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No. 09-338

IN THE
Supreme Court of the United States

PAUL RENICO, WARDEN,
Petitioner,
v.
REGINALD LETT,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

Reginald Lett was charged with first degree murder and using a firearm during the commission of a felony for the August 29, 1996 death of Adesoji Latona in Detroit, Michigan. See generally Pet. App. 19a. A jury trial began on June 3, 1997 and was conducted intermittently on June 5, 10, 11, 12 and 13, 1997. *Id.* at 20a. Jury deliberations began at 3:24 p.m. on June 12, 1997, and the jury was excused for the day at approximately 4:00 p.m. *Id.* Deliberations resumed on Friday June 13th at an unknown time, presumably in the morning. *Id.* After approximately four hours of deliberation, the jury sent out a note that asked "What if we can't agree? Mistrial? Retrial? What?" Pet. App. 41a. Then the following exchange occurred upon the jury's return to the courtroom at 12:45 p.m.:

> THE COURT: You may be seated. Is the jury present and properly seated, counsel?
>
> MR. HEAPHY [the assistant prosecutor]: Yes, your Honor.
>
> MR. GORDON [defense counsel]: Yes, Judge.
>
> THE COURT: I received your note asking me what if you can't agree? And I have to conclude from that that that is your situation at this time. So, I'd like to ask the foreperson to identify themselves, please?
>
> THE FOREPERSON: My name is Janice Bowden.
>
> THE COURT: Okay, thank you. All right. I need to ask you if the jury is deadlocked; in other words, is there a disagreement as to the verdict?
>
> THE FOREPERSON: Yes, there is.

> THE COURT: All right. Do you believe that it is hopelessly deadlocked?
>
> THE FOREPERSON: The majority of us don't believe that–
>
> THE COURT: (Interposing) Don't say what you're going to say, okay?
>
> THE FOREPERSON: Oh, I'm sorry.
>
> THE COURT: I don't want to know what your verdict might be, or how the split is, or any of that. Thank you. Okay? Are you going to reach a unanimous verdict or not?
>
> THE FOREPERSON: (No response)
>
> THE COURT: Yes or no?
>
> THE FOREPERSON: No, Judge.
>
> THE COURT: All right. I hereby declare a mistrial. The jury is dismissed.
>
> (At about 12:48 p.m.—jury discharged)

Pet. App. 93a-94a. Mr. Lett's trial attorney did not object to the declaration of a mistrial.

Upon retrial before a different judge, Mr. Lett was convicted of felony firearm and the lesser offense of second degree murder. Pet. App. 22a.

Mr. Lett successfully appealed his convictions to the Michigan Court of Appeals. Pet. App. 68a-75a. The state Court of Appeals found that Mr. Lett did not consent to the discharge of the first jury and that the trial court abused its discretion in concluding that the jury was deadlocked. Pet. App. 72a-74a. Therefore, there was no manifest necessity for the trial court's *sua sponte* declaration of a mistrial. Pet. App. 74a-75a. The Court of Appeals held that the second

trial violated double jeopardy under the plain error standard of review. Pet. App. 72a, 75a.

The Wayne County Prosecutor filed an application for leave to appeal that decision to the Michigan Supreme Court. While that application was pending, Mr. Lett, through counsel, filed a trial court motion to enforce the Michigan Court of Appeals' decision, and sought release pending the prosecutor's application for leave to appeal. District Court R.22, Post-Conviction Hearing of July 7, 2000, 6th Cir. Joint Apx. Pgs. 152-153. At the hearing on that motion, the likelihood of the Michigan Supreme Court granting leave to appeal was discussed (among other points) whereupon the prosecutor acknowledged that the trial court erred in declaring a mistrial:

> MS. NAPP [local assistant prosecutor]: "[ ]I will say—I will acknowledge on the record that Judge Brown should not have dismissed the jury.
>
> THE COURT: Absolutely.
>
> MS. NAPP: That clearly—
>
> THE COURT: I think we all—
>
> MS. NAPP: —*that clearly was error* [ ]."

District Court R.22, Post-Conviction Hearing of July 7, 2000 at pages 21-22, 6th Cir. Joint Apx. Pgs. 152-153 (emphasis added).

The Michigan Supreme Court granted leave to appeal. *People* v. *Lett*, 463 Mich. 939, 620 N.W.2d 855 (2000) (Table). In that Order, the Michigan Supreme Court specifically declined to accept the prosecutor's concession of error, "because this Court is not required to accept the prosecutor's concession concerning the constitutional nature of any error that occurred in this case . . .," and directed the parties to

answer a series of questions including whether Mr. Lett "forfeited" the error or "implicitly consent[ed]" by failing to object to the declaration of the mistrial. *Id.* The Michigan Supreme Court also asked the parties to address, among other points, "the appropriate remedy where a trial court's declaration of mistrial occurs within the context of a record that is inadequate regarding whether manifest necessity existed [and] whether the inadequacy of a record regarding whether manifest necessity existed is the equivalent of an absence of manifest necessity[ ]." *Id.*

After briefing and oral arguments, the Michigan Supreme Court reversed the decision of the Michigan Court of Appeals, concluding the trial court correctly declared a mistrial where manifest necessity existed.[1] Pet. App. 39a-67a. Given this "manifest necessity," the state Supreme Court determined, over dissent of two Justices, that the trial judge exercised sound discretion in declaring a mistrial such that Mr. Lett's retrial did not violate his Fifth Amendment double jeopardy rights.[2] Pet. App. 59a-60a.

Mr. Lett filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Michigan, which was granted by District Judge David M. Lawson on August 31, 2007, in a published opinion. Pet. App. 18a-38a. The District

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[1] The Michigan Supreme Court did not specifically address the forfeiture aspect of the claim in its opinion, and elected to "save for another day" the issue of implied consent. Pet. App. 58a-59a.

[2] The Michigan Supreme Court's Order thereafter directed the Michigan Court of Appeals to address the remaining issues on appeal, which are not relevant to these proceedings. The Michigan Court of Appeals and Michigan Supreme Court denied relief on those claims.

Court ruled that the state trial judge did not exercise sound discretion because no manifest necessity existed to declare a mistrial, and that the Michigan Supreme Court's decision otherwise was an unreasonable application of the United States Supreme Court's precedent set forth in *Arizona* v. *Washington*, 434 U.S. 497 (1978). Pet. App. 37a.

The State of Michigan appealed that decision to the United States Court of Appeals for the Sixth Circuit. The Sixth Circuit affirmed the decision to grant the habeas petition in an unpublished opinion. Pet. App. 1a-17a. Like the District Court, the Sixth Circuit held that the trial court did not exercise "sound discretion" in declaring a mistrial, and the Michigan Supreme Court's decision otherwise was an unreasonable application of this Court's precedent. Pet. App. 11a-15a. *En banc* rehearing was unanimously denied. Pet. App. 76a.

Warden Renico, through the State of Michigan Attorney General's Office, petitioned for certiorari to this Court on the following issue:

> 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.

This Court granted certiorari on November 30, 2009.

SUMMARY OF ARGUMENT

Reginald Lett's habeas petition was properly granted. The Michigan Supreme Court unreasonably applied this Court's clearly established precedent in holding that the Fifth Amendment's Double Jeopardy Clause did not bar Mr. Lett's retrial. As the local prosecutor conceded after the initial appeal, the trial judge should not have declared a mistrial and discharged the jury at 12:48 p.m. on June 13, 1997. There was no "manifest necessity" to declare a mistrial at that point where the jurors had not deliberated for very long, the charges involved first degree murder, and the jury had merely asked what would happen *if* they could not agree. See Pet. App. 93a. The trial court acted so hastily that there was no opportunity to object before the mistrial was declared.

