No. 09-338 OCT 28 2009

# In the Supreme Court of the United States

PAUL RENICO, WARDEN,
*Petitioner,*

v

REGINALD LETT,
*Respondent.*

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

REPLY BRIEF OF PETITIONER


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## PETITIONER'S REPLY BRIEF

The U.S. Court of Appeals for the Sixth Circuit failed to apply 185 years of this Court's precedent that recognizes broad discretion in the trial court to make a manifest necessity determination based on a hung jury, and likewise, failed to apply deference to the State court determinations as mandated by the Antiterrorism and Effective Death Penalty Act. The State of Michigan is not aware of a single case in which this Court second-guessed a trial court's determination that a mistrial due to a deadlocked jury was proper based on manifest necessity.

There is no clearly established precedent from this Court to support the Sixth Circuit's conclusion that the State trial court was required to employ additional methods to ensure the jury was genuinely deadlocked. In doing so, the Sixth Circuit has forcefully undercut the State trial courts' discretion and injected uncertainty within the circuits regarding what the deadlocked jury test is. The Sixth Circuit further compounded its error by creating a framework whereby a federal court will second-guess a State court's factual determination in a manner that is nowhere to be found in this Court's decisions. These errors cast doubt on the States' ability to rely upon the AEDPA's proscriptions against expansive habeas review and the ability to protect proper convictions from unwarranted review.

Respondent cannot avoid the jurisprudential significance of this case by simply stating that the case is fact-bound. In doing so, Respondent proves the State's argument for three main reasons:

- 185 years' precedent from this Court recognizes a trial court's broad discretion in finding manifest necessity based upon the facts before it;

- The Michigan Supreme Court's decision that the State trial court acted appropriately in granting a mistrial on manifest necessity was not an unreasonable application of existing Supreme Court precedent and was supported by the record – a factual conclusion that warrants an additional layer of deference under AEDPA;

- If federal courts can second-guess the State trial court's factual determinations and the State appellate court's factual conclusions and application of this Court's precedent, the circuit where a defendant is convicted will affect the test to be employed in manifest-necessity determinations and the scope of a habeas court's review given the differences of application on this issue among the circuits.

### 1. For nearly two centuries, this Court has consistently recognized a State trial court's discretion in finding manifest necessity.

Since *United States v. Perez* in 1824, this Court has recognized that trial courts possess the discretion to declare a mistrial under the manifest-necessity standard based on a jury's inability to reach a verdict.[1] This Court has characterized that discretion as "broad discretion."[2] Moreover, in a denial of a petition for certiorari in *Winston v. Moore*, a habeas case, Justice Rehnquist noted in his dissent, "[N]or do I know of a single case from this Court which has ever overturned a trial court's declaration of a mistrial after a jury was unable to reach a verdict on the ground that the 'manifest necessity' standard had not been

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[1] *United States v. Perez*, 22 U.S. (9 Wheat) 579, 580 (1824).

[2] *Arizona v. Washington*, 434 U.S. 497, 505-506, 509 (1978).

met."[3] It is clear that the trial court's factual determination of manifest necessity is not a province to be invaded lightly.

Here, in the first jury trial, the evidence was presented to the jury over the span of four days of testimony (June 3, 1997; June 5, 1997; June 11, 1997; and June 12, 1997), not including the voir dire and the deliberations. In two of these days, the jury was only present for two hours or less, and the total length of the trial on these four days comprised about *ten hours* of testimony, not including lunch breaks.[4]

The jury was instructed and began deliberating at 3:24 p.m. on June 12, 1997. Pet. App. 91a. The jury was excused for the day at 4:00 p.m. Pet. App. 318a. The jury resumed deliberations on June 13, 1997. Early on the second day of deliberations, the jury sent out a noted indicating that it had "*a concern about our voice levels disturbing other proceedings that might be going on.*"[5]

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[3] *Winston v. Moore*, 452 U.S. 944, 947 (1981) (Rehnquist, J., dissenting).

