Petition Appendix

In the

United States Court of Appeals

For the Seventh Circuit

No. 17-1727

SCOTT E. SCHMIDT,

Petitioner-Appellant,

v.

BRIAN FOSTER, Warden,

Respondent-Appellee.

Appeal from the United States District Court for the
Eastern District of Wisconsin.
No. 2:13-CV-01150-CNC — **Charles N. Clevert, Jr.**, *Judge*.

ARGUED SEPTEMBER 6, 2018 — DECIDED DECEMBER 20, 2018

Before WOOD, *Chief Judge*, and FLAUM, EASTERBROOK, KANNE, ROVNER, SYKES, HAMILTON, BARRETT, SCUDDER, and ST. EVE, *Circuit Judges*.[*]

ST. EVE, *Circuit Judge*. Scott Schmidt shot and killed his estranged wife. He confessed at the scene, but come trial he sought to mitigate his crime with the second-degree defense

[*] Circuit Judge Brennan did not participate in the consideration or decision of this case.

of adequate provocation. The Wisconsin trial court, in deciding whether the defense should go to the jury, asked for an offer of proof and an evidentiary hearing. Schmidt complied with the first request but balked at the second, not wanting to show any more of his defense hand. That concern was well taken, and the trial court ordered an *ex parte*, *in camera* examination of Schmidt instead. The trial court added, however, that Schmidt's lawyer could "not say[ ] anything" and would "just be present" for the examination.

The trial court questioned Schmidt in chambers. Schmidt's lawyer observed silently. Schmidt rambled, interrupted only by a few open-ended questions from the trial court and a brief break during which he reviewed his offer of proof with his lawyer. After the examination, the trial court ruled that Schmidt did not act with adequate provocation. He therefore could not raise the defense at trial. A jury later convicted Schmidt of first-degree homicide, and he was sentenced to life in prison.

Schmidt petitioned for a writ of habeas corpus, arguing that the trial court's *in camera* examination deprived him of counsel and due process. The district court denied Schmidt's petition, and a divided panel of our court reversed and remanded with instructions to grant it. We vacated that decision, reheard the case en banc, and now affirm the district court's judgment. The state trial court's unusual examination of Schmidt was constitutionally dubious, and we discourage the measure. But our habeas review is limited. We ask whether the state court of appeals unreasonably applied clearly established Supreme Court precedent in rejecting Schmidt's constitutional claims. We answer that it did not.

I. Background

During an argument on April 17, 2009, Schmidt followed his estranged wife, Kelly Wing-Schmidt, out of her home and onto her driveway. There, he shot her seven times with his revolver. Police arrived and found Schmidt standing over the body with the gun in his hand. He confessed immediately.[1]

A. Pretrial Proceedings

Wisconsin charged Schmidt with first-degree intentional homicide. He never recanted his confession, but he did intend to present an affirmative defense—adequate provocation. *See* Wis. Stat. § 940.01(2)(a). Under Wisconsin law, that defense mitigates intentional homicide from first degree to second. *Id.* § 939.44(2). The defense has "both subjective and objective components"—a defendant "must actually believe the provocation occurred" and the provocation must be one "that would cause an ordinary, reasonable person to lack self-control completely." *State v. Schmidt*, 824 N.W.2d 839, 842 (Wis. Ct. App. 2012) (citing Wis. Stat. § 939.44(1); *State v. Felton*, 329 N.W.2d 161, 172 (Wis. 1983)). "Once a defendant successfully places" adequate provocation "in issue," the state must disprove it beyond a reasonable doubt. *Id.* at 843 (citing *State v. Head*, 648 N.W.2d 413 (Wis. 2002)). To place the defense "in issue," a defendant need only present "'some'

[1] The material facts of this case are undisputed, and this background draws directly from the state courts' findings and the trial record. *See State v. Schmidt*, 824 N.W.2d 839 (Wis. Ct. App. 2012); *State v. Schmidt*, No. 09 CF 275, slip op. (Wis. Cir. Ct. July 27, 2011). Schmidt has not attempted to rebut any of the state courts' findings, and so we presume that they are correct. 28 U.S.C. § 2254(e)(1); *see also Hicks v. Hepp*, 871 F.3d 513, 525 (7th Cir. 2017).

evidence supporting the defense." *Id.* (quoting *Head*, 648 N.W.2d at 439).

Before trial, Schmidt filed a motion notifying the trial court and the state that he intended to present the adequate-provocation defense. He intended, specifically, to introduce evidence of Wing-Schmidt's "false allegations, controlling behaviors, threats, isolation, unfaithfulness, verbal abuse and arguments." The state argued that evidence of the couple's history, however fraught, did not support a theory of adequate provocation under Wisconsin law.

The trial court held a pretrial hearing in early 2010. At the hearing, the court echoed the state's concern that Schmidt's proposed provocation evidence, most of which related to events years before the murder, was irrelevant and would unfairly prejudice the state's case. The trial court therefore ordered an evidentiary hearing to determine whether Schmidt could meet his threshold burden. It instructed Schmidt that during the hearing his counsel could call witnesses, and, if the court was unsatisfied with the evidence presented, Schmidt could supplement the record. Before the hearing, Schmidt had to file a list of witnesses he intended to call.

Schmidt did so. His counsel filed a list of 29 witnesses with short summaries of their anticipated testimony, a legal analysis of the defense's applicability, and a five-page offer of proof with a six-year timeline of the couple's troubled history. A few days later, at another hearing, the trial court noted that it had reviewed Schmidt's submissions, but its reservations persisted. The trial court did not, however, ask for the presentation of witnesses or evidence from Schmidt, as it had said it would the month before. Instead, the court explained that its review of Wisconsin law—namely, *State v. McClaren*, 767

N.W.2d 550 (Wis. 2009)—confirmed that a hearing was appropriate, but that it should hold the hearing *in camera* to protect the defense from disclosing its trial strategy to the state (a measure *McClaren* blessed, 767 N.W.2d at 559 n.12). Schmidt's lawyer responded that additional evidence was unnecessary, but he agreed that if the court was going to question Schmidt it should do so *in camera* and *ex parte*. Schmidt's lawyer, in fact, noted that he intended to suggest that, if the court "ask[ed] for evidence from the defendant that goes to his subjective belief for adequate provocation," it should do so through an "ex parte in-camera inspection of the Court and the defendant and seal those records." The state agreed this was the "best way" to handle the court's examination.

The trial court then asked the state whether it would object to Schmidt's lawyer silently observing the examination. The state did not object—nor, for that matter, did Schmidt's lawyer. The state noted, though, that it did not want Schmidt conferring with counsel about how to answer the court's questions. Before concluding the in-court hearing and beginning the *in camera* examination, the court offered Schmidt's lawyer "a few minutes" to consult with his client. Schmidt's lawyer accepted.

The *in camera* examination opened with the trial court putting on the record that Schmidt's lawyer was "present but … not participating in the hearing." The court then asked Schmidt "what was in your mind" when he confronted Wing-Schmidt. Schmidt's answer, which went on uninterrupted for 14 transcript pages, addressed the events leading up to the killing, some history between him and his estranged wife, the moment of the killing (though he professed not to remember pulling the trigger), and the immediate aftermath. The trial

court stopped Schmidt as he was describing his arrest. It explained to Schmidt that his "attorney has made an offer of proof about other things that had occurred prior to this that had entered into your mind at the time." The trial court asked Schmidt to "tell us how those things entered into your mind at the time?" Schmidt explained that his estranged wife had threatened to take the kids and physically abused him. The trial court asked again; Schmidt continued to detail the couple's troubled history.

The trial court explained that Schmidt's testimony did not align with his offer of proof, to which Schmidt replied that he had not even seen the offer. The trial court then suggested a "short break," during which Schmidt could review the offer of proof while the court took a phone call. Schmidt's lawyer asked if he could consult with his client. The trial court responded, "It's off the record. Yeah, you can talk. But he should just be reviewing" the offer of proof.

Back on the record, the trial court noted that they had taken a break so that Schmidt could "review this offer of proof and different facts contained in it." Then, and again, the trial court asked Schmidt about "what you contemplated at the time" of the killing. Schmidt responded that everything had come "to a head," he was "overwhelmed, and eventually just got—they piled up one after another." Schmidt elaborated upon events that happened in years past—financial struggles, abusive behavior, and fights. The trial court concluded the examination, asked Schmidt and his lawyer to return to the courtroom, and said that it would consider its decision. Schmidt's lawyer did not ask to supplement his evidentiary presentation with affidavits or additional testimony.

That afternoon, and without further argument, the trial court ruled. It did not detail factual findings, citing the *ex parte* and *in camera* nature of the examination. Its conclusion was that the killing "did not involve a provocation and it was not an adequate provocation."

A month later, at another pretrial hearing, the parties discussed whether Schmidt would call one of the witnesses identified in his annotated witness list. The trial court stated that since it had ruled on the defense's admissibility, it did not see the relevance of the testimony. Schmidt's lawyer explained that he thought the "issue open" and believed that the court would allow further supplementation. The trial court rejected that idea, noting again that it had already ruled on the defense's admissibility. The court would, though, allow Schmidt to "supplement the record for appeal." Schmidt's lawyer did not do so.

B. Trial and Posttrial Proceedings

Trial began on March 4, 2010, and lasted five days. The jury convicted Schmidt of first-degree homicide.

Schmidt moved for a new trial on two grounds: the denial of his due process right to present a defense and the denial of his Sixth Amendment right to counsel during the *in camera* examination. The trial court held oral argument. During oral argument, the trial court asserted that the examination was simply "an effort to supplement the writing" which the court "relied upon and made reference to" during the examination. At the end of oral argument, the court denied Schmidt's motion and issued its opinion. The opinion explained:

> [D]efense counsel suggested and agreed to an in-camera hearing, and did not at any point request to actively

> participate in the in-camera examination. In addition, there was a break during the in-camera hearing to allow defense counsel and defendant to confer regarding the offer of proof. Thus, defense counsel actively participated prior to and during the in-camera proceeding. As the State notes, this is not a circumstance where the issues and argument were undertaken by the defendant without representation of counsel. The nature and detail of the written offer of proof clearly indicates that counsel discussed the numerous points with the defendant.

The opinion repeated that the defense "expressed a preference for, and agreed to, an in-camera proceeding for the defendant's oral offer of proof" and that "[a]t no time did counsel make a request to question the defendant." It concluded, in "view of defense counsel's extensive argument and submissions with regard to the adequate provocation defense, the Court finds there was no denial of the right to counsel."

The trial court sentenced Schmidt to the mandatory penalty for first-degree homicide—life in prison. *See* Wis. Stat. §§ 940.01, 939.50(3)(a), 973.014(1g).

C. The Court of Appeals Decision

Schmidt appealed. The Court of Appeals of Wisconsin explained first that Schmidt's case presented a "close question" as to whether he put forth "some evidence" of adequate provocation. *Schmidt*, 824 N.W.2d at 850. It noted that the state had conceded that "Schmidt, subjectively, acted in the heat of passion when he shot Wing-Schmidt." *Id.* at 850 n.8; *see also id.* at 844 n.5. But the state court of appeals, citing mostly Schmidt's "rambling narrative" during the *in camera* examination, held that Schmidt had failed to present some evidence of objectively adequate provocation. *Id.* at 847, 850–52. It cited also the

lengthy history of hostility between Schmidt and his estranged wife. Considering this history and the fact that Schmidt had a hand in starting the fight that culminated in the killing, the court decided that Schmidt "deliberately chose to ignite the fire." *Id.* at 852.

The court of appeals also rejected Schmidt's right-to-counsel claim. The *in camera* examination was, according to the court, "merely a supplementary proceeding conducted for his benefit." *Id.* Especially in light of *McClaren*, the court said, the examination in "a nonadversarial atmosphere was a reasonable accommodation." *Id.* at 852–53. Regarding Schmidt's argument that the examination was a "critical stage," the court of appeals saw it as "[f]atal" that the examination was "not the only opportunity for Schmidt to present his provocation evidence to the court." *Id.* at 853. The court added that, in any event, the trial court "recessed to allow Schmidt to review his attorney's written offer of proof and speak with his attorney." *Id.* The court of appeals concluded that "if counsel felt Schmidt or the court was overlooking something, or had any other concerns, there was an opportunity to so advise Schmidt." *Id.* Plus, according to the court, "Schmidt had the opportunity to present any concerns or questions he had to his attorney." *Id.*

D. Federal-Court Proceedings

Schmidt turned to federal court, petitioning for a writ of habeas corpus. The district court denied Schmidt's petition. It concluded that the state courts had not deprived Schmidt of his due process right to present a defense. It concluded further that the state courts had not unreasonably applied clearly established Supreme Court law in rejecting Schmidt's right-to-counsel claim. *See* 28 U.S.C. § 2254(d)(1). On both claims,

however, the district court granted a certificate of appealability. *See id.* § 2253(c).

A divided panel of our court reversed and remanded. *Schmidt v. Foster*, 891 F.3d 302 (7th Cir. 2018). The majority reasoned that Schmidt had a clearly established right to counsel at critical stages, and, in this case, there was no more important stage for Schmidt—whose sole defense hinged on the ruling that immediately followed—than the *ex parte*, *in camera* examination. The majority did not reach Schmidt's due process claim. The warden petitioned for a rehearing en banc. A majority of active judges voted to grant the petition, and we vacated our initial opinion. *Schmidt v. Foster*, 732 F. App'x 470 (7th Cir. 2018).

II. Discussion

We review the district court's decision de novo, but our inquiry is an otherwise narrow one. *Freeman v. Pierce*, 878 F.3d 580, 585 (7th Cir. 2017). Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), a federal court may grant habeas relief after a state-court adjudication on the merits only when that decision (1) "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) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. §§ 2254(d)(1), (2). We focus here on the state court of appeals opinion, as the last reasoned state-court decision on the merits. *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018). The question, all agree, is whether that opinion unreasonably applied clearly established Supreme Court precedent. *See* 28 U.S.C. § 2254(d)(1).

The bounds of a reasonable application depend on "the nature of the relevant rule." *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004). "The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations." *Id.* The Supreme Court has emphasized that only its holdings define the constitutional rule invoked. *Harrington v. Richter*, 562 U.S. 86, 100 (2011); *see also Carey v. Musladin*, 549 U.S. 70, 75–77 (2006). If a rule entails an "inevitable" application to a set of facts, courts must apply it to those facts. *Long v. Pfister*, 874 F.3d 544, 549 (7th Cir. 2017) (en banc), *cert. denied*, 138 S. Ct. 1593 (2018); *see also Panetti v. Quarterman*, 551 U.S. 930, 953 (2007). But AEDPA "does not require state courts to extend" precedent nor does it "license federal courts to treat the failure to do so as error." *White v. Woodall*, 572 U.S. 415, 426 (2014) (emphasis omitted). Time and again, the Court has cautioned against stretching its precedent to declare state-court decisions unreasonable. *Sexton v. Beaudreaux*, 138 S. Ct. 2555, 2558–60 (2018) (per curiam); *Virginia v. LeBlanc*, 137 S. Ct. 1726, 1728–29 (2017) (per curiam); *Woods v. Etherton*, 136 S. Ct. 1149, 1152 (2016) (per curiam); *Woods v. Donald*, 135 S. Ct. 1372, 1376–77 (2015) (per curiam); *Lopez v. Smith*, 135 S. Ct. 1, 3–4 (2014) (per curiam); *Nevada v. Jackson*, 569 U.S. 505, 512 (2013) (per curiam).

A state-court decision can be a reasonable application of Supreme Court precedent even if, in our judgment, it is an incorrect application. *McDaniel v. Polley*, 847 F.3d 887, 893 (7th Cir. 2017), *cert. denied sub nom. McDaniel v. Foster*, 138 S. Ct. 554 (2017); *Winston v. Boatwright*, 649 F.3d 618, 632 (7th Cir. 2011). A state-court decision can be a reasonable application even if the result is clearly erroneous. *Woodall*, 572 U.S. at 419. And a state-court decision can withstand habeas review even when the petitioner presents "a strong case for relief."

Harrington, 562 U.S. at 102. Only when a state-court decision is "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement" does it constitute an unreasonable application of clearly established law. *Id.* at 103; *Woodall*, 572 U.S. at 420. This standard is as Congress intended: "difficult to meet." *Harrington*, 562 U.S. at 102; *Sexton*, 138 S. Ct. at 2558. As we have said, solely in "those relatively uncommon cases in which state courts veer well outside the channels of reasonable decision-making about federal constitutional claims" is habeas relief appropriate. *Dassey v. Dittmann*, 877 F.3d 297, 302 (7th Cir. 2017) (en banc), *cert. denied*, 138 S. Ct. 2677 (2018).

This is not one of those uncommon cases. In our narrow habeas review, we need not, and do not, endorse the constitutionality of the trial court's unusual *ex parte*, *in camera* examination without counsel's active participation. *See, e.g.*, *Marshall v. Rodgers*, 569 U.S. 58, 64 (2013) (per curiam). It is enough to say that the Supreme Court has "never addressed" a case like this one—factually or legally—and so we cannot brand the state-court decision unreasonable. *Carey*, 549 U.S. at 76.

A. Right-to-Counsel Claim

The Sixth Amendment provides that in "all criminal prosecutions, the accused shall enjoy the right … to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. This right means more than a lawyer at trial. *See Powell v. Alabama*, 287 U.S. 45, 60–66 (1932). It ensures that defendants facing incarceration will have counsel at "all critical stages of the

criminal process." *Marshall*, 569 U.S. at 62 (citation omitted); *see also, e.g.*, *Lee v. United States*, 137 S. Ct. 1958, 1964 (2017).

Schmidt's claim is not about the effectiveness of his lawyer, a claim which would require him to show prejudice. *See Strickland v. Washington*, 466 U.S. 668 (1984). He argues, instead, that his lawyer's court-ordered silence during the examination completely deprived him of counsel at a critical stage, such that prejudice is therefore presumed. This type of claim has its roots in *United States v. Cronic*, 466 U.S. 648 (1984). In *Cronic*, decided the same day as *Strickland*, the Supreme Court synthesized its right-to-counsel jurisprudence to date and, in doing so, described the "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *Cronic*, 466 U.S. at 658; *see also, e.g.*, *Bell v. Cone*, 535 U.S. 685, 695–96 (2002) (describing *Cronic*'s "three situations"); *Reynolds v. Hepp*, 902 F.3d 699, 705 (7th Cir. 2018) (same).

Schmidt invokes *Cronic*'s first and "[m]ost obvious" circumstance—"the complete denial of counsel."[2] *Cronic*, 466 U.S. at 659. Such a denial need not last the entire proceeding, but it must occur during a critical stage. *Id. Cronic* explained that the Court has "uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage." *Id.* at 659 n.25. That explanation referred to cases in which counsel had not been appointed to represent

[2] *Cronic*'s other two scenarios concern (1) instances in which counsel fails entirely to subject the prosecution to meaningful adversarial testing and (2) circumstances in which even a fully competent lawyer likely could not provide effective assistance. *Cronic*, 466 U.S. at 658–60. Schmidt's claim does not fit into either scenario, and he does not contend otherwise.

the accused at the time of a critical stage in the proceeding, *White v. Maryland*, 373 U.S. 59 (1963) (per curiam) (no counsel present at entry of plea); *Hamilton v. Alabama*, 368 U.S. 52 (1961) (no counsel present at arraignment), or cases in which a court order or state law barred counsel from assisting during a critical stage of the trial, *Geders v. United States*, 425 U.S. 80 (1976) (bar on consultation during overnight recess); *Herring v. New York*, 422 U.S. 853 (1975) (bar on summation); *Brooks v. Tennessee*, 406 U.S. 605 (1972) (law requiring defendant to testify first at trial or not at all); *Ferguson v. Georgia*, 365 U.S. 570 (1961) (bar on eliciting client's trial testimony). At all rates, *Cronic* and later decisions emphasize that the denial must be "complete" to warrant the presumption of prejudice. *Cronic*, 466 U.S. at 659; *Wright v. Van Patten*, 552 U.S. 120, 125 (2008); *Roe v. Flores-Ortega*, 528 U.S. 470, 483 (2000); *see also Penson v. Ohio*, 488 U.S. 75, 88 (1988).

Cronic and its kin are clearly established law, but they come with two caveats. First, the presumption of prejudice is "narrow." *E.g.*, *Florida v. Nixon*, 543 U.S. 175, 190 (2004); *Smith v. Brown*, 764 F.3d 790, 796 (7th Cir. 2014). It arises only when the denial of counsel is extreme enough to render the prosecution presumptively unreliable. *Flores-Ortega*, 528 U.S. at 484; *see also Mickens v. Taylor*, 535 U.S. 162, 166 (2002). That happens rarely: only once in the thirty-plus years since *Cronic* has the Court applied the presumption of prejudice it described in a critical-stage case. *See Penson*, 488 U.S. at 88 (presuming prejudice where the defendant lacked counsel for appeal). Second, the Court has outlined the principles behind the *Cronic*-described rights in only general terms. As a result, the "precise contours" of these rights "remain unclear." *Donald*, 135 S. Ct. at 1377 (quoting *Woodall*, 572 U.S. at 424); *see also Van Patten*, 552 U.S. at 125. State courts therefore "enjoy

'broad discretion' in their adjudication" of them.[3] *Donald*, 135 S. Ct. at 1377 (quoting *Woodall*, 572 U.S. at 424); *accord Yarborough*, 541 U.S. at 664. Mindful of those principles, we turn to the reasonableness of the state-court decision denying Schmidt's claim that (1) at a critical stage (2) he was completely denied counsel.

1. Critical Stage

The Supreme Court has not provided a concise explanation of what constitutes a critical stage. *Van v. Jones*, 475 F.3d 292, 312 (6th Cir. 2007). Broadly, it has described a critical stage as a "step of a criminal proceeding" that holds "significant consequences for the accused." *Bell*, 535 U.S. at 696 (citations omitted). Alternatively, though still broadly, the Court has said that whether a stage is critical depends on whether, during a "particular confrontation," the accused faces prejudice that counsel could "help avoid." *United States v. Wade*, 388 U.S. 218, 227 (1967); *see also Rothgery v. Gillespie Cty., Tex.*, 554 U.S. 191, 212 (2008) (stating "what makes a stage critical is what shows the need for counsel's presence"); *United States v. Ash*, 413 U.S. 300, 313 (1973) (describing a critical stage as a moment in which the accused requires "aid in coping with legal problems or assistance in meeting his adversary").

However described, the Supreme Court has recognized a range of pretrial, trial, and posttrial events to count as critical stages. *See, e.g.*, *Montejo v. Louisiana*, 556 U.S. 778, 786 (2009) (postindictment interrogation); *Iowa v. Tovar*, 541 U.S. 77, 87

[3] We avoid calling these claims "*Cronic* claims," as some have. *Cronic* itself was not a case "in which the surrounding circumstance make it unlikely that the defendant could have received the effective assistance of counsel." 466 U.S. at 666. *Cronic* explained the rare types of cases in which courts presume prejudice, but it did not exemplify any of them.

(2004) (plea hearing); *Penson*, 488 U.S. at 88 (appeal); *Estelle v. Smith*, 451 U.S 454, 470–71 (1981) (court-ordered psychiatric evaluation); *Coleman v. Alabama*, 399 U.S. 1, 9–10 (1970) (plurality) (preliminary hearing); *Wade*, 388 U.S. at 236–37 (postindictment lineup); *Mempa v. Rhay*, 389 U.S. 128, 134 (1967) (sentencing); *White*, 373 U.S. at 59–60 (plea entry); *Hamilton*, 368 U.S. at 53 (arraignment). Yet the Court has not confronted the circumstance that this case presents: a deprivation of counsel during an *in camera* examination, which was conducted as a part of a broader, pretrial evidentiary presentation. Its decisions, therefore, do not bind us on how to assess the relevant stage, whether as the *in camera* examination alone or as the entire evidentiary presentation.

That gap in the law shows itself here. In his papers, Schmidt contended that the *in camera* examination was itself the relevant critical stage. At oral argument, his counsel seemed to take a different approach. She submitted that the critical stage was the "entire proceeding" regarding the sufficiency of Schmidt's provocation evidence, "one portion" of which was the *in camera* examination. Under this view, the critical stage comprised in-court hearings, briefing, an offer-of-proof submission, oral arguments, and, of course, the *in camera* examination. The dissent, for its part, submits that both the *in camera* examination and the broader evidentiary presentation are critical stages unto themselves, a conclusion which means there can be critical stages within critical stages. That may be one way to look at the problem. No Supreme Court decision says that it is the only or right way.

We need not resolve how to define the scope of a critical stage in cases like this one. Nor do we need to decide whether this case presents a critical stage, whatever its scope, under

clearly established law. AEDPA governs our review, and we note only that these unanswered threshold questions portend this case's unsuitability for habeas relief. We can assume this case involves a critical stage, and whether that stage was the entire evidentiary presentation or only the *in camera* examination, Schmidt cannot meet the second part of the analysis—that he was so deprived of counsel as to mandate the presumption of prejudice.

2. Complete Deprivation

Schmidt's *Cronic*-based claim lies only when there is a "*complete* denial of counsel during a critical stage." *Flores-Ortega*, 528 U.S. at 483 (emphasis added) (citing *Cronic*, 466 U.S. at 659; *Penson*, 488 U.S. at 88; *Smith v. Robbins*, 528 U.S. 259, 286 (2000)); *see also Glebe v. Frost*, 135 S. Ct. 429, 431 (2014) (per curiam). Only for such out-and-out deprivations—those "on par with total absence"—does the Court's precedent require the presumption of prejudice. *Van Patten*, 552 U.S. at 125; *see also, e.g.*, *Donald* 135 S. Ct. at 1377.

Looking at the evidentiary presentation in its entirety, Schmidt suffered nothing near a complete denial of counsel. During the stage in question, Schmidt's lawyer filed the notice of the provocation defense, argued for its application during court hearings, briefed the law, and submitted a detailed offer of proof and an annotated witness list. Save for the one portion of the stage in which the trial court held the *in camera* examination, Schmidt had full access to counsel. No Supreme Court precedent suggests, much less establishes, that such facts warrant the presumption of prejudice.

Even if the proper critical stage is the *in camera* examination in isolation rather than the entire evidentiary

presentation, the result is the same. During the examination, as the trial court made clear, Schmidt's lawyer was "present" but could "not participat[e]." Schmidt insists that this deprived him of counsel, and, to an extent, we agree. But again: the deprivation must be "complete" to mandate the presumption of prejudice.

Schmidt and his counsel consulted immediately before the examination. In the examination, the trial court repeatedly referenced, and made plain that he was working from, the offer of proof Schmidt's lawyer drafted. The trial court later noted that the "nature and detail" of the offer of proof reflected that counsel had discussed its many factual assertions with Schmidt. Schmidt and his lawyer consulted again during a recess in the examination, as the state court of appeals observed. *See Schmidt*, 824 N.W.2d at 853. In that recess, Schmidt and his counsel—who had the benefit of hearing the trial court's questions and his client's answers—discussed the offer of proof, the focus of the *in camera* examination. *See id.* To be sure, Schmidt otherwise lacked assistance during the examination. But he was not entirely, or "completely," without his lawyer's help, and so a fair-minded jurist could conclude that the presumption does not apply. *Cf. Penson*, 488 U.S. at 88; *Cronic*, 466 U.S. at 659.

No clearly established holding of the Supreme Court mandates otherwise. We, for example, have twice said that the Court's decisions establish a presumption of prejudice only when counsel was "*physically absent* at a critical stage." *Morgan v. Hardy*, 662 F.3d 790, 804 (7th Cir. 2011) (emphasis added) (citations omitted); *McDowell v. Kingston*, 497 F.3d 757, 762 (7th Cir. 2007) (citations omitted); *see also Rodgers*, 569 U.S. at 64 (stating a circuit court may rely on circuit precedent to

determine whether it has recognized a "particular point in issue" as clearly established). We acknowledge that *Morgan* and *McDowell* overstated the law; the Supreme Court has in fact presumed prejudice for some constructive denials during a critical stage despite counsel's physical presence. *See Herring*, 422 U.S. at 865; *Ferguson*, 365 U.S. at 571. Yet we do not think a state court unreasonably errs for understanding the Court's decisions in the same way that we have. *See Woodall*, 572 U.S. at 422 n.3 (noting that divergent court of appeals decisions "illustrate the possibility of fairminded disagreement").

Or take how we explained the Court's precedent in *Kitchen v. United States*, 227 F.3d 1014 (7th Cir. 2000). In *Kitchen*, we described the Court's complete-denial cases (specifically in the appellate-stage context) as establishing that the presumption of prejudice applies only when "defendants have had *no* assistance of counsel for *any* issues." 227 F.3d at 1020–21 (emphases in original) (citing *Flores-Ortega*, 528 U.S. at 483). Not so for Schmidt, who again consulted with his lawyer before and during the examination and reviewed the offer of proof that his lawyer prepared before answering questions focused on that offer.

Consider also *Estelle v. Smith*. In *Estelle*, a defendant submitted to a court-ordered psychiatric examination, but neither the state nor the trial court notified his appointed counsel. 451 U.S. at 470–71. That evaluation "proved to be a 'critical stage'" in his prosecution because the state later used the findings against the defendant. *Id.* The Court, however, did not take issue with the counsel's absence *during* the critical stage. *See id.* It instead held that the defendant's inability to consult with his counsel before "making the significant decision of whether to submit to the

examination"—that is, his inability to consult with counsel before entering the critical stage—violated his right to counsel. *Id.* at 471. Apply *Estelle*'s reasoning here: Schmidt could, and did, consult with his counsel before submitting to (and during) the *in camera* examination, and thus the right-to-counsel problem does not necessarily follow.[4]

Of all the Supreme Court's decisions, *Ferguson* comes closest to establishing a principle that the state-court decision may have misapplied. *Cronic* described *Ferguson* as a presumed-prejudice case because, there, counsel was "prevented from assisting the accused during a critical stage" (though *Ferguson* did not use the phrase "critical stage"). 466 U.S. at 659 n.25. Specifically, *Ferguson* involved a Georgia law that prohibited a defendant from testifying in his own defense. 365 U.S. at 570–71. By extension, the law prohibited a defendant from having counsel elicit his testimony. The Court held that the Georgia law denied the defendant "the guiding hand of counsel" and was therefore unconstitutional. *Id.* at 572 (quoting *Powell*, 287 U.S. at 69).

To conclude that *Ferguson* clearly established a rule subject to misapplication here is to read it at too high a level of generality. *See Long*, 874 F.3d at 547. *Ferguson* held only that a state law effectively banning counsel from eliciting his client's trial testimony was unconstitutional. It did not establish that

[4] As the vacated panel opinion noted, *Estelle*, like this case, involved a "non-adversarial setting where the prosecutor was absent." *Schmidt*, 891 F.3d at 313. We express no opinion as to whether *ex parte* examinations—if ever necessary—require active and unhampered counsel. The point remains, however, that no clearly established Supreme Court holding tells us what constitutes a complete denial of counsel in those unique circumstances.

defendants have an absolute right to have their counsel elicit any important testimony, or else prejudice will be presumed. Here, in fact, Schmidt did not even ask that his counsel elicit his testimony—he objected to the need to adduce more evidence, but he agreed that an *in camera* examination was appropriate to address the trial court's concerns. What is more, *Ferguson* concerned (1) a defendant's statements (2) about his innocence (3) during a jury trial. This case concerns (1) a defendant's response to questions, in part guided by his written offer of proof, (2) regarding the admissibility of a defense (3) in chambers. Those distinctions matter. *Ferguson* worried about the "tensions of a *trial*," embarrassment before "*public* assemblies," the chance to establish a defendant's "*innocence*," and the risk that he could "*overlook*[ ] important" exculpatory facts. *Ferguson*, 365 U.S. at 594–96 (emphases added) (citations and quotations omitted). With none of those worries pressing here, it is hardly "obvious" that *Ferguson* must control. *Long*, 874 F.3d at 549.

One may still argue that where state action (as opposed to a lawyer's neglect) causes a less-than-complete deprivation during a critical stage, prejudice should still be presumed. A loose reading of *Cronic*, which noted that the Court has presumed prejudice when counsel was "prevented from assisting the accused during a critical stage," could support that view. 466 U.S. at 659 n.25 (citing, among other cases, *Geders*, 425 U.S 80; *Herring*, 422 U.S. 853; *Brooks*, 406 U.S. 605; *Ferguson*, 365 U.S. 570); *see also Strickland*, 466 U.S. at 692 (citing *Cronic* for the proposition that "prejudice is presumed … [after] various kinds of state interference with counsel assistance"). But that view would be mistaken, at least as far as clearly established law is concerned. The Court's decisions, *Cronic* included, speak of the "complete denial of counsel" at

a critical stage. *Van Patten*, 552 U.S. at 125 (quoting *Cronic*, 466 U.S. at 659); *Bell*, 535 U.S. at 696; *Flores-Ortega*, 528 U.S. at 483. There is no clearly established lesser standard for state-action denials.

Glebe makes that clear. *Glebe*, like *Herring*, involved a court-ordered restriction on summation. *Cronic* described *Herring* as a critical-stage case (though *Herring*, like *Ferguson*, did not use the phrase), and *Herring* held that a bar on all trial summation violated the right to counsel. *Cronic*, 466 U.S. at 659 n.25; *Herring*, 422 U.S. at 865. In *Glebe*, the Court considered whether a court-ordered *partial* bar on trial summation warranted the presumption of prejudice on habeas review. The Court said it did not, because its precedent, namely *Herring*, establishes only that the "*complete denial* of summation" requires the presumption. 135 S. Ct. at 431 (emphasis in original) (citing *Herring*, 422 U.S. 853). Even though a court order caused the deprivation, *Glebe* held the petitioner's claim to the prevailing standard that the Court's precedents establish—that of a "complete denial." *Id.* So too must we hold Schmidt's claim on habeas review.

The dissent sees the Supreme Court's jurisprudence differently. It focuses on the fact that an accused is entitled to effective counsel for every part of a critical stage. But the existence of that right does not mean courts must presume prejudice if it is infringed. The Court ruled out that possibility by requiring a "complete denial of counsel during a critical stage." *Flores-Ortega*, 528 U.S. at 483 (citing *Cronic*, 466 U.S. at 659).

The dissent also reads the Supreme Court's decisions to mean that courts may presume prejudice when the state interferes with the assistance of counsel. To get to that general

proposition, the dissent connects *Powell* (which concerned the last-minute appointment of counsel before trial), with *Holloway v. Arkansas*, 435 U.S. 475 (1978) (which concerned a lawyer's conflict of interests), with *Brooks*, *Herring*, and *Geders* (which, as noted, concerned the sequencing of a defendant's testimony, summation, and an overnight recess, respectively), and with *Ferguson*. This reading conflates decisions that the Court, starting in *Cronic*, has thought distinct for right-to-counsel purposes. *Cronic*, 466 U.S. at 659–61 & nn.25, 28 (citing *Brooks*, *Herring*, *Geders*, and *Ferguson* as critical-stage cases and *Powell* and *Holloway* as cases in which "surrounding circumstances made it so unlikely that any lawyer could provide effective assistance"); *see also Bell*, 535 U.S. at 695–96. The approach is also self-defeating. If we must take several dissimilar decisions and reduce them to blanket principles in order to arrive at a general proposition applicable here, the proposition is "far too abstract to establish clearly the specific rule" Schmidt needs. *Lopez*, 135 S. Ct. at 4.

The state-court decision was a reasonable application of Supreme Court law, namely the complete-denial requirement for the presumption of prejudice in critical-stage cases. We could end there, but we add another reason the state-court decision has support. Even eschewing the complete-denial requirement—and venturing beyond clearly established law[5]—a fair-minded jurist could conclude that this case's facts were

[5] The dissent criticizes our focus on the need for a "complete denial" to presume prejudice as a "new theory" in this case. The warden argued in his brief that Schmidt's denial was not complete, and the state court of appeals ruled similarly. *See Schmidt*, 824 N.W.2d at 853. That the vacated panel decision chose not to address the Supreme Court's complete-denial requirement does not make the theory new. *See Schmidt*, 891 F.3d at 318–21.

not "so likely to prejudice the accused" as to warrant the presumption of prejudice upon which Schmidt's case depends. *Cronic*, 466 U.S. at 658.

As noted, Wisconsin's adequate-provocation defense has "both subjective and objective components." *Schmidt*, 824 N.W.2d at 842. The primary purpose of the *in camera* examination was to assess Schmidt's subjective belief of provocation. For that reason, virtually all the trial court's questions were aimed at Schmidt's mental state at the time of the shooting. It inquired: "[W]hat was in your mind at that time?"; "[H]ow things entered into your mind at the time?"; "How did you contemplate these things on the 17th?" It wanted to know "what [Schmidt] contemplated at the time," and what "weighed on [his] mind." If in responding to these questions Schmidt had failed to convince the trial court of his subjective belief of provocation, perhaps his lack of full access to counsel while facing these questions would suggest prejudice. But that is not what happened. The trial court ruled that, based on Schmidt's proffer and his testimony, Schmidt lacked facts "that would drive a *reasonable* person to kill his spouse." It did not decide whether Schmidt lacked adequate subjective evidence but only ruled on the objective prong. The state then conceded on appeal that Schmidt had satisfied the subjective prong. *Schmidt*, 824 N.W.2d at 844 n.5, 850 n.8. The court of appeals, in turn, agreed with the trial court, ruling that Schmidt's defense fell short only for want of objectively adequate provocation evidence. *Id.* at 852.

