No. 09-338

In The
Supreme Court of the United States

PAUL RENICO
Petitioner,

v.

REGINALD LETT
Respondent.

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

REPLY BRIEF

Michael A. Cox
Attorney General

B. Eric Restuccia
Michigan Solicitor General
Counsel of Record
P. O. Box 30212
Lansing, Michigan 48909
restucciae@michigan.gov
(517) 373-1124

Joel D. McGormley
Division Chief

Laura L. Moody
First Assistant
Appellate Division
Attorneys for Petitioner

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTRODUCTION 1

ARGUMENT 2

I. The State trial court properly exercised sound discretion in determining that the jury was deadlocked, and the Michigan Supreme Court's review of that record was not objectively unreasonable when it applied this Court's clearly-established precedent and concluded that the trial court had not abused its discretion in discharging the jury. 2

II. This Court's clearly-established precedent holds that a trial court's exercise of sound discretion to discharge a jury should be deferred to. 10

III. There is no clearly-established precedent that requires trial courts to take additional measures or force deliberations for some unspecified amount of time, and the Sixth Circuit cannot give greater definition to this Court's general, deferential standard by imposing its own test and new requirements. 13

A. Clearly established precedent of this Court is to be narrowly drawn. 13

B. The Sixth Circuit improperly drew from its circuit precedent and misapprehended this Court's clearly-established precedent that recognizes a deferential standard. 14

C. Irrespective of the varying guideposts used by the circuits, Lett only produces a handful of readily distinguishable cases where the circuits have found an abuse of discretion when reviewing a mistrial due to a deadlocked jury. 19

CONCLUSION..... 24

TABLE OF AUTHORITIES

Page

Cases

Allen v. United States,
164 U.S. 492 (1896) 16

Arizona v. Washington,
434 U.S. 497 (1978) ..... passim

Fay v. McCotter,
765 F.2d 475 (5th Cir. 1985)..... 20

Gori v. United States,
367 U.S. 364 (1961). 8, 11

House v. Hatch,
527 F.3d 1010, 1017 (10th Cir. 2008) 19

Illinois v. Somerville,
410 U.S. 458 (1973) 10, 18

Klein v. Leis,
548 F.3d 425 (6th Cir. 2008) 23

Knowles v. Mizayance,
566 U.S. ___; 129 S. Ct. 1411 (2009)..... 12, 14

Lett v. Renico,
316 F. App'x 421 (6th Cir. 2009)..... 10, 14, 15

Lindsay v. Smith,
820 F.2d 1137 (11th Cir. 1987) 20

Lyell v. Renico,
470 F.3d 1177 (6th Cir. 2006)..... 16

Moose Lodge No. 107 v. Irvis,
407 U.S. 163 (1972) 8

People v. Lett,
466 Mich. 206; 644 N.W.2d 743 (2002) ..... passim

Richardson v. United States,
429 U.S. 14 (1976) 2

Ross v. Petro,
515 F.3d 653 (6th Cir. 2008), *cert. denied*, 129 S. Ct. 906 (2009) 23

Smith v. Spisak,
130 S. Ct. 676 (2010) 14

Thaler v. Haynes,
175 L. Ed. 2d 1003 (2010)..... 14

United States ex rel. Webb v. Court of Common Pleas,
516 F.2d 1034 (3d Cir. 1975)..... 21

United States v. Clinton,
338 F.3d 483 (6th Cir. 2003) 16

United States v. Gordy,
526 F.2d 631 (5th Cir. 1976) 11, 21

United States v. Horn,
583 F.2d 1124 (10th Cir. 1978) 21

United States v. Jorn,
400 U.S. 470 (1971) 18

United States v. Perez,
22 U.S. (9 Wheat.) 579 (1824) 2, 4, 10

United States v. Razmilovic,
507 F.3d 130 (2d Cir. 2007)..... 21

United States v. Starling,
571 F.2d 934 (5th Cir. 1978) 21

Wade v. Hunter,
336 U.S. 684 (1949) 10

Walls v. Konteh,
490 F.3d 432 (6th Cir. 2007) 23

Williams v. Taylor,
529 U.S. 362 (2000) 9, 12, 13

Winston v. Moore,
452 U.S. 944 (1981) 16

Woodford v. Visciotti,
537 U.S. 19 (2002) 9

Yarborough v. Alvarado,
541 U.S. 652 (2004) 12, 13

Statutes

28 U.S.C. § 2254..... 1

28 U.S.C. § 2254(d) 13, 14

28 U.S.C. § 2254(d)(1)..... passim

28 U.S.C. § 2254(d)(2)..... 6

28 U.S.C. § 2254(e)(1) 6

Other Authorities

1 S. Childress & M. Davis, Federal Standards of Review § 4.21 12

Random House Webster's College Dictionary 352, 700, 701, 1040 (2001)..... 9

The Hon. Henry J. Friendly, *Indiscretion about Discretion*, 31 Emory L.J. 747, 763-65 (1982) 12

