No. 09-338 AUG 27 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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Sixth Circuit, in a habeas case, erred in holding that the Michigan Supreme Court failed to apply clearly established Supreme Court precedent under 28 U.S.C. § 2254 in denying relief on double jeopardy grounds in the circumstance where the State trial court declared a mistrial after the foreperson said that the jury was not going to be able to reach a verdict.

PARTIES TO THE PROCEEDING

Petitioner is Paul Renico, Warden of the Mid-Michigan Correctional Facility in Michigan. Petitioner was respondent-appellant in the U.S. Court of Appeals for the Sixth Circuit.

Respondent is Reginald Lett, a prisoner in a State correctional facility in Michigan, serving a sentence of 16-40 years' imprisonment for second-degree murder and felony-firearm. Respondent was the petitioner-appellee in the Sixth Circuit.

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The decision of the Sixth Circuit, *Lett v. Renico,* affirming the district court's grant of habeas corpus is an unreported decision filed on March 10, 2009. Pet. App. 1a-17a. The order of the Sixth Circuit denying a motion for rehearing is unpublished. Pet. App. 76a. The district court decision granting habeas is published at 507 F.Supp.2d 777 (E.D. Mich. 2007). Pet. App. 18a-38a.

For the State court decisions, the decision of the Michigan Supreme Court in *People v. Lett* is reported at 466 Mich. 206; 644 N.W.2d 743 (2002). Pet. App. 39a-67a. The decision of the Michigan Court of Appeals is unpublished. Pet. App. 68a-75a.

JURISDICTION

The State of Michigan filed a motion for rehearing with a suggestion for rehearing en banc of the Sixth Circuit's March 10, 2009 decision, which was denied by that Court in a May 29, 2990 order. Pet. App. 76a. This Court has jurisdiction to review this writ of certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Sixth Circuit found that there was a violation of the right against double jeopardy under the Fifth Amendment.

The Fifth Amendment prohibits a person from being "twice put in jeopardy of life or limb."

The prisoner challenged the basis of his confinement under 28 U.S.C. § 2254 of the Antiterrorism and Effective Death Penalty Act (AEDPA) in habeas corpus, which provides:

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

INTRODUCTION

There are four reasons why the Court should grant this petition.

First, there is a split of authority among the circuits about whether a jury that has deliberated for four hours and indicated that it is deadlocked is by itself sufficient to demonstrate manifest necessity in discharging the jury or whether the State trial court must employ additional measure to ensure that the jury is deadlocked. At least three other circuits have found similar lengths of deliberations without a verdict to warrant a finding of manifest necessity. And at least two circuits have reached the conclusion that the Sixth Circuit did here – albeit in direct review – in cases that were factually similar to this one. The question about whether a relatively short period of deliberations followed by a statement that the jury is deadlocked requires the trial court to take additional actions to confirm that the deadlock is genuine should not depend on where the trial occurs.

Second, the Sixth Circuit's opinion conflicts with this Court's precedent, existing for 185 years. It has been an unchanging principle that trial courts possess broad discretion to discharge for manifest necessity a hung jury and to ensure the trial process protects the ends of public justice.

Third, the disagreement among the circuits on the issue about what standard to apply in evaluating manifest necessity determinations evidences the fact that there is no clearly established Supreme Court precedent on this point. The AEDPA statute, 28 U.S.C. § 2254(d), requires that the State court's decision be an

unreasonable application of clearly established Supreme Court precedent. The fact that the Sixth Circuit cited no authority from this Court to support its contention that there is a need for the trial court to take additional steps in making the manifest necessity determination is indicative of the fact there is no clearly established precedent from this Court.

Fourth, the Sixth Circuit decision was wrongly decided. The jury was deadlocked and the discharge of the jury because of manifest necessity was correct. The Sixth Circuit engaged in a classic case of second-guessing and did not accord the State court determinations the required deference on AEDPA. In doing so, the Sixth Circuit usurped the role of the State courts.

Finally, the State of Michigan would note that it has filed four other petitions for certiorari this year. See *Preselink v. Avery* (08-1389); *Metrish v. Newman* (08-1401); *Berghuis v. Smith* (09-1402); and *Berghuis v. Thompkins* (08-1470). All are murder cases, all published, all reaching disposition in 2009, in which the State of Michigan contends that the Sixth Circuit failed to accord the State court decisions with the proper level of deference required by AEDPA. These cases evidence a pattern by the Sixth Circuit of usurping the role of the State courts by failing to properly apply the AEDPA. This failure has dramatic consequences for this case by wrongly vacating Lett's second-degree murder conviction and prohibiting reprosecution under the Double Jeopardy Clause. This Court should grant this petition.

