

No. 09-338

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In The  
**Supreme Court of the United States**

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PAUL RENICO  
*Petitioner,*

*v.*

REGINALD LETT  
*Respondent.*

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

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**BRIEF FOR PETITIONER**

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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 United States 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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## OPINIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit, *Lett v. Renico*, affirming the district court's grant of habeas corpus is an unreported decision filed on March 10, 2009.<sup>1</sup> The Sixth Circuit's order denying a motion for rehearing is unpublished. Pet. App. 76a. The district court decision granting habeas relief is published.<sup>2</sup>

The decision of the Michigan Supreme Court in *People v. Lett* is reported.<sup>3</sup> The decision of the Michigan Court of Appeals is unpublished.<sup>4</sup>

## 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, 2009, order. Pet. App. 76a. This Court has jurisdiction 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.

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<sup>1</sup> *Lett v. Renico*, 316 F. App'x 421 (6th Cir. 2009); Pet. App. 1a-17a.

<sup>2</sup> *Lett v. Renico*, 507 F. Supp. 2d 777 (E.D. Mich. 2007); Pet. App. 18a-38a.

<sup>3</sup> *People v. Lett*, 466 Mich. 206; 644 N.W.2d 743 (2002); Pet. App. 39a-67a.

<sup>4</sup> *People v. Lett*, No. 209513, 2000 Mich. App. LEXIS 1841 (released on April 21, 2000); Pet. App. 68a-75a.

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

Lett 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.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the

judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

## STATEMENT OF THE CASE

A State jury convicted Reginald Lett of second-degree murder under Mich. Comp. Law § 750.317 and possession of a firearm during the commission of a felony, Mich. Comp. Law § 750.227b. Lett was sentenced to consecutive terms of 16-to-40 years 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 jury trial, the State trial court declared a mistrial and discharged the jury after determining that the jury was deadlocked and unable to reach a verdict.

### 1. The Crime and the Trial

The Michigan Supreme Court succinctly described 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 [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.<sup>5</sup>

In the first jury trial, evidence was presented to the jury during four days of testimony (June 3, 1997; June 5, 1997; June 11, 1997; and June 12, 1997), not including voir dire and 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.<sup>6</sup>

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. 91a.

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<sup>5</sup> *Lett*, 644 N.W.2d at 745; Pet. App. 40a-42a.

<sup>6</sup> The trial testimony on June 3, 1997, began at 11:00 a.m. where the jury was empaneled and concluded on that day at 11:59 a.m., for a total of one hour. Pet. App. 78a-80a. On June 5, 1997, the jury began on the record at 10:18 a.m., and the court adjourned at 4:15 p.m. Pet. App. 81a, 85a. The jury broke for lunch at 12:00 noon and returned at 2:55 p.m. 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 a.m. and adjourned at 12:30 p.m., for a total of approximately two hours. Pet. App. 87a-88a. Finally, on June 12, 1997, the trial commenced at 10:00 a.m. and the jury began to deliberate at 3:24 p.m. Pet. App. 89a, 91a. With the lunch break running from 12:31 p.m. to 2:19 p.m., Pet. App. 90a, there were approximately four hours of work conducted on this day before deliberations. These four days then totaled approximately ten hours of trial time.

The jury resumed deliberations on June 13, 1997.<sup>7</sup> Pet. App. 93a. Early on the second day of deliberations, the jury sent out a note indicating that it had "a concern about our voice levels disturbing any other proceedings that might be going on."<sup>8</sup> During two days of deliberations, the jury sent out a total of seven notes.<sup>9</sup>

At about 12:45 p.m. on the second day of deliberations, the jury returned to the courtroom to address another note, asking what would happen if the jury could not agree: "What if we can't agree? [M]istrial? [R]etrial? [W]hat?"<sup>10</sup> The State trial court concluded from the note that the jury might 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? [sic] 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.

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<sup>7</sup> It is not entirely clear from the record when the jury began deliberations on June 13, 1997. It appears as though the Michigan Supreme Court presumed that the jury began at 9:00 a.m. *Lett*, 644 N.W.2d at 745, 746 n.1 (estimating "four or five hours of deliberations"); Pet. App. 41a-42a. See also *Lett*, 644 N.W.2d at 755, n.1 (Cavanagh, J., dissenting); Pet. App. 64a.

<sup>8</sup> *Lett*, 644 N.W.2d at 746 n.2; Pet. App. 42a.

<sup>9</sup> *Lett*, 644 N.W.2d at 746 n.2; Pet. App. 42a.

<sup>10</sup> *Lett*, 644 N.W.2d at 745; Pet. App. 41a.

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?

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. [Pet. App. 93a-94a.]

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

On retrial, Respondent Reginald Lett was convicted of second-degree murder.<sup>11</sup> There was no 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.<sup>12</sup> The Michigan Court of Appeals found that the grant of a mistrial was improper and reversed.<sup>13</sup> The Michigan Supreme Court reversed the Michigan Court of Appeals, reinstating Lett's conviction.<sup>14</sup>

In affirming the State trial court's decision to discharge the deadlocked jury, the Michigan Supreme Court found that the record substantiated the fact that the jury was not going to be able to reach a verdict.<sup>15</sup> Specifically, the Michigan Supreme Court noted that the trial was not complex and relatively short, and the jury had deliberated for at least four hours.<sup>16</sup> Next, the Michigan Supreme Court recognized that the jury had sent several notes, including one that could be interpreted as jury deliberations having turned acrimonious.<sup>17</sup> Finally, the Michigan Supreme Court determined that the jury had indicated a deadlock

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<sup>11</sup> *Lett*, 644 N.W.2d at 746; Pet. App. 43a.

<sup>12</sup> *Lett*, 644 N.W.2d at 746; Pet. App. 43a.

<sup>13</sup> *Lett*, 2000 Mich. App. LEXIS 1841; Pet. App. 73a-75a.

<sup>14</sup> *Lett*, 644 N.W.2d at 754; Pet. App. 61a.

<sup>15</sup> *Lett*, 644 N.W.2d at 752-753 (citing *Arizona v. Washington*, 434 U.S. 497, 515-517 (1978)); Pet. App. 56a.

<sup>16</sup> *Lett*, 644 N.W.2d at 753; Pet. App. 59a.

<sup>17</sup> *Lett*, 644 N.W.2d at 753; Pet. App. 59a.

through the colloquy between the trial court and the foreperson.<sup>18</sup>

For these reasons, the Michigan Supreme Court concluded that the record provided sufficient justification and "[t]he reasons were plain and obvious" through the foreperson's indication of deadlock.<sup>19</sup> Therefore, the Michigan Supreme Court held that the trial judge did not abuse her discretion, that manifest necessity existed to discharge the jury, and that there was no bar to Lett's retrial under double-jeopardy protections.<sup>20</sup>

## **2. The Habeas Review in Federal Court**

On habeas review, the federal district court revisited the mistrial 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.<sup>21</sup>

This decision was based in part on the federal district court's factual analysis where it found that "there is nothing in this record that lends support to the [State court's] conclusion that the jury was overwhelmed with

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<sup>18</sup> *Lett*, 644 N.W.2d at 753; Pet. App. 59a-60a.

<sup>19</sup> *Lett*, 644 N.W.2d at 754; Pet. App. 61a.

<sup>20</sup> *Lett*, 644 N.W.2d at 753-754; Pet. App. 59a, 61a.