Schmidt did not have full use of counsel during the examination, but a fair-minded jurist could find that circumstance not presumptively prejudicial. The trial court and court of appeals had plenty before them in deciding

whether Schmidt's evidence sufficed: Schmidt's motion, a brief arguing the defense's legal support, a written offer of proof setting forth the defense's factual support, a summary of 29 witnesses' testimony, counsel's oral argument, and 35 transcript pages of Schmidt's testimony.[6] Schmidt has not cited one fact or piece of evidence that he could have raised during the examination if only he had counsel. He, instead, argues that his testimony was filled with "trivial, irrelevant[ ] matters." That is hard to believe, because he prevailed on the subjective prong. But even if the argument held water, it is unclear how superfluous testimony would likely prejudice him. The state courts needed to look only for "some evidence" of adequate provocation, and we cannot presume that they are prone to distraction or obfuscation by a poorly performing witness. There are therefore grounds to think that the deprivation here did not render "the proceeding presumptively unreliable." *Flores-Ortega*, 528 U.S. at 484. At the least, "[n]o precedent of th[e] Court clearly forecloses that view." *Etherton*, 136 S. Ct. at 1152.

It is true, as the dissent points out, that the judges who have rejected Schmidt's right-to-counsel claim have had different reasons for doing so. Those judges have decided that Schmidt had adequate counsel (the state courts), that the

[6] At oral argument, Schmidt's lawyer emphasized that the state court's analysis rested on Schmidt's *in camera* testimony. This, according to Schmidt's lawyer, undermines the impact of Schmidt's other counseled opportunities to present evidence. The state-court decision did in fact examine the offer, *Schmidt*, 824 N.W.2d at 851–52, and to the extent it focused on Schmidt's testimony that is because on appeal Schmidt "relie[d] primarily upon the *in camera* testimony," *id.* at 846. Schmidt did not even discuss his annotated witness list in his opening brief to the court of appeals. *Id.* at 846 n.7.

examination was not a critical stage (the state court of appeals), that the examination was too incomparable to anything the Supreme Court has considered (the district court), that the examination was not a critical stage under clearly established law (the panel dissent), and that Schmidt was not completely denied counsel under clearly established law (our majority). The dissent thinks this divergence of thought suggests that denying Schmidt relief is an error. The opposite is true. That so many judges see Schmidt's claim differently underscores that there is room for fair-minded disagreement about how to view and resolve Schmidt's claim. *E.g.*, *Harrington*, 562 U.S. at 103.

That room exists because the Supreme Court has never addressed a case like this. Its decisions, instead, emphasize the limited reach of right-to-counsel claims that presume prejudice, especially when considered on habeas review. *See Donald*, 135 S. Ct. at 1377; *Van Patten*, 552 U.S. at 125. Without clearly established law mandating relief, we cannot grant it under AEDPA.

B. Due Process Claim

Schmidt also raises a due process claim. He argues on appeal that the trial court's "inquisitorial" (as opposed to adversarial) procedure for resolving the admissibility of his only defense "was so arbitrary" that it violated his right to present a defense. Schmidt admits that this is a "novel" argument. He submits, however, that novelty does not doom his claim—he argues that the claim should enjoy *de novo* review because the state court of appeals did not address it.[7]

[7] We are not so sure the state court of appeals "inadvertently overlooked" Schmidt's due process claim thus subjecting it to *de novo* review,

The warden argues that Schmidt has procedurally defaulted and waived this claim. There is another problem worth addressing first. In its order denying Schmidt's petition, the district court certified the following for appeal:

> Schmidt's argument that the state court violated his right to present a defense when it ruled he had not met his burden on the state law affirmative defense of adequate provocation.

That is not the argument Schmidt now advances. To be sure, the argument he now advances is difficult to pin down. His opening brief focused on the arbitrariness of the examination's procedure; on reply he submits that his perhaps "esoteric" claim is "not [focused on] the process per se or the result per se" but the "*arbitrariness*, which suffused" both. At any rate, the challenge is not one to the trial court's evidentiary ruling *vis-à-vis* his right to present a defense.

"When a petitioner's case is subject to § 2253(c)," as this case is, "non-certified claims are not properly before this court." *Bolton v. Akpore*, 730 F.3d 685, 698 (7th Cir. 2013). We have, moreover, "repeatedly reminded habeas corpus petitioners, especially when represented by counsel, to request permission before arguing non-certified claims." *Welch v. Hepp*, 793 F.3d 734, 737–38 (7th Cir. 2015) (collecting cases). That much aside, a "defect in a certificate concerning one

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as the district court ruled. *Johnson v. Williams*, 568 U.S. 289, 303 (2013). Before the state court of appeals, Schmidt couched his due process argument in his state-law argument that he was entitled to the defense of adequate provocation. The state court of appeals held that he was not entitled to the defense under state law, and under Schmidt's then-theory that holding likely resolved his due process claim as well. *Schmidt*, 824 N.W.2d at 850–52. We need not decide the issue, though, for reasons explained in the text.

claim does not deprive us of jurisdiction over that claim." *Id.* (citing *Gonzalez v. Thaler*, 565 U.S. 134, 142 (2012)). Looking beyond the certificate-of-appealability problem, we agree with the warden that the due process claim is procedurally defaulted and waived.

A habeas petitioner may not raise a federal claim that he has not exhausted in state court. 28 U.S.C. § 2254(b)(1)(A). He must instead fairly present his federal claim to the state courts so that they have a "fair opportunity" to consider and, if needed, correct the constitutional problem. *Picard v. Connor*, 404 U.S. 270, 275–76 (1971). We have laid out four factors to determine whether a petitioner has defaulted a claim:

> 1) whether the petitioner relied on federal cases that engage in a constitutional analysis; 2) whether the petitioner relied on state cases which apply a constitutional analysis to similar facts; 3) whether the petitioner framed the claim in terms so particular as to call to mind a specific constitutional right; and 4) whether the petitioner alleged a pattern of facts that is well within the mainstream of constitutional litigation.

Brown, 764 F.3d at 796 (quoting *Ellsworth v. Levenhagen*, 248 F.3d 634, 639 (7th Cir. 2001)). These factors are not applied mechanically. The "bottom line" is whether "in concrete, practical terms, … the state court was sufficiently alerted to the federal constitutional nature of the issue to permit it to resolve that issue on a federal basis." *Kurzawa v. Jordan*, 146 F.3d 435, 442 (7th Cir. 1998) (quoting *Verdin v. O'Leary*, 972 F.2d 1467, 1476 (7th Cir. 1992)).

The court of appeals could not have been so alerted here. Schmidt concedes his claim is "novel" in the law. It is neither in the mainstream nor evocative of a specific constitutional right. True, Schmidt did cite *Chambers v. Mississippi*, 410 U.S.

284 (1973), and related cases to the state court of appeals. That, however, was not enough to flag to the state court the claim he now brings. *Chambers* did not deal with "a defendant's ability to present an affirmative defense"—which adequate provocation is under Wisconsin law—nor has *Chambers* been understood to apply in that context. *Gilmore v. Taylor*, 508 U.S. 333, 343 (1993); *see also Kubsch v. Neal*, 838 F.3d 845, 858 (7th Cir. 2016) (en banc).

We afford relatively little leeway to habeas petitioners who try to reformulate due process arguments. *Chambers v. McCaughtry*, 264 F.3d 732, 738 (7th Cir. 2001) (citing *Kurzawa*, 146 F.3d at 443). Schmidt's claim before the state court of appeals was that a "defendant's due process right to a fair trial renders it incumbent upon a trial court to err on the side of admitting evidence of a mitigation defense." That is a far cry from what he argues now, namely, "the trial court's inquisitorial procedure … was so arbitrary that it violated Schmidt's constitutional right to present a defense." These two claims are not variations of the same theory, *see, e.g.*, *McGee v. Bartow*, 593 F.3d 556, 566 (7th Cir. 2010); they are different in kind. Schmidt points to no cause, prejudice, or miscarriage of justice. *See Coleman v. Thompson*, 501 U.S. 722, 750 (1991). His due process claim is procedurally defaulted.

It is also waived. Schmidt's argument at the district court was a straightforward one under *Chambers v. Mississippi*, challenging the trial court's "ruling" and "exclusion" of his defense. He did not, as he does now, challenge the *ex parte*, *in camera* examination as itself violative of due process.

III. Conclusion

Nothing we have said should be mistaken as belief that the *ex parte*, *in camera* examination of Schmidt, held without his counsel's active participation and regarding his principal defense, was in fact constitutional. A pillar of the Sixth Amendment is the right to unhampered counsel; the aim of the Sixth Amendment is to protect the promise of a fair trial tested by adversaries. Trial courts must promote access to counsel and guard the adversarial process while it runs its course. These principles hold even when—especially when—courts meet uncharted waters filled with risk for an accused facing life in prison.

Applied here, trial courts should not opt to hold *ex parte* hearings and silence defense counsel over other, less severe alternatives without exceedingly good reasons. Even then, trial courts must, if necessary, obtain a knowing and voluntary right-to-counsel waiver from the accused for purposes of the hearing.

These, however, are our admonitions. They are not clearly established Supreme Court precedent dictating habeas relief in this case. No such precedent exists. For that reason, we AFFIRM the district court's judgment.

HAMILTON, *Circuit Judge*, joined by WOOD, *Chief Judge*, and ROVNER, *Circuit Judge*, dissenting. The state trial court violated Schmidt's right to counsel. *The judge was questioning the accused* on the merits of the case. Yet *the judge ordered his lawyer not to participate* in the hearing. This constitutional violation was clear even under the demanding standard for federal habeas corpus relief in 28 U.S.C. § 2254(d)(1).

The accused in a criminal case is entitled to the assistance of counsel in any "critical stage" of the prosecution, a category that applies broadly. E.g., *Bell v. Cone*, 535 U.S. 685, 695–96 (2002) (describing a "critical stage" as "a step of a criminal proceeding, such as arraignment, that held significant consequences for the accused"). The Supreme Court's critical-stage cases show beyond reasonable debate that the judge's interrogation of Schmidt about his mitigation defense was a critical stage. By commanding the lawyer to stay silent while the judge interrogated his client, the judge violated the right to counsel that is a foundation of our system of criminal justice. Denying counsel at such a critical stage requires relief without separate proof of prejudice from the denial. E.g., *Bell v. Cone*, 535 U.S. at 695–96; *United States v. Cronic*, 466 U.S. 648, 658–60 (1984).

The majority tries not to decide the critical-stage issue and then denies habeas relief on the new theory that the state court's denial of counsel was not quite "complete." The theory does not hold up against the Supreme Court's right-to-counsel cases, which show that a "complete" denial is *sufficient* to presume prejudice, but it's not *necessary*. The majority, not the Supreme Court, has introduced here the notion that only a "complete" denial of counsel requires a presumption of prejudice. But see *Cronic*, 466 U.S. at 659 n.25 ("The Court

has *uniformly* found constitutional error without any showing of prejudice when counsel was either totally absent, *or prevented from assisting the accused during a critical stage of the proceeding*.") (collecting cases discussed below) (emphases added).

If the judge had simply said that he wanted to hear what the accused had to say without any counsel even present, I could not have imagined, at least before this case, that any court in the United States would find such interrogation acceptable without a valid waiver of counsel by Schmidt himself.

The only difference here is that Schmidt's lawyer was physically present in the room, but the judge might as well have gagged him: he ordered the lawyer not to "participate" in this critical stage of the prosecution. I don't see a constitutional difference between an absent lawyer and a silenced lawyer.

The majority's own discomfort with the state court's extraordinary procedure shines through from beginning to end: "constitutionally dubious," "we discourage the measure," "we … do not endorse the constitutionality of the trial court's unusual … examination," "these … are our admonitions." That discomfort is fully justified.

Readers will notice, in addition to the majority's discomfort, that the theories to justify denying relief to Schmidt kept shifting. The state trial court concluded that Schmidt was not denied counsel at the *ex parte* hearing because his counsel submitted the written offer of proof, made an oral argument, and conferred with Schmidt during the brief recess for the judge's telephone call. That was wrong because Schmidt's testimony

was itself a critical stage. Even if one thinks of the entire pretrial proceeding as the critical stage, Schmidt was entitled to counsel for all of the critical stage, not just part of it. The state appellate court found that the *ex parte* hearing was not a critical stage at all, but "merely a supplementary proceeding conducted for his benefit," so that Schmidt was not entitled to counsel at all. *State v. Schmidt*, 2012 WI App 113, ¶¶ 46–48, 344 Wis. 2d 336, 362–63, 824 N.W.2d 839, 852–53. That was wrong because the hearing so easily satisfied the Supreme Court's criteria for a critical stage: the accused confronted the state, and his interests were at greater risk without counsel. E.g., *United States v. Wade*, 388 U.S. 218, 227 (1967).

The federal district court focused on the unique *ex parte* procedure here, concluding briefly that habeas relief should be denied because the Supreme Court has not yet confronted an identical situation of silenced counsel in an *in camera* hearing. *Schmidt v. Pollard*, No. 13-CV-1150, 2017 WL 1051121, at *11 (E.D. Wis. Mar. 20, 2017). That was more understandable but wrong because § 2254(d)(1) does not insist on such a close fit where the violation of rights is so clear. E.g., *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007).

The panel dissent focused on the absence of the prosecutor, reasoning that the Supreme Court's critical-stage cases did not require state courts to treat Schmidt's testimony as a critical stage. *Schmidt v. Foster*, 891 F.3d 302, 322 (7th Cir. 2018) (Barrett, J., dissenting). That was wrong because the accused was still facing the power of the state (in the person of the judge) during the prosecution, and his interests were very much at risk, especially without counsel.

The en banc majority offers yet another theory: assuming that Schmidt's testimony was a critical stage, the denial of

counsel was not "complete" and did not prejudice him, or at least so the state courts might reasonably have concluded. Cf. *Wilson v. Sellers*, 138 S. Ct. 1188, 1191–92 (2018) (federal habeas review should ordinarily focus on state courts' stated reasons rather than those that might be imagined). The majority's new theory requires it to embrace at least one of two mistaken propositions. The first is that Supreme Court precedents allow state courts to deprive a defendant of counsel for *part* of a critical stage of the prosecution. But see *Ferguson v. Georgia*, 365 U.S. 570 (1961). The second is that Supreme Court precedents allow state courts to silence a lawyer in a critical stage as long as the lawyer is physically present in the room. But see *Cronic*, 466 U.S. at 569 n.25 (collecting the relevant cases). Both propositions are contrary to Supreme Court precedent.

It is widely recognized that the Supreme Court has recently been using summary reversals of decisions granting habeas relief to push lower federal courts toward faithful application of the demanding standard in 28 U.S.C. § 2254(d)(1). In this case, the majority has over-corrected. It denies habeas relief in the face of a blatant violation of the right to counsel. It does so by suggesting immaterial distinctions that the Supreme Court itself has refused to draw in its right-to-counsel decisions. We should grant a writ of habeas corpus to allow petitioner Schmidt a fair chance to show that he was guilty of second-degree murder rather than first-degree murder. I respectfully dissent.

I. *The Facts*

Schmidt's testimony in the *ex parte*, *in camera* hearing addressed the only contested issue in his case. He admitted shooting his wife while he was still standing over her holding a smoking gun. He faced a mandatory life sentence for first-

degree murder. The only way he might have avoided a life sentence was to show that he acted under "adequate provocation," which could have mitigated the crime to second-degree murder. See Wis. Stat. §§ 939.44, 940.01(2)(a).

The judge decided to evaluate the proposed defense before trial. The judge wanted to see if Schmidt could satisfy the modest "some evidence" standard under state law for submitting the defense to the trial jury. See *State v. Schmidt*, 2012 WI App 113, ¶¶ 8–11, 344 Wis. 2d 336, 343–44, 824 N.W.2d 839, 843. We know that Schmidt's testimony was critical for the judge's pretrial decision. The judge had already reviewed a written submission from Schmidt's counsel and had heard argument from both the defense lawyer and the prosecutor. Those submissions had not convinced the judge either way. Before making a decision, the judge wanted to hear directly from Schmidt himself.

The majority places great, perhaps even decisive, importance on the brief recess late during Schmidt's testimony during the *ex parte* hearing. The recess came as a surprise to everyone except the judge, who announced that he needed to make a telephone call. When Schmidt's lawyer asked the judge for permission merely to talk with his client—a phrase that deserves emphasis: merely *to talk* with his client during a recess—the judge told the lawyer he could only review with Schmidt the written offer of proof summarizing the intended defense. This limited opportunity for a brief talk with counsel was not enough to satisfy the Sixth Amendment "in any substantial sense," and to conclude otherwise "would simply be to ignore actualities." *Powell v. Alabama*, 287 U.S. 45, 58 (1932); see also *Geders v. United States*, 425 U.S. 80, 91 (1976) (court

violated right to counsel by preventing counsel from conferring with client during overnight trial recess). At no point during the *in camera* examination was Schmidt's counsel allowed to question him directly to focus attention on the key facts or to guide him toward meeting his burden of production for his defense in mitigation.

II. *Denial of Schmidt's Right to Counsel*

The Supreme Court has taught that it is supposed to be difficult for a habeas petitioner to satisfy the standard of § 2254(d)(1). Schmidt must show that the state courts not only erred but unreasonably applied controlling Supreme Court precedent. *Harrington v. Richter*, 562 U.S. 86, 102 (2011). Since the 1996 amendment of § 2254(d), habeas corpus relief is reserved for rare cases in which state courts have strayed from clearly established federal law. This case meets that standard. Part II-A explains why, under controlling Supreme Court precedent, Schmidt's testimony was a critical stage of the prosecution. Part II-B explains the principal mistakes in the majority's reasoning, which seeks to excuse the state court's denial of counsel in a critical stage on the theories that a state court may deny the accused counsel for *part* of a critical stage and/or that silencing the lawyer by court order during the critical hearing was allowed because it was not a "complete" denial of counsel as long as the lawyer was physically present.

A. *Critical Stage*

The Sixth Amendment guarantees that in "all criminal prosecutions, the accused shall enjoy the right" to "have the Assistance of Counsel for his defence." The Supreme Court has long recognized that the right applies not only at trial but

also at all "critical stages" of the adversary process. E.g., *Powell v. Alabama*, 287 U.S. 45, 57 (1932); *Coleman v. Alabama*, 399 U.S. 1, 9–10 (1970) (plurality opinion); *Hamilton v. Alabama*, 368 U.S. 52, 53–55 (1961); *United States v. Wade*, 388 U.S. 218, 227–28 (1967); *Rothgery v. Gillespie County*, 554 U.S. 191, 212–13 & n.16 (2008). The majority tries not to base its denial of habeas relief on the absence of a critical stage. The majority questions whether this hearing was a critical stage but in the end assumes without deciding that it was. Still, the critical-stage issue must be addressed here. The majority's ultimate conclusion about a less than "complete" denial of counsel depends on its views on the critical-stage issue.

The judge's *ex parte*, *in camera* interrogation of the accused on the merits of his case was certainly a critical stage under the Court's Sixth Amendment right-to-counsel decisions. The majority complains that the Supreme Court has not provided one single definition of a critical stage. The slightly different phrasing in different cases does not reflect substantive uncertainty about the broad and inclusive standard. In *Bell v. Cone*, the Court concisely said that a critical stage is "a step of a criminal prosecution, such as arraignment, that held significant consequences for the accused." 535 U.S. at 695–96. In *Wade*, the Court explained that a court must "scrutinize any pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance at the trial itself," and the court must analyze "whether potential substantial prejudice to defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice." 388 U.S. at

227. And in *United States v. Ash*, the Court said we must "determine whether the accused required aid in coping with legal problems or assistance in meeting his adversary." 413 U.S. 300, 313 (1973).

However the standard is phrased, the judge's interrogation of the accused easily satisfies it. More important than the particular phrasing of the standard are the many Supreme Court decisions actually applying the standard. The sheer number and range of these cases, discussed below, show that the right to counsel at a critical stage is not narrow and fact-bound.

It's not surprising that the Supreme Court has not considered an *ex parte*, *in camera* hearing on a substantive issue quite like this one. Virtually all judges in American courts understand that they simply may not do what this judge did. This hearing was an extraordinary, apparently unprecedented, departure from the most basic standards of criminal procedure in our system of criminal justice: "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." *United States v. Cronic*, 466 U.S. 648, 655 (1984), quoting *Herring v. New York*, 422 U.S. 853, 862 (1975).

By questioning the accused directly, the trial judge here improvised a procedure that abandoned that "very premise of our adversary system of criminal justice." Then he prohibited defense counsel from participating. This hearing thus violated Schmidt's Sixth Amendment right to the assistance of counsel, which "has been understood to mean that there can be no restrictions upon the function of counsel in defending a

criminal prosecution in accord with the traditions of the adversary factfinding process that has been constitutionalized in the Sixth and Fourteenth Amendments." *Herring*, 422 U.S. at 857, quoted in *Cronic*, 466 U.S. at 656 n.15.

In any event, the Supreme Court has explained that 28 U.S.C. § 2254(d)(1) does not require "federal courts to wait for some nearly identical factual pattern" before granting relief. *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007), quoting *Carey v. Musladin*, 549 U.S. 70, 81 (2006) (Kennedy, J., concurring in judgment); see also *Williams v. Taylor*, 529 U.S. 362, 407 (2000) (holding that state courts can unreasonably apply clearly established federal law to facts the Supreme Court has not considered). "Nor does [§ 2254(d)(1)] prohibit a federal court from finding an application of a principle unreasonable when it involves a set of facts 'different from those of the case in which the principle was announced.'" *Panetti*, 551 U.S. at 953, quoting *Lockyer v. Andrade*, 538 U.S. 63, 76 (2003). What matters is the extent of guidance provided by relevant Supreme Court precedents.

Here that guidance is extensive. The Supreme Court has treated as a critical stage every stage of the criminal process between arraignment and appeal that either addresses a substantive issue or risks loss of a procedural right. Critical stages include: a preliminary hearing at which defendant could cross-examine witnesses and otherwise test the evidence against him; arraignments at which defenses must be asserted; entry of a plea; pretrial identification through an in-person line-up; pretrial interrogation by a government informant; sentencing hearings; and deferred sentencing hearings that revoke probation. See *Coleman v. Alabama*, 399 U.S. at 9 (plurality); *id.* at 11 (Black, J., concurring) (preliminary

hearing where defendant could test evidence to avoid indictment and build record for trial); *Hamilton v. Alabama*, 368 U.S. at 54 (arraignment where defenses could be "irretrievably lost, if not then and there asserted"); *White v. Maryland*, 373 U.S. 59, 60 (1963) (entry of plea); *Moore v. Michigan*, 355 U.S. 155, 156, 159 (1957) (entry of plea); *United States v. Wade*, 388 U.S. at 236–37 (pretrial in-person identification); *Massiah v. United States*, 377 U.S. 201, 206 (1964) (pretrial interrogation); *Townsend v. Burke*, 334 U.S. 736, 740–41 (1948) (sentencing); *Mempa v. Rhay*, 389 U.S. 128, 137 (1967) (deferred sentencing and revocation of probation).

The Court has explained its decisions by focusing on the consequences of the particular stage, and in particular on consequences for the defendant's ability to receive a fair trial. See, e.g., *Wade*, 388 U.S. at 227. Looking both at what the Supreme Court has done and at what it has said shows beyond reasonable dispute that testimony on a contested substantive issue is a critical stage of the proceedings. The Court has repeatedly found that pretrial stages were critical as long as the accused risked serious consequences affecting the fairness of the trial. In the face of the extensive body of case law, the majority has not identified any Supreme Court case even suggesting, let alone holding, that a hearing comparable to the one in this case was not a critical stage, or offered a plausible theory for saying it was not.

The *ex parte*, *in camera* hearing certainly had the potential to prejudice Schmidt's defense. The Sixth Amendment analysis focuses on whether there is a potential for prejudice given what or whom the uncounseled defendant must confront and what counsel could do later to fix the defendant's mistakes. E.g., *Ash*, 413 U.S. at 313, 317; *Coleman*, 399 U.S. at 7 (plurality);

id. at 11 (Black, J., concurring); *Wade*, 388 U.S. at 227. In this case, Schmidt was asked to show before trial that he could meet the burden of production to go forward at trial with his only defense in mitigation. No stage was more critical. What happened in the judge's chambers settled Schmidt's fate.

The risks for Schmidt were evident. Without assistance of counsel, he faced the risks that the judge might lose sight of the elements of adequate provocation or might fail to separate the wheat from the extensive chaff in Schmidt's rambling answers. There was also a risk that Schmidt would help the judge, perhaps unconsciously, convert the hearing into a mini-trial on the ultimate merits of the defense rather than a debate about only the burden of production. If Schmidt had met the burden of production—and only that burden—he would have had the right to present his evidence and to argue his defense to the jury. The trial judge's oral ruling suggests that this risk might have been realized here: "The Court finds that the circumstances that led to the death of Kelly Wing did not involve a provocation and it was not an adequate provocation and denies the motion." That conclusion sounds a lot more like a decision on the ultimate merits of the defense than a decision on the burden of production.

In addition, Schmidt's counsel could not fix later the harm done by Schmidt's rambling answers. The judge, having silenced counsel in the *ex parte* hearing, rejected the defense shortly after the hearing ended. When counsel tried to revisit the issue shortly before trial, the judge refused, saying he had already made his decision. Because counsel could not later undo the harm to Schmidt, the risk of prejudice at the evidentiary hearing affected his trial.

Finally, there should be no doubt that Schmidt could have benefited from his attorney's help at the hearing. In *Ferguson v. Georgia*, 365 U.S. 570, 594–96 (1961), the Supreme Court explained the need for counsel in a context very close to this case. At that time, Georgia prohibited the accused from testifying in his own defense, but state law allowed the accused to make an unsworn statement to the jury. In making such a statement, however, the accused ordinarily had to do so without questioning by his counsel to guide him.

The Supreme Court held in *Ferguson* that the accused had a right to have his lawyer question him to help elicit his statement. In explaining this conclusion, the Court quoted Chief Justice Cooley, the nineteenth-century jurist from Michigan, in a lengthy passage that recognizes how essential a lawyer's help can be, and that fits Schmidt's case well:

> But to hold that the moment the defendant is placed upon the stand he shall be debarred of all assistance from his counsel, and left to go through his statement as his fears or his embarrassment may enable him, in the face of the consequences which may follow from imperfect or unsatisfactory explanation, *would in our opinion be to make, what the statute designed as an important privilege to the accused, a trap into which none but the most cool and self-possessed could place himself with much prospect of coming out unharmed*. An innocent man, charged with a heinous offence, and against whom evidence of guilt has been given, is much more likely to be overwhelmed by his situation, and embarrassed, when called upon for explanation, than

> the offender, who is hardened in guilt; and *if he is unlearned, unaccustomed to speak in public assemblies, or to put together his thoughts in consecutive order any where, it will not be surprising if his explanation is incoherent, or if it overlooks important circumstances.*

365 U.S. at 595–96 (emphases added), quoting *Annis v. People*, 13 Mich. 511, 519–20 (1865) (reversing conviction where trial judge had not allowed defense counsel to remind defendant he had omitted a material fact from his statement).

Schmidt was not innocent, but the danger that *Ferguson* described came to pass here. Without the guidance of counsel's questioning, Schmidt provided a rambling and disjointed narrative, much like the defendants in *Ferguson* and *Annis*. Even without the assistance of counsel, Schmidt's account of the circumstances came close to supporting his defense in mitigation. (The state appellate court said that was a "close question.") The "Assistance of Counsel for his defence" could have helped Schmidt organize the facts, present a coherent and legally relevant response, and meet the burden of production. Without counsel acting in that role at this critical stage, "a serious risk of injustice infects the trial itself." *Cronic*, 466 U.S. at 656, quoting *Cuyler v. Sullivan*, 446 U.S. 335, 343 (1980).

The majority, however, struggles with the critical-stage issue, unsure whether it should focus on the entire pretrial evaluation of Schmidt's mitigation defense or on only Schmidt's interrogation by the judge. Precedent and common sense show that both are properly considered critical stages for purposes of the Sixth Amendment.

In terms of precedent, for example, *Ferguson* shows that when the accused tells the trier of fact his story, that's a critical stage *by itself*. Denying assistance of counsel for just that part of the trial required reversal, though counsel was present and active in defending during the rest of the trial. See also, e.g., *Herring*, 422 U.S. at 857 (closing argument was critical stage).

In terms of common sense, consider the alternative view adopted by the state appellate court, that Schmidt's testimony was not itself a critical stage. If that were correct, then the judge could have excluded Schmidt's lawyer entirely without violating the right to counsel. Yet in light of the Supreme Court's many decades of right-to-counsel decisions, it is hard to imagine a more clear-cut example of an unconstitutional denial of counsel. Schmidt was entitled to the assistance of counsel both while he was testifying and throughout the pre-trial proceeding, just as he was throughout the prosecution. On the other side of the coin, neither the Wisconsin appellate court, the state's lawyers, nor the majority has offered a theory for treating Schmidt's testimony as anything other than a critical stage that can be reconciled with the Supreme Court's expansive treatment of the right to counsel.[1]

B. *The Violation of Schmidt's Right to Counsel*

The judge's order silencing Schmidt's lawyer during the interrogation violated Schmidt's right to counsel. The state

[1] The majority questions whether it's possible to have "critical stages within critical stages." Ante at 16. Of course it is. A trial is a critical stage; so is just the trial testimony of an eyewitness to the crime. A motion to suppress is a critical stage; so is just the testimony of the police officer that the accused consented to the search. It would be unreasonable to conclude otherwise and to think the accused could be denied counsel for *any* of those portions of the prosecution.

courts' different conclusion was, in terms of § 2254(d)(1), an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States.

The Sixth Amendment, of course, guarantees the *effective* assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Cronic*, 466 U.S. at 654; *McMann v. Richardson*, 397 U.S. 759, 771 (1970). A lawyer can be constitutionally ineffective either because of the lawyer's own errors or because the government interferes with the lawyer's performance. *Strickland*, 466 U.S. at 687, 692; *Cronic*, 466 U.S. 658–60 (categorizing circumstances when government interference with attorney performance violates Sixth Amendment and prejudice is presumed). Interference is what happened here, by judicially-enforced silence.

1. *The Presumption of Prejudice*

The government violates the Sixth Amendment when it interferes to such an extent that, "although counsel is available to assist the accused," the "likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct." *Cronic*, 466 U.S. at 659–60. The Supreme Court has applied the presumption of prejudice to a wide variety of forms of interference with counsel at all stages of prosecutions. And it has done so where the interference fell well short of what the majority calls a "complete" denial of counsel.

As early as *Powell v. Alabama*, the Court held that "defendants were not accorded the right of counsel in any substantial sense" when the court appointed defense lawyers for the

Scottsboro Boys but did so on the morning of trial, giving them no adequate time to prepare for trial. 287 U.S. at 57–58.

In *Ferguson v. Georgia*, the Court found unconstitutional a rule that prohibited defense counsel—though physically present at trial and assisting in all other portions of the trial—from directly examining a defendant who chose to speak in his own defense. 365 U.S. at 596.

In *Geders v. United States*, the Court found that "an order preventing petitioner from consulting his counsel 'about anything'" overnight during trial "impinged upon his right to the assistance of counsel." 425 U.S. 80, 91 (1976).

In *Brooks v. Tennessee*, the Court held that a rule requiring a defendant to testify first or not at all deprived the accused of "the 'guiding hand of counsel' in the timing of this critical element of his defense." 406 U.S. 605, 612–13 (1972).

In *Herring v. New York*, the Court held that complete denial of counsel's ability to offer a summation was "a denial of the basic right of the accused to make his defense." 422 U.S. at 859.

And in *Holloway v. Arkansas*, the Court found that the "mere physical presence of an attorney does not fulfill the Sixth Amendment guarantee" when the state refused to appoint counsel free of conflicts of interest. 435 U.S. 475, 490 (1978). The lawyer's "conflicting obligations … effectively sealed his lips on crucial matters." *Id*.

In all of these cases, the Court explained in *Cronic*, the interference with defense counsel had led to a presumption of prejudice. 466 U.S. at 659–61. The Court added in *Cronic* that it had "*uniformly* found constitutional error" when counsel was "either totally absent, *or prevented from assisting the accused*

during a critical stage." 466 U.S. at 659 n.25 (emphases added) (collecting Supreme Court's cases).

Given these cases and the Court's own summary of them, it is simply not reasonable to conclude that the physical presence of a silenced lawyer satisfies the Sixth Amendment or avoids the presumption of prejudice. Schmidt's counsel was, in the trial judge's own words, "just … present" and "not saying anything" during the hearing. The judge told Schmidt—and assured the prosecutor—that his lawyer would not speak during the hearing. Once in chambers, the judge repeated the command that Schmidt's lawyer not participate. And throughout the *ex parte* hearing, Schmidt spoke uninterrupted by his counsel for long enough to fill thirty-five transcript pages. The judge addressed Schmidt directly, not his lawyer. Consistent with the judge's assurance to the prosecutor, the judge never gave the lawyer an opportunity to question Schmidt himself, to focus on key facts or to fill in gaps.

The state—in the person of the judge—thus prevented Schmidt's lawyer from performing the "role that is critical to the ability of the adversarial system to produce just results." *Strickland*, 466 U.S. at 685. Schmidt's lawyer was not allowed to speak while the judge conducted his own interrogation of Schmidt on the most important issue in his defense. It was objectively unreasonable for the state court to conclude that Schmidt's counsel could have provided effective assistance and meaningfully tested the arguments against the provocation defense by "not saying anything." See *Cronic*, 466 U.S. at 656, citing *Anders v. California*, 386 U.S. 738, 743 (1967) (summarizing Supreme Court precedent requiring counsel acting as an advocate).

2. The Majority's Erroneous Premises

The majority concedes that Schmidt was denied counsel "to an extent," ante at 18, but justifies denial of habeas relief on the theory that Schmidt's deprivation of counsel was not "complete," so that the presumption of prejudice does not apply. The majority offers two branches of reasoning to support this conclusion. Both run contrary to clear Supreme Court precedents on the right to counsel.

a. *Denial for Part of a Critical Stage?*

One branch of reasoning requires the majority to take sides on the issue it says it does not decide: whether to consider Schmidt's interrogation as a critical stage by itself. To conclude that the denial of counsel was not complete, the majority expands the lens to view the entire pretrial proceeding to evaluate the mitigation defense: "Schmidt's lawyer filed the notice of the provocation defense, argued for its application during court hearings, briefed the law, and submitted a detailed offer of proof and an annotated witness list." Ante at 17. That is all true but beside the point, as a matter of fact and law.

As a matter of fact, the judge clearly had not made up his mind based on that information submitted with the lawyer's assistance. The decision point for the judge was his *in camera* interrogation. Shortly after it ended, the judge made a final decision that Schmidt would not be allowed to present his defense to the jury. Schmidt was denied counsel during that critical event due to the court's order silencing his lawyer.[2]

[2] Since Schmidt's testimony in the *in camera* hearing was so central to the judge's decision, it is difficult to understand the state appellate court's

As a matter of law, allowing a defense lawyer to submit written and oral arguments cannot justify excluding or silencing the lawyer for his client's oral testimony. Consider, for example, a motion to suppress evidence in a criminal case. The defense lawyer submits a brief and affidavits in advance of the evidentiary hearing and then makes an opening statement. Could the judge then send the lawyer away (or silence her) during the live witness testimony, or even the defendant's own testimony? Surely not, yet under the majority's rationale, it would seem to be acceptable for the judge simply to excuse the defense lawyer while her client is cross-examined, whether in a hearing on a motion to suppress or at trial. After all, the lawyer would have participated in all other aspects of the hearing or trial. Under the majority's reasoning, there would not be a "complete" denial of counsel at that critical stage of the trial.

This reasoning runs contrary to *Ferguson* and *Herring*, among other cases. In both, a state court prevented counsel from providing effective assistance at a critical stage within a larger critical stage. I am aware of no support for the majority's logic in the Supreme Court's critical-stage jurisprudence, and I hope that no court would follow the majority's logic to the conclusion allowing denial of counsel for "part" of any critical stage. Yet the majority's insistence that only a supposedly "complete" denial of counsel supports a presumption of prejudice certainly points that way.

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treatment of that hearing as not a critical stage but "merely a supplementary proceeding conducted for [Schmidt's] benefit." See *Schmidt*, 2012 WI App. 113 ¶ 46, 344 Wis. 2d at 362, 824 N.W.2d at 852.

b. *Denial of Counsel Need Not Be "Complete"*

So let's shift back to treat the *in camera* examination itself as a critical stage. It is beyond dispute that Schmidt's counsel was silenced for the entirety of the judge's questioning, and the judge never modified his order to offer counsel an opportunity to supplement.

The majority builds its entire decision on the premise that Supreme Court precedent requires a "complete" denial of counsel to invoke the presumption of prejudice. See ante at 17–26. That premise is demonstrably wrong. Start with *United States v. Cronic*, where the Court described the "complete denial of counsel" as the "[m]ost obvious" situation for presuming prejudice. 466 U.S. at 659. It is surely correct that a "complete" denial of counsel is sufficient to invoke the presumption of prejudice, but *Cronic* and other cases cannot be read to say a "complete" denial is necessary to invoke that presumption.

In that same paragraph, *Cronic* dropped a footnote that shows the majority's reading of Supreme Court precedent is simply wrong:

> The Court has *uniformly* found constitutional error without any showing of prejudice when counsel was either totally absent, *or prevented from assisting the accused during a critical stage of the proceeding*. See, e.g., *Geders v. United States*, 425 U.S. 80 (1976); *Herring v. New York*, 422 U.S. 853 (1975); *Brooks v. Tennessee*, 406 U.S. 605, 612–613 (1972); *Hamilton v. Alabama*, 368 U.S. 52, 55 (1961); *White v. Maryland*, 373 U.S. 59, 60 (1963) (per curiam); *Ferguson v. Georgia*, 365

> U.S. 570 (1961); *Williams v. Kaiser*, 323 U.S. 471, 475–476 (1945).

