No. 22-721

IN THE

Supreme Court of the United States

DAMIAN MCELRATH

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

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

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

F. ANDREW HESSICK
160 Ridge Road
Chapel Hill, NC 27599

H. MADDOX KILGORE
CARLOS J. RODRIGUEZ
KILGORE & RODRIGUEZ, LLC
36 Ayers Avenue
Marietta, GA 30060

RICHARD A. SIMPSON
COUNSEL OF RECORD
ELIZABETH E. FISHER
WILEY REIN LLP
2050 M Street NW
Washington, DC 20036
(202) 719-7314
rsimpson@wiley.law

Counsel for Petitioner

April 14, 2023

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

ARGUMENT

The Georgia Supreme Court's decision contradicts this Court's clear command that the Double Jeopardy Clause prohibits retrial on a charge of which the defendant has been acquitted. There is no basis in law or logic for the holding below that this Court's absolute prohibition on retrial following acquittal does not apply to so-called "repugnant" verdicts.

The State, represented by its Attorney General, makes no serious effort to argue that the decision below can be reconciled with this Court's precedents. As the same Attorney General conceded before the Georgia Supreme Court, this Court's double jeopardy cases prohibit the State from subjecting McElrath to a second trial on the charge of which he was acquitted.[1]

Instead, the State devotes most of its attention to arguing that this Court should overlook the Georgia Supreme Court's failure to follow this Court's controlling on-point precedents. It makes the extraordinary claim that McElrath waived his double jeopardy argument under state law by not raising it

---

[1] Br. of Appellee by the Att'y Gen. at 9 n.3, *McElrath v. State*, 880 S.E.2d 518 (Ga. 2022) (No. S22A0605) ("Appellee acknowledges that retrial of the malice murder charge would be precluded by double jeopardy under the law as it currently stands, as a verdict of acquittal 'is, of course, absolutely final.'" (quoting *Bullington v. Missouri*, 451 U.S. 430, 445 (1981) and citing *Burks v. United States*, 437 U.S. 1, 15–16 (1978))).

on a motion for reconsideration after the Georgia Supreme Court *sua sponte* vacated the acquittal in *McElrath I*. But *McElrath I* did not address whether the Double Jeopardy Clause precludes the State from mounting a second prosecution following the acquittal, and McElrath timely raised that issue in his plea in bar. Indeed, in *McElrath II*, the Georgia Supreme Court deemed it appropriate to decide the issue on the merits.

The State also asserts that the issue presented is not important enough to justify review because it will rarely occur. In substance, the State contends that review is unwarranted because the decision below will result in the State only *occasionally* violating a fundamental constitutional right. Even if that were correct, preventing those inevitable violations of the Double Jeopardy Clause would be sufficiently important to justify review.

In fact, however, the State's argument that "repugnant" verdicts will be exceedingly rare sits atop a house of cards. *McElrath I* and *McElrath II* changed the law. Following those decisions, the second of which came just five months ago, prosecutors in Georgia will have repeated opportunities to argue that inconsistent verdicts are "repugnant" and thus that this Court's double jeopardy rules do not apply.

A. The decision below directly violates this Court's controlling precedents regarding the Double Jeopardy Clause.

The State bases its merits argument on a single assertion made in perfunctory fashion, namely, that the decision below does not conflict with this Court's double jeopardy decisions because "repugnant verdicts" are different than "inconsistent verdicts." Br. in Opp. at 12–16. That argument does not pass the straight-face test.

1. This Court's precedents establish a bright-line rule: the Double Jeopardy Clause forbids a second prosecution after a verdict of acquittal. *Benton v. Maryland*, 395 U.S. 784, 795–97 (1969). It is no matter that the acquittal may be "irreconcilable" with another verdict. *Bravo-Fernandez v. United States*, 580 U.S. 5, 8 (2016) (reaffirming that "[t]he Government is barred by the Double Jeopardy Clause from challenging [an] acquittal" even if that acquittal conflicts with a guilty verdict).

Nothing in this Court's precedents creates an exception for acquittals that are "repugnant" to other verdicts. The State's arguments to the contrary rest on a fundamental misunderstanding of both the Double Jeopardy Clause and *United States v. Powell*, 469 U.S. 57 (1984).