Rules

Supreme Court Rule 14 6

INTRODUCTION

Lett's abridged reading of the record cannot change the facts. Those facts show that the trial court exercised sound discretion when it determined the jury was deadlocked. It did so only after receiving notes from the jury indicating deliberations were acrimonious and questioning what would happen if they could not agree. When asked point-blank whether the jury would be able to reach a unanimous verdict, the jury foreperson unequivocally answered, "No, Judge." Moreover, the fact that all this occurred over a span of four hours of deliberations for a relatively uncomplicated trial underscores the validity of the Michigan Supreme Court's decision that the trial court did not abuse its discretion in declaring a mistrial.

Lett's double-jeopardy analysis is faulty in several respects. First, it fails to recognize that the Michigan Supreme Court correctly identified and applied this Court's clearly-established precedent when it reviewed whether the State trial court had abused its discretion. Second, it fails to apply the dual layers of deference necessary in this case by not giving full effect to the requirement under 28 U.S.C. § 2254, *et seq.*, that a federal habeas corpus court's review is not whether the State court was "incorrect"; rather its review is limited to whether the State court decision was "objectively unreasonable" and by ignoring the broad discretion given the trial court's deadlocked jury determination. Third, it also fails to recognize that federal habeas corpus courts may not impose new rules on State courts when examining the reasonableness of their decisions.

ARGUMENT

I. The State trial court properly exercised sound discretion in determining that the jury was deadlocked, and the Michigan Supreme Court's review of that record was not objectively unreasonable when it applied this Court's clearly-established precedent and concluded that the trial court had not abused its discretion in discharging the jury.

The State trial court exercised its sound discretion in declaring a mistrial and was in the best position to determine whether the jury was deadlocked. It properly balanced Lett's right to have his case decided by a single tribunal in conjunction with society's interest in having a fair opportunity to vindicate its laws, and the avoidance of a coerced verdict.

In reviewing the record and the State trial court's mistrial declaration, the Michigan Supreme Court applied the correct general constitutional standard and properly concluded that the trial court acted within its discretion in finding that the jury would not be able to reach a verdict.[1] The Michigan Supreme Court gave a meaningful review to the trial court's mistrial declaration.

---

[1] *People v. Lett*, 466 Mich. 206; 644 N.W.2d 743, 747-53 (2002) (applying *Arizona v. Washington*, 434 U.S. 497 (1978) and *Richardson v. United States*, 429 U.S. 14 (1976), citing *United States v. Perez,* 22 U.S. (9 Wheat.) 579 (1824)); Pet. App. 46a-60a. *See Arizona*, 434 U.S. at 516-17 (determining that when the record is sufficient to justify the declaration of a mistrial, there is no requirement that the trial court clearly explain its ruling).

It first noted the deliberation time, in light of the limited complexity of the trial, saying, "The jury had deliberated for at least four hours following a relatively short, and far from complex, trial."[2] Nowhere does Lett refute these predicate factual points.

Next, the Michigan Supreme Court recognized that the jury had sent notes – showing open communications between the trial court and the jury – including one indicating possibly acrimonious deliberations between the jurors, stating: "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."[3]

Lett brushes aside the importance of these notes by claiming, "The trial judge thought so little of the 'notes' that they were not preserved as part of the record . . . and therefore can not carry the weight the Michigan Supreme Court assigned to them." Resp. Br. p. 16. However, it is clear that the notes were very much a part of the trial record that was reviewed by the Michigan Supreme Court. Although the notes were not part of the federal habeas record, Lett's request that the notes he obtained from the State court record be lodged confirms that the notes were preserved as part of the State court record. The content of the notes was neither misconstrued nor manufactured.

---

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

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

As to the potential acrimonious deliberations, Lett proffers nothing to dispute the Michigan Supreme Court's interpretation of that note. In fact, Lett only mentions that "the Michigan Supreme Court placed emphasis" on the note indicating potential acrimonious deliberations. Resp. Br. p. 15 n.4. There is nothing untoward with this because consideration of potential acrimonious deliberations is consistent with a trial court exercising its sound discretion in light of all the considerations before it.[4] Indeed, ignoring the note would be unsound.