Although deference is owed to both a trial judge in declaring a mistrial based on juror deadlock and to a state court on habeas corpus review, review is nonetheless required. State appellate courts have an obligation to assure themselves that the trial court exercised sound discretion, both in determining that the jury was genuinely deadlocked *and* that there was a high degree of necessity for a mistrial. Federal courts on habeas review must examine whether the state appellate courts reasonably applied this Court's precedent in assessing sound discretion and manifest necessity. This Court has established these requirements in the cases of *United States* v. *Perez*, 22 U.S. (9 Wheat.) 579 (1824), *United States* v. *Jorn*, 400 U.S. 470 (1971) and *Arizona* v. *Washington*, 434 U.S. 497 (1978). Paying heed to the required deference, the Sixth Circuit applied this Court's precedent to determine that the Michigan Supreme

Court's ruling was unreasonable under 28 U.S.C. § 2254(d)(1).

These precedents establish a clear rule that, while accommodating of a variety of circumstances, nonetheless requires that the trial court determine that a "manifest" or "high degree" of necessity justifies a mistrial based upon juror deadlock to avoid the double jeopardy bar against retrial. Trial courts are to exercise "sound discretion" in determining that such "manifest necessity" exists, which requires taking "all circumstances into consideration" and applying a strong presumption against terminating trial short of a verdict. Even though no mechanical formulation or steps are specified, a trial judge confronted with a possible juror deadlock must treat the declaration of a mistrial as a near-last resort. Where, as here, the foreperson's statements do not establish that the jury is hopelessly deadlocked, consideration of alternatives to the declaration of a mistrial and consultation with counsel for the parties are highly relevant to whether sound discretion was exercised.

The fact this Court has not mandated precise steps for using sound discretion or spelled out specific factors establishing manifest necessity by no means diminishes the mandates of *Perez, Jorn and Washington.* For example, federal circuits reviewing mistrial rulings have displayed remarkable coherence and consistency in applying this precedent, and have identified substantially similar factors to guide their sound discretion inquiries. Such coherence is relevant to assess the reasonableness of the state appellate court decision on habeas review. And a survey of the various consistent factors identified by the circuit courts supports the conclusion that the Michigan Supreme Court fell below an objective

standard of reasonableness in applying this Court's precedent.

ARGUMENT

I. THE SIXTH CIRCUIT CORRECTLY HELD THAT MR. LETT'S CONSTITUTIONAL RIGHT TO BE FREE FROM DOUBLE JEOPARDY WAS VIOLATED AND THAT THE STATE COURT UNREASONABLY APPLIED THIS COURT'S ESTABLISHED PRECEDENT.

Habeas relief was granted in both the District and Circuit Courts because the Michigan Supreme Court's decision to reinstate Mr. Lett's convictions was based on an unreasonable application of this Court's decisions in *United States* v. *Perez*, 22 U.S. (9 Wheat.) 579 (1824), *United States* v. *Jorn*, 400 U.S. 470 (1971) and *Arizona* v. *Washingto*n, 434 U.S. 497 (1978). The Michigan Supreme Court held that the trial court exercised "sound discretion" in discharging the jury, despite any record support that discretion was soundly exercised or that there was the required manifest necessity for a mistrial. Both the Federal District Court and the Sixth Circuit held that there was no evidence that the trial court exercised "sound discretion" required by *Perez*, *Jorn* and *Washington*.

A. Mr. Lett's Double Jeopardy Rights Were Violated Because There Was No "Manifest Necessity" Justifying the Declaration of a Mistrial.

The Fifth Amendment to the United States Constitution provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb . . ." This provision was made applicable to the states through the Fourteenth Amendment.

Benton v. *Maryland*, 395 U.S. 784 (1969). Jeopardy attaches once a jury is empanelled and sworn. *Crist* v. *Bretz*, 437 U.S. 28, 35 (1978) (citing *Downum* v. *United States*, 372 U.S. 734 (1963)). A defendant has a "valued right" to have his case tried by the original jury. *Jorn*, 400 U.S. at 480 (quoting *Wade* v. *Hunter*, 336 U.S. 684, 689 (1949)). This right is so valuable because multiple trials can be "grossly unfair" by increasing "the financial and emotional burden" on the defendant and "prolong[ing] the period in which he is stigmatized" by having charges pending against him. *Washington*, 434 U.S. at 503-04 (internal citations omitted). Multiple trials "may even enhance the risk that an innocent defendant may be convicted." *Id*. at 504.

But this "valued right" must sometimes yield to the public's "interest in fair trials designed to end in just judgments." *Wade* v. *Hunter,* 336 U.S. 684, 689 (1949). In other words, there may be "manifest necessity" to declare a mistrial and dismiss the jury short of a verdict for a variety of reasons, including juror misconduct or errors by witnesses or parties that may prejudice the jury. Here, a mistrial was ultimately declared after the jury inquired about the consequences of failing to agree on a verdict. A deadlocked jury is regarded as the "prototypical example" of manifest necessity. *Oregon* v. *Kennedy*, 456 U.S. 667, 672 (1982) (citing *Washington*, 434 U.S. at 509).

Petitioner points out that jeopardy is not implicated where a mistrial is premised on "manifest necessity," and that a deadlocked jury is one instance presenting such a manifest necessity. Pet. Br. 19-24. This is true, but begs the question of whether Mr. Lett's jury was "genuinely deadlocked" to invoke the manifest necessity of retrial. *Washington*, 434 U.S. at 509.

Here, the trial court did not exercise the constitutionally required "sound discretion" in declaring a mistrial. Therefore, Mr. Lett's retrial was barred by the Double Jeopardy Clause.

1. A trial court must exercise "sound discretion" in finding that "manifest necessity" exists to declare a mistrial.

Because of the importance of a defendant's valued right to have his trial heard by the original jury and the fact that the right is frustrated by any mistrial declaration, there must be "manifest necessity" to declare a mistrial. The term "manifest necessity" was first used in *Perez*, 22 U.S. (9 Wheat.) at 580 to define a situation involving "urgent circumstances":

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

Id. (emphasis added).

As this Court explained, "manifest necessity" means a "high degree" of necessity: "we assume that there are degrees of necessity and we require a 'high degree' before concluding that a mistrial is appropriate." *Washington,* 434 U.S. at 506. "The

discretion to discharge the jury before it has reached a verdict is to be exercised 'only in very extraordinary and striking circumstances.'" *Downum* v. *United States*, 372 U.S. 734, 736 (1963) (quoting Mr. Justice Story's words in *United States* v. *Coolidge*, 25 Fed. Cas. 622, 633 (1815)).

Trial courts must exercise "sound discretion" in determining whether manifest necessity requiring a mistrial exists. *Perez,* 22 U.S. (9 Wheat.) at 580; *Washington,* 434 U.S. at 514. In light of the "varying and often unique situations arising during the course of a criminal trial," this Court has rejected a "mechanical" approach or bright line rule for interpreting and applying the phrase "sound discretion." *Illinois* v. *Somerville*, 410 U.S. 458, 462 (1973). But *Perez's* directive that "all the circumstances" be considered and mistrial declarations be treated with the "greatest caution" serves "as a command to trial judges" not to declare a mistrial "until a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings." *Jorn,* 400 U.S. at 485.

