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IN THE SUPREME COURT OF THE UNITED STATES

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PAUL RENICO, WARDEN, :

Petitioner : No. 09-338

v. :

REGINALD LETT :

- - - - - x

Washington, D.C.

Monday, March 29, 2010

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:04 a.m.

APPEARANCES:

JOEL D. MCGORMLEY, ESQ., Lansing, Michigan; on behalf of Petitioner.

MARLA R. McCOWAN, ESQ., Assistant Defender, Detroit, Michigan; on behalf of Respondent.

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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 09-338, Renico v. Lett.

Mr. McGormley.

ORAL ARGUMENT OF JOEL D. MCGORMLEY

ON BEHALF OF THE PETITIONER

MR. MCGORMLEY: Mr. Chief Justice, and may it please the Court:

Because this is a habeas case arising from a murder conviction obtained in the Michigan courts, the threshold question under AEDPA is whether there is any clearly established Supreme Court precedent that the Michigan Supreme Court objectively, unreasonably applied in rejecting Mr. Lett's claims that the trial court had abused its discretion in -- in discharging the jury due to deadlock.

The Sixth Circuit second-guessed on habeas, ignored deference under AEDPA, as well as the broad discretion, due the trial court determination. Here there was a note suggesting acrimonious deliberations received early on in the second day of deliberations, followed by a second note suggesting a deadlock after approximately 10 hours of trial testimony and 4 hours of

1 deliberations.

2 The trial court at that time engaged the
3 foreperson in a colloquy, a two-part colloquy, in which
4 the foreperson not only confirmed the content of the
5 first note, but also confirmed the existence of a
6 deadlock.

7 JUSTICE SOTOMAYOR: Excuse me. The content
8 of the first note was a query of the court. And that
9 query was: "What happens if we can't reach a verdict?"
10 Isn't that substantially different? Doesn't that
11 suggest that the jury is trying to figure out what are
12 the consequences of its actions and whether reaching a
13 consensus is possible?

14 MR. MCGORMLEY: Well, Justice Sotomayor, the
15 first note was the note regarding our raised voices
16 disturbing other proceedings. The second note
17 regards --

18 JUSTICE SOTOMAYOR: Excuse me. How long
19 before that last note was that?

20 MR. MCGORMLEY: Well, the Michigan Supreme
21 Court refers to that as early on in the second day of
22 deliberations. And then there is approximately 3 hours
23 and 15 more minutes of deliberations, because after the
24 second note --

25 JUSTICE SOTOMAYOR: Did anybody hear the

1 voices?

2 MR. MCGORMLEY: The record doesn't disclose,
3 doesn't disclose that.

4 JUSTICE SOTOMAYOR: Could you tell me what
5 facts found by the lower courts or the trial courts show
6 that the Court acted, quote, and this is from our
7 earlier Perez case, the very first in this area,
8 "deliberately, responsibly, and not precipitously" in
9 declaring a mistrial. What in the facts you have
10 recited --

11 MR. MCGORMLEY: Well --

12 JUSTICE SOTOMAYOR: -- show that activity?

13 MR. MCGORMLEY: Justice Sotomayor, the first
14 point I would make is that, of course, this is on habeas
15 review, and so the -- the Michigan Supreme Court made
16 factual findings here that would be due deference.

17 JUSTICE SOTOMAYOR: What is the factual
18 finding that you think we have to give deference to? I
19 know the facts you've recited. There don't appear to be
20 any of the facts with respect to what occurred during
21 the activity. So what factual finding do we have to
22 give deference to?

23 MR. MCGORMLEY: Well, the factual finding by
24 the Michigan Supreme Court that -- that there appeared
25 to be acrimonious deliberations. That's a factual

1 finding due deference under (e)(1).

2 JUSTICE SOTOMAYOR: But I'm not sure how
3 that finding supports the finding, or a finding, that
4 the Court was acting deliberately, responsibly, and not
5 precipitously.

6 MR. MCGORMLEY: Going back to this Court's
7 opinion in *Perez*, considering sound judgment,
8 discretion, considering all the circumstances, here we
9 have to look at the totality of the circumstances in
10 that it was a relatively short trial, that we have a
11 note that could be reasonably interpreted as acrimonious
12 deliberations, the second note that could be reasonably
13 construed as a deadlock.

14 And then the trial court did not declare a
15 mistrial at that point. Rather, the trial court brings
16 the jury out and engages in a colloquy. And in that
17 colloquy, the trial court accepts the foreperson's
18 answer at her word. And that is: "Are you going to be
19 able to reach unanimous verdict?" The answer being:
20 "No." And in fact, it's the Sixth Circuit who
21 second-guessed in this case by saying: You can't place
22 that much weight on that statement by the foreperson.

23 JUSTICE GINSBURG: Because the foreperson at
24 first hesitated. When the court asked the question,
25 "Are you going to reach a unanimous verdict or not,"

1 then there's no response. And then the court says, "Yes
2 or no?" And only at that second point does the
3 foreperson say "no." So it was a reluctant "no."

4 MR. MCGORMLEY: I don't necessarily believe
5 it was a reluctant no.

6 JUSTICE SCALIA: She might have been
7 sneezing. I mean, we don't know what caused the pause,
8 do we?

9 MR. MCGORMLEY: That's correct,
10 Justice Scalia.

11 JUSTICE GINSBURG: And that's another factor
12 in this. We have the transcript. Are you urging that,
13 because the trial court judge was there on the spot, saw
14 the jury, worked with the jury, that that's something
15 that deserves a special measure of respect?

16 MR. MCGORMLEY: Absolutely,
17 Justice Ginsburg. And this Court has qualified that as
18 broad discretion and special respect due the trial court
19 determination, after the trial court is the one viewing
20 the jury in real time. So absolutely. And in fact,
21 this -- this risk of coercion was recognized also by
22 this Court in *Arizona v. Washington*.

23 JUSTICE ALITO: May I ask you another
24 question about what happened?

25 After the foreperson said: No, Judge, we

1 are not going to reach a unanimous verdict, the judge
2 says: All right, I hereby declare a mistrial; the jury
3 is dismissed. And then the next entry in the transcript
4 that we have is: Well, Mr. Gordon snuck away before we
5 could set a new trial date. Now, Mr. Gordon was defense
6 -- was the defense attorney?

7 MR. MCGORMLEY: Correct, Your Honor.

8 JUSTICE ALITO: So when did he leave? Do we
9 know when he left? He was present when the judge said
10 that she was going to declare a mistrial?

11 MR. MCGORMLEY: Correct. But I don't know
12 that minute or so gap. I don't know when Mr. Gordon
13 snuck out.

14 JUSTICE KENNEDY: Can you tell me, along the
15 line of -- the same line of questioning, I understand
16 about AEDPA. I understand about deference, the
17 jurisdictions. Just tell me a little bit about how this
18 often works in State courts and in Federal courts?

19 Would it be good practice, in your view --
20 and that may not control your case, but would it be good
21 practice for the -- a judge to have had exactly this
22 colloquy and then say: The jurors are dismissed while I
23 talk with counsel. And you say: Counsel, in light of
24 this response, I am prepared to declare a mistrial. Do
25 you have any comment?

1 Is that good practice?

2 MR. MCGORMLEY: It may be good practice, but
3 the question becomes whether it's constitutionally
4 required.

5 JUSTICE KENNEDY: I'm asking -- I'm asking
6 if it's good practice as a general practice.

7 MR. MCGORMLEY: I would say -- well, in this
8 Court --

9 JUSTICE KENNEDY: Because -- because that
10 will bear, ultimately, on a constitutional issue. I
11 understand deference. I understand that all intendments
12 are in favor of what the State Supreme Court found. I'm
13 just -- I want you to tell me how it works out there in
14 the real world?

15 MR. MCGORMLEY: Well, I believe that
16 discussion with counsel is a factor in -- in the
17 consideration. I don't dispute that. But this Court
18 has never held that it's a requirement.

