No. 22-721

In The
Supreme Court of the United States

DAMIAN MCELRATH,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Georgia

BRIEF IN OPPOSITION

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QUESTION PRESENTED

A jury found Damian McElrath "guilty but mentally ill" of the felony murder of his adoptive mother, whom he killed by stabbing over 50 times. The jury also found McElrath not guilty of malice murder by reason of "insanity." The Supreme Court of Georgia determined that these verdicts were "repugnant" to one another because they relied on incompatible, affirmative, on-the-record findings: the jury found McElrath both sane and insane during the same criminal episode. Although neither party asked the court to vacate the not guilty verdict, the court vacated *both* verdicts and remanded for a new trial.

McElrath did not challenge that decision through a motion for reconsideration in the Georgia Supreme Court. But he then argued on remand that retrial was barred by the Double Jeopardy Clause. The trial court rejected that argument, and the Supreme Court of Georgia affirmed, concluding that the repugnant verdicts failed to terminate jeopardy because there is no way to decipher what, if any, determination of guilt or innocence they represent. In other words, the jury simply failed to produce a verdict.

The question presented is whether the Double Jeopardy Clause precludes retrial after a court vacates repugnant verdicts based on mutually exclusive, affirmative, on-the-record findings—a situation that has, as far as the State is aware, never arisen outside of this case.

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INTRODUCTION

Petitioner Damian McElrath seeks to challenge the Georgia Supreme Court's application of its "repugnant verdicts" rule to vacate the jury's conflicting verdicts in his criminal trial. But Georgia's repugnant verdicts rule is unique among the states and applies only in exceptionally rare cases. Indeed, the ruling of which McElrath complains (vacatur of a not-guilty-by-reason-of-insanity verdict) has, as far as Georgia is aware, happened only once—in this very case. And it is unlikely to happen again. It is, in other words, neither a recurring issue nor an important one. And even if this Court were interested in reviewing Georgia's repugnant verdicts rule, this would not be the right case to do so.

McElrath killed his adoptive mother by stabbing her over 50 times in a single attack in their family home. But he showed no remorse for his crime. Instead, he reported himself to the police and insisted that killing his mother was the "right" thing to do because he believed she had been poisoning his drinks. McElrath was tried for malice murder and felony murder predicated on aggravated assault. After trial, the jury made two contradictory findings: it found him (1) not guilty by reason of insanity on the malice murder count and (2) guilty but mentally ill (and therefore sane) on the felony murder count, based on the same conduct. Recognizing that these two findings—that McElrath was both sane and insane—are irreconcilable, the Georgia Supreme Court deemed the verdicts "repugnant," vacated them, and remanded for a new trial.

McElrath did not challenge that decision by, for example, asking the court to reconsider its remedy. (Despite the fact that neither party had asked the court to vacate McElrath's not-guilty verdict.) Yet he now argues that he cannot be retried for malice murder because it would supposedly violate the Double Jeopardy Clause. And he asserts that, without this Court's intervention, the Georgia Supreme Court's decision will precipitate a rash of purported double jeopardy violations for criminal defendants in Georgia. *See* Pet. at 6, 16.

But what McElrath seeks is the narrowest kind of error correction: addressing a supposed "error" that has, as far as Georgia is aware, never happened before and is unlikely to ever happen again. Georgia appears to be the only state with the repugnant verdicts rule applied here, and it is not simply a rule on "inconsistent verdicts" as McElrath contends. *See* Pet. at 10. Instead, the rule applies only when a jury in a criminal case makes *affirmative* findings on the record that are irreconcilable. That scenario is exceedingly unlikely to occur. Demonstrating as much, the Georgia Supreme Court has applied the rule only two times *ever*, including this case. *See Turner v. State*, 283 Ga. 17, 19–21 (2008); *McElrath v. State*, 308 Ga. 104, 111–12 (2020) ("*McElrath I*"). In only one of those cases—this one—did the court use the rule to vacate a purported acquittal. So this case is quite literally one-of-a-kind. It has never happened before and may never happen again. That is hardly a candidate for this Court's review.

And because no other state has considered truly *repugnant*, as opposed to merely *inconsistent*, verdicts—let alone adopted a rule for such verdicts that conflicts with Georgia's own—there is no split in authority requiring this Court's intervention. McElrath tries to manufacture a split in authority by pointing to supposedly conflicting decisions from other state high courts, *see* Pet. at 12–15, but the cited cases are inapposite; they all involved merely inconsistent, not repugnant, verdicts.

McElrath also points to what he sees as a conflict between Georgia's repugnant verdicts rule and this Court's precedents, but here, too, McElrath's arguments fall flat. (And even assuming McElrath were correct, this would, again, be the narrowest of all error corrections.) Because he misunderstands both this Court's cases on inconsistent verdicts and the Georgia Supreme Court's cases on repugnant verdicts, McElrath fails to grasp the key distinction between the two: Georgia's rule applies only to an extremely narrow set of cases involving contradictory, on-the-record, affirmative findings that prove the jury simply failed to reach a coherent verdict. And because repugnant verdicts are incoherent—and thus, essentially, failed verdicts—they, like a mistrial, fail to terminate jeopardy, which means the Double Jeopardy Clause does not bar retrial.