Lett mischaracterizes the State trial court's actions regarding the note indicating a potential deadlock. The noted stated, "'What if we can't agree? [M]istrial? [R]etrial? [W]hat?'"[5] Lett suggests that "[t]he note was asking the judge for more information. . . ." Resp. Br. pp. 17-18. Or, Lett suggests, the jury was merely posing a hypothetical question, devoid of any meaning behind the question. Resp. Br. p. 6. These contentions are nothing more than Lett's subjective spin on the facts.

Lett also claims that "[t]he trial court's assertion of 'deadlock' based on the jury's written question was presumptuous." Resp. Br. p. 17. But that is not what occurred. The State trial court had already received a note reasonably indicating acrimonious deliberations. It then received the note that indicated a potential deadlock. And, after receiving those two notes, the Court had a colloquy with the foreperson. Pet. App.

---

[4] *See Perez*, 22 U.S. (9 Wheat.) at 580; *Lett*, 644 N.W.2d at 746, n.2, 753; Pet. App. 42a, 59a.

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

93a-94a. Only after the colloquy did the trial judge determine that the jury was hopelessly deadlocked.

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.[6]

Lett claims that the jury was not "genuinely deadlocked," saying that "the foreperson's statements do not establish that the jury was hopelessly deadlocked" and that the trial court simply surmised "that the jury *might* be deadlocked." Resp. Br. pp. 7, 13.

Here, however, after receiving the two notes and four hours of deliberations, the State trial court asked, "I need to ask you if the jury is deadlocked; in other words is there a disagreement?" Pet. App. 93a. The foreperson unequivocally responded, "Yes, there is." Pet. App. 93a. Then, the trial court asked, "All right. Do you believe that it is hopelessly deadlocked?" Pet. App. 93a-94a. After stopping the foreperson from giving a potential breakdown of the verdict, the trial court clearly inquired, "Are you going to reach a unanimous verdict or not?" Pet. App. 94a. The foreperson again unequivocally responded, "No, Judge." Pet. App. 94a. Lett's position that "[t]he foreperson's

---

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

answer to the court's question about 'unanimous verdict' was ambiguous in context" is contrary to the actual record. Resp. Br. p. 18. The determination by the State courts that the foreperson clearly stated that the jury was hopelessly deadlocked was reasonable and entitled to deference under 28 U.S.C. § (e)(1).[7]

The trial court did not "demand[ ]" answers affirming the existence of a deadlock, nor "ram[ ]" through the colloquy, nor "extract[ ]" responses from the foreperson. Respondent's Brief, pp. 16, 34. Rather, in light of all the circumstances and the clear expression of deadlock by the foreperson, there was no ambiguity and no need "to clarify the foreperson's ambiguous answer to an ambiguous question by asking follow-up questions or the other jurors' for their opinions" as argued by Lett. Resp. Br. p. 34. The State trial court here was not acting on a "hunch." Resp. Br. p. 18. There is no "clearly established" authority from this Court that the State trial court had to challenge the foreperson's expression of a deadlock.[8]

---

[7] Lett argues that the State of Michigan has not fairly presented to this Court any claims regarding deference under 28 U.S.C. § 2254(d)(2) and (e)(1). The State of Michigan did not purport to bring the petition under (d)(2). Rather, the State of Michigan presented the question as both a clearly established and unreasonable application case under (d)(1), with the factual predicates involving the jury's deliberations, the jury's notes, and the complexity and nature of the trial, and the expression of a deadlock resolved by the Michigan Supreme Court being entitled to deference under (e)(1). Pet. Br. pp. 30-31. These factual assertions were made below and in the petition for certiorari, and they are therefore fairly presented to this Court. Further, under Supreme Court Rule 14, every fairly presented question contains the subsidiary questions, and the issue of (e)(1) deference was fairly presented in the body of the petition under Rule 14.

[8] *See* 28 U.S.C. § 2254(d)(1).

The Michigan Supreme Court was well-aware of this Court's concern regarding forced deliberations rendering a coerced verdict.[9] But in response to this concern over avoiding coerced verdicts, Lett relegates the danger to a single footnote: "This deference is also rooted in a legitimate concern that *too much appellate second guessing* might lead trial courts to use coercive means to break apparent jury deadlocks, thereby forcing unjust and unsound verdicts." Resp. Br. p. 13 n.3 (emphasis added).