19 JUSTICE SCALIA: What if, in fact, there
20 isn't -- what if both Counsel say, no, you should not
21 declare a mistrial? Can the judge go ahead and declare
22 a mistrial?

23 MR. MCGORMLEY: Absolutely. And here -- and
24 here's why.

25 JUSTICE SCALIA: That's not a very big fact.

1 MR. MCGORMLEY: Well, it's important in the
2 coercion context, because certainly the trial court has
3 an independent obligation to ensure a just judgment.

4 JUSTICE KENNEDY: That independent
5 obligation is not reinforced by getting counsel's views
6 just as a matter of good practice?

7 MR. MCGORMLEY: It may be. It may be
8 reinforced in certain circumstances, but again, we are
9 looking at the totality of the circumstances when we
10 have a note indicating acrimony, a note indicating
11 deadlock, and then the colloquy in which there's an
12 unequivocal --

13 JUSTICE ALITO: Well, certainly it's good
14 practice. If both counsel agree that there is manifest
15 necessity for a mistrial, then there isn't going to be a
16 double jeopardy issue in the case, isn't that right?

17 MR. MCGORMLEY: Correct. Under Dennis, if
18 the defendant consents, then there is no double
19 jeopardy.

20 JUSTICE SCALIA: Was there an objection here
21 by counsel for the defendant?

22 MR. MCGORMLEY: No. No, there wasn't. But,
23 you know, the colloquy is relatively short. But no, I
24 believe the defendant's counsel could have objected.

25 JUSTICE KENNEDY: Well, there was a ruling

1 by the court: I hereby declare a mistrial. I suppose
2 you could have an objection, but it would be very -- the
3 jury was present when the judge said: I hereby declare
4 the mistrial.

5 MR. MCGORMLEY: Correct.

6 JUSTICE KENNEDY: So it would be rather
7 awkward for the counsel at that is point.

8 JUSTICE GINSBURG: There was no -- there was
9 no pause, you agree, between the foreperson's report and
10 the court then said immediately afterward: The jury is
11 dismissed. So there was no interval for an objection?

12 MR. MCGORMLEY: Well, it -- it would be
13 difficult for counsel to object at that point, but I
14 still think counsel could have made a record immediately
15 at that point.

16 JUSTICE ALITO: Why would it have been
17 difficult? Why would it be difficult for counsel to
18 say, may we have a sidebar, and say, Your Honor, I don't
19 think that there should be a mistrial, I think you
20 should ask the jury to deliberate further?

21 MR. MCGORMLEY: Well, that is possible and
22 that as seen in the Webb case as well, where the trial
23 court -- this is a circuit court --

24 JUSTICE STEVENS: What do you make of the
25 fact that in subsequent proceedings the prosecutor

1 acknowledged that the judge made a mistake?

2 MR. MCGORMLEY: In Michigan confessions of
3 error are controlled by court rule as a procedural
4 matter, and the appellate courts have the ability to
5 accept statements that could be qualified as a
6 confession of error or not. Here the Michigan Supreme
7 Court addressed this case on the merits, the underlying
8 double jeopardy merits. In much the same way, it did
9 not address potential waiver or consent issues by the
10 defendant. So we have a merits opinion here.

11 JUSTICE BREYER: There are thousands and
12 thousands of mistrials every year and hung juries are
13 not all that unusual. So in this case we have testimony
14 going on for 4 days, 10 hours total. And we have jury
15 deliberation of 4-1/2 hours, and we have really very
16 little -- I think you can argue it both ways that the
17 jury was deadlocked. There are some things for, some
18 against, only a couple.

19 And he doesn't consult with the lawyer, all
20 right. Now, in these thousands and thousands of cases
21 that must be there over the decades, you probably looked
22 through a few or at least talked to your fellow bar
23 members. How many have you found where you would say
24 that a mistrial was declared despite facts that are on
25 your side? In other words, there are going to be

1 millions of cases, not millions but thousands; many of
2 them will support the defense. Maybe many support you.
3 But I haven't seen any here that say they support you.
4 So how many do? And what do you want me to read to see
5 that this is not an extreme case that counts as an abuse
6 of the judge's discretion? How many did you find which
7 will prove to me this is not, this is closer to the
8 norm?

9 MR. MCGORMLEY: Well, the difficult part in
10 answering Your Honor's question is that this Court has
11 indicated that there is no mechanical formula or test.

12 JUSTICE BREYER: Correct. That's why I am
13 asking the question. What they've said is, is it an
14 abuse of discretion? And they've also said the judge
15 has to be careful. Okay, so we have like an abuse of
16 discretion scale and this is pretty far over on the
17 abuse of discretion side. I think anyone would admit.
18 But what cases will show to me that it's on your side,
19 not quite an abuse of discretion? Or is this the most
20 extreme case in history?

21 MR. MCGORMLEY: I don't believe it is, Your
22 Honor.

23 JUSTICE BREYER: I know you don't believe
24 it. All I want you to do is to give me some evidence,
25 like refer me to some other cases or explain to me how

1 you have come to that conclusion, not on the facts of
2 this case, but looking on the scale.

3 MR. MCGORMLEY: I reach that conclusion by
4 looking at this Court's other language, for instance --

5 JUSTICE BREYER: I don't want you to look at
6 this Court. We don't have a case where we said what was
7 an abuse of discretion. I want you to tell me -- and
8 I've already said this twice, but I am judging from your
9 answer you found no case supporting it. You have found
10 no case in the history of the United States that was
11 more extreme than this --

12 MR. MCGORMLEY: I have not --

13 JUSTICE BREYER: -- where they said it
14 wasn't an abuse of discretion. That's what I'm judging
15 from your answer.

16 MR. MCGORMLEY: I have not found a case on
17 these facts with a note indicating acrimonious
18 deliberations, that is correct.

19 JUSTICE BREYER: There is no note
20 indicating. There are five, there are notes they sent
21 out, and at 9:30 in the morning they said: Judge, we
22 have a concern about our voice levels, disturbing.
23 That's what they said. Then they asked to see the
24 evidence and they said: Explain Count 2.

25 Then they said: Are we allowed to break?

1 And then they said: What if we can't agree? Mistrial,
2 retrial, what? And at 12:27, the same time, they said:
3 What about lunch?

4 Then he brought them out and he says to the
5 juror: All right, do you believe it's hopelessly
6 deadlocked? And the foreperson said: The majority of
7 us don't believe that. And he said: Don't say what
8 you're going to say. And then he doesn't have the
9 lawyer there.

10 Okay, that's fairly extreme. So that's why
11 I ask the question.

12 MR. MCGORMLEY: But the reference there
13 about don't say what you're going to say is likely a
14 reference to don't give the breakdown of your verdict.

15 JUSTICE SCALIA: Mr. McGormley, is it your
16 burden to answer that question? Given AEDPA, is it up
17 to you to show that this case is within the mainstream
18 or is it up to the other side to show rather
19 conclusively that it is not in the mainstream? I
20 thought that's what AEDPA required.

21 MR. MCGORMLEY: It is Petitioner's burden.

22 JUSTICE SCALIA: It is Petitioner's burden
23 to show that there are cases like this, where I guess to
24 show that uniformly in cases like this, there is no
25 discharge of the jury. And I'm not aware that they have

1 carried that burden. But we will ask when they come up.
2 It is their burden, however.

3 JUSTICE BREYER: Exactly but I'm drawing
4 some conclusions from your silence. You haven't found a
5 case supporting it?

6 MR. MCGORMLEY: I haven't found a case on
7 these facts, but that's consistent --

8 JUSTICE SOTOMAYOR: Have you found any case
9 where a judge has declared a mistrial without conferring
10 with counsel, where the declaration was upheld?

11 MR. MCGORMLEY: Actually, there's one out of
12 the Sixth Circuit, Klein v. Leis, from this very
13 circuit, in which the individual -- it was not a
14 deadlocked jury case, but the individual had some sort
15 of stun or control belt on the defendant and he lifted
16 it up, and the trial court --

17 JUSTICE SOTOMAYOR: Well you can't read from
18 that one, because in that one it was -- the mistrial was
19 held, not because of a jury deadlock, but because of
20 improper prejudicial actions during the trial.