The Double Jeopardy Clause categorically prohibits retrying a defendant on a charge of which he was acquitted—even if the acquittal was "based upon

an egregiously erroneous foundation." *Fong Foo v. United States*, 369 U.S. 141, 143 (1962); *Arizona v. Washington*, 434 U.S. 497, 503 (1978); *accord Ball v. United States*, 163 U.S. 662, 671 (1896) ("The verdict of acquittal was final, and could not be reviewed, on error or otherwise, without putting [the defendant] twice in jeopardy, and thereby violating the Constitution."). "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense . . . ." *Green v. United States*, 355 U.S. 184, 187 (1957). This rule is unequivocal: no acquittal can be retried, ever.

Powell does not depart from this rule. *Powell* addressed only whether a *conviction* should be overturned because of its inconsistency with an acquittal. The decision expressly accepted as established that a retrial following an acquittal is prohibited: "*[g]iven . . . the fact that the Government is precluded from challenging the acquittal*," inconsistency is not a basis for challenging a conviction. 469 U.S. at 65 (emphasis added). The Court recently reiterated this point in *Bravo-Fernandez*, emphasizing that "[t]he Government is barred by the Double Jeopardy Clause from challenging [an] acquittal" even if that acquittal is "inconsistent" with a guilty verdict that "turn[s] on the very same issue of ultimate fact." 580 U.S. at 8.

2. Even on its own terms, the State's purported distinction between inconsistent and "repugnant" verdicts fails. Verdicts are inconsistent when they rest on conclusions that are "rationally irreconcilable," *id.,* or as the State puts it, "if they cannot logically coexist with one another," Br. in Opp. at 23. Under Georgia law, verdicts are "repugnant" when a jury finds a defendant "not guilty on one count and guilty on another," and in doing so makes "*affirmative* findings shown on the record that cannot logically or legally exist at the same time." Pet. App. at 28a. (*McElrath I*).

Reading those definitions side-by-side shows that a "repugnant" verdict is merely a specific kind of inconsistent verdict. All inconsistent verdicts rest on findings by the jury—explicit or implicit—that cannot logically be reconciled; in both instances, the same jury necessarily made inherently contradictory findings. That the findings are explicit in one instance and implicit in another does not alter their fundamental character.

The State argues that "repugnant" verdicts fall outside the *rationale* of this Court's double jeopardy decisions involving inconsistent verdicts. According to the State, double jeopardy precludes retrial on inconsistent verdicts because of the uncertainty surrounding the inconsistency, and "repugnant" verdicts do not present this same uncertainty. Br. in Opp. at 23–24. That argument miscomprehends both the law and the nature of "repugnant" verdicts.

As discussed, once a jury renders an inconsistent verdict, it is not *uncertainty about the reasons* for the inconsistency that animates the prohibition on retrying the acquitted charge. *Supra*, 3–4. Rather, double jeopardy precludes retrying an acquittal that is inconsistent with another verdict because double jeopardy precludes retrials of *all* acquittals.

To be sure, an inconsistent verdict does present uncertainty. As the Court has explained, inconsistent verdicts show "that either in the acquittal or the conviction the jury did not speak their real conclusions." *Dunn v. United States*, 284 U.S. 390, 393 (1932) (quoting *Steckler v. United States*, 7 F.2d 59, 60 (2d Cir. 1925)). When a jury renders inconsistent verdicts, it may result from "mistake, compromise, or lenity," and we do not know which side benefitted; the inconsistency might have been a windfall for the government or the defendant. *Powell*, 469 U.S. at 65. But that uncertainty has no bearing on whether double jeopardy precludes retrial of an acquittal.

In any event, a "repugnant" verdict containing affirmative inconsistent findings is equally uncertain. It does not reveal the reason for the inconsistency any more than does any other inconsistent verdict. Here, for example, the jury may have found McElrath to be both sane and insane at the same time by mistake, or as a compromise between jurors who disagreed about whether to find McElrath guilty or not guilty of all

charges, or to show lenity by convicting McElrath only of some offenses.

