No. 09-338

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In The
Supreme Court of the United States

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PAUL RENICO, Warden,
Petitioner,

vs.

REGINALD LETT,
Respondent.

---

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

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**MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AFFIDAVIT OF INDIGENCY**

*** BRIEF IN OPPOSITION ***

**CERTIFICATE OF SERVICE**

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**SUBMITTED BY:**
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_____/

**MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS**

The Respondent, REGINALD LETT, who is indigent, asks leave to file the attached Brief in Opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit without prepayment of costs, and to proceed *in forma pauperis* pursuant to rule 39.

The Respondent's affidavit in support of this application is attached hereto.

**STATE APPELLATE DEFENDER OFFICE**

Counsel for Respondent

BY: _____
**MARLA R. McCOWAN (P 57218)**
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Date: October 19, 2009

No. 09-338

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_____/

**CERTIFICATE OF SERVICE**

**Marla R. McCowan**, Counsel of Record in this matter, hereby certifies that on October 19, 2009, that she mailed one copy of the following:

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS
AFFIDAVIT OF INDIGENCY

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

*via first class U. S. Mail with postage prepaid to:*
Mr. B. Eric Restuccia
Solicitor General
P.O. Box 30212
Lansing, Michigan 48909
(517) 373-1124

_____
**MARLA R. McCOWAN (P 57218)**

Iden #15080

No. 09-338

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In The
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PAUL RENICO, Warden,

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_____/

**BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

**SUBMITTED BY:**
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## REASONS FOR DENYING THE WRIT

***There Are No Compelling Reasons***
***to Review the Decision of the Sixth Circuit Court of Appeals.***

### A. THE STATE COURT OF APPEALS, THE FEDERAL DISTRICT COURT, AND THE UNITED STATES COURT OF APPEALS APPROPRIATELY GRANTED RELIEF TO THE RESPONDENT.

The issue in this case centers around the lack of discretion exercised by the trial court in declaring a mistrial after the following exchange at the conclusion of Respondent's first trial:

> THE COURT: I received your note asking 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, 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 a disagreement as to the verdict?
>
> THE FOREPERSON: Yes, there is.
>
> THE COURT: All right. Do you believe that it is hopelessly deadlocked?
>
> THE FOREPERSON: The majority of us don't believe that--
>
> THE COURT: (Interposing) Don't say what you're going to say, okay?
>
> THE FOREPERSON: Oh, I'm sorry.
>
> 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.
>
> THE COURT: All right, I hereby declare a mistrial. The jury is dismissed.

(At about 12:48 p.m. - jury discharged). (Petition *Appendix* at pages 93a-94a [transcript]).

After a mistrial was declared, Mr. Lett was convicted upon retrial of second degree murder on November 20, 1997. (*Id.* at 71a-72a [State Court of Appeals Opinion]). In direct appeal of that conviction, the Michigan Court of Appeals unanimously reversed Mr. Lett's convictions, finding that the trial court did not reasonably declare a mistrial, and that a retrial violated Respondent's rights against double jeopardy as guaranteed by the United States and Michigan Constitutions. (*Id.* at 74a-75a). Although Petitioner currently takes the position that "the discharge of the jury……was correct" (Petition at 4), the original prosecutor assigned to the appeal 'acknowledged that the judge's precipitous declaration `clearly was error'" during a post-conviction motion hearing. (Petition *Appendix* at 12a [United States Court of Appeals Opinion]).

The majority of the Michigan Supreme Court disagreed with the state Court of Appeals' analysis, and reinstated Mr. Lett's convictions over dissent by two Justices. *People v. Lett*, 466 Mich. 206 (2002). In so doing, the Michigan Supreme Court determined that the trial court acted reasonably when it concluded that the jury was deadlocked.

