No. 18-

IN THE

SUPREME COURT OF THE UNITED STATES

Scott E. Schmidt — PETITIONER
(Your Name)

VS.

Brian Foster — RESPONDENT(S)

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis.*

Please check the appropriate boxes:

☒ Petitioner has previously been granted leave to proceed *in forma pauperis* in the following court(s):
United States District Court of the Eastern District of Wisconsin

☐ Petitioner has **not** previously been granted leave to proceed *in forma pauperis* in any other court.

☐ Petitioner's affidavit or declaration in support of this motion is attached hereto.

☐ Petitioner's affidavit or declaration is **not** attached because the court below appointed counsel in the current proceeding, and:

☐ The appointment was made under the following provision of law: _____, or

☒ a copy of the order of appointment is appended.

(Signature)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

SCOTT ERIC SCHMIDT,

Petitioner,

v. Case No. 13-C-1150

WILLIAM J. POLLARD,

Respondent.

ORDER APPOINTING COUNSEL, SCHEDULING HEARING,
AND SETTING A BRIEFING SCHEDULE

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, the trial court 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 present evidence related to 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 the pretrial in-camera hearing when his attorney was not permitted to participate and assist him in presenting an offer of proof with respect to 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 his conviction, and the Wisconsin Supreme Court denied his petition for writ of certiorari. *State v. Schmidt*, 2012 WI App 113, *cert. denied*, 346 Wis. 3d 284 (2013). Having reviewed the briefs and record filed by respondent, the court will appoint counsel and schedule a hearing.

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). Indeed, 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." § 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 a claim was adjudicated on the merits to determine whether in AEDPA's "highly deferential standards kick 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*, 133 S. Ct. at 1094 (2015), *quoting Harrington,* 131 S. Ct. at 784-85; *see also Fargo*, 2016 WL 5415747 at 10-11. "When 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, respondent has asserted 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.) As indicated by respondent, the Wisconsin Court of Appeals' decision was based on the application of two Wisconsin Statutes and Wisconsin cases that did not address the Sixth Amendment right to present a defense. Because the court believes this is an issue that warrants additional consideration, the court will appoint counsel based on Schmidt's previous request that was denied without prejudice and schedule a hearing.

In addition to addressing the standard that applies, counsel shall address respondent's assertion that the first issue is not cognizable under § 2254, the tension between the state evidence law and the constitutional issues raised by Schmidt, and the constitutional implications of restricting counsel's participation during an in-camera evidentiary hearing. Counsel shall review the transcripts and the statements made by the court regarding the burden of production on the adequate provocation defense and the

manner in which the hearing was conducted. In addition to reviewing the approach of the Seventh Circuit Court of Appeals in *Johnson v. Chrans*, 844 F.2d 482, 484 (7th Cir. 1988), the parties should be prepared to address the recent Seventh Circuit decision in *Kubusch v. Neal,* 2016 WL 5335495 (7th Cir. Sept. 23, 2015), where 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*., 2016 WL 5335495 at *7. Now, therefore,

IT IS ORDERED that the Federal Defender Services shall appoint counsel for Schmidt under 18 U.S.C. § 3006A. Counsel shall consult with Schmidt and advise the court whether Schmidt will appear in person or telephonically for the hearing.

IT IS FURTHER ORDERED that the parties shall appear for a hearing on February 21, 2017, at 11:00 AM. On or before January 24, 2017, the petitioner may file a brief addressing the issues raised above. Respondent may file a reply on or before February 14, 2017.

Dated at Milwaukee, Wisconsin, this 7th day of December, 2016.

BY THE COURT

/s/ C.N. Clevert, Jr.
C.N. CLEVERT, JR.
U.S. DISTRICT JUDGE