No. 20-

IN THE

Supreme Court of the United States

DEREK MICHAEL RIGSBY,

Petitioner,

v.

COLORADO,

Respondent.

On Petition for a Writ of Certiorari to the Colorado Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Due Process Clause and the Sixth Amendment require that a defendant receive a new trial where a jury returns mutually exclusive guilty verdicts?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is Derek Rigsby. Respondent is the State of Colorado. No party is a corporation.

RULE 14.1(b)(iii) STATEMENT

This case arises from the following proceedings in the Colorado Supreme Court and the Colorado Court of Appeals:

People v. *Rigsby*, No. 18SC923 (Colo. Sept. 14, 2020) (en banc)

People v. *Rigsby*, No. 16CA0138 (Colo. Ct. App. Dec. 13, 2018)

People v. *Rigsby*, No. 14CR1706 (Colo. Dist. Ct. Dec. 4, 2015)

There are no other proceedings in state or federal trial or appellate courts, or in this Court directly related to this case

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CONSTITUTION AND STATUTES

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the decision of the Colorado Supreme Court.

OPINIONS BELOW

The en banc opinion of the Colorado Supreme Court is reported at 471 P.3d 1068 and is reproduced in the appendix to this petition at Pet. App. 1a–33a. The opinion of the Colorado Court of Appeals is available at 474 P.3d 119 and is reproduced at Pet. App. 34a–47a.

JURISDICTION

The Colorado Supreme Court entered judgment on September 14, 2020, Pet. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment of the United States Constitution states in relevant part: "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." U.S. Const. amend. VI.

The Fourteenth Amendment of the United States Constitution provides, "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

In *United States* v. *Powell,* this Court reserved the question of what to do in the case of mutually exclusive verdicts, which result when a jury returns two convictions "where . . . one count logically excludes a

finding of guilt on the other." 469 U.S. 57, 69 n.8. (1984). In the nearly forty years since *Powell*, courts have split on how to resolve this question. Some courts vacate mutually exclusive guilty verdicts, others allow them to stand, and still others attempt to cleave distinctions between different types of inconsistency, allowing some and striking others.

In this case, the Colorado Supreme Court upheld Mr. Rigsby's mutually exclusive guilty verdicts. Mr. Rigsby was found guilty of second and third degree assault. As instructed, to find Mr. Rigsby guilty of both offenses the jury was required to find that he was simultaneously aware *and* unaware of the risk of bodily injury—which is, of course, impossible. The Colorado Supreme Court's decision runs contrary to the well-recognized Due Process and Sixth Amendment rights to have a jury find every element of a crime beyond a reasonable doubt. Where a jury issues one verdict that "logically excludes a finding of guilt on the other," *id.*, the jury necessarily possesses a reasonable doubt about some element of the crime, and the verdicts are therefore mutually exclusive and cannot stand. Mr. Rigsby's case squarely presents this issue, allowing this Court to resolve an intractable conflict amongst the lower courts.

I. BACKGROUND OF THE CASE

A. Factual Background

Derek Rigsby went to a bar with his girlfriend and two mutual friends. Pet. App. 4a. As Mr. Rigsby's girlfriend stood with a friend on the dance floor, they were approached by Nathan Mohrman and one of his friends. *Id.* Soon, an altercation developed between Mr. Rigsby and Mohrman, during which Mr. Rigsby struck Mohrman in the face with a glass, producing an injury requiring several stitches. *Id.*

B. Proceedings Below

The State of Colorado brought three felony charges against Mr. Rigsby, all for second degree assault, representing alternative theories of the same crime. *Id.* He was charged with second degree assault: (1) with intent to cause bodily injury, (2) involving recklessness and causing serious bodily injury with a deadly weapon, and (3) with intent to cause bodily injury and causing serious bodily injury with a deadly weapon. All three charges were based on the same conduct.