The precipitous mistrial declaration in this case did not satisfy *Perez*'s directive. In *Washington,* 434 U.S. at 515-16, this Court described the "sound discretion" exercised by a trial court faced with a mistrial request based on prejudicial statements made by defense counsel in opening statement as evidencing careful and deliberate action:

> The trial judge did not act precipitately in response to the prosecutor's request for a mistrial. On the contrary, evincing a concern for the possible double jeopardy consequences of an erroneous ruling, he gave both defense counsel and the prosecutor full opportunity to explain

> their positions on the propriety of a mistrial. We are therefore persuaded by the record that the trial judge acted responsibly and deliberately, and accorded careful consideration to respondent's interest in having the trial concluded in a single proceeding."

Id. Thus, careful, deliberate action is the type of "sound discretion" that is required before declaring a mistrial. Any decision to declare a mistrial is not to be taken lightly. *Somerville*, 410 U.S. at 471. As the Sixth Circuit in this case recognized, "[t]hat a mistrial may not be declared without caution, deliberation, and a consideration of the defendant's Fifth Amendment rights is clear from *Perez*, *Jorn,* and *Washington.*" Pet. App. 9a. By contrast, this Court in *Somerville* described the trial court's action in *Jorn,* as "erratic." *Somerville*, 410 U.S. at 469; see also *Washington,* 434 U.S. at 514 (citing *Jorn* for the proposition that a trial court's action can not be condoned "if a trial judge acts irrationally or irresponsibly").

This Court has indicated that the mere existence of possible alternatives to the declaration of a mistrial does not in itself belie a finding of sound discretion. See, *e.g., Washington,* 434 U.S. at 511. But the trial judge "'must always temper the decision whether or not to abort the trial by considering the importance to the defendant of being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate.'" *Id.* at 514 (quoting *Jorn*, 400 U.S. at 486). This, combined with the requirement that "all circumstances" be considered reveals that alternatives short of a mistrial are important to the equation and should be considered in determining whether manifest necessity existed. See *Jorn,* 400

U.S. at 487 (holding that trial court made no effort to exercise sound discretion in abruptly declaring a mistrial based on the failure to advise several witnesses of their Fifth Amendment rights where the court did not solicit input from counsel or consider alternatives to a mistrial such as granting a trial continuance); see also *Somerville*, 410 U.S. at 481 ("Once it is shown that alternatives to the declaration of a mistrial existed, as they did here, we must consider whether the reasons which led to the declaration were sufficient, in light of those alternatives, to overcome the defendant's interest in trying the case to the jury." (Marshall, J., dissenting)). In other words, "sound discretion" requires that a mistrial to be treated as something closer to a last resort rather than as the first or only consideration by the trial judge.

While it is true that trial courts are afforded great deference because they are in the best position to assess the status of the jury, *Washington,* 434 U.S. at 509-10,[3] reviewing courts have an "obligation to satisfy themselves that . . . the trial judge exercised 'sound discretion' in declaring a mistrial." *Id.* at 514. To that end, it is readily apparent that it is not proper to declare a mistrial simply when the trial court surmises that the jury *might* be deadlocked. *Washington* spoke in terms of the jury being "genuinely deadlocked" in order to find that the trial court exercised sound discretion to declare a mistrial. *Id.* at 509. Moreover the record must actually support that the trial court exercised "sound

[3] 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. *Washington*, 434 U.S. at 509-10.

discretion" in order for a reviewing court to afford wide latitude in declaring a mistrial:

> If the record reveals that the trial judge has failed to exercise the "sound discretion" entrusted to him, the reason for such deference by an appellate court disappears. Thus, if the trial judge acts for reasons completely unrelated to the trial problem which purports to be the basis for the mistrial ruling, close appellate scrutiny is appropriate.

Id. at 510 n.28 (internal citations omitted).

There is no evidence that the trial court in this case declared a mistrial for pretextual reasons. However, heightened deference to a mistrial declaration is equally inappropriate where there was neither record support nor any finding of manifest necessity, i.e., where it does not appear, "taking all the circumstances into consideration" *Perez,* 22 U.S. (9 Wheat.) at 580, that the jury was "genuinely deadlocked." *Washington*, 434 U.S. at 509.

As three out of the four courts to review this case have held, and as the local prosecutor conceded in the trial court below, the trial judge here did not exercise sound discretion, and manifest necessity did not justify the declaration of a mistrial in this case.

2. Where the trial court did not exercise "sound discretion" in declaring a mistrial, the Michigan Supreme Court incorrectly held that Mr. Lett's double jeopardy rights were not violated.

The problem with the Michigan Supreme Court decision lies with the application of these principles to the ultimate conclusion that the trial court

exercised "sound discretion" in this case. Fundamentally, the Michigan Supreme Court failed to appreciate that discretion is an *exercise;* one requiring analysis of "all circumstances." *Perez,* 22 U.S. (9 Wheat.) at 580. Here, the trial court called the parties and the jurors into the courtroom upon receiving a note that asked "what if" the jury could not agree. Pet. App. 93a. Nothing in the record indicated that the parties had any idea what the note said before it was read in open court at approximately 12:45 p.m. See, *e.g.*, Pet. App. 43a. This was the first record-based exchange with the jury since it began deliberating.[4] Three *minutes* after this question was read in court, the jury was discharged. Pet. App. 94a (discharging the jury at 12:48 p.m.).

One is hard pressed to imagine a trial judge doing less to protect the defendant's "valued right" to have this first jury reach a verdict in his case. But it was essentially upon this three minute exchange that the state Supreme Court found "sound discretion." Absent any clue from the trial court as to what it was thinking beyond its brief exchange, the Michigan Supreme Court backfilled this hole by pointing out that, (1) the jury "deliberated for at least four hours following a relatively short, and far from complex, trial," (2) the jury sent out several notes "including one that appears to indicate that its discussions may

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[4] The Michigan Supreme Court noted that the jury sent out a total of "seven notes," the majority of which "were routine requests for evidence, instructions and breaks." None of these notes are in the record materials. Pet. App. 20a; *id*. at 2a. The Michigan Supreme Court placed emphasis on one such note in which the jurors purportedly expressed "'a concern about our voice levels disturbing any other proceedings that might be going on,' indicating that perhaps the deliberations had already become somewhat acrimonious." Pet. App. 42a-43a.

have been particularly heated"[5] and (3) the "foreperson expressly stated that the jury was not going to reach a verdict." Pet. App. 59a.

In this case, the trial court "[ ]made no findings, provided no reasoning, articulated no justification, and entertained no argument from counsel" requiring the reviewing court to "look to other objective clues in the record to determine whether the trial court exercised discretion in declaring a mistrial and to assess the soundness of the choice." Pet. App. 32a. None of the State Supreme Court's conclusions are supported by an objective review of the record. This was a first degree murder case and was quite complex, particularly viewed from Mr. Lett's perspective, given that his life and freedom were at stake. The trial judge thought so little of the "notes" that they were not preserved as part of the record, see Pet. App. 20a; *id*. at 2a, and therefore can not carry the weight the Michigan Supreme Court assigned them. Most importantly, the jury as a whole never said that they were hopelessly deadlocked. They asked for more information, which necessarily implied that an answer to their question would impact further deliberations. Without more information or any further instruction, the trial court demanded that the foreperson (and only the foreperson) state "yes" or "no" whether the jury would reach a unanimous verdict. Pet. App. 93a-94a. The Michigan Supreme Court characterized this as "sound discretion." In so doing, the court rendered the "manifest necessity" requirement superfluous. For if manifest necessity can be found "on the most

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[5] As set forth in n.4, *supra*, none of the notes are contained in the record, save for the transcript reference asking "what if" the jury could not agree.

meager record," Pet. App. 66a (Cavanagh, J., dissenting), then there is no point to even undertake any inquiry—a reviewing court need only affix its rubber stamp.