Even if this Court were interested in reviewing Georgia's repugnant verdicts rule, this case would be a poor vehicle to do so. McElrath's key argument, although clothed in the language of double jeopardy,

is that the Georgia Supreme Court erred by vacating his acquittal after determining that his verdicts were repugnant and therefore void. As a matter of Georgia law, that may or may not be correct. But this argument was barred by law of the case because the question of vacatur was decided by the Georgia Supreme Court in McElrath's first appeal. *See McElrath v. State*, 315 Ga. 126, 127–28 (2022) ("*McElrath II*"). McElrath chose not to dispute that decision, which precluded him from doing so in this second appeal. *See id.* at 128 ("[T]his appeal is not a proper vehicle for challenging [the] earlier [vacatur] decision . . . ."). In any event, if McElrath were correct that the Georgia Supreme Court's decision in his first appeal—a decision he failed to challenge—was simply a mistake as a matter of state law, that would do nothing more than establish that the Georgia Supreme Court is unlikely to repeat the "error" in future cases.

Future criminal defendants, of course, will not be bound by the same procedural missteps. Thus, in the highly unlikely event that another defendant is subject to repugnant verdicts *and* the Georgia Supreme Court is asked to vacate those verdicts and permit retrial, the defendant will be able to present to the Georgia Supreme Court the arguments that McElrath was procedurally barred from making here. And given the Georgia Supreme Court's treatment of repugnant verdicts in *Turner*, 283 Ga. at 19–21, it may very well accept those arguments, rendering McElrath's follow-on double jeopardy arguments pointless.

Simply put, McElrath seeks error correction regarding a decision that has never happened before and likely will never happen again. If, inexplicably, this issue arises repeatedly in the future, the Court can step in and review, when it has become apparent that it is a recurring and important question. But the Court should deny certiorari now, where this case is the very definition of a one-off.

STATEMENT

A. Governing Legal Framework

In multi-count criminal cases, juries sometimes return seemingly incompatible verdicts: guilty on one count, but not guilty on another count involving the same underlying conduct. A jury might, for example, convict a defendant of using a telephone in the commission of a felony, but acquit the defendant of the predicate felony. *See United States v. Powell*, 469 U.S. 57, 59–60 (1984). When reviewing these "inconsistent verdicts," federal courts and Georgia courts will generally affirm both the conviction and the acquittal. *See id.* at 60, 68–69; *Milam v. State*, 255 Ga. 560, 562 (1986).

The Georgia Supreme Court has articulated one exception to the inconsistent verdicts rule. If two incompatible verdicts are based on affirmative, on-the-record, irreconcilable factual findings, they are considered "repugnant." *McElrath I*, 308 Ga. at 111–12. This distinguishes them from merely inconsistent verdicts, where the jury's reason for returning incompatible verdicts is not apparent from the record. *Id.* at 108–09.

But repugnant verdicts are rare; Georgia has deemed verdicts repugnant only twice, including here. *See Turner*, 283 Ga. at 19–21; *McElrath I*, 308 Ga. at 111–12. Previously, when faced with repugnant verdicts, the Georgia Supreme Court reversed the conflicting conviction and allowed the conflicting acquittal to stand. *See Turner*, 283 Ga. at 21. For the first time in this case, the Georgia Supreme Court instead vacated both verdicts. *McElrath I*, 308 Ga. at 112.

B. Factual Background

In July 2012, Damian McElrath stabbed his adoptive mother more than 50 times in an attack that began in their home's upstairs bedroom and ended at the front door. *McElrath I*, 308 Ga. at 104–05. After killing his mother, McElrath washed her blood off his body, changed his clothes, and drafted a letter. *Id.* In the letter, McElrath denied any remorse for his crime. He stated, "I think I am right for doing it." *Id.* And he claimed that, prior to the stabbing, his mother told him that she had been poisoning him. *Id.* McElrath called the police and reported the murder. *Id.*

McElrath was indicted for aggravated assault, malice murder, and felony murder predicated on aggravated assault. *Id.* at 104 n.1. All three counts were based on the same conduct: stabbing his mother until her death. *Id.* The evidence presented at trial indicated that McElrath suffered from a schizoaffective mental disorder, which contributed to his difficulties with his mother. *Id.* at 104. (One of their previous quarrels resulted in police being called to the home, and at

one point his mother "felt it was necessary to force McElrath to stay in an extended-stay hotel for approximately two months." *Id.* at 104 n.3.) Psychological experts testified that McElrath "suffer[ed] from at least some delusions, including the delusion that he was being poisoned by" his mother. *Id.* at 105–06.