[4] The trial testimony on June 3, 1997, began at 11:00 am where the jury was empanelled and concluded that day at 11:59 am, for a total of one hour. Pet. App. 78a-80a. On June 5, 1997, the jury began on the record at 10:18 am, and the court adjourned at 4:15 am. Pet. App. 81a, 85a. The jury broke for lunch at 12:00 noon and returned at 2:55 pm. Pet. App. 82a-84a. This is approximately three hours of trial time. On June 11, 1997, the trial court went on the record at 10:44 am and adjourned at 12:30 am, for a total of approximately two hours. Pet. App. 87a-88a. Finally, on June 12, 1997, the trial commenced at 10:00 am and the jury began to deliberate at 3:24 pm. Pet. App. 89a, 91a. With the lunch break running from 12:31 pm to 2:19 pm, Pet. App. 90a, there were four hours of work conducted on this day before deliberations. These four days then totaled approximately ten hours of trial time.

[5] *People v. Lett,* 644 N.W.2d 743, 746 n.2 (2002) (emphasis added). Pet. App. 42a.

During its deliberations, the jury sent out a total of *seven notes.*[6]

At about 12:45 p.m., the jury returned to the courtroom based on another note, asking what would happen if the jury could not agree: "*What if we can't agree? Mistrial? Retrial? What?*"[7] The trial court initially asked the foreperson whether the jury was "hopelessly deadlocked" and interrupted the foreperson when it appeared that the foreperson might disclose the current vote status of the jurors. Pet. App. 93a-94a. Subsequently, the trial court inquired from the foreperson whether the jury would be able to reach a unanimous verdict, and the foreperson stated, "*No, Judge.*" Pet. App. 93a-94a (emphasis added). At this point, the trial court declared a mistrial and discharged the jury. Pet. App. 94a. As this Court has noted, there has been no expressed "standard that can be applied mechanically or without attention to the particular problem confronting the trial judge."[8]

There was no objection by Respondent's trial counsel. Respondent was retried and convicted. The trial court's exercise of its discretion was consistent with *Perez's* longstanding principles.

**2. The Michigan Supreme Court's decision, which was supported by the factual record, was not an unreasonable application of this Court's decisions.**

The Michigan Supreme Court's decision that the State trial court acted appropriately in granting a mistrial

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[6] *Lett,* 644 N.W.2d at 746 n.2. Pet. App. 42a.

[7] *Lett,* 644 N.W.2d at 745-746 (emphasis added). Pet. App. 41a-42a.

[8] *Washington,* 434 U.S. at 506.

based on manifest necessity was not an unreasonable application of existing Supreme Court precedent and was supported by the record – a factual conclusion that warrants an additional layer of deference under AEDPA, so that habeas review does not become an invitation for federal courts to conduct post hoc de novo review of every State court action.

28 U.S.C. § 2254(d) requires that the State court decision be an unreasonable application of clearly established Supreme Court precedent. Here, the Michigan Supreme Court applied this Court's precedent in *Washington* and *Richardson*,[9] referencing *Perez*, for the correct proposition that declaration of a mistrial is within the trial court's broad discretion and a hung jury is the classic example of manifest necessity, warranting the jury's discharge.[10] Further, the Michigan Supreme Court was well aware of the coercive dangers of forcing a deadlocked jury to reach a verdict.[11] Specifically, the Michigan Supreme Court noted, "The jury had sent out several notes over the course of its deliberations, including one that appears to indicate that its *discussions may have been particularly heated.*"[12]

Contrary to Respondent's assertion that Michigan is a jurisprudential outlier, the Michigan Supreme Court was correct that there is no precedent from this Court that mandates that the State trial courts employ additional measures to ensure that the jury is genuinely

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[9] *Washington,* 434 U.S. at 506; *Richardson v. United States,* 468 U.S. 317 (1984).

[10] *Lett,* 644 N.W.2d at 747-753. Pet. App. 45a-61a.

[11] *Lett,* 644 N.W.2d at 751-752; Pet. App. 54a-55a, 58a.

[12] *Lett,* 644 N.W.2d at 753; Pet. App. 59a.

deadlocked.[13] Nor has this Court addressed the situation where jury deliberations had become acrimonious and the jury was discharged. In fact, this Court's recent habeas corpus jurisprudence reiterates the point that in the absence of clearly established Supreme Court precedent, there is no relief under AEDPA.[14] The Sixth Circuit chose to contest the facts properly determined by the State courts and create novel standards for manifest necessity determinations not present in this Court's precedent. Both actions violate AEDPA deference and invade the sovereign States' authority to conduct trials and achieve public justice.

