No. 22-721

IN THE

Supreme Court of the United States

DAMIAN MCELRATH,

Petitioner,

v.

GEORGIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF OF *AMICUS CURIAE* GEORGIA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS (GACDL) IN SUPPORT OF PETITIONER

HUNTER RODGERS
Chair, GACDL Amicus Committee
J. RYAN BROWN LAW, LLC
60 Salbide Avenue
Newnan, GA 30263

V. NATASHA PERDEW SILAS
President, GACDL
FEDERAL DEFENDER PROGRAM INC.
Centennial Tower
101 Marietta Street NW, Suite 1500
Atlanta, GA 30303

GREG WILLIS
Counsel of Record
JESSICA JONES
CASEY A. CLEAVER
WILLIS LAW FIRM
6000 Lake Forrest Drive, Suite 375
Atlanta, GA 30328
(404) 835-5553
gw@willislawga.com

Counsel for Amicus Curiae

319217

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page

Cases

Cited Authorities

Cited Authorities

Constitutional Provisions

Miscellaneous

INTEREST OF *AMICUS CURIAE* GACDL

The Georgia Association of Criminal Defense Lawyers (GACDL) is a private, member-funded statewide organization comprised largely of criminal defense lawyers.[1] Its mission is to promote fairness and justice through member education, services and support, public outreach, and a commitment to quality representation for all. Consistent with its mission, GACDL has a particular interest in the proper application and development of Georgia's criminal law. This appeal involves an important constitutional question that will continue to have adverse consequences for criminal defendants in Georgia until it is reversed by this Court.

SUMMARY OF ARGUMENT

Damian McElrath was tried by a jury of his peers. The jury found McElrath not guilty of malice murder by reason of insanity and guilty but mentally ill of felony murder and aggravated assault. The Georgia Supreme Court vacated Damian McElrath's acquittal in *McElrath v. Georgia*, 839 S.E. 573 (Ga. 2020) ("*McElrath I*"). In doing so, the court created its own "state-law-based legal fiction that treats the jury's verdict as though it never happened." *McElrath v. Georgia*, 880 S.E.2d 518, 523 (Ga. 2022) ("*McElrath II*") (Pinson, J., concurring).

---

1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. *Amicus* provided timely notice to the parties of its intent to file its brief, per Rule 37.2.

The opinions of the Georgia Supreme Court in *McElrath I* and *McElrath II* stand in stark contrast to this Court's consistent adherence to the "universal and humane principle of criminal law 'that no man shall be brought into danger more than once for the same offense.'" *Ball v. United States*, 163 U.S. 662, 668 (1896). "Perhaps the most fundamental rule in the history of double jeopardy jurisprudence has been that '(a) verdict of acquittal . . . could not be reviewed, on error or otherwise, without putting (a defendant) twice in jeopardy, and thereby violating the Constitution.'" *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977) (citing *Ball*, 163 U.S. at 671).

> Fear and abhorrence of governmental power to try people twice for the same conduct is one of the oldest ideas found in western civilization. Its roots run deep into Greek and Roman times. Even in the Dark Ages, when so many other principles of justice were lost, the idea that one trial and one punishment were enough remained alive through the canon law and the teachings of the early Christian writers. By the thirteenth century it seems to have been firmly established in England, where it came to be considered as a 'universal maxim of the common law.' It is not surprising, therefore, that the principle was brought to this country by the earliest settlers as part of their heritage of freedom, and that it has been recognized here as fundamental again and again. …
>
> While some writers have explained the opposition to double prosecutions by emphasizing

> the injustice inherent in two punishments for the same Act, and others have stressed the dangers to the innocent from allowing the full power of the state to be brought against them in two trials, the basic and recurring theme has always simply been that it is wrong for a man to 'be brought into Danger for the same Offence more than once.' Few principles have been more deeply 'rooted in the traditions and conscience of our people.'
>
> *Bartkus v. People of State of Ill.*, 359 U.S. 121, 151–554 (1959) (Black, J., dissenting) (footnotes omitted).

The precedent established by the Georgia Supreme Court in this case is violative of the fundamental constitutional protections against governmental oppression. If the court's opinion is not reversed, criminal defendants, including Damian McElrath, may be retried on charges they have already been acquitted of. "[T]he Government with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense. This truth is expressed in the three common-law pleas of *autrefois acquit*, *autrefois convict*, and pardon, which lie at the core of the area protected by the Double Jeopardy Clause." *United States v. Scott*, 437 U.S. 82, 96 (1978).