21 MR. MCGORMLEY: But that's --

22 JUSTICE SOTOMAYOR: Those are different
23 questions.

24 MR. MCGORMLEY: But it's still a manifest
25 necessity determination. In fact, this Court has

1 indicated that on the spectrum of reasons a deadlocked
2 jury warrants the least amount of appellate scrutiny.

3 JUSTICE SOTOMAYOR: Could you -- yes, but
4 that doesn't mean none.

5 What -- other than we have cases where
6 judges have declared mistrials because they are going on
7 vacation. Those are easy, okay?

8 But somewhere the word "abuse of discretion"
9 means that someone has discretion, but is improperly
10 exercising it. What facts would it take for you to
11 believe that that would have been the case? What do you
12 have to take out of this case to say, ah, that was --
13 that would have been an abuse of discretion? What
14 point? If he got the note and declared a mistrial, that
15 would be enough, right? Or would it?

16 MR. MCGORMLEY: Well, to best answer Your
17 Honor's question, I would point out again that in
18 Arizona this Court mentioned that examples being of
19 abuse of discretion or actions that cannot be condoned
20 are when the trial court acts irrationally,
21 irresponsibly, or for pretextual reasons. And in our
22 yellow brief we cited several cases where I would say
23 the Court was correct to find an abuse of discretion --
24 the Starling case in which the jury is giving a contrary
25 indication. The jury in the Starling case indicated

1 that, we are making progress and in fact can we have 15
2 more minutes; and the judge pulse them out and declares
3 a mistrial.

4 Your Honor's example then with the Gordy
5 case would be the imminent travel plans and docket
6 considerations.

7 We also have where the court acts sua
8 sponte, and that's where -- the Webb case, where the
9 trial court --

10 JUSTICE SOTOMAYOR: Why isn't that this one,
11 meaning the jury doesn't say, we are deadlocked,
12 hopelessly deadlocked, we cannot reach a verdict. It
13 asks: What happens if we don't? And the foreperson
14 hasn't conferred with the jury to determine whether or
15 not as a group they believe they are hopelessly
16 deadlocked. Why isn't this precipitous action?

17 MR. MCGORMLEY: Well, again, as I -- as I
18 mentioned, it's a reasonable view of the first note that
19 it is indicative of acrimony. It's a reasonable view of
20 the second note that it was indicative of a deadlock.

21 JUSTICE SCALIA: But again, that's --that's
22 not your burden. We are operating here under a statute
23 which says: "In a proceeding instituted by an
24 application for a writ of habeas corpus by a person in
25 custody pursuant to the judgment of a State court, a

1 determination of a factual issue made by a State court
2 shall be presumed to be correct. The applicant shall
3 have the burden of rebutting the presumption of
4 correctness by clear and convincing evidence."

5 Now, what is the factual
6 determination that has been made here? I assume it's
7 the factual determination that the jury was deadlocked.

8 MR. MCGORMLEY: That is correct.

9 JUSTICE SCALIA: And that has to be rebutted
10 by clear and convincing evidence, correct?

11 MR. MCGORMLEY: That's correct.

12 JUSTICE SCALIA: Why didn't you answer that
13 to those questions.

14 JUSTICE GINSBURG: But what is the status of
15 the -- the Allen charge in Michigan? Has Michigan taken
16 a position on whether that's a good thing, a permissible
17 thing for a trial court to do?

18 MR. MCGORMLEY: Well, a -- Michigan has
19 adopted the ABA standard. Michigan has the Instruction
20 3.12. It's not what we would call the traditional Allen
21 dynamite charge because it's not asking the minority to
22 give credence to the majority's opinion. So there is a
23 deadlocked jury instruction in Michigan. It's not the
24 traditional Allen dynamite charge.

25 JUSTICE GINSBURG: And that wasn't

1 requested, either?

2 MR. MCGORMLEY: Well, that was not -- that
3 was not done here. But again, I think it's reasonable,
4 understanding that this is a dual -- dual-layered
5 deference case, being a habeas case as well as the trial
6 court being -- having broad discretion to make this
7 determination, that when you have -- have the notes -- I
8 mean, it -- it may tell the -- the trial court may have
9 felt that giving an Allen charge when there's acrimony
10 may be telling those minority jurors that it doesn't
11 matter and that they may have to submit to the majority
12 opinion.

13 So I believe it was -- it was reasonable for
14 the Michigan Supreme Court here, applying AEDPA to -- to
15 conclude that the -- the trial court acted in
16 conformance with this --

17 JUSTICE STEVENS: May I ask you as a matter
18 of Michigan practice, could the trial judge have
19 interrogated the other jurors beyond the foreman and
20 asked them what they thought about whether there was a
21 deadlock?

22 MR. MCGORMLEY: I believe that is
23 permissible, though not constitutionally required.

24 JUSTICE STEVENS: Is there any reason -- do
25 you suppose there is any reason why he didn't do that?

1 MR. MCGORMLEY: I believe --

2 JUSTICE GINSBURG: She.

3 MR. MCGORMLEY: -- she, the trial judge --

4 JUSTICE STEVENS: He took the view of the
5 foreman, an answer to one question, and that was it; is
6 that right?

7 MR. MCGORMLEY: The --

8 JUSTICE STEVENS: His conclusion that there
9 was a deadlock was based on one question and one answer
10 of one of the jurors, and that was the whole record
11 supporting his decision; is that right?

12 MR. MCGORMLEY: Respectfully, no, Your
13 Honor. I believe it was based on the totality of the
14 circumstances, including the two previous notes and a
15 bifurcated question where --

16 JUSTICE STEVENS: Well, what other
17 circumstance is relevant? The fact that they raised
18 their voices during deliberation, certainly that -- that
19 doesn't cut any ice either way, does it?

20 MR. MCGORMLEY: Well -- oh, I believe it
21 does, because this Court has indicated in Arizona
22 that -- that acrimony is a concern. It's a
23 countervailing concern to balancing the interest of the
24 defendant having his case decided by a single tribunal
25 and fair and just judgments, as well as society having

1 one fair opportunity to vindicate its laws. So I think
2 it's very much an appropriate consideration.

3 JUSTICE SCALIA: Mr. McGormley, what
4 evidence was there to the effect that the jury was not
5 deadlocked?

6 MR. MCGORMLEY: None.

7 JUSTICE SCALIA: Which is presumably what
8 the other side has to prove by clear and convincing
9 evidence, if -- if we accept the factual finding of the
10 State court.

11 MR. MCGORMLEY: Correct. That's why it's
12 imperative to view this case in the habeas box that it
13 resides. And that is the Michigan Supreme Court made
14 reasonable factual determinations and did not
15 objectively unreasonably apply this Court's precedent.
16 And the fact that we may look at these notes and go one
17 way or the other means that the State wins. The State
18 should prevail, because it's a reasonable interpretation
19 of those notes. If one person may say, I don't know
20 that that really indicates deadlock and the Michigan
21 Supreme Court is looking at it and it's a reasonable
22 determination, then deference should apply and the State
23 should prevail.

24 JUSTICE GINSBURG: Mr. McGormley, do we have
25 any indication how long this trial judge was on the

1 bench when this trial came up?

2 MR. MCGORMLEY: How long in terms of serving
3 on the bench?

4 JUSTICE GINSBURG: Yes.

5 MR. MCGORMLEY: My recollection is that this
6 was an experienced trial judge who then went to either
7 civil arena from recorder's court or retired. So I
8 believe this was an experienced trial. I don't have the
9 exact years.

10 JUSTICE KENNEDY: Acrimony, I recognize we
11 have talked about it in Arizona, but it -- I mean, it
12 could be that the jurors had all agreed on the murder
13 count and they were just quarrelling over whether they
14 should add the firearms count, or the other way around.