The jury returned contradictory verdicts. It found McElrath not guilty of malice murder by reason of insanity. *Id.* at 104; *see also* O.C.G.A. § 16-3-3 (providing that a defendant is not guilty if he "acted as he did because of a delusional compulsion . . . which overmastered his will to resist committing the crime"). However, it also found him "guilty but mentally ill" of felony murder and its predicate, aggravated assault. *McElrath I*, 308 Ga. at 104 & n.1; *see also* O.C.G.A. § 17-7-131(a)(3), (c)(2) (providing that a defendant is guilty but mentally ill if he is subject to "a disorder of thought . . . which significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life"). Based on the felony murder and aggravated assault convictions, which merged for sentencing, the trial court sentenced McElrath to life imprisonment. *McElrath I*, 308 Ga. at 104 n.1. The court also committed McElrath to a state mental health facility for psychiatric evaluation. *Id.*

C. Proceedings Below

McElrath appealed to the Supreme Court of Georgia, arguing that the verdicts were repugnant. *Id*. at 104. After noting that sufficient evidence supported both the conviction and the acquittal, the court agreed

that the verdicts were repugnant. *See id.* at 106–08, 112. "This," the court reasoned, "is because the not guilty by reason of insanity verdict on malice murder and the guilty but mentally ill verdict on felony murder . . . required affirmative findings of different mental states that could not exist at the same time during the commission of those crimes." *Id.* at 112. Because of this "logical and legal impossibility," the court vacated both verdicts and remanded for a new trial. *Id.* (Although neither party had asked the court to vacate both verdicts. *Id.* at 104, 113.)

McElrath did not challenge or seek reconsideration of the Georgia Supreme Court's decision, although he was free to do so. *See* Ga. Sup. Ct. R. 27 ("A motion for reconsideration may be filed regarding any matter in which the Court has ruled within 10 days from the date of decision.").

Instead, after remand to the trial court, McElrath filed a "plea in bar" arguing that the State could not retry him on the malice murder charge because the jury returned a verdict of acquittal on that charge in his first trial. *McElrath II*, 315 Ga. at 126. After the trial court denied that motion, McElrath again appealed to the Georgia Supreme Court. *Id.* In this second appeal, McElrath argued that—when deciding his *first* appeal—the Georgia Supreme Court should have affirmed his malice murder acquittal and reversed his felony murder conviction, instead of vacating both. *Id.* at 127. And he reiterated his closely related argument that retrying him for malice murder is barred by the

jury's verdict acquitting him of that charge in his first trial. *Id.*

The Georgia Supreme Court affirmed. To start, the court explained that McElrath's argument regarding the court's vacatur decision in his first appeal was barred by law of the case. The issue "ha[d] already been conclusively decided in McElrath's earlier appeal," and McElrath declined to contest that decision through a motion for reconsideration. *Id.* at 127–28.

The court also rejected McElrath's Double Jeopardy Clause argument. "The Fifth Amendment," explained the court, "guarantees criminal defendants protection against double jeopardy." *Id.* at 128. And double jeopardy generally bars "subsequent prosecution for the same offense" following a "verdict of acquittal." *Id.* at 129 (citation omitted). But in McElrath's case, the court continued, "the purported acquittal" was "rendered valueless" because it was repugnant to the accompanying felony murder conviction. *Id.* at 130. So McElrath's "repugnant verdicts failed to result in an event that terminated jeopardy, akin to a situation in which a mistrial is declared after a jury is unable to reach a verdict. . . . Accordingly, the general principles of double jeopardy d[id] not bar McElrath's retrial on the malice murder charge." *Id.*

In a separate concurrence, Justices Pinson and McMillian expressed some reservation but ultimately agreed with the logic of the court's holding: "the acquittal was a 'repugnant' verdict; a repugnant verdict is 'void,' which means that, unlike other merely

'erroneous' verdicts, it is not a verdict at all; and so the jury never reached a verdict that ended the defendant's jeopardy." *Id.* at 132 (Pinson, J., concurring). The concurrence also noted that "precedent supports the general idea that a 'void' acquittal is 'no bar to subsequent indictment and trial.'" *Id.* (quoting *Ball v. United States*, 163 U.S. 662, 669 (1896)).

REASONS FOR DENYING THE PETITION

This petition does not warrant a grant of certiorari. *First*, the question has, it seems, never arisen before and is unlikely to recur. Georgia's repugnant verdicts rule is apparently unique among the states, and Georgia has applied it only two times *ever*, including here. In fact, McElrath has identified *no* case (other than his own) in which the Georgia Supreme Court has applied the repugnant verdicts rule to vacate an acquittal and permit retrial. And because no other state has addressed repugnant verdicts, there is no split in authority.