Permitting the government to retry a criminal defendant despite their acquittal, "'thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though

innocent he may be found guilty[,]'" is a double jeopardy violation of the most basic sort. *Serfass v. United States*, 420 U.S. 377, 388 (1975) (citations omitted).

Inconsistent verdicts are a common occurrence. Under *McElrath I,* any inconsistent verdict may now be considered "repugnant," meaning they would not be subject to double jeopardy and the finality of an acquittal can be ignored. Based on the precedents set forth by this Court, it is incomprehensible that an acquittal may no longer be considered final. If permitted to stand, the Georgia Supreme Court's rulings will affect a vast number of cases, subjecting criminal defendants to second trials on charges they have already been acquitted of. This will continue to be a recurring issue unless this Court reverses the significant constitutional violations sanctioned by the Georgia Supreme Court. This case involves a compelling issue that requires this Court's attention.

Amicus curiae urges this Honorable Court to grant the petition and reverse the opinions of the Georgia Supreme Court.

ARGUMENT

A. The Georgia Supreme Court departed from this Court's controlling precedents on the important issue of double jeopardy and the finality of an acquittal.

This Court has "consistently refused to rule that jeopardy for an offense continues after an acquittal, whether that acquittal is express or implied by a conviction on a lesser included offense when the jury was given a full

opportunity to return a verdict on the greater charge." *Price v. Georgia*, 398 U.S. 323, 329 (1970). "[T]o try a man after a verdict of acquittal is to put him twice in jeopardy[.]" *Kepner v. United States*, 195 U.S. 100, 133 (1904) (citing *Ball*, 163 U.S. at 662). "[W]here the Double Jeopardy Clause is applicable, its sweep is absolute. There are no 'equities' to be balanced, for the Clause has declared a constitutional policy, based on grounds which are not open to judicial examination." *Burks v. United States*, 437 U.S. 1, 11 n.6 (1978).

> The public interest in the finality of criminal judgments is so strong that an acquitted defendant may not be retried even though "the acquittal was based upon an egregiously erroneous foundation." If the innocence of the accused has been confirmed by a final judgment, the Constitution conclusively presumes that a second trial would be unfair.
>
> *Arizona v. Washington*, 434 U.S. 497, 503 (1978) (citation omitted).

By vacating the jury's verdict of not guilty of malice murder by reason of insanity and permitting Georgia to retry McElrath notwithstanding his acquittal, the Georgia Supreme Court wholly disregarded this Court's longstanding jurisprudence on the issue of double jeopardy and the finality of an acquittal.

Decided in 1896, *Ball v. United States* is one of this Court's earliest double jeopardy cases. According to *Ball*,

> [t]he constitution of the United States, in the fifth amendment, declares, 'nor shall any person be subject to be twice put in jeopardy of life or limb.' The prohibition is not against being twice punished, but against being twice put in jeopardy; and the accused, whether convicted or acquitted, is equally put in jeopardy at the first trial.
>
> *Ball*, 163 U.S. at 669.

"In ascertaining the meaning of the phrase taken from the Bill of Rights it must be construed with reference to the common law from which it is taken." *Kepner*, 195 U.S. at 125. In *Ex parte Lange*, 85 U.S. 163, 169 (1873), this Court acknowledged that "[t]he common law not only prohibited a second punishment for the same offence, but it went further and forbid a second trial for the same offence, whether the accused had suffered punishment or not, and whether in the former trial he had been acquitted or convicted."

Kepner, decided in 1904, found

> At the common law, protection from second jeopardy for the same offense clearly included immunity from second prosecution where the court having jurisdiction had acquitted the accused of the offense. The rule is thus stated by Hawkins, Pleas of the Crown, quoted by Mr. Justice Story in *United States v. Gibert*, 2 Sumn. 39 Fed. Cas. No. 15,204Gibert, 2 Sumn. 39 Fed. Cas. No. 15,204:

> 'The plea (says he) of autrefois acquit is grounded on this maxim, that a man shall not be brought into danger of his life for one and the same offense more than once. From whence it is generally taken by all our books, as an undoubted consequence, that *where a man is once found not guilty, on an indictment or appeal, free from error, and well commenced before any court which hath jurisdiction of the cause*, ***he may, by the common law, in all cases, plead such acquittal in bar of any subsequent indictment or appeal for the same crime.***'
>
> *Kepner,* 195 U.S. at 126 (emphasis added).