15 MR. MCGORMLEY: Well, it -- it -- it gets
16 back to that fundamental --

17 JUSTICE KENNEDY: In which case they would
18 be much closer than -- than your comment about acrimony
19 might indicate.

20 MR. MCGORMLEY: Well, it gets back to the
21 fundamental principle that the trial court should be
22 able to take -- now, this is on the second, but the
23 initial layer of deference -- that the trial court
24 should be able to take the foreperson at her word when
25 she says that the jury is deadlocked, the jury is

1 deadlocked, especially -- especially in light of
2 these --

3 JUSTICE SOTOMAYOR: You can't say, can you,
4 that every time the jury records that it can't reach a
5 verdict or it hasn't reached a unanimous verdict, that
6 that's a legal deadlock requiring a mistrial, can you?

7 MR. MCGORMLEY: I do not assert that.

8 JUSTICE SOTOMAYOR: So obviously the word
9 "deadlock," and as I read the judge's questions, he
10 defined it merely as a disagreement as to the verdict.
11 And later he uses "hopelessly deadlocked," but changes
12 the question when he asks the foreperson to respond.

13 Isn't there a difference between hopelessly,
14 i.e., no further deliberations is likely to reach a
15 verdict, as opposed to you can't ever reach a verdict?

16 MR. MCGORMLEY: Well, I guess I don't quite
17 see the difference, because if the jury is in -- I -- I
18 think hopelessly deadlocked is probably a higher
19 standard than -- than genuinely deadlocked.

20 JUSTICE ALITO: That isn't what the judge
21 said just before she got the response. She said: Are
22 you going to reach a unanimous verdict or not?

23 MR. MCGORMLEY: Right. It's a bifurcated
24 question.

25 JUSTICE ALITO: And the foreperson said:

1 No, judge.

2 MR. MCGORMLEY: It's a bifurcated question,
3 correct. I mean, the -- the first one was regarding
4 confirming the nature of their note, and then, even with
5 the interruption, there are -- twice the court
6 approaches this inability to reach a unanimous verdict.

7 So again, here, what is paramount is that
8 it's the Michigan Supreme Court did not objectively
9 unreasonably apply this Court's clearly established
10 precedent. There -- there is no case that flatly
11 controls this case, other than the Braun-Perez standard.
12 In fact, the Sixth Circuit here created its own
13 three-part test, as we've indicated in our brief, when
14 they said that there are three considerations that
15 determine.

16 So when you take that three-part test, which
17 is not this Court's holdings and test on habeas, as well
18 as the second-guessing of those predicate factual
19 determinations being, well, the jury probably didn't
20 have enough time to even review the witnesses, juries
21 often report themselves deadlocked, we can't give as
22 much weight to this foreperson's statement, it's
23 contrary to these dual layers of deference.

24 And if there are no further questions, may I
25 reserve the balance of my time for rebuttal?

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.
2 Ms. -- Ms. McCowan.

3 ORAL ARGUMENT OF MARLA R. McCOWAN

4 ON BEHALF OF THE RESPONDENT

5 MS. McCOWAN: Mr. Chief Justice, and may it
6 please the Court:

7 Habeas relief was properly granted. I would
8 like to first answer Justice Ginsburg's somewhat easy
9 question for me. Judge Brown was sworn into service on
10 January 1st of 1991. At the time of this trial she had
11 been on the bench approximately 6-1/2 years. We are not
12 disputing her experience as a trial judge.

13 I do disagree with my friend's contention
14 that the Sixth Circuit articulated any specific test.
15 What the Sixth Circuit did was set forth some
16 considerations or some guidelines, including the first
17 of which, that the court heard the -- heard the opinions
18 of the parties. And that does go a long way, Justice
19 Kennedy, toward the idea that the judge is exercising
20 sound discretion.

21 CHIEF JUSTICE ROBERTS: What -- what would
22 be gained from that? I -- the parties, one says --
23 let's say one says yes and the other says no. You ought
24 to grant a mistrial, you shouldn't.

25 MS. McCOWAN: Well, at the very least, it

1 evidences that the trial judge at least considered that
2 there were -- that there competing interests and -- and
3 debated whether to -- to dismiss the jury, which is an
4 extraordinarily drastic remedy.

5 And instead, our position is that there
6 really is no down side to talking with counsel. You
7 would be able to have the benefit of the parties'
8 arguments.

9 CHIEF JUSTICE ROBERTS: Do people usually --
10 in your experience is there usually a clear breakdown
11 between prosecution and defense on a question like this?
12 My perhaps uninformed view is presumably the defense, if
13 they have got a deadlocked jury, they want that to
14 continue, because all they need is, you` know, one
15 holdout.

16 MS. McCOWAN: My -- my experience -- there
17 is a range of things that are going on. I'm sorry, I
18 can't -- I -- I think it just -- it just depends on a
19 variety of the circumstances. But yes, I think that the
20 case law generally presumes that the defendant does want
21 the first jury to deliberate to verdict.

22 JUSTICE SCALIA: Ms. -- Ms. McCowan, you are
23 -- you are arguing the case as -- as though the -- the
24 only question for us is whether it was an abuse of
25 discretion by the district judge -- by the trial judge

1 here.

2 That would certainly be the case if this is
3 coming up through the Federal system and we had a
4 Federal trial judge who had made this determination, but
5 it is not. It -- it is coming up from a State court and
6 Congress enacted a statute designed specifically to
7 reduce the interference of Federal courts with -- with
8 State justice. And that statute says specifically that
9 where there has been a factual finding by the State
10 court, it cannot be contradicted by -- by the Federal
11 courts unless it is refuted by clear and convincing
12 evidence.

13 Now, what clear and convincing evidence is
14 there here that there was not a deadlocked jury?

15 MS. McCOWAN: Well, first, I am not sure
16 that I understand -- I -- I disagree with the -- with
17 the premise that -- that there was a factual finding by
18 the trial court that the jury was in fact deadlocked.
19 The judge acquired or extracted the "no" answer and then
20 immediately declared a mistrial. The ruling that --

21 JUSTICE SCALIA: Well, what was the basis
22 for that declaration of mistrial?

23 MS. McCOWAN: Well, presumably on these
24 facts it would be that -- that -- her estimation that
25 the jury was deadlocked.

1 JUSTICE SCALIA: Right.

2 MS. McCOWAN: But there is no actual
3 specific ruling. And instead, what we are focused here
4 on is the Michigan Supreme Court's determination that
5 there was manifest necessity, and in the absence of the
6 trial judge exercising sound discretion, there is no --
7 the reason for the --

8 JUSTICE SCALIA: The Michigan Supreme
9 Court's determination is simply a determination of the
10 same fact: There was a manifest necessity because the
11 jury was deadlocked.

12 MS. McCOWAN: Well, my --

13 JUSTICE SCALIA: I mean, that factfinding is
14 implicit not -- not only in what the trial court did,
15 but also in the Michigan Supreme Court's decision.

16 MS. McCOWAN: My understanding of manifest
17 necessity is that that was a legal determination by the
18 Michigan Supreme Court, that there was -- according to
19 this Court's precedent, there was manifest necessity.

20 CHIEF JUSTICE ROBERTS: If the jury is
21 hopelessly deadlocked, is there a situation where that
22 would not constitute manifest necessity?

23 MS. McCOWAN: Typically, a genuinely and
24 hopelessly deadlocked jury does constitute --

25 CHIEF JUSTICE ROBERTS: So it does get back

1 to the factual determination of deadlock, correct?

2 MS. McCOWAN: Generally, yes -- yes, I
3 believe so. But in --

4 JUSTICE ALITO: The Michigan Supreme Court
5 cited four factors in support of its decision: the
6 length of the deliberations in relation to the
7 complexity of the case, the heated discussions among the
8 jurors, the fact most importantly that the foreperson
9 said that the jury would not be able to reach a
10 unanimous verdict, and the fact that there was no
11 objection by defense counsel.

