IN THE SUPREME COURT OF THE UNITED STATES

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PAUL RENICO, WARDEN, :

Petitioner : No. 09-338

v. :

REGINALD LETT :

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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.

C O N T E N T S

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

deliberations.

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

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

MR. McGORMLEY: Well, Justice Sotomayor, the first note was the note regarding our raised voices disturbing other proceedings. The second note regards --

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

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

JUSTICE SOTOMAYOR: Did anybody hear the

voices?

MR. McGORMLEY: The record doesn't disclose, doesn't disclose that.

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

MR. McGORMLEY: Well --

JUSTICE SOTOMAYOR: -- show that activity?

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

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

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

finding due deference under (e)(1).

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

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

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

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

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

MR. McGORMLEY: I don't necessarily believe it was a reluctant no.

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

MR. McGORMLEY: That's correct, Justice Scalia.

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

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

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

After the foreperson said: No, Judge, we

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

MR. McGORMLEY: Correct, Your Honor.

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

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

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

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

Is that good practice?

MR. McGORMLEY: It may be good practice, but the question becomes whether it's constitutionally required.

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

MR. McGORMLEY: I would say -- well, in this Court --

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

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

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

MR. McGORMLEY: Absolutely. And here -- and here's why.

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

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

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

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

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

MR. McGORMLEY: Correct. Under Dennis, if the defendant consents, then there is no double jeopardy.

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

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

JUSTICE KENNEDY: Well, there was a ruling

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

MR. McGORMLEY: Correct.

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

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

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

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

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

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

acknowledged that the judge made a mistake?

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

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

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

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

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

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

MR. McGORMLEY: I don't believe it is, Your Honor.

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

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

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

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

MR. McGORMLEY: I have not --

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

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

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

Then they said: Are we allowed to break?

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

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

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

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

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

MR. McGORMLEY: It is Petitioner's burden.

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

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

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

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

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

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

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

MR. McGORMLEY: But that's --

JUSTICE SOTOMAYOR: Those are different questions.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. McGORMLEY: That is correct.

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

MR. McGORMLEY: That's correct.

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

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

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

JUSTICE GINSBURG: And that wasn't

requested, either?

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

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

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

MR. McGORMLEY: I believe that is permissible, though not constitutionally required.

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

MR. McGORMLEY: I believe --
JUSTICE GINSBURG: She.
MR. McGORMLEY: -- she, the trial judge --
JUSTICE STEVENS: He took the view of the foreman, an answer to one question, and that was it; is that right?
MR. McGORMLEY: The --
JUSTICE STEVENS: His conclusion that there was a deadlock was based on one question and one answer of one of the jurors, and that was the whole record supporting his decision; is that right?
MR. McGORMLEY: Respectfully, no, Your Honor. I believe it was based on the totality of the circumstances, including the two previous notes and a bifurcated question where --
JUSTICE STEVENS: Well, what other circumstance is relevant? The fact that they raised their voices during deliberation, certainly that -- that doesn't cut any ice either way, does it?
MR. McGORMLEY: Well -- oh, I believe it does, because this Court has indicated in Arizona that -- that acrimony is a concern. It's a countervailing concern to balancing the interest of the defendant having his case decided by a single tribunal and fair and just judgments, as well as society having

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

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

MR. McGORMLEY: None.

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

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

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

bench when this trial came up?

MR. McGORMLEY: How long in terms of serving on the bench?

JUSTICE GINSBURG: Yes.

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

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

MR. McGORMLEY: Well, it -- it -- it gets back to that fundamental --

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

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

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

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

MR. McGORMLEY: I do not assert that.

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

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

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

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

MR. McGORMLEY: Right. It's a bifurcated question.

JUSTICE ALITO: And the foreperson said:

No, judge.

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

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

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

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Ms. -- Ms. McCowan.

ORAL ARGUMENT OF MARLA R. McCOWAN

ON BEHALF OF THE RESPONDENT

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

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

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

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

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

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

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

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

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

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

here.

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

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

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

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

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

JUSTICE SCALIA: Right.

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

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

MS. McCOWAN: Well, my --

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

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

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

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

CHIEF JUSTICE ROBERTS: So it does get back

to the factual determination of deadlock, correct?

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

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

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

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

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

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

JUSTICE ALITO: The question is when those

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

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

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

MS. McCOWAN: Right.

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

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

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

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

MS. McCOWAN: That's correct, Your Honor. I --

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

MS. McCOWAN: Indeed, there --

JUSTICE BREYER: How can it be that there

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

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

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

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

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

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

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

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

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

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

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

JUSTICE SCALIA: But our -- but our cases

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

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

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

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

MS. McCOWAN: And there's nothing --

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

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

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

MS. McCOWAN: Precisely, Your Honor.

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

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

MS. McCOWAN: Precisely.

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

MS. McCOWAN: I agree.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MS. McCOWAN: I certainly would hope so as

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

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

MS. McCOWAN: No.

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

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

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

MS. McCOWAN: Not at all.

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

MS. McCOWAN: I think it just also indicates

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

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

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

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

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

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

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

MS. McCOWAN: I'm sorry.

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

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

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

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

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

judge consulted with counsel before making the ruling?

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

JUSTICE KENNEDY: In -- in Arizona.

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

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

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

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

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

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

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

JUSTICE ALITO: Right.

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

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

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

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

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

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

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

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

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

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

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

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

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

MS. McCOWAN: I think that that is right.

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

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

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

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

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

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

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

got a -- a note from the jury --

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

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

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

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

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

Disagreement is not --

CHIEF JUSTICE ROBERTS: Well, but you got to

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

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

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

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

MS. McCOWAN: Well --

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

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

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

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

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

MS. McCOWAN: I thought there was a dash.

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

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

CHIEF JUSTICE ROBERTS: Isn't that exactly

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

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

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

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

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

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

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

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

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

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

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

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

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

that there was substantial disagreement?

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

CHIEF JUSTICE ROBERTS: Thank you, Ms. McCowan.

Mr. McGormley, you have three minutes remaining.

REBUTTAL ARGUMENT OF JOEL D. McGORMLEY
ON BEHALF OF THE PETITIONER

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

CHIEF JUSTICE ROBERTS: You mean Respondent, right?

MR. McGORMLEY: I'm sorry?

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

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

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

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

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

MR. McGORMLEY: 186.

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

(Laughter.)

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

MR. McGORMLEY: Well --

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

MR. McGORMLEY: Correct, Justice Ginsburg, this is not a very easy --

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

MR. McGORMLEY: I would not. And I --

JUSTICE STEVENS: Why not?

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

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

MR. McGORMLEY: Perez.

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

ago, but --

(Laughter. )

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

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

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

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

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

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.)