In *Green v. United States*, 355 U.S. 184 (1957), this Court again reaffirmed the notion that no man is to be tried more than once for the same offense.

> In accordance with this philosophy ***it has long been settled under the Fifth Amendment that a verdict of acquittal is final***, *ending a defendant's jeopardy*, and even when 'not followed by any judgment, *is a bar to a subsequent prosecution for the same offence.*' Thus it is one of the elemental principles of our criminal law that ***the Government cannot secure a new trial by means of an appeal even though an acquittal may appear to be erroneous.***
>
> *Green*, 355 U.S. at 187–88 (emphasis added) (citations and punctuation omitted).

This Court has consistently adhered to the doctrinal principle that an acquittal is final and not subject to subsequent prosecution. "A verdict of acquittal on the issue of guilt or innocence is, of course, absolutely final. … Having received 'one fair opportunity to offer whatever proof it could assemble,' the State is not entitled to another." *Bullington v. Missouri*, 451 U.S. 430, 445-446 (1981) (citation omitted). "Since we necessarily afford absolute finality to a jury's *verdict* of acquittal—no matter how erroneous its decision—it is difficult to conceive how society has any greater interest in retrying a defendant when, on review, it is decided as a matter of law that the jury could not properly have returned a verdict of guilty." *Burks,* 437 U.S. at 16 (emphasis in original). "'[T]he verdict of acquittal was final, and could not be reviewed without putting (the petitioners) twice in jeopardy, and thereby violating the constitution.'" *Fong Foo v. United States*, 369 U.S. 141, 143 (1962). "When a defendant has been acquitted of an offense, the Clause guarantees that the State shall not be permitted to make repeated attempts to convict him[.]" *United States v. Wilson*, 420 U.S. 332, 343 (1975). "[A] defendant once acquitted may not be again subjected to trial without violating the Double Jeopardy Clause." *United States v. Scott*, 437 U.S. 82, 96 (1978).

"[T]he Government is precluded from appealing or otherwise upsetting such an acquittal by the Constitution's Double Jeopardy Clause." *United States v. Powell*, 469 U.S. 57, 65 (1984). "Perhaps the most fundamental rule in the history of double jeopardy jurisprudence has been that '(a) verdict of acquittal . . . could not be reviewed, on error or otherwise, without putting (a defendant) twice in jeopardy, and thereby violating the Constitution.'" *Martin Linen Supply Co.*, 430 U.S. at 571 (citing *Ball*,

163 U.S. at 671). "'[A]cquittals, unlike convictions, terminate the initial jeopardy.' Thus, whether the trial is to a jury or to the bench, subjecting the defendant to postacquittal factfinding proceedings going to guilt or innocence violates the Double Jeopardy Clause." *Smalis v. Pennsylvania,* 476 U.S. 140, 145–146 (1986) (citations and punctuation omitted). "[A] writ of error cannot be sued out in a criminal case after a final judgment in favor of the defendant, whether that judgment has been rendered upon a verdict of acquittal, or upon a determination by the court of an issue of law." *United States v. Sanges*, 144 U.S. 310, 318 (1892).

This is true regardless of whether the acquittal was entered in error. "It has been half a century since [this Court] first recognized that the Double Jeopardy Clause bars retrial following a court-decreed acquittal, even if the acquittal is 'based upon an egregiously erroneous foundation.' ***A mistaken acquittal is an acquittal nonetheless***[.]" *Evans v. Michigan*, 568 U.S. 313, 318 (2013) (emphasis added) (citing *Fong Foo*, 369 U.S. at 143). "[I]ts finality is unassailable." *Yeager v. United States*, 557 U.S. 110 (2009) (citation and punctuation omitted).