Nor is it clear which party benefitted from the inconsistency. Consistency in the verdicts may have led to McElrath being convicted on all charges or being acquitted on all charges. The *only* thing established by the inconsistent affirmative findings is that the verdicts are logically irreconcilable.

At its core, the State's argument is that the decision below does not conflict with this Court's controlling precedents because the Court has never addressed this specific kind of inconsistency. But the rationale of this Court's decisions applies equally to both inconsistent and "repugnant" verdicts. The State's argument is like saying that discriminating against persons of a particular race does not conflict with this Court's decisions prohibiting racial discrimination because the Court has never addressed a discrimination case involving a person of that particular race.

3. Equally unavailing is the State's argument that "repugnant" verdicts are void and thus do not terminate jeopardy, similar to a mistrial. Br. in Opp. at 25–27. As a general matter, state law may dictate what events constitute a mistrial. But the Double Jeopardy Clause limits that power. This Court has squarely held that all acquittals, even erroneous ones, terminate jeopardy and preclude a second trial on the charge of which a defendant was acquitted. *Fong Foo*,

369 U.S. at 143; *Arizona*, 434 U.S. at 503.[2] The State's expedient attempt to circumvent the Double Jeopardy Clause by likening an inconsistent acquittal to a mistrial cannot be squared with this Court's holdings.

B. The State's argument that McElrath is procedurally barred from raising the double jeopardy argument is wrong and contrary to the Georgia Supreme Court's decision.

The State suggests that McElrath's double jeopardy challenge is procedurally barred under Georgia state law. Br. in Opp. at 20–23. The State is wrong.

In *McElrath I*, the Georgia Supreme Court *sua sponte* vacated not only McElrath's conviction but also his acquittal, notwithstanding that the State did not seek to vacate the acquittal. Pet. App. at 15a. The State argues that McElrath waived his right to challenge his retrial on double jeopardy grounds because he did not file a motion for reconsideration regarding vacatur of the acquittal. Br. in Opp. at 22. This assertion misses the point.

As this Court has recognized, the prohibition on double jeopardy protects "two vitally important interests." *Yeager v. United States*, 557 U.S. 110, 117

---

[2] The State's reliance on *United States v. Shippley*, 690 F.3d 1192, 1195 (10th Cir. 2012) (Gorsuch, J.) is puzzling. Br. in Opp. at 26. *Shippley* expressly did not address any potential violation of the Double Jeopardy Clause because the defendant did not make that argument. *See, e.g.*, 690 F.3d at 1195.

(2009). First, it prohibits retrial on acquitted charges. *Green*, 355 U.S at 187–88 (declaring double jeopardy prohibits "repeated attempts to convict an individual for an alleged offense"). Second, it protects final judgments by prohibiting vacatur of acquittals. *See Fong Foo*, 369 U.S. at 143.

McElrath's only challenge in this Court is that the Double Jeopardy Clause prohibits retrial on the charge of which he was acquitted. Pet. at 5–6. Although the vacatur was also error, McElrath's real harm came when the State launched the second prosecution on the charge of which he was acquitted. McElrath timely raised this objection to retrial in his plea in bar. Georgia's "law of the case" doctrine poses no obstacle to McElrath raising that distinct argument here. *Cf.* Br. in Opp. at 20–21.

The Georgia Supreme Court sees it the same. In *McElrath II*, the District Attorney argued that McElrath was procedurally barred from challenging either the earlier decision vacating the acquittal or the denial of his plea in bar as to retrial. Br. of Appellee by the Dist. Att'y at 12, *McElrath v. State*, 880 S.E.2d 518 (Ga. 2022) (No. S22A0605).

The Georgia Supreme Court agreed only that McElrath was precluded from challenging the earlier decision vacating the acquittal. It permitted McElrath's argument that the Double Jeopardy Clause precluded retrial on the acquitted charge and accordingly decided that issue on the merits. Pet. App. at 4a. This Court should decline the State's

invitation to second guess the Georgia Supreme Court's conclusion that Georgia state law imposes no procedural bar to McElrath pursuing his argument that double jeopardy precludes retrial on the charge of which he was acquitted.