Second, McElrath's petition really disputes the Georgia Supreme Court's decision to vacate his acquittal—along with his conviction—after his first appeal. But McElrath failed to challenge that decision at the appropriate time (i.e., through a motion for reconsideration). Realizing this, he seeks to repackage his challenge to the vacatur as a double jeopardy argument. But it was his choice not to challenge the Georgia Supreme Court's novel holding, and it is quite possible the court will never repeat that holding, making this Court's review even *less* necessary.

Third, Georgia's repugnant verdicts rule does not conflict with the decisions of this Court. McElrath says "repugnant" verdicts are really just a kind of "inconsistent" verdicts and should be treated exactly the same. But that ignores this Court's rationale for the inconsistent verdicts rule and the Georgia Supreme Court's explanation for why that rationale does not apply to repugnant verdicts. Moreover, it is not clear at all that a double jeopardy bar applies where, as here, the jury's verdicts are so repugnant as to have no value at all; retrial in such a case is essentially the same as retrial following a mistrial.

I. This case does not present a recurring or important question worthy of certiorari.

McElrath argues that the Georgia Supreme Court erred by allowing him to be retried after it vacated the jury's repugnant verdicts. Pet. at 5. In doing so, he argues, the court got a "critically important" question "egregiously wrong" and exposed every criminal defendant who receives inconsistent verdicts to retrial after acquittal. *Id.* at 6, 16; *see also* Br. of Amicus Curiae Ga. Ass'n of Criminal Def. Lawyers at 4 (arguing the decision "will affect a vast number of cases").

That's wrong on both counts. Setting aside its merits, Georgia's repugnant verdicts rule is narrow and has been applied only two times—including here—in two rare situations. It is therefore unlikely to have "ramifications" for other criminal defendants in Georgia, and it is the furthest thing from "critically important." Pet. at 16.

A. Georgia's repugnant verdicts rule is nothing more than a rarely applicable exception to the general inconsistent verdicts rule applied by this Court and many states.

1. Before 1986, when faced with inconsistent verdicts—an "irreconcilable conflict" between a simultaneous conviction and acquittal—Georgia appellate courts would, as a rule, reverse the conviction and leave the acquittal untouched. *Hines v. State*, 254 Ga. 386, 387 (1985) (citation omitted); *see also Kuck v. State*, 149 Ga. 191, 193, 195 (1919); *Evans v. State*, 138 Ga. App. 620, 621–22 (1976); *Hancock v. State*, 127 Ga. App. 21, 21 (1972). Where two offenses "hav[e] a similar or related factual basis," the Georgia Supreme Court explained, an acquittal on one "necessarily determines that the evidence failed to establish a fact which is an essential ingredient of the offense charged in the other count." *Jackson v. State*, 230 Ga. 640, 641 (1973).

But in *United States v. Powell*, 469 U.S. 57 (1984), this Court rejected that rule for federal criminal cases. "Consistency in the verdict," the Court held, "is not necessary." *Id.* at 62 (citation omitted). And, contrary to the Georgia Supreme Court's assumptions, inconsistency does not mean the jury "w[as] not convinced of the defendant's guilt." *Id.* at 64–65 (citation omitted). "It is equally possible" that the jury, though convinced of the defendant's guilt, opted to acquit on one of the charged offenses as a matter of "compromise" or "lenity." *Id.* at 65. An apparently inconsistent verdict, in

other words, may actually favor the criminal defendant, meaning there is no reason to reverse or vacate the conviction "as a matter of course." *Id.*

The Supreme Court of Georgia followed suit in *Milam v. State*, 255 Ga. 560 (1986). There, the court "abolished [its] rule that inconsistent verdicts . . . warranted reversal" and explicitly adopted the "rationale set out by the U.S. Supreme Court in [*Powell*]." *Turner*, 283 Ga. at 20. Since then, the general practice in Georgia has been to affirm inconsistent verdicts as this Court does. *See*, *e.g.*, *Milam*, 255 Ga. at 562; *Smashum v. State*, 261 Ga. 248, 249 (1991); *Dugger v. State*, 297 Ga. 120, 122 (2015); *Thornton v. State*, 298 Ga. 709, 712–15 (2016); *Collins v. State*, 312 Ga. 727, 734–35 (2021).

2. In addition to inconsistent verdicts, Georgia recognizes a separate category of "repugnant" verdicts. *See McElrath I*, 308 Ga. at 108–12 (explaining the distinction). But Georgia's repugnant verdicts rule is nothing more than a small "exception" to the inconsistent verdicts rule. *Turner*, 283 Ga. at 20–21.

Unlike merely inconsistent verdicts (where the jury returns two seemingly incompatible verdicts for unknown reasons), repugnant verdicts occur when the jury renders conflicting verdicts based on mutually exclusive affirmative factual findings on the record. *See id.*; *Hinkson v. State*, 310 Ga. 388, 391 (2020) (explaining that "repugnant verdicts" turn on "specific findings"). In McElrath's case, for example, the jury determined, on the record, that he was sane *and* that

he was insane, two "affirmative findings . . . that are not legally and logically possible of existing simultaneously." *McElrath I*, 308 Ga. at 112. In cases like this, the court is not left to wonder as to the jury's reasons for returning inconsistent verdicts; the jury's reasoning—or, more accurately, its *error*—is "transparent" in the record. *Turner*, 283 Ga. at 21.