Evans addressed the many ways *Fong Foo* has been applied, noting that acquittals have been deemed unreviewable in the following circumstances:

- when a judge directs the jury to return a verdict of acquittal as it did in *Fong Foo*;

- when the judgement of acquittal was entered by the judge, *Smith v. Massachusetts*, 543 U.S. 462, 467–468 (2005);

- where there was an erroneous decision to exclude evidence, *Sanabria v. United States*, 437 U.S. 54, 68–69 (1978);

- where there was a mistaken understanding of the sufficiency of evidence to sustain a conviction, *Smith*, 543 U.S. at 473;

- where there was a "misconstruction of the statute" defining the requirements to convict, *Arizona v. Rumsey*, 467 U.S. 203, 211 (1984);

- where the trial judge granted a demurrer which amounted to an acquittal, *Smalis*, 476 U.S. at 144–145;

- and, as in *Evans,* where the trial judge entered a midtrial directed verdict and dismissal based on the court's erroneous requirement of an extra element for the charged offense.

"In all these circumstances, 'the fact that the acquittal may result from erroneous evidentiary rulings or erroneous interpretations of governing legal principles affects the accuracy of that determination, but it does not alter its essential character.'" *Evans*, 568 U.S. at 319 (citing *Scott*, 437 U.S. 82, 98).

An acquittal has been defined as encompassing "any ruling that the prosecution's proof is insufficient to establish criminal liability for an offense. Thus an 'acquittal' includes 'a ruling by the court that the evidence is insufficient to convict,' a 'factual finding [that] necessarily establish[es] the criminal defendant's lack of

criminal culpability,' and any other 'rulin[g] which relate[s] to the ultimate question of guilt or innocence.'" *Id.* at 318-319 (citations omitted).

As *Evans* acknowledged, these are substantive rulings which differ from procedural dismissals, e.g., rulings that are unrelated to factual guilt or innocence or errors in an indictment. "'[T]he law attaches particular significance to an acquittal,' ***so a merits-related ruling concludes proceedings absolutely***." *Id.* at 319 (emphasis added).

In *McElrath I*, the Georgia Supreme Court accepted the jury's not guilty verdict, finding that the evidence presented at trial "authorized the jury to find that McElrath was not guilty of malice murder by reason of insanity at the time that he stabbed his mother." *McElrath I*, 839 S.E.2d at 576. According to the court, the defense expert testified

> specifically that McElrath was suffering from a multifaceted delusion, one in which he believed ***both*** that Diane was poisoning him ***and*** that he was in imminent danger of death at the time that he attacked Diane. This 'absurd or unfounded' delusion authorized the jury to determine that, under the facts as McElrath believed them to be, his actions were justified.
>
> *Id.* (Emphasis in original).[2]

2. The court also acknowledged evidence presented at trial showed that "[t]here was a general consensus that McElrath was, in fact, mentally ill and suffering from at least some delusions, including the delusion that he was being poisoned by Diane." *McElrath I*, 839 S.E.2d at 576.

This finding by the court endorses the notion that McElrath was properly acquitted of malice murder. It was, in effect, a "ruling that the prosecution's proof is insufficient to establish criminal liability for an offense[,] … [and] a 'factual finding [that] necessarily establish[es] the criminal defendant's lack of criminal culpability[.]'" *Evans,* 568 U.S. at 319.[3] "[T]he Double Jeopardy Clause precludes a second trial once the reviewing court has found the evidence legally insufficient, the only 'just' remedy available for that court is the direction of a judgment of acquittal." *Burks*, 437 U.S. at 18.

As a result, McElrath's plea in bar to prevent Georgia from subjecting him to a second trial on the charge of which he was acquitted should have been granted in *McElrath II*; the Georgia Supreme Court's decision below affirming denial of that plea in bar is flatly contrary to this Court's controlling precedents.

In *McElrath II,* the Georgia Supreme Court acknowledged that "the jury's purported verdict of not guilty by reason of insanity would appear to be an acquittal that precludes retrial, as not guilty verdicts are generally inviolate." *McElrath II*, 880 S.E.2d at 521. However, the court disregarded the finality of the acquittal because, "[v]iewed in context alongside the verdict of guilty but mentally ill, [] the purported acquittal loses considerable steam. Because the verdicts were repugnant, both are rendered valueless." *Id.* at 521. According to the court, "[t]here is no way to decipher what factual finding

3. *See also Burks,* 437 U.S. at 10 ("By deciding that the Government had failed to come forward with sufficient proof of petitioner's capacity to be responsible for criminal acts, that court was clearly saying that Burks' criminal culpability had not been established.")

or determination they represent, and McElrath cannot be said with any confidence to have been found not guilty based on insanity any more than it can be said that the jury made a finding of sanity and guilt with regard to the same conduct." *Id.*

Despite the court's acknowledgment in *McElrath I* that the acquittal was authorized, and its finding in *McElrath II* that acquittals are "inviolate," the Georgia Supreme Court chose to wholly disregard this Court's longstanding jurisprudence on the issue of double jeopardy and the finality of an acquittal. It erroneously affirmed the denial of McElrath's plea in bar in *McElrath II* because of its newly created "legal fiction" of "repugnant verdicts."