More is required. The trial court must exercise sound discretion in determining whether the jury is genuinely deadlocked. The record must confirm manifest necessity. The power to declare a mistrial "ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes." *Perez,* 22 U.S. (9 Wheat.) at 580. Judges "should be extremely careful how they interfere with any of the chances of life, in favour of the prisoner." *Id.* This Court assumes trial courts would undertake that discretion, but has made clear that when judges act "irrationally or irresponsibly" their actions will not survive scrutiny. *Washington,* 434 U.S. at 514 (citing *Jorn,* 400 U.S. at 486). A reviewing court like the Michigan Supreme Court has an "obligation to satisfy" itself that sound discretion was exercised. *Id.* Instead, the Michigan Supreme Court simply provided its own speculation in an attempt to supplement a record that the trial court failed to make. See Pet. App. 37a.

The trial court acted irrationally and irresponsibly without any regard for Mr. Lett's valued right to have his first jury reach a verdict. There was no "high degree of necessity" for a mistrial where the jury had simply asked "what if" they could not agree three minutes before being discharged. The trial court's assertion of "deadlock" based on the jury's written question was presumptuous. See Pet. App. 11a ("The note—'What if we can't agree? [M]istrial? [R]etrial? [W]hat?'—was not a statement that the jury was hopelessly deadlocked, or even deadlocked at all. The note was asking the judge for more

information. . . . "). The foreperson's answer to the court's question about "unanimous verdict" was ambiguous in context. The judge jumped right to a mistrial declaration without considering any alternatives short of that, such as answering the jury's question, asking whether the foreperson thought further deliberations would be productive, asking whether the other jurors agreed with the foreperson's answer, or giving a deadlocked jury instruction. The judge did not bother consulting with counsel. The only thing apparent from this record is that a mistrial was the first and only consideration for the trial judge, instead of something closer to the last alternative. Declaring a mistrial on a "hunch"[6] that the jury was deadlocked defies the mandate set forth in *Perez* and *Arizona* v. *Washington* that a mistrial be manifestly necessary. As such, Mr. Lett's retrial violated double jeopardy.

The unsoundness of the Michigan Supreme Court's decision to reinstate Mr. Lett's conviction is highlighted by the manner with which the claim reached and was presented to that Court in the first place. After Mr. Lett's first successful appeal, the prosecutor stated "for the record," that the trial court "should not have dismissed the jury" and that it was "clearly error" for the trial court to do so. District Court R.22, Post Conviction Motion Hearing of July 7, 2000, at 21-22; 6th Cir. Joint Apx. Pgs. 152-153. That concession was repeated in the prosecutor's leave application to the Michigan Supreme Court, which phrased the issue presented as whether the trial court's "inadvertent error" in declaring a mistrial barred retrial because the error was not

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[6] As described by Justice Cavanagh in his dissent in *People* v. *Lett*. Pet. App. 66a-67a.

"plain" and because Mr. Lett did not suffer "sufficient prejudice" from that "inadvertent error." District Court R.26. The prosecutor asked the court to grant review in part "to determine the degree of prejudice that a defendant must suffer to justify a reversal on a forfeited double jeopardy claim." *Id*.[7]

Despite these concessions, the Michigan Supreme Court granted leave to appeal, noting that "this Court is not required to accept the prosecutor's concession concerning the constitutional nature of any error that occurred in this case. . . . " *Lett*, 463 Mich. 939. The Michigan Supreme Court went on to find no error at all in the trial court's ruling. This dubious history combined with the state Supreme Court's flawed analysis reveals a clear attempt merely to rubber stamp the mistrial declaration and save Mr. Lett's convictions.

B. Mr. Lett Was Properly Granted Habeas Relief Under 28 U.S.C. § 2254(d)(1), As the State Court Unreasonably Applied this Court's Double Jeopardy and "Manifest Necessity" Precedent.

Under 28 U.S.C. § 2254(d)(1), a court may grant the writ of habeas corpus where a state court judgment "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." To determine what constitutes "clearly established" law, courts look to the law established by Supreme Court holdings. *Yarborough* v. *Alvarado*, 541 U.S. 652, 660-61 (2004); *Lockyer* v. *Andrade*, 538

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[7] *But see Price* v. *Georgia*, 398 U.S. 323, 331 (1970) (explaining that double jeopardy claims are not amenable to harmless error analysis).

U.S. 63, 71 (2003); *Williams* v. *Taylor*, 529 U.S. 362, 412 (2000) (O'Connor, J., concurring in part).

As a threshold matter, Mr. Lett sought habeas relief claiming that the Michigan Supreme Court's decision was an unreasonable application of this Court's decision in *Washington, supra*, which also encompasses earlier precedent including *Jorn, supra*, and *Perez, supra*. Part of Petitioner's argument is that this Court's precedent has never required any specific "additional" measures to be undertaken by a trial court to determine that a manifest necessity exists prior to declaring a mistrial, and therefore the decision to grant habeas corpus relief by the District Court and Sixth Circuit was not based on "clearly established" precedent. See, *e.g.*, Pet. Br. 35-43. Contrary to this contention, neither Mr. Lett nor the Sixth Circuit have demanded specific "additional" steps be taken beyond what the constitution and this Court's precedent require. Rather, the "steps" taken by the trial court to ensure juror deadlock were so insufficient, and the record so devoid of facts establishing manifest necessity, that the Michigan Supreme Court unreasonably applied this Court's precedent in reinstating Mr. Lett's conviction.

1. The law guiding decisions on what constitutes "sound discretion" and "manifest necessity" to declare a mistrial is clearly established by this Court's precedent.

Where a trial court exercises "sound discretion" in determining that the jury is genuinely deadlocked and therefore there is manifest necessity for a mistrial, that decision is entitled to great deference. Petitioner claims that the law is "not clearly established as to all of the circumstances that demonstrate sound discretion in reaching the

determination that the jury was deadlocked." Pet. Br. 32. This Court has never explicitly defined what would constitute "sound discretion" or that specific steps must be taken prior to declaring a mistrial. See *Somerville,* 410 U.S. at 462 (rejecting a "mechanical" approach to sound discretion). *Perez* explains that "it is impossible to define all the circumstances" that the trial court must consider. 22 U.S. (9 Wheat.) at 580. In fact, this Court has "explicitly declined . . . to formulate rules based on categories of circumstances which will permit or preclude retrial." *Jorn,* 400 U.S. at 480. This "conscious refusal" to create "rules based on categories of circumstances . . . reflects the elusive nature of the problem presented by judicial action foreclosing the defendant from going to his jury." *Id.* at 485.