466 U.S. at 659 n.25 (emphases added). Of the cited cases, *Geders*, *Herring*, *Brooks*, and *Ferguson* fit the description that counsel was "prevented from assisting the accused during a critical stage of the proceeding." (In *Hamilton*, *White*, and *Williams*, the accused had no counsel at a critical stage.)

In the text, *Cronic* then explained that the presumption of prejudice applied in the Scottsboro Boys case, *Powell v. Alabama*, because the same-day appointment of counsel in the capital case made it so unlikely that even a fully competent lawyer could provide effective assistance. 466 U.S. at 659–61. *Cronic* went on to collect other cases where counsel were present but forced to go to trial on schedules that made effective assistance impossible. 466 U.S. at 661 n.28. Footnote 28 also explained that ineffectiveness is presumed (i.e., prejudice is presumed) when counsel "actively represented conflicting interests," citing *Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980); *Flanagan v. United States*, 465 U.S. 259, 268 (1984); *Holloway v. Arkansas*, 435 U.S. at 489–90; and *Glasser v. United States*, 315 U.S. 60, 67–77 (1942).

In short, while a "complete" denial of counsel is sufficient to invoke the presumption of prejudice, the *Cronic* opinion itself rebuts the majority's assertion that "the denial must be 'complete' to warrant the presumption of prejudice." Ante at 14.[3]

[3] Given the clear language in *Cronic* discussed above, I do not see how the majority can describe this account as a "loose reading of *Cronic*." Ante at 21.

Nor do later cases fill in that gap for the majority. *Roe v. Flores-Ortega*, 528 U.S. 470, 483 (2000), held that a defense lawyer's refusal to file a notice of appeal upon his client's request was ineffective per se, requiring relief in the form of permission to pursue an appeal without requiring proof of prejudice. The *Flores-Ortega* opinion quoted and cited cases to the effect that a complete denial of counsel supports a presumption of prejudice. *Id*. at 483, citing *Robbins*, at 286 ("denial of counsel altogether … warrants a presumption of prejudice"), and *Penson v. Ohio*, 488 U.S. 75, 88–89 (1988) ("complete denial of counsel on appeal requires a presumption of prejudice"). Again, these comments to the effect that a "complete" denial of counsel invokes the presumption of prejudice do not show that *only* a complete denial will suffice. And the language in *Flores-Ortega* cannot reasonably be read to erase from the books *Cronic*, *Holloway*, *Geders*, *Herring*, *Brooks*, *Powell*, and *Ferguson*, which show that the presumption of prejudice applies to less-than-complete denials of counsel when a court makes it impossible for counsel to provide effective assistance.

To support its requirement of "complete" denial, the majority also cites *Wright v. Van Patten*, 552 U.S. 120, 125 (2008), where the Court held that its precedents did not require a presumption of prejudice where a state court allowed the defense lawyer to appear at a guilty-plea hearing by speakerphone. *Wright* quoted, among other things, the critical note 25 from *Cronic*, saying that prejudice is presumed when counsel is either totally absent or prevented from assisting the accused during a critical stage of the proceeding. 552 U.S. at 125. *Wright* did not impose a new requirement of "complete" denial of counsel, erasing in passing *Cronic* and the cases that it (and I have) cited. Here's the key passage from *Wright*:

> Our precedents do not clearly hold that counsel's participation by speakerphone should be treated as a "complete denial of counsel," on par with total absence. Even if we agree with Van Patten that a lawyer physically present will tend to perform better than one on the phone, it does not necessarily follow that mere telephone contact amounted to total absence *or "prevented [counsel] from assisting the accused,"* so as to entail application of *Cronic*. The question is not whether counsel in those circumstances will perform less well than he otherwise would, but whether the circumstances are likely to result in such poor performance that an inquiry into its effects would not be worth the time.

552 U.S. at 125 (emphasis added). This passage from *Wright* also cannot be fairly read to impose a new requirement of "complete" denial of counsel. It restated the *Cronic* standard, which, as shown above, allows the presumption of prejudice in a wide range of circumstances in which a trial court prevents a lawyer who is present from providing effective assistance. And the lawyer in *Wright* participated in a plea hearing by speakerphone. He could at least be heard. That cannot reasonably be compared to this case, where the judge's order silenced the lawyer.

To support its assertion that only a "complete" denial of counsel will invoke the presumption of prejudice, the majority also quotes our decision in *Kitchen v. United States*, 227 F.3d 1014 (7th Cir. 2000). The majority writes: "In *Kitchen*, we described the Court's complete-denial cases (specifically in the appellate-stage context) as establishing that the presumption

of prejudice applies only when 'defendants have had *no* assistance of counsel for *any* issues.' 227 F.3d at 1020–21 (emphases in original) (citing *Flores-Ortega*, 528 U.S. at 483)." Ante at 19. The critical "only" in that sentence comes from the majority here, not from *Kitchen*, let alone from the Supreme Court. The same is true for all of the majority's other attempts to introduce "only" into the standard for presuming prejudice.

Instead, *Kitchen* correctly cited *Cronic* and *Strickland* regarding the presumption of prejudice, 227 F.3d at 1020, and concluded that Kitchen's claim of ineffective assistance of appellate counsel required proof of prejudice under *Strickland*. Kitchen had in fact had counsel on appeal who pursued several issues, including some that were successful. We correctly treated Kitchen's claim as one challenging his lawyer's strategic choice of issues to pursue on appeal. 227 F.3d at 1021. Having appellate counsel who chooses which issues to pursue cannot reasonably be compared with having a lawyer whom the trial judge has silenced. *Kitchen* does not support the majority's attempt to impose "complete" denial as a new requirement for the presumption of prejudice.

The majority also argues that a state court could reasonably conclude that the mere physical presence of counsel should defeat the presumption of prejudice. To support this notion, the majority quotes two of our precedents. Yet even the majority acknowledges the quoted passages from those two cases are demonstrably wrong. In *Morgan v. Hardy*, 662 F.3d 790 (7th Cir. 2011), we wrote: "The Supreme Court has consistently limited the presumption of prejudice to cases where counsel is physically absent at a critical stage." *Id*. at 804, citing *Penson v. Ohio*, 488 U.S. 75, 88 (1988) (withdrawal of appellate counsel in criminal case), *White v. Maryland*, 373

U.S. 59, 60 (1963) (no counsel for entry of plea in capital case), and *Hamilton v. Alabama*, 368 U.S. 52, 54–55 (1961) (no counsel for arraignment where defenses could be lost if not asserted). That passage in *Morgan* had been copied verbatim, including even the citations and their parentheticals, from the second case the majority cites, *McDowell v. Kingston*, 497 F.3d 757, 762 (7th Cir. 2007), though *Morgan* did not cite *McDowell*.

Contrary to that language in *Morgan* and *McDowell*, and as shown above, the Supreme Court in fact has decided quite a few cases applying a presumption of prejudice where counsel were physically present but prevented in a variety of ways from providing effective assistance. E.g., *Holloway*, 435 U.S. at 490 (lawyer silenced on key issue by conflict of interest); *Herring*, 422 U.S. at 859 (closing argument prohibited); *Geders*, 425 U.S. at 91 (overnight consultation prohibited during trial); *Brooks*, 406 U.S. at 609–12 (lawyer required to put defendant on witness stand first or not at all); *Ferguson*, 365 U.S. at 596 (no assistance when defendant made his statement to trial jury); and *Powell*, 287 U.S. at 57–58 (inadequate time to prepare).

The majority even acknowledges that the dicta in *Morgan* and *McDowell* were wrong *as a matter of fact*. Yet to deny Schmidt the benefit of the presumption of prejudice when his lawyer was physically present but silenced, the majority offers the following astonishing excuse: "we do not think a state court unreasonably errs for understanding the Court's decisions in the same way that we have." Ante at 19. This remarkable observation is wrong in two basic ways. First, it patronizes the state courts, which did not make this error of thinking that mere physical presence was enough, let alone cite *Morgan*

or *McDowell*. Second, our erroneous dicta did not err in *understanding* the Supreme Court's decisions. They erred by *overlooking* those decisions. Oversights in our legal research could not somehow create ambiguity in the Court's case law.[4]

The majority correctly acknowledges that *Ferguson v. Georgia* offers strong support for Schmidt's claim for denial of counsel. Ante at 20. Recall that in *Ferguson*, state law prohibited the defense lawyer from calling the accused to the witness stand and questioning him in the ordinary fashion. Instead, the accused was required to make any statement on his own behalf on his own, in narrative fashion, without guidance from a lawyer's questioning. 365 U.S. at 571–72.

The majority offers several proposed distinctions to avoid applying *Ferguson* to the denial of counsel in this critical stage of the prosecution:

> *Ferguson* held only that a state law effectively banning counsel from eliciting his client's trial

[4] *McDowell* at least included a footnote recognizing that physical absence was not actually required to apply the presumption of prejudice, citing cases where counsel fell asleep during trial. 497 F.3d at 762 n.2, citing *Burdine v. Johnson*, 262 F.3d 336, 341 (5th Cir. 2001) (en banc), *Tippins v. Walker*, 77 F.3d 682, 686 (2d Cir. 1996), and *Javor v. United States*, 724 F.2d 831, 833 (9th Cir. 1984). The results in *McDowell* and *Morgan* did not depend on their erroneous "physical presence" dicta. In *McDowell*, the issue was a tactical choice by defense counsel, not a court-imposed gag. We held that the state courts did not act unreasonably by applying *Strickland v. Washington* and its requirement that prejudice from supposedly ineffective assistance be shown rather than presumed. 497 F.3d at 763. And Morgan was never denied counsel. At least one defense lawyer was both physically present and able to represent him throughout his trial. 662 F.3d at 804.

> testimony was unconstitutional. It did not establish that defendants have an absolute right to have their counsel elicit any important testimony, or else prejudice will be presumed.

Ante at 20–21. The majority also notes that *Ferguson* concerned a defendant's statements about his innocence during a jury trial, whereas Schmidt's situation concerned his response to questions, in part guided by his written offer of proof, in chambers regarding the admissibility of a defense. According to the majority, unlike with Schmidt's situation, "*Ferguson* worried about the 'tensions of a *trial*,' embarrassment before '*public* assemblies,' the chance to establish a defendant's '*innocence*,' and the risk that he could '*overlook*[ ] important' exculpatory facts." Ante at 21, quoting *Ferguson*, 365 U.S. at 594–96.

The majority assures us that these distinctions matter because "none of those worries" apply here. That's hard to accept at face value. In terms of tension, no matter how many people were in the room, the stakes could not have been higher for Schmidt: life in prison versus a chance at a term of years he might survive. *Ferguson* spoke in terms of an accused who is "unaccustomed to speak in public assemblies, or to put together his thoughts in consecutive order any where." 365 U.S. at 595–96. And while Schmidt may or may not have overlooked any exculpatory facts, he certainly flooded the judge with lots of irrelevant and distracting detail in his rambling narrative, which conflicted, at least in the judge's mind, with the lawyer's summary offer of proof. See ante at 6.

More important, when considering the majority's proposed distinctions, it's essential to remember that *Ferguson* simply does not stand alone, in terms of precedent, logic, or

common sense. The suggestion that its logic could be limited to only one critical stage—trial testimony—runs counter to the entire sweep of the Supreme Court's critical-stage jurisprudence. Is the majority's theory that even if *Ferguson* established a rule for trials, a court may deny the accused the assistance of a lawyer in presenting his testimony in other critical pretrial proceedings? The majority's theory for treating this state court decision as reasonable depends on suggesting distinctions between *Ferguson* and this case that the Supreme Court's right-to-counsel cases reject: between trial and sentencing (see, e.g., *Mempa v. Rhay*, 389 U.S. 128 (1967)), and between trial and pretrial hearings (see all the pretrial critical-stage cases). The Supreme Court has made sufficiently clear that criminal courts may not pick and choose among critical stages, denying assistance of counsel for only some of them as long as they allow counsel for others.

The majority criticizes this analysis of the right-to-counsel cases as too general, connecting *Powell*, *Holloway*, *Brooks*, *Herring*, *Geders*, and *Ferguson*. Ante at 22–23. In the majority's view, drawing a general principle from such varied contexts simply cannot meet the burden of showing that habeas relief is required by Supreme Court precedent. After the 1996 amendment to § 2254(d)(1), that is often a good argument against habeas relief, but not here. The point here is that the Supreme Court itself has applied both the right to counsel and the presumption of prejudice in so many different contexts, regardless of distinctions the majority invokes here. The right to counsel is broad. So is the presumption of prejudice, though not as broad as the right to effective assistance of counsel. Habeas relief cannot reasonably be denied on the ba-

sis of distinctions the Supreme Court itself has rejected by extending both that right and the presumption of prejudice so broadly and in so many contexts.

Ferguson stated clearly what I would expect trial judges and lawyers to take for granted: only the most extraordinary client could provide a narrative as effective as an account of relevant facts set forth through a lawyer's organized direct examination. *Ferguson* is only the closest example of a series of Supreme Court cases, cited above, holding that an accused was denied counsel when the state silences the lawyer or otherwise prevents the lawyer from providing effective assistance to the accused in *any* critical stage.[5]

I noted earlier a potentially relevant line of cases, though one that neither the state courts nor the majority have invoked. It addresses defense lawyers who fall asleep or who are briefly absent from trial. The practical consequences of a silenced lawyer are akin to those of a sleeping lawyer. The

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[5] The majority also seeks support from a most unlikely source: *Estelle v. Smith*, 451 U.S. 454 (1981). In that case, the Supreme Court held that a defendant was entitled to the assistance of his lawyer in deciding whether to submit to a psychiatric evaluation. *Id*. at 471. The Court did not hold that the accused had a right to have his lawyer present during the psychiatric examination itself. *Id*. at 470 n.14. The majority suggests: "Apply *Estelle*'s reasoning here: Schmidt could, and did, consult with his counsel before submitting to (and during) the *in camera* examination, and thus the right-to-counsel problem does not necessarily follow." Ante at 20.

The majority seems to be suggesting that a state court could reasonably extend a case addressing a private psychiatric examination to other critical stages of the prosecution, including an interrogation on the merits by the judge. That is an unreasonable stretch, and it's a symptom of the majority's over-correction in applying § 2254(d)(1), trying much too hard to find and support a theory to deny relief.

general rule is that a lawyer who is physically present but asleep is not acting as a lawyer for the accused. See, e.g., *United States v. Roy*, 855 F.3d 1133, 1161 (11th Cir. 2017) (en banc); *McDowell*, 497 F.3d at 762 n.2; *Burdine v. Johnson*, 262 F.3d 336, 341 (5th Cir. 2001) (en banc); *Tippins v. Walker*, 77 F.3d 682, 686 (2d Cir. 1996); *Javor v. United States*, 724 F.2d 831, 833 (9th Cir. 1984). The cases show, however, that courts have allowed for *de minimis* exceptions to the presumption of prejudice, applying the presumption if counsel slept through a "substantial portion" of the trial. *Roy*, 855 F.3d at 1161 (collecting cases); see also *Woods v. Donald*, 135 S. Ct. 1372, 1377–78 (2015) (reversing grant of habeas relief where one defense lawyer chose to miss ten minutes of testimony about other defendants and had told judge in advance that the testimony would not matter to his client's defense).

To determine what constitutes a "substantial portion," courts look at "the length of time counsel slept, the proportion of the trial missed, and the significance of the potion counsel slept through." *Roy*, 855 F.3d at 1162, quoting *United States v. Ragin*, 820 F.3d 609, 622 n.11 (4th Cir. 2016). Another consideration is "whether the specific part of the trial that counsel missed is known or can be determined." *Id*.

Those cases of dozing or briefly absent lawyers help illustrate how different the denial of counsel was in this case. There was nothing *de minimis* about this denial of counsel. The lawyer was silenced during the entire interrogation, and the importance of this interrogation cannot be overstated. It was the decisive presentation of evidence on the only disputed issue. Having been ordered by the judge not to participate in it, Schmidt's lawyer might as well have been asleep … or entirely absent.

The right to counsel at all critical stages of a prosecution is not narrow and fact-bound. It is critical to our criminal justice system, and the presumption of prejudice is essential to the Supreme Court jurisprudence enforcing that right. The majority has lost sight of the fact that the accused is entitled to the assistance of counsel during the entirety of a critical stage, not just part of it. Schmidt needed counsel's help in confronting the burden of production on a complex factual and legal defense. The court's silencing of his lawyer deprived him of counsel at the most critical stage of his case. When the state denies a defendant counsel at a critical stage, prejudice is presumed. E.g., *Bell v. Cone*, 535 U.S. 685, 695–96 (2002); *Cronic*, 466 U.S. at 658–59 & n.25. This presumption should apply here. We should reverse the denial of a writ of habeas corpus.

III. *Schmidt's Due Process Claim*

Schmidt also argues that the state trial court deprived him of his liberty without due process of law by denying him the right to present his defense in mitigation to the jury. The Supreme Court has long held that the accused in a criminal case has a due process right to present a defense, and that arbitrary or disproportionate limits on that right can violate the federal Constitution. See, e.g., *Holmes v. South Carolina*, 547 U.S. 319, 329–31 (2006); *Rock v. Arkansas*, 483 U.S. 44, 55–57 (1987) (state prohibited testimony from witnesses who had been hypnotized); *Crane v. Kentucky*, 476 U.S. 683, 689–91 (1986) (state prohibited challenge to voluntariness of confession); *Green v. Georgia*, 442 U.S. 95, 97 (1979) (at sentencing, state prohibited hearsay from witness who testified that co-defendant had fired fatal shot); *Chambers v. Mississippi*, 410 U.S. 284, 302–03 (1973) (state hearsay rules barred reliable exculpatory evidence); accord, e.g., *Kubsch v. Neal*, 838 F.3d 845, 860–62 (7th

Cir. 2016) (en banc) (same). This line of cases applies not only to questions of innocence and guilt, but also to grounds for mitigating punishment. Under this line of cases, state rules of law that are ordinarily reasonable may, as applied, deprive a particular defendant of liberty without due process.

To the extent Schmidt argues in this appeal that the state trial court's inquisitorial process—all questioning by the judge rather than counsel—violated his due process rights, that focus on the judicial questioning was not developed in the state courts or the district court. At every stage of the prosecution and appellate and habeas review, including this appeal, however, Schmidt has raised a broader due process challenge to the judge's pretrial decision that prevented him from presenting his "adequate provocation" defense to the trial jury. His briefing has cited the *Chambers*/*Holmes*/*Rock*/*Crane* line of Supreme Court due process cases and Wisconsin state court decisions citing and applying them, including *State v. St. George*, 2002 WI 50, ¶ 52, 252 Wis. 2d 499, 526–27, 643 N.W.2d 777, 788. His challenge in the state courts to the judge's pretrial decision was addressed primarily in terms of state law: whether the judge erred in finding that Schmidt had failed to produce "some evidence" of "adequate provocation." His argument included a clear assertion, however, that he was also seeking relief on a federal due process theory.

Accordingly, on the question whether he fairly presented his due process claim to the state courts and to the district court, Schmidt has considerably stronger arguments than the majority asserts. Since Schmidt's claim for denial of his right to counsel is so strong, however, I see no need to delve more deeply into his due process theory.

Conclusion

The violation of petitioner Schmidt's right to counsel during the most critical stage of his prosecution was evident from controlling Supreme Court precedent. The state courts' rejection of Schmidt's claim was unreasonable under 28 U.S.C. § 2254(d)(1). We should reverse the denial of a writ of habeas corpus and allow Schmidt a fair chance to show that he was guilty of second-degree murder rather than first degree murder.

In the

United States Court of Appeals

For the Seventh Circuit

No. 17-1727

SCOTT SCHMIDT,

Petitioner-Appellant,

v.

BRIAN FOSTER,

Respondent-Appellee.

Appeal from the United States District Court for the
Eastern District of Wisconsin.
No. 13-CV-1150 — **Charles N. Clevert, Jr.**, *Judge*.

ARGUED JANUARY 4, 2018 — DECIDED MAY 29, 2018

Before WOOD, *Chief Judge*, and HAMILTON and BARRETT, *Circuit Judges*.

HAMILTON, *Circuit Judge*. Petitioner Scott Schmidt murdered his wife, Kelly Wing-Schmidt. He admitted the murder but tried to rely on the state-law defense of "adequate provocation" to mitigate the crime from first- to second-degree homicide. A state trial judge denied Schmidt the assistance of his counsel while the judge questioned Schmidt in a pretrial

hearing on that substantive issue. Under law clearly established by the Supreme Court of the United States, the evidentiary hearing on that substantive issue was a "critical stage" of Schmidt's prosecution. By denying Schmidt the assistance of counsel in that critical stage, the state court violated his Sixth Amendment right to counsel.

The Sixth Amendment guarantees the accused in a criminal case "the Assistance of Counsel for his defence." Because "an unaided layman" has "little skill in arguing the law or in coping with an intricate procedural system," the Supreme Court has long held that the right to counsel extends beyond the trial itself. *United States v. Ash*, 413 U.S. 300, 307 (1973). Criminal prosecutions involve "critical confrontations" before trial "where the results might well settle the accused's fate." *United States v. Wade*, 388 U.S. 218, 224 (1967). The Sixth Amendment therefore guarantees defendants "the guiding hand of counsel" at all "'critical' stages of the proceedings." *Id.* at 224–25, quoting *Powell v. Alabama*, 287 U.S. 45, 69 (1932).

Since Schmidt admitted having murdered his wife, the only substantive issue in the prosecution was whether he acted under "adequate provocation," which in Wisconsin would mitigate homicide from first to second degree. The prosecution opposed Schmidt's intended defense, arguing before trial that he had failed to offer "some evidence" of provocation, which would be sufficient to shift the burden of persuasion to the state to disprove provocation beyond a reasonable doubt. The trial court chose to address this critical substantive issue before trial.

After a hearing where counsel debated the defense's written summary of evidence of provocation, the trial court held

an unprecedented *ex parte*, *in camera* hearing. The judge allowed Schmidt's counsel to attend the hearing but, critically, did not allow him to speak or participate. Instead, the judge questioned Schmidt directly. After listening to Schmidt's answers, the judge ruled that Schmidt could not present the adequate provocation defense at trial. A jury convicted Schmidt of first-degree intentional homicide, and he was sentenced to life in prison.

Schmidt sought post-conviction relief, and the Wisconsin Court of Appeals held that the trial court did not violate Schmidt's Sixth Amendment right to counsel. That decision was an unreasonable application of clearly established Supreme Court precedent guaranteeing counsel at all critical stages of criminal proceedings, including whenever "potential substantial prejudice to defendant's rights inheres in the particular confrontation." *Wade*, 388 U.S. at 227. Schmidt therefore meets the stringent standards for habeas corpus relief under 28 U.S.C. § 2254(d)(1).[1]

I. *Factual & Procedural Background*

In April 2009, Schmidt shot his wife, Kelly Wing-Schmidt, seven times. She died in their driveway. When police officers

[1] The usual relief in such a case would be to order the State either to release Schmidt or to retry him. A different remedy may be appropriate here. In the district court, the State requested the option to ask the state trial court to modify the judgment of conviction to second-degree intentional homicide and to resentence Schmidt accordingly. In briefing in this appeal, Schmidt says he agrees with that request. On remand, the district court should consider that option, in addition to the usual choices of retrial or release.

arrived, they found Schmidt standing by her body. He quickly admitted he had shot her.

A. *The Trial Court Proceedings*

Wisconsin charged Schmidt with first-degree intentional homicide. Schmidt never denied shooting and killing Kelly, but he intended to argue at trial that he acted with "adequate provocation." In Wisconsin, adequate provocation is an affirmative defense that mitigates intentional homicide from first to second degree for defendants who "lack self-control completely at the time of causing death." Wis. Stat. §§ 939.44; 940.01(2)(a). To be "adequate," the provocation must be "sufficient to cause complete lack of self-control in an ordinarily constituted person." § 939.44. If the defendant can produce "some" evidence supporting adequate provocation before trial, then the defendant may introduce evidence of the defense at trial. *State v. Schmidt*, 824 N.W.2d 839, 843 (Wis. App. 2012), citing *State v. Head*, 648 N.W.2d 413, 439 (Wis. 2002). The prosecution must then disprove the defense beyond a reasonable doubt. *Schmidt*, 824 N.W.2d at 843, citing *Head*, 648 N.W.2d at 437–38.

Schmidt filed a pretrial motion disclosing that he would present evidence of provocation through "false allegations, controlling behaviors, threats, isolation, unfaithfulness, verbal abuse and arguments." Schmidt planned to present evidence that his wife had abused him emotionally and physically throughout their marriage. He would have testified that right before the shooting, he and Kelly had a heated argument in which Kelly taunted him about an affair he had just discovered, told him their children were not actually his, and threatened to make up stories so that he would never see their children again. According to Schmidt, he lost self-control and

shot his wife. The State objected to the evidence, arguing that Schmidt's disclosure lacked specificity and that the circumstances did not support an adequate provocation defense. The State also argued that Schmidt did not clarify the timeframe covered by his proposed evidence and that evidence dating back too far would be irrelevant and prejudicial.

The court acknowledged the State's concerns. Over Schmidt's objection, the court scheduled a hearing to determine whether Schmidt had met the some-evidence standard and could present the defense at trial. Before the hearing, Schmidt submitted two documents: an offer of proof summarizing the testimony of twenty-nine potential witnesses and a legal analysis of the provocation defense with a timeline of events from 2004 through the 2009 shooting.

The evidentiary hearing began in court with Schmidt, his lawyer, and the prosecutor present. The judge was not prepared to decide on the paper submissions alone whether Schmidt could meet the "some evidence" threshold for the provocation defense. Schmidt's lawyer objected to having to expose his defense evidence before trial. The judge decided that he should question Schmidt *ex parte* to assess the provocation defense. Schmidt's counsel agreed that if the court intended to question Schmidt, it should do so in chambers outside of the prosecutor's presence. The court then proposed to the prosecutor that Schmidt's counsel would attend the hearing in chambers, but would "just be present" and "not saying anything." The prosecutor agreed. Schmidt's counsel did not object, but nobody asked Schmidt if he was willing to go forward in this hearing, so critical to his fate, without the assistance of his lawyer.

The trial judge, court reporter, Schmidt, and Schmidt's counsel proceeded to the judge's chambers. The judge stated that Schmidt "appears in person" and that "his attorney is also present but is not participating in the hearing." The court then asked Schmidt an open-ended question about what was on his mind when he shot Kelly. Schmidt gave the first of what would be several rambling narrative responses:

> The day I went over was April 17th. I hadn't slept in at least a week, week-and-a-half. And I—it was like two days before that, I believe the 14th of April, the 14th or 15th of April I think it was, that I found an e-mail on my work computer from a—of a reservation for my wife and a guy that she supposedly was a friend with that worked for Gold Cross Ambulance. And I found that when I was at the fire station. I knew of him, up until that point, that they were friends.
>
> Um, I had been out of the house for a couple of weeks. And I walked there. I went to the fire station, and I walked up to the house, because I knew there were some issues with, um, Kelly had threatened to take—these aren't my f'ing kids, that if she saw me at the house that she didn't want—I wasn't going to be part of the kids' lives anymore, our two youngest children. I just had a feeling that she'd probably call the cops if I pulled in the driveway. So I parked at the station, Fire Station 6, over on Lightning, and I walked to the house.

> Actually, my main goal was, um, I had a job to do. I was going to build a house for a retired battalion chief up in Door County. And all my tools, my job trailer, and everything was at our house on JJ on Edgewood. I was at the time staying out at the lake—the lake house that I had—had owned prior to us being married in Stockbridge. And there's—I didn't have any heat, slept on the couch, there was no blankets. I mean, it was—there were no dishes. I had—everything was—the house was empty. Gas was actually shut off because we—instead of paying the bills there, I wanted to make sure the bills were paid where the kids and Kelly were at … .

That first answer continued for fourteen transcript pages. Thus began what the Wisconsin Court of Appeals called a "rambling narrative" that spans thirty-five transcript pages. *Schmidt*, 824 N.W.2d at 847. The trial court asked Schmidt the same open-ended question about his mental state six times. Each time Schmidt's response was unfocused and confused with irrelevant details.

Near the end of the questioning, the judge took a short break for a telephone call. Schmidt's lawyer asked if he could talk to Schmidt. The judge responded that they should limit discussion to reviewing the written offer of proof. After the break, the judge asked Schmidt a few more questions before ending the hearing. Later that day, the court orally announced that "the circumstances that led to the death of Kelly Wing did not involve a provocation" and denied Schmidt's motion to present the defense at trial, rejecting it conclusively.

B. *Post-conviction Processes*

A jury convicted Schmidt of first-degree intentional homicide.[2] Schmidt moved for a new trial, arguing that he had been denied his Sixth Amendment right to counsel and his Sixth and Fourteenth Amendment right to present a defense. The trial court denied the motion, concluding that Schmidt had not met his burden of production to present the adequate provocation defense. The trial court also concluded that Schmidt was not denied counsel at the *ex parte* hearing because his counsel submitted the written offer of proof, made an oral argument, and conferred with Schmidt during the recess for the judge's telephone call.

Schmidt appealed, and the Wisconsin Court of Appeals affirmed. The Court of Appeals found that Schmidt had not met the some-evidence standard, though the court called it "a close question." The court found that the *ex parte* interrogation was a valid exercise of the trial judge's discretion under state law. Turning to the Sixth Amendment question, the Court of Appeals found that the *ex parte* hearing was not a critical stage of the proceedings at which Schmidt was entitled to counsel. The court also reasoned that the hearing was not adversarial and that counsel was available to advise Schmidt. The court did not reach Schmidt's claim that the hearing violated his right to present a defense. The Wisconsin Supreme Court denied review.

Schmidt then sought habeas corpus relief in federal court, raising the Sixth and Fourteenth Amendment claims. The district court denied relief on both. The district court considered

[2] The jury also convicted Schmidt of recklessly endangering safety and bail-jumping. He does not challenge those convictions.

de novo Schmidt's claim that he was denied the right to present a defense and concluded that the Wisconsin evidence law did not deprive him of that right because it protected a legitimate interest and was not arbitrary or disproportionate. The court next found that the deferential standard of review under the Antiterrorism and Effective Death Penalty Act (AEDPA) governed the Sixth Amendment claim. See 28 U.S.C. § 2254(d). The district court concluded that the Wisconsin Court of Appeals decision was not contrary to or an unreasonable application of Supreme Court precedent guaranteeing criminal defendants counsel at all critical stages. The district court therefore denied habeas relief but granted a certificate of appealability on both issues.

II. *Analysis*

The Wisconsin Court of Appeals rejected Schmidt's Sixth Amendment claim on the merits, and the facts are not disputed. Under AEDPA, a federal court therefore cannot grant a writ of habeas corpus on that claim unless the state court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). A state court's decision is unreasonable if it correctly identifies the controlling Supreme Court precedent but "unreasonably extends" that "legal principle" to "a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Williams v. Taylor*, 529 U.S. 362, 407 (2000). To obtain federal relief, Schmidt must show that the state court decision was not just incorrect but "objectively unreasonable." *Id.* at 409–10; accord, e.g., *Woodford v. Visciotti*, 537 U.S. 19, 24–25 (2002)

(per curiam). This standard is meant to be "difficult to meet." *Harrington v. Richter*, 562 U.S. 86, 102 (2011).

Even under this deferential standard, Schmidt is entitled to a writ of habeas corpus. The state-court decision was an objectively unreasonable application of Supreme Court decisions on the right to counsel. The *ex parte* hearing was a critical stage of the proceeding. Schmidt was guaranteed "the guiding hand of counsel" throughout it, see *Powell*, 287 U.S. at 69, but he did not have that guidance because of the judge's ground rules for his inquisition of Schmidt, barring his counsel from participating. Because we grant Schmidt's petition based on the violation of his right to counsel, we do not reach his claim that the trial court also denied his right to present a defense.

A. *"Critical Stage"*

The Sixth Amendment guarantees that in "all criminal prosecutions, the accused shall enjoy the right" to "have the Assistance of Counsel for his defence." The Supreme Court has long recognized that the right applies not only at trial but also at all "critical stages" of the adversary process. The first question in this case is the scope of the Supreme Court's precedents on what constitutes a "critical stage."

A brief look at the history of the Sixth Amendment provides helpful context for understanding the scope of a defendant's right to counsel in pretrial proceedings. In *United States v. Wade*, 388 U.S. 218 (1967), the Supreme Court explained:

> The Framers of the Bill of Rights envisaged a broader role for counsel than under the practice then prevailing in England of merely advising his client in 'matters of law,' and eschewing any

responsibility for 'matters of fact.' The constitutions in at least 11 of the 13 States expressly or impliedly abolished this distinction. *Powell v. State of Alabama*, 287 U.S. 45, 60–65; Note, 73 Yale L.J. 1000, 1030–1033 (1964). 'Though the colonial provisions about counsel were in accord on few things, they agreed on the necessity of abolishing the facts-law distinction; the colonists appreciated that if a defendant were forced to stand alone against the state, his case was foredoomed.' 73 Yale L.J., *supra*, at 1033–1034. This background is reflected in the scope given by our decisions to the Sixth Amendment's guarantee to an accused of the assistance of counsel for his defense. When the Bill of Rights was adopted, there were no organized police forces as we know them today. The accused confronted the prosecutor and the witnesses against him, and the evidence was marshalled, largely at the trial itself. In contrast, today's law enforcement machinery involves critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused's fate and reduce the trial itself to a mere formality. In recognition of these realities of modern criminal prosecution, our cases have construed the Sixth Amendment guarantee to apply to 'critical' stages of the proceedings. The guarantee reads: 'In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel *for his defence*.' (Emphasis supplied.) *The plain wording of*

> *this guarantee thus encompasses counsel's assistance whenever necessary to assure a meaningful 'defence.'*

388 U.S. at 224–25 (footnotes omitted, emphasis added).

The Court has identified two historical reasons for the right to counsel. First was the development of an "intricate procedural system." *United States v. Ash*, 413 U.S. 300, 307 (1973). As the Court explained:

> A concern of more lasting importance was the recognition and awareness that an unaided layman had little skill in arguing the law or in coping with an intricate procedural system. The function of counsel as a guide through complex legal technicalities long has been recognized by this Court. […] The Court frequently has interpreted the Sixth Amendment to assure that the 'guiding hand of counsel' is available to those in need of its assistance.

Id. at 307–08. Second was the development of the public prosecutor: "Another factor contributing to the colonial recognition of the accused's right to counsel was the adoption of the institution of the public prosecutor from the Continental inquisitorial system." *Id.* at 308. "Thus, an additional motivation for the American rule" that a criminal defendant is entitled to counsel "was a desire to minimize imbalance in the adversary system that otherwise resulted with the creation of a professional prosecuting official." *Id.* at 309. An uncounseled defendant could not be expected to argue his case, navigate the rules of evidence, or articulate his defenses with the same skill as an "expert adversary," the prosecutor. *Id.* at 310.

Over time, the same became true of various pretrial steps in prosecutions. With increasing frequency, defendants confronted issues before trial that previously would have surfaced at trial—issues like articulating defenses or disputing the admissibility of evidence. With the history of the Sixth Amendment in mind, the Court has repeatedly applied the right to counsel to these critical confrontations "that might appropriately be considered to be parts of the trial itself," that is, steps when "the accused was confronted, just as at trial, by the procedural system, or by his expert adversary, or by both." *Id.* at 310. The Court has called these confrontations "critical stages." See, e.g., *Wade*, 388 U.S. at 224; *Hamilton v. Alabama*, 368 U.S. 52, 53–54 (1961).

It is clearly established that criminal defendants are entitled to counsel at all critical stages of the criminal process, and the case law on which stages are critical is extensive. The State relies here on *Carey v. Musladin*, 549 U.S. 70 (2006), which explained that "clearly established Federal law" under § 2254(d)(1) includes only the Supreme Court's holdings, not its dicta. *Id.* at 74. In *Carey*, the Court rejected a Ninth Circuit decision for reading Supreme Court precedent at too high a level of generality. *Id.* at 75–76. Wisconsin uses *Carey* to argue that no clearly established federal law applies to this case because the Supreme Court has not held that a hearing like the extraordinary *ex parte*, *in camera* hearing here is a critical stage.

AEDPA deference does not go so far. A few months after deciding *Carey*, the Court clarified that AEDPA does not require "federal courts to wait for some nearly identical factual pattern" before granting relief. *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007), quoting *Carey*, 549 U.S. at 81 (Kennedy, J., con-

curring in judgment); see also *Williams*, 529 U.S. at 407 (holding that state courts can unreasonably apply clearly established federal law to facts the Supreme Court has not considered). "Nor does AEDPA prohibit a federal court from finding an application of a principle unreasonable when it involves a set of facts 'different from those of the case in which the principle was announced.'" *Panetti*, 551 U.S. at 953, quoting *Lockyer v. Andrade*, 538 U.S. 63, 76 (2003).