The irony of Lett's minimization of the concern regarding coerced verdicts is that if the State trial court had been indifferent to coercion and forced longer deliberations, Lett could perhaps challenge an unfavorable verdict as coerced and unjustly obtained. After all, the first note indicated "'a concern about our voice levels disturbing other proceedings that might be going on.'"[10] The second note indicated, "'What if we can't agree? [M]istrial? [R]etrial? [W]hat?'"[11] Finally, when asked whether the jury would be able to reach a unanimous verdict, the foreperson unequivocally indicated, "No." Pet. App. 94a.

This is precisely why this Court in *Arizona* recognized the need for broad discretion: to balance a defendant's right to have his case decided by a single tribunal with the concern that a verdict not be

---

[9] *Lett,* 644 N.W.2d at 751 (citing *Arizona*, 434 U.S. at 509-10); Pet. App. 54a-55a.

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

[11] *Lett*, 644 N.W.2d at 745; Pet. App. 41a.

coerced.[12] Otherwise, trial courts are forced to "navigate a narrow compass between Scylla and Charybdis. . . . [This will] make [trial courts] unduly hesitant conscientiously to exercise their most sensitive judgment . . . ."[13]

Lett's contentions that "[o]ne is hard pressed to imagine a trial judge doing less" and that the trial court's actions here "were so insufficient, and the record so devoid of facts" as not to support a mistrial declaration, Resp. Br. pp. 15, 20, are simply hyperbole and belied by a fair reading of the facts.[14]

Most importantly, Lett fails to show that the Michigan Supreme Court's decision was "objectively unreasonable."[15] The Michigan Supreme Court properly determined that "[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."[16] Relying on this Court's language that the trial court cannot act irrationally, irresponsibly, precipitately, or for reasons unrelated to the trial

---

[12] *Arizona*, 434 U.S. at 509.

[13] *Gori v. United States*, 367 U.S. 364, 369-70 (1961).

[14] Further, Lett's contention that this Court should place great stock in the assistant prosecuting attorney's statement at the post-conviction bond hearing about the propriety of the mistrial declaration is unpersuasive. This Court has never found that counsel's on-the-spot statements made at oral argument control the legal analysis. *See Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 170 (1972). Just as the Michigan Supreme Court ruled against Lett on the merits of his double-jeopardy claim without addressing his possible consent or waiver, it did not find these statements controlling.

[15] 28 U.S.C. § 2254(d)(1).

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

problem, and must act deliberately, the Michigan Supreme Court's decision was not objectively unreasonable.[17]

While another court might view the situation differently after the fact, that does not make the decision objectively unreasonable under § 2254(d)(1). Although "unreasonable" at times might be difficult to define, "it is a common term in the legal world and, accordingly, federal judges are familiar with its meaning."[18] And the term must be considered in the greater context that, in habeas, federal courts are to give State court decisions "the benefit of the doubt."[19] Thus, a "readiness to attribute error is inconsistent with the presumption that State courts know and follow the law."[20]

The Sixth Circuit, however, improperly fashioned its own factual conclusions: (1) the jury would not have had enough time to review the testimony and deliberate, (2) the serious nature of the crime and punishment warranted longer deliberations,

---

[17] These terms are commonly understood as: "Deliberate: studied or intentional: *a deliberate lie*. 2. characterized by deliberation; careful or slow in deciding: *a deliberate decision*. * * * Irrational: 1. lacking the faculty of reason; deprived of reason. 2. lacking sound judgment or logic. * * * Irresponsible: 1. said, done, or characterized by a lack of a sense of responsibility. 2. not capable of or qualified for responsibility. * * * Precipitate: 1. to hasten the occurrence of; bring about prematurely or suddenly: *to precipitate a crisis*." *Random House Webster's College Dictionary* 352, 700, 701, 1040 (2001).

[18] *Williams v. Taylor*, 529 U.S. 362, 410 (2000) (O'Connor, J. for the Court).

[19] *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002).

[20] *Woodford*, 537 U.S. at 24.

(3) juries often initially express deadlock but reach a verdict later.[21] When the Sixth Circuit created a three-part test with new requirements not present in this Court's clearly-established precedent in habeas and second-guessed the predicate factual determinations, a finding of unreasonableness was inevitable.

II. This Court's clearly-established precedent holds that a trial court's exercise of sound discretion to discharge a jury should be deferred to.

Since *Perez* 186 years ago, this Court has held that – considering all the circumstances – it is within a trial court's exercise of sound discretion to discharge a deadlocked jury.[22] This long-held proposition properly recognizes the defendant's valued right to have his case decided by a single tribunal, society's interest in vindicating its laws, and the avoidance of coerced verdicts obtained by forced deliberations.[23] This Court has indicated that there is no mechanical test.[24]

A deadlocked jury determination is at the extreme end of the spectrum of reasons for declaring a mistrial, warranting the least amount of scrutiny.[25] Even in cases not involving deadlocked juries, this Court has "consistently declined to scrutinize with

---

[21] *Lett v. Renico*, 316 F. App'x 421, 427 (6th Cir. 2009); Pet. App. 13a.