12 Is there any decision in this Court that
13 says that under -- that in a case in which those four
14 factors are present, that the trial judge may not grant
15 a mistrial?

16 MS. McCOWAN: No, there are no specific
17 requirements.

18 JUSTICE ALITO: And is there -- could you
19 give us a long list of -- of lower court cases holding
20 that in a case where those four factors are present, a
21 trial judge may not grant a mistrial?

22 MS. McCOWAN: Well, no. But the law does
23 still require that the judge exercise sound discretion
24 in -- in making a determination that there --

25 JUSTICE ALITO: The question is when those

1 four factors are present, why are they not sufficient to
2 establish that the judge was exercising sound
3 discretion? Unless there is a decision of this Court or
4 perhaps a huge body of lower court case law, saying
5 that, no, even when those four factors are present you
6 may not grant a mistrial, how do you justify the
7 conclusion that you are asking us to draw?

8 MS. McCOWAN: Well, I -- I under -- I think
9 I understand the question. I do -- I do recognize that
10 there are no specific requirements, and that in the
11 absence of that, that there is nothing specific that the
12 trial judge was required to do beyond the exercise of
13 sound discretion. And in this case the judge -- the
14 record does not support that the judge did exercise
15 sound discretion.

16 JUSTICE BREYER: So can -- what -- what
17 is -- looking at -- can you take the converse of the
18 question I asked your colleague on the other side, if
19 you can remember it? I'll -- do you see what I'm -- on
20 the scale. I mean, this is a fairly simple case.

21 MS. McCOWAN: Right.

22 JUSTICE BREYER: What is wonderful about
23 this case is there is no disagreement about the facts.
24 We could write them in under two pages, just quoting
25 exactly the notes and exactly what the colloquy was and

1 note that the lawyer wasn't there. So there we are.

2 Now, imagine that in front of you. You --
3 it's easier for you to look up the cases than it is for
4 him, because you want to find reversals, and all you
5 have to do is you look and you try to see when the State
6 courts, Federal courts have said there was not manifest
7 necessity.

8 So I have some time. I will read some
9 cases. Which ones do you want me to read? And I don't
10 need to read the standard. I have the standard. And I
11 don't have to worry about -- I agree with the quotation
12 of the statute; you have the burden. And the question
13 is we have a record of those two pages, and does it
14 clearly show that he abused his discretion when he said
15 there was manifest necessity? Now, I will read --
16 whatever cases you tell me to read, I will read. But I
17 want to find facts and I'm not sure you found some,
18 either.

19 MS. McCOWAN: That's correct, Your Honor.

20 I --

21 JUSTICE BREYER: How could it be that there
22 are no cases? I mean really, thousands and thousands of
23 mistrials?

24 MS. McCOWAN: Indeed, there --

25 JUSTICE BREYER: How can it be that there

1 are no cases? Are reversals very, very rare for
2 manifest necessity?

3 MS. McCOWAN: Well, I -- I -- I did
4 undertake tremendous research, as did my staff, and I
5 did not find -- I mean, a short answer is I did not find
6 anything that looks even remotely as bad as this.

7 Now --

8 JUSTICE BREYER: Oh, that's good. Now, tell
9 me then what did you find? When you say "remotely as
10 bad," then you perhaps found some where contention was
11 rejected, or where contention -- what did you find?
12 What did you find by way of cases where they said on
13 facts as bad as this, or not quite as bad as this, there
14 was no manifest necessity?

15 MS. McCOWAN: Well, I guess the short answer
16 is that --- that there was nothing exactly on point. I
17 mean, there were -- there were cases where the judge
18 acted abruptly and hastily and then there were cases
19 where the judge did consider the -- the options of the
20 parties.

21 CHIEF JUSTICE ROBERTS: So the -- so the
22 proposition that what happened here is an abuse of
23 discretion cannot be said to be clearly established,
24 right?

25 MS. McCOWAN: Well, I don't think that it

1 has to be established at -- at a granular level. This
2 Court does require still that the -- that the trial
3 judge exercise sound discretion in making the
4 determination that there was manifest necessity. And
5 the case law --

6 CHIEF JUSTICE ROBERTS: You don't have
7 anything like this case that says this would be an abuse
8 of discretion?

9 MS. McCOWAN: Well, I -- I do believe that
10 this case looks something like -- *Jorn*, which is a
11 plurality opinion from this Court, where the trial judge
12 acted without warning, acted *sua sponte*, no warnings to
13 the parties whatsoever, and immediately declared a
14 mistrial; was acting irrationally, irresponsibly --

15 CHIEF JUSTICE ROBERTS: So the fact that
16 it's a plurality opinion means that it was not clearly
17 established by the decisions of this Court.

18 MS. McCOWAN: But in *Arizona v. Washington*
19 this Court quoted *Jorn* for the proposition that when the
20 trial judge acts irrationally and irresponsibly and
21 precipitously, that their action -- that their ruling
22 will not be upheld; and instead, sound discretion
23 requires that the trial judge act carefully and
24 deliberately.

25 JUSTICE SCALIA: But our -- but our cases

1 have required much -- much more than that, much more
2 than referring to a generalized standard that our
3 opinions have set forth. They have required proving
4 that the application of that standard in our opinions
5 comports with the provision of the statute that requires
6 you to show that the claim resulted in a decision that
7 was contrary to or involved in unreasonable application
8 of, clearly established Federal law, as determined by
9 the Supreme Court of the United States.

10 Now, our cases don't show that you can
11 simply come in and say, well, it's an abuse of
12 discretion standard, that was clearly established by the
13 Supreme Court of the United States, and therefore all I
14 have to show is that this is an abuse of discretion. I
15 don't think so. I think our cases show you have to show
16 that the standard as applied by our cases does not cover
17 your situation. And you don't have any cases like that.

18 MS. McCOWAN: Well, I do understand -- well,
19 I guess the best answer that I have for that is that,
20 why there are no cases, is maybe because -- I mean, I
21 don't know, but what I -- what I came up with or
22 theorized is that I think that for the most part trial
23 courts understand that this is a tremendous obligation
24 that they must exercise sound discretion. And for the
25 most part for 186 years this has pretty much worked.

1 JUSTICE SCALIA: That may be. That may well
2 be --

3 MS. McCOWAN: And there's nothing --

4 JUSTICE SCALIA: -- which says it's a
5 terrible statute, but there it is. It says it has to be
6 contrary to clearly established Federal law as
7 determined by the Supreme Court of the United States.
8 And you are saying, no, it's enough if it's established
9 by an unbroken line of lower court decisions. That's
10 not what the statute says.

11 JUSTICE GINSBURG: I thought your -- your
12 position was that everybody agrees on what the law is:
13 If there is a deadlock, a new trial is appropriate. So
14 there is no question about that statement of the law.
15 It's the fact question, was this a deadlock, and up
16 until now we have been talking about this, including
17 Justice Scalia, under the fact problem of AEDPA; that
18 is, have you shown by clear and convincing evidence.

19 JUSTICE STEVENS: Well, is it quite correct
20 to say the legal issue is whether there's a deadlock?
21 Isn't the legal issue whether there was a manifest
22 necessity to take the action? Isn't that the test?

23 MS. McCOWAN: Precisely, Your Honor.

24 JUSTICE STEVENS: And the argument is that
25 there was not a manifest necessity shown, even though

1 there was disagreement about whether there was a
2 deadlock, because all deadlocks are not exactly alike.

3 MS. McCOWAN: Precisely.

4 JUSTICE STEVENS: Some people think one --
5 there is one holdout, that means it's a deadlock. Some
6 people think it -- it might be more. I don't think the
7 test is deadlock. The test is manifest necessity.

8 MS. McCOWAN: I agree.

9 CHIEF JUSTICE ROBERTS: I thought you
10 answered an earlier question that I asked -- maybe I'm
11 -- maybe it was something I asked your friend, although
12 I doubt it, since it would help him -- that the issue
13 did come down to the factual determination of deadlock,
14 because if there is deadlock then there is manifest
15 necessity.

