester (1278), the King was to be notified of all cases of "defensive homicide."[69] A statute of Henry VIII (1532) later clarified that the King should find defendants who partake in such "defensive" killings not guilty of homicide.[70] Similarly, the Statute of Northampton (1328) reaffirmed that the primary purposes of the right to bear arms were self-defense and revolution.[71] Together, these facts establish that the right of self-defense was clearly established in sixteenth-century England, and therefore would likely have been adopted as a part of the American common law.[72] Indeed, Thomas

majority] does not claim that the Sixth Amendment incorporated every feature of common-law practice[.]"). The constitutional right to a jury trial cannot practically extend to cover all procedural guarantees under a state's law. Instead, this Note argues that only procedures that are "so rooted in the traditions and conscience of our people as to be ranked as fundamental" are constitutionally guaranteed by the Sixth and Fourteenth Amendments. Palko v. Connecticut, 302 U.S. 319, 325 (1937) (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)).

64. William C. Bradford, *"The Duty to Defend Them": A Natural Law Justification for the Bush Doctrine of Preventive War*, 79 NOTRE DAME L. REV. 1365, 1429–31 (2004) (stating that Cicero and Thomas Hobbes believed it was an individual's right to use self-defense).

65. Marcus Tullius Cicero, Pro Milone § 6 (52 B.C.), *in* ATTALUS (N.H. Watts trans., 1931), https://www.attalus.org/cicero/milo.html [https://perma.cc/6UBA-GH5E].

66. Stuart R. Hays, *The Right to Bear Arms, A Study in Judicial Misinterpretation*, 2 WM. & MARY L. REV. 381, 385 (1960).

67. *Id.* (first citing Magna Carta § 61; and then citing WILLIAM SHARP MCKECHNIE, MAGNA CARTA 465 (2d ed. 1914)).

68. *Id.*

69. *Id.* at 387.

70. *Id.* (citing 24 Henry 8 c. 5).

71. *Id.* at 385 (stating that the statute "made it illegal to ride in the darkness armed with a dangerous weapon and terrorizing the people") (first citing 2 Edw. 3 c. 3; then citing JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF STATUTORY CRIMES §§ 783, 784 (3d ed. 1901); then citing 4 WILLIAM BLACKSTONE, COMMENTARIES *149; and then citing Knight's Case (1686), 87 Eng. Rep. 75).

72. *Id.* at 387.

Jefferson confirmed the existence of such a natural right to self-defense in the Declaration by outlining the rights to "Life, Liberty and the pursuit of Happiness."[73] As scholars have asserted, this right to life, like other natural rights, "must be vested with the ability to *defend* [the right]."[74]

Relatedly, the Supreme Court's twenty-first-century Second Amendment jurisprudence confirms that our Constitution includes the right to utilize self-defense. For one, in *District of Columbia v. Heller*,[75] the Court confirmed that "the inherent right of self-defense has been central to the Second Amendment right."[76] Then, the Court reaffirmed that self-defense is a fundamental right, protected in part by the Second Amendment, when it incorporated its decision in *Heller* against the states in *McDonald v. City of Chicago*.[77] Most recently, Justice Thomas reiterated these holdings by writing that the history of the right to bear arms in England, inherently connected to the right to act in self-defense, supports the idea that the Second Amendment exists—at least in part—because a right to self-defense is assured by our Constitution.[78]

In addition to the implicit approval of self-defense that may be found in the Second Amendment, the procedural right to assert self-defense as an excuse in a criminal trial has long been a feature of state law. Twenty-one state constitutions explicitly provide for the right to self-defense.[79] For example, the first article of Pennsylvania's Constitution states that "all men are born equally free and independent, and have certain natural, inherent and inalienable rights, amongst which are, the enjoying and defending life and liberty."[80] Similarly, the Massachusetts Constitution originally declared that "[a]ll men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; . . . [and] seeking and obtaining their

73. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); PAULINE MAIER, AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE 134 (1997) (asserting that these rights included the right to seek safety).

74. Joshua Prince & Allen Thompson, *The Inalienable Right to Stand Your Ground*, 27 ST. THOMAS L. REV. 32, 39–40 (2015).

75. 554 U.S. 570 (2008).

76. *Id.* at 628.

77. 561 U.S. 742, 791 (2010).

78. Rogers v. Grewal, 140 S. Ct. 1865, 1871, 1874 (2020) (Thomas, J., dissenting in the denial of certiorari) (arguing that self-defense is a primary purpose of the Second Amendment); *see also* 1 WILLIAM BLACKSTONE, COMMENTARIES *139–40 (explaining that the right to arms protected by the 1689 English Bill of Rights preserved "the natural right of resistance and self-preservation" and "the right of having and using arms for self-preservation and defence").