The Georgia Supreme Court did not present any reasonable basis on which to distinguish its decisions from this Court's longstanding jurisprudence regarding double jeopardy and the finality of an acquittal. Instead, it refused to follow this Court's precedent solely on its creation of "repugnant verdicts." As discussed below, "repugnant verdicts" are nothing more than a type of inconsistent verdicts that this Court has repeatedly held do not permit a defendant to be tried a second time on a charge of which he was acquitted.

B. Repugnant verdicts are a category of inconsistent verdicts and are equally subject to double jeopardy.

According to the Georgia Supreme Court's holdings, the jury's contradictory verdicts were "repugnant" because "it is not legally possible for an individual to simultaneously be insane and not insane during a single criminal episode against a single victim, even if the episode gives rise to more than one crime." *McElrath I*, 839 S.E.2d

at 580. The court vacated the not guilty of malice murder by reason of insanity verdict *and* the guilty but mentally ill verdicts because it believed they were based on a "legal and logical impossibility[.]" *Id.* at 580.

This Court has previously held that "[i]nconsistency in a verdict is not a sufficient reason for setting it aside." *Harris v. Rivera*, 454 U.S. 339, 345 (1981). As this Court noted in *Powell*, *supra*, "where truly inconsistent verdicts have been reached, '[t]he most that can be said ... is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt.'" 469 U.S. at 64–65.[4]

> [I]nconsistent verdicts—even verdicts that acquit on a predicate offense while convicting on the compound offense—*should not necessarily be interpreted as a windfall to the Government at the defendant's expense.* It is equally possible that the jury, convinced of guilt, properly reached its conclusion on the compound offense, and then through mistake, compromise, or lenity, arrived at an inconsistent conclusion on the lesser offense. But in such situations the Government has no recourse if it wishes to correct the jury's error; *the Government is precluded from appealing or*

4. *See also United States v. Dotterweich*, 320 U.S. 277, 279 (1943) ("Whether the jury's verdict was the result of carelessness or compromise or a belief that the responsible individual should suffer the penalty instead of merely increasing, as it were, the cost of running the business of the corporation, is immaterial. Juries may indulge in precisely such motives or vagaries.")

> *otherwise upsetting such an acquittal by the Constitution's Double Jeopardy Clause.*

Powell, 469 U.S. at 65 (emphasis added).

In *McElrath I*, the court analyzed the "three main classes of contradictory verdicts: 'inconsistent verdicts,' 'mutually exclusive verdicts,' and 'repugnant verdicts.'" *McElrath I*, 839 S.E.2d at 577. Footnote 13 acknowledged that "[c]ases from Georgia appellate courts and elsewhere have often conflated these categories, *in particular using 'inconsistent' to describe all types of contradictory verdicts*." *Id.* (Emphasis added). Despite the acknowledgement that these contradictory verdicts have all been deemed "inconsistent," the Georgia Supreme Court created a new doctrine of "repugnant verdicts," holding that it exists separate and apart from inconsistent verdicts.

The court cited *Powell* as "the classic example of inconsistent verdicts." *McElrath I*, 839 S.E.2d at 577. Notably, the court did not cite *any* federal authority in its analysis of "repugnant verdicts." The court relied solely on its own decisions and declared that repugnant verdicts "occur when, in order to find the defendant not guilty on one count and guilty on another, the jury must make *affirmative* findings shown on the record that cannot logically or legally exist at the same time."[5] *Id.* at 579 (emphasis in original).