STATEMENT OF THE CASE

1. The State Court Trial and Review in the State Appellate Courts

Respondent was convicted by a State jury of second-degree murder under MCL 750.317 and possession of a firearm during the commission of a felony, MCL 750.227b. Respondent was sentenced to consecutive terms of 16-to-40 for the second-degree murder conviction and two years for the felony firearm conviction. This conviction resulted from his second jury trial. In the first, the State trial court declared a mistrial and discharged the jury after determining that the jury was deadlocked and unable to reach a verdict.

The Michigan Supreme Court provided a succinct description of the crime. "On August 29, 1996, Adesoji Latona, a taxi driver, was fatally shot at a Detroit liquor store. Latona was apparently confronted by a group of men, including defendant [i.e., Reginald Lett], as he entered the liquor store. One of the men, Charles Jones, accused Latona of throwing him out of Latona's cab, and an argument ensued inside the store. Latona's girlfriend testified that she saw [Lett] draw a gun, after which she heard two gunshots. In a statement given to police following the incident, [Lett] admitted that he was at the party store at the time of the shooting and that he and Jones had fought with Latona inside the store. [Lett] further stated that he had retrieved a gun from another friend in the parking lot, and that he went back inside and fired the gun into the air before running back outside. Latona died from two gunshot wounds, one to the head and one to the chest."[1]

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[1] *People v. Lett,* 644 N.W.2d 743, 744-745 (2002), Pet. App. 40a-42a

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.[2]

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."[3] During its deliberations, the jury sent out a total of seven notes.[4]

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[2] 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.

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

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

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?"[5] The trial court concluded from the note that the jury may be deadlocked, and asked questions of the foreperson regarding the matter:

> THE COURT: I received your note asking me what if you can't agree? And I have to conclude from that that that is your situation at this time. So, I'd like to ask the foreperson to identify themselves [sic], please?
>
> THE FOREPERSON: My name is Janice Bowden.
>
> THE COURT: Okay, thank you. All right. I need to ask you if the jury is deadlocked; in other words, is there disagreement as to the verdict?
>
> THE FOREPERSON: Yes, there is.
>
> THE COURT: All right. Do you believe that it is hopelessly deadlocked?
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> THE FOREPERSON: The majority of us don't believe that--
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> THE COURT: (Interposing) Don't say what you're going to say, okay?
>
> THE FOREPERSON: Oh, I'm sorry.

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[5] *Lett,* 644 N.W.2d at 745-746. Pet. App. 41a-42a.

> THE COURT: I don't want to know what your verdict might be, or how the split is, or any of that. Thank you. Okay? Are you going to reach a unanimous verdict, or not?
>
> THE FOREPERSON: (No response)
>
> THE COURT: Yes or no?
>
> THE FOREPERSON: No, Judge. Pet. App. 93a-94a.

At this point, the trial court declared a mistrial and discharged the jury. Pet. App. 94a. There was no objection.

Reginald Lett was convicted on retrial of second-degree murder without objection or motion to dismiss on the basis of double jeopardy. Lett appealed his conviction to the Michigan Court of Appeals, arguing for the first time that the trial court erred in granting a mistrial because there was no manifest necessity. The Michigan Court of Appeals found that the grant of a mistrial was improper.[6] The Michigan Supreme Court reversed and reinstated the conviction. The Michigan Supreme Court affirmed the State trial court's decision, finding that the record substantiated the fact that the jury was not going to be able to reach a verdict.[7]

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[6] See *People v. Lett,* Michigan Court of Appeals, No. 209513, released on April 21, 2000. Pet. App. 73a-75a.

[7] *Lett,* 644 N.W.2d at 752, citing *Arizona v. Washington,* 434 U.S. 497, 515-517 (1978). Pet. App. 56a.

2. The Habeas Review in Federal Court

In habeas, the federal district court revisited this issue and disagreed with the Michigan Supreme Court's resolution:

> It is the state supreme court's determination that the record in this case demonstrates a "high degree" of necessity to declare a mistrial that the petitioner challenges, and with which this Court cannot agree. Pet. App. 29a.