Truly repugnant verdicts, though, are exceptionally rare, despite McElrath's claims to the contrary. *See* Pet. at 16 ("McElrath surely will not be the only defendant to face retrial after acquittal."); Amicus at 4 ("Under *McElrath I*, any inconsistent verdict may now be considered 'repugnant' . . . ."). To see why, consider the unique nature of repugnant verdicts. They require not only conflicting verdicts, but also that it be absolutely clear from the record that the conflict between the verdicts stemmed from jury error rather than lenity or compromise. *See King v. Waters*, 278 Ga. 122, 123 (2004) (requiring that there be "no speculation" as to the jury's motives); *Turner*, 283 Ga. at 20–21 (explaining that repugnancy applies only when "the appellate record makes transparent the jury's reasoning"). Yet jury verdicts are rarely so obvious in their reasoning. *See Powell*, 469 U.S. at 66–67 (warning that it would be "unworkable" and "pure speculation" for courts to try and determine "the reason for the inconsistency" in most cases); *cf. Tanner v. United States*, 483 U.S. 107, 127 (1987) (noting the "long-recognized and very substantial concerns support[ing] the protection of jury deliberations from intrusive inquiry"). Essentially the only situation in which jury error *will* be so

obvious is the one at issue here: two conflicting verdicts that turn on inconsistent, affirmative findings as to the defendant's mental state. *See*, *e.g.*, *Turner*, 283 Ga. at 21 (verdicts finding a defendant's conduct both justified and not justified).

That repugnancy is rare is also *empirically* demonstrable. The Georgia Supreme Court has applied the repugnant verdicts rule *only two times*, including this case. *See Turner*, 283 Ga. at 19–21; *McElrath I*, 308 Ga. at 111–12.[1] But there have been myriad cases, conveniently elided by McElrath's petition, in which Georgia courts have declined to deem conflicting verdicts repugnant. *See*, *e.g.*, *State v. Owens*, 312 Ga. 212, 215–18 (2021); *Guajardo v. State*, 290 Ga. 172, 174–75 (2011); *Watson v. State*, 289 Ga. 39, 44 (2011); *Smith v. State*, 348 Ga. App. 643, 645–46 (2019); *Reese v. State*, 308 Ga. App. 528, 528 (2011).

Moreover, even in the rare case of truly repugnant verdicts, it is hardly a given that a Georgia court will vacate an acquittal and permit retrial. *Contra* Pet. at

[1] The Georgia Supreme Court described the rationale for the repugnant verdicts rule in *King v. Waters*, 278 Ga. 122, 123 (2004), when it explained that the inconsistent verdicts rule does not apply if "the reasoning of the decision-maker is apparent." But *King* was not itself a case of repugnant verdicts. The verdicts were perfectly consistent, convicting the defendant on both a compound and a predicate offense. *Id.* at 122. A habeas court subsequently vacated the predicate conviction based on ineffective assistance of counsel, but neglected to vacate the compound conviction. *Id.* On appeal, the Georgia Supreme Court held that, because counsel's ineffective assistance necessarily infected *both* verdicts, the compound conviction must be vacated as well. *Id.* at 123.

16 (arguing that "prosecutors in Georgia may now retry a defendant for a crime of which he was acquitted so long as that acquittal is accompanied by another [repugnant] verdict"). McElrath's case, in fact, is the *only* case in which the Georgia Supreme Court has applied the repugnant verdicts rule to vacate an acquittal. In *Turner*—the court's prior repugnant verdicts case—the court allowed the acquittal to stand and simply reversed the conflicting conviction. *See* 283 Ga. at 21. So vacatur of a supposed not-guilty verdict, despite McElrath and his amicus's sky-is-falling rhetoric, will not be "a recurring situation." Amicus at 24; *see also* Pet. at 10.

3. Finally, it is not clear that criminal defendants in Georgia would be better off if this Court were to hold that Georgia's repugnant verdicts rule is constitutionally impermissible. Repugnant verdicts would then be treated like any other inconsistent verdict; they would be automatically affirmed on appeal. *See King*, 278 Ga. at 123 (explaining that an inconsistent "conviction . . . should be upheld so long as the evidence will support it"); *Turner*, 283 Ga. at 20 (explaining that repugnant verdicts are merely an "exception" to this general rule). That means defendants would have *no chance* of vacating a repugnant conviction on appeal. The conviction would just be affirmed. But under Georgia's repugnant verdicts rule, defendants like McElrath have at least a chance of prevailing on retrial. In other words, as it is usually applied, *see Turner*, 283 Ga. at 20–21, Georgia's repugnant verdicts rule *favors* criminal defendants.