The jury found Mr. Rigsby guilty on the first two counts. *Id.* at 4a–5a. On the third count, the jury instead returned a verdict of guilty on the lesser included misdemeanor offense: third degree assault with criminal negligence and causing bodily injury with a deadly weapon. *Id.*

To find Mr. Rigsby guilty of second degree assault with intent to cause bodily injury, the jury was instructed that it had to find, among other things, that Mr. Rigsby acted "with intent . . . to cause bodily injury to another person . . . by means of a deadly weapon." *Id.* at 59a. To find Mr. Rigsby guilty of second degree assault involving recklessness and causing serious bodily injury with a deadly weapon, the jury had to find, among other things, that Mr. Rigsby "recklessly . . . caused serious bodily injury . . . by means of a deadly weapon." *Id.* at 59a–60a. Finally, to find Mr. Rigsby guilty of third degree assault with criminal negligence and causing bodily injury, the jury had to find, among other things, that Mr. Rigsby "with criminal negligence . . . caused bodily injury . . . by means of a deadly weapon." *Id.* at 63a.

The jury was instructed as follows on the definitions of the terms "intent," "recklessness," and "criminal negligence."

> A person acts intentionally or with intent when his conscious objective is to cause the specific result prescribed by the statute defining the offense . . . . A person acts recklessly when he consciously disregards a substantial and unjustifiable risk that a result will occur or that a circumstance exists. A person acts with criminal negligence when, through a gross deviation from the standard of care that a reasonable person would exercise, he fails to perceive a substantial and unjustifiable risk that a result will occur or that a circumstance exists.

Id. at 57a–58a.

On appeal, the Colorado Court of Appeals ordered a new trial for Mr. Rigsby after concluding that the two guilty verdicts for second degree assault were mutually exclusive of the guilty verdict for third degree assault. *Id.* at 2a. The court explained that the mental states required for the second degree assault charges—recklessness and intent, respectively—required Mr. Rigsby's awareness of the risks posed by his conduct, whereas criminal negligence, the mental state required for the third degree assault charge, precluded such awareness. *Id.* at 2a–3a. Thus, with respect to Mr. Rigsby's conduct—hitting Mohrman in the face with a glass—it was impossible to have "concomitantly 'consciously act[ed]' despite being aware of the risk" while simultaneously "fail[ing] to perceive [that] risk." *Id.* at 6a (internal quotations omitted) (third alteration in original). The court of appeals was, therefore, unable to "determine the jury's intent because the verdicts [were] logically and legally inconsistent." *Id.* at 44a. As a result, it deemed a new trial

necessary, which was no mere "academic exercise" in light of the disparity in sentence length between Mr. Rigsby's misdemeanor third-degree assault conviction (maximum 18 months) and the two felony second degree assault convictions (minimum five years). *Id.* at 44a–45a.

On a grant of certiorari, the Colorado Supreme Court reversed the court of appeals on its ruling that the mutually exclusive verdicts required retrial. *Id.* at 16a. The Colorado Supreme Court did, however, hold that Mr. Rigsby's assault convictions were multiplicitous and violated the United States and Colorado Constitutions' Double Jeopardy Clauses. *Id.* at 15a–19a.. It therefore directed that, on remand, the trial court should merge the multiplicitous convictions into a single conviction on the greatest offense—second degree assault. *Id.* at 18a–19a.

REASONS FOR GRANTING THE PETITION

I. THIS CASE PRESENTS THE QUESTION LEFT OPEN IN *UNITED STATES* V. *POWELL*

Powell left open the question of whether, in the case of a defendant "convicted of two crimes, where a guilty verdict on one count logically excludes a finding of guilt[y] on the other," 469 U.S. at 69 n.8, the verdicts can stand. This case squarely presents *Powell*'s unresolved question.