This decision was based in part of the federal district court's factual analysis in which it found that "there is nothing in this record that lends support to the [State court's] conclusion that the jury was overwhelmed with disharmony or that it would not be able to reach a unanimous verdict given sufficient time" Pet. App. 34a. The district court granted habeas relief finding a violation of the Double Jeopardy Clause. Pet. App. 18a.-38a.

On appeal the Sixth Circuit again revisited the Michigan Supreme Court's conclusions and – over a dissent – indicated its belief that the jury was not *really* deadlocked and that the jury may well have reached a verdict if allowed to deliberate further:

> [I]t would be remarkable if the jurors had had time even to review the testimony of the seventeen witnesses in the brief span of three or four hours (broken into two days and punctuated by breaks), much less reach a conclusion that they were hopelessly deadlocked. The extremely

> serious nature of the crime and the potential punishment for the defendant also suggests that the jury should have been permitted more time to deliberate. Juries often initially report themselves deadlocked after several hours and then proceed to reach unanimous verdicts. Pet. App. 13a.

The Sixth Circuit affirmed the district court's grant of habeas relief. Pet. App. 15a.

REASONS FOR GRANTING THE PETITION

I. The decision of the Sixth Circuit creates a conflict among the circuits on the issue of what standard to apply in evaluating manifest necessity determinations.

The seminal Supreme Court case that has examined a trial court's decision to declare a mistrial based on a jury's inability to reach a verdict is *United States v. Perez.*[8] This Court expressly noted that where the jury is "unable to agree" and is discharged the Double Jeopardy Clause does not bar reprosecution:

> We think, that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and, in capital cases especially, Courts should be extremely careful how they interfere with any of the chances of life, in favour of the prisoner. But, after all, they have the right

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

> to order the discharge; and the security which the public have for the faithful, sound, and conscientious exercise of this discretion, rests, in this, as in other cases, upon the responsibility of the Judges, under their oaths of office.[9]

This case has been followed by other Supreme Court decisions in which the decision discharging the jury was based on the fact that the jury was unable to reach a verdict was upheld.[10]

In other cases examining reasons for granting a mistrial, this Court has noted that a defendant has a right to have his trial completed by a particular tribunal, but where there is manifest necessity, the Double Jeopardy Clause does not prohibit a second trial.[11] The standard manifest necessity is met where there is a "high degree" of necessity, and the situation where the jury is unable to reach a verdict is the "classic case" of manifest necessity.[12] "[T]he trial judge may discharge a genuinely deadlocked jury and require the defendant to submit to a second trial."[13]

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[9] *Perez,* 22 U.S. at 580.

[10] See, e.g., *Keerl v. State of Montana,* 213 U.S. 135, 137 (1909); and *Logan v. United States,* 144 U.S. 263, 296 (1892). See also *Dreyer v. Illinois,* 187 U.S. 71, 85 (1902)("It seems to be undisputed that the case was submitted to the jury at four o'clock in the afternoon and that the jury having retired to consider of their verdict were kept together until nine o'clock and thirty minutes in the morning of the succeeding day, when they were finally discharged from any further consideration of the case").

[11] *Oregon v. Kennedy,* 456 U.S. 667, 671-672 (1982), citing *Wade v. Hunter,* 336 U.S. 684, 689 (1949).

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

[13] *Washington,* 434 U.S. at 509.

This Court has explained that the trial court enjoys *"broad discretion"* about whether a deadlocked jury must be discharged based on manifest necessity because of the competing considerations of maintaining the particular tribunal and the fear of coercing that tribunal to reach a verdict:

> [I]n this situation there are especially compelling reasons for allowing the trial judge to exercise *broad discretion in deciding whether or not "manifest necessity" justifies a discharge of the jury.* On the one hand, if he discharges the jury when further deliberations may produce a fair verdict, the defendant is deprived of his "valued right to have his trial completed by a particular tribunal." But if he fails to discharge a jury which is unable to reach a verdict after protracted and exhausting deliberations, there exists a significant risk that a verdict may result from pressures inherent in the situation rather than the considered judgment of all the jurors.[14]

That is, a State trial court, faced with a jury that appears to be unable to reach a verdict, must balance competing interests – the defendant's right of having his guilt determined by a particular tribunal, ensuring that the particular tribunal is not coerced into reaching a hasty verdict, and public's interest in a just judgment for those violating its laws. As a consequence, the trial court's decision to declare a mistrial is "accorded great deference" by an appellate court.[15] The trial court is in

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[14] *Washington,* 434 U.S. at 505-506 (emphasis added).