B. Georgia is the only state that has addressed repugnant verdicts, so there is no split in authority.

Since this Court's decision in *Powell*, many states have developed their own rules on inconsistent verdicts. The rules across the states are not uniform. Some, like this Court and Georgia, presumptively affirm inconsistent verdicts. *See*, *e.g.*, *State v. Davis*, 466 S.W.3d 49, 72, 77–78 (Tenn. 2015); *State v. Arroyo*, 973 A.2d 1254, 1269–70 (Conn. 2009); *People v. Jones*, 797 N.E.2d 640, 647 (Ill. 2003). Others presumptively reverse convictions inconsistent with a simultaneous acquittal. *See*, *e.g.*, *State v. Sayles*, 244 A.3d 1139, 1160 (Md. 2021); *Brown v. State*, 959 So.2d 218, 220–23 (Fla. 2007). But McElrath has identified no state other than Georgia that has considered truly repugnant verdicts like those at issue here: verdicts based on mutually exclusive, affirmative, on-the-record factual findings. Certainly, no state has held that (1) repugnant verdicts must be treated the same as merely inconsistent verdicts or (2) repugnant verdicts, when vacated, preclude retrial.

McElrath attempts to contrive a split in authority with four state courts, *see* Pet. at 12–15, but none of the cases he cites address repugnant verdicts, as that term is understood in Georgia. Rather, they discuss merely *inconsistent* verdicts, even if they use the term "repugnant" to describe them.

For example, in *DeSacia v. State*, 469 P.2d 369 (Alaska 1970), a defendant was charged with two

counts of manslaughter arising from the same automobile accident in which the defendant caused another car to veer into a river, resulting in the death of two passengers in that car. *Id.* at 370–71. The jury acquitted the defendant of manslaughter as to one victim, but convicted as to the other. *Id.* at 371. On appeal, the Alaska Supreme Court reversed the inconsistent conviction and held that the Double Jeopardy Clause precluded retrial. *Id.* at 378. McElrath tries to analogize *DeSacia* to his own case, but he ignores a key difference. In *DeSacia*, the jury made no specific factual findings when it returned the inconsistent verdicts; the inconsistency arose only from the fact that the verdicts themselves were supposedly "irrational." *Id.* By contrast, in McElrath's case, the jury specifically concluded both that he was insane and that he was sane. *McElrath I*, 308 Ga. at 104. Those are mutually exclusive, affirmative findings, which is what makes verdicts repugnant in Georgia. *Id.* at 112.

Similarly, *People v. DeLee*, 26 N.E.3d 210 (N.Y. 2014), *Pleasant Grove City v. Terry*, 478 P.3d 1026 (Utah 2020), and *State v. Halstead*, 791 N.W.2d 805 (Iowa 2010), all involved merely inconsistent, not repugnant, verdicts. In each case, the defendant was convicted of a compound offense but acquitted of the corresponding predicate offense. *See DeLee*, 26 N.E.2d at 211 (acquitted of first-degree manslaughter but convicted of first-degree manslaughter as a hate crime); *Terry*, 478 P.3d at 1027 (acquitted of domestic violence but convicted of domestic violence in the presence of a child); *Halstead*, 791 N.W.2d at 807 (acquitted of felony

of theft but convicted of assault while participating in a felony). And in each case, the state's highest court reversed the conviction because it was inconsistent to convict a defendant on a compound crime while acquitting him of the predicate offense. *See DeLee*, 26 N.E.2d at 213; *Terry*, 478 P.3d at 1030; *Halstead*, 791 N.W.2d at 816.

But again, although these courts sometimes used the term "repugnant," the verdicts at issue were merely inconsistent, at least as Georgia understands those terms. In no case did the jury make affirmative factual findings—the essence of Georgia's repugnant verdicts doctrine, *see Hinkson*, 310 Ga. at 391—beyond the ultimate verdicts of guilty and not guilty. In fact, *DeLee*, *Terry*, and *Halstead* present exactly the situation this Court considered in *Powell*: a defendant convicted of a compound offense but acquitted on the predicate offense. And *Powell* is the classic case of inconsistent, not repugnant, verdicts. *See* 469 U.S. at 60 (defendant acquitted of conspiring to possess cocaine but convicted of using the telephone to commit conspiracy to possess cocaine).

McElrath relies exclusively on these inapposite inconsistent verdict cases. *See* Pet. at 13–15. But he is not challenging Georgia's approach to inconsistent verdicts; he is challenging its unique approach to *repugnant* verdicts. And he has identified no other state that has considered truly repugnant verdicts *at all*, let alone adopted a rule conflicting with Georgia's.

II. McElrath could have raised these arguments previously and chose not to do so.

Setting aside the merits of whether repugnant verdicts preclude retrial, this case is a poor vehicle to decide that question because of procedural complications largely attributable to McElrath himself. These procedural complications, moreover, are further evidence that—far from being a recurring issue—it is quite possible the Georgia Supreme Court will never decide a case in this fashion again.