Powell dealt with the situation where a jury returns a seemingly inconsistent guilty verdict on one count and an acquittal on another. In that situation, this Court delivered a clear rule—a defendant cannot attack a conviction for "inconsisten[cy] with the jury's verdict of acquittal on another count." *Id.* at 58. In *Powell*, the defendant was convicted of using the tel-

ephone to commit a felony—conspiring to possess and distribute cocaine—but acquitted of the underlying conspiracy. *Id.* at 59–60. This Court rejected the defendant's argument that the guilty verdict must be overturned because it was inconsistent with the acquittal. This was because the jury might, through "mistake, compromise, or lenity," acquit the defendant of one offense while still convinced beyond a reasonable doubt of her guilt on the other. *Id.* at 57.

Because the Due Process Clause and Sixth Amendment require that the jury find "proof beyond a reasonable doubt of every fact necessary to constitute the crime with which [the defendant] is charged," *In re Winship*, 397 U.S. 358, 364 (1970), *Powell*'s unanswered question raises serious constitutional concerns. In the 36 years since *Powell*, courts nationwide have struggled to find an answer.

II. COURTS ARE INTRACTABLY DIVIDED OVER WHETHER MUTUALLY INCONSISTENT GUILTY VERDICTS CAN STAND

Colorado's decision departs from the decisions of other courts—and its own decision in *People* v. *Delgado*, 450 P.3d 703 (Colo. 2019)—in that it delineates between *logically* and *legally* inconsistent guilty verdicts. But this departure merely underscores the intractable division among the state supreme courts and federal courts of appeals over how to treat mutually exclusive guilty verdicts. Some courts have held that mutually exclusive verdicts warrant retrial, others have found that mutually exclusive verdicts are merely a different species of the inconsistent verdicts permitted by *Powell*, and still others have found certain inconsistencies to require retrial while finding other inconsistencies constitutional.

Most courts to address the issue have found that mutually exclusive guilty verdicts require retrial. See, *e.g.*, *United States* v. *Gross*, 961 F.2d 1097, 1107 (3d Cir. 1992) (concluding that upholding mutually exclusive verdicts would be "patently unjust because a defendant would be convicted of two crimes, at least one of which [the defendant] could not have committed"); *Heard* v. *State*, 999 So.2d 992, 1005 (Ala. 2007) (concluding that mutually exclusive verdicts must be overturned, although finding that the defendant's convictions were not mutually exclusive); *Briones* v. *State*, 848 P.2d 966, 973–75 (Haw. 1993) (noting, in analyzing an ineffective assistance of counsel claim, that defense counsel was obligated to object to mutually exclusive convictions for first and second degree murder, which would have warranted retrial); *State* v. *Moore*, 458 N.W.2d 90, 94 (Minn. 1990) (overturning guilty verdicts on charges of first degree premeditated murder and second degree manslaughter because of legal inconsistency); *State* v. *Speckman*, 391 S.E.2d 165, 167 (N.C. 1990) ("[A] defendant may not be convicted of both embezzlement and false pretenses . . . due to the mutually exclusive nature of those offenses.").

Others, though, have found no issue with mutually exclusive verdicts, reasoning that such verdicts represent merely a "different form of [the] inconsistent verdicts" discussed in *Powell*. *State* v. *Davis*, 466 S.W.3d 49, 77 (Tenn. 2015) (declining to order a new trial for two murder convictions entailing mutually exclusive *mentes reae* because doing so might "open the door to . . . increased confusion and increase litigation [arising] from trying to parse a jury's inconsistent verdicts"); see also *United States* v. *Driver*, 945 F.2d 1410, 1414–15 (8th Cir. 1991) (declining to order a new trial when the defendant was convicted

of two assault charges for which the court's jurisdiction was predicated on mutually exclusive factual findings).

Still others, including the Colorado Supreme Court itself, take varying approaches based on distinctions between different sorts of inconsistency. See, *e.g.*, Pet. App. 11a (delineating between "logically inconsistent" and "legally inconsistent" mutually exclusive verdicts); *Delgado*, 450 P.3d at 707 ("[D]ue process prevents a defendant from being convicted of crimes with mutually exclusive elements."); *State* v. *Halstead*, 791 N.W.2d 805, 807–17 (Iowa 2010) (delineating between "inconsistent" and "repugnant" verdicts).