[15] *Washington,* 434 U.S. at 510.

the best position to assess all the factors in making this discretionary decision. But if the trial court acts for reasons unrelated to the hung jury, then "close appellate scrutiny is appropriate."[16]

In comparison to this case – four hours of deliberations for four days of testimony – with decisions of other circuits on direct review, the federal circuits have reached conflicting results.

Although there are factual variations, other circuits, on direct review, have found similar lengths of deliberations to be sufficient to warrant a declaration of manifest necessity. Specifically, in *United States v. Lorenzo,* the U.S. Court of Appeals for the Ninth Circuit determined that a jury deliberating for three hours was sufficient under *Perez* to warrant a mistrial where the jurors all stated that they would be unable to reach a verdict:

> Lorenzo's next claim of error is that he was impermissibly subjected to double jeopardy. After deliberating a little over three hours, the jury foreman reported that it would be impossible to arrive at a verdict. The district judge questioned each juror, and all agreed that there was no possibility that the deadlock could be overcome by further deliberations. As a result, the jury was discharged and Lorenzo was retried.
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> * * *
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> Here, the district court determined from questioning each member of the jury that it was their belief that their differences were

[16] *Washington,* 434 U.S. at 510 n 28.

> irreconcilable. Although it is true that the jury had been deliberating for only a little over three hours, the district court did not abuse its discretion in light of the jurors' belief that a verdict could not be reached and the fact that the brief trial itself presented no complex factual questions. See *United States v. Brahm*, 459 F.2d 546 (3d Cir.), cert. denied, 409 U.S. 873 [] (1972) (mistrial after five hours of deliberations in a two-day trial); *United States v. Cording*, 290 F.2d 392 (2d Cir. 1961) (mistrial after nearly four hours of deliberations).[17]

The Fifth and Eleventh Circuits also denied relief on double jeopardy grounds where the jury had only deliberated for three hours, both habeas cases.[18]

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.[19]

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[17] *United States v. Lorenzo,* 570 F.2d 294, 298, 299 (9th Cir. 1978).

[18] See *Fay v. McCotter,* 765 F.2d 475, 477 (5th Cir. 1985)("Although the jury deliberated for only three hours, the facts of the case were few and uncomplicated[.]"); *Lindsey v. Smith,* 820 F.2d 1137, 1155 (11th Cir. 1987)("Where, as here, the jury twice returned to tell the trial court that it could not reach a verdict, the court did not abuse its discretion by declaring a mistrial, even though the jury had deliberated only three hours"). See also *Campbell v. Brunnelle,* 925 F. Supp. 150, 159 (S.D.N.Y. 1995)("Three hours of deliberation was not insufficient, and the more important factor is that the jury declared itself deadlocked").

[19] See *United States v. Gordy,* 526 F.2d 631, 636-637 (5th Cir. 1976) (abuse of discretion in declaring a mistrial after five and one-half hours where there was evidence that the mistrial was based on docket considerations); *United States United States ex rel. Webb v. Court of Common Pleas,* 516 F.2d 1034 (3d Cir. 1975)(abuse of discretion in declaring mistrial after six and one-half hours of

Here, the Sixth Circuit on habeas review concluded that State trial courts are constitutionally required to do more – employing additional requirements not mandated by this Court's clearly established precedent. In this regard, the circuits are split.

II. The Sixth Circuit's opinion conflicts with this Court's precedent, existing for 185 years, that trial courts possess broad discretion to discharge for manifest necessity a hung jury.

As discussed above, in *Perez* in 1824 and in cases following *Perez*, this Court has recognized that a trial court possesses the broad discretion to discharge for manifest necessity a hung jury. Retrial is therefore not prohibited by double jeopardy protections. Nothing in this Court's two-century long precedent has changed.

In fact, in a denial of a petition for certiorari in *Winston v. Moore*, 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 met."[20] Moreover, in more recent cases where this Court has reviewed the manifest necessity determination from a deadlocked jury, it has concluded that the trial court's finding of manifest necessity did not constitute a double jeopardy violation when the defendants were retried.

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deliberations for six-day trial where the inquiry regarding the deadlock was at the judge's initiative).