79. Eugene Volokh, *State Constitutional Rights of Self-Defense and Defense of Property*, 11 TEX. REV. L. & POL. 399, 400 (2007).

80. PA. CONST. art I (1776). The Pennsylvania Constitution is reflective of the Founders' intentions in writing the U.S. Constitution because it was drafted by the same people and in the same year.

safety and happiness."[81] Vermont, as well, protected the "right to bear arms for the defence of themselves and the State."[82] Confirming this, the Vermont Supreme Court reaffirmed its 1876 holding that an individual "had a right to go prepared to defend himself against any assault" that might be made upon him and "if he only intended to use a pistol in such an emergency in defending his own life, or against the infliction of great bodily harm, the carrying of the pistol for such purpose would be lawful" in 1903.[83] Quite clearly, the law of self-defense has always been a part of the American legal system's foundation. Moreover, today, every state recognizes some version of the "right to use force against another person in self-defense."[84]

Just as the Supreme Court considered the fact that forty-eight states required unanimous jury verdicts before finding that unanimity was a requirement of the Sixth Amendment right to a jury trial in *Ramos*,[85] the Court should give great weight to the fact that every state guarantees defendants the right to assert self-defense. Taken as a whole, the history of self-defense from English Common Law to the Founding of the United States and the current consensus among states that self-defense is essential enough to be recognized by every state's statutory or common law establishes that the right to assert self-defense is "so rooted in the traditions and conscience of our people as to be ranked as fundamental."[86]

C. A Comparative Analysis with the Right to Effective Counsel

The method that the Supreme Court used to establish and explain the Sixth Amendment right to effective counsel in *Strickland v. Washington*[87] also endorses the existence of a Sixth Amendment right to a self-defense jury instruction.[88] Specifically, *Strickland* helps establish how the constitutional right to argue self-defense translates into a Sixth Amendment right to have a jury decide whether a defendant's actions were justified by self-defense. In *Strickland*, the Supreme Court recognized that "[t]he Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment."[89] Of particular relevance here, the Court also held that "a fair

81. MASS. CONST. art I, *annulled by* MASS. CONST. art. CVI.

82. VT. CONST. ch. 1, § 15 (1777).

83. State v. Rosenthal, 55 A. 610, 611 (Vt. 1903).

84. Eugene Volokh, *Self-Defense Is a Constitutional Right*, WASH. POST (Dec. 26, 2014, 11:21 AM), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/12/26/self-defense-is-a-constitutional-right/ [https://perma.cc/FTT6-8LYJ].

85. Ramos v. Louisiana, 140 S. Ct. 1390, 1394 (2020).

86. Palko v. Connecticut, 302 U.S. 319, 325 (1937) (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)).

87. 466 U.S. 668 (1984).

88. *Id.* at 685–86.

89. *Id.* at 684–85

trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding."[90] The Court then concluded that a fair trial requires not only the right to counsel—which is explicitly outlined in the Sixth Amendment—but also the right to effective assistance of counsel.[91] *Strickland* tells us that the reason counsel must be effective is that counsel "is critical to the ability of the adversarial system to produce just results."[92] In sum, the right to counsel would be meaningless if that counsel were not effective.

Similar logic can be applied to the need for a jury to consider self-defense. Just as the Sixth Amendment explicitly guarantees criminal defendants an attorney, the Amendment also promises the right to trial "by an impartial jury."[93] Specifically, the Court has stated that this right constitutes a right to be heard before one's peers.[94] Ultimately, it is logical to conclude that just as the right to counsel is meaningless if counsel is ineffective, the right to a jury of one's peers is meaningless if that jury is not actually presented with the opportunity to make a fully informed judgment. The *Strickland* Court's assertion that the "[g]overnment violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense" fits squarely within this comparison.[95] The government—here a state court—violates the right to be heard by a jury of one's peers when it interferes with the jury's ability to make factual decisions. And that is exactly what happens when a judge decides not to instruct a jury on self-defense despite the existence of evidence that could support that defense. The judges in the state court proceedings that led to the cases we know as *Keahey*, *Davis*, and *Lockridge* took the decision-making power away from the juries in those cases by failing to give them the full opportunity to consider the cases of their respective defendants. Therefore, under an analysis that is analogous to that employed by the Supreme Court in *Strickland*, the state courts violated each defendant's Sixth Amendment right to a jury trial.