<sup>21</sup> *Lett*, 507 F. Supp. 2d at 784; Pet. App. 29a.

disharmony or that it would not be able to reach a unanimous verdict given sufficient time."<sup>22</sup> The district court granted habeas relief finding a violation of the Double Jeopardy Clause.<sup>23</sup>

On appeal, the Sixth Circuit reviewed the Michigan Supreme Court's conclusions and, in a split decision, suggested 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.<sup>24</sup>

The Sixth Circuit rejected the Michigan Supreme Court's determination that the trial court had exercised sound discretion. Instead, the Sixth Circuit found that "the trial judge's actions exhibited haste

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<sup>22</sup> *Lett*, 507 F. Supp. 2d at 786; Pet. App. 34a.

<sup>23</sup> *Lett*, 507 F.Supp.2d at 788; Pet. App. 37a.

<sup>24</sup> *Lett*, 316 F. App'x at 427; Pet. App. 13a.

and lack of consideration for Lett's rights that fell short of the sound discretion required."<sup>25</sup>

In reaching its own conclusion regarding the events surrounding the declaration of the mistrial, the Sixth Circuit interpreted differently the jury's note asking what would happen if the jury could not agree as merely asking for more information.<sup>26</sup> Likewise, the Sixth Circuit dismissed the significance of another note regarding raised voice levels as "the jurors may simply have been concerned that they were disrupting other proceedings."<sup>27</sup> Next, the Sixth Circuit supposed "the judge improperly conflated deadlock with mere disagreement . . . ."<sup>28</sup> Finally, the Sixth Circuit opined that the State trial court "insist[ed] on haste and refus[ed] to allow the foreperson to elaborate, combin[ing that] with the judge's already-expressed opinion that the jury was deadlocked, exerted inappropriate pressure to acquiesce in the judge's conclusion."<sup>29</sup>

In the Sixth Circuit's opinion, the State trial court should have done more. Specifically, the Sixth Circuit determined that the trial court should have consulted with counsel after the colloquy.<sup>30</sup> The Sixth Circuit further concluded that "the record does not indicate that the trial judge gave any consideration to the alternatives to declaring a mistrial, such as giving

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<sup>25</sup> *Lett*, 316 F. App'x at 426; Pet. App. 11a.

<sup>26</sup> *Lett*, 316 F. App'x at 427; Pet. App. 11a.

<sup>27</sup> *Lett*, 316 F. App'x at 427; Pet. App. 13a.

<sup>28</sup> *Lett*, 316 F. App'x at 426; Pet. App. 11a.

<sup>29</sup> *Lett*, 316 F. App'x at 427; Pet. App. 12a.

<sup>30</sup> *Lett*, 316 F. App'x at 428; Pet. App. 14a.

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."<sup>31</sup> "Any of [those additional methods]," according to the Sixth Circuit "would have been reasonable."<sup>32</sup> Finally, the Sixth Circuit concluded that the State trial court had acted too abruptly.<sup>33</sup>

For these reasons, the Sixth Circuit affirmed the district court's grant of habeas relief.<sup>34</sup>

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<sup>31</sup> *Lett*, 316 F. App'x at 428; Pet. App. 14a-15a.

<sup>32</sup> *Lett*, 316 F. App'x at 428; Pet. App. 15a.

<sup>33</sup> *Lett*, 316 F. App'x at 428; Pet. App. 15a.

<sup>34</sup> *Lett*, 316 F. App'x at 428; Pet. App. 15a.

## SUMMARY OF ARGUMENT

On habeas review, a State trial court's declaration of a mistrial due to manifest necessity arising from a deadlocked jury is entitled to two layers of deference. First, the Antiterrorism and Effective Death Penalty Act (AEDPA) requires that a State court's decision receive deference, unless it is an unreasonable application of clearly-established United States Supreme Court precedent. Second, the underlying State trial court is granted broad discretion in making a sound determination that there is manifest necessity to declare a mistrial. The Sixth Circuit's decision that double jeopardy barred Lett's second trial for murder cannot stand when these two layers of deference are faithfully applied.

What constitutes clearly-established precedent is narrowly drawn. This Court has clearly established that if a mistrial is declared because of manifest necessity due to a deadlocked jury, a subsequent trial is not barred by double-jeopardy protections. Since 1824, in *United States v. Perez*, this Court has recognized the trial court's sound discretion in making a manifest necessity declaration – the paradigm of manifest necessity being a hung jury – and the existence of a deadlocked jury does not bar subsequent retrial. Additionally, this Court has clearly established that a trial court is granted broad discretion with which to exercise its sound judgment. The exercise of this discretion is due *great* deference.

This Court has given some indication as to what does not fall within the trial court's broad discretion, by suggesting in *Arizona v. Washington* that certain situations fall below the constitutional floor of the

exercise of sound discretion, when the trial court acts: (1) irrationally, (2) irresponsibly, or (3) for reasons unrelated to the purported trial problem giving rise to the declaration of a mistrial. These circumstances have never been established as the set test to measure all mistrial scenarios as falling above or below the constitutional threshold. However, they are the best measures that are consistent with broad discretion and the deference necessary for situations that face trial courts in declaring a mistrial, especially the paradigm example – a deadlocked jury. But this Court has never clearly established that a trial court must force the jury to deliberate for a certain length of time or employ additional measures to ensure a jury is deadlocked.

Here, the Michigan Supreme Court reasonably applied this Court's clearly-established precedent, recognizing the broad discretion given a trial court when faced with facts warranting a mistrial. Further, the Michigan Supreme Court applied this Court's precedent recognizing the countervailing concerns of a defendant's right to have his case decided by a single tribunal and the jury's reaching a non-coerced verdict.

Because the Michigan Supreme Court reasonably applied this Court's precedent, that decision is due deference under AEDPA. The Sixth Circuit erred when it held that the State trial court was required to take additional steps before declaring a mistrial. In fact, such a requirement is nowhere to be found in this Court's precedent. The result was that the Sixth Circuit failed to accord the Michigan Supreme Court's decision the requisite deference.

On the merits, there is no authority from this Court that authorizes an open-ended inquiry, even on direct review, into whether a trial court exercised sound discretion. When, as here, prior to declaring a mistrial, a trial court receives: (1) a note indicating possible acrimonious deliberations, (2) a note indicative of a potential deadlock, and (3) the foreperson confirms that the jury is deadlocked, it is the paradigm exercise of sound discretion. If this is untrue, trial courts will either force continued deliberations for an unspecified amount of time and implement unspecified measures thereby risking a coerced verdict or declare that there is manifest necessity, which will open that decision to second-guessing. For these reasons, the Sixth Circuit should be reversed.

## ARGUMENT

- I. **The Michigan Supreme Court's decision – that the State trial court acted within its discretion in granting a mistrial after the foreperson confirmed that the jury was deadlocked – was not an unreasonable application of this Court's clearly-established precedent under AEDPA, 28 U.S.C. § 2254.**

This Court's clearly-established precedent establishes two general propositions regarding review of a trial court's declaration of a mistrial: (1) the declaration of a mistrial because of manifest necessity arising from a deadlocked jury and subsequent retrial does not violate double-jeopardy protections, and (2) a trial court's exercise of sound discretion in declaring a mistrial due to a deadlocked jury is accorded great deference. Here, the Michigan Supreme Court's decision reasonably applied this precedent. Then, the inquiry turns to whether there is any clearly-established precedent that would support the Sixth Circuit's conclusions that the State trial court was constitutionally required to employ additional methods to ensure that the jury was deadlocked. A review of this Court's decisions establishes that there is no such precedent.