The record was clear that the initial note on June 13, 1997 indicated heated discussions ("a concern about our voice levels"), a later note suggested that the jury was unable to agree on a verdict, and the foreperson clearly stated that the jury was deadlocked. Under the Sixth Circuit's strained analysis that this factual predicate is adequate for manifest necessity, which compromises AEDPA deference, the State trial court is left with a Hobson's choice: either declare a mistrial and risk second-guessing by the federal court on habeas review, or choose to disbelieve the jury's contentious deliberations and the foreperson's clear expression of a deadlock, thereby leaving "a significant risk that a verdict may result from pressures inherent in the situation rather than the considered judgment of all the jurors."[15] Given the raised

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[13] *Lett*, 644 N.W.2d at 752, n. 13; Pet. App. 56a-57a. The Michigan Supreme Court's opinion is published and remains binding on Michigan's State courts.

[14] *Wright v. Van Patterson*, 128 S. Ct. 743, 747 (2008) (defendant pled to reckless homicide at a plea hearing where trial counsel participated by speakerphone); *Carey v. Musladin*, 549 U.S. 70, 74 (2006) (whether displaying of buttons by the victim's family during the defendant's trial deprived the defendant of a fair trial).

[15] *Washington*, 434 U.S. at 505-506.

voices, there was a legitimate fear that the deadlocked jurors might force a unanimous verdict if allowed to continue deliberating even if they had only been deliberating for four hours.

In referring to the role of the habeas court, Justice Rehnquist aptly noted in *Winston* that it is inappropriate for federal courts to second-guess the broad discretion granted a trial court confronted with a hung jury as well as to create new standards on habeas review:

> Either it simply "second-guessed" the state trial judge as to whether this particular jury could, after further deliberation, reach a verdict, or it created a principle of law that has never been sanctioned by this Court to the effect that a trial judge must interrogate each juror as to the possibility of reaching a verdict before it may declare a mistrial because the jury has "hung." Either one of these actions, with their concomitant affirmance by the Court of Appeals, merits plenary review here.

Justice Rehnquist's observation in *Winston* applies squarely to the Sixth Circuit's actions present here.

**3. The split among the circuits over what length of deliberations is required to support a declaration of manifest necessity due to a hung jury will cause defendants to be treated differently depending on the circuit where the trial occurs.**

Respondent ignores that the circuits are split on what length of deliberations is sufficient to warrant a declaration of manifest necessity for a hung jury. On

direct review in *United States v. Lorenzo*, the U.S. Court of Appeals for the Ninth Circuit determined that jury deliberating for three hours was sufficient under *Perez* to warrant a mistrial.[16] The Fifth and Eleventh Circuits also denied relief on double jeopardy grounds where the jury had only deliberated for three hours, both habeas cases.[17] In contrast, other circuits on direct review have found that a comparable amount of time deliberating to be inadequate to justify a finding of manifest necessity.[18] This split demonstrates that there is no clearly established Supreme Court precedent.

Here, the Sixth Circuit on habeas review concluded that the State trial courts are constitutionally required to do more – employing additional requirements not mandated by this Court. The Michigan Supreme Court correctly recognized and applied this Court's precedent, and further acknowledged the Hobson's choice of granting a mistrial or forcing the jury to deliberate longer, thereby risking a coerced verdict when the foreperson had clearly expressed that the jury could not reach a verdict and when deliberations were contentious. Further, the Sixth Circuit demonstrated a willingness to ignore AEDPA deference in order to contest the facts properly determined by the State courts, as well as create new law. The law applied in a habeas case should not depend on which circuit hears the case but rather on this Court's clearly established precedent.

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[16] *United States v. Lorenzo*, 570 F.2d 475, 477 (9th Cir. 1978).

[17] *Fay v. McCotter*, 765 F.2d 475, 477 (5th Cir. 1985); *Lindsey v. Smith*, 820 F.2d 1137, 1155 (11th Cir. 1987).

[18] *United States v. Gordy*, 526 F.2d 631, 636-637 (5th Cir. 1976); *United States ex rel. Webb v. Court of Common Pleas*, 516 F.2d 1034 (3rd Cir. 1975).

## CONCLUSION

The State of Michigan respectfully requests that this Honorable Court grant the writ of certiorari.

Respectfully submitted

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