What matters here is what the Supreme Court has done and what it has said in deciding its many "critical stage" cases, which we address next. Also, it is not surprising that the Supreme Court has not considered an *ex parte*, *in camera* hearing on a substantive issue quite like this one. "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." *United States v. Cronic*, 466 U.S. 648, 655 (1984), quoting *Herring v. New York*, 422 U.S. 853, 862 (1975). In this case the trial court improvised an unprecedented procedure that both abandoned that "very premise of our adversary system of criminal justice" to question the defendant directly *and* prohibited defense counsel from participating. While trial judges have discretion to question witnesses directly, this inquisitorial procedure in which defense counsel is silenced is not compatible with the American judicial system. See *Williams v. Wahner*, 731 F.3d 731, 732–33 (7th Cir. 2013) (declaring unlawful a federal judge's practice of questioning prisoner-plaintiff in *ex parte* hearing to decide material factual disputes against the plaintiff, and comparing procedure to inquisitorial procedures from European legal systems). As the *Herring* Court explained further: "the right to the assistance of counsel has been understood to mean that there can be no restrictions

upon the function of counsel in defending a criminal prosecution in accord with the traditions of the adversary factfinding process that has been constitutionalized in the Sixth and Fourteenth Amendments." 422 U.S. at 857, quoted in *Cronic*, 466 U.S. at 656 n.15.[3]

1. *Confrontation*

Turning first to what the Court has actually done, as the State conceded at oral argument, the Court has treated as a "critical stage" every stage of the criminal process between arraignment and appeal that addresses a substantive issue or risks loss of procedural rights. As examples, the Court has recognized the following as critical stages: a preliminary hearing at which defendant could cross-examine witnesses and otherwise test the evidence against him; arraignments at which defenses must be asserted; entry of a plea; pretrial identification

[3] By "inquisitorial," we "don't mean it was modeled on the procedures employed by the Inquisition." *Henderson v. Wilcoxen*, 802 F.3d 930, 931 (7th Cir. 2015). We refer to the "system of proof-taking used in civil law, whereby the judge conducts the trial, determines what questions to ask, and defines the scope and the extent of the inquiry." *Inquisitorial System*, Black's Law Dictionary (10th ed. 2014). As the Supreme Court has explained: "What makes a system adversarial rather than inquisitorial is not the presence of counsel … but rather the presence of a judge who does not (as an inquisitor does) conduct the factual and legal investigation himself, but instead decides on the basis of facts and arguments pro and con adduced by the parties." *McNeil v. Wisconsin*, 501 U.S. 171, 181 n.2 (1991). Although many countries continue to use inquisitorial systems of factfinding, our Constitution establishes an adversarial system. Cf. *Henderson*, 802 F.3d at 931 ("In modern usage an inquisitorial hearing is a hearing in open court in which the judge examines the parties to the suit rather than leaving examination to the lawyers, as in our legal system, which is adversarial rather than inquisitorial.").

through an in-person line-up; pretrial interrogation by a government informant; sentencing hearings; and deferred sentencing hearings that revoke probation. See *Coleman v. Alabama*, 399 U.S. 1, 9 (1970) (plurality); *id.* at 11 (Black, J., concurring) (preliminary hearing where defendant could test evidence to avoid indictment and build record for trial); *Hamilton*, 368 U.S. at 54 (arraignment where defenses can be "irretrievably lost, if not then and there asserted"); *White v. Maryland*, 373 U.S. 59, 60 (1963) (entry of plea); *Moore v. Michigan*, 355 U.S. 155, 156, 159 (1957) (entry of plea); *Wade*, 388 U.S. at 236–37 (pretrial in-person identification); *Massiah v. United States*, 377 U.S. 201, 206 (1964) (pretrial interrogation); *Townsend v. Burke*, 334 U.S. 736, 740–41 (1948) (sentencing); *Mempa v. Rhay*, 389 U.S. 128, 137 (1967) (deferred sentencing and revocation of probation).

The sheer number and range of these cases show that the right to counsel at "critical stages" is not narrow and factbound. The Court has explained its decisions by focusing on the consequences of the particular stage, and in particular on consequences for the defendant's ability to receive a fair trial. In *Wade*, the Court summarized:

> In sum, the principle of *Powell v. Alabama* and succeeding cases requires that we scrutinize any pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself. It calls upon us to analyze whether potential substantial prejudice to defendant's

> rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice.

Wade, 388 U.S. at 227. In *Mempa v. Rhay*, the Court summarized its precedents as "clearly stand[ing] for the proposition that" counsel is "required at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected." 389 U.S. at 134. In *Coleman v. Alabama*, the Court quoted the above passage from *Wade* and referred to it as a "test" that the Court had consistently applied throughout its critical-stage precedents. 399 U.S. at 8. And in *Ash*, the Court stated that its "review of the history and expansion of the Sixth Amendment counsel guarantee" demonstrated "that the test utilized by the Court has called for examination of the event in order to determine whether the accused required aid in coping with legal problems or assistance in meeting his adversary." 413 U.S. at 313.

It is true that many of the Court's "critical-stage" cases address direct confrontations between the defendant and the professional prosecutor, and that the prosecutor was not in the room for the hearing at issue in this case. See, e.g., *Coleman*, 399 U.S. at 9 (preliminary hearing where defendant could test prosecutor's evidence before trial); *Mempa*, 389 U.S. at 137 (deferred sentencing hearing where prosecutor argued for revocation of probation). That is typically how proceedings are held when the rules of adversarial proceedings are followed, but the Supreme Court's clearly established precedent is not limited to adversarial confrontations where the prosecution and/or police are literally in the room with the accused. We cannot imagine that the Supreme Court would tolerate a procedure in which the trial judge, without a valid

waiver of the right to counsel, took the defendant alone into chambers for questioning on the record on any substantive issue. The result is no different here, where the lawyer was physically present but prohibited from speaking or otherwise participating.

First, in *Estelle v. Smith*, 451 U.S. 454 (1981), the Court held that a trial judge had violated the accused's right to counsel in a non-adversarial setting where the prosecutor was absent. The judge "informally ordered" a psychiatrist to examine the accused to determine competency to stand trial. *Id.* at 456–57, 457 n.1. The defendant was found competent to stand trial and then found guilty at trial. At the penalty phase of the trial, the judge then allowed the state to offer the contents of the interview and the psychiatrist's opinion to prove future dangerousness. The defense lawyer had not been notified in advance that the psychiatric examination would take place, let alone that it would include the issue of future dangerousness. *Id.* at 470–71, 471 n.15. The accused did not have his assistance in deciding whether to submit to the examination. *Id.* at 471. The Supreme Court held (unanimously) that the judge's non-adversarial decision to order the psychiatric interview—with only the accused and the psychiatrist present—was a critical stage of the proceedings and that the accused had a right to a lawyer in deciding whether to submit to it. *Id.* at 470–71.[4] Critically, the Court held that the defendant was entitled to counsel's advice *before* the interview itself, because it "follows logically" from the Court's "precedents that a defendant should not be forced to resolve such an important issue 'without the

[4] The Court did not hold that the accused had a right to have his lawyer present for the examination itself, but he had a right to the advice of counsel in deciding whether to submit to it. 451 U.S. at 470 n.14.

guiding hand of counsel.'" *Id.* at 471, quoting *Powell*, 287 U.S. at 69. Resolving that issue—whether to submit to the evaluation—did not involve an in-person confrontation with the prosecutor, the police, or any other agent of the state.

Similarly, in *Geders v. United States*, the Court found that the defendant's right to counsel had been violated when, during trial, the judge ordered the defendant not to consult with his attorney during an overnight recess. 425 U.S. 80, 81 (1970). The trial itself, of course, is a stage in the criminal process where the defendant has a right to counsel (and the Court therefore did not need to engage in a critical-stage analysis). But the overnight recess was not a formal part of the trial proceedings and did not occur in the courtroom or in the prosecutor's presence. Yet the defendant did not lose his right to counsel when he left the courtroom and the traditionally adversarial setting. He required his counsel's guidance overnight to make tactical decisions in light of the proceedings against him. *Id.* at 88–89, 91. Importantly, the Court did not analyze the overnight recess as a separate stage that may or may not be critical by itself. Underlying both *Smith* and *Geders* is the recognition that the accused needs and is entitled to the assistance of counsel in making choices throughout the prosecution, regardless of whether the precise moment in question is "adversarial" in the sense that the professional prosecution or police are literally in the room at the time.

More generally, the Court has repeatedly applied the "critical stage" analysis by focusing on the consequences the accused faces in the particular stage of the case, not necessarily on whether the prosecution or police are in the room. That is clear from the critical "or" in *Ash*: "This review of the history and expansion of the Sixth Amendment counsel guarantee

demonstrates that the test utilized by the Court has called for examination of the event in order to determine whether the accused required aid in coping with legal problems *or* assistance in meeting his adversary." 413 U.S. at 313 (emphasis added).

Confirming the importance of that "or" in *Ash*, the Court has recognized as critical stages several proceedings that require defendants to make procedural decisions. In those cases, it was the defendant's inability to cope with the procedural system—not any face-to-face confrontation with the prosecutor—that drove the Court's holdings. See, e.g., *Hamilton*, 368 U.S. 52 (finding Alabama arraignment a critical stage because the defendant had to assert or forfeit defenses, without any mention of prosecutor or contested issues); *White*, 373 U.S. 59 (finding Maryland preliminary hearing a critical stage because defendant had to enter a plea, without any mention of prosecutor or contested issues); *Smith*, 451 U.S. 454 (finding decision to submit to psychiatric evaluation on competence to stand trial a critical stage, without any mention of prosecutor or contested issues).

And this makes sense. When a defendant confronts a purely procedural question—even outside of the courtroom and outside of the prosecutor's presence—he does so in response to the adversary proceedings that the prosecution has brought against him. One motivation for the right to counsel "was a desire to minimize the imbalance in the adversary *system*," which recognizes that a layperson does not have the same skill or knowledge necessary to navigate the law. *Ash*, 413 U.S. at 309 (emphasis added). After all, requiring an uncounseled defendant to make a consequential procedural decision can easily undermine the desired balance between the

prosecutor and the accused, prejudice the defense, and reduce "the trial itself to a mere formality." *Wade*, 388 U.S. at 224 (explaining that goal of right to counsel at critical stages is to preserve the integrity of the trial).

By looking both at what the Supreme Court has done and at what it has said, it is clear that an evidentiary hearing on a contested substantive issue is a critical stage of the proceedings. There is no reason to think the result is different when the judge moves half of the hearing into chambers and elicits, through the judge's own questioning, the defendant's rebuttal to the prosecutor's opposition. Against the weight of the many cases finding pretrial stages were critical as long as the accused might face serious consequences affecting the fairness of the trial, the State has not identified any Supreme Court case even suggesting, let alone holding, that a hearing comparable to the one in this case was not a critical stage.

The Court has found stages not critical only when they are non-adversarial *and* there is no risk that an accused might make mistakes that a lawyer cannot cure before or at trial. In *Ash* itself, for example, the Court distinguished between an eyewitness identification by in-person lineup, which *Wade* held is a critical stage, and a witness's identification by looking at a photographic array, which is not. 413 U.S. at 317. At a line-up, the defendant is present and confronts either law enforcement or the prosecutor. Without counsel's observation and guidance, "there is a grave potential for prejudice" because the uncounseled defendant is unable to identify a suggestive procedure and unlikely to be able to reconstruct a biased procedure at trial. *Wade*, 388 U.S. at 230–32, 236. A photographic array, by comparison, is only non-adversarial gathering of evidence outside of the defendant's presence. There

is "no possibility" that "the accused might be misled by his lack of familiarity with the law or overpowered by his professional adversary." *Ash*, 413 U.S. at 317. The Court reached a similar conclusion in *Gerstein v. Pugh* when it found that the probable cause determination, by itself, is not a critical stage. 420 U.S. 103, 120, 122 (1975). Probable cause is typically decided "by a magistrate in a nonadversary proceeding on hearsay and written testimony." *Id.* at 120. It does not require the defendant's participation and its outcome cannot "impair defense on the merits." *Id.* at 122.

The Supreme Court has clearly established that the right to counsel extends to a pretrial evidentiary hearing on a contested, substantive issue, where an uncounseled defendant risks decisive consequences for his prospects at trial. E.g., *Coleman*, 399 U.S. at 9 (plurality); *id.* at 11 (Black, J., concurring); *Wade*, 388 U.S. at 227, 236–37. In this case, the Wisconsin Court of Appeals correctly recognized the general rule that the Sixth Amendment guarantees counsel at all critical stages. But the court strayed in finding that the *ex parte* hearing was not a critical stage in Schmidt's case.

The state court's observation that the *ex parte*, *in camera* proceeding was not adversarial, in the sense that the prosecutor was not in the room, thus missed the point. It unreasonably applied Supreme Court precedent and, frankly, ignored reality in favor of a formalism that the Court has not adopted. The *ex parte*, *in camera* hearing was not a distinct stage in Schmidt's case. It was part of the evidentiary hearing the court held to address a substantive issue—the mitigating defense of adequate provocation. That defense was certainly contested. That is precisely why the judge held the hearing: to determine whether the prosecution or defense had the better arguments

on the adequate provocation defense. The prosecution opposed admission of the evidence related to the defense, while Schmidt argued that he had met the threshold showing for admissibility. Schmidt presented part of his side of the case in the judge's chambers, but that fact makes no difference given what the Supreme Court has held to be critical stages. There is no question that the overall hearing was an adversary proceeding. Nothing in the Supreme Court's extensive critical-stage jurisprudence suggests that the hearing became any less critical, or any less of a "trial-like confrontation," when the judge took the accused and his (silenced) lawyer into chambers to question him about the facts supporting the defense.

In addition to confronting the prosecutor's substantive arguments on the disputed provocation defense, Schmidt needed to navigate the "complex legal technicalities" of the "intricate procedural system." *Ash*, 413 U.S. at 307. He needed to meet the burden of production that Wisconsin requires for affirmative defenses like adequate provocation: the "some evidence" threshold. If he met that burden at trial, the prosecutor would bear the burden of persuasion and would have to disprove the defense beyond a reasonable doubt. To show before trial that he had "some evidence" of adequate provocation, Schmidt needed to reveal only his best evidence. These are not procedural concepts that a layperson—especially one whose own fate is at stake—is likely to understand, let alone execute. The transcript in this case shows as much. Schmidt's lack of understanding about the burden of production caused him to disclose too much at this stage. In effect, Schmidt did the prosecutor's job for her and converted the *ex parte*, *in camera* hearing into a mini-trial on the merits of his defense.

In sum, in this hearing conducted without his counsel's participation, Schmidt not only confronted a complex substantive and procedural question; he was also forced to defend his position on the meaning of the procedural rule after the prosecutor challenged him. This was a critical stage—in this case, actually *the most* critical stage—of this prosecution. The accused's right to counsel in this inquisitorial hearing did not depend on whether the prosecutor was in the room, or on whether the judge's tone of voice and phrasing of questions were gentle or hostile. What mattered, under clearly established Supreme Court precedent, is that Schmidt was confronting the complex machinery of the criminal justice process on the most critical, disputed, and substantive issue in the case.

2. *Potential for Prejudice*

For a pretrial confrontation to be a critical stage, it must also have the potential to prejudice the defendant and therefore undermine the integrity of the trial. *Wade*, 388 U.S. at 227. The *ex parte*, *in camera* hearing had the potential to prejudice Schmidt substantially. The state court's conclusion to the contrary was unreasonable. "Fatal to Schmidt's argument," the Wisconsin court reasoned, the hearing was "supplemental" and "Schmidt had already submitted written offers of proof" in support of his defense. The logic of that rationalization for denying Schmidt assistance of counsel flies in the face of clearly established Supreme Court precedent.

The Sixth Amendment analysis focuses on whether there is a potential for prejudice given what or whom the uncounseled defendant must confront and what counsel could do later to fix the defendant's mistakes. E.g., *Ash*, 413 U.S. at 313,

317; *Coleman*, 399 U.S. at 7 (plurality); *id.* at 11 (Black, J., concurring); *Wade*, 388 U.S. at 227. In this case, Schmidt was asked to meet the burden of production to preserve his most promising—indeed, his only—defense in mitigation at trial. In this case, no stage was more critical. What happened in chambers settled Schmidt's fate. It reduced "the trial itself to a mere formality." See *Wade*, 388 U.S. at 224.

The criminal process is full of pretrial steps that involve both written and oral submissions to the court: to name a few, motions to suppress evidence; motions challenging venue, jurisdiction, or competency to stand trial; and motions asserting selective or vindictive prosecution, or denial of speedy trial rights, or discovery disputes. Counsel's help with the written half of the process does not erase the potential for prejudice in the oral half, let alone justify denying assistance of counsel. To our knowledge, the Supreme Court has never held that having assistance of counsel in part of a critical stage of the prosecution justifies denial of counsel in the rest of it. In this case the judge questioned Schmidt after reviewing the written offers of proof. If the judge had thought the written offers of proof had met the some-evidence threshold, the *ex parte*, *in camera* questioning would have been unnecessary. What Schmidt would say in chambers was critical.

Even if Schmidt had met the some-evidence threshold in his written offers of proof alone, his unfocused "rambling narrative" in chambers could have diluted that evidence with details harmful to his defense. At that point in the pretrial process, Schmidt did not need to prove adequate provocation. He needed to provide "some evidence" of it. *Schmidt*, 824 N.W.2d at 843, citing *Head*, 648 N.W.2d at 439.

The risk was not only that the judge might lose sight of the elements of adequate provocation or might fail to separate the wheat from the extensive chaff in Schmidt's rambling answers, though those are certainly good reasons for needing counsel in the hearing. There was also a risk that Schmidt would convert the hearing into a mini-trial on the merits of his defense rather than a debate about the burden of production. If Schmidt could have just met the burden of production—and only that burden—he would have had the right to present his evidence and argue his defense to the jury. And the trial judge's oral ruling suggests that this risk might have played out here: "The Court finds that the circumstances that led to the death of Kelly Wing did not involve a provocation and it was not an adequate provocation and denies the motion." That conclusion sounds more like a decision on the merits than a decision on the burden of production.

Finally, Schmidt's counsel could not fix later the harm done by Schmidt's answers. The trial court silenced counsel in the *ex parte* hearing and ruled on the defense shortly after questioning Schmidt. Because counsel could not later undo the harm to Schmidt, the risk of prejudice at the evidentiary hearing infected his trial.

3. *Role of Counsel*

The last factor in the critical-stage analysis is whether counsel could have helped Schmidt avoid prejudice at the hearing. There can be no doubt that Schmidt would have benefited from his attorney's help at the hearing. It is a basic tenet of constitutional law that an accused has a right to counsel when he is in custody or after formal proceedings have begun against him because of the risk that he will inadvertently harm his defense. See *Miranda v. Arizona*, 384 U.S. 436, 466

(1966) (Sixth Amendment guarantees right to counsel at police interrogation to protect defendant against self-incrimination); *Massiah*, 377 U.S. at 206 (same in interrogation by government informant). The dangers to Schmidt and the opportunity for his counsel to help him are both evident here.

In *Ferguson v. Georgia*, 365 U.S. 570, 594–96 (1961), the Supreme Court explained the need for counsel in a context very close to this case. At that time, Georgia prohibited the accused from testifying in his own defense. State law allowed the accused to make an unsworn statement to the jury, but he ordinarily had to do so without questioning by his counsel to guide him. The Court held that the defendant had a right to have his counsel question him to elicit his statement. In explaining this conclusion, the Court quoted Chief Justice Cooley, the nineteenth-century jurist from Michigan, in a lengthy passage that fits Schmidt's case well:

> But to hold that the moment the defendant is placed upon the stand he shall be debarred of all assistance from his counsel, and left to go through his statement as his fears or his embarrassment may enable him, in the face of the consequences which may follow from imperfect or unsatisfactory explanation, would in our opinion be to make, what the statute designed as an important privilege to the accused, a trap into which none but the most cool and self-possessed could place himself with much prospect of coming out unharmed. An innocent man, charged with a heinous offence, and against whom evidence of guilt has been given, is much more likely to be overwhelmed by his situation,

> and embarrassed, when called upon for explanation, than the offender, who is hardened in guilt; and *if he is unlearned, unaccustomed to speak in public assemblies, or to put together his thoughts in consecutive order any where, it will not be surprising if his explanation is incoherent, or if it overlooks important circumstances.*

365 U.S. at 595–96 (emphasis added), quoting *Annis v. People*, 13 Mich. 511, 519–20 (1865) (reversing conviction where trial judge had not allowed defense counsel to remind defendant he had omitted a material fact from his statement).

Schmidt was not innocent, but the subject of the *ex parte*, *in camera* hearing was his only theory of mitigation. And what *Ferguson* described with the quotation from *Annis* is just what happened here. Without the guidance of counsel's questioning, Schmidt provided an incoherent account of the circumstances that might have supported his defense in mitigation. (Recall that the Wisconsin Court of Appeals said it was "a close question" whether Schmidt had produced "some evidence" sufficient to present a triable defense of adequate provocation.) Counsel could have helped him organize the facts, present a coherent and legally relevant response, and meet the burden of production. Without counsel acting in that role, "a serious risk of injustice infects the trial itself." *Cronic*, 466 U.S. at 656, quoting *Cuyler v. Sullivan*, 446 U.S. 335, 343 (1980).

B. *Assistance of Counsel at the Hearing*

Because the hearing was a critical stage in Schmidt's case, the next question is whether Schmidt received the assistance

of counsel during it. The Wisconsin Court of Appeals reasoned that Schmidt's counsel was present for the *ex parte* hearing and could have advised Schmidt and answered any questions he had. Under AEDPA, we presume that this was a finding on the merits. *Johnson v. Williams*, 568 U.S. 289, 293 (2013). Even assuming AEDPA controls, it is unreasonable to conclude that counsel's silent (and silenced) presence satisfied the Sixth Amendment. See 28 U.S.C. § 2254(d)(1).

The Sixth Amendment guarantees the *effective* assistance of counsel, of course. *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Cronic*, 466 U.S. at 654; *McMann v. Richardson*, 397 U.S. 759, 771 (1970). The Sixth Amendment is not satisfied when "no actual Assistance for the accused's defence is provided" and, as a result, the prosecution's case is not tested against "the crucible of meaningful adversarial testing." *Cronic*, 466 U.S. at 654, 656 (internal quotations omitted). Attorneys can be constitutionally ineffective either because of their own errors or because the government interferes with their performance. *Strickland*, 466 U.S. at 687, 692; *Cronic*, 466 U.S. 658–60 (categorizing circumstances when government interference with attorney performance violates Sixth Amendment). The Supreme Court has held that the government violates the Sixth Amendment when it interferes to such an extent that "although counsel is available to assist the accused," the "likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct." *Cronic*, 466 U.S. at 659–60.

A long line of Supreme Court cases has applied the rule that mere appointment or presence of counsel is insufficient

if state action converts counsel's presence into a sham. In *Powell v. Alabama*, the Court held that "defendants were not accorded the right of counsel in any substantial sense" when the court appointed defense lawyers for the Scottsboro Boys but did not give the lawyers adequate time to prepare for trial. 287 U.S. at 57–58; see also *Avery v. Alabama*, 308 U.S. 444, 446 (1940) ("[T]he denial of opportunity for appointed counsel to … prepare his defense, could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement."). In *Ferguson*, as noted, the Court found unconstitutional a rule that prohibited defense counsel—though present at trial—from directly examining a defendant who chose to speak in his own defense. 365 U.S. at 596. In *Geders*, the Court found that "an order preventing petitioner from consulting his counsel 'about anything'" overnight during trial "impinged upon his right to the assistance of counsel." 425 U.S. at 91. And in *Holloway v. Arkansas*, the Court found that the "mere physical presence of an attorney does not fulfill the Sixth Amendment guarantee" when the state refused to appoint counsel free of conflicts of interest and "the advocate's conflicting obligations … effectively sealed his lips on crucial matters." 435 U.S. 475, 490 (1978). Thus, the Court has "uniformly found constitutional error" when counsel was "either totally absent, *or prevented from assisting* the accused during a critical stage." *Cronic*, 466 U.S. at 659 n.25 (emphasis added).

Even comparatively modest government interference with the attorney's ability to exercise judgment can render counsel ineffective and violate the Sixth Amendment. See *Herring*, 422 U.S. at 863, 865 (state violated Sixth Amendment by barring defense attorney from giving closing summation in bench

trial); *Brooks v. Tennessee*, 406 U.S. 605, 612–13 (1972) (state violated Sixth Amendment by requiring that defendant who chose to testify be the first witness). The Court summarized its precedent in *Strickland*:

> That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair. For that reason, the Court has recognized that the right to counsel is the right to effective assistance of counsel.

466 U.S. at 685–86 (collecting cases; internal quotations omitted).

In this case, Schmidt's counsel was, in the trial judge's own words, "just … present" and "not saying anything" during the *ex parte* hearing. The state thus prevented Schmidt's counsel from performing the "role that is critical to the ability of the adversarial system to produce just results." *Strickland*, 466 U.S. at 685. Schmidt's counsel was not allowed to speak while the court questioned his client on the most important issue in his defense. It was objectively unreasonable for the state court to conclude that Schmidt's counsel could have provided effective assistance and meaningfully tested the arguments against the provocation defense by "not saying anything." See *Cronic*, 466 U.S. at 656, citing *Anders v. California*, 386 U.S. 738, 743

(1967) (summarizing Supreme Court precedent requiring counsel acting as an advocate).

In this appeal, the State echoes the state court's suggestion that Schmidt's counsel "could have objected" during the hearing and was "functionally present" to help Schmidt. We find no factual support for these statements. The trial judge told Schmidt—and assured the prosecutor—that Schmidt's counsel would not say anything during the hearing. Once in chambers, the judge reiterated that Schmidt's counsel was not to participate. And throughout the *ex parte* hearing, Schmidt spoke uninterrupted by his counsel for long enough to fill thirty-five transcript pages. The judge addressed Schmidt directly, not his counsel. Given the judge's ground rules for the hearing, there is no basis for the conclusion that counsel could have objected or advised Schmidt. Doing so would have amounted to contempt of court.

The State also argues that Schmidt could have cured any prejudice by supplementing his offers of proof after the *ex parte* hearing. The State points to an earlier pretrial hearing when the court announced that it would hold the hearing on the provocation defense and might allow Schmidt to supplement the record "if the Court is not satisfied" at "the end of that" hearing. There are three major flaws in this argument. First, the accused is entitled to the assistance of counsel during the entirety of a critical stage, not just part of it. Second, and more specifically, Schmidt needed counsel's help in confronting the burden of production on a complex factual and legal defense. The prejudice he suffered came from disclosing irrelevant details and diluting the evidence that could support his defense. Any hypothetical opportunity to supplement the record later would not have reversed the damage to Schmidt's

case or satisfied Schmidt's right to counsel during the critical hearing itself.

Third, again, the factual record does not support the State's argument. The trial court ruled on the provocation defense immediately after the *ex parte* proceeding. When Schmidt's counsel mentioned supplementing the record a month later, the judge replied that he had already "ruled on" the defense.

The State also points out that Schmidt's counsel did not object to the judge's ground rules that required counsel to remain silent during the *ex parte* hearing. (Schmidt's counsel did object to holding the hearing at all, and to the judge's plan to question Schmidt himself, but on Fifth Amendment grounds.) The absence of a Sixth Amendment objection does not matter here. The accused himself may waive the right to counsel, whether for the entire case or for a particular stage of the proceeding, but any waiver must be knowing and intelligent. E.g., *Brewer v. Williams*, 430 U.S. 387, 404 (1977) (state must prove "intentional relinquishment or abandonment of a known right or privilege" to show waiver of right to counsel at critical stage). There is also a strong presumption against waiver of constitutional rights that preserve a fair trial. *Id.*; *Schneckloth v. Bustamonte*, 412 U.S. 218, 237–38 (1973). There is no indication in this record that Schmidt knew he had a right to effective assistance of counsel in the highly unusual *ex parte*, *in camera* hearing, let alone that he knew the judge's ground rules would deny him that right or that he agreed to waive the right.

Finally, the State points to the brief recess late in the hearing when the judge made a telephone call. Counsel asked if he might speak to his client during the short recess. The judge

said only that counsel could review the written offer of proof summarizing Schmidt's intended defense. This limited opportunity for a brief talk with counsel was not enough to satisfy the Sixth Amendment "in any substantial sense," and to conclude otherwise "would simply be to ignore actualities." *Powell*, 287 U.S. at 58. As the Supreme Court has observed, the "tensions of a trial for an accused with life or liberty at stake might alone render him utterly unfit to give his explanation properly" when speaking "without the guiding hand of counsel." *Ferguson*, 365 U.S. at 594 (internal quotations and citations omitted). Schmidt was never guided while explaining his offense and the provocation he claimed. The problems the Supreme Court predicted in *Ferguson* occurred here. Schmidt's answers to the judge's questions were so unfocused, with so much irrelevant and distracting details and sidetracks, that the judge asked him the same question six times: what was your mental state when you shot your wife? The Sixth Amendment guaranteed him more than a silenced attorney listening to his answers.

When the State denies a defendant counsel at a critical stage, prejudice is presumed. E.g., *Bell v. Cone*, 535 U.S. 685, 695–96 (2002); *Cronic*, 466 U.S. at 658–59. The district court's judgment is REVERSED and the case is REMANDED with instructions to grant the writ of habeas corpus ordering that Schmidt be released or retried promptly, or perhaps, as the State suggested in the district court, that the state court modify Schmidt's judgment of conviction to second-degree intentional homicide and re-sentence him accordingly.

BARRETT, *Circuit Judge*, dissenting. I dissent from the majority opinion for three reasons. First, I disagree that clearly established Supreme Court precedent dictates the resolution of Schmidt's Sixth Amendment claim. The majority says that this *ex parte* and *in camera* proceeding was a "critical stage," but the Court's "critical stage" precedent deals exclusively with adversarial confrontations between the defendant and an agent of the State. Second, the majority suggests that even if the presence of an adversary is necessary, the judge played that role. The procedural context and transcript, however, provide ample grounds for a fairminded jurist to conclude otherwise. Finally, I disagree with the majority that the Wisconsin Court of Appeals unreasonably applied federal law in deciding that this proceeding did not risk substantial prejudice to Schmidt. The prejudice alleged is that Schmidt's wandering testimony cluttered the record with irrelevant details that distracted the judge from Schmidt's best evidence. This proceeding, however, supplemented the defense's written offer of proof detailing Schmidt's evidence of adequate provocation. A fairminded jurist could conclude that the written summary of Schmidt's evidence kept the judge from losing the forest for the trees.

I.

Because the Wisconsin Court of Appeals adjudicated Schmidt's Sixth Amendment claim on the merits, the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) prevents us from granting his application for a writ of habeas corpus unless the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the

United States." 28 U.S.C. § 2254(d)(1). The majority's description of this case as "unprecedented" and "highly unusual" gives away the fact that the opinion enters territory that the Supreme Court has not broached. Existing Supreme Court precedent addresses a defendant's right to counsel in certain adversarial confrontations with a prosecutor, the police, or an agent of either. No Supreme Court precedent addresses the question presented by this case: whether a defendant has the right to counsel when testifying before a judge in a nonadversarial proceeding. Because there is no clearly established Supreme Court precedent for the Wisconsin Court of Appeals to have unreasonably applied, Schmidt cannot satisfy § 2254(d)(1)'s stringent standard for relief.

A.

The majority describes Supreme Court precedent as "clearly stand[ing] for the proposition that" counsel is "required at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected." Majority Op. at 17 (citing *Mempa v. Rhay*, 389 U.S. 128, 134 (1967)). That states the rule at too high a level of generality. The Court's "critical stage" precedent deals exclusively with a defendant's right to counsel in adversarial confrontations with law enforcement. And the connection between the right to counsel and an adversarial confrontation is by no means a mere sidelight in the cases; it is central to them.

The Court has rooted the right to counsel in the need to protect the defendant when he faces the prosecuting authority. In *United States v. Ash*, it explained that the right emerged alongside the introduction of a "government official whose specific function it was to prosecute, and who was incomparably more familiar than the accused with the problems of

procedure, the idiosyncrasies of juries, and, last but not least, the personnel of the court." 413 U.S. 300, 308 (1973) (citing F. Heller, The Sixth Amendment 20–21 (1951)). Consistent with this history, the Sixth Amendment was designed "to minimize imbalance in the adversary system that otherwise resulted with the creation of a professional prosecuting official." *Id.* at 309. While the Amendment's protection is not limited to the formal trial, "[t]he Court consistently has applied a historical interpretation of the guarantee, and has expanded the constitutional right to counsel only when new contexts appear presenting the same dangers that gave birth initially to the right itself." *Id.* at 311.

The "new contexts" to which the Court has extended the right invariably involve a confrontation between the defendant and his adversary, be it a prosecutor, the police, or one of their agents. For example, in *Estelle v. Smith*, a psychiatrist functioning as an "agent of the State" performed an examination of the defendant in his jail cell. 451 U.S. 454, 467 (1981).[5]

[5] The majority characterizes *Estelle* as a case in which the Court recognized the right to counsel in a non-adversarial proceeding. Majority Op. at 18–19. In *Estelle*, the judge had "informally ordered the State's attorney to arrange a psychiatric examination of [the defendant] … to determine [his] competency to stand trial,"451 U.S. at 456–57, and the majority asserts that the Court held that "the judge's non-adversarial decision to order the psychiatric interview … was a critical stage of the proceedings." Majority Op. at 18. But it was the examination by the psychiatrist, not the decision by the judge, that the Court deemed a "critical stage." 451 U.S. at 470 ("[R]espondent's Sixth Amendment right to counsel clearly had attached when Dr. Grigson examined him at the Dallas County Jail, and their interview proved to be a 'critical stage' of the aggregate proceedings against the respondent." (footnote omitted)). And the Court left no doubt that the psychiatrist functioned as the defendant's adversary. It stressed that the defendant was "faced with a phase of the adversary system" and was "not

In *Coleman v. Alabama*, the defendant attended a preliminary hearing at which there was an opportunity to cross-examine the prosecution's witnesses, preview the prosecutor's case to better prepare for trial, and argue for matters such as "the necessity for an early psychiatric examination or bail." 399 U.S. 1, 9 (1970) (plurality opinion). In *United States v. Wade*, an FBI agent conducted a lineup of Wade and several other prisoners. 388 U.S. 218 (1967). In *Mempa v. Rhay*, the defendant was summoned to a hearing at which the prosecutor sought to have his probation revoked and a sentence imposed. 389 U.S. 128 (1967). In *Massiah v. United States*, federal agents sent an informant wearing a wire to elicit incriminating testimony from the defendant after he had already been indicted. 377 U.S. 201 (1964). In *Escobedo v. Illinois*, the police interrogated the defendant without counsel despite his repeated requests that counsel be present. 378 U.S. 478 (1964). In *White v. Maryland*, the prosecutor presented a prima facie case against the defendant at a preliminary hearing, where the defendant pleaded guilty. 373 U.S. 59 (1963) (per curiam).[6] In *Hamilton v.*

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in the presence of [a] perso[n] acting solely in his interest." *Id.* at 467 (citations omitted). The psychiatrist assessed the defendant's "future dangerousness," gathering evidence that the prosecution used in seeking the death penalty, *id.* at 467, 471, and he then testified against the defendant at trial, "recounting unwarned statements made in a postarrest custodial setting." *Id*. at 467. Given the stakes of submitting to such an interview, the Court held that the defendant had the right to counsel's help in deciding whether to do it. *Id.* at 470.

[6] The brief per curiam opinion is short on details, but the petitioner's brief explains that at a preliminary hearing in Maryland, "the defendant may be called upon by the magistrate to plead guilty or not guilty, and a plea of guilty is admissible evidence at the subsequent trial of his case. Here, also, the defendant is afforded the first opportunity to be informed of the charges against him, cross-examine State's witnesses, and begin to

Alabama, the defendant faced the prosecutor at arraignment, which was his only opportunity to plead insanity, make pleas in abatement, and move to quash the indictment based on racial discrimination in the composition of the grand jury. 368 U.S. 52 (1961). Although these confrontations occurred outside the context of the formal trial, the Sixth Amendment applied because they "offered opportunities for prosecuting authorities to take advantage of the accused," or the risk that the accused "might be misled by his lack of familiarity with the law." *Ash*, 413 U.S. at 312, 317.[7]

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effectively prepare his defense … [The magistrate's] sole function at this hearing is to determine from the evidence presented by the State's attorney whether to hold the accused for the action of the Grand Jury … or discharge him." Petitioner's Brief at 4, 6.

[7] The majority relies on *Geders v. United States*, 425 U.S. 80 (1976), as support for the proposition that a proceeding need not be adversarial for the right to counsel to apply. *See* Majority Op. at 19. *Geders*—which is not a "critical stage" case—is inapposite. In *Geders*, the Court held that the trial court violated the defendant's Sixth Amendment right when it instructed all witnesses, including the defendant, not to discuss the case with anyone during an overnight recess in the trial. The case did not present the question whether a particular event (there, the overnight recess) is a "critical stage" at which the state must ensure that the defendant is either accompanied by counsel or waives his right to be accompanied by counsel. It presented the different question whether a trial court can prevent the defendant from consulting counsel on his own initiative outside of the trial. *Id.* at 88. *Geders* says nothing about the characteristics of a "critical stage," much less suggests that such a stage need not be adversarial. Nor does *Geders* stand for the proposition that the start of the adversarial process—or even the start of trial—marks the beginning of a continuous "critical stage." On the contrary, the Court has indicated that a trial may encompass stages that are not critical. *See, e.g.*, *Woods v. Donald*, – U.S. –, 135 S.Ct. 1372, 1377–78 (2015) (per curiam) (reversing the Sixth Circuit's grant of

Ash includes a line that is susceptible to misinterpretation. There, the Court said that a stage is critical when "the accused was confronted, just as at trial, by the procedural system, or by his expert adversary, or by both." *Id*. at 310. This language could be understood as setting up alternative settings—one non-adversarial and the other adversarial—in which the right to counsel applies. In context, however, it is evident that the Court was explaining why it has extended the right of counsel not only to situations in which the defendant or his witness is questioned by the police or prosecutor (as in post-indictment interrogation of the accused or examination at trial), but also to situations in which the prosecutor puts the accused to a procedural choice (like entering a plea or raising a defense). In other words, *Ash* describes two kinds of risks that an accused might face in an adversarial setting. It does not describe the right to counsel as extending outside of an adversarial proceeding, and the Court has not understood it that way.

To the contrary, the Court has never extended the right outside of the adversarial context. And when it has refused to extend the right, it has done so on the ground that the proceeding was not adversarial. *Ash* refused to extend the right of counsel to a post-indictment photographic display precisely because the display involved no confrontation between the accused and the prosecuting authority. 413 U.S. at 315, 321. Similarly, in *Gerstein v. Pugh*, the Court held that a probable cause hearing is not a critical stage "[b]ecause of its limited function and its nonadversary character." 420 U.S. 103, 122

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habeas relief to a petitioner whose counsel was absent during trial testimony about the petitioner's co-defendants because the Court had never held that the presentation of testimony tangentially related to the defendant was a "critical stage").