1. At bottom, McElrath's issue is with the Georgia Supreme Court's decision to vacate and remand both of his verdicts—the conviction and the acquittal—following his first appeal. He thinks the court should have simply affirmed the acquittal and vacated only the conviction. *See McElrath II*, 315 Ga. at 127 (describing McElrath's arguments on this point). One can see why he would want to challenge that decision. It is, after all, intertwined with the court's repugnancy analysis—the court vacated McElrath's acquittal *because* it was repugnant and therefore void, *McElrath I*, 308 Ga. at 112—and the vacatur of the acquittal is what enabled the State to retry McElrath on the malice murder count. Plus, neither party argued in *McElrath I* that the Georgia Supreme Court should vacate his acquittal; that was a *sua sponte* decision of the court.

But McElrath chose not to challenge that decision at the appropriate time—on rehearing of his first appeal—and now he is procedurally barred from doing so,

at least through direct appeal. It is well established that a party may not disturb a court's decision on a discrete issue when that issue has already been litigated to finality. *See Arizona v. California*, 460 U.S. 605, 618 (1983) ("[W]hen a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages of the same case."). And this doctrine—the "law of the case"—is a statutory obligation in Georgia. "Under the 'law of the case' rule, 'any ruling by the Supreme Court [of Georgia] or the Court of Appeals *shall be binding* in all subsequent proceedings in that case in the lower court and in the Supreme Court . . . .'" *Langlands v. State*, 282 Ga. 103, 104 (2007) (quoting O.C.G.A. § 9-11-60(h)) (emphasis added).

The Georgia Supreme Court, as it explained in its most recent decision, "conclusively decided" the question of remedy in McElrath's first appeal when it vacated his verdicts as void. *McElrath II*, 315 Ga. at 127; *see also McElrath I*, 308 Ga. at 112. And that issue is inextricably bound up with McElrath's double jeopardy arguments.

It is not clear whether the Georgia Supreme Court's decision on the proper remedy was correct as a matter of state law and the court's own precedents. For that very reason, it is also not clear that the court would ever repeat that decision in a future case. In *McElrath II*, 315 Ga. at 128, the court rejected McElrath's attempts to reopen the question because it had been decided in *McElrath I*. But in the rare future case of repugnant verdicts, when the court is not bound by law of the case, it would consider similar arguments

and clarify its remedial approach to repugnant verdicts. And if it agrees that Georgia law does *not* require vacating not-guilty verdicts, then that would confirm that McElrath's case is and will remain the only one of its kind.

2. McElrath, to be clear, had the chance to challenge the vacatur decision. He easily "could have filed a motion for reconsideration contesting that decision during the reconsideration period for the [first] appeal." *McElrath II*, 315 Ga. at 128 (citing Ga. Sup. Ct. R. 27).

Put differently, the time to challenge the Georgia Supreme Court's decision vacating his acquittal was *when it vacated his acquittal*. Not now, after the case has already been remanded and the trial court has initiated a new round of proceedings. But McElrath "did not do so," which means the Georgia Supreme Court could not take up the vacatur issue in McElrath's most recent appeal. *Id.* This case, in other words, had vehicle problems even in the Georgia Supreme Court.

Nor should this Court assume that other criminal defendants will repeat McElrath's procedural errors. *Cf. Hallstrom v. Tillamook County*, 493 U.S. 20, 28 (1989) (noting that lawyers are "presumed to be aware of" procedural requirements and deadlines); *Caidor v. Onondaga County*, 517 F.3d 601, 605 (2d Cir. 2008) (explaining that even pro se litigants "are required to inform themselves regarding procedural rules and to comply with them"). Going forward, any criminal defendant who is subject to repugnant verdicts (which

are, again, exceedingly rare) is free to press the arguments in the Georgia Supreme Court that McElrath failed to make during his first appeal and now seeks to repackage here. And, again, it is quite possible that the Georgia Supreme Court would *accept* those arguments given that, in the past, that court has vacated only convictions and has left repugnant acquittals untouched. *See Turner*, 283 Ga. at 21.

III. The Georgia Supreme Court's decision conforms to this Court's precedents on double jeopardy and inconsistent verdicts.

Contrary to McElrath's and his amicus's arguments, *see* Pet. at 10–12; Amicus at 13–24, Georgia's repugnant verdicts rule does *not* conflict with this Court's precedents.

1. To start, McElrath ignores the crucial difference between inconsistent and repugnant verdicts. He says repugnant verdicts are "merely a subcategory of inconsistent verdicts" and the two should be treated exactly the same. Pet. at 10; *see also id.* at 5, 10–12, 16–17 (rejecting any distinction between inconsistent and repugnant verdicts). But repugnant verdicts are fundamentally different from merely inconsistent verdicts. McElrath fails to grasp this distinction because he misunderstands *both* this Court's cases explaining what makes verdicts inconsistent *and* Georgia's cases explaining what makes verdicts repugnant.