The State court decisions are viewed through the two lenses of deference: AEDPA deference to the Michigan Supreme Court's conclusions and the deference given to a trial court's declaration of manifest necessity due to a deadlocked jury.

**A. This Court's clearly-established precedent has established two general propositions: (1) the declaration of a mistrial because of manifest necessity arising from a deadlocked jury and subsequent retrial does not violate double-jeopardy protections, and (2) a trial court's declaration of a mistrial due to a deadlocked jury is accorded great deference.**

With the enactment of AEDPA, Congress modified how federal courts reviewed State court judgments on habeas review.<sup>35</sup> Generally, under AEDPA, federal courts no longer may conduct an independent review of State court judgments on the merits, but, instead, federal courts are to employ a "highly deferential standard" of review.<sup>36</sup> AEDPA therefore requires that habeas relief be denied unless the State court decision was "contrary to, or involved an unreasonable application of, clearly-established Supreme Court precedent."<sup>37</sup> And the decision regarding what constitutes "clearly established" Supreme Court precedent is derived from this Court's holdings at the time of the relevant State court adjudication, rather than from obiter dictum.<sup>38</sup> Thus, the decision of the State court must not be just "incorrect," it must also be "objectively unreasonable."<sup>39</sup>

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<sup>35</sup> *Williams v. Taylor*, 529 U.S. 362, 403-404 (2000).

<sup>36</sup> *Lindh v. Murphy*, 521 U.S. 320, 333 n.7 (1997).

<sup>37</sup> 28 U.S.C. § 2254(d)(1).

<sup>38</sup> *Williams*, 529 U.S. at 412.

<sup>39</sup> *Williams*, 529 U.S. at 409, 411-412.

This Court has also consistently drawn a distinction between State court decisions applying a general, broad constitutional standard and those decisions that apply a narrow rule. Where a broad standard is at issue, State court decisions are given greater leeway:

Applying a general standard to a specific case can demand a substantial element of judgment. As a result, evaluating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations.<sup>40</sup>

Likewise, in *Knowles v. Mizayance*, this Court held that ineffective assistance of counsel claims must be given extra latitude in light of the general nature of the rule: "because the *Strickland* standard is a general standard, a State court has even more latitude to reasonably determine that a defendant has not satisfied that standard."<sup>41</sup> Here, the standard is also general to determine whether the trial court acted within its sound discretion.

Thus, in cases where a trial court has declared a mistrial and the State appellate courts have affirmed, this Court should require the reviewing habeas court to first look to the standard used by the State court, and

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<sup>40</sup> *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004).

<sup>41</sup> *Knowles v. Mizayance*, 556 U.S. \_\_\_\_; 129 S. Ct. 1411, 1420 (2009).

then examine the State court's application of the facts to that standard. This analysis of the facts, however, should not be an independent review. The review of the State court decision should examine the legal reasoning – the facts cited, whether these facts were supported by the record, whether the inferences from them were within the range of reasonable conclusions, and whether the application of the standards correlated to the facts. Such an examination would thereby require the reviewing court to examine the process of analysis by the State courts and thus would honor and give meaning to the distinction between a decision that may be erroneous and one that is objectively unreasonable. Without such guidance, the reality is that the AEDPA review will effectively be an independent or de novo review with some lip service being given to the legal standards of AEDPA. In short, the limitations established by Congress in § 2254(d) will have been disregarded.

**1. The declaration of a mistrial because of manifest necessity arising from a deadlocked jury and subsequent retrial does not violate double-jeopardy protections.**

The Double Jeopardy Clause ensures the finality of criminal judgments and protects an accused's right to have his trial completed by a particular tribunal.<sup>42</sup> The underlying rationale to a bar of double jeopardy "is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual . . . thereby subjecting him to

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<sup>42</sup> *Arizona*, 434 U.S. at 503-504.

embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity."<sup>43</sup>

But when there is manifest necessity, the Double Jeopardy Clause does not prohibit a second trial.<sup>44</sup> Manifest necessity is met when there is a "high degree" of necessity, and the situation where the jury is unable to reach a verdict is the "classic basis" of manifest necessity.<sup>45</sup> "[T]he trial judge may discharge a genuinely deadlocked jury and require the defendant to submit to a second trial."<sup>46</sup>

This Court's seminal case, which 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*.<sup>47</sup> There, the Court noted that trial courts have the inherent authority to discharge a deadlocked jury:

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.<sup>48</sup>

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<sup>43</sup> *Green v. United States*, 355 U.S. 184, 187 (1957).

<sup>44</sup> *Oregon v. Kennedy*, 456 U.S. 667, 672 (1982) (citing *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824)).

<sup>45</sup> *Arizona*, 434 U.S. at 505-506, 509.

<sup>46</sup> *Arizona*, 434 U.S. at 509.

<sup>47</sup> *Perez*, 22 U.S. (9 Wheat.) at 580.

<sup>48</sup> *Perez*, 22 U.S. (9 Wheat.) at 580.

The recognition that a defendant can be retried after a deadlocked jury and the purpose for this allowance were succinctly identified by this Court in *Arizona v. Washington*:

[W]ithout 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 opportunity to convict those who have violated its laws.<sup>49</sup>

Likewise, thirty years prior to *Arizona*, this Court similarly recognized in *Wade v. Hunter* that a defendant should not automatically receive a windfall benefit when the jury deadlocks:

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

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<sup>49</sup> *Arizona*, 434 U.S. at 509.

impossible, such as the failure of a jury to agree on a verdict.<sup>50</sup>

An unyielding right for a defendant to have his case tried by a single tribunal would thwart society's countervailing interest in seeking a just judgment for those breaking its laws:

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 public's interest in fair trials designed to end in just judgments.<sup>51</sup>

Without recognizing the discretion of trial courts to assess the particular situation before it and to balance society's and the defendant's competing interests, trial courts would be forced "to navigate a narrow compass between Scylla and Charybdis . . . . [and] make [trial courts] unduly hesitant conscientiously to exercise their most sensitive judgment . . . ."<sup>52</sup>

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<sup>50</sup> *Wade v. Hunter*, 336 U.S. 684, 688-689 (1949).

<sup>51</sup> *Wade*, 336 U.S. at 689.

<sup>52</sup> *Gori v. United States*, 367 U.S. 364, 369-370 (1961) (eagerness of trial judge to declare mistrial was for the protection and benefit of the defendant); *but see* plurality opinion in *United States v. Jorn*, 400 U.S. 470, 483 (1970) (questioning a post hoc review based on who benefited from the mistrial).

Further, in *United States v. Sanford*, a jury trial resulted in a hung jury, and the trial court declared a mistrial.<sup>53</sup> The district court dismissed the indictment, the government appealed, and the Ninth Circuit affirmed, after an intervening remand by this Court.<sup>54</sup> This Court, in addressing the same issue here, granted certiorari and summarily reversed in a per curiam opinion, holding, "The situation of a hung jury presented here is precisely the situation that was presented in *Perez*, . . . and therefore the Double Jeopardy Clause does not bar retrial of these respondents on the indictment which had been returned against them."<sup>55</sup>

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.<sup>56</sup> This Court rejected the idea that a hung jury terminated jeopardy allowing the defendant to assert a valid claim of double jeopardy and that a hung jury was the equivalent of an appellate court's finding of insufficient evidence, which operates for double jeopardy purposes as an acquittal.<sup>57</sup> In doing so, this Court relied upon *Perez* and its progeny.<sup>58</sup>

These considerations are seen in other double jeopardy contexts as well. For example, in *Illinois v. Somerville*, the defendant was indicted, the case was

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<sup>53</sup> *United States v. Sanford*, 429 U.S. 14, 14 (1976) (per curiam).