(1975). We too have recognized the presence of an adversary as a necessary factor for Sixth Amendment protection. In *United States v. Jackson*, 886 F.2d 838, 844 (7th Cir. 1989), for example, we held that a defendant's uncounseled interview with a probation officer in the course of the officer's preparation of the presentence report was not a critical stage precisely because the "probation officer does not have an adversarial role in the sentencing proceedings." Rather than serving as an arm of the prosecutor, "the probation officer serves as a neutral information gatherer for the sentencing judge." *Id.*

B.

The majority acknowledges that the Court has never addressed a claim like Schmidt's. But it points out that a case need not present facts identical to those previously considered by the Court for clearly established precedent to govern it. The Court has said that a state court acts unreasonably for purposes of § 2254(d)(1) if it "refuses to extend [controlling Supreme Court precedent] to a new context where it should apply." *Williams v. Taylor*, 529 U.S. 362, 407 (2000). The majority reasons that the Wisconsin trial court's questioning of Schmidt is such a context—not one that the Court has confronted before, but one to which its "critical stage" precedent clearly extends.

This reasoning only works, however, if the controlling precedent is read at the level of generality the majority proposes—as establishing the right to counsel in any post-indictment proceeding in which legal assistance would help the accused avoid substantial prejudice. If that is the law, then we need to decide whether the state court unreasonably refused to apply it to this new context. But if the precedent is read more narrowly—as establishing the right to counsel when the

accused faces his adversary—then clearly established law does not dictate the outcome. Resolving the Sixth Amendment question therefore requires us to decide the level of generality at which to read the Supreme Court's precedent.

Carey v. Musladin answers that question: we track the level of generality at which the Court has spoken. 549 U.S. 70 (2006). In *Carey*, the Court reviewed the Ninth Circuit's determination that buttons with the victim's image worn by courtroom spectators had deprived the habeas petitioner of a fair trial. The Court had previously held that certain state-sponsored practices (like compelling a defendant to wear prison clothing at trial) were "inherently prejudicial," and the Ninth Circuit reasoned that the buttons posed a similar risk. The Court rejected that reasoning. The Ninth Circuit interpreted the Court's precedent as establishing a general rule against courtroom conduct inherently prejudicial to the defendant; it should have interpreted the Court's precedent as establishing a more specific rule against *state-sponsored* courtroom conduct inherently prejudicial to the defendant. *Id.* at 76. The Court emphasized that it "ha[d] never addressed a claim that such private-actor courtroom conduct was so inherently prejudicial that it deprived a defendant of a fair trial." *Id*. By stating the rule more broadly than the Court had, the Ninth Circuit held the state responsible for violating law that was not clearly established.

So here. The Court has never addressed a claim that a defendant has a right to counsel in an *ex parte* and *in camera* proceeding before a judge. Like the Ninth Circuit in *Carey*, the majority errs by stating the established law at a higher level of generality than the Court has. Indeed, the centrality of ad-

versarial confrontation to the Court's "critical stage" jurisprudence makes the extraction of a general principle from a more specific rule even more evident here than it was in *Carey*.

To be clear, *Carey* is not inconsistent with the Court's admonition in *Williams v. Taylor* that a state court acts unreasonably if it "refuses to extend [controlling Supreme Court precedent] to a new context where it should apply." 529 U.S. at 407. A state court cannot treat the Court's clearly established precedent as fact-bound. On the contrary, a state court, like a reviewing federal court, must respect the level of generality at which the Court has spoken. Just as a federal court cannot elevate the level of generality, a state court cannot contract it. Thus, a state court would act unreasonably if it refused to recognize a defendant's right to counsel in a post-indictment, adversarial proceeding on the ground that the proceeding was not exactly the same as those the Court has previously addressed. Clearly established law does not entitle the defendant to counsel in a laundry list of specific proceedings, but in "proceedings between an individual and agents of the State … that amount to 'trial-like confrontations,' at which counsel would help the accused 'in coping with legal problems or … meeting his adversary." *Rothgery v. Gillespie County*, 554 U.S. 191, 212 n.16 (2008) (citations omitted). The state court is obliged to follow that rule, even if the factual circumstance is new. But under AEDPA, we cannot hold the state court accountable for declining to expand the rule itself.

Perhaps the right to counsel should extend to a hearing like the one the judge conducted in Schmidt's case. But AEDPA precludes us from disturbing a state court's judgment on the ground that a state court decided an open question differently than we would—or, for that matter, differently than

we think the Court would. Because the Court has never addressed the question that the Wisconsin Court of Appeals faced, there was no clearly established precedent for it to flout.

II.

The majority does not rely exclusively on an extension of the Court's "critical stage" cases to nonadversarial proceedings. Its opinion appears to rest on a second rationale: that this proceeding was functionally adversarial. While it stops short of actually calling the judge the defendant's "adversary," it strongly implies that the judge stood in the shoes of the prosecutor. The majority's reasoning, then, seems to be twofold. Clearly established Supreme Court precedent is not limited to adversarial proceedings, but in any event, this proceeding was functionally adversarial and risked substantial prejudice to Schmidt. In concluding otherwise, the Wisconsin Court of Appeals unreasonably applied clearly established federal law.

The majority gives too little deference to the Wisconsin Court of Appeals. A state-court decision is "unreasonable" under § 2254(d) if it is "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Woods v. Etherton*, – U.S. –, 136 S. Ct. 1149, 1151 (2016) (per curiam) (citation and quotation marks omitted); *see also Harrington v. Richter*, 562 U.S. 86, 102 (2011) (Section 2254(d) "preserves authority to issue the writ in cases where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with this Court's precedents."). That is a high bar, and Schmidt does not clear it.

A.

The majority holds that the Wisconsin Court of Appeals unreasonably applied the Court's "critical stage" jurisprudence when it concluded that the *ex parte* and *in camera* proceeding was nonadversarial. Given the prosecutor's absence, it was certainly not "adversarial" in the ordinary sense of the word—or in the sense that the Court has employed it in the cases. In an effort to get around that, the majority characterizes the proceeding as "inquisitorial." If used in its benign sense—as referring to the system of proof-taking in civil law systems—the word "inquisitorial" by definition means nonadversarial. *See* Majority Op. at 15 n.3. At some points in its opinion, the majority concedes that the proceeding was nonadversarial and faults it on that ground. *See*, *e.g.*, Majority Op. at 14. (That concession, of course, forecloses the argument that the Wisconsin Court of Appeals unreasonably characterized the *ex parte* and *in camera* hearing as a nonadversarial one.) Elsewhere, however, the majority asserts that the proceeding was adversarial. Majority Op. at 22–23. This suggests that the majority is using the description "inquisitorial" as it is often deployed in American criminal cases—to describe a proceeding in which the accused faces an aggressive questioner gathering evidence against him. *See*, *e.g.*, *Miller v. Fenton*, 474 U.S. 104, 110 (1985); *Miranda v. Arizona*, 384 U.S. 436, 442–43 (1966). And while the majority does not attribute ill will to the judge, it does cast him as Schmidt's adversary. Majority Op. at 23 (asserting that the hearing was a "trial-like confrontation" in which "the judge took the accused and his (silenced) lawyer

into chambers to question him about the facts supporting the defense").

The transcript, however, contains no suggestion that the judge ever functioned as a surrogate prosecutor. His aim was not to secure Schmidt's conviction—or, as specifically relevant here, to establish that Schmidt was not entitled to raise the "adequate provocation" defense. On the contrary, as the Wisconsin Court of Appeals observed, the judge conducted the proceeding this way for Schmidt's benefit.

The hearing grew out of a dispute between the parties about when the trial court would decide whether Schmidt had sufficient evidence to put the "adequate provocation" defense in issue. Schmidt argued that Wisconsin law required the court to wait to resolve that question until it instructed the jury; doing it before trial, he insisted, would give the prosecution a preview of his case. The State wanted the court to rule on the admissibility of Schmidt's evidence before trial; otherwise, it argued, the jury would hear a litany of prejudicial evidence about the victim that might not be probative of an issue actually in the case. The court agreed with the State. It decided—in a ruling that the Wisconsin Court of Appeals ultimately affirmed—that Wisconsin law gave the trial court the discretion to determine before trial whether the defendant could carry his burden of production on the "adequate provocation" defense.

While the judge decided to make the evidentiary determination before trial, he was sympathetic to Schmidt's concern about showing the prosecutor his hand. He proposed the *ex parte* and *in camera* hearing as a way of addressing that concern. Defense counsel responded as follows to the court's proposal:

> A suggestion that I was going to bring up today is that the Court, if you are going to ask for evidence from the defendant or evidence that goes to his subjective belief for adequate provocation, is that, in fact, we would do an ex parte in-camera inspection of the Court and the defendant and seal those records because I don't think it would be—it should be allowed to the State and should have that information prior to trial.

Transcript of Motion Hearing 2.10.2010 at 5. The court wanted defense counsel to accompany Schmidt, but because the prosecution was barred from the hearing, the court instructed defense counsel to function as an observer only. The prosecutor agreed to the proceeding on that condition. Had Schmidt's counsel actively participated, the judge would have included the prosecutor, and Schmidt wanted the prosecutor out of the room.

The majority puts little weight on the prosecutor's absence, because it suggests that the judge filled the prosecutor's shoes.[8] The judge, however, spoke very little during the hearing. Instead, he primarily listened as Schmidt testified about

[8] The majority also suggests that the *ex parte* and *in camera* proceeding followed on the heels of the prosecutor's oral argument about why Schmidt's evidence fell short of what was necessary to carry his burden of production. Majority Op. at 21. But the judge did not hear arguments about the substance of the adequate provocation issue from either side before he examined Schmidt. He "entertain[ed] comments from counsel" on the procedural questions of whether he could resolve the burden-of-production question before trial and whether he could do an *in camera* inspection of Schmidt. Transcript of Motion Hearing 2.10.2010 at 2–7. The rest of the hearing dealt with various trial-management matters. At no point did

his state of mind before he shot his wife.[9] And far from positioning himself as Schmidt's adversary, the judge tried to help him by calling a recess so that Schmidt could review the written offer of proof with his counsel.[10] The offer of proof was a roadmap for Schmidt's testimony. It contained a timeline of the allegedly provocative events, and the judge wanted Schmidt to refresh his memory so that he didn't overlook any. Before the recess, he told Schmidt "that you might not state all of the things that are in the offer of proof, possibly because you … haven't had an opportunity to review this." Transcript of Proceedings at 25. When the hearing resumed, the judge asked Schmidt how the incidents described in the document might have affected his state of mind.

In retrospect, it may have been better for the judge to decline Schmidt's request for an *ex parte* and *in camera* hearing. There would be no Sixth Amendment question before us if the judge had proceeded in the normal course, with both lawyers participating. That said, the judge structured the hearing as

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the prosecutor make an argument about why Schmidt's evidence of adequate provocation was insufficient.

[9] Schmidt, who testified voluntarily, does not argue that the court violated his Fifth Amendment right against self-incrimination. As the trial court noted "[the pretrial hearing] accelerates what the defendant might already say in a trial, but it is the defendant that chooses to present this defense." Transcript of Motion Hearing 2.10.2010 at 4.

[10] During this recess, the judge permitted defense counsel to confer with Schmidt while the judge stepped out to make a phone call. Defense counsel asked: "Am I allowed to talk to my client now or not?" The judge responded: "It's off the record. Yeah, you can talk. But he should just be reviewing [the offer of proof]." Transcript of Proceedings at 26.

he did in an effort to accommodate Schmidt, and the transcript reflects that the judge remained neutral throughout it. It was therefore reasonable for the Wisconsin Court of Appeals to conclude that this was not a trial-like confrontation in which Schmidt was entitled to counsel to "compensate[] for advantages of the prosecuting authorities." *Ash*, 413 U.S. at 314.

B.

It is not enough for Schmidt to demonstrate that the Wisconsin Court of Appeals unreasonably concluded that this proceeding was nonadversarial. To secure relief, Schmidt must also show that no fairminded judge could conclude that this hearing lacked the potential to substantially prejudice him. That is yet another ground on which Schmidt's argument fails.

According to the majority, "The prejudice [Schmidt] suffered came from disclosing irrelevant details and diluting the evidence that could support his defense." Majority Op. at 32. In other words, Schmidt was harmed because his rambling narrative failed to focus the judge on the evidence most helpful to his "adequate provocation" defense. The idea that the judge—who knew the legal elements of the adequate provocation defense—was incapable of separating the wheat from the chaff sells the judge short.[11] But in any event, the judge

[11] The majority also sells the trial judge short with its argument that by saying too much, Schmidt risked confusing the judge about whether he was supposed to resolve the merits or decide whether Schmidt had carried his burden of production on the defense. Majority Op. at 25–26. This argument not only underrates the judge (and the court of appeals that affirmed his judgment), but it also rests on an assumption that is odd given

was not left to cull the evidence without input from defense counsel. As the Wisconsin Court of Appeals said, the examination of Schmidt was supplementary. The judge went into it already having reviewed a legal analysis of the adequate provocation defense; a detailed timeline of the relevant events; the summarized testimony of 29 witnesses who observed his wife's allegedly provocative behavior; a hotel reservation that Schmidt discovered shortly before the shooting and took as evidence of his wife's infidelity; and a copy of a statement that Schmidt gave police at the scene that detailed some of what was in his mind when he shot his wife. So even if Schmidt's testimony cluttered the record with irrelevant details, the written evidence focused the judge on the key facts.

The Wisconsin Court of Appeals acknowledged that it might have been more efficient to have counsel guide the presentation of Schmidt's testimony. But the fact that the participation of counsel would have been helpful to Schmidt does not necessarily mean that the lack of counsel risked substantial prejudice to him. A fairminded jurist could find that this proceeding, which was reinforced by written evidence, did not risk substantial unfair prejudice to Schmidt.

III.

Because the majority holds that Schmidt is entitled to relief on his Sixth Amendment claim, it does not reach Schmidt's

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the facts of this case: that Schmidt should have been sparing in his testimony to avoid "convert[ing] the hearing into a mini-trial on the merits of his defense rather than a debate about the burden of production." *Id* at 26. As it was, both the Wisconsin trial and appellate courts found that Schmidt had not introduced enough evidence to get the defense before the jury. Given that his evidence was thin enough to permit that finding, he would have been ill advised to hold back any evidence from the judge.

claim that the *ex parte* and *in camera* hearing arbitrarily violated his due process right to present a defense. For the sake of completeness, I briefly note that I would deny relief on this claim as well.

In both the Wisconsin Court of Appeals and the federal district court, Schmidt asserted a claim under *Chambers v. Mississippi*, which holds that state evidentiary rules must yield to the defendant's due-process right to present a defense. 410 U.S. 284 (1973). According to Schmidt, Wisconsin violated the Due Process Clause by requiring him to satisfy a burden of production (that he produce "some evidence" of adequate provocation) before he could introduce evidence of that defense at trial. Both the Wisconsin Court of Appeals and the federal district court correctly rejected that claim, because, among other things, none of the cases in which the *Chambers* principle has prevailed (and it has prevailed only rarely) "involved restrictions imposed on a defendant's ability to present an affirmative defense." *Gilmore v. Taylor*, 508 U.S. 333, 343 (1993); *see also Kubsch v. Neal*, 838 F.3d 845, 858 (7th Cir. 2016) (en banc) (discussing *Chambers* and its progeny). Adequate provocation in Wisconsin is an affirmative defense. Wis. Stat. § 939.44(2).

Presumably recognizing the weakness of his *Chambers* claim, Schmidt has repackaged his due process argument into a new claim. Before us, he argues not that Wisconsin's evidentiary rules must yield to his due process right to put on a defense, but that the trial court's use of the *ex parte* and *in camera* process violated the Due Process Clause. Because Schmidt did not raise this claim in either the Wisconsin Court of Appeals

or the federal district court, I would deny it as both procedurally defaulted and forfeited.

* * *

The standard for relief under AEDPA is intentionally difficult because federal habeas review of state convictions "frustrates both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights." *Calderon v. Thompson*, 523 U.S. 538, 555–56 (1998) (citation and quotation marks omitted). To reinforce that point, the Court has not hesitated to reverse the courts of appeals when they fail to give state courts the deference that AEDPA requires. *See, e.g.*, *Woods*, 136 S. Ct. 1149; *Woods v. Donald*, – U.S. –, 135 S. Ct. 1372 (2015) (per curiam); *White v. Wheeler*, – U.S. –, 136 S. Ct. 456 (2015) (per curiam); *Marshall v. Rodgers*, 569 U.S. 58 (2013) (per curiam); *Nevada v. Jackson*, 569 U.S. 505 (2013) (per curiam); *Parker v. Matthews*, 567 U.S. 37 (2012) (per curiam); *Renico v. Lett*, 559 U.S. 766 (2010). The majority fails to give the Wisconsin Court of Appeals the required deference, and I therefore dissent.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

SCOTT ERIC SCHMIDT,

Petitioner,

v. Case No. 13-CV-1150

WILLIAM J. POLLARD,

Respondent.

DECISION AND ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS, DISMISSING CASE AND GRANTING CERTIFICATE OF APPEALABILITY

Scott Schmidt filed a petition for writ of habeas corpus challenging his May 12, 2010, judgment of conviction in Outagamie County Circuit Court on one count of first-degree intentional homicide, one count of first-degree recklessly endangering safety, and one count of bail jumping. (Doc. 12-1 at 1-2.) After the jury returned a guilty verdict on the three counts, Judge John A. Des Jardins sentenced Schmidt to life imprisonment with eligibility for extended supervision after forty years. (Doc. 12-1 at 1.) Schmidt filed a post-conviction motion seeking a new trial on the homicide charge, arguing that he was denied his right to present his chosen defense when the trial court refused to permit him to offer the affirmative defense of adequate provocation at trial. (Doc. 12-2 at 18-19.) Additionally, he argued that he was denied his right to counsel during a pretrial in camera hearing when his attorney was not permitted to participate and assist him in tendering an offer of proof respecting the planned defense. (*Id.*) When the post-conviction motion was denied, Schmidt filed a direct appeal with the Wisconsin Court of Appeals. *State v. Schmidt*, Appeal No. 2011AP001903. On appeal he raised the same arguments asserted in his post-conviction motion. The

Wisconsin Court of Appeals affirmed the conviction, and the Wisconsin Supreme Court denied Schmidt's petition for a writ of certiorari. *State v. Schmidt*, 2012 WI App 113, *cert. denied*, 346 Wis. 3d 284 (2013). For the reasons set forth below, the petition before this court will be denied.

STATEMENT OF FACTS

On April 17, 2009, Scott Schmidt shot and killed his estranged wife, Kelly Wing-Schmidt, after an argument. Firing his .22 caliber revolver, Schmidt struck Wing-Schmidt three times in the head, twice in the left hand, and twice in the right arm. He also shot his mother-in-law in the chest. The State charged Schmidt with first-degree intentional homicide in the shooting death of Wing-Schmidt, attempted first-degree intentional homicide in the shooting of his mother-in-law, and felony bail jumping.

On September 17, 2009, the defense filed a Motion to Include Other Acts Evidence pursuant Wis. Stat. § 904.04 for use in an adequate provocation defense. An adequate provocation defense mitigates the offense of first-degree intentional homicide to second-degree intentional homicide. A motion hearing was set for November 13, 2009; however, the motion was not addressed. On January 19, 2010, a second motion hearing was conducted and the State asked the court to bar presentation of any such evidence under any theory — other acts, habit evidence, or adequate provocation. The defense offered to supplement the motion, and the court expressed concern that the process would allow for potentially inadmissible evidence to be presented to the jury. "Well, if I were to accept everything you had to say, anytime somebody would raise, the you know, the defense of adequate provocation, then it would open up the door to all kinds of evidence that might be entirely inadmissible before a jury." (Doc. 12-9 at 23-24.) Accordingly, the court advised

the parties that it would conduct an evidentiary hearing to determine what evidence, if any would be admissible at trial. As the trial court stated, "[I]f the Court were to allow, you know, the adequate provocation to defense to go forward with all of the these loose ends going on, you know, possibly for years and months, all of that potentially could come in and be totally irrelevant to the case if its not tied up properly." (Doc. 12-9 at 28.) The defense was ordered to provide a list of witnesses with a summary before the hearing.

During the February 10, 2010, hearing, the trial court concluded that it could require the defense to disclose a summary of the evidence supporting its motion to determine admissibility prior to trial. In ruling, the trial court relied on *State v. McClaren,* 2009 WI 69, where the Wisconsin Supreme Court discussed the constitutional implications of disclosing evidence of violent acts committed by the victim that the defendant knew about at the time of the alleged crime to support a claim of self-defense. *Id*., 2009 WI 69 at ¶ 5. In *McLaren*, the Wisconsin Supreme Court concluded that measures ensuring fair play and the efficient use of trial time did not invade the Fifth Amendment, violate the Due Process Clause, or otherwise impinge on any "right to surprise a prosecutor." *Id.* Meanwhile, a trial court has the authority under Wis. Stat. § 906.11 to exercise "'reasonable control' over the presentation of evidence so that it can be done effectively and with minimal waste of time. *Id.*, 2009 WI 69 at ¶ 26. "To hold otherwise could frustrate a circuit court's efforts to try to be certain that a jury is presented with admissible, reliable evidence and to make pretrial rulings so that the trial runs smoothly." *Id.*, 2009 WI 69 at ¶ 47.

After the trial court's ruling, Schmidt's counsel suggested that "in fact, we would do an ex parte in camera inspection of the Court and the defendant and seal those records because I don't think it would be – it should be allowed to the State and should have that

information prior to trial." (Doc. 12–10 at 5.) Notwithstanding the court's concern that the hearing would "become a mini-trial," it proceeded with the in camera proceeding. Schmidt filed two documents: (1) an offer of proof identifying at least 29 potential witnesses along with a brief synopsis of their testimony and a legal analysis of the adequate provocation defense; and (2) an offer of proof with a time line of events from 2004 to the day of the shooting.

The in camera proceeding was held in chambers, and the court clearly stated that defense counsel was present but was not participating in the hearing. (Doc. 12-2 at 95.) Schmidt testified about physical, emotional, and verbal abuse by Wing-Schmidt during their marriage. (Doc. 12-2.) The court asked how those things affected his state of mind on the 17th, and Schmidt responded:

> I guess to me it just was a combination of everything. There was no way – there was no way out anymore. There was – I went there – I went there to defend my marriage and to keep my marriage together. I knew full well, or thought, I guess, in my mind that Chad was going to come and pick her up, and they were going to go to Chicago. That's what I thought. I did not know that they had cancelled their plans or whatever the police reports say. I – there's a lot of things in the police reports that I didn't know at that time.

(Doc. 12-2 at 113.) Schmidt further testified that he had written numerous suicide notes and letters to the kids "kind of telling them why I couldn't do it anymore." (Doc. 12-2 at 116.) According to Schmidt, he "saw everything gone."

> [E]verything I worked for my entire life just gone. My kids were gone. I –and she would — her and Barb would poison the kids' minds, just like they did Scout and Jory, and they would end up hating me, just like Scout and Jory hated John. The writing was on the wall. It just – and I thought about hanging myself. I thought about – I didn't have any guns. I didn't have any guns out at the house. I thought about shooting myself. I did have nothing. The only – I didn't – I totally. I didn't even remember about the pistol till that day. Otherwise, I had nothing. I was going to hang myself. I was going to drive my car into an abutment."

(Doc. 12-2 at 117-118.) The court observed that it appeared that Schmidt was contemplating these things on the date of the shooting. It then recessed and allowed Schmidt to review the offer of proof with his attorney. (*Id.)* When they reconvened, the court asked how the earlier incidences entered his mind or affected him on the day of the shooting. Schmidt responded:

> I guess it just kind of came to a head, overwhelmed, and eventually just got – they piled up one after another, just continuously year after year more stress was added. And I guess really the big turning point for me was when the house fell through – the sale of the house fell through. Um, there were more positives than negatives up to that point kind of. And I could work kind of, you know, points when I got kicked out of the house or things like that. But after that, it's like more negatives than positives. And we – with getting in the accident, Barb being around more, it just added more and more stress to an already stressful situation. It came to a head on the 17th.

(Doc. 12-2 at 121.) The court asked whether any one of these circumstances weighed more heavily than the others, to which Schmidt responded:

> The isolation, alienation, the trying to come up with money to pay Barb to watch the kids, to keep food on the table when she was not willing to work the EM, the repeated verbal and physical abuse that nobody would believe me because of who – she's the female and I'm the guy."

(*Id.*)

The court took the matter under advisement, and later ruled:

> The record should reflect that the Court conducted an in camera conference with the defendant. And because it was an in camera conference, the Court feels that it cannot make any extensive findings of fact because that would affect the defense of the defendant, so I'm just going to render a decision.
>
> The Court finds that the circumstances that led to the death of Kelly Wing did not involve a provocation and it was not an adequate provocation and denies the motion."

(Doc. 12-11.)

At trial, defense counsel acknowledged in his opening statement that Schmidt killed

Wing-Schmidt, but argued as follows:

> Where we vary on the State's interpretation of this case is Scott Schmidt's intent. They've been telling you what they think his intent is, but you're going to have to determine as jurors what he intended to do that day. You're going to have to look at the evidence and make a determination of what you think he intended to do. The State has their opinion. I will give you mine. But in the end, the only opinion that counts is yours.
>
> We will argue that he did not go there with the intent to kill Kelly Wing-Schmidt. In fact, he had no intention. I think the facts will show that. We will argue that he went there to confront another individual named Chad Lindsley, who was Kelly Wing-Schmidt's boyfriend, in an attempt to say, Please stay away from my wife. I want to work on my marriage. You've heard that he was living out of the house, but through their marriage he had moved in and out on more than one occasion and they had patched it back up.

(Doc. 12-12 at 44.) Defense counsel outlined the evidence for the jury, including evidence regarding Wing-Schmidt's boyfriend, their financial troubles, and his intent to confront her regarding a confirmation for a hotel room with a king bed. At trial, Schmidt testified regarding their relationship, including their arguments and financial strain, Wing-Schmidt's boyfriend, his reasons for going to the house of the day of the shooting, and why he had the gun in his possession at the time of the shooting.

The jury was instructed on first-degree intentional homicide, first-degree reckless homicide, attempted first-degree intentional homicide, first-degree recklessly endangering safety, and felony bail jumping. Nevertheless, on March 10, 2010, the jury returned a guilty verdict on first-degree intentional homicide, first-degree recklessly endangering safety, and felony bail jumping. (Doc. 12-1 at 1-2.) Schmidt was sentenced to life imprisonment with eligibility for parole after forty years. (Doc. 12-1 at 1.)

On April 7, 2011, defense counsel filed a motion for a new trial arguing that Schmidt was denied his right to present a defense in violation of the Sixth Amendment when the trial

court denied his motion to admit evidence related to Wisconsin's affirmative defense of adequate provocation. Citing *Holmes v. South Carolina,* 547 U.S. 319, 324 (2006), counsel argued that there must be a compelling state interest at stake before a state evidentiary rule can overcome the defendant's Constitutional right. After outlining a history of "verbal and emotional abuse inflicted upon [Schmidt] over the years," counsel argued that the offer of proof was adequate to meet the "some evidence" standard and that any deficiencies stemmed from his being unconstitutionally deprived of counsel at the in camera hearing. (Doc. 24-1 at 9.) In making this argument, defense counsel cited *State v. Felton*, 110 Wis. 2d 485, 329 N.W.2d 161 (1983) and *State v. Hoyt*, 21 Wis. 2d 284, 124 N.W.2d 47, 128 N.W.2d 645 (1964), for their holdings that the trial court must take into account, "not just the events immediately preceding the fatal incident, but the history of the relationship between the defendant and the victim." (Doc. 24-1 at 11.)

Additionally, defense counsel maintained that he was prohibited from participating in the in camera hearing leaving Schmidt to respond on his own to the court's questions in violation of the Sixth Amendment. Defense counsel cited *Bell v. Cone*, 535 U.S. 685, 695 (2002), in support of the argument that Schmidt was denied the presence of counsel at a critical stage because the proceeding had significant consequences for his case – its purpose was to determine whether evidence relating to his defense would be admitted at trial. Counsel further asserted that the facts paralleled the situation in *Ferguson v. State of Georgia,* 365 U.S. 570 (1961), where the Supreme Court held that a defendant was denied assistance of counsel in making his unsworn statement. The State opposed the motion, thoroughly discussing the constitutional implications of Schmidt's arguments.

On July 27, 2011, the trial court issued a 15-page written decision denying the motion for a new trial. In so ruling, the trial court first discussed adequate provocation under Wis. Stat. § 939.44, which has two essential requirements: (1) subjective (defendant acted in response to provocation); and (2) objective (only provocation sufficient to cause a reasonable person to lose self-control completely is legally adequate to mitigate the severity of the offense). The court discussed Schmidt's testimony as well as the written offer of proof. Acknowledging that Schmidt only had the burden of production, the court concluded that Schmidt had not met that burden:

> Defendant's proffered evidence describes a contentious marital relationship, along with financial issues. While these factors may have been a source of stress for the defendant, they are not the type that would drive a reasonable person to kill his spouse. Further, the events on the day of the shooting under a reasonable view of the evidence, do not establish reasonable, adequate provocation to render the defendant incapable of forming and executing the distinct intent to kill his wife.
>
> None of the events over the six-year relationship, including the friction between Kelly and defendant's family, the couple's arguments, Kelly's relationship with Chad, and Kelly's hotel reservation, considered alone or in combination, meet the test of reasonable adequate provocation of an "ordinarily constituted person." The majority of these events were too remote from the time of the shooting, as most people would have cooled off and had time to reflect on their course of action in the interim. The defendant was aware of Kelly's friendship with Chad for some time before the incident. Just prior to the shooting, Kelly asked defendant to leave, but defendant followed her into the home. When Kelly discovered that defendant had a gun and ran out of the home, defendant ran after her and shot her multiple times. The Court notes that defendant's selective amnesia with regard to the shooting itself, while he has no difficulty recalling and testifying to all the facts and details before and after the actual shooting.
>
> Cases such as *Felton* and *Head,* cited by defendant, can be distinguished from the instant case, as they involve incidents in which the defendants were threatened and in imminent physical danger. In those cases, the defendants were battered spouses who had experienced a long history of violence at the hands of their victims. Here, the defendant parked some distance away from the home, concealed a weapon on his person, and shot his wife in the head

> several times. As in *Williford*, in view of the couple's history, the argument on the day of the shooting was no more than an ordinary dispute between them. The Court finds that the defendant's offer of proof, both written and in camera, was not sufficient to place the adequate provocation defense in issue.

(Doc. 12-2 at 142.)

With respect to Schmidt's argument that he was denied the right to counsel, the trial court noted that counsel filed an offer of proof, an amended offer of proof, presented oral argument at motion hearings on January 19, 2010, and February 10, 2010, and was present and conferred with Schmidt during the in camera hearing. (Doc. 12-2 at 143.) At no point did counsel request to actively participate in the in camera hearing. Further, defense counsel "expressed a preference for, and agreed to, an in camera proceeding for defendant's oral offer of proof regarding the adequate provocation defense." Hence, in "view of defense counsel's extensive argument and submissions with regard to the adequate provocation defense," the court found no denial of the right to counsel. (Doc. 12-2 at 144.)

On appeal, Schmidt contended that he was deprived of his Sixth and Fourteenth Amendment right: (1) to a defense when the trial court precluded him from presenting evidence relevant to adequate provocation at trial; and (2) to counsel when the trial court allowed defense counsel to be present but not participate in the in camera hearing in which Schmidt testified regarding the adequate provocation defense. (Doc. 12-2 at eight.) Schmidt cited *Chambers,* 410 U.S. 284, 294 (1973), and argued that "due process prohibits the trial court from applying evidentiary rules so that the critical defense evidence is excluded." Additionally, Schmidt submitted that to the extent that the offer of proof was inadequate to permit the presentation of adequate provocation evidence, it stemmed from

the denial of this right to have counsel assist him in presenting his oral offer of proof during the in camera proceeding. In support of this argument, Schmidt cited numerous Supreme Court cases for their holding that a trial is presumptively unfair where an accused is denied the presence of counsel at a "critical stage." *See Bell v. Cone*, 535 U.S. 685, 695-696 (2002). According to Schmidt, the in camera hearing was a critical stage because it held significant consequences for him.

On September 5, 2012, the Wisconsin Court of Appeals addressed Schmidt's arguments that "he was denied his right to present a defense when the trial court ruled that Schmidt could not present any evidence in support of an adequate provocation mitigation defense" and deprived of "his right to counsel during an in camera hearing where Schmidt testified in support of his mitigation defense." In affirming the judgment of conviction, the Court of Appeals concluded that Schmidt's proffered evidence was inadequate to raise a provocation issue, as a matter of law, after reviewing the proffer and construing the evidence in Schmidt's favor.

The Wisconsin Court of Appeals recounted all of the evidence offered by Schmidt from the financial pressures to the emotional and physical abuse by Wing-Schmidt. However, the Court of Appeals admitted that the "some evidence" standard is a relatively low burden thereby making it a close question as to whether Schmidt placed the objective component of the adequate provocation defense in issue. To reach this conclusion, the Court of Appeals relied heavily on two Wisconsin Court of Appeals decisions: *Felton*, 110 Wis. 2d 485, and *Muller v. State,* 94 Wis. 3d 450, 289 N.W.2d 570 (1980). *Id.*, 2012 WI App 113 at ¶¶ 38-41. It concluded that the history of abuse by Wing-Schmidt paled in comparison to that of *Felton* where the wife had been physically abused by her husband for

23 years. Rather, it was more like the infidelity uncovered in *Muller* where the husband learned of the infidelity a month before the crime and the prior knowledge negated the objective component of provocation because there was an adequate cooling off period. *Id.*, 2012 WI App 113 at ¶ 41 (citing *Williford*, 103 Wis. 2d at 116-117("'even the most unreasonable of human beings would have cooled off and had time to reflect or deliberate' about events occurring two weeks or more prior"). Put simply, Wing-Schmidt's reactions on the day of the shooting were nothing new to Schmidt.

> Next, we address a few deficiencies in Schmidt's offer of proof. First, his offer of proof fails to explain how his revolver came to be loaded with nine live rounds of ammunition when it fell down his pants immediately before he lost control and shot Wing–Schmidt. No reasonable person would leave a loaded handgun stored in a garage where multiple children might access it. Thus, the only reasonable inference is that he loaded the pistol that morning. Second, Schmidt told police he intended to confront Wing–Schmidt when he went to her home that morning. Indeed, it is implausible that Schmidt still had the hotel receipt in his pocket days later, and just coincidentally happened to recall it was there while in the garage.
>
> Thus, the immediate provocation—Wing–Schmidt's arguing with or taunting Schmidt prior to the shooting—cannot constitute objective adequate provocation. Schmidt himself was the initial provocateur. A reasonable person in Schmidt's situation would have expected that confronting Wing–Schmidt about her paramour would result in the very conduct which she undertook. If Schmidt acted in the heat of passion, it was because he deliberately chose to ignite the fire. Schmidt cannot incite a contentious argument and then legitimately argue that Wing–Schmidt's reciprocal provocation should mitigate his culpability. *Cf. Root v. Saul*, 2006 WI App 106, ¶ 26, 293 Wis.2d 364, 718 N.W.2d 197 ("[A] defendant who is the initial aggressor can lose the right to claim self-defense, unless the defendant abandons the fight and gives notice to his adversary that he has done so."); Wis. Stat. § 939.48(2)(c) ("A person who provokes an attack, whether by lawful or unlawful conduct, with intent to use such an attack as an excuse to cause death or great bodily harm to his or her assailant is not entitled to claim the privilege of self-defense.").

Id., 2012 WI App 113 at ¶¶ 43-44.

The second issue regarding Schmidt's right to counsel at the in camera hearing was

less problematic for the Court of Appeals. Because the hearing was a supplementary hearing conducted for Schmidt's benefit and counsel was present and conferred with Schmidt, the Wisconsin Court of Appeals found no denial of the right to counsel. Citing to Supreme Court precedent such as *Bell*, the Wisconsin Court of Appeals noted that Schmidt had "already presented written offers of proof, and had the option to present whatever additional oral testimony he decided in open court." *Id.*, 2012 WI App 113 at ¶ 47. The in camera hearing was designed to prevent prejudice to him by minimizing disclosure of his defense to the State and discussed by the Wisconsin Supreme Court in *State v. McClaren:*

> Any concerns that a defendant has concerning the disclosure potentially being used by the prosecutor in the case-in-chief could be addressed by an in camera review by the circuit court. Such a mechanism has been endorsed by the United States Supreme Court as a fair way of resolving disclosure disputes.

Id., 2012 WI App 113 at ¶ 46 *(citing Pennsylvania v. Ritchie*, 480 U.S. 39, 60, 107 S. t. 989, 94 L. Ed. 2d 40 (1987)). The Wisconsin Supreme Court denied Schmidt's petition for writ of certiorari on January 14, 2013. *Schmidt*, 346 Wis. 2d 284 (2013).

STANDARD OF REVIEW

This petition is governed by the provisions of the Anti–Terrorism and Death Penalty Act of 1996 ("AEDPA"). *See Lindh v. Murphy*, 521 U.S. 320, 336, 117 S. Ct. 2059, 138 L. Ed. 2d 481 (1997). AEDPA allows a district court to issue a writ of habeas corpus on behalf of a person in custody pursuant to a state court judgment "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." U.S.C. § 2254(a). The court can only grant an application for habeas relief if it meets the requirements of 28 U.S.C. § 2254(d), which provides:

> [a]n 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.