---

5. The court did not specify what qualifies as an "affirmative finding." In *McElrath I*, the court found that "the guilty and not guilty verdicts reflect affirmative findings by the jury that are not legally and logically possible of existing simultaneously. This is because the not guilty by reason of insanity verdict on malice murder and the guilty but mentally ill verdict on felony murder

If the decisions of the Georgia Supreme Court are permitted to stand, almost any inconsistent verdict could be classified as a "repugnant verdict." The jury's findings appear to be the primary distinction between the court's interpretation of a "repugnant verdict" and an inconsistent one.

In *McElrath I*'s discussion of "repugnant verdicts," the court cited its earlier decision in *Turner v. Georgia*, 655 S.E.2d 589, 592 (Ga. 2008) where it recognized "an exception to the abolition of the inconsistent verdict rule[.]"

> [W]hen[,] instead of being left to speculate about the unknown motivations of the jury [regarding its return of contradictory verdicts,] ***the appellate record makes transparent the jury's reasoning why it found the defendant not guilty of one of the charges***, '[t]here is ... no speculation, and the policy explained in *Powell* and adopted in *Milam*, *supra*, ... does not apply.'

---

based on aggravated assault required affirmative findings of different mental states that could not exist at the same time during the commission of those crimes as they were indicted, proved, and charged to the jury." *McElrath I,* 839 S.E.2d at 580.

During deliberations, the jurors asked for clarification on the insanity law. After the verdict was read, there was no further discussion with jurors to explain their factual or other findings on the record. Thus, it is unclear what exactly the court deemed "affirmative findings" in *McElrath* as opposed to other cases with inconsistent verdicts reflecting mental states, e.g., where a jury acquits on a malice murder charge based on self-defense but convicts on the underlying felony murder. See *Guajardo v. Georgia,* 718 S.E.2d 292 (Ga. 2011).

> *McElrath I*, 839 S.E.2d at 579 (emphasis added) (citation omitted).

Thus, the court incorrectly held that the precedent set forth in *Powell, supra* can be ignored for "repugnant verdicts" so long as the jury made findings on the record. As discussed in Footnote 5, it is unclear what the court considers "affirmative findings" by the jury.

Relying on *McElrath I* and cases cited therein, the Georgia Court of Appeals found that "[r]epugnant verdicts 'occur in the rare instance where, instead of being left to speculate as to the jury's deliberations, ***the appellate record makes transparent the jury's rationale***.'" *Wright v. Georgia*, 878 S.E.2d 751, 758 (Ga. Ct. App. 2022) (citation omitted) (emphasis added).

By contrast, "inconsistent verdicts occur when a jury in a criminal case renders seemingly incompatible verdicts of *guilty* on one charge and *not guilty* on another." *McElrath I*, 839 S.E.2d at 577 (emphasis in original). "Inconsistent verdicts are permitted to stand because ***the jury's rationale is not apparent from the record*** *and courts generally are not permitted to make inquiries into the jury's deliberation process*." *Georgia v. Owens*, 862 S.E.2d 125, 130 (Ga. 2021) (emphasis added).

The Georgia Supreme Court's interpretation of "repugnant verdicts" effectively requires courts to analyze the thoughts and rationale of the jurors. This is the type of analysis this Court rejected in *Powell*.

> Such an individualized assessment of the reason for the inconsistency would be based

> either on pure speculation, or would require inquiries into the jury's deliberations that courts generally will not undertake. Jurors, of course, take an oath to follow the law as charged, and they are expected to follow it. … [O]nce the jury has heard the evidence and the case has been submitted, the litigants must accept the jury's collective judgment. Courts have always resisted inquiring into a jury's thought processes[;] through this deference the jury brings to the criminal process, in addition to the collective judgment of the community, an element of needed finality.
>
> *Powell*, 469 U.S. at 66-67 (citations omitted).

Powell further held that a court reviewing the sufficiency of the evidence involves an assessment of evidence presented at trial.

> This review should be independent of the jury's determination that evidence on another count was insufficient. The Government must convince the jury with its proof, and must also satisfy the courts that given this proof the jury could rationally have reached a verdict of guilty beyond a reasonable doubt. We do not believe that further safeguards against jury irrationality are necessary.
>
> *Id.* at 67.

"That the verdict may have been the result of compromise, or of a mistake on the part of the jury, is

possible. But verdicts cannot be upset by speculation or inquiry into such matters." *Dunn v. United States*, 284 U.S. 390, 394 (1932). "When the basic issue before the appellate court concerns the sufficiency of the Government's proof of a defendant's sanity [], a reviewing court should be most wary of disturbing the jury verdict." *Burks*, 437 U.S. at 17, n.11.