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

In *United States v. Sanford*, a jury trial resulted in a hung jury, and the trial court declared a mistrial.[21] The district court dismissed the indictment, the government appealed, and U.S. Court of Appeals for the Ninth Circuit affirmed, after an intervening remand by this Court.[22] This Court in addressing the same issue here granted certiorari and summarily reversed in a per curiam opinion, finding the issue squarely controlled by *Perez*.[23]

Also in *Richardson v. United States,* the jury convicted the defendant on several of the counts but hung on others, and the trial court declared a mistrial.[24] In rejecting the defendant's double jeopardy claim, this Court relied on *Perez* and its progeny.[25]

The deference this Court has shown to the determinations of trial courts of manifest necessity for a hung jury is predicated, in part, on ensuring a fair process for all participants – the defendant and the prosecutor. As this Court noted in *Washington*:

> [Without] exception, the courts have held that the trial judge may discharge a genuinely deadlocked jury and require the defendant to submit to a second trial. This rule accords recognition to society's interest in giving the prosecution one complete

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[21] *United States v. Sanford,* 429 U.S. 14 (1976) (per curiam).

[22] *Sanford,* 429 U.S. at 14-15.

[23] *Sanford,* 429 U.S. at 16.

[24] *Richardson v. United States*, 468 U.S. 317, 318 (1984).

[25] *Richardson*, 468 U.S. at 323-326.

> opportunity to convict those who have violated its laws.[26]

Thirty years prior to *Washington,* this Court similarly recognized in *Wade v. Hunter* that a defendant should not automatically receive a windfall benefit when the jury deadlocks because the administration of justice would be frustrated:

> The double-jeopardy provision of the Fifth Amendment, however, does not mean that every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment. Such a rule would create an insuperable obstacle to the administration of justice in many cases in which there is no semblance of the type of oppressive practices at which the double-jeopardy prohibition is aimed. There may be unforeseeable circumstances that arise during a trial making its completion impossible, such as the failure of a jury to agree on a verdict. In such event the purpose of law to protect society from those guilty of crimes frequently would be frustrated by denying courts power to put the defendant to trial again. . . . What has been said is enough to show that a defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the

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[26] *Washington,* 434 U.S. at 509.

> public's interest in fair trials designed to end in just judgments.[27]

The balancing of a defendant's right to have a trial completed by a particular tribunal is weighed against the interest in fair trial in which the jury is not compelled to reach a unanimous decision when there is disagreement about the verdict.[28]

These ends are seen in other double jeopardy contexts. For example, in *Illinois v. Somerville*, the defendant was indicted, the case was set for trial, and the jury was impaneled and sworn.[29] The prosecutor realized a fatal error in the indictment, and the error could not be remedied by amendment.[30] The trial court granted the State's request for a mistrial and the defendant was again indicted by the grand jury but without the error.[31]

In reversing the grant of habeas relief by the Seventh Circuit, this Court in *Somerville* noted that proceeding with the trial would have built in error, and a double jeopardy bar would have forced the matter to be resolved on appeal, before a second trial could take place, thus wasting the resources of all involved.[32] This Court concluded:

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[27] *Wade*, 336 U.S. 684 at 689.

[28] *Washington,* 434 U.S. at 509-510.

[29] *Illinois v. Somerville,* 410 U.S. 458, 459 (1973).

[30] *Somerville,* 410 U.S. at 459-460.

[31] *Somerville,* 410 U.S. at 460.

[32] *Somerville,* 410 U.S. at 460.

> Here, the trial judge's action was a rational determination designed to implement a legitimate state policy, with no suggestion that the implementation of that policy in this manner could be manipulated so as to prejudice the defendant. . . . Given the established standard of discretion set forth in *Perez*, *Gori*, and *Hunter*, we cannot say that the declaration of a mistrial was not required by "manifest necessity" or the "ends of public justice."[33]

The long-recognized judicial discretion and principles of fairness and public justice have no mechanical formula.[34]

Here, given the notes sent out by the jury, the record was clear that the initial note on June 13, 1997 indicated raised voices ("a concern about our voice levels"), that the later note suggested that the jury was unable to agree on a verdict, and the foreperson then state clearly that the the jury was deadlocked. In these circumstances, public justice would not be served by forcing the jury to reach a verdict out of duress. Like *Somerville* the trial court was rational and responsible, seeking a just judgment – for both Lett and the prosecutor. As in *Sanford* and *Richardson*, the principles set forth over a century and a half before in *Perez* recognize the trial court's discretion – discretion that is "accorded great deference" and "special respect."[35] The dissent here correctly recognized this discretion and that this Court's precedent has not mandated as a

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[33] *Somerville,* 410 U.S. at 460.