<sup>54</sup> *Sanford*, 429 U.S. at 14-15.

<sup>55</sup> *Sanford*, 429 U.S. at 16.

<sup>56</sup> *Richardson v. United States*, 468 U.S. 317, 318 (1984).

<sup>57</sup> *Richardson*, 468 U.S. at 323-326.

<sup>58</sup> *Richardson*, 468 U.S. at 323-326.

set for trial, and the jury was impaneled and sworn.<sup>59</sup> The prosecutor realized a fatal error in the indictment, and the error could not be remedied by amendment.<sup>60</sup> 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.<sup>61</sup> The Seventh Circuit granted habeas relief, but this Court reversed, noting that proceeding with the trial would have built in an error.<sup>62</sup> This was because 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.<sup>63</sup>

This Court's precedent is clear that if the jury was deadlocked, the trial court's discharging of the jury and Lett's subsequent retrial, would not be barred by Double Jeopardy.

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<sup>59</sup> *Illinois v. Somerville*, 410 U.S. 458, 459 (1973).

<sup>60</sup> *Somerville*, 410 U.S. at 459-460.

<sup>61</sup> *Somerville*, 410 U.S. at 460.

<sup>62</sup> *Somerville*, 410 U.S. at 460-461.

<sup>63</sup> *Somerville*, 410 U.S. at 460.

**2. This Court's clearly-established precedent has set forth that it is within the trial court's broad discretion to declare a mistrial due to a deadlocked jury.**

This Court's precedent clearly establishes that a trial court is granted broad discretion to declare a mistrial due to a deadlocked jury. In exercising this broad discretion the trial court must act soundly. This Court has also identified what does *not* constitute an exercise of sound discretion by the trial court – trial court's actions that are irrational or irresponsible or unrelated to the alleged problem giving rise to manifest necessity. It is less apparent, however, and not clearly established, what all the affirmative examples are of when a trial court has exercised sound discretion. But the classic example of sound discretion remains where a trial court declares a mistrial because the jury is deadlocked, i.e., a situation presenting the highest degree of necessity.

As to the trial court's broad discretion to discharge the jury, this Court in *Perez* recognized the exercise of sound discretion naturally rests with judges:

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 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.<sup>64</sup>

*Perez* has been adhered to in subsequent Supreme Court decisions in which the decision discharging the jury based on the fact that the jury was unable to reach a verdict was upheld.<sup>65</sup>

Consistent with *Perez*, this Court's later cases commenting on the manifest necessity determination from a deadlocked jury have concluded that the trial court's exercise of discretion in finding manifest necessity did not constitute a double-jeopardy violation when a defendant was retried.

For example, in the context whether a deadlocked jury may be discharged, this Court in *Arizona* recognized a general standard and explained

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<sup>64</sup> *Perez*, 22 U.S. (9 Wheat.) at 580.

<sup>65</sup> See, e.g., *Keerl v. State of Montana*, 213 U.S. 135, 137 (1909); and *Logan v. United States*, 144 U.S. 263, 298 (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 4 o'clock in the afternoon, and that the jury, having retired to consider of their verdict, were kept together until 9 o'clock and thirty minutes in the morning of the succeeding day, when they were finally discharged from any further consideration of the case.").

that the trial court enjoys "broad discretion" 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.<sup>66</sup>

That is, a State trial court, when 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 the public's interest in a justice for those violating its laws. When it does so, the trial court is making a "rational determination designed to implement a legitimate state policy."<sup>67</sup>

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<sup>66</sup> *Arizona*, 434 U.S. at 509 (emphasis added).

<sup>67</sup> *Somerville*, 410 U.S. at 469.

The situation that confronted the State trial court here is the classic example of these competing interests. If the State trial court forced further deliberations it might have resulted in a coerced verdict. The jury had already sent a note about raised voices that can reasonably be interpreted as evincing acrimonious deliberations. Further, another note, which immediately preceded the State trial court's colloquy with the foreperson, indicated questions about what would happen if the jury could not agree. Most importantly, the foreperson indicated that the jury was deadlocked. The Michigan Supreme Court was aware of the dangers of a coerced verdict.<sup>68</sup>

This Court further recognized in *Arizona* that a manifest necessity determination is a spectrum analysis that depends on the basis for the mistrial, which dictates how closely the trial court's decision should be scrutinized:

Thus, the strictest scrutiny is appropriate when the basis for the mistrial is the unavailability of critical prosecution evidence, or when there is reason to believe that the prosecutor is using the superior resources of the State to harass or to achieve a tactical advantage over the accused.

At the other extreme is the mistrial premised upon the *trial judge's belief that*

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<sup>68</sup> *Lett*, 644 N.W.2d at 751 (citing *Arizona*, 434 U.S. at 509-510); Pet. App. 54a-55a.

*the jury is unable to reach a verdict, long considered the classic basis for a proper mistrial.*<sup>69</sup>

This is what occurred here – the State trial court granted a mistrial because the jury was deadlocked.

The discretion involved in this case is in sharp contrast to a situation where there are successive prosecutions to harass an accused or for the prosecution to obtain a more favorable chance to convict; this case involved a deadlocked jury.<sup>70</sup> This Court has "consistently declined to scrutinize with sharp surveillance the exercise of that discretion," even in cases not involving deadlocked juries.<sup>71</sup> It is one decision that historically has been "accorded great deference" and "special respect."<sup>72</sup> As long as the record provides "sufficient justification," there is no basis to second-guess.<sup>73</sup>

Although this Court's precedent has clearly established that a trial court possesses broad discretion and its decision is entitled to deference, the question remains as how to qualify the trial court's decision – whether it acted soundly or not. The corresponding

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<sup>69</sup> *Arizona*, 434 U.S. at 508-509 (footnotes omitted) (emphasis added).

<sup>70</sup> See *Gori*, 367 U.S. at 369; see also *Downum v. United States*, 372 U.S. 734, 735 (1963) (missing key prosecution witness and the accused moved for dismissal of those counts – trial court denied the motion and declared a mistrial).

<sup>71</sup> *Gori*, 367 U.S. at 368.

<sup>72</sup> *Arizona*, 434 U.S. at 510.

<sup>73</sup> *Arizona*, 434 U.S. at 516-517.

answer has its genesis in this Court's reference in *Perez* to the trial court exercising sound discretion.<sup>74</sup>

This Court's precedent has established general parameters of when a trial court has *not* exercised sound discretion within the broad discretion granted it to make manifest necessity determinations. These parameters demonstrate situations that fall below the floor of sound discretion and are not inclusive as a test for sound discretion. "Judicial wisdom counsels against anticipating hypothetical situations in which the discretion of the trial judge may be abused and so call for the safeguard of the Fifth Amendment ...."<sup>75</sup> These circumstances generally fall into categories where the trial court abuses his authority by allowing the prosecution to gain a tactical advantage through a mistrial or permits "successive, oppressive prosecutions."<sup>76</sup> None of these is present here.

For example, although the question before this Court in *Arizona* was whether improper comment by defense counsel formed a proper basis for a mistrial, this Court concluded that, in a deadlocked jury scenario, declaration of a mistrial warrants close scrutiny "*if the trial judge acts for reasons completely unrelated to the trial problem which purports to be the basis for the mistrial ruling . . .*"<sup>77</sup> This proposition parallels the Court's later expression of what is *not*

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<sup>74</sup> *Perez*, 22 U.S. (9 Wheat.) at 580.