The Georgia Supreme Court's decision is in direct conflict with the principles set forth in *Dunn* and *Powell*. The court's newly created "legal fiction" of "repugnant verdicts" is based on the erroneous notion that repugnancy is distinct from inconsistency. That cannot be so.

It is presumed that the Georgia Supreme Court said what it meant and meant what it said. Because there appears to be some ambiguity in the various categories of inconsistent or contradictory verdicts, it is necessary to look to the definitions of each.

> **Inconsistency**. (17c) **1.** A part of something that is incompatible with another part of the whole thing. **2.** A conflict between two things or different parts of one thing.
>
> (Black's Law Dictionary 883 (10th ed. 2014)).
>
> **Legally inconsistent verdict.** (1975) A verdict in which the same element is found to exist and not to exist, as when a defendant is acquitted of one offense and convicted of another, even though the offenses arise from the same set of facts and an element of the second offense requires proof that the first offense has been

> committed. Also termed *legal inconsistency*, Cf. *repugnant verdict.* (*Id*. at 1791).
>
> **Repugnant verdict.** (1883). A verdict that contradicts itself by containing jury findings that are irreconcilable or incomplete. • In *U.S. v. Powell*, 469 U.S. 57 (1984), the Court explained why a defendant cannot attack a conviction on one count because it is inconsistent with an acquittal on another count. It is incorrect to assume that the acquittal was proper. Inconsistency may be a product of the jury's leniency or of a mistake. To prove a mistake, a litigant would have to speculate about or inquire into the jury's deliberations. Appellate review for sufficiency of the evidence is sometimes adequate protection against jury irrationality or error. Sometimes the inconsistency occurs in a single verdict (*repugnant verdict*) and sometimes it occurs in two separate verdicts (*repugnant verdicts*). Both terms are used mainly in New York. Cf. *legally inconsistent verdict*. (*Id.* at 1792).

Of particular importance is Black's Law Dictionary's cite to *Powell*, *supra* under the definition of *repugnant verdicts*, as opposed to the Georgia Supreme Court's reliance on *Powell* in its discussion of *inconsistent verdicts*, and its acknowledgement that repugnant verdicts are mainly used in New York. A review of New York's case law regarding repugnant verdicts makes it clear that the Georgia Supreme Court is inaccurately applying the doctrine of repugnancy by permitting an acquittal to be reversed and retried.

According to the New York Court of Appeals, "[w]hen there is a claim that repugnant jury verdicts have been rendered in response to a multiple-count indictment, a verdict as to a particular count shall be set aside only when it is inherently inconsistent when viewed in light of the elements of each crime as charged to the jury." *New York v. Tucker*, 431 N.E.2d 617, 617 (1981). "The underlying purpose of this rule is to ensure that an individual is not convicted of 'a crime on which the jury has actually found that the defendant did not commit an essential element, whether it be one element or all[.]'" *New York v. Muhammad*, 959 N.E.2d 463, 467 (2011) (citations and punctuation omitted). "The remedy for this type of error is dismissal of the repugnant conviction[.]" *Id.* n.1.[6]

This is the type of repugnancy claimed by McElrath in his first appeal, i.e., that the guilty but mentally ill verdict was repugnant to the not guilty of malice murder by reason of insanity verdict and thus, required reversal. Rather than vacating the guilty but mentally ill verdict, the Georgia Supreme Court took it upon itself to vacate *all* verdicts, including the acquittal.

The New York Court of Appeals addressed repugnant verdicts at length in *Tucker, supra*, acknowledging that the terms "repugnant" and "inconsistent" are used interchangeably.

---

6. *See also New York v. DeLee*, 26 N.E.3d 210, 215 (2014) ("Given that New York's repugnancy jurisprudence already affords defendants greater protection than the Federal Constitution requires, permitting a retrial on the repugnant charge upon which the jury convicted, *but not on the charge of which the jury actually acquitted defendant*, strikes a reasonable balance.") (Emphasis added, citation omitted.)