Washington describes the considerations of the trial judge that range between the risk of discharging the jury too quickly when it may be able to reach a verdict versus the risk of coercing a jury to agree on a verdict even though it has not done so "after protracted and exhausting deliberations." 434 U.S. at 509. This comports with *Perez*'s mandate that the trial court "tak[e] all the circumstances into consideration" prior to declaring a mistrial. *Jorn* further explains that "the trial judge must still take care to assure himself that the situation warrants action on his part foreclosing the defendant from a potentially favorable judgment by the tribunal." *Jorn,* 400 U.S. at 486. In *Washington*, double jeopardy did not preclude retrial where the record reflected that the trial judge exercised sound discretion: "the trial judge acted responsibly and deliberately, and accorded careful consideration to [the defendant's] interest in having the trial concluded in a single proceeding." 434 U.S. at 516.

Read together, *Perez, Jorn*, and *Washington* make it clear that "sound discretion" means that the trial court consider all of the circumstances, and make a ruling that is thoughtful and deliberative, and not act "irrationally," "irresponsibly," or "precipitately." *Washington,* 434 U.S. at 514-15. *Washington*, *Jorn* and *Perez* clearly establish the law in this regard, and Mr. Lett makes no claim that any specific act beyond exercising "sound discretion" is required.

"Section 2254(d)(1) permits a federal court to grant habeas relief based on the application of a governing legal principle to a set of facts different from those of the case in which the principle was announced." *Lockyer*, 538 U.S. at 76. The term "holding" for purposes of § 2254(d)(1) is not limited to mechanical steps and narrow statements but instead refers to "the governing legal principle or principles set forth by the Supreme Court" designed to apply to a range of factual contexts. *Id*. at 71. "[T]he relevant Supreme Court precedent need not be directly on point, but must provide a 'governing legal principle' and articulate specific considerations for the lower courts to follow when applying the precedent." *Quinn* v. *Haynes*, 234 F.3d 837, 844 (4th Cir. 2000) (citing *Williams,* 529 U.S. at 413). "A legal principle, by definition, applies to diverse factual scenarios. And those factual scenarios can differ in innumerable ways, so long as they are analogous on the point to which the legal principle applies." *Robinson* v. *Polk*, 444 F.3d 225, 232 (4th Cir. 2006) (per curiam) (King, J., dissenting from the denial of rehearing *en banc*) (citing *Wiggins* v. *Smith*, 539 U.S. 510, 520 (2003)).

2. The Michigan Supreme Court's decision was an unreasonable application of Supreme Court precedent warranting habeas relief.

Habeas relief is required where the state court decision unreasonably applies the clearly established precedent to the facts of the case. *Williams*, 529 U.S. at 413. It is not enough that the state court decision is "incorrect" or "erroneous"; rather, "[t]he state court's application of clearly established law must be objectively unreasonable." *Lockyer,* 538 U.S. at 75 (citing *Williams,* 529 U.S. at 410). While this Court's precedent is the starting and ending point under 28 U.S.C. § 2254(d)(1), lower federal court decisions applying those holdings are useful for determining whether a legal principle is clearly established, and as a guide for determining whether precedent was reasonably applied. The Sixth Circuit recognized the value of its own precedent to assess the reasonableness of the state court's decision. Pet. App. 10a ("the decisions of lower federal courts may be instructive in assessing the reasonableness of a state court's resolution of an issue."). See also *Phoenix* v. *Matesanz*, 233 F.3d 77, 83 n.3 (1st Cir. 2000); *Copeland* v. *Washington*, 232 F.3d 969, 974 (8th Cir. 2000); *Lajoie* v. *Thompson*, 217 F.3d 663, 669 n.6 (9th Cir. 2000).

The Sixth Circuit held that the state trial court did not exercise "sound discretion" where the judge did not seek input of the parties, did not appear to consider alternatives, and acted abruptly in declaring a mistrial. Pet. App. 14a-15a. As shown above, the Michigan Supreme Court's decision to reinstate Mr. Lett's convictions was an objectively unreasonable application of this Court's law.

The trial court discharged the jury less than five minutes after they inquired what would happen "if" they could not agree upon a verdict. Pet. App. 93a. To conclude that "sound discretion" was exercised here, or that a "manifest necessity" existed—either based upon the three minute exchange with the foreperson or by any other equivocal factors gleaned from the record—was an objectively unreasonable application of this Court's precedent.

Applying the principles of *Perez*, *Jorn* and *Washington*, the Sixth Circuit correctly determined that the Michigan Supreme Court's decision to reinstate Mr. Lett's convictions was an unreasonable application of this Court's precedent, and required habeas corpus relief. In so doing, the Sixth Circuit explained precisely why the mistrial declaration in this case was not an exercise of sound discretion:

> First, the trial judge declared a mistrial without pausing to hear from counsel, and the brief colloquy leading to the judge's declaration—lasting all of three minutes—was immediately followed by the dismissal of the jury, providing counsel no opportunity to object. Second, the record does not indicate that the trial judge gave any consideration to the alternatives to declaring a mistrial, such as giving a "deadlocked jury" instruction, polling the jury, answering the question posed in the jury's note about what would happen if it was unable to reach a unanimous verdict, or allowing the jury more time to deliberate. Any of these courses of action would have been reasonable, given that the jury had only deliberated for three or four hours in this first-degree murder trial. Third, and most troubling, the judge's declaration was inexplicably abrupt, making it "abundantly

> apparent that the trial judge made no effort to exercise a sound discretion to assure that, taking all the circumstances into account, there was a manifest necessity for the *sua sponte* declaration of this mistrial." *Jorn,* 400 U.S. at 487.

Pet. App. 14a-15a.

It is with the Sixth Circuit's mention of possible alternative actions that Petitioner finds fault and claims that no specific action is required by this Court's precedent. But the Sixth Circuit's opinion did not rest exclusively on the failure to provide a deadlocked jury instruction, or failure to consult with the parties, or poll the jury. Rather, the Sixth Circuit's decision was that there was a failure to do *anything* sufficient to satisfy the requirement of exercising "sound discretion". Any contrary conclusion by the state Supreme Court was an objectively unreasonable application of this Court's precedent.

Petitioner also takes issue with a perceived lack of deference by the Sixth Circuit to the state court's determination. Deference is required, but it is not absolute. To be sure, *Perez* explicitly contemplates appellate review by requiring that the record support the trial court's decision. As this Court observed in *Somerville*, the rationale of *Perez* is that "[where] a mistrial has been declared prior to verdict, the conclusion that jeopardy has attached begins, rather than ends, the inquiry. . . ." 410 U.S. at 467-68. It is clear that "reviewing courts have an obligation to satisfy themselves that, in the words of Mr. Justice Story, the trial judge exercised 'sound discretion' in declaring a mistrial." *Washington,* 434 U.S. at 514. Deference may guide the inquiry, but inquiry is absolutely required. The Sixth Circuit observed, "discretion does not equal license; the Fifth

Amendment's guarantee against double jeopardy would be a sham if trial judges' declarations of 'necessary' mistrials were in fact to go unreviewed." Pet. App. 8a (quoting *United States* v. *Sisk*, 629 F.2d 1174, 1178 (6th Cir. 1980)). The fact that this is a habeas case changes the review to the extent that it is examined through the lens of objective unreasonableness. Where, as here, the state court decision is an objectively unreasonable determination that "sound discretion" was used by the trial court, habeas relief is indeed warranted. 28 U.S.C. § 2254(d)(1).

a. There is no "split" amongst the circuits or around the country in this area of law, only factual differences that are outcome determinative.

Petitioner argues that a "variation between the circuits" has emerged that evinces a lack of clearly-established Supreme Court precedent. Pet. Br. 38-41. To the contrary, the circuits have coherently performed the task of deciding whether a judge exercised "sound discretion" to find the "manifest necessity" required for a mistrial. Far from bolstering the claim of uncertainty, the circuits' concordant analysis in this area reveals the law is both clearly established and consistently applied, albeit to inevitably distinctive facts. The 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.