This standard is "difficult to meet" and "highly deferential." *Cullen v. Pinholster*, 563 U.S.170, 131 S. Ct. 1388, 1398, 179 L. Ed. 2d 557 (2011). Habeas review must not be used as a "vehicle to second-guess the reasonable decisions of state courts." *Parker v. Matthews*, 132 S. Ct. 2148, 2149, 183 L. Ed. 2d 32 (2012) (per curiam), *quoting Renico v. Lett*, 559 U.S. 766, 779, 130 S. Ct. 1855, 176 L. Ed. 2d 678 (2010). Further, it is not enough to show that the state court's decision was wrong. *White v. Woodall*, 134 S. Ct. 1697, 1702, 188 L. Ed. 2d 698 (2014). Supreme Court case law requires that the "the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011).

At the same time, AEDPA's deferential standard of review applies only to claims that were actually "adjudicated on the merits in State court proceedings." 28 U.S.C. § 2254(d). Where state courts did not reach a federal constitutional issue, § 2254(d) deference applies "only to those issues the state court explicitly addressed." *Quintana v. Chandler*, 723 F.3d

849, 853 (7th Cir. 2013), *citing Wiggins v. Smith*, 539 U.S. 510, 534, 123 S. Ct. 2527, 156 L. Ed.2d 471 (2003). As a consequence, the court must inquire into whether the claim was adjudicated on the merits to determine whether in AEDPA's "highly deferential standard kicks in." *Fargo v. Douma*, 2016 WL 5415747 at 8 (citing *Davis v. Ayala*, 135 S. Ct. 2187, 2198 (2015) (citation omitted)).

To be adjudicated on the merits, the state court is not required to give reasons. *Johnson v. Williams*, __ U.S. __, 133 S. Ct. at 1094 (2015), *quoting Harrington,* 131 S. Ct. at 784-85; *see also Fargo*, 2016 WL 5415747 at 10-11. Indeed, "[w]hen a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state law procedural principles to the contrary." *Id.* (quoting *Richter*, 131 S. Ct. at 784-785). Moreover, the federal claim may be regarded as adjudicated on the merits where the state standard subsumes the federal standard. *Johnson*, 133 S. Ct. 1099, 185 L. Ed. 2d 105 at (2013). On the other hand, where the state courts did not reach a federal constitutional issue, "the claim is reviewed de novo." *Cone v. Bell*, 556 U.S. 449, 472, 129 S. Ct. 1769, 173 L. Ed. 2d 701 (2009).

Schmidt's first argument is that he was deprived of his right to present a defense when he was not allowed to argue adequate provocation. Schmidt framed the issue in constitutional terms before the state courts; however, the trial court and the Wisconsin Court of Appeals decided this issue as a matter of state evidence law. In briefing the habeas petition, respondent argued that this issue was not decided as a matter of federal law and therefore not cognizable under § 2254:

> A review of the state court's decision reveals that the court's resolution of Schmidt's adequate-provocation claim cannot fairly be read as relying primarily on federal law or interwoven with federal law. In resolving that claim, the state court cited only Wisconsin cases and statutes. The state court did not treat his adequate-provocation claim as being interwoven with federal law, and neither should this court.

(Doc. 35 at 6.)

The Supreme Court's presumption in *Williams* is that the state courts must be given the benefit of the doubt when their opinions do not cover every topic raised by the petitioner. A careful reading of the Court of Appeals' decision reveals that it was based on the application of two Wisconsin Statutes, § 939.44(1) and § 940.01(2)(a), and Wisconsin cases, *Felton*, *Head*, and *Muller*. None of these cases addressed the defendant's constitutional right to present a defense; however, *Felton* addressed the constitutional right to effective assistance of counsel finding prejudice in counsel's failure to raise the provocation defense where the facts would have been sufficient to warrant instruction on heat-of-passion manslaughter. Because the state courts did not address the federal constitutional issue, review must be de novo for there is no state court judgment to which the court could defer. *Harris v. Thompson,* 698 F.3d 609, 625 (7th Cir. 2012).

Respondent argues that Schmidt is impermissibly attempting to use the habeas petition to review the state courts' decisions on state evidentiary standards. However, Schmidt clearly called into question his constitutional right to present a defense. Indeed, this case presents a conflict between the Sixth and Fourteenth Amendment rights to present evidence in support of a defense and the "state's right to regulate the presentation of evidence in its courts." *Johnson v. Chrans*, 844 F.2d 482, 484 (7th Cir. 1988). It is axiomatic that "[s]tate and federal rulemakers have broad latitude under the Constitution to establish

rules excluding evidence from criminal trials." *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006); *see also Montana v. Egelhoff*, 518 U.S. 37, 42, 1727, 116 S. Ct. 2013, 135 L. Ed. 2d 361 (1996)(holding that due process does not guarantee a defendant the right to present all relevant evidence.) On the other hand, that latitude is limited by a defendant's constitutional rights to due process and to present a defense, rights originating in the Sixth and Fourteenth Amendments. *Holmes,* 547 U.S. at 324, 126 S. Ct. 1727. "While the Constitution prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote, well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury." *Id.,* 547 U.S. at 325-326.

The Seventh Circuit Court of Appeals has employed a balancing approach to resolve this conflict in accordance with the Supreme Court's analysis in *Green v. Georgia,* 442 U.S. 95, 97, 99 S. Ct. 2150, 2151, 60 L. Ed. 2d 738 (1979) and *Chambers v. Mississippi,* 410 U.S. 284, 295, 93 S. Ct. 1038, 1045, 35 L. Ed. 2d 297 (1973). *Johnson*, 844 F.2d at 484. The task is "to evaluate the exculpatory significance of [relevant and competent] evidence and then to balance it against the competing state interest in the procedural rule that prevented the defendant from presenting this evidence at trial." *Id.*

Recently, the Seventh Circuit Court of Appeals, in an en banc decision, examined the clash between ordinary evidence rules and the Constitutional right to present a defense. *Kubusch v. Neal,* 838 F.3d 845 (7th Cir. 2016). In *Kubusch,* the trial court excluded the videotaped testimony of a girl who would have testified that she saw the defendant at the

time of the murders. By the time of the trial, the girl no longer had any recollection of seeing either the defendant or his son. For that defendant, the "stakes could not be higher: because the state courts found *Chambers* inapplicable, the jury never heard evidence that, if believed, would have shown that Kubsch could not have committed the crimes." *Id*., 838 F.3d at 846. Acknowledging that the witness's inability to vouch for the accuracy of her prior statement meant that it could not be admitted for the truth under Indiana Rule of Evidence 803(5), the Seventh Circuit concluded that the "the last word does not belong to state law" - "it belongs to the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution." *Id*., 838 F.3d at 853.

The Seventh Circuit relied on the decision in *Chambers* and the 33 cases citing *Chambers* after it was handed down. *Id.*, 838 F.3d at 856. *Kubsch* and *Chambers* involved murder prosecutions, state evidentiary rules, the exclusion of evidence vital to the defense, and circumstances providing assurance that it was reliable. In some of the cases decided after *Chambers*, the court ruled that state evidentiary rules must yield to the defendant's fundamental right to present a defense. In other cases, *Chambers* did not require the state evidence rule to be overridden. *Id.*, 838 F.3d at 857. For example, In *Montana v. Egelhoff*, 518 U.S. 37, 116 S. Ct. 2013, 135 L. Ed. 2d 361 (1996), the defendant charged with homicide introduced evidence of extreme intoxication but the court instructed the jury that it could not consider the condition in determining whether he had the requisite mental state. Justice Scalia labeled *Chambers* "highly case-specific error correction" and found the state's rule to be consistent with common law. *Id.*, 838 F.3d at 857. In addition, *Clark v. Arizona*, 548 U.S. 735, 126 S. Ct. 2709, 165 L. Ed. 2d 842 (2006), involved Arizona's rule restricting

consideration of defense evidence of mental illness and incapacity to its bearing on the claim of insanity thereby eliminating any significance with respect to mens rea. *Id.,* 548 F.3d at 858. Quoting *Holmes*, the Supreme Court held that this state rule did not violate due process: "While the Constitution prohibits the exclusion of evidence under rules that serve no legitimate purpose or are disproportionate to legitimate ends, it does permit the exclusion of evidence if its probative value is outweighed by factors such as prejudice, confusion, or potential to mislead." *Id.*

Ultimately, the Seventh Circuit gleaned five lessons to be learned from the "the *Chambers* line of cases." First, the *Chambers* principle has prevailed in cases dealing with the exclusion of evidence or the testimony of defense witnesses and not "a defendant's ability to present a defense." *Id.*, 548 F.3d at 858, quoting *Gilmore v. Taylor*, 508 U.S. 333, 113 S. Ct. 2112, 124 L. Ed. 2d 306 (1993). Second, all of the cases in which the Court has applied *Chambers* involved murder and often the death penalty. *Id.* Third, the evidence must be essential to the defendant's ability to present a defense and not cumulative, impeaching, unfairly prejudicial, or potentially misleading. *Id.* Fourth, the evidence must be reliable and trustworthy (and one way is to show that it closely resembles evidence that would be admissible under the state's rules). Finally, the rule cannot operate in an arbitrary matter in the case at hand. *Id.* Applying these lessons, the Seventh Circuit determined that in *Kubsch,* the total exclusion of relevant evidence necessitated the issuance of a writ, particularly where the evidence was the strongest evidence of actual innocence and it was unusually reliable. *Id.*, 833 F.3d at 862.

Unlike *Chambers*, *Crane,* and *Holmes*, the evidence that Schmidt wished to introduce

at trial did not present evidence of innocence but rather an affirmative defense arising under state law. Indeed, the jury was instructed on first-degree intentional homicide and first-degree reckless homicide, but not receive an additional instruction regarding second-degree intentional homicide. Further, defense counsel argued that Schmidt did not intend to shoot Wing-Schmidt on the day that he went to her house and there was testimony at trial regarding the strain in Schmidt's marriage, his desire to stay married, their financial burdens, Wing-Schmidt's infidelity, his call to Wing-Schmidt's boyfriend the week before the shooting, the reasons he went to the house on the day of the shooting, and his state of mind at the time of the shooting.

The evidence that Schmidt wanted to present was excluded for a myriad of reasons. Under state law, a defendant seeking to mitigate first-degree intentional to second-degree intentional homicide, a defendant bears the burden of producing some evidence of adequate provocation. "Provocation" is defined as "something which the defendant reasonably believes the intended victim has done which causes the defendant to lack self-control completely at the time of causing death," id. § 939.44(1)(b); and provocation is "adequate" when it is "sufficient to cause complete lack of self-control in an ordinarily constituted person," *id.* § 939.44(1)(a). The adequacy requirement is the objective component of the defense; it requires proof of "such mental disturbance, caused by a reasonable, adequate provocation as would ordinarily so overcome and dominate or suspend the exercise of the judgment of an ordinary man, as to render his mind for the time being deaf to the voice of reason: make him incapable of forming and executing that distinct intent to take human life...." *Johnson v. State*, 129 Wis. 146, 108 N.W. 55, 60–61 (1906). However, provocation

is the subjective part of the defense. A defendant must show that the events in question did in fact produce the required mental disturbance at the time of the homicide. *State v. Williford*, 103 Wis.2d 98, 307 N.W.2d 277, 284 (1981). Even the Seventh Circuit has recognized that whether the objectively reasonable person would have lost control "is typically limited to those events that immediately precede the killing." *Kerr v. Thurmer*, 639 F.3d 315 (7th Cir. 2011).

As discussed above, the Wisconsin Court of Appeals carefully reviewed *Felton* and *Muller*, specifically in its analysis of the objective component of provocation. *Id.* 36-41; *State v. Felton*, 110 Wis. 2d 485, 329 N.W.2d 161 (1983); *Muller*, 94 Wis. 2d 450, 289 N.W.2d 570 (1980). The evidence did not rise to the level of abuse in *Felton*, and closely resembled the evidence in *Muller.* Indeed, the court's analysis is not inconsistent with the *Chambers* line of cases discussed in *Kubsch* holding that state evidence rules may restrict consideration of certain evidence and the court found that Schmidt could not satisfy the objective prong of the affirmative defense. As determined by the state courts, Schmidt was not suddenly surprised by his wife's infidelity or threats to prevent Schmidt from seeing his children and acted as the initial provocateur. Because no reasonable person would leave a loaded handgun in a garage where multiple children had access, the "only reasonable inference is that he loaded the pistol that morning." "If Schmidt acted in the heat of passion, it was because he deliberately chose to light the fire." 2012 WI App 113 at ¶ 44.

Ultimately, when the court looks to the lessons learned from the *Chambers* line of cases, Schmidt was arguing a mitigating circumstance in the murder but not a complete defense. Schmidt was given an opportunity to present his evidence in a hearing — as

suggested by defense counsel – after the trial court raised concerns about relevance, confusion, and prejudice. A state court has a legitimate interest in excluding cumulative, confusing or misleading, or unfairly prejudicial evidence. Here, the exclusion was neither arbitrary nor disproportionate to the evidentiary purpose advanced by the exclusion.

Next, Schmidt argues that he had a right to assistance of counsel during the in camera hearing regarding the evidence supporting his defense because it was a critical stage of trial. His attorney was present at the in camera hearing although he was not allowed to question Schmidt. *Schmidt,* 2012 WI App 113. Schmidt's interaction with counsel was limited to their conversation during the recess.

The parties agree that the AEDPA deference standard applies to this issue because the Wisconsin courts addressed the constitutional component of this claims. Under the same § 2254 standard discussed above, this court finds that the decision of the Wisconsin Court of Appeals was not an unreasonable application of clearly established law. It is true that the Sixth Amendment guarantees an accused the assistance of counsel not just at trial, but whenever it is necessary to assure a meaningful defense. *U.S. v. Wade*, 388 U.S. 218, 18 L. Ed. 2d 1149, 87 S. Ct. 1926 (1967). Moreover, "[t]he complete denial of counsel during a critical stage of a judicial proceeding mandates a presumption of prejudice." *U.S. v. Cronic,* 466 U.S. 648, 659, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984). The Supreme Court has defined "critical stage" as a phase of trial in which "[a]vailable defenses may be as irretrievably lost, if not then and there asserted." *Hamilton v. Alabama*, 368 U.S. 52, 54, 82 S. Ct. 157, 7 L. Ed. 2d 114 (1961). However, there is no clearly established case law ordaining a state court violates the right to counsel at a critical stage when defense counsel

is present but unable to confer with the defendant during in camera pretrial hearing where the prosecutor is barred from the proceedings.

The Wisconsin Court of Appeals considered the in camera hearing "merely a supplementary proceeding conducted for [Schmidt's] benefit." *Schmidt*, 2012 WI App 113 at ¶¶ 45-46, 344 Wis. 2d 336, 824 N.W.2d 839. Acknowledging that it may have been more efficient to have counsel guide Schmidt's testimony during the in camera hearing, the Court of Appeals found the trial court's exercise of its discretion to be reasonable. *Id.* Further, with respect to Schmidt's argument that this was a critical stage of the proceedings, the Wisconsin Court of Appeals noted that counsel "had already presented written offers of proof, and had the option to present whatever additional oral testimony he desired in open court. [He] merely chose not to present additional affidavits or testimony . . ." *Id.* The Court of Appeals found that "because the in camera hearing did not supplant Schmidt's opportunity to present evidence in support of his affirmative defense, ... it was not a critical stage." *Id.*

Such a finding is not an unreasonable application of, clearly established federal law or an unreasonable determination of the facts in light of the evidence presented in state court. The record reveals that defense counsel outlined the parameters for such a hearing following the court's discussion of *McLaren* and the constitutional concerns of presenting such evidence:

> A suggestion that I was going to bring up today is that the Court, if you are going to ask for evidence from the defendant or evidence that goes to his subjective belief for adequate provocation, is that, in fact, we would do an ex parte in camera inspection of the Court and the defendant and seal those records because I don't think it would be – it should be allowed to the State and should have the information prior to trial.
>
> So I would be agreeable and agree with the State – or the Court's analysis.

(Doc. 12-10 at 5.) Although the narrative was rambling during the in camera hearing, Schmidt has never identified any evidence supporting his proposed affirmative defense that the trial court did not hear or consider in its ruling. Thus, the court finds no violation of his due process right to present a defense and no violation of his right to assistance of counsel in the state court proceedings.

Now, therefore,

IT IS ORDERED that the petition for habeas relief is denied.

IT IS FURTHER ORDERED that a certificate of appealability is granted on Schmidt's argument that the state court violated his right to present a defense when it ruled he had not met his burden on the state law affirmative defense of adequate provocation. In addition, the court will grant a certificate of appealability on the issue of whether it was a violation of his right to counsel to allow counsel to be present at an in camera hearing but otherwise limit counsel's participation during Schmidt's offer of proof on the affirmative defense.

IT IS FURTHER ORDERED that this case is dismissed.

Dated at Milwaukee, Wisconsin, this 20th day of March, 2017.

BY THE COURT

s/ C. N. Clevert, Jr.
C. N. Clevert, Jr.
U.S. District Court

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen United States Courthouse
Room 2722 - 219 S. Dearborn Street
Chicago, Illinois 60604

Office of the Clerk
Phone: (312) 435-5850
www.ca7.uscourts.gov

FINAL JUDGMENT

December 20, 2018

Before:

DIANE P. WOOD, *Chief Circuit Judge*

JOEL M. FLAUM, *Circuit Judge*

FRANK H. EASTERBROOK, *Circuit Judge*

MICHAEL S. KANNE, *Circuit Judge*

ILANA DIAMOND ROVNER, *Circuit Judge*

DIANE S. SYKES, *Circuit Judge*

DAVID F. HAMILTON, *Circuit Judge*

AMY C. BARRETT, *Circuit Judge*

MICHAEL Y. SCUDDER, *Circuit Judge*

AMY J. ST. EVE, *Circuit Judge*

No. 17-1727	SCOTT E. SCHMIDT, Petitioner - Appellant v. BRIAN FOSTER, Warden, Respondent - Appellee
Originating Case Information:	
District Court No: 2:13-cv-01150-CNC Eastern District of Wisconsin District Judge Charles N. Clevert	

The judgment of the District Court is **AFFIRMED**, with costs, in accordance with the decision of this court entered on this date.

* Circuit Judge Brennan did not participate in the consideration or decision of this case.

OFFICE OF THE CLERK

Supreme Court of Wisconsin

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WI 53701-1688

TELEPHONE (608) 266-1880
FACSIMILE (608) 267-0640
Web Site: www.wicourts.gov

January 14, 2013

To:

Hon. John A. Des Jardins
Outagamie County Circuit Court Judge
320 S. Walnut Street
Appleton, WI 54911

Marguerite M. Moeller
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Lonnie Wolf
Outagamie County Clerk of Circuit Court
320 S. Walnut Street
Appleton, WI 54911

Carrie A. Schneider
District Attorney
320 S. Walnut Street
Appleton, WI 54911

Donna L. Hintze
Asst. State Public Defender
P.O. Box 7862
Madison, WI 53707-7862

You are hereby notified that the Court has entered the following order:

No. 2011AP1903-CR State v. Schmidt L.C.#2009CF275

A petition for review pursuant to Wis. Stat. § 808.10 having been filed on behalf of defendant-appellant-petitioner, Scott E. Schmidt, and considered by this court;

IT IS ORDERED that the petition for review is denied, without costs.

Diane M. Fremgen
Clerk of Supreme Court

COURT OF APPEALS
DECISION
DATED AND FILED

September 5, 2012

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2011AP1903-CR Cir. Ct. No. 2009CF275

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SCOTT E. SCHMIDT,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Outagamie County: JOHN A. DES JARDINS, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Mangerson, JJ.

¶1 HOOVER, P.J. Scott Schmidt appeals a judgment of conviction for first-degree intentional homicide and an order denying postconviction relief.[1] Schmidt argues he was denied his right to present a defense when the trial court ruled before trial that Schmidt could not present any evidence in support of an adequate provocation mitigation defense. Alternatively, Schmidt argues the court deprived him of his right to counsel during an *in camera* hearing where Schmidt testified in support of his mitigation defense. We conclude Schmidt's proffered evidence was inadequate to raise a provocation issue, as a matter of law. We also reject Schmidt's right-to-counsel argument. We therefore affirm.

BACKGROUND

¶2 Schmidt shot and killed his estranged wife Kelly Wing-Schmidt on Friday, April 17, 2009. Schmidt fired multiple rounds from his .22 caliber revolver, striking Wing-Schmidt three times in the head, twice in the left hand, and twice in the right arm.

¶3 The State charged Schmidt with first-degree intentional homicide. Prior to his trial, Schmidt moved to introduce other acts evidence in support of an adequate provocation defense. Schmidt asserted the provocative acts consisted of "false allegations, controlling behaviors, threats, isolation, unfaithfulness, verbal abuse and arguments." The State responded that the motion lacked specificity regarding the identity of the witnesses, a summary of their testimony, or the specific items of evidence the defense wanted to introduce to establish adequate provocation.

[1] Schmidt was also convicted of first-degree recklessly endangering safety and felony bail jumping. He does not appeal those convictions.

¶4 Schmidt ultimately replied by submitting two documents. The first was an offer of proof listing twenty-nine potential witnesses, along with a brief synopsis of their testimony. The second document included a legal analysis of the adequate provocation defense and an offer of proof with a timeline of events from 2004 to the day of the shooting. The trial court later heard Schmidt testify *in camera*. Following the *in camera* testimony, the court denied Schmidt's motion to introduce evidence in support of an adequate provocation defense.

¶5 The case proceeded to trial with the defense acknowledging in its opening statement that Schmidt shot and killed Wing-Schmidt, but contending he did not act with an intent to kill. The jury found Schmidt guilty. In a postconviction motion, Schmidt argued that he was denied his right to present a defense when the court excluded all adequate provocation evidence and that he was denied his right to counsel at the *in camera* hearing. The court denied the motion, and Schmidt appeals.

DISCUSSION

Adequate Provocation Defense

¶6 Schmidt argues he was entitled to present evidence to the jury in support of an adequate provocation defense. Adequate provocation is an affirmative defense to first-degree intentional homicide that mitigates the offense to second-degree intentional homicide. WIS. STAT. § 940.01(2)(a).[2] The defense

[2] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

applies if "[d]eath was caused under the influence of adequate provocation as defined in s. 939.44." *Id.* Adequate provocation is defined as follows:

> (a) "Adequate" means sufficient to cause complete lack of self-control in an ordinarily constituted person.
>
> (b) "Provocation" means something which the defendant reasonably believes the intended victim has done which causes the defendant to lack self-control completely at the time of causing death.

WIS. STAT. § 939.44(1). "'Complete loss of self-control' is an extreme mental disturbance or emotional state. It is a state in which a person's ability to exercise judgment is overcome to the extent that the person acts uncontrollably. It is the highest degree of anger, rage, or exasperation." WIS JI—CRIMINAL 1012 (2006).[3]

¶7 Adequate provocation includes both subjective and objective components. ***State v. Felton***, 110 Wis. 2d 485, 508, 329 N.W.2d 161 (1983). As to the subjective component, the defendant must actually believe the provocation occurred, and the lack of self-control must be caused by the provocation. *See* WIS. STAT. § 939.44(1); ***Felton***, 110 Wis. 2d at 508. As to the objective component, the provocation must be such that would cause an ordinary, reasonable person to lack self-control completely, and the defendant's belief that the provocative acts occurred must be reasonable. *See* WIS. STAT. § 939.44(1); ***Felton***, 110 Wis. 2d at 508.

¶8 Once a defendant successfully places an affirmative defense in issue, the State is required to disprove the defense beyond a reasonable doubt. ***State v.***

[3] The jury instruction's definition of complete loss of self-control is adapted from the description of "heat of passion" under prior law. WIS JI—CRIMINAL 1012, cmt. 9 (2006). The law of homicide in Wisconsin was revised in 1988. 1987 Wis. Act 399; ***State v. Head***, 2002 WI 99, ¶54, 255 Wis. 2d 194, 648 N.W.2d 413.

Head, 2002 WI 99, ¶¶106-07, 255 Wis. 2d 194, 648 N.W.2d 413; *see also* WIS. STAT. § 940.01(3). Thus, the lack of the defense becomes an element of the crime. *See* WIS. STAT. § 940.05(1)(a). "To place a mitigating factor in issue, there need be only 'some' evidence supporting the defense." ***Head***, 255 Wis. 2d 194, ¶112 (citing ***Felton***, 110 Wis. 2d at 507). Our supreme court explained:

> "The burden upon the defendant where a heat-of-passion defense is projected is merely the burden of production as opposed to the burden of persuasion. *It is for the accused to come forward with some evidence* in rebuttal of the state's case—evidence sufficient to raise the issue of the provocation defense. The burden of persuasion, of course, always remains upon the state."

Id., ¶111 (quoting ***Felton***, 110 Wis. 2d at 507).

¶9 When applying the some evidence standard, "the circuit court must determine whether a reasonable construction of the evidence will support the defendant's theory viewed in the most favorable light it will reasonably admit of from the standpoint of the accused." ***Id.***, ¶113 (quotation marks and citations omitted). "In other words, 'if under any reasonable view of the evidence the jury could have a reasonable doubt as to the nonexistence of the mitigating circumstance, the burden has been met.'" ***Id.*** (quoting Walter Dickey, David Schultz & James L. Fullin, Jr., THE IMPORTANCE OF CLARITY IN THE LAW OF HOMICIDE: THE WISCONSIN REVISION, 1989 Wis. L. Rev. 1323, 1347).

¶10 Schmidt and the State dispute the proper formulation of the test for determining the admissibility of provocation evidence at trial, the scope of evidence that may be considered, and, ultimately, whether the evidence presented here was sufficient to raise an issue of adequate provocation.

A. Test for admissibility

¶11 Schmidt first argues that the standard for introducing evidence of adequate provocation at trial is lower than the "some evidence" standard that applies when later determining whether the defendant is entitled to a jury instruction on the defense. This argument arises from the following commentary in ***Head***:

> We think that the standard for giving a jury instruction on self-defense may, in some circumstances, be *higher* than the standard for admitting self-defense evidence at trial, because a defendant's claim of self-defense may be so thoroughly discredited by the end of the trial that no reasonable jury could conclude that the state had not disproved it. In any event, the threshold for admitting evidence at trial is either lower or the same as the threshold for giving a jury instruction. This means that if, before trial, the defendant proffers "some" evidence to support her defense theory and if that evidence, viewed most favorably to her, would allow a jury to conclude that her theory was not disproved beyond a reasonable doubt, the factual basis for her defense theory has been satisfied.

Head, 255 Wis. 2d 194, ¶115. Schmidt contends that unless an offer of proof is to become a mini-trial, a defendant must be given some latitude in the admission of provocation evidence. Thus, he asserts, a trial court should admit any evidence that is relevant to a mitigation defense. In Schmidt's view, a court should examine "the relevancy and admissibility of each piece of proffered evidence," rather than whether the totality of the defendant's proffered evidence is sufficient to raise an issue as to adequate provocation.[4]

[4] In his reply brief, Schmidt appears to step back from, if not concede, his argument that the provocation evidence should be examined individually rather than as a whole. However, he clearly maintains that the standard for admissibility is something less than that for obtaining a jury instruction. Because Schmidt's position is not entirely clear, and the State has briefed the issue, we address it.

¶12 The some evidence standard is already a low bar. *See* ***State v. Peters***, 2002 WI App 243, ¶27 n.4, 258 Wis. 2d 148, 653 N.W.2d 300 ("The 'some' evidence standard is a relatively low threshold, in part because of the distinct functions of judge and jury."). Schmidt's proposed lower standard is really no standard at all. It would permit the wholesale introduction of evidence that would otherwise be inadmissible or irrelevant and would unnecessarily prolong and complicate trials. A defendant could introduce all matter of unsavory evidence about his or her victim regardless of whether there was any potentially viable provocation defense. This would ultimately require the striking of substantial amounts of testimony, potentially from numerous witnesses. While the same risk necessarily exists under the already low "some evidence" standard, Schmidt's proposal opens the door too wide. We therefore reject Schmidt's "mere relevance" standard. The defendant's proffered evidence of provocation must be examined as a whole to determine whether the some evidence threshold is satisfied. It is an all-or-nothing determination as to whether the jury hears any evidence of the affirmative defense.

B. Scope of evidence considered

¶13 We next address, and reject, the State's argument that, when undertaking the some evidence analysis, the only evidence relevant to the objective components of the adequate provocation defense is that conduct which occurs just prior to the crime.[5] The State contends the only exception to this rule

[5] The State does not contend that evidence of prior provocation is irrelevant to the subjective components of the adequate provocation defense, nor does it ultimately argue that Schmidt fails to satisfy the some evidence standard as to the subjective components.

is where the defendant is a battered spouse. The State's argument conflicts with case law and finds no support in the language of WIS. STAT. § 939.44.

¶14 Admittedly, the only relevant appellate cases where the defendant *successfully* argued he or she satisfied the burden of production as to adequate provocation were cases involving battered spouses. *See* ***Felton***, 110 Wis. 2d at 509-11; ***State v. Hoyt***, 21 Wis. 2d 284, 287, 128 N.W.2d 645 (1964). However, the supreme court utilized broad language in ***Felton***, not limiting its holding to cases of battered spouses. The court held:

> While it is true that a defendant's background is not in general relevant to the objective test for heat of passion, the question is how an ordinary person faced with a similar provocation would react. The provocation can consist, as it did here, of a long history of abuse. It is proper in applying the objective test, therefore, to consider how other persons similarly situated with respect to that type, or that history, of provocation would react.

Felton, 110 Wis. 2d at 509-10. Indeed, the court suggested it was appropriate to also consider evidence of prior acts against those other than the battered spouse, namely, the prior sexual abuse of the victim's daughters. ***Id.*** at 511. In any event, the court has in fact considered evidence of prior provocation in other cases not involving battered spouses when undertaking the some evidence analysis.

¶15 For example, in ***State v. Lucynski***, 48 Wis. 2d 232, 236-37, 179 N.W.2d 889 (1970), the court considered the prior acts of the victim in its analysis of the objective component of adequate provocation. However, the victim was not Robert Lucynski's spouse; rather, the victim was a man who had previously engaged in "home-defiling activities" with Lucynski's wife. ***Id.*** at 237. The victim had lived in Lucynski's home while dating his daughter, and Lucynski had obtained a judgment for money he loaned the victim during that time.

¶16 The court explained, "***Hoyt*** stands for the proposition that actions over a long period of time can have 'cumulative effect upon any ordinary person so that the provocation just before the shooting would be greatly magnified.'" ***Id.*** at 235. The court further observed, "Here, as in ***Hoyt***, we have a series of provocative incidents preceding the day of the actual shooting." ***Id.*** at 236. Ultimately, the court held the objective component of the heat of passion defense was not satisfied because the provocation immediately prior to the murder—the victim's refusal to pay the money owed—was unrelated to the prior affair with Lucynski's wife. ***Id.*** at 237. Nonetheless, the court's analysis is inconsistent with the State's argument that prior acts of provocation are always irrelevant except in the case of battered spouses.

¶17 The State cites ***State v. Williford***, 103 Wis. 2d 98, 116, 307 N.W.2d 277 (1981), in further support of its argument that acts prior to the murder are irrelevant to the adequate provocation defense. ***Williford***, however, merely held that the prior acts there, alone or in tandem with the immediate provocation, did not rise to the level of adequate provocation. ***Id.*** at 120. Thus, having actually considered the prior provocation in its analysis, ***Williford*** does not support the State's position.

¶18 We further observe that the State has not argued that WIS. STAT. § 939.44(1)(b), which defines "provocation," itself imposes any temporal restrictions upon the evidence that may be considered. Rather, the statute requires only that the proffered acts had a causal effect upon the defendant's loss of self-control at the time of the crime. *See* ***id.*** Thus, if the victim's prior acts could

contribute to a reasonable person's loss of self-control at the time of the crime, the acts are relevant to the objective component of the defense.[6]

C. Whether the evidence placed the adequate provocation defense in issue

¶19 Having set the stage, we now consider whether Schmidt presented sufficient evidence of adequate provocation to place the affirmative defense in issue. That is, did Schmidt present "some evidence," such that a jury could reasonably conclude he shot Wing-Schmidt while under the influence of adequate provocation. We hold that he did not.

¶20 As noted, Schmidt provided written offers of proof concerning numerous witnesses in addition to his *in camera* testimony. His adequate provocation argument here, however, relies primarily upon the *in camera* testimony, and exclusively upon evidence from Schmidt.[7] For our purposes, we must construe the evidence in Schmidt's favor. *See* ***Head***, 255 Wis. 2d 194, ¶113.

¶21 Schmidt and Wing-Schmidt married in April 2006, and had two children together, Kyan and Cassidi. Additionally, Wing-Schmidt had three children from prior relationships, all of whom resided in the family home. Schmidt had one child from a prior marriage, Max, who lived elsewhere. During their marriage, Wing-Schmidt threw Schmidt out of the house multiple times, but

[6] The scope of prior acts evidence that may be *relevant* is necessarily vast. But, as we concluded above, evidence of prior provocation is not admissible merely because it is relevant. It becomes admissible on the issue of adequate provocation only if the defendant satisfies the some evidence threshold.

[7] The State's response criticizes a handful of the witness synopses from Schmidt's written offer of proof. Schmidt replies that the State merely picked the weakest of the numerous summaries. Schmidt did not, however, discuss the witnesses' expected testimony in his initial brief.

the couple always reconciled. The shooting occurred at a time when Schmidt was not living in the home.

¶22 Schmidt contends Wing-Schmidt had been "emotionally and psychologically abusive" during their turbulent relationship. Schmidt explained that Wing-Schmidt did not get along with his family. She threatened to have his sister removed as godparent of their oldest child and refused to permit his parents to attend the baptism of their youngest child on threat of calling the police. Once, when Schmidt returned after taking Kyan to his parents' home on Kyan's birthday, she came out of the house screaming at him, extremely upset that he had done so. Wing-Schmidt gave him an ultimatum that he had to choose between her and their children, or Max and his parents, thereby isolating him from his family. In December 2009, when she kicked him out of the house within a week after he was released from the hospital after sustaining serious injuries in a car accident, she became irate when he stayed at his sister's house.

¶23 Schmidt explained that his children were his world. In the year or more prior to the shooting, Wing-Schmidt began making frequent comments that the children were not his "f'ing kids," they did not like him, they did not think of him as their dad, and that they would be taken from him. Schmidt knew how she had obtained full custody of her children by other fathers, including making things up, to the point where the fathers were not part of their children's lives. He also knew that she and her mother had told the children unfavorable things about their fathers until the children wanted nothing more to do with them. He feared Wing-Schmidt and her mother would do the same to him.

¶24 Wing-Schmidt also isolated Schmidt from friends. She told him she did not want him to spend time with a friend with whom he hunted and fished;

publicly accused him of cheating with a friend's wife; and emailed a female friend of his accusing her of having an affair with him. She also belittled and swore at him in front of friends and told him no one wanted to be around him because of who he was. She also embarrassed and hurt him by having an affair with Chad Lindsley.

¶25 The couple also had financial issues. The primary financial burden fell on Schmidt once Wing-Schmidt started school and worked only one day per week. Approximately a year and one-half before the shooting, Schmidt executed a mortgage on the lake home he owned prior to the marriage in order to pay off some debt, including $16,000 of Wing-Schmidt's credit card debt. Shortly before the shooting, Wing-Schmidt informed him this same credit card he thought was destroyed was "maxed out" at $14,000 and she had not made a payment for several months.

¶26 About three weeks before the shooting, Wing-Schmidt said she needed $400, which they did not have, to register for the paramedics exam, and she also pressured him to pay her mother $400 for watching the children for two weeks. Also, both of their vehicles were breaking down. Schmidt hoped the $5,000 tax refund they anticipated would alleviate some of the pressure, and he intended to use that money to replace Wing-Schmidt's vehicle. However, he learned two days before the shooting that Wing-Schmidt had the refund direct-deposited into her personal checking account and the money was already gone. Meanwhile, Schmidt was staying at the lake home, where the gas was shut off so he could make sure the bills were paid where Wing-Schmidt and the children were living.

¶27 Schmidt also stated, however, that much of their financial difficulty was due to the failed sale of the lake home in late 2007. He conceded that was due to the buyers backing out, and not attributable to anything Wing-Schmidt had done. Further, Schmidt's car accident and resulting serious injuries were apparently alcohol related, and he served home confinement because of it. Thus, his inability and reduced ability to work were of his own making.

¶28 Wing-Schmidt also physically abused Schmidt. After a shoulder surgery in 2007, she would purposely hit him in the shoulder, knowing that nobody would believe him. Further, she "would hit herself, clawed at her face, [and] she'd punch, kick herself." While hospitalized after his car accident, she hit him with the phone and yelled at his parents and she had to be removed from the intensive care unit.

¶29 Schmidt's *in camera* testimony was largely a rambling narrative, directed only by a few questions from the court. As to the alleged prior provocation, the court repeatedly asked Schmidt to explain how Wing-Schmidt's past conduct "entered into [his] mind at the time," "affect[ed his] state of mind," or how he "contemplate[d] these things." Schmidt variously responded:

> I guess to me it just was a combination of everything. There was no way—there was no way out anymore. There was— ... I went there to defend my marriage and to keep my marriage together. I knew full well, or thought, I guess, in my mind that [Lindsley] was going to come and pick her up, and they were going to Chicago.
>
> ....
>
> The ... week-and-a-half before that, I was out at the lake and I had wrote numerous suicide notes ... or letters to the kids, letters to [Wing-Schmidt] ... kind of telling them why I couldn't do it anymore, why—if I didn't have ... my kids and my wife, it wasn't worth it anymore to go on. And I ... lived on cigarettes and coffee. I didn't eat.

I don't know how I contemplated ... all I knew is I was losing my wife and I was losing my kids.