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

[23] *Arizona*, 434 U.S. at 509-10; *Wade v. Hunter*, 336 U.S. 684, 688-89 (1949).

[24] *Illinois v. Somerville*, 410 U.S. 458, 462 (1973).

[25] *Arizona*, 434 U.S. at 508-09.

sharp surveillance the exercise of that discretion."[26] It is one decision that historically has been "accorded great deference" and "special respect."[27] As long as the record provides "sufficient justification," there is no basis to second-guess.[28]

This Court has stated, "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 . . . ."[29] Although this Court has not clearly adopted a set definition of what is not the exercising of sound discretion – or stated differently, what is an abuse of discretion – it has identified some explanatory terminology.

For example, although the question before this Court in *Arizona* was whether an 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* . . . ."[30] This proposition parallels this Court's later expression of what is *not* sound discretion. In *Arizona*, this Court identified some examples, concluding, "Thus, if a trial judge acts

---

[26] *Gori*, 367 U.S. at 368.

[27] *Arizona*, 434 U.S. at 510.

[28] *Arizona*, 434 U.S. at 516-17.

[29] *Gori*, 367 U.S. at 369.

[30] *Arizona*, 434 U.S. at 510 n.28 (emphasis added) (citing *United States v. Gordy*, 526 F.2d 631, 633, 636-37 (5th Cir. 1976) (hectic trial pace to accommodate docket considerations and the judge's expressed concern regarding imminent travel plans)).

irrationally or *irresponsibly*, cf. *United States v. Jorn*, . . . ; see *Illinois v. Somerville*, . . . , his action cannot be condoned."[31] Further, this Court in *Arizona* also used "precipitately" and "deliberately."[32] Unlike Lett, the State of Michigan does not assert that these terms are a test, but rather, they are helpful in providing definition to what an abuse of discretion might be.[33] Resp. Br. p. 22.

On the second prong of § 2254(d)(1), the decision of the Michigan Supreme Court here must not be just "incorrect," it must also be "objectively unreasonable."[34] Further, this Court has also consistently distinguished between State court decisions applying a general, constitutional standard and those decisions that apply a narrow rule. Where a broad standard is involved, State court decisions are given greater leeway.[35] Here, the Michigan Supreme Court's decision was not objectively unreasonable because the State court correctly identified the applicable legal rule from this Court's precedent and reasonably applied it to the facts.[36]

---

[31] *Arizona*, 434 U.S. at 514 (emphasis added).

[32] *Arizona*, 434 U.S. at 515-16.

[33] There is no universal meaning of the phrase "abuse of discretion," and the level of scrutiny it implies varies with the context. Often, courts equate it with clear error – a definite and firm conviction that a mistake has been made. 1 S. Childress & M. Davis, Federal Standards of Review § 4.21. *See also* The Hon. Henry J. Friendly, *Indiscretion about Discretion*, 31 Emory L.J. 747, 763-65 (1982).

[34] *Williams*, 529 U.S. at 409, 411-12 (O'Connor, J. for the Court).

[35] *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004); *Knowles v. Mizayance*, 566 U.S. ___; 129 S. Ct. 1411, 1420 (2009).

[36] *Williams*, 529 U.S. at 406 (O'Connor, J. for the Court).

III. There is no clearly-established precedent that requires trial courts to take additional measures or force deliberations for some unspecified amount of time, and the Sixth Circuit cannot give greater definition to this Court's general, deferential standard by imposing its own test and new requirements.

A. Clearly established precedent of this Court is to be narrowly drawn.

In challenging his conviction in habeas corpus, Lett was required to demonstrate that the decision of the Michigan Supreme Court was "contrary to, or involved an unreasonable application of, clearly established" Supreme Court precedent under 28 U.S.C. § 2254(d). Clearly-established law must be drawn from the holdings of this Court, not from obiter dictum.[37] Further, 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."[38]

In the last two months, this Court has twice reiterated the point that the rule at issue must be one that was specifically established by this Court, and has continued to *narrowly* draw what is "clearly

---

[37] *Williams*, 529 U.S. at 403-04 (O'Connor, J. for the Court).