IV. The Resulting Tension and the Supreme Court's Ability to Ameliorate It

In the words of Chief Justice John Marshall, "[t]he government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, *if the laws*

90. *Id.* at 685.
91. *Id.* at 686 (citing McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970)).
92. *Id.* at 685.
93. U.S. CONST. amend. VI.
94. Crane v. Kentucky, 476 U.S. 683, 690 (1986).
95. *Strickland*, 466 U.S. at 686.

furnish no remedy for the violation of a vested legal right."[96] Appropriately, then, when a state-court system deprives a criminal defendant of a constitutional right, the average American might instinctively expect that the federal court system can—and perhaps even has the duty to—redress the violation. And, if the district and appellate courts fail to meet this expectation, one will likely anticipate vindication from the Supreme Court.[97] After all, what is the purpose of a right that no court will vindicate? The average American and Chief Justice John Marshall would seemingly agree that a right that no court will vindicate is useless. Indeed, a resort to nothing more than our common sense tells us that a right unprotected is not a right at all.

However, this Note's conclusions—that (1) a federal court cannot grant habeas relief to a state petitioner who was denied the opportunity to have a jury consider self-defense, and yet (2) there is a federal, constitutional right to a self-defense jury instruction—confirm that the American expectation that our federal courts should be able to provide remedies for violations of federal rights is not currently supported by the law. The Supreme Court's habeas corpus jurisprudence, when paired with the Court's increasing propensity to deny petitions of certiorari seeking direct appeal of criminal convictions in state courts, has left us with a reality in which federal rights are often left unprotected.[98]

Thus, if we believe Chief Justice Marshall is correct, this Note's conclusions should be unsettling. Indeed, if we are taking Chief Justice Marshall's statement seriously, we should not condone a system of justice in which our federal courts cannot remedy constitutional violations without discounting federal statutes.[99] But, in the absence of action from the Supreme

96. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) (emphasis added).

97. The Supreme Court's public website touts that the Court is "charged with ensuring the American people the promise of equal justice under law." *The Court and Constitutional Interpretation*, SUP. CT. U.S., https://www.supremecourt.gov/about/constitutional.aspx [https://perma.cc/83MJ-NKYD]. Similarly, the website for the U.S. Courts says that the Supreme Court is "the court of last resort for those looking for justice" and that "it protects civil rights and liberties by striking down laws that violate the Constitution." *About the Supreme Court*, U.S. CTS., https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/about [https://perma.cc/A4Z8-DEGP].

98. *See* Nathan Nasrallah, *The Wall that AEDPA Built: Revisiting the Suspension Clause Challenge to the Antiterrorism and Effective Death Penalty Act*, 66 CASE W. RSRV. L. REV. 1147, 1151 (2016) (noting the extreme difficulty habeas petitioners face in pursuing the writ and the low likelihood of their success at the Supreme Court).

99. This is intentionally phrased as a normative claim, not a legal one. At the time of Williams v. Taylor, 529 U.S. 362 (2000), it was foreseeable that a situation could arise where (1) a federal court would conclude that a state court decision violates the United States Constitution, and yet (2) 28 U.S.C. § 2254(d)(1) would forbid that federal court from providing relief to the habeas petitioner that stood before the court. 2 RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 32.5 (7th ed. 2022). Nevertheless, the Supreme Court denied certiorari on the question of whether this dynamic interferes with a federal court's obligations under

Court, snubbing AEDPA appears to be the only thing that federal district and appellate courts can do to protect the rights of criminal defendants who were not granted the opportunity to have a jury consider whether they acted in self-defense.[100] Thus, because of the limits that AEDPA has placed on federal habeas review, there is an urgent need for the Supreme Court to affirmatively recognize the existence of a constitutional right to a self-defense jury instruction.

If the Court does not recognize this right in a manner that conforms to AEDPA's standard for "clearly established law," there will be a subset of criminal defendants for whom the right to a jury trial exists in name only.[101] Or alternatively, to the threat of our legal system's legitimacy, courts like the Second and Ninth Circuits—who presumably recognize the fundamental nature of the right to a self-defense jury instruction—may continue to uphold the right on habeas review, in violation of AEDPA. As the late Judge Stephen Reinhardt has explicitly acknowledged, some jurists might even be so uncomfortable with the idea of knowingly allowing constitutional violations to endure without providing a remedy to the victim of the violation that those jurists will grant habeas petitions knowing full and well that the Supreme Court's interpretation of AEDPA does not allow for the petitions.[102] Judge Reinhardt likely identified as one of those jurists. When answering a Yale Law Student's provocative question regarding why the Judge repeatedly issued habeas petitions that he knew the Supreme Court would reverse him on, Reinhardt famously stated, "They can't catch 'em all."[103] While that may