Some circuits have indeed found sufficient evidence of deadlock and justification for a mistrial where

there was a given time that the jury had deliberated, while other courts have found a lack of manifest necessity where juries had deliberated for comparable time periods. Pet. Br. 38-39. But different results can be fully expected where this Court has expressly rejected a mechanical formula for exercising sound discretion and finding a manifest necessity. See *Somerville*, 410 U.S. at 462. Instead, it is clearly established that "all circumstances" be considered before a mistrial is declared. *Perez*, 22 U.S. (9 Wheat.) at 580; see also *Jorn*, 400 U.S. at 487. Under this requirement, a jury's deliberation time is but one circumstance to be weighed. When the time of deliberation is viewed out of context, similar periods of deliberation would fall on either side of the line separating sound from unsound discretion. Singular, or even primary, focus on deliberation time would be patently misguided, and has never been proffered as a legal standard in this case.

None of the cases cited by Petitioner to illuminate this supposed inconsistency had endeavored to set a time limit for finding juror deadlock. Rather, each case properly contemplated the length the jury had deliberated as but one factor in the sound discretion inquiry. Compare Pet. Br. 39-41. For example, in *United States* v. *Lorenzo,* 570 F.2d 294, 299 (9th Cir. 1987), the trial court questioned all jurors to definitively confirm there was no possibility of overcoming the deadlock, which demonstrated sound discretion despite a relatively brief deliberation period, particularly where the trial was not particularly complex or lengthy. Similarly, the jurors' *collective* opinion that it was hopelessly deadlocked, following a note saying that a single juror would not budge in her position, weighed against a relatively short period of deliberation to support a

finding that sound discretion was used in *United States* v. *Hernandez-Guardado,* 228 F.3d 1017, 1029-30 (9th Cir. 2000). Finally, in *Fay* v. *McCotter,* a three hour deliberation period was considered in light of the jury foreperson confirming that the jury was split "three-quarters to a quarter" in a relatively short, single issue trial. 765 F.2d 475, 476-78 (5th Cir. 1985).

The cases Petitioner cites that found a lack of manifest necessity despite comparable periods of deliberation came out differently precisely because additional facts were considered and those unique facts set the cases apart from others. In *United States* v. *Gordy*, 526 F.2d 631 (5th Cir. 1976), a mistrial declaration was deemed erroneous not simply because the jury had deliberated for only five and a half hours, but in large part because it appeared that the judge had acted for reasons "unrelated to the trial problem which purport[ed] to be the basis for the mistrial ruling." *Washington,* 434 U.S. at 510, n.28 (citing *Gordy, supra*). In *United States ex rel. Webb* v. *Ct. of Common Pleas*, 516 F.2d 1034, 1036 (3d Cir. 1975), a finding of sound discretion was rejected not only on the basis of a six and a half hour deliberation time, but also because the trial judge had *sua sponte* initiated a colloquy with the jury foreperson regarding deadlock, the jury as a whole was not polled to assure such deadlock, and the parties were not consulted prior to the mistrial declaration. Indeed, Petitioner undermines its own claim that it is application of law rather than application of fact driving these divergent outcomes, when it asserts that *Gordy* and *Webb* are "distinguishable from the facts here." Pet. Br. 39. That divergent facts render divergent outcomes when viewed under the same legal standard does not evince

a circuit split, nor the lesser "variation between circuits." *Id.* at 38.

Petitioner's attempt to portray variance (and therefore a lack of clearly established law) by a sampling of selected federal circuit "guideposts" for determining sound discretion is similarly unavailing. Pet. Br. 41-43. In fact, there is far from a "split" among the circuits. Examples from the First, Second, Third, and Seventh Circuits supplied by Petitioner illustrate this point. In various forms, each circuit implicitly or explicitly calls for signs of adequate reflection from the trial judge before declaring a mistrial. See *United States* v. *Charlton*, 502 F.3d 1, 5 (1st Cir. 2007) (courts should examine whether mistrial declaration was "made after sufficient reflection") (internal citations omitted); *United States* v. *Razmilovic*, 507 F.3d 130, 137-38 (2d Cir. 2007)(examination of steps taken by trial court to ensure jury deadlocked and confirm that further deliberations would be fruitless relevant to sound discretion); *United States* v. *Wecht*, 541 F.3d 493, 506 (3d Cir. 2008) (itemizing factors including that "adequate reflection" must precede declaration of a mistrial); *United States* v. *Byrski*, 854 F.2d 955, 961 (7th Cir. 1988) (court should consider effects of possible exhaustion and the impact which coercion of further deliberations might have had on the verdict, and question the jury, to determine whether further deliberations would be helpful).

Adequate reflection can be shown by the judge taking steps to assure him or herself that the jury truly can not agree, that additional deliberations would be fruitless, and that alternatives to a mistrial are not reasonable or viable. *Charlton*, 502 F.3d at 5 ("whether alternatives to a mistrial were explored and exhausted" relevant to sound discretion*)*;

Razmilovic, 507 F.3d at 138 ("alternatives [to a mistrial] that the district court chose not to pursue" relevant to sound discretion); *Wecht*, 541 F.3d at 506 (jury's opinion that it cannot agree and possible negative effects of requiring further deliberations should be considered); *Byrski*, 854 F.2d at 961 (urging courts to consider "the effects of possible exhaustion and the impact which coercion of further deliberations might have had on the verdict.") (internal citation omitted). While some circuits offer additional guideposts, such as the length and complexity of the trial, length of deliberations, and communications from the jury regarding deadlock, see *Razmilovic, supra, Wecht, supra,* and *Byrski, supra,* those considerations are merely more specific means of determining that a jury was truly deadlocked, that additional deliberations would not yield a sound verdict, and that there were not reasonable alternatives to a mistrial.

While each of these circuits may not articulate their considerations identically, their approaches are remarkably similar if not entirely consistent with one another and with the "sound discretion" that *Perez* and its progeny demand. What can be drawn from these examples (and many others like them) is that 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. That is the essence of *Perez's* requirement that "all circumstances" be considered before a judge declares a mistrial. 22 U.S. (9 Wheat.) at 580.

Examination of so-called guideposts from beyond the four circuits surveyed by Petitioner reveals similar synergy. The cases are not limited to the hung jury situation, but nevertheless develop context

for the "sound discretion" and "manifest necessity" inquiries.