[38] *Yarborough*, 541 U.S. at 666.

established" under 28 U.S.C. § 2254(d).[39] In habeas, "it is not 'an unreasonable application of clearly established Federal law' for a state court to decline to apply a specific rule that has not been squarely established by this Court."[40]

B. The Sixth Circuit improperly drew from its circuit precedent and misapprehended this Court's clearly-established precedent that recognizes a deferential standard.

This Court has never clearly established precise, particular steps that a trial court must take in a deadlocked jury case before declaring a mistrial. But the Sixth Circuit mistakenly held it was necessary for the State trial court to employ additional measures before the State court's decision could be an exercise of sound discretion, i.e., give a deadlocked jury instruction, polling the jury, or giving the jury more time to deliberate.[41] But in arriving at this conclusion the Sixth Circuit improperly cited its own precedent instead of this Court's in determining what is clearly established.[42]

The Sixth Circuit concluded that this Court had established a three-factor test, saying:

---

[39] *Smith v. Spisak*, 130 S. Ct. 676, 684 (2010); *Thaler v. Haynes*, 175 L. Ed. 2d 1003, 1008 (2010).

[40] *Knowles*, 129 S. Ct. at 1419 (citations omitted) (internal quotes omitted).

[41] *Lett*, 316 F. App'x at 228; Pet. App. 14a-15a.

[42] *Lett*, 316 F. App'x at 226, 228; Pet. App. 10a, 14a.

> In *Fulton v. Moore*, 520 F.3d at 529, we reviewed a habeas petition based on a double jeopardy claim and held that *Arizona v. Washington sets forth three factors that determine whether a judge has 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.[43]

But this Court has never established these factors as the test for judging all mistrials in any of its cases. Likewise, this Court has never required specific additional measures. The Sixth Circuit criticized the trial court, concluding:

> [T]he 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 . . . .[44]

---

[43] *Lett*, 316 F. App'x at 226 (emphasis added); Pet. App. 10a.

[44] *Lett*, 316 F. App'x at 228; Pet. App. 14a-15a.

But there are definite risks inherent in (1) polling the jury members,[45] (2) giving a deadlocked jury instruction,[46] or (3) forcing longer deliberations.[47] Pet. App. 14a-15a. In certain circumstances, these might be reasonable, but not always. The trial court is in the best position to exercise discretion and determine appropriate steps before declaring a mistrial. Moreover, to the extent that the Sixth Circuit *required* an express finding on the record, this Court in *Arizona* rejected that proposition. As long as the record demonstrates the basis, nothing more needs to be done by the trial court to justify its decision.[48]

The Sixth Circuit's test demands specific additional steps. Logically, it makes no sense for Lett to claim that the State trial court's actions, as reviewed by the Michigan Supreme Court, were insufficient for

---

[45] As Justice Rehnquist recognized in his dissent from the denial of a writ of certiorari in *Winston*, a requirement of additional methods 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 . . . ." *Winston v. Moore*, 452 U.S. 944, 947 (1981) (Rehnquist, J., dissenting). Further, as the Sixth Circuit itself has noted, "The most frequent setting in which the risk of juror coercion arises is when a court inquires into a numerical division of a deadlocked jury." *Lyell v. Renico*, 470 F.3d 1177, 1182 (6th Cir. 2006).

[46] An *Allen* charge comes from *Allen v. United States*, 164 U.S. 492, 501-02 (1896). Whether a formal *Allen* charge or other deadlocked jury instruction, such charges can carry a risk of coercion. As the Sixth Circuit has noted, the trial judge is in the "best position" to determine whether the charge is appropriate, and whether its effect was coercive depends on the circumstances. *United States v. Clinton*, 338 F.3d 483, 487 (6th Cir. 2003).

[47] As this Court recognized in *Arizona*, prolonging deliberations can lead to the risk of a coerced verdict. *Arizona*, 434 U.S. at 509.

[48] *Arizona*, 434 U.S. at 502-03, 516-17.

not doing enough ("[m]ore is required"), while simultaneously claiming that his argument is not advancing the theory that anything specifically more was required. Resp. Br. pp. 17-20. Lett is advancing a theory summarized in his response brief as: "while there is no mechanical formula, something must be done, or something more must exist, beyond what was done and existed here to establish sound discretion." Resp. Br. p. 30. Such argument is inconsistent with a principle that, objectively, the Michigan Supreme Court unreasonably applied this Court's clearly-established precedent.

As the record demonstrates, that "something" exists here and was done. There is the first note, which may reasonably be construed as indicating acrimonious deliberations. There is the second note, which may reasonably be construed as indicating a deadlock. Lastly, there is the trial court's colloquy with the foreperson who – in response to the trial court's question of whether the jury was going to reach a unanimous verdict – plainly and unambiguously answered, "No, Judge." Pet. App. 94a.