<sup>75</sup> *Gori*, 367 U.S. at 369.

<sup>76</sup> *Gori*, 367 U.S. at 369.

<sup>77</sup> *Arizona*, 434 U.S. at 510 n.28 (emphasis added) (citing *United States v. Gordy*, 526 F.2d 631, 633, 636-637 (5th Cir. 1976) (hectic trial pace to accommodate docket considerations and the judge's expressed concern regarding imminent travel plans)).

sound discretion. In *Arizona*, this Court identified some examples, concluding, "Thus, if a trial judge acts *irrationally* or *irresponsibly*, cf. *United States v. Jorn*, . . . ; see *Illinois v. Somerville*, . . . , his action cannot be condoned."<sup>78</sup> The State trial court here was not acting irrationally or irresponsibly when it declared a mistrial due to a deadlocked jury, nor was the trial court acting for an unrelated reason.

In *United States v. Jorn*, a plurality of this Court concluded that the trial court failed to exercise sound discretion by disbelieving that witnesses had adequately been given their Fifth Amendment warnings, not giving consideration or opportunity for a trial continuance, and then abruptly, *sua sponte* declaring a mistrial.<sup>79</sup> This Court concluded, "When one examines the circumstances surrounding the discharge of this jury, it seems 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 . . . ."<sup>80</sup> The trial court, under such circumstances, abused its discretion, and whether the defendant benefited from the ruling was not the proper inquiry.<sup>81</sup>

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<sup>78</sup> *Arizona*, 434 U.S. at 514 (emphasis added).

<sup>79</sup> *Jorn*, 400 U.S. at 487.

<sup>80</sup> *Jorn*, 400 U.S. at 487.

<sup>81</sup> *Jorn*, 400 U.S. at 483, 486; *but see Jorn*, 400 U.S. at 492 (Stewart, J. joined by White, J., and Blackmun, J., dissenting) ("Whether or not there has been an 'abuse of discretion' sufficient to bar retrial cannot be determined without reference to the purpose and effect of the mistrial ruling. The real question is whether there has been an 'abuse' of the trial process resulting in prejudice to the accused, by way of harassment or the like, such as to outweigh society's interest in the punishment of crime.").

Later, this Court in *Somerville* recognized the limitations of *Jorn's* plurality opinion and counseled against overextending its analysis that the defendant's interests in having his case decided by a single tribunal should necessarily prevail.<sup>82</sup> This Court also noted, "[t]hat [the *Jorn*] opinion dealt with action by a trial judge that can fairly be described as erratic."<sup>83</sup>

This Court's most explicit statement of what does *not* qualify as sound discretion appears in *Arizona*. A trial court is not exercising sound discretion when acting irresponsibly or irrationally. To wit: this is the best working definition of what is *not* sound discretion. Thus, whether a trial court exercised sound discretion is determinative of whether it has abused its discretion.<sup>84</sup>

It has remained true since *Perez* that a trial court's granting of a mistrial due to a deadlocked jury is the paradigm of the proper exercise of sound discretion. It is less apparent and not clearly established as to all of the circumstances that demonstrate sound discretion in reaching the determination that the jury was deadlocked. This is because this Court has expressed that it "abjures the application of any mechanical formula by which to judge the propriety of declaring a mistrial in the varying and often unique situations arising during the course of a criminal trial."<sup>85</sup> And attempting to

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<sup>82</sup> *Somerville*, 410 U.S., at 469-470.

<sup>83</sup> *Somerville*, 410 U.S., at 469.

<sup>84</sup> *Somerville*, 410 U.S. at 468; *Jorn*, 400 U.S. at 487.

<sup>85</sup> *Somerville*, 410 U.S. at 462.

establish all the scenarios where a trial court could affirmatively exercise sound discretion would be impossible.

However, this Court in *Arizona* concluded that the trial court had exercised sound discretion in handling potential juror bias due to improper comments by defense counsel because the trial court had acted "responsibly and deliberately, and accorded careful consideration to [the defendant's] interest in having the trial concluded in a single proceeding."<sup>86</sup> Likewise, "the trial judge's action was a rational determination designed to implement a legitimate state policy" as in *Somerville*.<sup>87</sup>

In the context of a deadlocked jury, the trial court is in the best situation to make the determination whether the jury is hung and thereby balance the competing interests: i.e., seeking a conviction for those who violate its laws, a defendant's right to have his case decided by a single tribunal, and protecting against a verdict reached by coercive means.<sup>88</sup> If a trial court is confronted with the foreperson's expression of deadlock, the trial court is not acting irresponsibly or irrationally in declaring a mistrial. Further, by the inherent possibility that continued deliberations would render a coerced verdict – especially, as present here, where there was a preceding note indicating potentially acrimonious deliberations – the trial court considered defendant's interests. Therefore, the trial court's decision should not be second-guessed.

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<sup>86</sup> *Arizona*, 434 U.S. at 516.

<sup>87</sup> *Somerville*, 410 U.S. at 469.

<sup>88</sup> *Arizona*, 434 U.S. at 509, 510 n.28.

The breadth of this deference to a trial court's exercise of sound discretion was noted by Justice Rehnquist in the denial of a petition for certiorari in *Winston v. Moore*, another habeas case. Although the case was a denial of certiorari and prior to AEDPA, Justice Rehnquist's dissent properly recognizes the limited nature of review of a trial court's declaration of a mistrial due to a deadlocked jury, especially on habeas review. Justice Rehnquist, writing on behalf of Chief Justice Burger and Justice Stewart stated, "[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."<sup>89</sup>

Here, because the basis for the mistrial was the existence of a deadlocked jury, it involves the classic example of manifest necessity and the exercise of sound discretion. Even applying other indicia of not exercising sound discretion, there is no suggestion that the State trial court declared a mistrial for reasons other than that the jury was deadlocked – the classic example of manifest necessity. The trial court acted deliberately, rationally, and responsibly; its reason was related to the existence of a deadlock. Moreover, in light of the foreperson's expression of the deadlock and the previous note indicating potentially acrimonious deliberations, the trial court gave consideration to the defendant's interests – balancing the right to have his case decided by a single tribunal and the avoidance of a

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<sup>89</sup> *Winston v. Moore*, 452 U.S. 944, 947 (1981) (Rehnquist, J., dissenting).

coerced verdict. The trial court's declaration of a mistrial due to a deadlocked jury must therefore be afforded two layers of deference under AEDPA and the initial deference that should be accorded the trial court's decision on direct review.

**B. This Court's precedent has never permitted close scrutiny of a trial court's deadlocked jury determination and no clearly-established precedent mandates that the trial court employ additional methods to ensure that the jury is deadlocked. Rather, the Michigan Supreme Court reasonably applied this Court's precedent.**

The Sixth Circuit operated here as though this Court's precedent has established that a reviewing court may second-guess a trial court's declaration of a mistrial due to a deadlocked jury by utilizing a heightened level of scrutiny and by speculating whether additional methods would have resolved the deadlock. The Sixth Circuit's actions are not supported by this Court's clearly-established precedent.

**1. This Court has narrowly drawn what constitutes clearly-established precedent.**

In the last few years, this Court has reiterated the point that the rule at issue must be one that was specifically established by this Court, and has *narrowly* drawn what is "clearly established" under 28 U.S.C. § 2254(d).