As explained above, verdicts are inconsistent if they cannot logically coexist with one another. For example, "acquit[ting] on a predicate offense while

convicting on the compound offense." *Powell*, 469 U.S. at 65. Or convicting one defendant while acquitting another of the same charge based on identical conduct. *See Harris v. Rivera*, 454 U.S. 339, 340 (1981). Critically, though, the inconsistent verdicts rule rests on the assumption that a reviewing court cannot know why the jury acted as it did. *See Powell*, 469 U.S. at 64–65; *id.* at 65 ("[I]t is unclear whose ox has been gored.").

That assumption, however, is simply not true for repugnant verdicts as Georgia defines them. Repugnant verdicts require mutually exclusive, affirmative, on-the-record factual findings from the jury. *See McElrath I*, 308 Ga. at 111–12; *Turner*, 283 Ga. at 20–21; *Hinkson*, 310 Ga. at 391 (explaining that "repugnant verdicts" turn on "specific findings"). With such findings, the reviewing court no longer has to wonder as to why the jury rendered inconsistent verdicts; the reason for the inconsistency, or the mistake that produced it, is "transparent" in the record. *Turner*, 283 Ga. at 21.

McElrath tries to erase this distinction. He says that, "[b]y definition, inconsistent verdicts are verdicts that cannot be reconciled." Pet. at 10. In other words, he believes that *all* inconsistent verdicts, not just repugnant ones, are based on affirmative "findings that contradict findings required for the other verdict." *Id.*; *see also id.* at 11 ("[R]eferring to the verdicts as 'repugnant' is simply another way of saying that the verdicts are highly inconsistent."). But that ignores this Court's clear statements to the contrary. In *Powell*, the leading inconsistent verdicts case, this Court explained that,

absent a clear indication otherwise, there is no way to know whether an inconsistent verdict is the product of "mistake"—as McElrath insists *all* inconsistent verdicts are—rather than "compromise" or "lenity." 469 U.S. at 65. The cases on which McElrath himself relies say exactly the same thing: inconsistent verdicts, unlike repugnant ones, are not necessarily the result of conflicting findings. *See*, *e.g.*, *Bravo-Fernandez v. United States*, 580 U.S. 5, 12 (2016) (citing *Powell*); *Dunn v. United States*, 284 U.S. 390, 393–94 (1932). But repugnant verdicts, by definition, are a matter of a jury saying two contradictory things, like declaring a defendant both sane and insane at the same time. *McElrath I*, 308 Ga. at 111–12.

This distinction between inconsistent and repugnant verdicts is what justifies treating them differently. With repugnant verdicts, "we are not dealing with a verdict by a jury whose motivations must remain a mystery to us." *King*, 278 Ga. at 123. "There is, therefore, no speculation, and the policy explained in *Powell* . . . does not apply." *Id.*

2. Properly understood, the Georgia Supreme Court's decision below does not conflict with this Court's double jeopardy cases. In arguing the opposite, McElrath relies heavily on this Court's instruction that even erroneous acquittals terminate jeopardy and therefore preclude retrial. *See* Pet. at 8–9, 11; *see also* Amicus at 9–11. But again, McElrath misunderstands the nature of repugnant verdicts. A repugnant verdict, unlike an inconsistent verdict, is not simply an erroneous verdict. Rather, it is *no verdict at all*. That means double

jeopardy is not implicated because a repugnant verdict fails to terminate a defendant's initial jeopardy. *See Richardson v. United States*, 468 U.S. 317, 325 (1984) ("[T]he Double Jeopardy Clause by its terms applies only if there has been some event . . . which terminates the original jeopardy.").

When a jury returns truly repugnant verdicts, those verdicts are "valueless" because there "is no way to decipher what factual finding or determination they represent." The verdicts are a "nullity." *McElrath II*, 315 Ga. at 127. In this case, for instance, 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.* at 130. The verdicts are as nonsensical as if the jury were, for example, to return simultaneous verdicts of guilty and not guilty on the same count. Entering a judgment on such verdicts would not just be "logically incongruous," as with inconsistent verdicts. It would be "metaphysically impossible" because it would, as in the case of repugnant verdicts, require the court to "overlook" conflicting findings of fact. *United States v. Shippley*, 690 F.3d 1192, 1195 (10th Cir. 2012) (Gorsuch, J.) (noting that *Powell* does not speak to such cases). In such circumstances, double jeopardy does not attach because the first jeopardy never ended; the jury never produced an actual verdict.

So here, McElrath's repugnant verdicts "failed to result in an event that terminated jeopardy," *McElrath II*, 315 Ga. at 130 (comparing repugnant verdicts to a

mistrial), meaning retrial does not implicate the Double Jeopardy Clause. At the very least, this Court need not further review this question, which is unlikely to ever arise again.

CONCLUSION

For the reasons set out above, this Court should deny the petition.

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