16 MS. McCOWAN: I'm sorry. I thought that,
17 when I answered that question, that you were asking if
18 typically, if the jury is genuinely deadlocked, does
19 that constitute an example of manifest necessity? I'm
20 sorry for the --

21 CHIEF JUSTICE ROBERTS: Right. So the case
22 comes down to whether or not this is a case of genuine
23 deadlock, right?

24 MS. McCOWAN: Well, no, I believe that the
25 case ultimately comes down to -- I am sorry if I

1 misspoke before. I believe that the case ultimately
2 comes down to whether the Michigan Supreme Court
3 unreasonably applied this Court's precedent in finding
4 that the trial judge exercised -- that there was
5 manifest necessity in the absence of the trial judge
6 exercising sound discretion.

7 CHIEF JUSTICE ROBERTS: With the layers --
8 with the two layers of deference worked into your
9 formulation. It's not simply whether the trial court
10 erred in the determination that there was a deadlock
11 that constitutes manifest necessity; it's whether or not
12 there was an abuse of -- of discretion for the trial
13 judge to so determine that we review under an additional
14 abuse of discretion standard.

15 MS. McCOWAN: Well, my understanding of 2254
16 is that it does take into consideration the contours of
17 the underlying constitutional violation, and it still is
18 our position that if the -- if the trial judge was not
19 exercising sound discretion, that it -- that it can't be
20 objectively unreasonable for the Michigan Supreme Court
21 to have found that, that that is necessarily
22 contemplated by 2254.

23 CHIEF JUSTICE ROBERTS: Doesn't our law
24 clearly establish the fact that the prosecution bears
25 the burden of showing there's manifest necessity, and if

1 there is an absence of evidence supporting that burden,
2 hasn't been -- hasn't been -- why isn't that the answer
3 to the case?

4 MS. McCOWAN: Well, that certainly sounds
5 fair. I don't want to quibble, but I think that the --
6 my understanding of the law is that when -- when there
7 is an objection by the defense, then the burden is on
8 the prosecution. In this case, there was no opportunity
9 to object. So I'm not sure that --

10 JUSTICE ALITO: Well, why is that -- why is
11 that so? If Mr. Gordon thought that this jury was
12 11-to-1 for acquittal, do you think he would have been
13 reluctant to ask for a sidebar and object to the
14 granting of a mistrial?

15 MS. McCOWAN: I think, yes, practically --
16 practically speaking, I think he probably would have
17 been reluctant to jump up and -- I mean, this is a
18 Friday afternoon and the judge has essentially released
19 them for the day.

20 JUSTICE GINSBURG: What does he have to lose
21 at that point? She has made the ruling and that's that
22 there is going to be a mistrial. The lawyer at that
23 point can say: Your Honor, I object, and moreover, I
24 would like you to give the Michigan version of the Allen
25 charge. Nothing stopped the lawyer from doing that.

1 MS. McCOWAN: Well, I think just as a
2 practical matter, having the jury hear that the defense
3 does not want the jury to leave, the potential for
4 prejudice would be tremendous. And as a practical
5 matter, I think that the parties would have been
6 reluctant to do that. And I think --

7 JUSTICE ALITO: Are you really saying that?
8 You're saying that a lawyer in your office defending a
9 client who thinks that the jury is leaning, is 11-to-1
10 for acquittal, and the judge says, well, we're going to
11 have a mistrial and the acquittal is going out the
12 window, the lawyer is going to be reluctant to say:
13 Judge, may we have a sidebar, and then go to the sidebar
14 and object to the granting of a mistrial?

15 MS. McCOWAN: Well, I -- I'm not sure how we
16 -- we would know on these facts that the jury was 11-to-
17 1 for acquittal.

18 JUSTICE ALITO: Well, I'm not suggesting
19 that they were or they weren't. I'm just asking about
20 what defense counsel would do in that situation. Maybe
21 they are more timid in Michigan than the ones I'm
22 familiar with. I would think that they would not be
23 hesitant to raise an objection if they thought it was
24 going to prejudice the client.

25 MS. McCOWAN: I certainly would hope so as

1 well. But here I think that it was all just done just
2 so fast and without warning and truly without any
3 opportunity to object. And so for that reason, I -- I
4 think that the lack of objection really doesn't do
5 anything to fortify the conclusion that there was
6 manifest necessity in these facts. Instead --

7 CHIEF JUSTICE ROBERTS: What -- what -- I'm
8 sorry. Please finish your sentence.

9 MS. McCOWAN: No.

10 CHIEF JUSTICE ROBERTS: Okay. What other
11 explanation is there for a note saying "Are we being too
12 loud," other than that there was some degree of acrimony
13 on the jury?

14 MS. McCOWAN: Well, I don't think that the
15 Michigan Supreme Court even made a specific finding that
16 the jury had become -- had completely devolved at that
17 point and they were no longer -- I think that --

18 CHIEF JUSTICE ROBERTS: No, you don't
19 dispute the fact that a note came out saying, Are we
20 being too loud?

21 MS. McCOWAN: Not at all.

22 CHIEF JUSTICE ROBERTS: Well, what would
23 that indicate other than that there was some degree of
24 acrimony?

25 MS. McCOWAN: I think it just also indicates

1 they maybe they just don't want anybody to hear them and
2 they want to make sure that they are not being
3 overheard, and that, you know, they have some privacy in
4 their deliberations and freedom to, you know, engage
5 in a -- in a free debate, as loud as they want to be.

6 I don't think that there is -- I mean, I
7 suppose what I'm trying to say, however inartfully, is
8 that I don't think we can do anything other than just
9 take that note at face value. They send out a note
10 saying: We have a concern that our voice levels may be
11 disturbing the other proceedings. That's it. It did
12 not --

13 JUSTICE SCALIA: Well, maybe that's right
14 and maybe it's wrong, but the State courts thought that
15 it was evidence of acrimony, which it could be. And you
16 say: Well, it also couldn't be. That may well be. But
17 we are bound to accept the factual determination of the
18 State court, unless you can show by clear and convincing
19 evidence that that's wrong.

20 MS. McCOWAN: I'm not sure -- I mean, maybe
21 I am just not understanding the Michigan Supreme Court
22 opinion, but I don't know that they actually made a
23 finding that that was, in fact, evidence of acrimony.

24 I thought that the Michigan Supreme Court
25 said that may indicate that they perhaps had become --

1 that the deliberations had become acrimonious. And I --
2 and I think that that's a credible point.

3 JUSTICE SCALIA: Don't waste your time. I
4 will look for it.

5 MS. McCOWAN: I'm sorry.

6 JUSTICE SCALIA: Don't waste your argument
7 time. I will look for it.

8 JUSTICE SOTOMAYOR: Counsel, there is no
9 case in our jurisprudence with identical or nearly
10 identical facts, so this is not under the "contrary to"
11 prong of 24 -- of 2254(d)(1).

12 So it has to be under the "unreasonable
13 application." Particularly for me, what Supreme Court
14 precedent do you think was unreasonably applied, and
15 explain how and why?

16 MS. McCOWAN: I think Arizona v. Washington
17 clearly establishes the law that the trial judge must
18 exercise sound discretion in finding a manifest
19 necessity. And in this case, on these facts, it was
20 objectively unreasonable for the Michigan Supreme Court
21 to have found that there was manifest necessity in the
22 absence of any discretion being exercised whatsoever by
23 the trial judge.

24 JUSTICE KENNEDY: And in that case, one of
25 the specific factors was that he consulted with -- the

1 judge consulted with counsel before making the ruling?

2 MS. McCOWAN: In this case, that he -- that
3 the trial judge failed?

4 JUSTICE KENNEDY: In -- in Arizona.

5 MS. McCOWAN: Oh, right. In -- right,
6 exactly. In Arizona v. Washington, what this Court had
7 found is that -- that the judge did exercise discretion;
8 that was -- that was evidenced by the judge giving the
9 parties an opportunity to weigh in on it.