To determine whether sound discretion was exercised in any mistrial declaration, the Fourth Circuit asks whether the trial judge "acted precipitately" or whether it displayed concern for the possible double jeopardy consequences of a mistrial declaration. *Gilliam* v. *Foster*, 75 F.3d 881, 894-95 (4th Cir. 1996); see also *United States* v. *Sloan*, 36 F.3d 386, 394 (4th Cir. 1994); *United States* v. *Shafer*, 987 F.2d 1054, 1057 (4th Cir. 1993). Whether the trial court heard input from the parties and considered "less drastic alternatives" to a mistrial are also key factors in the sound discretion equation. *Shafer, supra.* These more broadly articulated considerations clearly overlap with and encompass the more specific factors deemed important by the four circuits listed above in determining sound discretion in the specific instance of jury deadlock.[8]

The Fifth Circuit has similarly held that: (1) the length of the trial, (2) the complexity of the issues involved, (3) the length of deliberations, (4) the district court's communications with the jurors, (5)

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[8] The consistency of the Fourth Circuit's approach is actually highlighted in *Winston* v. *Moore*, 452 U.S. 944 (1981) (Rehnquist, J., dissenting from denial of certiorari), cited repeatedly by Petitioner. Pet. Br. 34, 37, 50. Justice Rehnquist's dissent explains that habeas relief was granted by the District Court and affirmed by the Fourth Circuit where the trial judge declared a mistrial without exercising sound discretion in determining that the jury was actually deadlocked. The decision to grant habeas relief was premised on the facts that the jury had not deliberated very long (2 ½ hours during which a deadlocked jury instruction was given) and the jury had not expressly stated as a whole that they were deadlocked. Habeas relief was granted even in the absence of a defense objection to the mistrial.

jury statements regarding deadlock, and (6) whether alternatives to a mistrial were considered are all useful guideposts in the sound discretion equation. *Gordy*, 526 F.2d at 635-36. See also *Grandberry* v. *Bonner*, 653 F.2d 1010, 1014 (5th Cir. 1981); *United States* v. *Starling*, 571 F.2d 934 (5th Cir. 1978).

Like most or all of its sister circuits, the Sixth Circuit asks whether the trial judge heard or solicited input from the parties on the propriety of a mistrial, considered alternatives to a mistrial, and acted "deliberately, instead of abruptly." *Fulton* v. *Moore,* 520 F.3d 522, 529 (6th Cir. 2008) (citing *Washington*, 434 U.S. at 515-16). That circuit likewise considers whether there was a timely objection by defendant, the jury's collective opinion that it cannot agree, the length of deliberations, the length and complexity of the trial, the nature of communications between jury and judge, the effects of exhaustion and potential for coercing a verdict if deliberations were to continue, and the trial judge's belief that additional trials will result in continued hung juries. *Jones* v. *Hogg*, 732 F.2d 53, 56 (6th Cir. 1984).

Ninth Circuit "guideposts" include the jurors' collective opinion that they can not agree, the length of the trial and complexity of the issues, the length of time the jury has deliberated, whether the defendant has objected to a mistrial, and the effects of exhaustion or coercion on the jury. *Hernandez-Guardado,* 228 F.3d at 1029. For manifest necessity rulings in general, that circuit also stresses the importance of any input from counsel for the parties, and the consideration of alternatives to a mistrial. See *United States* v. *Chapman*, 524 F.3d 1073, 1082 (9th Cir. 2008).

In *United States* v. *Horn*, 583 F.2d 1124, 1127-28 (10th Cir. 1978), the Tenth Circuit reviewed the

guideposts suggested by the Fifth and Ninth Circuits and also looked to factors considered by the Second and Third Circuits to determine whether sound discretion was exercised in finding jury deadlock and declaring a mistrial. (Citing *Arnold* v. *McCarthy*, 566 F.2d 1377 (9th Cir. 1978); *Gordy,* 526 F.2d 631; *United States ex rel. Russo* v. *Superior Court*, 483 F.2d 7 (3d Cir. 1973); *Webb*, 516 F.2d 1034; *United States* v. *Beckerman*, 516 F.2d 905 (2d Cir. 1975)).

Notably, "the need for careful consideration of alternatives to mistrial, and the hard lesson of retrials barred by double jeopardy when there was no such consideration" is reflected in Federal Rule of Criminal Procedure 26.3. *Sloan*, 36 F.3d at 394. The rule requires that "[b]efore ordering a mistrial, the court shall provide an opportunity for the government and for each defendant to comment on the propriety of the order, including whether each party consents or objects to a mistrial, and to suggest any alternatives." *Id*. (alteration in original).

Thus, a review of these circuits and their guideposts reveals consistency in the application of this Court's clearly established precedent to a highly fact-specific inquiry. Compare *Carey* v. *Musladin,* 549 U.S. 70, 76-77 (2006) (finding no clearly established precedent to support habeas relief for *spectator* conduct during trial despite some circuit court extension of precedent premised on *state sponsored* conduct). Here, there are no gaps, inconsistencies, divergences, or disagreements among lower courts in their inquiry into sound discretion and manifest necessity as required by *Perez*, *Jorn*, and *Washington.*

In fact, the consistency among the federal circuits only reinforces the conclusion that the state court unreasonably applied this Court's precedent in

holding that the mistrial declaration was justified by manifest necessity. 28 U.S.C. § 2254(d)(1). See generally *supra* Part I.B.2*;* Pet. App. 10a ("the decisions of lower federal courts may be instructive in assessing the reasonableness of a state court's resolution of an issue") (internal citation omitted). Examination of the circuit decisions surveyed above reveals the overwhelming principle that even in cases of jury deadlock, sound discretion requires courts to treat the declaration of a mistrial as something closer to a last resort than the near first resort treatment it was given by the state court in this case. It is readily apparent that a lack of sound discretion would have been found upon applying any considerations used by the various circuits. In less than four minutes, the trial judge rammed through essentially a two-question colloquy that was initiated by a simple jury question of what "if we can't agree?" Pet. App. 93a-94a. The judge assumed the jury was hopelessly deadlocked, then extracted a one word answer of "no" by asking the foreperson whether the jury was "going to reach unanimous verdict . . . Yes or no?" *Id.* No clarifying questions were asked to glean whether the possible impasse was momentary, long term, or permanent. *Razmilovic,* 507 F.3d at 137-38 (actions judge took to determine whether there was genuine deadlock relevant); *Hernadez-Guardado,* 228 F.3d at 1029 (noting that "critical factor" to be considered is "jury's own statement that it is unable to reach a verdict." (internal quotations omitted)); *Byrski,* 854 F.2d at 961 (same); *Horn,* 583 F.2d at 1127 (same). The judge made no effort to clarify the foreperson's ambiguous answer to an ambiguous question by asking follow-up questions or the other jurors for their opinions. *Hernandez-Guardado, supra* (jury's collective opinion regarding deadlock important)*;* see also *Wecht,* 541 F.3d at 500 (same); *Hogg,* 732 F.2d at

56 (same); *Horn*, 583 F.2d at 1127 (same). The judge abruptly declared a mistrial, with no reflection, after giving no opportunity for input from counsel for the parties. Compare Fed. R. Crim. P. 26.3; *Charlton*, 502 F.3d at 5; *Gilliam*, 75 F.3d at 894-95; *Chapman*, 524 F.3d at 1082; *Wecht,* 541 F.3d at 506; *United States* v. *Berroa*, 374 F.3d 1053, 1058 (11th Cir. 2004). There was obviously no thought given to alternatives to a mistrial, such as simply answering the jury question by explaining what would happen if the jury could not agree, ordering additional deliberations, or giving a deadlock jury instruction. *Charlton,* 502 F.3d at 5-6; *Razmilovic*, 507 F.3d at 138.

The trial judge simply failed this Court's clear directive to take "all circumstances into account" before finding jury deadlock and declaring a mistrial. *Perez*, 22 U.S. (9 Wheat.) at 580; see also *Jorn*, 400 U.S. at 487. Thus, as the Sixth Circuit held, under any objectively reasonable application of this Court's manifest necessity holdings, sound discretion would not and should not be found.

b. Claims regarding the application of 28 U.S.C. §§ 2254(d)(2) and (e)(1) have not been fairly presented.