In *Wright v. Van Patten*, this Court examined whether an attorney was presumptively ineffective for participating at his client's plea hearing by speaker phone.<sup>90</sup> The State courts had denied relief, but the United States Court of Appeals for the Seventh Circuit determined this was a structural error under *United States v. Cronin* and granted habeas relief.<sup>91</sup> This Court reversed, in a per curiam opinion, because there was no established Supreme Court precedent on this point, stating, "No decision of this Court, however, squarely addresses the issue in this case . . . ."<sup>92</sup> *Wright* required that there be a "clear[ ] hold[ing]" from this Court on the question at issue.<sup>93</sup>

In *Carey v. Musladin*, another habeas case, this Court examined whether the wearing of buttons by the victim's family during the defendant's trial deprived the defendant of a fair trial.<sup>94</sup> This Court initially noted that it had examined the question about possible error in the conduct of trials based on State-sponsored conduct.<sup>95</sup> However, this Court concluded that spectator conduct was an open question, and lower federal precedent varied on whether error could arise from the conduct of spectators.<sup>96</sup> In light of this divergence, this Court concluded that there was no

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<sup>90</sup> *Wright v. Van Patten*, 552 U.S. 120, 121 (2008).

<sup>91</sup> *Wright*, 552 U.S. at 122 (citing *United States v. Cronin*, 466 U.S. 648 (1984)).

<sup>92</sup> *Wright*, 552 U.S. at 125.

<sup>93</sup> *Wright*, 552 U.S. at 125.

<sup>94</sup> *Carey v. Musladin*, 549 U.S. 70 (2006).

<sup>95</sup> *Carey*, 549 U.S. at 75.

<sup>96</sup> *Carey*, 549 U.S. at 76-77.

clearly-established Supreme Court law for the State court to apply.<sup>97</sup>

This Court again recently reiterated the established principle that Federal courts can only grant habeas relief on the basis of clearly-established law. In *Smith v. Spisak*, the Sixth Circuit granted habeas relief after determining that the State court instructions were unconstitutional.<sup>98</sup> This Court reversed the decision, in part, stating, "[w]e have not, however, previously held jury instructions unconstitutional for this reason." This Court then concluded that "[w]hatever the legal merits of the rule or the underlying verdict forms in this case were we to consider them on direct appeal, the jury instructions at [Petitioner's] trial were not contrary to 'clearly established Federal law.' 28 U.S.C. § 2254(d)(1)."<sup>99</sup>

On the issue presented here, a dissent by then-Justice Rehnquist in *Winston*, further recognized that this Court had never held that a trial court must employ additional methods, and allowing a court on habeas review to require more would "create[ ] 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 was 'hung.' "<sup>100</sup>

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<sup>97</sup> *Carey*, 549 U.S. at 77.

<sup>98</sup> *Smith v. Spisak*, 558 U.S. \_\_\_\_; \_\_\_\_ S. Ct. \_\_\_\_; \_\_\_\_ L. Ed. 2d \_\_\_\_; slip op. at 9 (January 12, 2010).

<sup>99</sup> *Smith v. Spisak*, 558 U.S. at \_\_\_\_; slip op. at 9.

<sup>100</sup> *Winston*, 452 U.S. at 946-947 (Rehnquist, J., dissenting).

Creation of new obligations not clearly established in this Court's precedent is improper on habeas review. "Section 2254(d)(1) would be undermined if habeas courts introduced rules not clearly established under the guise of extensions to existing law."<sup>101</sup>

No case from this Court has ever clearly established a set amount of time for deliberations. The lack of such an example is consistent with this Court's precedent that there can be no mechanical formula by which to judge the trial court's exercise of sound discretion.<sup>102</sup> Since *Perez* in 1824, this Court has recognized this proposition.<sup>103</sup> Further, this Court has never mandated that additional measures be employed by the trial court to ensure that the jury is deadlocked before declaring a mistrial. In *Arizona*, this Court rejected the Ninth Circuit's application of this principle.<sup>104</sup>

The fact that there is no clearly-established Supreme Court precedent regarding additional methods and set time limits for deliberations is demonstrated by the variation between the circuits in

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<sup>101</sup> *Yarborough*, 541 U.S. at 666.

<sup>102</sup> *Somerville*, 410 U.S. at 462.

<sup>103</sup> *Perez*, 22 U.S. (9 Wheat.) at 580.

<sup>104</sup> *See Arizona*, 434 U.S. at 502, 503 ("The Ninth Circuit . . . affirmed because . . . absent a finding of manifest necessity or an explicit consideration of alternatives, the court was unwilling to infer that the jury was prevented from arriving at a fair and impartial verdict. . . . We are persuaded that the Court of Appeals applied an inappropriate standard of review to the mistrial rulings of this kind . . .").

examining whether the declaration of a mistrial was proper given the amount of time the jury deliberates.

Some circuits have found comparable deliberation time sufficient to warrant a conclusion that the jury was deadlocked. On direct review in *United States v. Lorenzo*, the Ninth Circuit held that a jury deliberating for three hours was sufficient under *Perez* to warrant a mistrial.<sup>105</sup> Also, in *United States v. Hernandez-Guardado*, the Ninth Circuit concluded that the grant of a mistrial, where the jury deliberated for slightly less than two hours and sent out a jury note expressing a deadlock, and the trial court inquired into the deadlock, did not violate double-jeopardy protections.<sup>106</sup> The Fifth and Eleventh Circuits also denied relief on double jeopardy grounds where the jury had only deliberated for three hours, both habeas cases.<sup>107</sup>

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. These cases, however, are distinguishable from the facts here.

In *United States v. Gordy*, a Fifth Circuit case, the total jury deliberations were approximately five and one-half hours, the trial court's communications with the jury were inconclusive of a deadlock because

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<sup>105</sup> *United States v. Lorenzo*, 570 F.2d 294, 299 (9th Cir. 1978).

<sup>106</sup> *United States v. Hernandez-Guardado*, 228 F.3d 1017, 1029-1030 (9th Cir. 2000).

<sup>107</sup> *Fay v. McCotter*, 765 F.2d 475, 477 (5th Cir. 1985); *Lindsay v. Smith*, 820 F.2d 1137, 1155 (11th Cir. 1987).

the jury did not indicate that it was deadlocked but only that it was divided, and there was a hurried atmosphere in the trial that arose from docket considerations and the trial court's imminent travel plans.<sup>108</sup> Also, the jury had previously sent a note requesting clarification on the count on which they were divided, which would indicate potential for further deliberations.<sup>109</sup> Further, in response to defense counsel's objection to declaring a mistrial, the trial court identified reasons that were separate from the existence of a deadlock, stating, "I'm going to discharge this jury. I can make my plane if you will just get off my back long enough for me to do it. I can make my plane if you'll let me."<sup>110</sup> The Fifth Circuit found there was no manifest necessity under *Perez's* "case-by-case standard" given the "totality of the factors."<sup>111</sup>

Also, in *United States ex rel. Webb v. Court of Common Pleas*, without initiation from counsel or the jury, the trial court brought the jury out of deliberations and initiated a colloquy on whether the jury was deadlocked.<sup>112</sup> At the point the trial court sua sponte inquired about the deadlock, the jury had deliberated for six and one-half hours.<sup>113</sup> The Third Circuit determined that the trial court's finding of a deadlock was premature because the trial court directed the inquiry only to the foreperson, raised the

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<sup>108</sup> *United States v. Gordy*, 526 F.2d 631, 633, 634, 636-637 (5th Cir. 1976).