Article III and the Supremacy Clause to deny all force and effect to state law that is contrary to federal law. *See* Petition for Writ of Certiorari at 28, *Williams*, 529 U.S. 362 (No. 98-8384) (arguing that Congress, via section 2254(d)(1), cannot constitutionally bar a federal court from granting habeas corpus relief from a state court decision of law that the federal court independently adjudges to violate federal law in effect when the state court ruled). Since then, commentators have argued that 28 U.S.C. § 2254(d)(1) is constitutional because it can be read as a limitation on the relief that Article III courts may grant instead of a "congressional dilution of the federal courts' ability to reach independent conclusions as to whether a constitutional violation has occurred." 2 HERTZ & LIEBMAN, *supra* § 32.3 (citing Richard Fallon & Daniel Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1765, 1789, 1798 (1991)). My claim here is that the Supreme Court should affirm the constitutional right to a self-defense jury instruction so that other federal courts can enforce that right; I am not advancing the argument that the Supreme Court is required to do so.

100. *See, e.g.*, Davis v. Strack, 270 F.3d 111, 133 (2d Cir. 2001) (addressing the constitutional violation only because it interpreted AEDPA broadly); Lockridge v. Scribner, 190 F. App'x 550, 551 (9th Cir. 2006) (same); 2 HERTZ & LIEBMAN, *supra* note 99, § 32.5 (noting that when federal appellate courts' interpretations of AEDPA exhibit "a high degree of deference to state court rulings," that deference raises potential constitutional problems).

101. This subset of defendants consists of those who do not successfully have their complaints remedied on state collateral review.

102. Linda Greenhouse, *Dissenting Against the Supreme Court's Rightward Shift*, N.Y. TIMES (Apr. 12, 2018), https://www.nytimes.com/2018/04/12/opinion/supreme-court-right-shift.html [https://perma.cc/YK9N-5QWX].

103. *Id.*

be true—the Supreme Court cannot review every error that federal courts make[104]—a judicial system that inspires judges to disregard federal statutes to feel satisfied that they are upholding their sworn commitment to the Constitution is not a judicial system that deserves high regard. To preserve the legitimacy of our judicial system, the Supreme Court should do what is in its control. That is, the Court should prioritize attending to conflicts of law when it is clear, as it is here, that doing so is necessary for lower federal courts to faithfully apply the Constitution while still abiding by federal statutory law. In light of AEDPA, this requires prioritizing direct appellate review of criminal convictions that allege constitutional violations.

Conclusion

In sum, there is currently a circuit split regarding whether a federal court can grant a criminal defendant's habeas petition on the grounds that a state court violated the defendant's constitutional right to have a jury consider self-defense after the defendant has presented some evidence to support such a defense. In *Keahey v. Marquis*, the Sixth Circuit held that a habeas petition was not proper under AEDPA—because the Supreme Court has not promulgated clear federal law on the issue of whether a self-defense jury instruction is a right.[105] Notably, the Court did not directly address whether the state court's failure to provide a self-defense charge to the jury could in fact be a violation of a defendant's constitutional rights. Conversely, the Second and Ninth Circuits have both granted habeas petitions in similar incidences, arguing that the defendants in each case were deprived of their constitutional rights under the Sixth and Fourteenth Amendments but failing to properly apply the AEDPA standard.[106]

Consequently, as the law stands right now, federal courts do not have the authority to grant habeas relief to a criminal defendant who alleges that their constitutional right to a self-defense jury instruction was violated. Yet, at the same time, the history and text of the Sixth Amendment suggest that the jury instruction is just as fundamental to the right to a jury trial as the right to effective counsel is to the right to have an attorney.[107] This reality is unsettling. That federal district and appellate courts cannot vindicate—or truly even consider—a constitutional right of a criminal defendant is counter to the American principle of justice. Accordingly, it is imperative that the United States Supreme Court affirmatively acknowledge the existence of the

104. The Court only issued sixty-eight opinions during the 2020–2021 term. *Opinions of the Court–2020*, SUP. CT. U.S., https://www.supremecourt.gov/opinions/slipopinion/20 [https://perma.cc/7LFC-5FK7].

105. 978 F.3d 474, 479 (6th Cir. 2020).

106. Davis v. Strack, 270 F.3d 111, 133 (2d Cir. 2001); Lockridge v. Scribner, 190 F. App'x 550, 551 (9th Cir. 2006).

107. *See* discussion *supra* subpart III(C).

right to a self-defense jury instruction for any defendant who (1) requests the instruction, and (2) presents enough evidence concerning the defense for a reasonable jury to be able to find for the defendant. By doing so on direct review, the Supreme Court will ensure that federal district and appellate courts can enforce the constitutional right to a self-defense jury instruction—a right that the Second and Ninth Circuits have already recognized—in a manner that complies with the limitations of AEDPA.