The problem of repugnant, or inconsistent, verdicts has long plagued the common law. Many jurisdictions precluded any judgment of conviction if the verdicts were inconsistent (see Comment, Inconsistent Verdicts in a Federal Criminal Trial, 60 Col.L.Rev. 999, 1001, and ns 12–15). American courts have divided on the question, with the majority accepting that the conviction is valid, albeit inconsistent (id., at pp. 1001–1002, and ns 16–18).

Whether verdicts are described as "repugnant" or "inconsistent" is substantively inconsequential and so the two terms are used interchangeably here. The critical concern is that an individual not be convicted for a crime on which the jury has actually found that the defendant did not commit an essential element, whether it be one element or all. Allowing such a verdict to stand is not merely inconsistent with justice, but is repugnant to it.

The genesis of repugnancy problems lies in the submission to the jury of alternative theories of guilt, in the form of different counts, based upon the same evidence. The problem often occurs when the jury convicts the defendant on one count and acquits on another, but the verdicts are illogical when viewed in light of the proof adduced. The difficulty stems from the jury's implicit finding that the essential elements of one crime were proven, while one or more of the same elements were not proven for the other crime.

There exist two approaches for determining whether jury verdicts are repugnant. The first would have the court review the record *in toto* so as to consider all the evidence and discover the underlying basis of the jury's determination, whereupon the reviewing court can determine the logic or illogic of the verdicts and remedy the repugnancy when it exists. The second approach is more limited, looking to the record only to review the jury charge so as to ascertain what essential elements were described by the trial court; then, the assertedly inconsistent verdicts will be harmonized on the basis of the jury charge. Under this approach, a conviction will be reversed only in those instances where acquittal on one crime as charged to the jury is conclusive as to a necessary element of the other crime, as charged, for which the guilty verdict was rendered (see Wax, 24 N.Y.L. School L.Rev., at pp. 740–742).

There is a compelling policy reason for preferring the second method of analysis. The first approach, by its very nature, requires the court to intrude into the jury's deliberative process by speculating on how the jury perceived and weighed the evidence. The court's reluctance to do so is generally reflected by limiting attacks on jury verdicts to showing improper influence, while excluding for purpose of impeachment "proof of the tenor of [the jury's] deliberations" The problems of second-guessing are compounded by the possibility that the jury has not necessarily acted irrationally,

> but instead has exercised mercy. *When the jury has decided to show lenity to the defendant, an accepted power of the jury, the court should not then undermine the jury's role and participation by setting aside the verdict.*
>
> *Tucker*, 431 N.E.2d 618-619 (emphasis added) (citations, footnotes and punctuation omitted).

The Georgia Supreme Court's decision in *McElrath I* and its progeny are inconsistent with the New York Court of Appeals' treatment of "repugnant verdicts." Rather than recognizing that "repugnant verdicts" are merely a category of inconsistent verdicts equally subject to double jeopardy, the Georgia Supreme Court proclaimed that "repugnant verdicts" exist separately with no double jeopardy concerns. In doing so, the court disregarded this Court's longstanding jurisprudence on the finality of an acquittal for "repugnant verdicts," permitting any person to be retried on a charge that previously resulted in a "not guilty" verdict.

Inconsistent verdicts are a common occurrence. Under *McElrath I,* any inconsistent verdict may now be considered "repugnant." In *McElrath II,* Georgia Supreme Court held that an acquittal under a "repugnant verdict" is "rendered valueless[]" and can thus be retried by the government. *McElrath II*, 880 S.E.2d at 521. If the court's decision is permitted to stand, this will be a recurring situation in Georgia where criminal defendants will be subjected to a second trial on charges they have already been acquitted of. This case presents compelling constitutional issues that require this Court's attention.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

HUNTER RODGERS
Chair, GACDL Amicus Committee
J. RYAN BROWN LAW, LLC
60 Salbide Avenue
Newnan, GA 30263

V. NATASHA PERDEW SILAS
President, GACDL
FEDERAL DEFENDER PROGRAM INC.
Centennial Tower
101 Marietta Street NW, Suite 1500
Atlanta, GA 30303

GREG WILLIS
Counsel of Record
JESSICA JONES
CASEY A. CLEAVER
WILLIS LAW FIRM
6000 Lake Forrest Drive, Suite 375
Atlanta, GA 30328
(404) 835-5553
gw@willislawga.com

Counsel for Amicus Curiae

March 6, 2023.