Petitioner makes a passing assertion that the Sixth Circuit's "lack of deference" to the state court decision runs afoul of 28 U.S.C. § 2254 (e)(2)[9] by failing to

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[9] 28 U.S.C. § 2254(e)(1) provides:

"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

presume the correctness of the state court's "factual" determination that the jury was deadlocked. Pet. Br. 50. To the extent Petitioner attempts to advance such an argument, it should be rejected as it has not been "fairly included" in either the petition for certiorari or its merits brief questions presented. See Sup. Ct. R. 14.1(a); *Wood* v. *Allen,* No. 08-9156, 2010 WL 173369, at *8 (U.S. Jan. 20, 2010). "The question whether a state court errs in determining the facts is a different question from whether it errs in applying the law." *Rice* v. *Collins,* 546 U.S. 333, 342 (2006). While its question presented cites 28 U.S.C. § 2254 as a whole, Petitioner specifies the argument it seeks to raise herein by phrasing the issue as one of whether the state court "failed to apply clearly-established Supreme Court precedent. . . . [I]n denying relief on double jeopardy grounds. . . ." Pet. Br. i. This near-verbatim recitation of 28 U.S.C. § 2254(d)(1) to the exclusion of any reference to a factual dispute that evokes § 2254(e)(1) does not fairly include a claim under the latter subsection. *Wood,* 2010 WL 173369, at *9. Nor does Petitioner's passing reference to 28 U.S.C. § 2254(e)(1) in the text of its petition for certiorari properly raise the issue in this Court. *Wood,* 2010 WL 173369, at *8 (quoting *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U.S. Philips Corp*., 510 U.S. 27, 31 n.5 (1993)).

Even if the perfunctory 28 U.S.C. § 2254(e)(1) assertion were given consideration, Petitioner's contention in this regard is unavailing. Whether manifest necessity existed is a mixed question of law and fact. See *Wecht,* 541 F.3d at 504-05. The underlying facts leading up to the mistrial declaration—the length of the trial and jury

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presumption of correctness by clear and convincing evidence."

deliberations, the jury note(s), and the substance of the trial judge's truncated inquiry—are not contested. Rather, as the Sixth Circuit held, the state court unreasonably applied the requirements of *Perez* and its progeny to those undisputed facts. In other words, the trial judge failed to "take all circumstances into account" to find deadlock; it used far from "great caution" in racing through its ambiguous inquiry; and it did not err on the side of Mr. Lett in abruptly declaring a mistrial. *Perez,* 22 U.S. (9 Wheat.) at 580. This flawed approach lead to the fundamentally unreasonable legal determination that "sound discretion" was exercised, or that there was a "high degree" of necessity to overcome the double jeopardy bar against retrial. *Washington*, 434 U.S. at 506-07 & n.18. Accordingly, habeas relief was properly granted within the confines of 28 U.S.C. § 2254(d)(1).

3. The fact that Mr. Lett did not "object" to the mistrial or retrial is true, but irrelevant.

Petitioner correctly asserts that Mr. Lett did not "object" to the declaration of a mistrial at any time prior to raising the issue for the first time on appeal. See, *e.g.*, Pet. Br. 8, 44, 50. On direct appeal, the Michigan Court of Appeals held that plain error occurred despite the absence of an objection.[10] Pet.

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[10] At the time that Mr. Lett filed his original brief on appeal in 1998, the law in Michigan was that a defendant could raise a double jeopardy violation for the first time on appeal and it would be subject to de novo review. *People* v. *Lugo*, 542 N.W.2d 921, 925 (Mich. Ct. App. 1995) (per curiam). Though *Lugo* has not been specifically overruled, the Michigan Court of Appeals recognizes the Michigan Supreme Court decision in *People* v. *Carines*, 597 N.W.2d 130, 138-39 (Mich. 1999) applies plain error review to all unpreserved claims of constitutional error.

App. 72a. The Michigan Supreme Court essentially ignored the "plain error" nature of the question presented by the local prosecutor and held that no error occurred on the merits, without addressing whether the failure to object posed a specific obstacle to relief in this case, beyond being part of the general conclusion that manifest necessity existed. Pet. App. 39a-61a.

Mr. Lett does not dispute that his trial attorney could theoretically have objected prior to the retrial on double jeopardy grounds. He did not. But an objection would not have obviated the error. As dissenting Justice Cavanagh explained, there was no opportunity to object to the mistrial and thus no inferences should be drawn from the failure to object. Pet. App. 65a ("Though an objection on the record would have been helpful in determining defendant's position and in refreshing the judge concerning her duty to exercise sound discretion, defense counsel's failure to voice an objection cannot be considered evidence that a mistrial declaration was manifestly necessary.") (Cavanagh, J., dissenting). This is especially so where Mr. Lett "gain[ed] nothing" by submitting to a retrial despite the double jeopardy violation. *Id.*

In granting habeas corpus relief, the District Judge echoed Justice Cavanagh's findings that the lack of objection was irrelevant to the manifest necessity determination on the facts of this case:

> The state court also pointed to the absence of objection to the mistrial from defense counsel. Certainly, lack of objection is a factor to consider if it can lead to the conclusion of acquiescence in

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See People v. *Matuszak*, 687 N.W. 2d 342, 347 n.1 (Mich. Ct. App. 2004).

> the trial judge's actions. However, as acknowledged by the state supreme court, there is no evidence in this record that the trial judge ever advised counsel as to the substance of the jury's note or engaged counsel in any discussion. To the contrary, it appears that the trial judge acted precipitously, and her announcement of a mistrial was the first notice defense counsel had of the court's intended action. An objection after the fact perhaps would have completed the record, but it is unlikely that it would have changed the result. In the absence of any discussion by counsel on the record of any nature concerning the termination of the first trial, the lack of objection does little to fortify the conclusion that a mistrial was necessary.

Pet. App. 34a-35a.

The Sixth Circuit was justifiably unconcerned with counsel's failure to object to the retrial on double jeopardy grounds, where it was clear from the record that Mr. Lett did not *acquiesce* in the decision to declare a mistrial. Pet. App. 14a. *Perez* originally spoke to this acquiescence, by considering whether the defendant was retried "without the consent" of the parties. *Perez,* 22 U.S. (9 Wheat.) at 579. From there, this Court recognized that the lack of objection carries little weight where, as here, there was no opportunity to object before it was too late. See *Jorn,* 400 U.S. at 487. The Sixth Circuit rightfully gave little weight to the lack of objection, where, "'the trial judge acted so abruptly in discharging the jury that, had the . . . defendant [been disposed] to object to the discharge of the jury, there would have been no opportunity to do so.'" Pet. App. 13a-14a (quoting *Jorn*, 400 U.S. at 487).

An objection is only useful to the extent that there is an opportunity to object prior to the mistrial being declared. If the mistrial was not "manifestly necessary", Mr. Lett's failure to object in no way undermines the error where the trial court acts without warning or opportunity. This Court's decisions in *Perez* and *Jorn* focus on objections *before* the mistrial is declared. An objection after the fact is entirely academic. Accordingly, the lack of objection should pose no bar to relief in this case.

* * *

The trial court did not exercise "sound discretion" in declaring a mistrial. The Michigan Supreme Court's decision to reinstate Mr. Lett's convictions was an unreasonable application of this Court's clearly established precedent. For all of these reasons, habeas relief was properly granted.

CONCLUSION

Reginald Lett respectfully requests that this Court AFFIRM the decisions of the Sixth Circuit and the Eastern District of Michigan to GRANT habeas corpus relief.

Respectfully submitted,

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