It is clear, however, reading the Sixth Circuit's opinion that it was engrafting requirements onto this Court's precedent that are not clearly established. To this, Lett seeks to pile on additional requirements when determining whether a State trial court's actions constituted an abuse of discretion. Lett's attempt to avoid the strictures of § 2254(d)(1)'s clearly-established requirement can be seen in his analysis.

First, Lett quotes Justice Marshall's dissenting opinion from *Arizona* to the effect that alternatives

should be considered when determining whether a trial court abused its discretion. But citation to a dissenting opinion neither qualifies as a holding of this Court, nor does it represent clearly-established precedent. Indeed, Lett ignores the fact that this Court rejected that proposition in *Arizona* that the trial court must make "explicit consideration of alternatives" as long as the record is sufficient to justify the ruling.[49]

Second, Lett proffers citations and quotations to language in various opinions that are divorced from the cases' factual contexts and that do not resolve the question of what is clearly established in order to guide trial courts in their exercise of discretion if, in fact, other measures are required.[50] Moreover, Lett's brief does not provide what the State trial court would have been required to do pursuant to this Court's clearly-established precedent. Lett's difficulty lies in the fact that this Court has consistently refused to establish a mechanical test.[51]

---

[49] *Arizona*, 434 U.S. at 502-03, 516-17.

[50] For example, Lett relies on *Jorn*, itself a plurality opinion, where the holding is merely "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," and there "reprosecution would violate the double jeopardy provision of the Fifth Amendment." *United States v. Jorn*, 400 U.S. 470, 487 (1971). That holding is consistent and no broader than *Perez*. The mention to the trial court acting "abruptly" cannot be divorced from the underlying facts where the trial court sua sponte and abruptly declared a mistrial due to the trial court's disbelief that witnesses had been adequately warned of their Fifth Amendment rights. *Jorn*, 400 U.S. at 487. In fact, the trial court's actions in *Jorn* were referred to by this Court in *Somerville* as being "erratic." *Somerville*, 410 U.S. at 469.

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

Lett cites no clearly-established precedent from this Court that supports the Sixth Circuit's mandate here that the State trial court employ additional measures, force longer deliberations, or that the record must expressly contain the trial court's consideration of other alternatives. By effectively ignoring the clearly-established prong of § 2254(d)(1) – whether the Michigan Supreme Court's decision was an unreasonable application of this Court's clearly established precedent – the Sixth Circuit essentially collapsed the two prongs of § 2254(d)(1) together into one inquiry.[52]

C. Irrespective of the varying guideposts used by the circuits, Lett only produces a handful of readily distinguishable cases where the circuits have found an abuse of discretion when reviewing a mistrial due to a deadlocked jury.

On pages 41-43 of its merits brief, the State of Michigan cited cases from other circuits involving deadlocked juries, which demonstrated that the circuits utilize various considerations to judge the trial court's actions on direct review. Contrary to Lett's position, the circuits are not all consistent. Indeed, it is

---

[52] The inquiries of whether a claim can be supported by clearly established law and whether a claim was reasonably adjudicated in the State courts are separate. *House v. Hatch*, 527 F.3d 1010, 1017 (10th Cir. 2008) ("[T]he threshold determination that there is no clearly established federal law is analytically dispositive in the § 2254(d)(1) analysis. That is, without clearly established federal law, a federal habeas court need not assess whether a State court's decision was 'contrary to' or involved an 'unreasonable application' of such law.")

plainly evident that the Sixth Circuit's formulation of a three-part test – (1) heard argument from counsel; (2) considered alternatives to a mistrial; and (3) acted deliberately, instead of abruptly – is dissimilar from all but one of the circuits noted at pages 41-43 of the State of Michigan's opening brief. Further, the circuits recognize that these factors merely provide guidance or are relevant factors and are not a set test, although in essence they operate as a test within the circuit. In the two habeas cases cited on page 39 of the State of Michigan's brief, no set test was applied at all, but rather, the circuits correctly recognized that the trial court is in the best position to determine the classic basis for a mistrial – a deadlocked jury.[53]

The lower courts have not been quick to second-guess trial courts' deadlocked jury determinations, even on direct review and even applying varying guideposts. The cases where reviewing courts have found an abuse of discretion generally fall into two categories: (1) where the trial court acts for reasons unrelated to the deadlock and (2) where, under all of the circumstances, it is apparent that the jury was not indicating it was hopelessly deadlocked.