This split in authority highlights the need for this Court to resolve the question of whether mutually exclusive guilty verdicts can stand. The division between various courts on this issue has become an enduring one since *Powell*'s decision in 1986 and has only deepened with passing years.

III. THIS IS AN IMPORTANT AND RECURRING ISSUE OF LAW

A jury that returns mutually exclusive verdicts has failed to find guilt beyond a reasonable doubt for at least one of the verdicts. And, where a jury returns a guilty verdict without finding guilt beyond a reasonable doubt, the defendant has not received his constitutional right to due process and a fair trial.

The Due Process Clause, together with the Sixth Amendment, requires that a jury, not a judge, find a defendant guilty of each element of each offense beyond a reasonable doubt. *Sullivan* v. *Louisiana*, 508 U.S. 275, 277–78 (1993); see also *In re Winship*, 397 U.S. at 361 ("The requirement that guilt of a criminal charge be established by proof beyond a reasonable doubt dates at least from our early years as a Na-

tion."). And fulfillment of that right is entrusted solely to the jury: "It would not satisfy the Sixth Amendment to have the jury determine that the defendant is *probably* guilty, and then leave it up to the judge to determine . . . whether he is guilty beyond a reasonable doubt." *Sullivan*, 508 U.S. at 278.

Where a jury reaches mutually exclusive guilty verdicts, there is no possibility that it found the defendant guilty beyond a reasonable doubt on each element of each offense.

Nor does a court merging multiple guilty verdicts—as happened in Mr. Rigsby's case—resolve the problem with the jury reaching mutually exclusive verdicts. In Mr. Rigsby's case, the Colorado Supreme Court instructed on remand that Mr. Rigsby's conviction be merged in the greater offense, second degree assault. The difference between a sentence for second degree assault and third degree assault, however, is significant. At the time of Mr. Rigsby's sentencing, second degree assault required a mandatory minimum sentence of five years in prison, which is what Mr. Rigsby received. See Colo. Rev. Stat. § 18-1.3-401(1)(a)(V)(A); Colo. Rev. Stat. § 18-1.3-406(1)(a); Colo. Rev. Stat. § 18-3-203(2)(c)(I) (2016). By contrast, third degree assault carries a maximum sentence of 18 months in prison. Mr. Rigsby would have also been probation eligible, or could have received a community corrections sentence. See Colo. Rev. Stat. § 18-1.3-501(1)(a).

The question is also recurring. Since *Powell*, numerous state courts have confronted the issue of mutually exclusive guilty verdicts. The Colorado Supreme Court in particular has issued three decisions on it in less than a year. *People* v. *Rigsby,* 471 P.3d 1068 (Colo. 2020); *People* v. *Struckmeyer*, 474 P.3d 57 (Colo. 2020); *Delgado*, 450 P.3d 703. However, instead

of coming to a unified response, courts have differed in their approaches to mutually exclusive guilty verdicts. The continued split and lack of clear standards show that courts cannot resolve this issue on their own.

IV. THE DECISION BELOW IS INCORRECT

For the jury to find Mr. Rigsby guilty of second degree assault in this case as instructed, it had to conclude that Mr. Rigsby *was aware* of the risk of bodily injury. To find Mr. Rigsby guilty of third degree assault, however, the jury had to find that Mr. Rigsby was *unaware* of the risk of bodily injury. Pet. App. 2a. In declaring Mr. Rigsby guilty as it did, the jury *had to find* that Mr. Rigsby was simultaneously aware *and* unaware of the risk of bodily injury. *Id.* at 2a–3a. It is, of course, logically (as well as legally) impossible for someone to be simultaneously aware and unaware of a fact.