[34] *Somerville,* 410 U.S. at 462.

[35] *Washington,* 434 U.S. at 510.

constitutional requirement that a trial court engage in additional steps before reaching a decision that there is manifest necessity to declare a mistrial based on a hung jury.[36]

III. The fact that the circuits are split on this issue underscores the point that there is no clearly established precedent from this Court to enable the Sixth Circuit to conclude the Michigan Supreme Court's decision here was unreasonable under AEDPA, 28 U.S.C. § 2254.

28 U.S.C. § 2254(d) requires that the State court decision be an unreasonable application of clearly established Supreme Court precedent. The fact that the circuits are split on this issue demonstrates the lack of clearly established precedent from this Court. In its recent habeas jurisprudence, this Court has reiterated the point that in the absence of clearly established Supreme Court precedent, there is no relief under AEDPA.

In *Carey v. Musladin,* a California case on habeas review, this Court examined whether the displaying of buttons by the victim's family during the defendant's trial deprived the defendant of a fair trial.[37] The Supreme Court initially noted that it had examined the

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[36] "A trial judges is in a far superior position to determine whether a jury is genuinely deadlocked and whether it is beneficial to the interest of justice to send the jury for further deliberations . . . [N]o Supreme Court holdings require specific findings on the record by a trial court and no Supreme Court holdings require proof that specific actions have been considered or taken prior to declaring mistrial due to a deadlocked jury." Pet. App. 16a.-17a. (Forester, J., dissenting).

[37] *Carey v Musladin,* 549 U.S. 70, 74 (2006).

question about possible error in the conduct of trials based on the State-sponsored conduct. It then noted that the lower federal courts had diverged in their decisions in applying this precedent, some applying it to the conduct of spectators, and others not. In light of this divergence, the Supreme Court concluded that there was no clearly established Supreme Court law for the State court to apply.[38] The Supreme Court thus reversed the Ninth Circuit, which had relied "on its own precedent" in determining that the Supreme Court cases that applied to State-sponsored conduct also governed the actions of spectators.[39] The point is that where the Supreme Court does not give a "clear answer" to the question presented, there is no basis on which to provide habeas relief.[40]

Recently, in *Wright v. Van Patterson*, this Court reinforced the limitation on habeas review when there is a lack of clearly established precedent. In *Wright*, the petitioner pled to reckless homicide. His attorney was not physically present at the plea hearing, but rather, participated by speakerphone. The petitioner subsequently moved to withdraw his plea, arguing that counsel's physical absence violated the Sixth Amendment – a claim that the State courts denied.

On habeas, however, the Seventh Circuit concluded the claim should have been resolved, not under *Strickland*, but under *Cronic*. This Court

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[38] *Musladin,* 549 U.S. at 76.

[39] *Musladin,* 549 U.S. at 74.

[40] *Wright v. Van Patten,* 128 S. Ct .743, 747 (2008)("Because our cases give no clear answer to the question presented, let alone one in [the defendant's] favor, it cannot be said that the state court unreasonably applied clearly established Federal law"), citing *Musladin,* 549 U.S. 72 (internal quotes omitted).

remanded and, when the case returned unchanged, reversed. This Court explained that its precedents do not "clearly hold" *Cronic* should apply as the Court has never considered this unique factual question:

> No decision of this Court, however, squarely addresses the issue in this case, see *Deppisch*, *supra*, at 1040 (noting that this case "presents [a] novel . . . question"), or clearly establishes that *Cronic* should replace *Strickland* in this novel factual context. Our precedents do not clearly hold that counsel's participation by speaker phone should be treated as a "complete denial of counsel," on par with total absence . . . . Our cases provide no categorical answer to this question, and for that matter the several proceedings in this case hardly point toward one.
>
> Because our cases give no clear answer to the question presented, let alone one in Van Patten's favor, "it cannot be said that the state court 'unreasonably applied clearly established Federal law.'" *Musladin*, 549 U.S., at 127 S. Ct. 649, 651, 166 L. Ed. 2d 482, 486) (quoting 28 U.S.C. § 2254(d)(1)). Under the explicit terms of § 2254(d)(1), therefore, relief is unauthorized.[41]

Such is the case here.