<sup>109</sup> *Gordy*, 526 F.2d at 633.

<sup>110</sup> *Gordy*, 526 F.2d at 634.

<sup>111</sup> *Gordy*, 526 F.2d at 637.

<sup>112</sup> *United States ex rel. Webb v. Court of Common Pleas*, 516 F.2d 1034, 1036 (3rd Cir. 1975).

<sup>113</sup> *Webb*, 516 F.2d at 1036.

issue of deadlock sua sponte, and did not consult counsel.<sup>114</sup> The fact of the deadlock here was not triggered by the trial court but by the jury when it sent out a note asking what would happen if it could not reach a verdict.

This variation between how circuits treat comparable lengths of jury deliberations is indicative of the fact-based inquiry in which there can be no mechanical formula that preponderates one way or the other. Further, the circuits have never uniformly applied set additional measures to be employed by trial courts in order for reviewing courts to measure whether the trial court exercised sound discretion.

**2. In the absence of any clearly-established, constitutionally-required additional measures or considerations to measure whether the trial court exercised sound discretion, the circuits have recognized a range of guideposts to assist in the inquiry.**

Circuits on direct review have developed and applied guideposts, which are not clearly established in this Court's precedent, to aid in the inquiry whether the trial court exercised sound discretion. For example, in *United States v. Charlton*, the First Circuit applied three factors:

- whether the trial court provided counsel an opportunity to be heard;

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<sup>114</sup> *Webb*, 516 F.2d at 1043.

- did the trial court consider alternatives to a mistrial; and
- whether the trial court's decision was made after adequate reflection.<sup>115</sup>

In *United States v. Razmilovic*, the Second Circuit indentified five considerations:

- statements by the jury that it cannot agree;
- length and complexity of the trial;
- amount of time the jury deliberated;
- impact that forced deliberations might have on the verdict; and
- actions taken by the trial court prior to declaring a mistrial to determine that jury was genuinely deadlocked.<sup>116</sup>

The Third Circuit in *United States v. Wecht* considered seven factors:

- a timely objection by the defendant;
- jury's collective opinion that it cannot agree;
- length of jury deliberations;
- length of the trial;
- complexity of the issues presented to the jury;
- any proper communications between the judge and jury; and
- effects of exhaustion and the impact of coercion of further deliberations on the jury.<sup>117</sup>

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<sup>115</sup> *United States v. Charlton*, 502 F.3d 1, 5 (1st Cir. 2007).

<sup>116</sup> *United States v. Razmilovic*, 507 F.3d 130, 137-138 (2nd Cir. 2007).

<sup>117</sup> *United States v. Wecht*, 541 F.3d 493, 506 (3rd Cir. 2008), cert. denied 129 S. Ct. 658 (2008).

While in *United States v. Byrski*, the Seventh Circuit applied five factors:

- jury's expression that it cannot agree;
- length of the trial;
- length of the deliberations;
- complexity of issues; and
- effect of exhaustion and potential for coercion.<sup>118</sup>

This divergence, both in how circuits on direct review assess the length of deliberations and the factors to be used to ascertain whether there was manifest necessity, underscores the fact that there is no clearly-established Supreme Court precedent on these points. The Michigan Supreme could not have unreasonably applied precedent that is not clearly established by this Court.

**3. The Michigan Supreme Court reasonably applied this Court's clearly-established precedent when it reviewed the trial court's declaration of a mistrial due to a deadlocked jury.**

The Michigan Supreme Court reasonably applied this Court's clearly-established precedent.

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<sup>118</sup> *United States v. Byrski*, 854 F.2d 955, 961 (7th Cir. 1988); see also *Lorenzo*, 570 F.2d at 299 (considering: [1] expression of deadlock by jury, [2] complexity of issues, and [3] length of deliberations); *Hernandez-Guardado*, 228 F.3d at 1029 (considering: [1] jury's collective opinion of deadlock, [2] length of trial and complexity of issues, [3] length of jury deliberations, [4] whether the defendant objected to the declaration of a mistrial, and [5] the effects of exhaustion or coercion on the jury).

Because the trial court has broad discretion in finding manifest necessity due to a deadlocked jury, there is a first layer of deference given that determination. This is even before the limited habeas review, which adds another layer of deference that is required under AEDPA. Here, the Sixth Circuit cut through those two layers of deference to second-guess the State court's determination that the jury was deadlocked.

The Michigan Supreme Court correctly cited and applied the proper general constitutional standard in evaluating the State trial court's action.<sup>119</sup> There was no objection by Lett's trial counsel either when the trial court declared the mistrial or when Lett was retried. Lett was then retried and convicted. The trial court's exercise of its discretion was consistent with *Perez's* principles established 186 years ago.

In reviewing the State trial court's actions, the Michigan Supreme Court engaged in a reasoned application of the record and concluded that the trial court acted within its discretion in finding that the jury was deadlocked and would not be able to reach a verdict.<sup>120</sup> The Michigan Supreme Court noted the length of time the jury deliberated, in light of the limited complexity of the trial:

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<sup>119</sup> *Lett*, 644 N.W.2d at 747-753 (applying *Arizona* and *Richardson*, citing *Perez*); Pet. App. 46a-60a.

<sup>120</sup> *Arizona*, 434 U.S. at 516-517 (If the record is sufficient to justify the declaration of a mistrial, there is no requirement that the trial court clearly explain its ruling.).

The jury had deliberated for at least four hours following a relatively short, and far from complex, trial.<sup>121</sup>

Next, the Michigan Supreme Court recognized that the jury had sent notes – which can reasonably be construed as indicating open communications between the State trial court and the jury, as well as possibly acrimonious deliberations between the jurors:

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.<sup>122</sup>

The Michigan Supreme Court was well aware of this Court's concern regarding forced deliberations rendering a potential for a coerced verdict.<sup>123</sup>

Finally, the Michigan Supreme Court determined that the jury, through the foreperson, had indicated a deadlock and held that because there was manifest necessity, there was no double-jeopardy bar to Lett's second trial:

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

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<sup>121</sup> *Lett*, 644 N.W.2d at 753; Pet. App. 59a.

<sup>122</sup> *Lett*, 644 N.W.2d at 753; Pet. App. 59a.

<sup>123</sup> *Lett*, 644 N.W.2d at 751 (citing *Arizona*, 434 U.S. at 509-510); Pet. App. 54a-55a.

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.<sup>124</sup>

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."<sup>125</sup> This decision was supported by the record and was not an unreasonable application of this Court's precedent.

The Sixth Circuit in its habeas review, however, second-guessed the Michigan Supreme Court's determination, and, in doing so, failed to accord the proper deference under AEDPA and failed to recognize that the State trial court is in the best position to determine whether a jury is deadlocked. The Sixth Circuit utilized an unwarranted level of scrutiny and concluded that the State trial court was required to employ additional measures to ensure that the jury was deadlocked.

The Sixth Circuit selectively quoted from this Court's footnote in *Arizona* regarding the dissipation of deference when the trial court does not act with sound

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<sup>124</sup> *Lett*, 644 N.W.2d at 753; Pet. App. 59a-60a.