....

Yeah. I mean, they just constantly—I guess, like I said, it was going round and round in my head. Everything. From the house that we were going to build to—it was just—it was a mess. To the kids, to losing the kids, to losing [Wing-Schmidt], to the baptism of Kyan, to the baptism of Cassidi, ... to [the father of two of Wing-Schmidt's children], to the way her mom treated my son [Max], the way [Wing-Schmidt] treated Max. You know, there was no—I took those kids in like they were my own.

....

I guess it just kind of came to a head, overwhelmed, and eventually just got—they piled up one after another, just continuously year after year more stress was added.

And I guess really the big turning point for me was when ... the sale of the house fell through. Um, there were more positives than negatives up to that point kind of. ... But after that, it's like more negatives than positives.

And we—with getting in the accident, [Wing-Schmidt's mother] being around more, it just added more and more stress to an already stressful situation. It came to a head on the 17th.

....

The isolation, alienation, the trying to come up with the money to pay [her mother] to watch the kids, to keep food on the table when she was not willing to work ..., the repeated verbal and physical abuse that nobody would believe me because of who—she's the female and I'm the guy.

.... I couldn't make a decision. I wasn't allowed to make a decision. I was told.

I mean, so many of those things tie in together with—just from—enjoying going hunting with my friends to union meetings to, I mean, no matter what I did, being accused of cheating by her, to taking my phone, breaking my phone.
....

> And the constant accusations that just kept weighing down. And no matter what I did, it was never good enough. If I made more money, it wasn't good enough. Then I wasn't around enough. ....
>
> ....
>
> And it was just back—it was—I don't know. I don't know what the heck happened. I just—so much—so many of those things—I mean everything just added up. It was just weighing on my mind continuously.
>
> ....
>
> And it just—it was like every which way I turned nothing was good enough. And it was—but yet I was good enough for certain things. "You're good enough for this. If I need something, you're good enough. But otherwise, you're not. Get the hell away from me."
>
> And that's how—I mean, that's—constantly the financial worries, the verbal abuse, the physical abuse ....
>
> ....
>
> We can't put the bullets back in the gun. You can't go back in time. I can't go back in my physical state, my mental state back. Everything was gone. And I loved her, and I still do. But there's days—there's days I hate her guts, and there's days I love her. And it just tore me up. I didn't know which way was up.

¶30 Schmidt contends Wing-Schmidt also provoked him the day of the shooting. Schmidt stated he discovered a hotel receipt several days before the shooting which he believed indicated Wing-Schmidt was going to spend a weekend with Lindsley. Schmidt decided to go to the home and gather his tools from the garage to use on a job. He parked at the fire station where he worked because he was afraid Wing-Schmidt would call the police if she saw his vehicle in the driveway. While he was in the garage, two of the children came in, followed by Wing-Schmidt. The two had a normal conversation for a while, until Schmidt took the hotel receipt from his pocket and confronted her with it.

¶31 Wing-Schmidt first stated she intended to take the kids to Chicago for the weekend. Schmidt responded that he did not believe her, because the reservation was for a single king bed. She replied, "It's none of your f'ing business. Why do you care anyways? These aren't your f'ing kids. And you're not going to see them." The two then argued about the kids and Lindsley.

¶32 Schmidt then agreed to get the kids' bikes down and inflate the tires. Meanwhile Wing-Schmidt went inside. Schmidt recalled that his .22 caliber pistol was still stored in a cabinet in the garage, and he decided to take it with him because it was not safe to have near the kids. Thus, he grabbed it and put it in his pants. As Schmidt was finishing up with the bikes, Wing-Schmidt came out and yelled at him to "get the frickin' bike tires done and get the F out of here. You're not welcome here. You're not—this isn't your home. You got your own home. These aren't your kids."

¶33 Schmidt explained that then:

> [W]e argued and kind of struggled. We got in the house .... We got upstairs to the top of the stairs in the house, and she picked up the phone and threw it at me .... Somehow we ended up in the bathroom arguing about [Lindsley]. There were flowers on the table from him.
>
> ....
>
> And she said, "Now you have nobody. ... You don't have your parents. You don't have me. And you will never have your kids."
>
> .... And the next thing I know, she said, "Fine. Fine. I will take you back." And I looked at her and I said, "What?" She said, ... "I'll take you back." And this is ... she's probably told me this 20 times in our lifetime. And I said, "What about [Lindsley]?" "Well, I—I want to be with [Lindsley] instead. I'm not taking you back. .... [Lindsley] doesn't drink like you do. He doesn't smell like cigarette smoke like you do. He doesn't hunt. He doesn't

> fish. He doesn't do anything. He stays at home. ... [H]e doesn't work all the time." ....
>
> And the next think I know, she's in my face. I heard [her mother] come into the house. .... And [Wing-Schmidt] pushed me. And as she pushed me, she noticed the gun that I had in my pants. And I ... had totally forgot about it. It fell down my pant leg, ... down to my ankle. And she went running out of the bathroom and said something to her mother like, "Mom, take the kids. He's got a gun." ... And she ran by me. And [her mother] looked at me and said ... something like, "Scott, what the hell are you doing here?" ....
>
> And at that point I ran down the stairs after [Wing-Schmidt], and I [threw] open the door, and I heard a gunshot. And to this day ..., I don't know where she was or where I was. I just heard the shot. I don't remember seeing the gun or nothing. I just remember hearing the frickin' shot. And then she was over by ... her van, and she was bleeding ... from her head.
>
> And then [her mother] came outside. I remember that. She came at me, and I pushed her away. And I heard the gun go off again.

¶34 Because the "some evidence" standard presents such a relatively low burden, it is a close question whether Schmidt placed the objective component of the adequate provocation defense in issue. Nonetheless, we agree with the State that Schmidt did not meet his burden of production.

¶35 We also reject, however, the State's characterization of the objective component, that "[a]n ordinary person ... would not have reacted ... by shooting [Wing-Schmidt] four times, including twice in the head." No reasonable person ever reacts to any provocation by killing the provocateur. No doubt, that is why the adequate provocation defense—unlike self-defense—is not a complete defense, but only mitigates the severity of the crime. Instead, Schmidt needed to show only that Wing-Schmidt's provocation could have caused a reasonable person to completely lose self-control at the time of the murder. *See* WIS. STAT.

§ 939.44(1). Stated otherwise, he needed to demonstrate that Wing-Schmidt's conduct was sufficient to induce the "highest degree of anger, rage, or exasperation" in an ordinarily constituted individual. *See* WIS JI—CRIMINAL 1012 (2006).

¶36 As the adequate provocation inquiry is fact-driven, every case must, of course, be evaluated on its own merits. Yet, while the inquiry is not conducive to bright-line rules, prior cases are instructive. We find two cases helpful here.

¶37 In ***Felton***, the court found the objective component of the provocation defense satisfied. There, the defendant wife had been physically abused by her victim husband for twenty-three years. ***Felton***, 110 Wis. 2d at 489-90. The beatings were regular and severe and continued through six pregnancies, even causing one miscarriage. The defendant was also sexually abused, suffered broken ribs, and would sometimes awaken in the night to find her husband beating or choking her. The husband also frequently threatened to kill her. Further, the frequency of abuse had escalated in the months preceding the shooting. ***Id.*** at 490. In addition, a clinical psychologist opined that Felton was detached from reality at the time of the crime because of the severe, recurrent abuse and "was in a state that anyone would be in under similar circumstances." ***Id.*** at 495.

¶38 The history of abuse in the present case pales in comparison to ***Felton***. The abuse here did not span decades, there was no sexual abuse, and the physical abuse was minimal. We acknowledge that ***Felton*** does not set a minimum threshold for what constitutes evidence of objective provocation. *See* ***id.*** at 511 ("It seems *clear* that the history of abuse, plus the provocation which occurred on the day of the shooting, was *clearly sufficient* ... to raise a jury issue as to the objective facet of heat of passion.") (emphasis added). Nevertheless, ***Felton***

is highly informative as an example of prior conduct that does rise to the level of objective, i.e., adequate, provocation.[8]

¶39 We also agree with the State that ***Muller v. State***, 94 Wis. 2d 450, 289 N.W.2d 570 (1980), is instructive. In ***Muller***, the defendant learned of his wife's potential infidelity a month prior to the crime. ***Id.*** at 461. One hour before the shooting, he learned the identity of the other man, "Pee Wee" Troxel, and received a description of his vehicle. Muller called his wife who first denied, but then admitted the affair. ***Id.*** at 462. She denied that Troxel was with her. Muller then drove to his wife's apartment and observed Troxel's vehicle parked outside, after 2 a.m. Muller ran up the stairs, kicked the door in, and ran past his sleeping children to the bedroom. He then "saw a hand come out of the bedroom and it had a pistol in it. The defendant grabbed the hand with the pistol, swung the person around, and the pistol broke free of his grip and discharged. The defendant could not remember anything after that." ***Id.*** at 459. The evidence showed that the semi-nude Pee Wee was shot three times—in the neck, shoulder, and chest. ***Id.*** at 455, 492.

¶40 The court held there was insufficient evidence on the objective component of provocation. It explained, "This is not evidence showing sudden resentment or such 'reasonable, adequate provocation' as would overcome or suspend the exercise of judgment of an ordinary man, since the defendant was

[8] Evidence of the subjective component of adequate provocation, however, appears stronger here than in ***Felton***. There, the defendant was intoxicated and she deliberated whether she should shoot her husband in his sleep prior to acting. ***Id.*** at 491-93, 512. Here, the State does not dispute that Schmidt, subjectively, acted in the heat of passion when he shot Wing-Schmidt.

aware one month prior to the crime that a man had stayed overnight at his wife's apartment." ***Id.*** at 462.

¶41 As in ***Muller***, here Schmidt was not suddenly surprised by his wife's infidelity, much less did he come upon Wing-Schmidt's paramour in her bedroom in the middle of the night. Schmidt had already called Lindsley eight days before the shooting and told him, "Stay away from my fucking wife or I'll kill you." Thus, Schmidt's prior knowledge of Wing-Schmidt's affair negated the objective component of that provocation because there was an adequate cooling off period. *See also* ***Williford***, 103 Wis. 2d at 116-17 ("even the most unreasonable of human beings would have cooled off and had time to reflect or deliberate" about events occurring two weeks or more prior).

¶42 The same reasoning applies equally to Wing-Schmidt's stated intent to prevent Schmidt from seeing his children. Schmidt's offer of proof indicates that, beginning four months before the shooting, Wing-Schmidt repeatedly threatened that she would take Schmidt's children from him and that he would not see them. Schmidt's similar threats on the morning of her murder were merely more of the same. Likewise, Schmidt acknowledged that Wing-Schmidt had accepted him back only to reject him again some twenty times in the past. Thus, this too was nothing new to Schmidt.[9]

¶43 Next, we address a few deficiencies in Schmidt's offer of proof. First, his offer of proof fails to explain how his revolver came to be loaded with

[9] We note that our preceding analysis, adopted from the State's argument, relies upon Wing-Schmidt's provocative conduct prior to the shooting. This is inconsistent with the State's position that the victim's past provocation is irrelevant to the objective inquiry.

nine live rounds of ammunition when it fell down his pants immediately before he lost control and shot Wing-Schmidt. No reasonable person would leave a loaded handgun stored in a garage where multiple children might access it. Thus, the only reasonable inference is that he loaded the pistol that morning. Second, Schmidt told police he intended to confront Wing-Schmidt when he went to her home that morning. Indeed, it is implausible that Schmidt still had the hotel receipt in his pocket days later, and just coincidentally happened to recall it was there while in the garage.

¶44 Thus, the immediate provocation—Wing-Schmidt's arguing with or taunting Schmidt prior to the shooting—cannot constitute objective adequate provocation. Schmidt himself was the initial provocateur. A reasonable person in Schmidt's situation would have expected that confronting Wing-Schmidt about her paramour would result in the very conduct which she undertook. If Schmidt acted in the heat of passion, it was because he deliberately chose to ignite the fire. Schmidt cannot incite a contentious argument and then legitimately argue that Wing-Schmidt's reciprocal provocation should mitigate his culpability. *Cf.* ***Root v. Saul***, 2006 WI App 106, ¶26, 293 Wis. 2d 364, 718 N.W.2d 197 ("[A] defendant who is the initial aggressor can lose the right to claim self-defense, unless the defendant abandons the fight and gives notice to his adversary that he has done so."); WIS. STAT. § 939.48(2)(c) ("A person who provokes an attack, whether by lawful or unlawful conduct, with intent to use such an attack as an excuse to cause death or great bodily harm to his or her assailant is not entitled to claim the privilege of self-defense.").

Right to Counsel at *in camera* Hearing

¶45 We next consider, and easily reject, Schmidt's argument that he was deprived of his right to counsel at the *in camera* hearing. Schmidt complains that his attorney, although present during the *in camera* testimony, was not permitted to participate and ask Schmidt questions.

¶46 The problem with Schmidt's argument is that the *in camera* hearing was merely a supplementary proceeding conducted for his benefit. The intent of the closed hearing was to prevent prejudice to him by minimizing disclosure of his defense to the State. Our supreme court suggested this very procedure recently in a self-defense affirmative defense case, ***State v. McClaren***, 2009 WI 69, ¶34 n.12, 318 Wis. 2d 739, 767 N.W.2d 550. There the court explained:

> Any concerns that a defendant has concerning the disclosure potentially being used by the prosecutor in the case-in-chief could be addressed by an *in camera* review by the circuit court. Such a mechanism has been endorsed by the United States Supreme Court as a fair way of resolving disclosure disputes.

Id. (citing ***Pennsylvania v. Ritchie***, 480 U.S. 39, 60 (1987)). While, in retrospect, it may have been more efficient to have counsel guide Schmidt's testimony rather than having the court elicit an unguided narrative, a court has broad discretion in the conduct of its proceedings. *See* WIS. STAT. § 906.11(1); ***State v. Payette***, 2008 WI App 106, ¶59, 313 Wis. 2d 39, 756 N.W.2d 423. We agree with the State that, since the prosecutor was barred from the hearing, preventing defense counsel from questioning Schmidt in a nonadversarial atmosphere was a reasonable accommodation and not a violation of Schmidt's right to counsel.

¶47 Schmidt contends, however, that the *in camera* hearing was a "critical stage" of the trial at which he was entitled to the assistance of counsel. *See* ***Bell v. Cone***, 535 U.S. 685, 695-96 (2002). Fatal to Schmidt's argument, the supplemental hearing was not the only opportunity for Schmidt to present his provocation evidence to the court. Indeed, Schmidt had already presented written offers of proof, and had the option to present whatever additional oral testimony he desired in open court. Schmidt merely chose not to present additional affidavits or testimony, of his own or from others, despite the court's explicit prior pronouncement that additional evidence would be permitted. Because the *in camera* hearing did not supplant Schmidt's opportunity to present evidence in support of his affirmative defense, we hold that it was not a critical stage.

¶48 In any event, we observe that, in the middle of the hearing, the court recessed to allow Schmidt to review his attorney's written offer of proof and speak with his attorney. Counsel was present for the entire *in camera* hearing. Thus, if counsel felt Schmidt or the court was overlooking something, or had any other concerns, there was an opportunity to so advise Schmidt. Likewise, Schmidt had the opportunity to present any concerns or questions he had to his attorney.

By the Court.—Judgment and order affirmed.

Recommended for publication in the official reports.

STATE OF WISCONSIN CIRCUIT COURT BRANCH VII OUTAGAMIE COUNTY

STATE OF WISCONSIN,
Plaintiff,

v.

SCOTT E. SCHMIDT,
Defendant.

CLERK OF CIRCUIT COURT
OUTAGAMIE COUNTY
FILED
JUL 27 2011
AT _____ O'CLOCK

Case No. 09 CF 275

DECISION ON MOTION FOR NEW TRIAL

Defendant was convicted of first-degree intentional homicide, first-degree recklessly endangering safety, and felony bail jumping. He moves for a new trial on the offense of first-degree intentional homicide on two grounds: 1) denial of the right to present a defense; and 2) denial of the right to counsel.

I.

Defendant argues that he was denied his Sixth Amendment right to present a defense when the Court denied his motion to admit evidence regarding the affirmative defense of adequate provocation. Under sec. 940.01(2)(a), Wis. Stats., first-degree intentional homicide is mitigated to second-degree intentional homicide if "[d]eath was caused under the influence of adequate provocation as defined in s. 939.44." The section 939.44 definition provides:

> (a) "Adequate" means sufficient to cause complete lack of self–control in an ordinarily constituted person.
> (b) "Provocation" means something which the defendant reasonably believes the intended victim has done which causes the defendant to lack self–control completely at the time of causing death.

Adequate provocation has two essential requirements. Under the subjective (state of mind) element of subsection (1)(b), the defendant must have acted in response to

provocation, which necessitates an assessment of the defendant's state of mind at the time of the killing. The objective (provocation) element under subsection (1)(a) provides that only provocation sufficient to cause a reasonable person to lose self-control completely is legally adequate to mitigate the severity of the offense.

Defendant filed a Motion to Include Other Acts Evidence, pursuant to sec. 904.04, Wis. Stats., in conjunction with the defense of adequate provocation. The Court ordered that the defense provide a list of witnesses with a summary of evidence prior to the hearing on the matter. In his response to the State's objection to the motion, defendant filed an offer of proof listing 42 events dating back to March 2003. Pursuant to the State's discovery demand, the defendant also filed an additional offer of proof containing 31 witnesses with a brief summary of expected testimony.

At the February 10, 2010 hearing, the Court indicated it was considering an in-camera inspection of the defendant to further develop the issues presented in the defense motion. Defense counsel agreed to this procedure, stating: "A suggestion that I was going to bring up today is that the Court, if you are going to ask for evidence from the defendant or evidence that goes to his subjective belief for adequate provocation, is that, in fact, we would do an ex parte in-camera inspection of the Court and the defendant and seal those records because I don't think it would be – it should be allowed to the State and should have that information prior to trial. So I would be agreeable and agree with the State – or with the Court's analysis." (2/10/10 Motion Hearing Transcript, page 5).

The Court conducted an in-camera inspection of the defendant in chambers, with defense counsel present. Based upon a review of the submissions and evidence presented at the in-camera proceeding, the Court denied the defense motion without providing a

great amount of detail in order to protect the information shared by the defendant during the in-camera inspection.

Among the cases cited by defendant in support of his argument that he has presented sufficient evidence in support of his adequate provocation defense are *State v. Felton*, 110 Wis. 2d 485, 329 N.W.2d 161 (1983) and *State v. Head*, 255 Wis. 2d 194, 648 N.W.2d 413 (2002). In *Felton*, the defense of a wife who shot and killed her husband was that she was a battered spouse who acted in self-defense. There was a long history of physical abuse of the wife and children by the victim over the entire course of the twenty-three-year marriage. Among the incidents of severe physical abuse to which Mrs. Felton testified: the victim beat her during her six pregnancies, broke her ribs, threatened to burn her with a blow-torch, choked her in her sleep, struck her so hard that her denture broke and cut her lip, threatened to kill her on various occasions, forced her to commit sexual acts, and beat their children. Several times, either the children or neighbors called the police because of these acts of domestic violence.

On the day of the incident, Mrs. Felton and the victim consumed alcohol at a local bar, where an argument began and continued when they arrived home. The victim argued with their fifteen-year-old daughter, after which the child's lip was bleeding. Mrs. Felton testified that the victim continued to shout at her, and when he took a swing at her, their nine-year-old twins pushed him away from her. She testified that she felt the victim would kill her based on his actions and demeanor that night, and that she knew there was no other way out without the victim killing her or the children. At trial, a clinical psychologist testified regarding Mrs. Felton's behavior as a battered spouse.

Mrs. Felton sought a new trial because of ineffectiveness of counsel. Defense counsel was new to the public defender's office, new to the practice of law in Wisconsin, had little criminal experience, and had never before tried a felony case. He acknowledged that he was unaware of the heat-of-passion manslaughter defense.

The *Felton* court noted that an adequate provocation defense must satisfy both an objective and a subjective test. The court referred to *State v. Williford*, 103 Wis. 2d 98, 113, 307 N.W.2d 277 (1981), in which it stated the provocation that would reduce murder to manslaughter must be sufficient to:

> . . . so overcome and dominate or suspend the exercise of the judgment of an ordinary man as to render his mind for the time being deaf to the voice of reason: make him incapable of forming and executing that distinct intent to take human life essential to murder in the first degree, and to cause him, uncontrollably, to act from the impelling force of the disturbing cause, rather than from any real wickedness of heart or cruelty or recklessness of disposition. . . .

Pointing out that in applying the objective test, it is proper to consider how other persons similarly situated with respect to that type or history of provocation would react, the *Felton* court held that the history of abuse, plus the events on the day of the shooting, was sufficient to meet the objective test for heat of passion.

In *Head*, the wife shot and killed her husband, claiming that she had acted in self-defense. The supreme court discussed whether Mrs. Head had presented sufficient evidence regarding her knowledge of the victim's violent character and his prior acts of violence to raise perfect and imperfect self-defense. The victim was upset over his teenage daughter's pregnancy and threatened to kill the father of the unborn child. On the day of the incident, the victim blamed Mrs. Head for their daughter's pregnancy, stating: "It's your fault that this all happened....Maybe I should just take care of you

guys and get on with my life." Mrs. Head understood this to be a threat and thought the victim was going to kill her and the child's father.

Mrs. Head testified that the victim clenched his fists and rolled across the bed as if he was going to reach for something. She knew that he kept a handgun under his side of the bed. She grabbed the gun, pointed it at him when he came toward her in a threatening manner, and shot him. The victim had previously and repeatedly threatened violence toward the father of the child, including the night he learned of the pregnancy, when he searched for him armed with guns. Mrs. Head made an offer of proof regarding a series of events when the victim physically abused her and threatened to kill her, as well as several incidents of violence or threats of violence to others.

The *Head* court engaged in a lengthy analysis of the requirements for raising both perfect and imperfect self-defense, particularly as to whether the defendant held a reasonable belief of the need to use force. The court pointed out that there are different thresholds for raising affirmative defenses: "Unnecessary defensive force also has a lower threshold than 'adequate provocation,' because 'provocation' is defined as 'something which the defendant reasonably believes the intended victim has done which causes the defendant to lack self-control completely at the time of causing death.' Wis. Stat. § 939.44(1)(b)." 255 Wis. 2d at 246.

The court noted that under imperfect self-defense, the defendant is not required to meet an objective reasonable threshold, i.e. the defendant may hold an unreasonable belief regarding the amount of force or the need to use force in order to raise the defense. That is not the case with the adequate provocation defense, as there must be a provocation sufficient to be determined an adequate provocation.

As the State points out, a determination of whether adequate provocation is at issue is dependent upon the specific facts in each case. When the defendant in *Williford*, *supra*, relied on *State v. Hoyt*, 21 Wis. 2d 284, 128 N.W.2d 645 (1964) to show adequate provocation, the *Williford* court referred to the following language in *Hoyt*: "Under the peculiar circumstances of this case, we conclude that a jury might properly have found her guilty of heat-of-passion manslaughter..." *Hoyt*, 21 Wis. 2d at 291-92, cited by *State v. Williford*, 103 Wis. 2d at 122. The *Williford* court distinguished that case from *Hoyt* in various respects, concluding that *Hoyt* "...must be limited to the 'peculiar circumstances' in that case of a continual pattern of reprehensible conduct of a husband physically assaulting and verbally insulting and humiliating his spouse." At 123.

In *Williford*, the defendant, who shot and killed his wife, claimed that he acted in the heat of passion upon adequate provocation. The couple was separated and Mrs. Williford was involved with another man. The Willifords had a continual mutually abusive relationship and argued on the morning of the shooting. Mrs. Williford had drawn a gun on the defendant twice in the few years before the killing, once shooting toward him, but striking the wall. The couple had a violent physical quarrel not long before the incident.

The defendant had been very upset when his wife brought her boyfriend to their legal separation hearings. Three weeks before the incident, the defendant attacked his wife when she insulted him as he received a speeding ticket. On the date of the shooting, the defendant went to his wife's home at 1:00 a.m. to visit his daughter. Mr. and Mrs. Williford argued, she allegedly took a gun out of her purse and threatened to blow his brains out. They struggled, he took the gun from her and shot her.

The defendant claimed loss of memory as to all events following the struggle for the gun until he left the home with the gun in his hand, realized he shot his wife, and went to the police station to report it. Williford told police he felt "too much pressure," his wife was seeing other men, and that things had gotten out of hand. The police indicated that Williford smelled of alcohol, but was under control of his faculties, and had a normal, calm demeanor.

The supreme court held that none of the arguably provocative events, considered either alone or together, met the test of reasonable adequate provocation of an ordinary person because they were too remote or too far removed from the time of the shooting. The court further held that even the most unreasonable person would have had time to reflect or deliberate on his course of action. Williford knew of his wife's infidelity over a month before the shooting, and the evidence showed he had cooled off and sought a reconciliation, including an offer immediately before the shooting.

The *Williford* court found that, in view of the couple's history, the altercation at the time of the incident was no more than an ordinary dispute between them. The court noted that Mrs. Williford had no intention of killing the defendant, as she had ample opportunity to do so. The court further indicated that the defendant knew he was never in any real danger, and was obviously in no danger at the time he turned the gun on her and fired all the live rounds into her body. The court noted the defendant's selective amnesia, as he had no difficulty recalling the facts and details occurring immediately before and after the actual shooting. It found Williford was so intent on killing his wife that he shot her at least four times, emptying the revolver.

With regard to Mrs. Williford's actions shortly before defendant shot her, the supreme court held the evidence showed her actions were "not such as would naturally and instantly produce the highest degree of exasperation, rage, anger, terror or sudden resentment in the mind of an ordinary person for any such feelings that an ordinary person might experience upon having his spouse draw a gun on him would clearly dissipate when he succeeded in disarming her." At 120. The *Williford* court further stated, *Id.*:

> The alleged resentment, anger or exasperation that followed the rejection of Williford's offer of reconciliation accompanied by a few verbal unpleasantries, when considered with tbe past history of continuous marital conflict and mutual physical and verbal abuse, must be held to constitute a lesser degree of provocation than that necessary to require submission of a verdict of manslaughter (heat of passion).

II.

In the instant case, defendant's offer of proof alleges that his wife, Kelly, engaged in actions "to hurt him and to isolate him from his family." These actions include tearing up photos of his family at the hospital following Kyan's birth; declaring that defendant's sister was no longer Kyan's godmother; getting married in Las Vegas to prevent his parents' attendance; barring his family from attending Cassidi's baptism; and refusing to permit defendant's son from a previous marriage to visit their home. With regard to her attempts to isolate him, defendant claims she threw him out of the house several times; sent emails to defendant's female friend accusing her of having an affair with him; threw his personal property into the driveway; struck him with a phone while he was in the hospital; belittled him in front of friends who moved him to his sister's house after she told him to leave during his recovery from accident injuries; and began a relationship with another man.

Defendant claims Kelly inflicted verbal and emotional abuse upon him during their six-year relationship. He indicates he would testify that she taunted him in stating that the children were not his and that they would be taken from him. Defendant further indicates that Kelly interfered with the relationship between her other children and their fathers. He also claims she physically abused him.

Two or three days before the shooting, defendant learned that Kelly had made reservations for a hotel room in Illinois on April 17, 2009. On that date, defendant went to their home to gather his tools for a job and to confront Kelly and her friend, Chad, regarding the trip to Illinois. He had not been living at the home for a few weeks. Defendant parked his car at a fire station some distance away. He states that as he sorted his tools in the garage, he found a gun that he had previously placed there. Defendant put the gun in his pants. Kelly eventually came into the garage, and they argued about the trip and about the children.

At some point, the couple entered the house and continued the argument in the bathroom. Kelly told him she wanted to be with Chad, stating: "Now you have nobody. You don't have your parents. You don't have me. And you will never have your kids." (2/10/10 In-Camera Proceedings Transcript, page 12). Defendant indicates that he felt everything he had worked for would be gone, including his children who were his "world." (Transcript, page 17).

During their argument, Kelly's mother, Barbara Wing arrived at the home. Kelly apparently attempted to push past the defendant to exit the bathroom when the gun fell out of defendant's pants. As Kelly ran out of the bathroom, she told her mother: "Mom, take the kids. He's got a gun." Barbara asked defendant, "What the hell are you doing

here?" (Transcript, page 13). Kelly ran out of the house, and defendant ran after her. Defendant claims he heard a gunshot, but has no recollection of shooting Kelly. He next recalls Kelly lying on her back near her van bleeding from her head. At that point, Barbara went outside and defendant shot her in the chest. He indicates he "heard the gun go off again." (Transcript, pages 13-14). He states that he told Barbara to call an ambulance.

Defendant went over to Kelly, grabbed her arm and dragged her to the flower bed area. As he knelt next to her, Kelly's cell phone rang. Noting that Chad was calling, the defendant opened the phone and gave it to Kelly. She spoke to Chad, stating: "Scott's here. He just shot me. And my hands are going numb. I'm sorry I put you through all of this." (Transcript, page 15). The police arrived, and defendant threw the gun down on the driveway. He indicates that he looked at Kelly and "knew she was gone." (Transcript, page 16).

Defendant argues that his offer of proof was sufficient to place the adequate provocation defense in issue. He also contends that the Court failed to consider his written offer of proof, relying solely on the in-camera examination of defendant. On the contrary, during the in-camera proceeding, the Court referred to defendant's written offer of proof several times: "Your attorney has made an offer of proof about other things that had occurred prior to this that had entered into your mind at the time." (Transcript, page 16); "You're telling us about some of these things that your attorney put in his offer of proof…" (Transcript, page 19); "But this suggests that you were contemplating these things on the 17th…" (The judge shows Mr. Schmidt the document.) (Transcript, page 25).

Following the latter reference to the offer of proof, the Court took a break so that the defendant could review the document, stating: "Why don't you take time to review those. There's about three pages of that or four. Why don't you just read it over, and we'll take a short break here." (Transcript, page 26); "We took a break for Mr. Schmidt to review this offer of proof and different facts contained in it." (Transcript, page 26-27). Clearly, the Court reviewed and considered defendant's written offer of proof in reaching its decision on defendant's adequate provocation defense.

Many of the incidents included in defendant's offer of proof date back several years prior to the April 2009 shooting. As indicated *supra*, the events indicate friction between Kelly and defendant's family, as well as an attempt to limit defendant's contact with his son, Maxwell, and other individuals. Other incidents relate to financial issues and the occasions when the defendant was not living in the family home. A January 2008 entry in the offer of proof alleges that Kelly physically and verbally abused defendant. On the day of the shooting, defendant's concern was Kelly's relationship with Chad.

In raising a mitigation defense, defendant bears only the burden of production, not the burden of persuasion. However, his offer of proof must satisfy the subjective and objective tests to establish a sufficient factual basis for an adequate provocation defense. Defendant's proffered evidence describes a contentious marital relationship, along with financial issues. While these factors may have been a source of stress for the defendant, they are not the type that would drive a reasonable person to kill his spouse. Further, the events on the day of the shooting, under a reasonable view of the evidence, do not establish reasonable, adequate provocation to render the defendant incapable of forming and executing the distinct intent to kill his wife.

None of the events over the six-year relationship, including the friction between Kelly and defendant's family, the couple's arguments, Kelly's relationship with Chad, and Kelly's hotel reservation, considered alone or in combination, meet the test of reasonable adequate provocation of an "ordinarily constituted person." The majority of these events were too remote from the time of the shooting, as most people would have cooled off and had time to reflect on their course of action in the interim. The defendant was aware of Kelly's friendship with Chad for some time before the incident. Just prior to the shooting, Kelly asked defendant to leave, but defendant followed her into the home. When Kelly discovered that defendant had a gun and ran out of the home, defendant ran after her and shot her multiple times. The Court notes defendant's selective amnesia with regard to the shooting itself, while he has no difficulty recalling and testifying to all of the facts and details before and after the actual shooting.

Cases such as *Felton* and *Head*, cited by defendant, can be distinguished from the instant case, as they involve incidents in which the defendants were threatened and in imminent physical danger. In those cases, the defendants were battered spouses who had experienced a long history of violence at the hands of their victims. Here, the defendant parked some distance away from the home, concealed a weapon on his person, and shot his wife in the head several times. As in *Williford*, in view of the couple's history, the argument on the day of the shooting was no more than an ordinary dispute between them. The Court finds that the defendant's offer of proof, both written and in camera, was not sufficient to place the adequate provocation defense in issue.

III.

Defendant also argues that he was denied the right to counsel when the Court allowed counsel to be present during the in-camera hearing, but did not permit him to otherwise participate. The purpose of the in-camera examination was to provide the Court with an offer of proof of defendant's testimony regarding the adequate provocation defense. In *State v. Dodson*, 219 Wis. 2d 65, 73-74, 580 N.W.2d 181 (1998), the supreme court stated: "An offer of proof may be made in question and answer form or by statement of counsel, but out of the presence of the jury....Although the form of the offer of proof is at the circuit court's discretion, this court has specifically urged judges to use the question and answer form whenever practicable."

Defense counsel filed a motion for other acts evidence and presentation of evidence on adequate provocation. He filed an offer of proof, an amended offer of proof, and presented argument at motion hearings on January 19, 2010 and February 10, 2010. As the State points out, in his response to the State's objections on this issue, defense counsel included a 42-point offer of proof. The State further notes that defense counsel was present with the defendant at the in-camera hearing, and could have filed a motion for reconsideration prior to trial to provide new or more detailed information on the issue.

In *United States v. Verkuilen*, 690 F.2d 648 (7th Cir. 1982), in which the defendant was convicted of failure to file federal income tax returns, defense counsel was not present during an in-camera discussion between the defendant and judge during the sentencing hearing. During a colloquy in the presence of defense counsel, the defendant agreed to an in-camera discussion of his affirmative defense, as he did not wish to discuss it publicly. The Seventh Circuit Court of Appeals found that the defendant knowingly

and intelligently waived his right to counsel during the in-camera conference, as the defendant expressly agreed to the in-camera discussion without defense counsel and counsel did not object to the in-camera proceeding. The *Verkuilen* court further pointed out that the defendant was not entirely denied assistance of counsel during the sentencing hearing, as counsel presented a comprehensive, vigorous argument in mitigation of the sentence. Thus, the court found there was no denial of the right to counsel.

Here, defense counsel suggested and agreed to an in-camera hearing, and did not at any point request to actively participate in the in-camera examination. In addition, there was a break during the in-camera hearing to allow defense counsel and defendant to confer regarding the offer of proof. Thus, defense counsel actively participated prior to and during the in-camera proceeding. As the State notes, this is not a circumstance where the issues and argument were undertaken by the defendant without representation of counsel. The nature and detail of the written offer of proof clearly indicates that counsel discussed the numerous points with the defendant.

Defense counsel expressed a preference for, and agreed to, an in-camera proceeding for defendant's oral offer of proof regarding the adequate provocation defense. The Court suggested that defense counsel be present during the proceeding. At no time did counsel make a request to question the defendant. Defendant and his counsel consulted prior to the in-camera hearing and during the break in the proceeding to review the written offer of proof. In view of defense counsel's extensive argument and submissions with regard to the adequate provocation defense, the Court finds there was no denial of the right to counsel.

Based on the foregoing, defendant's Motion for a New Trial is hereby denied.

Dated at Appleton, Wisconsin this 27 day of July, 2011.

BY THE COURT:

John A Desjardins

HONORABLE JOHN A. DES JARDINS
CIRCUIT COURT JUDGE, BRANCH VII
OUTAGAMIE COUNTY

STATE OF WISCONSIN CIRCU COURT BRANCH 7 OUTAGAMIE UNTY *For Official Use Only*

CLERK OF CIRCUIT COURT
OUTAGAMIE COUNTY
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MAY 12 2010
AT ____ O'CLOCK

State of Wisconsin vs. Scott E. Schmidt

New BA

5350419

5-18

Judgment of Conviction

Sentence to Wisconsin State Prisons

Date of Birth: 11-28-1970

Case No.: 2009CF000275

The defendant was found guilty of the following crime(s):

Ct.	Description	Violation	Plea	Severity	Date(s) Committed	Trial To	Date(s) Convicted
1	[968.075(1)(a) Domestic Abuse] 1st-Degree Intentional Homicide	940.01(1)(a)	Not Guilty	Felony A	04-17-2009	Jury	03-10-2010

IT IS ADJUDGED that the defendant is guilty as convicted and sentenced as follows:

Ct.	Sent. Date	Sentence	Length	Agency	Comments
1	05-07-2010	State prison	1 LF	Department of Corrections	Eligible for parole for 1-1-2050.
1	05-07-2010	Costs			

Conditions of Sentence or Probation

Obligations: (Total amounts only)

Fine	Court Costs	Attorney Fees	☐ Joint and Several Restitution	Other	Mandatory Victim/Wit. Surcharge	5% Rest. Surcharge	DNA Anal. Surcharge
	20.00			100.00	85.00		

Pursuant to §973.01(3g) and (3m) Wisconsin Statutes, the court determines the following:

The Defendant is ☐ is not ☐ eligible for the Challenge Incarceration Program.

The Defendant is ☐ is not ☐ eligible for the Earned Release Program.

IT IS ADJUDGED that **386** days sentence credit are due pursuant to § 973.155, Wisconsin Statutes

IT IS ORDERED that the Sheriff shall deliver the defendant into the custody of the Department.

Distribution:

John Des Jardins, Judge
Carrie A Schneider, District Attorney
Gregory A. Petit, Defense Attorney
P&P
DOC

BY THE COURT:

John A. Des Jardins
Circuit Court Judge/Clerk/Deputy Clerk

May 12, 2010
Date

This document (10 pages) is a full and true copy of the original on file in the office of the Outagamie County Clerk of Circuit Court, State of Wisconsin.