10 JUSTICE GINSBURG: That's a little shaky as
11 precedent for -- that -- that was a case that said: The
12 trial judge did right and no double jeopardy for a new
13 trial. But in passing, to get there, the Court said:
14 Well, this case didn't involve that. But the Court
15 isn't passing on anything other than the trial judge in
16 that case didn't violate defendant's right.

17 MS. McCOWAN: But I thought that this Court
18 did say that in any mistrial declaration, the trial
19 judge is obligated to still exercise sound discretion,
20 and a review in court must satisfy itself that, in
21 accordance with Perez, that the judge did in fact
22 exercise sound discretion in finding that there was
23 manifest necessity.

24 And I think that this case looks different
25 from Washington and may be similar to what was going on

1 in Jorn, where the judge acted without warning, without
2 any opportunity for the parties to weigh in on the
3 matter, and simply declared a mistrial, which this Court
4 found to be irrational, irresponsible, and precipitous.
5 And we --

6 JUSTICE ALITO: So are you suggesting that
7 whenever the trial judge abuses his or her discretion in
8 granting a mistrial, there can be relief under AEDPA?
9 It is clearly established that whenever there is an
10 abuse of discretion, relief can be granted under AEDPA.
11 It is an unreasonable application of our precedent?

12 MS. McCOWAN: I'm sorry. Just to clarify.
13 You are saying if the trial judge abused -- in fact
14 abuses his discretion?

15 JUSTICE ALITO: Right.

16 MS. McCOWAN: Yes. I think that if the
17 Michigan -- on these facts, for the Michigan Supreme
18 Court to have found that there -- that there was
19 manifest necessity in the absence of the judge
20 exercising any discretion whatsoever, that that was in
21 fact, an unreasonable application of this Court's
22 precedent.

23 JUSTICE SCALIA: So the standard of review
24 for setting aside a determination of the State Supreme
25 Court is exactly the same as the standard of review for

1 reviewing a Federal district court and a Federal court
2 of appeals despite AEDPA? We simply look and see
3 whether there has been an abuse of discretion. If there
4 has, we set aside the State Supreme Court judgment?

5 MS. McCOWAN: No, I'm sorry. To clarify, it
6 still has to be whether -- we are looking at the
7 Michigan Supreme Court's decision here. We are in -- on
8 habeas, you are looking at the last reasoned State
9 court's opinion.

10 And if the State supreme court -- the last
11 reasoned court opinion says -- makes an objectively
12 unreasonable determination, under this Court's clearly
13 established precedent then relief will be warranted.

14 JUSTICE SCALIA: But it's objectively
15 unreasonable, you say, whenever there has been an abuse
16 of discretion by the -- by the trial court, right?

17 MS. McCOWAN: Well, if the trial judge does
18 not exercise any discretion whatsoever and acts
19 irrationally, irresponsibly, and precipitously, I
20 believe that relief would be warranted, even under
21 habeas review.

22 JUSTICE SCALIA: So it's not just abuse of
23 discretion; it's abuse of discretion plus something
24 else? Plus what?

25 MS. McCOWAN: Well, it's -- it's whether the

1 Michigan -- whether the -- the decision under review,
2 whether it was an objectively unreasonable determination
3 of this Court's precedent.

4 CHIEF JUSTICE ROBERTS: So you -- you do
5 agree that there could be situations where a Federal
6 court on direct review would find abuse of discretion,
7 and yet a court on habeas under AEDPA would say that
8 that has to stand?

9 MS. McCOWAN: Yes. And I want to clarify.
10 I think my understanding is that it's not just whether
11 this Court disagrees. It does still has to be an
12 objectively unreasonable determination. So it's not
13 just simply whether -- whether this Court or any habeas
14 court reviewing it would come to a different conclusion.
15 It still has to be objectively unreasonable.

16 CHIEF JUSTICE ROBERTS: So there are a
17 category of cases where a Federal court could look at it
18 and say, that's an abuse of discretion, but that same
19 court reviewing it under habeas would say you are not
20 entitled to relief under AEDPA?

21 MS. McCOWAN: I think that that is right.

22 JUSTICE SCALIA: But "objectively
23 unreasonable" is already built into the criterion of
24 abuse of discretion. You don't abuse your discretion if
25 what you have done is reasonable, you know, within the

1 ballpark. It seems to me you are doubling up here.
2 I -- I don't -- I don't understand how it works.

3 MS. McCOWAN: Well, our argument is that the
4 trial court was not in the ballpark here. The trial
5 court in this case did not exercise any discretion
6 whatsoever, let alone sound discretion.

7 CHIEF JUSTICE ROBERTS: How can you say
8 that? I mean, you may think the discretion was abused,
9 but it's not like he just suddenly announced there was
10 going to be a mistrial. He exercised discretion. He
11 looked at the note, he asked the question, he's -- are
12 you hopelessly deadlocked? Are you going to be able to
13 reach a unanimous verdict?

14 And he was able to rely on the fact that
15 they had previously sent out a note saying, are we being
16 too loud, and the fact he knew, 4-1/2 hours on a case in
17 which there were 10 hours of testimony.

18 I mean, I understand your argument that he
19 abused his discretion, but I don't understand the
20 argument that he didn't exercise discretion at all.

21 MS. McCOWAN: Well, my -- my argument is
22 that the judge was not exercising sound discretion
23 because she was not responsibly gathering the facts.
24 She reached the conclusion that the jury was genuinely
25 deadlocked before she even asked a single question. She

1 got a -- a note from the jury --

2 CHIEF JUSTICE ROBERTS: No, she asked the
3 foreperson a question.

4 MS. McCOWAN: But if I could just back up a
5 couple lines, she received the note saying: What if we
6 can't agree. And she said: I have to conclude from
7 that, that that is your situation at this time.

8 So she had already reached the conclusion
9 that they were deadlocked before even asking a single
10 question. And then from there she -- she misdefines,
11 for lack of a better description -- she conflated mere
12 disagreement with deadlock, never corrected that --
13 that -- that erroneous definition. And she corralled
14 the -- the foreperson in a matter of seconds --

15 CHIEF JUSTICE ROBERTS: Where did -- where
16 did -- I'm sorry. Where did she conflate the two things
17 you said she conflated, deadlocked and the other thing?
18 What was it, inability to --

19 MS. McCOWAN: I'm in the petition appendix
20 at page 94a, where she says -- I'm sorry; at the bottom
21 of 93a. She said: "I need to ask if the jury is
22 deadlocked? In other words, is there a disagreement as
23 to the verdict?"

24 Disagreement is not --

25 CHIEF JUSTICE ROBERTS: Well, but you got to

1 read down further. She says: "Are you going to reach a
2 unanimous verdict or not?" And the foreperson says
3 "No."

4 MS. McCOWAN: But in the absence of an
5 expression of deadlock from the entire jury, on these
6 facts in this case, it was unreasonable for the Michigan
7 Supreme Court to find that that satisfied the trial
8 judge's obligation to exercise sound discretion. At a
9 minimum, the trial judge is required to responsively
10 gather the facts.

11 In this case, she -- she acted hastily and
12 precipitously and without regard for my client's right
13 to have this first jury deliberate to a verdict. She
14 declared a mistrial at the very first sign of
15 disagreement and did not give anybody an opportunity to
16 weigh in on that before she declared --

17 CHIEF JUSTICE ROBERTS: Well, just -- with
18 respect, it's not the very first sign of disagreement.
19 Reasonably interpreting, a note saying "Are we being too
20 loud" is a sign of disagreement. And there is another
21 note that comes out: "What happens if we can't agree?"
22 You are making it sound more precipitous than it was.