The Colorado Supreme Court, however, found only a "logical inconsistency," not a "legal inconsistency" in the jury's verdict because the mens rea statute was "hierarchical" and thus a higher mens rea necessarily satisfied a lower mens rea. *Id.* at 12a–13a. But that is both wrong and a distinction without a difference. The jury was not instructed on Colorado's hierarchical mens rea statute and therefore could not use it to reconcile any inconsistency between the two counts. As instructed, to convict Mr. Rigsby of second degree assault required the jury to find that Mr. Rigsby was aware of the risk of bodily injury. But, to find Mr. Rigsby guilty of third degree assault required the jury to find that he was not aware of the risk of bodily injury. Operating off the instructions given, the jury found Mr. Rigsby guilty of three offenses, for which an essential element of one offense negated an essential element of the other two.

The Colorado Supreme Court distinguished Mr. Rigsby's situation from its earlier holding in *Delgado*. *Id.* at 11a. There, the Colorado Supreme Court struck down mutually exclusive convictions of robbery and theft. The crime of robbery required that items to be taken by force, whereas the crime of theft required that items be taken without force. *Id.* The court found that because an element of one offense (taking by force) necessarily negated an element of the other (taking without force), the verdicts were mutually exclusive, and remanded the case for a new trial. *Id.*

But Mr. Rigsby's convictions contain the same defect that the court recognized in *Delgado*: "When a defendant is convicted of crimes featuring elements that are mutually exclusive, the defendant hasn't been convicted of each crime beyond a reasonable doubt. There's an explicit finding of doubt in the contradictory element." 450 P. 3d at 707.

That "explicit finding of doubt" is not a concern when a jury returns a guilty verdict and an acquittal, as in *Powell*. There, the Court found that, although a guilty verdict and an acquittal could be "a windfall to the Government at the defendant's expense[,] . . . [i]t [was] 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." *Powell*, 469 U.S. at 65. The Court also expressed concern with overturning such a conviction because the Government would be precluded by the Double Jeopardy Clause from appealing or retrying the acquittal. *Id.* But that same concern is inapplicable to two guilty verdicts, because the Double Jeopardy Clause does not preclude retrial when guilty verdicts are returned.

Furthermore, the explanations of compromise or lenity from *Powell* cannot possibly underlie two mutually exclusive convictions. *Delgado,* 450 P.3d at 707, ("[W]hile an acquittal has various explanations, a guilty verdict has but one."). And, as a result, a jury's arrival at two mutually exclusive guilty verdicts necessarily means that it did not find the defendant guilty beyond a reasonable doubt on at least one of those verdicts.

By deciding that a jury intended to return a guilty verdict for the greater offense, the Colorado Supreme Court assumes that a jury meant one verdict and didn't mean another, even though the verdict itself provides no indication of this. This approach is inconsistent with this Court's rationale in *Powell*, which allows for an inconsistent guilty verdict and acquittal because "[c]ourts have always resisted inquiring into a jury's thought process" in order to provide "an element of needed finality" to their verdicts. 469 U.S. at 67.

The desire for finality cannot be dispositive when a jury has made clear from its verdicts that it fundamentally misunderstood the law. Where two guilty verdicts indicate that the jury could not possibly have found the defendant guilty beyond a reasonable doubt on both offenses, a court must remand the case for a new trial to uphold a defendant's right to due process.

V. THIS CASE IS AN IDEAL VEHICLE

This case is an ideal vehicle to decide the open question identified in the Court's *Powell* opinion. Mr. Rigsby preserved his due process and Sixth Amendment arguments throughout, and the Colorado Supreme Court squarely addressed the question. Since this Court's decision in *Powell*, this issue has been presented in many state high courts, to varying ap-

proaches and answers. Waiting will neither resolve the split nor clarify the issues for this Court's review.

The question presented here is a dispositive one in Mr. Rigsby's case. But for the Colorado Supreme Court's holding, Mr. Rigsby would have received a new trial.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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