<sup>125</sup> *Lett*, 644 N.W.2d at 754; Pet. App. 61a

discretion.<sup>126</sup> The Sixth Circuit failed to include the remainder of *Arizona's* footnote 28, regarding deadlocked juries, which states, "*Thus, if the trial court acts for reasons completely unrelated to the trial problem which purports to be the basis for the mistrial ruling, close appellate scrutiny is appropriate.*"<sup>127</sup> Further, the Sixth Circuit quoted language from *Arizona* regarding what constituted "sound discretion" by the trial court in the context of the improper comments made by defense counsel.<sup>128</sup> However, the Sixth Circuit failed to reference this Court's recognition in *Arizona* that it is when a trial court acts "irrationally" or "irresponsibly" that the mistrial decision cannot stand.<sup>129</sup>

Contrary to the Sixth Circuit's opinion, *Arizona* did not grant license to a habeas court to conduct an open-ended, far-reaching inquiry into sound discretion every time there is a declaration of a mistrial due to a deadlocked jury. Rather, a deadlocked jury is the paradigm of manifest necessity, which warrants the least level of scrutiny and is at the far end of the spectrum.<sup>130</sup>

The Sixth Circuit also overextended this Court's holding in *Arizona*, a case that did not involve a

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<sup>126</sup> *Lett*, 316 F. App'x at 424-425; Pet. App. 8a (quoting, selectively, *Arizona*, 434 U.S. at 510 n.28, 514).

<sup>127</sup> *Arizona*, 434 U.S. at 510 n.28 (emphasis added).

<sup>128</sup> *Lett*, 316 F. App'x at 425; Pet. App. 8a (quoting excised portions of this Court's analysis regarding whether the trial court exercised sound discretion in the face of highly prejudicial comments by defense counsel in *Arizona*, 434 U.S. at 514 n.34, 515-516).

<sup>129</sup> *Arizona*, 434 U.S. at 514 (emphasis added).

<sup>130</sup> *Arizona*, 434 U.S. at 508-509 (footnotes omitted).

deadlocked jury. Specifically, citing to its own "distill[ation]" of *Arizona*, the Sixth Circuit concluded that "three factors [ ] determine whether a judge exercised sound discretion in declaring a mistrial: whether the judge (1) heard the opinion of the parties' counsel about the propriety of the mistrial; (2) considered alternatives to a mistrial; and (3) acted deliberately, instead of abruptly."<sup>131</sup> This Court in *Arizona* did not set these three specific considerations as a constitutional test to determine whether trial courts act soundly within their discretion.<sup>132</sup> Rather, this Court has never required that the trial courts employ or detail alternatives to declaring a mistrial.<sup>133</sup> By requiring the State court to employ measures not mandated by this Court, the Sixth Circuit engaged in a review that this Court said AEDPA forbids.<sup>134</sup>

Here, the Sixth Circuit substituted its own judgment in concluding that the State trial court had acted precipitously and had pressured the foreperson to "acquiesce" to the State trial court's determination of a deadlock.<sup>135</sup> For this reason, over a dissent, the Sixth

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<sup>131</sup> *Lett*, 316 F. App'x at 426, 428; Pet. App. 10a, 14a (citing *Fulton v. Moore*, 520 F.3d 522, 529 (6th Cir. 2008)).

<sup>132</sup> *Arizona*, 434 U.S. at 515-516.

<sup>133</sup> *See Arizona*, 434 U.S. at 502, 503 ("The Ninth Circuit . . . affirmed because . . . absent a finding of manifest necessity or an explicit consideration of alternatives, the court was unwilling to infer that the jury was prevented from arriving at a fair and impartial verdict. . . . We are persuaded that the Court of Appeals applied an inappropriate standard of review to the mistrial rulings of this kind . . .").

<sup>134</sup> *See Smith v. Spisak*, 558 U.S. at \_\_\_\_; slip op. at 9.

<sup>135</sup> *Lett*, 316 F. App'x at 427; Pet. App. 12a.

Circuit concluded that the Michigan Supreme Court's decision was "objectively unreasonable."<sup>136</sup>

The Sixth Circuit's analysis is wrong. It presupposes that the expression of the deadlock was not in fact a deadlock previously reached. The flaw in the Sixth Circuit's analysis is its failure to afford any credibility to the statement of the foreperson, who said the jury was deadlocked. The Sixth Circuit panel majority fashioned several of its own reasons why the jury was *not really deadlocked* and that the jury may well have reached a verdict if allowed to deliberate longer: (1) jurors would not have had enough time to review the testimony in the amount of time it deliberated, (2) serious nature of the crime and punishment warranted longer deliberations, and (3) juries often initially express deadlock and reach a verdict later.<sup>137</sup> Yet, this is, at best, speculation and provides no basis in fact for these pronouncements. While there might be some instances where time and distance afford greater clarity to events, this is not one of those instances. Here, the Sixth Circuit must necessarily guess at what happened. The Sixth Circuit's assumptions are, in large part, belied by the fact that Lett was convicted on retrial of murder after only three hours and fifteen minutes of deliberations.<sup>138</sup>

The Sixth Circuit engaged in classic second-guessing. Its decision directly contravened two layers of deference – AEDPA and that the State trial court is best suited to make the determination – and is exactly

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<sup>136</sup> *Lett*, 316 F. App'x at 428; Pet. App. 12a.

<sup>137</sup> *Lett*, 316 F. App'x at 427; Pet. App. 13a.

<sup>138</sup> *Lett*, 644 N.W.2d at 746 n.4; Pet. App. 43a.

the type of error Justice Rehnquist identified in *Winston*:

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.<sup>139</sup>

Justice Rehnquist's observations in *Winston* squarely apply here, even down to counsel's failure to object to the declaration of a mistrial due to a deadlocked jury.

The Sixth Circuit's lack of deference is even more pronounced here given that all State factual determinations are presumed to be correct unless there is a contrary showing by clear and convincing evidence under 28 U.S.C. § 2254(e)(1). In light of the nature of the decision, the State court's determination whether the jury was deadlocked was a factual one entitled to a presumption of correctness. Other federal circuits have noted this very point.<sup>140</sup>

Rather, in light of the broad, general standard applicable at issue, the State court here reasonably applied this Court's precedent. 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"), and that the later note

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<sup>139</sup> *Winston*, 452 U.S. at 947 (Rehnquist, J., dissenting).

<sup>140</sup> 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).

plainly supports the jury foreperson's statement that the jury was unable to agree on a verdict. Under these circumstances, 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 State. There is nothing in the record to suggest that the State trial court here acted for reasons unrelated to the expression of a deadlock. 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."<sup>141</sup> The dissenting judge in the Sixth Circuit correctly recognized this discretion and that this Court's precedent has not mandated as a 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 jury's deadlock.<sup>142</sup>

If the trial court's discretion is wrested away on post hoc habeas review, the State is left with an untenable situation when confronted with a jury's expression of deadlock. That is, either: (1) force continued deliberations for an unspecified amount of time and implement unspecified additional measures

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<sup>141</sup> *Arizona*, 434 U.S. at 510.

<sup>142</sup> "A trial judge 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." *Lett*, 316 F. App'x at 429; Pet. App. 16a.-17a. (Forester, J., dissenting).

without knowing when enough is enough thereby risking a coerced verdict or (2) declare that there is manifest necessity, which might then be open to far-reaching second-guessing on habeas review. Here, the State trial court exercised sound discretion and acted reasonably and responsibly within its broad discretion when it granted a mistrial. The Michigan Supreme Court reasonably applied this Court's existing general, broad standard in determining that a second trial was not barred by double-jeopardy protections. The Sixth Circuit erred by disregarding the State court's factual findings and second-guessing the Michigan Supreme Court's legal determination.

## CONCLUSION

The State of Michigan respectfully requests the judgment of the Sixth Circuit be reversed.

Respectfully submitted,

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