23 MS. McCOWAN: Well --

24 JUSTICE STEVENS: Also you are ignoring the
25 fact the first time the question was asked, do you

1 believe it was hopelessly deadlocked and the foreperson
2 said the majority of us don't believe that. And then
3 later --

4 CHIEF JUSTICE ROBERTS: Oh, no, no. I'm
5 sorry.

6 JUSTICE STEVENS: -- and there is a period,
7 in the opinion of the supreme court after we don't
8 believe that.

9 CHIEF JUSTICE ROBERTS: There is not a
10 period on page 7 of the Petitioner's brief. Is that a
11 mistake? There's a --

12 MS. McCOWAN: I thought there was a dash.

13 CHIEF JUSTICE ROBERTS: -- dash. And -- and
14 could the court be concerned that the person was about
15 to say, and again with deference to the court, "The
16 majority -- majority of us don't believe that" -- that
17 the defendant is guilty, that the defendant is innocent.
18 Wasn't the judge quite correct to stop her right there?

19 MS. McCOWAN: Well, it may be correct to
20 stop her right there, but there is other ways to figure
21 out exactly what the foreperson was trying to explain.
22 And if she was trying to say, well, the majority of us
23 think we can keep going, then it was -- it was incumbent
24 upon the trial judge to -- to do more.

25 CHIEF JUSTICE ROBERTS: Isn't that exactly

1 what she did? After that he says don't tell me what you
2 are going to -- or don't tell me what you are going to
3 say. I don't want to know what your verdict might be or
4 how the split is or anything like that, are you going to
5 reach a unanimous verdict? She did go on after that --

6 JUSTICE STEVENS: The foreperson did not
7 immediately answer. She had to ask a second question,
8 yes or no. And the foreperson answered for herself but
9 not necessarily for the jury when she said no.

10 MS. McCOWAN: I think that's right. And I
11 think --

12 CHIEF JUSTICE ROBERTS: How -- how do you
13 know she answered for herself? The judge was talking --
14 she can't reach a unanimous verdict by herself. She is
15 answering for the jury.

16 MS. McCOWAN: I -- I think that really at
17 best, though -- given the circumstances of this case, at
18 best that was an expression of the foreperson's opinion,
19 that the jury would not likely be able -- but that is
20 not a statement.

21 JUSTICE SCALIA: Do you always have to poll
22 the jury, is that what you are saying is a requirement?

23 MS. McCOWAN: No, it's not -- it's not --

24 JUSTICE SCALIA: I am not aware that you
25 would always have to poll the jury, and I could see some

1 real disadvantages to it as a matter of fact. It
2 perhaps puts more pressure on those who are the -- the
3 holdouts, it identifies, in some cases, whose are the
4 holdouts. I'm not aware that that's a requirement.

5 MS. McCOWAN: It's certainly not a
6 requirement and we were not saying that it is a
7 requirement. But on these facts when the jury has
8 simply sent the foreperson out to gather more
9 information, the trial judge was required to, in some
10 way, either -- either assure itself that the -- that the
11 jury as a whole did agree with the foreperson's
12 expression --

13 JUSTICE ALITO: You don't think it's a fair
14 inference from the note that the jury was stuck? Do you
15 think it's -- it's likely that they were just curious
16 and they were rolling along just fine, but they were
17 just curious, well, what if it happens after we
18 deliberated a little more if we can't reach a -- a
19 verdict? We just have a curiosity about that? Do you
20 think that's a fair inference from that note?

21 MS. McCOWAN: I think all that is fair is
22 that they were just trying to gather more information.
23 And that they -- but there is no --

24 JUSTICE ALITO: You don't think there's
25 an -- you can draw an inference fairly that they were --

1 that there was substantial disagreement?

2 MS. McCOWAN: No, I don't think that that
3 necessarily means that there is substantial
4 disagreement. They might have been having trouble.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 Ms. McCowan.

7 Mr. McGormley, you have three minutes
8 remaining.

9 REBUTTAL ARGUMENT OF JOEL D. MCGORMLEY

10 ON BEHALF OF THE PETITIONER

11 MR. MCGORMLEY: Thank you. Two brief
12 points. It is a Petitioner's burden to establish --
13 clearly establish precedent here that was objectively --

14 CHIEF JUSTICE ROBERTS: You mean Respondent,
15 right?

16 MR. MCGORMLEY: I'm sorry?

17 CHIEF JUSTICE ROBERTS: You are -- you are
18 the Petitioner.

19 MR. MCGORMLEY: I'm sorry, it -- it -- I'm
20 sorry, Mr. Lett -- Mr. Lett's burden to demonstrate that
21 there is clearly established precedent that was
22 objectively and unreasonably applied.

23 To Justice Breyer, your question although
24 not exact fact patterns and that is what I was
25 struggling with, I would point in our blue brief to

1 Hernandez-Guardado and Lindsay v. Smith, two cases in
2 which -- circuit cases, granted, but two cases in which
3 involved jury deadlocks and counsel was not asked a
4 question.

5 JUSTICE BREYER: And those are the ones --
6 so as I'm seeing this case, it isn't that complicated.
7 You know, it's pretty clear what the standard is. The
8 standard is, was the decision of the -- of the State
9 court reasonable in deciding that there was a sound --
10 sound -- the words come from nine wheat, that's --
11 that's, you know, like 100 years ago or something.

12 MR. MCGORMLEY: 186.

13 JUSTICE BREYER: 186 years ago when it was
14 something like "sound, careful, exercise patience" -- or
15 whatever, "the sound, careful exercise of discretion."
16 They said there was. And the question for us is, was
17 that reasonable? Okay? I guess if the judge had said,
18 "Hey, we have only been deliberating half an hour and
19 the game starts in five minutes, I've got to get
20 there -- dismissed," that would be unreasonable.

21 (Laughter.)

22 JUSTICE BREYER: Objectively unreasonable.
23 So come as close as you can to that, where they held
24 reasonable, and what case is it?

25 MR. MCGORMLEY: Well --

1 JUSTICE GINSBURG: Mr. McGormley, you have
2 stressed throughout that it's not -- not the question
3 that Justice Breyer put, but there are two -- you have
4 emphasized the two screens. This comes to us after we
5 have the trial court ruling and the Michigan Supreme
6 Court ruling. So the case isn't all that easy, without
7 making the judgment as though it were coming up in the
8 Federal system.

9 MR. MCGORMLEY: Correct, Justice Ginsburg,
10 this is not a very easy --

11 JUSTICE STEVENS: May I ask you, do you
12 think the most relevant precedent from this Court --
13 would you agree that the most relevant precedent from
14 this Court is Arizona v. Washington?

15 MR. MCGORMLEY: I would not. And I --

16 JUSTICE STEVENS: Why not?

17 MR. MCGORMLEY: The reason why, Justice
18 Stevens, is because Arizona was not even a deadlocked
19 jury case. And there is language that helps flesh out
20 what an abuse of discretion would be.

21 JUSTICE STEVENS: What do you think the most
22 relevant precedent from this Court is?

23 MR. MCGORMLEY: Perez.

24 CHIEF JUSTICE ROBERTS: Do you have an
25 answer to Justice Breyer's question? It was sometime

1 ago, but --

2 (Laughter.)

3 MR. MCGORMLEY: My best answer, Justice
4 Breyer, is that the best cases I have are -- are
5 those -- are those two, because this -- this Court has
6 never overruled a manifest necessity determination due
7 to a deadlocked jury.

8 JUSTICE SOTOMAYOR: Are you suggesting that
9 you need a precedent overruling a lower court decision
10 before we could declare that something was
11 unreasonable -- that our precedent was unreasonably
12 applied?

13 MR. MCGORMLEY: No, my point is that -- is
14 in the 186 years since Perez it's never happened. It
15 does not happen. And that is consistent with the broad
16 discretion and special respect --

17 JUSTICE SOTOMAYOR: But that could also be
18 consistent with the fact that Perez was clear enough
19 that judges have to act slowly and --and with thought,
20 and that lower courts are catching those when they are
21 not. I mean, I don't know how it cuts, is what I'm
22 saying.

23 MR. MCGORMLEY: Well, I -- I think it is
24 indicative of the fact that this has never happened --
25 this has never happened before.

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Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

The case is submitted.

(Whereupon, at 11:05 a.m., the case in the
above-entitled matter was submitted.)

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