5-12-10
Date

Deputy/Clerk of Court

SEAL OF CIRCUIT COURT
SEAL
OUTAGAMIE COUNTY, WIS.

State of Wisconsin
Waupun Correctional Institution
This document, having been compared by me with the original on file and of record in this office, is a true copy thereof.

Attest: April 4 20 14

By _____
Registrar/Deputy Registrar/Clerk

CR-212(CCAP), 05/2008 Judgment of Conviction, DOC 20, (08/2007)

EXHIBIT A

STATE OF WISCONSIN CIRCUIT COURT BRANCH 7 OUTAGAMIE COUNTY

For Official Use Only
CLERK OF CIRCUIT COURT
OUTAGAMIE COUNTY
FILED
MAY 12 2010
AT
O'CLOCK

State of Wisconsin vs. Scott E. Schmidt

BB

Judgment of Conviction

Sentence to Wisconsin State Prisons and Extended Supervision

Date of Birth: 11-28-1970

Case No.: 2009CF000275

The defendant was found guilty of the following crime(s):

Ct.	Description	Violation	Plea	Severity	Date(s) Committed	Trial To	Date(s) Convicted
2	[939.32 Attempt] 1st-Degree Recklessly Endangering Safety	941.30(1)	Not Guilty	Felony F	04-17-2009	Jury	03-10-2010
3	Bail Jumping-Felony	946.49(1)(b)	Not Guilty	Felony H	04-17-2009	Jury	03-10-2010

IT IS ADJUDGED that the defendant is guilty as convicted and sentenced as follows:

Ct.	Sent. Date	Sentence	Length	Agency	Comments
2	05-07-2010	State prison	7 YR 6 MO	Department of Corrections	Concurrent.
3	05-07-2010	State prison	1 YR	Department of Corrections	Concurrent.

Total Bifurcated Sentence Time

	Confinement Period				Extended Supervision			Total Length of Sentence		
Ct.	Years	Months	Days	Comments	Years	Months	Days	Years	Months	Days
2	7	6	0		5	0	0	12	6	0
3	1	0	0		1	0	0	2	0	0

Conditions of Extended Supervision:

Obligations: (Total amounts only)

Fine	Court Costs	Attorney Fees	☐ Joint and Several Restitution	Other	Mandatory Victim/Wit. Surcharge	5% Rest. Surcharge	DNA Anal. Surcharge
	40.00				170.00		

Ct.	Condition	Agency/Program	Comments
2	Costs		
2	Other	Department of Corrections	The Defendant is to provide a biological specimen for DNA analysis. If probation is revoked or discharged with outstanding financial obligations, a civil judgment shall be entered for the balance due, and/or other collection means, such as income assignment will be issued.
3	Costs		
3	Other	Department of Corrections	The Defendant is to provide a biological specimen for DNA analysis. If probation is revoked or discharged with outstanding financial obligations, a civil judgment shall be entered for the balance due, and/or other collection means, such as income assignment will be issued.

Pursuant to §973.01(3g) and (3m) Wisconsin Statutes, the court determines the following:

The Defendant is ☐ is not ☐ eligible for the Challenge Incarceration Program.

The Defendant is ☐ is not ☐ eligible for the Earned Release Program.

State of Wisconsin
Waupun Correctional Institution
This document, having been compared by me with the original on file and of record in this office, is a true copy thereof.

Attest: April 4 2014

By [signature]
Registrar/Deputy Registrar/Clerk

STATE OF WISCONSIN | CIRCU COURT BRANCH 7 | OUTAGAMIE UNTY | *For Official Use Only*

State of Wisconsin vs. Scott E. Schmidt

Judgment of Conviction

Sentence to Wisconsin State Prisons and Extended Supervision

Date of Birth: 11-28-1970

Case No.: 2009CF000275

IT IS ADJUDGED that **386** days sentence credit are due pursuant to § 973.155, Wisconsin Statutes

IT IS ORDERED that the Sheriff shall deliver the defendant into the custody of the Department.

BY THE COURT:

John A. Des Jardins

Circuit Court Judge/Clerk/Deputy Clerk

May 12, 2010

Date

Distribution:

John Des Jardins, Judge
Carrie A Schneider, District Attorney
Gregory A. Petit, Defense Attorney
P&P
DOC

State of Wisconsin
Waupun Correctional Institution
This document, having been compared by me with the original on file and of record in this office, is a true copy thereof.

Attest: April 4 20 14

By Corene Siebel

Registrar/Deputy Registrar/Clerk

TRANSCRIPT OF PROCEEDINGS

(The following proceedings were held in chambers.)

THE COURT: Okay. Let the record reflect that we're conducting an in-camera inspection of Scott Schmidt in case file 09-CF-275. He appears in person, and his attorney is also present but is not participating in the hearing.

And as previously stated, the Court asked Mr. Schmidt questions based upon their request for adequate provocation defense.

Scott, the date in question was April 17, 2009. At that time you went to Kelly Wing-Schmidt's residence apparently. And at that time there was a confrontation between you and Kelly Wing-Schmidt. Can you tell us what was in your mind at that time?

MR. SCHMIDT: The day I went over was April 17th. I hadn't slept in at least a week, week-and-a-half. And I -- it was like two days before that, I believe the 14th of April, the 14th or 15th of April I think it was, that I found an e-mail on my work computer from a -- of a reservation for my wife and a guy that she supposedly was a friend with that worked for Gold Cross Ambulance. And I found that when I was at the fire station. I knew of him, up until that

point, that they were friends.

Um, I had been out of the house for a couple of weeks. And I walked there. I went to the fire station, and I walked up to the house, because I knew there were some issues with, um, Kelly had threatened to take -- these aren't my f'ing kids, that if she saw me at the house that she didn't want -- I wasn't going to be part of the kids' lives anymore, our two youngest children. I just had a feeling that she'd probably call the cops if I pulled in the driveway. So I parked at the station, Fire Station 6, over on Lightning, and I walked to the house.

Actually, my main goal was, um, I had a job to do. I was going to build a house for a retired battalion chief up in Door County. And all my tools, my job trailer, and everything was at our house on JJ on Edgewood. I was at the time staying out at the lake -- the lake house that I had -- had owned prior to us being married in Stockbridge. And there's -- I didn't have any heat, slept on the couch, there was no blankets. I mean, it was -- there were no dishes. I had -- everything was -- the house was empty. Gas was actually shut off because we -- instead of paying the bills there, I wanted to make sure the bills were paid where the kids and Kelly were at.

But anyway, I tried -- I was trying to get some kind of grasp back to -- I knew I had to try to build this house. We were having money issues, and a lot of -- there were a lot of issues, but money was one of them. And we were having financial problems. We were having marriage problems. We were having -- about this guy. I wanted to confront him. I had confronted him two weeks earlier on the phone. I called him at Gold Cross. I told him to "stay away from my f'ing wife," I believe. And he basically laughed at me, and he hung up, told me he was going to get a restraining order if I called him again. And I didn't call him back. I just basically -- I didn't threaten him. I just said, "Stay away from my f'ing wife." I mean, it wasn't probably the most -- I was upset, but I told him to stay away from my wife.

So anyways, I tried to get my bearings to -- some kind of semblance and normalcy back. And I wanted -- I knew -- a lot of my tools were in the garage inside the service door. The rest were in my job trailer parked next to the garage.

So I was going to try to somehow organize those tools and try to get and figure out someway -- I had a car accident, or an auto accident, November 17th, five months earlier, in Stockbridge. I slid through a stop

sign and got t-boned by a guy. And I was messed up pretty bad. I got airlifted. Kelly was working at Theda that night.

And so I lost my truck. I mean, I totaled my truck. We had leased it. There was so much stuff. It's like everything that could go wrong went wrong.

So anyway, trying to get back to make a long story longer, I guess, um, I wanted to -- somehow I thought maybe if I tried to get some kind of organization of my tools, because I had talked to Guy Vanderweyst, he was the battalion chief I was going to build the house for earlier, and we were planning on sometime the end of April, beginning of May, punching the hole in the ground for this house up in Door County, I thought maybe that would give me some kind of -- some kind of focus back to reality or normalcy, some -- I'm always used to working and I hadn't been working. I was under house arrest. That's how I dealt with stuff. I worked. I was a workaholic. And that was my fault. But all I did was work.

So I thought I'd go and I'd sort through my tools, which I did, and they were all strewn out all over the garage inside the service door. I don't know if Noah, my 17-year-old -- at the time, 17-year-old stepson had gone through them, or if somebody had gone through

them, but they were all over the place. And there were -- I'm trying to get things sorted back together.

And a short time after that, I don't remember exactly how long it was, I don't remember if it was before -- it was before that or if it was after that -- the door opened -- the overhead door opened, and Kyan and Cassidi, our two little ones, came into the garage. They were -- they were coming out -- they were going outside to play, it appeared to me. And they saw me in the garage. And the service door was open, but the overhead door wasn't open. And my tools were right inside the service door. And Kelly said, "What are you doing here?" And I said, "I'm trying to go through my tools." And then we started talking. And she said, "We're going for a bike ride." And it was a normal -- somewhat of a normal conversation until I brought up the fact, I had the receipt that I had printed off at the station in my pocket, and I said, "By the way, what is this?" And I showed it to her. And she said, "I plan on taking the kids -- I plan on taking the kids to Chicago for the weekend." I said, "With one king size bed in a suite." I said -- you know, we've -- we had six kids, including my son from a previous marriage, but she was going to take four of the kids. I said, "In a king size bed. Okay, I'm not stupid." Then she

said, "It's none of your f'ing business. Why do you care anyways? These aren't your f'ing kids. And you're not going to see them." Then we started arguing.

And I had -- in the past, I had dealt a lot with John, her previous boyfriend, who has -- she has two children with and has had a lot of child support or custody issues with him. We spent a lot of money over years fighting those issues with him back and forth. And I knew -- I knew what happened with her and those -- her and him, and how she had gotten full custody of Scout and Jory, my other two stepkids, and that he basically wasn't a part of their life.

He -- her and Barb, her mother -- just for -- here's a prime example is they called him "new dad," which is -- it's not right. It's -- for the longest time when Jory was little, he thought I was his dad, which -- they called me dad for the longest -- that was fine. I had no problem with that because I took them in as my own kids. I mean, I had insurance on them and everything. I provided a roof over -- whatever I could do, I did for them. I -- I had no qualms about her and her previous relationships with other guys and having the kids outside of marriage. That was neither here nor there. I didn't care. We had two beautiful kids

together and we had a family.

I just knew that there was issues -- I knew I wasn't going to see my kids ever again. I -- the writing was on the wall in the way she talked, and the way Barb was, and the way they did anything and everything, either made stuff up when it came to abuse issues or -- I should say not -- allegations of that he would hit them, he would -- it's just.

So then we got into the whole Chad issue after the whole kid issue. And we -- she said, "I want to go for a bike" -- I remember her saying, "I want to go for a bike ride with the kids." And at that point she asked me, she goes, "Well, before you go, why don't you -- can you help take the bikes down out of the" -- because I always had them hung up in the garage. And it was spring. I said, "Sure. I can do that. I will blow them up."

And she went in the house, came back, and she was furious, just livid about something. I don't know if she was on the phone with somebody. I mean, according to the records, I know she was now, but at the time I did not know because I was outside blowing up tires. I had the little compressor I plugged into the cigarette outlet in the van.

She goes, "Well, you can f'ing leave now." She

goes, "But make sure those tires are pumped up before you leave." And I'm like, "That's pretty typical." I said, "I'm only good for three things. Basically I'm a sperm donor, I fix all the stuff around here, and I'm good for a paycheck," which is basically what it amounts to.

Um, and at which point the gun was in the -- I had taken it out from -- it was underneath the seat of my truck before the accident. And I had taken it out because Kelly was driving my truck, and I knew she didn't like it. So I put it under -- it was a .22 pistol, and I used to -- I used to have a 9 millimeter years ago, but I sold that. I used to always keep it -- going out West, I'd always have it underneath the front seat of my truck. We'd go out West hunting. That's always usually where I kept it. But it was a .22 pistol. So I took it out of there and I put it under the seat of my Celica, which is a Toyota Celica. And then when my truck got totaled out, Kelly was driving my car because I was on house arrest. And I was doing the -- I took it out of there because I knew she didn't like guns. She wasn't comfortable around guns. She never hunted. Her dad hunted long, long time ago. But I was -- I hunted. And I put it up inside the service door in a brown cabinet. I put it

up on the top shelf. And it sat there for months. I don't remember. It was sometime I think in January or February that I put it up in that cabinet. And at some point during the argument, I grabbed it and I put it in my pants -- down the front of my pants because I knew I had to get rid of it. It shouldn't be at the house anyways.

And then she came outside. And we were still arguing about the kids and about Chad. And at that time, just before that, Cassidi came up to me and she wanted her little -- that's my three-year-old daughter -- she had wanted me to push her in her -- her wagon -- plastic wagon because Kyan, her brother, was running around on his little tricycle.

And so I was pushing her, and she wanted -- kept saying, "Daddy, faster, further." So I pushed her. And we got this blacktop -- I'm sure you know how frost heaves blacktop up on the concrete kind of. Well, it dips down, and she hit that. She was looking back at me smiling, and she tipped over and bumped her head on it -- bumped her head on the concrete. And I came running over there. I was kind of freaked out. I picked her up and I brought her into the house. And Kelly took her from me. And I said, "She bumped her head." I think I was -- like I said, I was more

freaked out. She had a little egg on her head about here. Then I got Kyan, and he went in the house.

I finished -- I was finishing up the bike tires. She came out yelling at me about something, she was on the phone with somebody, and told me to "get the frickin' bike tires done and get the F out of here. You're not welcome here. You're not -- this isn't your home. You got your own home. These aren't your kids."

And we argued and kind of struggled. We got in the house, and I had grabbed her cell phone. She said I was going to break it. So she folded it up and put it in her pocket. We got upstairs to the top of the stairs in the house, and she picked up the phone and threw it at me, the cordless phone. I grabbed it and I threw it on the floor. Somehow we ended up in the bathroom arguing about Chad. There were flowers on the table from him. I guess they spent Easter over at his parents' house.

And there is a history of her and my parents not getting along and not wanting to do anything with my family, and I didn't like that. I had the ultimatum basically. It's either me and the kids or Max, who's my son from Kristin Stille, my ex-wife, either me and the kids or Max and my parents. There was no

involvement of anybody else. And that involvement, I was -- I was -- it was a long time ago. That was basically when the whole baptism of Kyan kind of blew up in my face. And then Cassidi -- she refused to have Cassidi -- my parents at the baptism. She threatened to call the cops. I had the -- that was the ultimatum I got.

And she said, "Now you have nobody." She said, "You don't have your parents. You don't have me. And you will never have your kids."

And we got arguing about something -- we got in the bathroom. And the next thing I know, she said, "Fine. Fine. I will take you back." And I looked at her and I said, "What?" She said, "I'll take you -- I'll take you back." And this is -- this -- she's probably told me this 20 times in our lifetime. And I said, "What about Chad?" "Well, I -- I want to be with Chad instead. I'm not taking you back." I said, "Those flowers are from Chad." We talked back and forth about that a little bit. "Chad doesn't drink like you do. He doesn't smell like cigarette smoke like you do. He doesn't hunt. He doesn't fish. He doesn't do anything. He stays at home. He's a -- he doesn't work all the time," even though he worked 24-hour shifts at Gold Cross like I did. I don't

understand. But he also didn't have six kids to feed.

And the next thing I know, she's in my face. I heard Barb come into the house. She came up the stairs. And Kelly went -- Kelly pushed me. And as she pushed me, she noticed the gun that I had in my pants. And I -- at that point I didn't even know -- I had totally forgot about it. It fell down my pant leg, down my jeans, down to my ankle. And she went running out of the bathroom and said something to her mother like, "Mom, take the kids. He's got a gun." Something like that. And she ran by me. And Barb looked at me and said, "Scott, what" -- something like, "Scott, what the hell are you doing in here? What the hell are you doing here?"

And at that point I ran down the stairs after Kelly, and I through open the door, and I heard a gunshot. And to this day -- to this day, I don't know where she was or where I was. I just heard the shot. I don't remember seeing the gun or nothing. I just remember hearing the frickin' shot. And then she was over by her car, her van, and she was bleeding somewhere. And -- thank you -- um, she was laying on her back bleeding from her head.

And then Barb came outside. I remember that. She came at me, and I pushed her away. And I heard the gun

go off again. And I yelled at Barb. I said, "Go call the ambulance."

And then I went over by Kelly, and she was there laying on her back just looking up at me. And I grabbed her by the arm and I dragged her over by her flower bed. She planted these butterfly bushes next to the door, I don't know, maybe five feet, ten feet away. And I knelt down next to her and I looked at her. She said, "I love you. I always loved you." I said, "I love you, too."

Then she said it felt like people were grabbing at her. She said "Whose hands are all over me?" And I said, "It's just me." And I reached down and I looked at my glove and it was just all blood. And I don't know if it's just -- I don't know if something just kicked in because of -- I've been trained to save people, not kill them. My whole life I spent on the fire service, and here's my hand all full of blood.

I started yelling for Barb to call the ambulance. And Kelly said, "Somebody -- my hands are going numb. Somebody needs to call the ambulance. I feel something on my head. Something running out of my head." And I said, "Grandma is in the house calling the ambulance." That's what we always called Barb is grandma. I said, "She's calling the ambulance." And she said, "I still

feel like all these hands are all over me." And I said, "It's the angels, honey. They're coming to take you home," because I could tell the way she was breathing, it wasn't good.

And then her phone rang. And I picked it up. And it said Chad on the front. I opened it up and I gave it to her. And she said, "Scott's here. He just shot me. And my hands are going numb. I'm sorry I put you through all of this." Then she hung up -- or she gave me the phone and I shut it because she couldn't hold it. Her hands weren't working right.

And at that point I remember stuffing the gun down my throat and her saying, "No. No. Don't do it." And I said, "Why?" And she said, "Our kids need you." And to tell you the honest-to-God truth, the only reason I didn't pull that God damn trigger is because she told me not to. Otherwise, I wouldn't be sitting here today.

And, sir, there is not a day that doesn't go by that I don't wish I would have. I loved my wife. And I know people -- I'm sure everybody thinks I'm nuts. That family and that woman was my world. Everything I worked for -- I built houses on the side, I took extra shifts at the fire department, all so those kids could have whatever they wanted, whatever they needed, that

they never wanted -- they never needed anything. They had more video games than Carter had liver pills. I don't know.

I looked at her, and she was having a hard time breathing. I said, "I love you." She said, "I love you, too." That's when the cop pulled up, and I threw the gun down the driveway, and I waved and yelled, "Come in, come on, she needs help." And I looked down at her and I knew she was gone. Her eyes just -- she was just starring straight ahead, you know. I seen -- I seen people die on the fire department, you know, before, and she was gone.

And then after that it's just kind of a blur. I got thrown to the ground, handcuffed. I remember Sergeant Fischer, because I went to school with him, asked me if I was hurt, because they were searching me before they put me in the car, because I had blood on me, and I said, "No, sir." And then I went to Grand Chute.

THE COURT: We don't really need to get into any more of that. You went through, you know, what happened here. Your attorney has made an offer of proof about other things that had occurred prior to this that had entered into your mind at the time. Now, can you tell us how those things entered into your mind

at the time?

MR. SCHMIDT: Like I had said earlier, it got -- I love them kids. They were my -- thank you -- they were my -- they were my world.

The big ultimatum was is, "Either you have Max or your parents or you've got -- you've got me and the kids."

There was physical abuse. I had shoulder and knee surgery back in '07, and she would purposely hit me in the shoulder, knowing that nobody would believe me. There were times that she would hit herself, clawed at her face, she'd punch, kick herself.

After the first disorderly conduct that I had gotten, um, we had gotten in an argument prior to when we got married about Kyan. And I had taken him actually to my parents' house for his birthday. And I came back to drop him off, and I had Max in the truck and Kyan with me. And I -- to drop him off. She came running out to the truck. I had parked out on JJ, because there's like a turn lane there. I think I had the boat on the back or something and I didn't want to back into the driveway. And she came out just screaming at me. She had followed me and found out that I had gone to my parents' house. And I said, "Well, it's Kyan's birthday. And, you know, you want

nothing to do with my parents. At least they can see their grandchild."

At that time she had the -- she had called my sister and took my sister's name off of the -- she was -- she was Kyan's sponsor for his baptism. And I don't know how that works. I don't know if she really did it or not, but she called and told my sister that she -- well, that she was no longer his sponsor and that she was going to change -- take her name off the baptismal paperwork.

Um, I had witnessed a lot of things with John Dorn and how John would have to drop the kids off. And the kids would come home -- and there were times when Kelly wasn't home. He'd come to pick them up. She would deliberately leave.

Um, our oldest, the 17-year-old, Noah, wanted absolutely nothing to do with his father because of things that Barb and Kelly had said about Jim. And Jim was a decent guy. I met Jim and talked to Jim several times. And it just didn't -- they fed him such a line of shit that he hated his dad. Scout and Jory were deathly afraid of John because of the -- the line of shit that Kelly and Barb fed them about John.

Any kind of disciplinary action that I would -- "Go to your room," it was impossible -- I was -- I was

there to provide a paycheck, sperm, and I was there to provide a livelihood. That's basically it. I was not allowed to discipline the kids, help rear the kids.

When I had my accident in '08, there was a lot of -- well, there were a lot of times that if I didn't -- if I was working or working on the side, if I would stop at a bar, talk with my friends -- I had -- my best friend, Jim Bruckner, him and I did a lot of hunting together, a lot of fishing. And it got to the point where, "I don't want you with him. I don't want you around Jim." And there's really -- I mean, there's really no relevancy to why. I mean, Jim wasn't a bad influence. He was over ten -- he's ten years older than I am. He was a lieutenant on the fire department. We went hunting. We went out to Colorado, Wyoming.

Basically, you were around the family. And mentally, I wasn't worthy to have friends. I wasn't good enough to -- nobody wanted to be around me because of who I was is what I was told.

THE COURT: How did these things affect your state of mind on the 17th? You're telling us about some of these things that your attorney put in his offer of proof, but how did that affect your state of mind on the 17th?

MR. SCHMIDT: I guess to me it just was a combination of everything. There was no way -- there was no way out anymore. There was -- I went there -- I went there to defend my marriage and to keep my marriage together. I knew full well, or thought, I guess, in my mind that Chad was going to come and pick her up, and they were going to go to Chicago. That's what I thought. I did not know that they had cancelled their plans or whatever the police reports say. I -- there's a lot of things in the police reports that I didn't know at the time.

Financially, we were in shambles. We had absolutely no money. Her car was going "t.u." Her car was breaking down. My car was breaking down. And I was -- we were going to get our tax return money and apply that towards getting her a different van for the kids. That's why I was trying real hard with Guy to get this house going so I could get some extra money. I had checked into financial planners. I had checked into -- I had an appointment on Monday, the following Monday, with Steve Rutten at the Bank of Little Chute to do some kind of home equity loan on the lake house, which I had taken out $50,000 -- I had taken out $50,000 I think about a year-and-a-half prior to that and paid off a lot of Kelly's debt, a lot of credit

card debt that -- some of it was mine, but we had accumulated -- she had accumulated probably $16,000 in credit card -- on one credit card. And now I found out right prior to that that she had accumulated another $14,000. She was living off that same credit card, which I thought it was cut up.

The house sale fell through. It kind of started -- the house was sold. It was supposed to close October 31st of 2007. And everything was kind of -- I don't know, I guess you could say we had more positives in our marriage than negatives back then. Three days before it was going to close, they backed out of the deal. We had thousands of dollars spent on -- I had moved -- done electrical work for them. I had done -- we had a survey done on the lake property. It was the lake house in Stockbridge.

And it's like right there we were right up -- I was doing everything I could from that point on trying to keep our head above water. And she was -- wasn't working. She was doing her schooling for paramedics and EMT and worked maybe one day a week and was going out to lunch with this Chad guy, I guess, and didn't have time to work. I was doing anything and everything I could.

I had legal issues with the car accident that I

had in '08, worrying about my job, that if I would have got -- if I would have gotten charged with a felony -- or a felony, that I would lose my medical certificate for First Responders. I couldn't provide. and the fire department was well aware. I had gone to AODA. I quit drinking. I kind of turned the corner. And I quit drinking. I had gotten back into -- I had gotten back into the Bible. I had grown up going to Fox Valley Lutheran High School. I got away from it, thought I could do it on my own, and kind of made the turn back to going back to church. And it's like everything was crashing down and I had nowhere to turn.

And she was -- she informed me that Wednesday that she took -- that money we had for our tax return money was going to get -- got deposited -- direct deposited, but because of her having the child support from John and Jim, when she did get it, she kept that account open, and it got direct deposited to that account with only her name on it. And I wasn't entitled -- or it wasn't under my name. Well, she told me that she had spent the tax return money, whether it be on the $3,000 for an attorney or whatever she was going to spend it on, the money was gone. And I needed to pay a legal expert to -- for some stuff about that car accident to

look at the box in my truck for the speed. It -- it just was -- it didn't stop.

THE COURT: How did you contemplate these things on the 17th? I mean, did you contemplate these things that you're talking about?

MR. SCHMIDT: The week -- the week-and-a-half before that, I was out at the lake and I had wrote numerous suicide notes and notes -- or letters to the kids, letters to Kelly, kind of -- kind of telling them why I couldn't do it anymore, why -- if I didn't have -- if I didn't have my kids and my wife, it wasn't worth it anymore to go on. And I -- I lived on cigarettes and coffee. I didn't eat.

I don't know how I contemplated -- I -- all I knew is I was losing my wife and I was losing my kids. And I kept -- every phone call I would try to call, I wanted to say good night to my kids.

My little -- my little lady, Cassidi, my three-year-old little girl -- you know, God, we had five boys, and we prayed to have a girl. And here comes this precious little girl. And we'd have tea parties. And her and I would get up every morning, we'd sit on her chair and have our tea and coffee. She'd always bring a book. "Daddy, you read it." She'd come from -- bring her blankets down the hall

with her bare feet and we'd sit there and watch the news. I don't know if you are familiar with the Daily Bread, but I'd read that in the morning. So she missed me and I missed her.

And I would call to say good night. A lot of times she wouldn't answer the phone or I'd have to call numerous times because she was with Chad, I guess, according to the -- I didn't know it at the time, but according to the police reports, they were together. And she would answer, "These aren't your f'ing kids. You don't need to call to say good night to them. They don't like you anyways. They don't even think of you as their dad." And I could hear Cassidi in the background saying, you know, "daddy," you know.

And I just -- I knew -- I just saw that John -- I just saw John Dorn. And I saw everything gone, the whole -- everything I worked for my entire life just gone. My kids were gone.

I -- and she would -- her and Barb would poison the kids' minds, just like they did Scout and Jory, and they would end up hating me, just like Scout and Jory hated John. The writing was on the wall.

It just -- and I thought about hanging myself. I thought about -- I didn't have any guns. I didn't have any guns out at the house. I thought about shooting

myself. I didn't have nothing. The only -- I didn't -- I totally -- I didn't even remember about the pistol till that day. Otherwise, I had nothing. I was going to hang myself. I was going to drive my car into an abutment.

I mean, I was -- I don't remember -- the only call I remember going on the last week-and-a-half that I worked at the fire department -- this is not like me. I love my job. I loved my job. I worked hard for that job. I remember one rollover accident we had Easter Sunday, the corner of Calumet. I don't even know who my firefighter was. I know who my driver was, but I couldn't tell you who my firefighter was. And that's not like me. It was a new guy. But it's like I was just -- I wasn't there.

THE COURT: Okay. Well, I can understand that you might not state all of the things that are in the offer of proof, possibly because you --

MR. SCHMIDT: I've never even seen it.

THE COURT: -- you haven't had an opportunity to review this, and you are not really that well prepared. But this suggests that you were contemplating these things on the 17th.

MR. SCHMIDT: Contemplating --

(The judge shows Mr. Schmidt the document.)

THE COURT: Well, that they weighed on your mind.

MR. SCHMIDT: Yeah. I mean, they just constantly -- I guess, like I said, it was going round and round in my head. Everything. From the house that we were going to build to -- it was just -- it was a mess. To the kids, to losing the kids, to losing Kelly, to the baptism of Kyan, to the baptism of Cassidi, I mean to John, to the way her mom treated my son, the way Kelly treated Max. You know, there was no -- I took those kids in like they were my own.

THE COURT: Why don't you take time to review those. There's about three pages of that or four. Why don't you just read it over, and we'll take a short break here. I have to make a phone call.

ATTORNEY PETIT: Am I allowed to talk to my client now or not?

THE COURT: It's off the record. Yeah, you can talk. But he should just be reviewing that.

(A brief recess was taken.)

THE COURT: All right. Let the record reflect that we're back on the record regarding the in-camera testimony of Scott Schmidt in case file 09-CF-275. We took a break for Mr. Schmidt to review this offer of proof and different facts contained in

it.

So there's quite a bit there. And to, I guess, just ask somebody who isn't contemplating this hearing today, you probably should have had a chance to review that.

So the question is what you contemplated at the time. And we were going through some of that. You've had a chance now to see all the different --

MR. SCHMIDT: Yeah.

THE COURT: -- um, incidences --

MR. SCHMIDT: Yeah. Sure.

THE COURT: -- that were mentioned from going back to 2004 leading up to April 17th of '09?

MR. SCHMIDT: Yes, sir.

THE COURT: So how did these incidences enter into your mind or affect you on the 17th?

MR. SCHMIDT: I guess it just kind of came to a head, overwhelmed, and eventually just got -- they piled up one after another, just continuously year after year more stress was added.

And I guess really the big turning point for me was when the house fell through -- the sale of the house fell through. Um, there were more positives than negatives up to that point kind of. And I could work kind of, you know, points when I got kicked out of the

house or things like that. But after that, it's like more negatives than positives.

And we -- with getting in the accident, Barb being around more, it just added more and more stress to an already stressful situation. It came to a head on the 17th.

THE COURT: Okay. The failure of the house selling wasn't Kelly's fault, though, was it?

MR. SCHMIDT: No. No. The -- that was just one of the financial strains that was on me. No, that was not Kelly's fault, no. It was just the financial strains on us. Not just me. On us. The family.

THE COURT: Well, you've gone through some of these circumstances that are mentioned in the offer of proof. Were there any of these that weighed more heavily on your mind than others?

MR. SCHMIDT: The isolation, alienation, the trying to come up with the money to pay Barb to watch the kids, to keep food on the table when she was not willing to work the EM, the repeated verbal and physical abuse that nobody would believe me because of who -- she's the female and I'm the guy.

And it -- it's like I married Kelly and Barb, is really what it comes down to. I couldn't make a decision. I wasn't allowed to make a decision. I was

told.

I mean, so many of those things tie in together with -- just from -- enjoying going hunting with my friends to union meetings to, I mean, no matter what I did, being accused of cheating by her, to taking my phone, breaking my phone. If I talked to anybody -- I mean, when I was in the hospital at ThedaClark after my accident, a good friend of mine's wife, him and his wife and kids stopped, and she kissed me on the forehead when she left, Shannon Rucynski, and said, "Schmidty, we're thinking about you and we love you." Well, Kelly was -- she was working that night. She went off the deep end. "What slut was that?" It's like, "That's -- you met Shannon, you know, maybe once or twice before. And that's Chad's wife. She's wished me -- you know, hoped that I got better." And just, "I suppose you're sleeping with her." "No, I'm not."

And the constant accusations that just kept weighing down. And no matter what I did, it was never good enough. If I made more money, it wasn't good enough. Then I wasn't around enough. If I wasn't around enough, then we didn't have any money.

You know, my oldest son started getting in trouble. Things -- we hired an attorney without my knowledge not even knowing, you know, what trouble he

was in. I was told that, "Mom and I" -- "Grandma and I can handle it," I was told by Kelly. Well, that's not quite good enough when -- when we're the one that's going to be paying the attorney. And I'm also helping to raise -- supposedly raise my stepson. And I'm in contact with the police department, you know, at the fire department. I work with these people. And, you know, I would kind of like to know what's going on. And, "It's none of your damn business," is basically point-blank what I was told.

It just -- my dog died two days before my accident in '08. And she called me and told me, "You need to get over here." He died at night. "You need to get over here and get your damn dog." He had cancer. "And get him out of here before the kids wake up." So she rushed the kids out of our bedroom, because I was out at the lake. She had kicked me out for one of the numerous reasons. I was staying there. This was before the house -- the house -- the house was empty I think then, too. Yeah, it was, because it was after the sale of the house fell through, because the house really wasn't empty till '07. So, yeah, I was sleeping on the couch. And at that time, I was drinking. I would stuff my feelings down. I would drink to keep -- to deal with my stuff. If I wouldn't want to deal with

it, I would drink until I forgot about it and pass out and I would go to sleep. So she calls me up five o'clock in the morning, "Come get your damn dog. Get him out of here before the kids get up." I rush over there, grab the dog. Max was staying at the lake with me. He heard numerous things on the phone. He changed his whole -- my other son was affected, also. It wasn't just me. I got the dog, buried the dog. Then it was okay. Then I was okay to come back home. Then all of a sudden it was like, ah, you know, the angles -- the heavens opened up and it was like, "Okay, it's okay for you to come back home today." "Well, why did I get kicked out in the first place?"

And it was just back -- it was -- I don't know. I don't know what the heck happened. I just -- so much -- so many of those things -- I mean everything just added up. It was just weighing on my mind continuously.

And then the money -- then she got -- she called me, we needed $400. This was about three weeks before the incident, I think it was. I just -- she needed $400 to go to register for her state paramedics license. I'm like, "We don't have 400 extra dollars to come up." And then in the same breath she said, "Well, we need to pay grandma $400 for watching the kids for

the last two weeks." So I thought -- she goes, "Fine." I said, "Well, then, you know what, why don't you call Chad and have him -- maybe he can pay for it." "Well, maybe I will do that. He will give me whatever I want anyways." Okay. Calls me back. "We need to come up with that money somehow." And by that time, I had calmed down, I said, "Well, we can put it on" -- we didn't have a credit card. It was maxed out. She hadn't paid it in three months. The payment -- the minimum payment was $1500 for the one month. So I said, "Well, we could put it on our ATM card." It has a pin -- you know, it's a debit card. You can charge it to that on the internet if you wanted to, you know, like you got your bank account. I said, "I'm getting paid for overtime that I worked, and we can" -- I had just gotten back to work and I had taken on overtime shift. I said, "Well, that is part of it. The rest we're going to need for X, Y, and Z." I don't exactly remember what. I think it was to fix the van. The head gasket had blown on the van, and I was adding anti-freeze, and I changed the brakes that winter. And I was just limping it along to try till we got the $5,000, what I thought was $5,000 tax return, and we'd get her something that -- I mean, not new obviously, but something that would be reliable.

And it just -- it was like every which way I turned nothing was good enough. And it was -- but yet I was good enough for certain things. "You're good enough for this. If I need something, you're good enough. But otherwise, you're not. Get the hell away from me."

And that's how -- I mean, that's -- constantly the financial worries, the verbal abuse, the physical abuse, the -- and when I was home on house arrest for the -- on the bracelet, I knew she was in school, and I did everything. I -- I did the cooking, the cleaning, I did the laundry, so she -- I specifically did that because she wasn't working, she worked one day a week at Theda or St. E.'s, and then that way she could concentrate on her school work. Okay. Well, that still wasn't good enough.

So no matter what I did, it -- and when I went to Theda for my accident, and she had hit me with the phone and just yelled at my parents. They had to -- she had to be removed from ICU because they got into -- I didn't know if I was on foot or horseback. I was all drugged up on Morphine, Codeine. I crushed my whole left side. I had plates put in.

It was -- from the baptism, where she threatened to call the cops if my mom and dad showed up at

Cassidi's baptism at the church. She would leave and call the cops and get a restraining order. You just -- you don't do that. My family is a close family before that, and we -- my son loves my mom and dad. Maxwell. He does stuff with grandpa and grandma all the time. For my other kids not to know my mom and dad, it's a shame, because they -- at first when Kelly and I were together, we went up North one or two times, and then she -- Max said, "My mom is prettier than you." He was like three years old, four years old at time. Well, she blew up. He is four years old. He's a kid -- I mean, it was some comment a little -- she left him there. I was out muskie fishing. She left him there all alone for a half an hour, took off and went home.

It's like -- so my parents tried to involve her, but it's like everything they did, she would run the opposite way from.

And it was no different with John. It's like the writing was on the wall. I knew those kids -- she was just looking for another guy to -- I had got a vasectomy and everything was fine and hunky-dory until I got it. And then she just went ballistic at me. "I can't believe -- why would you do that?" I said, "We talked about it. Why -- why wouldn't I?" She wanted another child. Well, we can't afford the six that we

got. I mean, you know, we've got -- money is damn tight the way it is, and she wanted another baby.

That's -- she -- that's -- that's what she did to John, I hate to say it. But she got pregnant with Jory, his second child with her, to keep him in the relationship. Finally he said enough, and he walked away. And if I would have been mentally -- if I would have been strong enough, if I would have been -- I wouldn't be here today. I would have walked away, too, I guess, if I would have -- obviously, you know, I wouldn't be in this situation if I did.

We can't put the bullets back in the gun. You can't go back in time. I can't go back in my physical state, my mental state back. Everything was gone. And I loved her, and I still do. But there's days -- there's days I hate her guts, and there's days I love her. And it just tore me up. I didn't know which way was up.

THE COURT: Okay. Lynn, do you have any questions? (no response.) All right. Why don't we go -- you can go back to the courtroom. And then I'm going to think about the decision. I don't know if I will have a decision this afternoon or not. But you can go out in the courtroom and wait, and I will either let you know whether -- what the Court's ruling might

be.

ATTORNEY PETIT: Okay. Thank you.

THE COURT: Okay.

(The in-camera proceedings were concluded.)