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[41] *Van Patten*, 128 S. Ct. at 746-747).

The Sixth Circuit cited to no decision from this Court that requires a State trial court to employ constitutionally-mandated, additional procedures to ensure that the jury is in fact deadlocked or that a specified amount of time for deliberations is required before the State court decision is insulated from second-guessing on habeas review. The dissenting judge in the Sixth Circuit correctly recognized this point. Pet. App. 16a-17a (Forester, J., dissenting).

In his dissent in *Winston*, a habeas case, Justice Rehnquist recognized the convergence of the layers of deference and this lack of precedent to second-guess State decisions in this area. Again, there is no precedent from this Court that has overturned the declaration of a mistrial after a jury has deadlocked:

> In sum, I am reluctantly led to the conclusion that the District Court did one of two things in order to grant the relief that it did, and that either of them merit review by this Court. 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.

> In my view, the determination of "manifest necessity" is one uniquely vested in the discretion of a trial judge, and particularly should not be subject to attack by a habeas action after trial counsel had failed to object to the declaration of a mistrial.[42]

Habeas corpus is an inappropriate proving-ground for establishing novel constitutional principles, especially in light of the 185 years of precedent and the strictures upon the scope of habeas review under AEDPA – years after Justice Rehnquist's observations. The petition here fits these observations, even down to the lack of trial counsel's objections to the mistrial, and in fact, the jury in *Winston* deliberated for a shorter period.[43]

IV. 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 deference under AEDPA, so that habeas review does not invade the province of the State courts.

The Michigan Supreme Court cited and applied the proper constitutional standards in evaluating the State trial court's action.[44]

The Court engaged in a reasoned application of the record and concluded that the trial court acted

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[42] *Winston*, 452 U.S. at 946-947.

[43] *Winston*, 452 U.S. at 947.

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

within its discretion in finding that the jury was deadlocked and would not be able to reach a verdict:

> The jury had deliberated for at least four hours following a relatively short, and far from complex, trial. 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. Most important here is the fact that the jury foreperson expressly stated that the jury was not going to reach a verdict. We conclude that, in the absence of an objection by either party, the declaration of a mistrial in this case constituted a proper exercise of judicial discretion. Accordingly, manifest necessity for the jury's discharge existed, and defendant's retrial did not constitute a constitutionally impermissible successive prosecution.[45]

In other words, the Michigan Supreme Court determined that the record was adequate to explain the basis for the trial court's decision – "[t]he reasons were plain and obvious: the jury foreperson indicated that the jury was not going to be able to reach a unanimous verdict."[46] This decision was supported by the record and was not an unreasonable application of existing Supreme Court precedent.

In examining the State trial court's decision, the Sixth Circuit here determined that the State trial court

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[45] *Lett,* 644 N.W.2d at 753. Pet. App. 59a-60a.

[46] *Lett,* 644 N.W.2d at 754. Pet. App. 61a

acted precipitously and pressured the foreperson to "acquiesce" to the State trial court's conclusion that it was deadlocked:

> It is possible that the foreperson was attempting to tell the judge whether or not a majority of the jurors believed the jury was deadlocked. Rather than pausing to inquire about such a possibility or to poll the jurors individually, the judge forced the foreperson to provide an immediate answer on behalf of the whole jury. When the foreperson hesitated, the judge demanded a "yes or no" answer. *This insistence on haste and refusal to allow the foreperson to elaborate, combined with the judge's already-expressed opinion that the jury was deadlocked, exerted inappropriate pressure to acquiesce in the judge's conclusion.* [Pet. App. 12a (emphasis added).]

For this reason, over a dissent, the panel majority concluded that the Michigan Supreme Court's decision was "objectively unreasonable." Pet. App. 12a.

But the Sixth Circuit's analysis is improper because it presupposes that the expression of the deadlock was not in fact a deadlock previously reached. The weakness of the Sixth Circuits' analysis therefore is in its failure to accept the statement of the foreperson that the jury was deadlocked. The majority indicated their belief that the jury was not *really* deadlocked and that the jury may well have reached a verdict if allowed to deliberate further:

> [I]t would be remarkable if the jurors had had time even to review the testimony of the seventeen witnesses in the brief span of three or four hours (broken into two days and punctuated by breaks), much less reach a conclusion that they were hopelessly deadlocked. The extremely serious nature of the crime and the potential punishment for the defendant also suggests that the jury should have been permitted more time to deliberate. Juries often initially report themselves deadlocked after several hours and then proceed to reach unanimous verdicts. [Pet. App. 13a.]