On habeas, however, the District Court found that the reasons cited by the Michigan Supreme Court to reinstate the convictions were "not particularly compelling" and did not provide an accurate portrayal or interpretation of the record. *Lett v. Renico*, 507 F. Supp. 2d 777, 785-787 (E.D. Mich. 2007) (finding, for

example, that "the foreperson did not `expressly state that the jury was not going to reach a verdict' contrary to the Michigan Supreme Court's description of the exchange). In affirming the decision to grant habeas corpus relief, the majority panel of the United States Court of Appeals likewise found no record support to suggest that the trial court utilized "sound discretion" prior to declaring a mistrial. (Petition *Appendix* at 11a-15a [United States Court of Appeals Opinion]) ("the foreperson's response cannot carry the weight placed upon it by the Michigan Supreme Court"). The petition for rehearing or rehearing *en banc* was denied by the Sixth Circuit. (Petition *Appendix* at 76a [Order]).

The United States Court of Appeals for the Sixth Circuit determined that habeas corpus relief was appropriately granted by the District Court, because the Michigan Supreme Court's decision to reinstate Respondent's conviction was an unreasonable application of United States Supreme Court precedent. Specifically, the Sixth Circuit Court looked to *United States v. Perez*, 22 U.S. (9 Wheat) 579 (1824), *United States v. Jorn*, 400 U.S. 470 (1971) and *Arizona v. Washington*, 434 U.S. 497 (1978) to determine whether "sound discretion" was employed by the trial court. (Petition *Appendix* at 8a-9a [United States Court of Appeals Opinion]). On the facts of this case, the Michigan Supreme Court decision was an unreasonable application of United States Supreme Court precedent, requiring habeas corpus relief pursuant to 28 U.S.C. §2254(d). The Sixth Circuit (like the Federal District Court before it and the Michigan Court of Appeals originally) simply found no

record evidence to suggest that the trial court exercised "sound discretion" prior to declaring a mistrial:

> First, the trial judge declared a mistrial without pausing to hear from counsel, and the brief colloquy leading to the judge's declaration-lasting all of three minutes-was immediately followed by the dismissal of the jury, providing counsel no opportunity to object. Second, the record does not indicate that the trial judge gave any consideration to the alternatives to declaring a mistrial, such as giving a "deadlocked jury" instruction, polling the jury, answering the question posed in the jury's note about what would happen if it was unable to reach a unanimous verdict, or allowing the jury more time to deliberate. Any of these courses of action would have been reasonable, given that the jury had only deliberated for three or four hours in this first-degree murder trial. Third, and most troubling, the judge's declaration was inexplicably abrupt, making it `abundantly apparent that the trial judge made no effort to exercise a sound discretion to assure that, taking all the circumstances into account, there was a manifest necessity for the *sua sponte* declaration of this mistrial.' *Jorn*, 400 U.S. at 487, 91 S. Ct. 547.

(Petition *Appendix* at 14a-15a [United States Court of Appeals Opinion]).

The Petition takes issue with the lack of deference afforded to the trial court's decision. A trial court is afforded "broad discretion" pursuant to *Arizona v. Washington*, *supra*, but this Court does not endorse a "rubber stamp approach" on further review. *Lett v. Renico*, 507 F. Supp. 2d at 784. The Sixth Circuit recognized that *Perez*, *Jorn* and *Washington* require a reviewing court to carefully evaluate all of the circumstances that led to the declaration of a mistrial. (Petition *Appendix* at 9a-11a [United States Court of Appeals Opinion]). The Sixth Circuit did not narrowly fashion its decision from whole cloth; rather, the Court relied upon interpretations of this Court's precedent to determine that sound discretion was not exercised by the trial court in this case. Any perceived "conflict" among the circuits

cited by Petitioner is factually driven and does not involve an unclear standard of review or a lack of clearly established precedent from this Court. The Sixth Circuit's decision is soundly based on established Supreme Court precedent. The petition for writ of certiorari must be denied.

**B. THERE ARE NO OTHER REASONS FOR GRANTING THE WRIT.**

Respondent's constitutional right to be free from double jeopardy was clearly violated, and this case does not present any close questions. To be sure, every Court presented with this issue since the inception of this appeal has granted relief to the Respondent, save for the majority of the Michigan Supreme Court.

## CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari must be denied.

**STATE APPELLATE DEFENDER OFFICE**

Counsel for Respondent

BY: _____
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Date: October 19, 2009