In the first category, essentially, the trial court has an ulterior reason. Whether completely or in part, the deadlock is a pretext to the trial court's true motivations for ending the trial. That is not the

---

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

exercise of sound discretion.[54] Lett concedes that the State trial court here did not possess ulterior motives. Resp. Br. p. 14.

There are only a handful of cases that fall in the second category, i.e., where the facts indicate that the jury was not hopelessly deadlocked. In these cases, the trial court ignored contrary evidence, did not discuss the matter with the jury at all, or the jury did not initiate the expression of a deadlock, rather the trial court did so sua sponte.[55]

Here, there was a note indicating potential acrimonious deliberations and a second note indicating a potential deadlock. There was no contrary evidence. Further, the State trial court here had a colloquy with

---

[54] *See, e.g., Gordy*, 526 F.2d at 636-37 (declaring a mistrial after five and one-half hours where there was evidence that the trial court based its decision on docket considerations and travel plans was an abuse of discretion).

[55] *See United States v. Starling*, 571 F.2d 934, 939 (5th Cir. 1978) (ignoring foreperson's expression that the jury had been engaging in deliberations and the fact that the jury had requested more time to deliberate was an abuse of discretion); *United States v. Horn*, 583 F.2d 1124, 1125, 1129 (10th Cir. 1978) (declaring a mistrial after three and one-half hours of deliberations, without discussion with foreperson or jury, and in the absence of evidence of disagreement at the time of the sua sponte ruling was an abuse of discretion); *United States v. Razmilovic*, 507 F.3d 130, 139 (2d Cir. 2007) (declaring a mistrial after a long, complex trial where there was only a single note from the jury regarding deadlock without confirmation from the jury that further deliberations would be unproductive was an abuse of discretion); *United States ex rel. Webb v. Court of Common Pleas*, 516 F.2d 1034, 1036 (3d Cir. 1975) (declaring a mistrial by bringing jury out of deliberations after six and one-half hours, without initiation from counsel or the jury, was an abuse of discretion).

the foreperson where the foreperson clearly expressed the existence of a deadlock and that further deliberations were fruitless. Finally, unlike the other direct review cases, the jury initiated the deadlocked discussion via the second note, and then the foreperson confirmed it.

The State trial court's actions here are distinguishable from these other cases. Lett's argument that "[t]he Sixth Circuit's conclusion that relief was required in this case would have been reached by any reviewing circuit court, as the analyses used by each – even if not identical – are nonetheless compatible and substantially the same," is belied by the distinguishing factors. Resp. Br. p. 26.

Moreover, if Lett's appeal in the Sixth Circuit had been heard by a different panel, the outcome may have been different. Lett fails to acknowledge that within the Sixth Circuit there is disagreement regarding additional measures and whether there are set requirements before a mistrial can be declared. Three recent cases, all in 2007-2008, all involving habeas petitions asserting double-jeopardy bars, in large part contravene the very positions of the Sixth Circuit panel here. Lett did not cite these cases and

they undercut the proposition that certain measures are clearly-established.[56]

Here, the Michigan Supreme recognized and reasonably applied this Court's clearly-established precedent when it concluded that the State trial court had not abused its discretion in discharging the jury because it was hopelessly deadlocked. Lett can neither change the facts that faced the trial court, nor this Court's clearly-established precedent. Both require Lett's argument be rejected.

---

[56] *See Klein v. Leis*, 548 F.3d 425, 432-33 (6th Cir. 2008) (recognizing alternatives to a mistrial need not be considered when sufficient justification appears on the record); *Walls v. Konteh*, 490 F.3d 432, 438 (6th Cir. 2007) (recognizing alternatives to a mistrial need not be considered when sufficient justification appears on the record, and that *Arizona* did not hold that declaration of a mistrial without consideration of alternatives was necessarily an abuse of discretion); *Ross v. Petro*, 515 F.3d 653, 669 (6th Cir. 2008), *cert. denied*, 129 S. Ct. 906 (2009) (finding that "[t]he predominant thrust" of *Arizona*'s holding is the broad discretion due the trial court's determination).

CONCLUSION

For these reasons, the State of Michigan asks this Court to reverse the decision of the Sixth Circuit.

Respectfully submitted,

Michael A. Cox
Attorney General

B. Eric Restuccia
Michigan Solicitor General
Counsel of Record
P. O. Box 30212
Lansing, Michigan 48909
restucciae@michigan.gov
(517) 373-1124

Joel D. McGormley
Division Chief

Laura L. Moody
First Assistant
Appellate Division
Attorneys for Petitioner

Dated: March 2010