But this analysis does not cite any authority.

This is classic second-guessing that directly contravenes the deference accorded State-court decisions under AEDPA. The State trial court had already received a note suggesting that there was disagreement regarding the verdict "What if we can't agree? Mistrial? Retrial? What?"[47] And there also was an earlier note regarding "raised voices," which the Michigan Supreme Court noted may be suggestive that the deliberations had already become "acrimonious."[48] Only in light of these notes did the foreperson confirm that the jury was not going to reach a verdict. The State trial court's decision to then grant a mistrial was within its discretion.

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[47] *Lett,* 464 N.W.2d at 745 n 2. Pet. App. 42a.

[48] *Lett,* 464 N.W.2d at 745 n 2. Pet. App. 43a.

The majority in the Sixth Circuit did not defer at all to the State trial court's superior ability to weigh these factors, deference that this Court requires the reviewing court to accord:

> It should be noted, however, that the rationale for this deference in the "hung" jury situation is that the trial court is in the best position to assess all the factors which must be considered in making a necessarily discretionary determination whether the jury will be able to reach a just verdict if it continues to deliberate.[49]

Instead, the majority relied on its post hoc view that the jury should have deliberated longer. But if the jury had been required to deliberate further – and these raised voices were indicative of "particularly heated" discussions – the decision to continue to deliberate may have reached a verdict only "from pressures inherent in the situation."[50] Because the majority of the Sixth Circuit assumed that the jury should have deliberated longer, it discounted that further deliberations could have resulted in a coercive setting. The State trial court was in a better position to make the determination whether there was any risk of coercion. The Sixth Circuit majority's assumption is also belied by the fact that Lett was convicted on retrial of murder after only three hours and fifteen minutes of deliberations.[51]

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[49] *Washington,* 434 U.S. at 510 n 28.

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

[51] *Lett,* 644 N.W.2d at 746 n 4. Pet. App. 43a.

Moreover, once the foreperson indicated that the jury was deadlocked, there is no established Supreme Court precedent that would require the State trial court to consider other alternatives, such as giving an instruction to require the jury to continue to deliberate. The Supreme Court in *Washington* rejected the Ninth Circuit's analysis, which had required the State trial court to consider other alternatives before declaring a mistrial.[52] The Sixth Circuit in its other cases also acknowledged that there is no such requirement before declaring a mistrial.[53] Once the foreperson revealed the fact that the jury was deadlocked, there were two options: either declare a mistrial or require the jury to continue to deliberate. Contrary to the suggestion of the Sixth Circuit, a decision by the State trial court to require the jury to deliberate in the face of the foreperson informing the State court of a deadlock may have resulted in the jurors pressuring one another. Granting the State trial court the proper deference, the Sixth Circuit could not have reached the decision of the State trial court was "irrational" or "irresponsible" under *Washington*.[54] The Sixth Circuit would also not have determined that the Michigan Supreme Court's decision was objective unreasonably.

This deference is even more significant here where all State factual determinations are presumed to be correct

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[52] *Washington,* 434 U.S. at 503.

[53] See *Klein v. Leis*, 548 F.3d 425, 431 (6th Cir. 2008)("In determining whether a "manifest necessity" exists, Courts need not find an absence of alternatives but only a "high degree" of necessity"); *Ross v. Petro*, 515 F.3d 653, 660 (6th Cir. 2008).

[54] *Washington,* 434 U.S. at 514 ("Thus, if a trial judge acts irrationally or irresponsibly, his action cannot be condoned")(citations omitted).

unless there is a contrary showing by clear and convincing evidence under 28 U.S.C. § 2254(e)(1). Given the nature of the decision here, the State trial court's determination whether the jury was deadlocked was a factual one entitled to a presumption of correctness. Other jurisdictions have noted the same basic point.[55]

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[55] See, e.g., *Weaver v. Thompson*, 197 F.3d 359, 363 n 6 (9th Cir. 1999); *Green v. Johnson*, 160 F.3d 1029, 1046 (5th Cir. 1998).

CONCLUSION

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

Respectfully submitted

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