C. The issue presented is critically important and likely to recur.

The State also asserts that the issue presented here is "the furthest thing from 'critically important'" because the circumstances of the decision below are "rarely applicable." Br. in Opp. at 11. It contends in substance that the issue does not warrant review because it will result in the State only *occasionally* violating the Double Jeopardy Clause. Needless to say, correcting a decision authorizing state courts to violate a fundamental constitutional right is an important issue warranting this Court's review, even if the violations are likely to be rare. Moreover, the State's basis for asserting that "repugnant" verdicts will be rare cannot withstand minimal scrutiny.

The protection against double jeopardy is a fundamental constitutional right. *Benton*, 395 U.S. at 794 ("[T]he double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage."). As shown, the Georgia Supreme Court's decision here directly contradicts this Court's controlling precedents by defining a new subcategory of inconsistent verdicts ("repugnant" verdicts) after which a defendant may face a second trial on a charge of which he was previously acquitted.

Supra, 3–7. Even if this holding affected only a small number of cases, it would warrant review by this Court because it authorizes the State and its courts to deny defendants in Georgia a fundamental constitutional right.

In any event, the State's argument that "repugnant" verdicts are likely to be exceedingly rare is based on misguided premises. First, the State argues that the "repugnant" verdict rule will apply only in rare "cases like this" in which it is apparent from the record that the inconsistent verdicts stemmed from legal error rather than leniency or compromise. Br. in Opp. at 14. But as discussed, the State's premise—that the verdict here shows the inconsistency resulted from legal error rather than leniency or compromise—is simply wrong. *Supra*, 3–4. Going forward, state courts will freely be able to characterize any verdict with irreconcilable findings as "repugnant" and so outside double jeopardy protection.

Second, the State's assertion that this is the only reported case in which the Georgia Supreme Court has vacated an acquittal based on "repugnant" verdicts proves nothing. As the State acknowledges, before *McElrath I*, when faced with inconsistent verdicts, the Georgia Supreme Court would leave the acquittal untouched. Br. in Opp. at 13. Consequently, the government never had a basis to seek to vacate an acquittal, so one would expect no decisions.

Moreover, until the decision in *McElrath II*, just five months ago, no reasonable Georgia prosecutor could have thought it permissible to subject a defendant to retrial following an acquittal, as evidenced by the Attorney General's concession below that double jeopardy prohibits the State from prosecuting McElrath again. It would thus be surprising if there were reported decisions in which a verdict of acquittal was vacated and a reprosecution were permitted.

Going forward, though, the Georgia Supreme Court's unprecedented decision here opens the door for prosecutors to argue that many inconsistent verdicts are "repugnant" and thus do not preclude a second trial following an acquittal. Considering the range of circumstances in which juries may render inconsistent affirmative findings (e.g., insanity, justification, or any time a special verdict is rendered), amicus is right that one can expect many instances in which Georgia courts permit second prosecutions following "repugnant" verdicts. Br. of Ga. Ass'n of Crim. Def. Laws. as Amicus Curiae Supporting Pet'r at 24.

Third, to the extent that the State suggests that a decision by this Court will have little impact because the decision below addressed whether a second trial is permitted rather than whether an acquittal may be vacated, that suggestion is flat-out wrong. Br. in Opp. at 20–22. The Double Jeopardy Clause protects both against vacating acquittals and against retrying a

charge after an acquittal. *Yeager,* 557 U.S. at 117–18. The scope of those protections does not differ. Importantly, the vacatur of an acquittal becomes most meaningful only when the State attempts to subject the defendant to a second trial on the acquitted charge. A decision by this Court prohibiting a second trial following an acquittal will bring Georgia back into line with how this Court has mandated acquittals be treated. Going forward, Georgia courts will know that the Double Jeopardy Clause mandates that an acquittal rendered as part of inconsistent verdicts is final and conclusive, regardless of whether the verdicts could be called "repugnant."

History is a good predictor. Issues of double jeopardy have commanded this Court's attention for over a century. *See, e.g.*, *Ball*, 163 U.S. 662 (1896); *Green*, 355 U.S. 184 (1957); *Fong Foo*, 369 U.S. 141 (1962); *Benton*, 395 U.S. 784 (1969); *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977); *United States v. Scott*, 437 U.S. 82 (1978); *Arizona*, 434 U.S. 497 (1978); *Powell,* 469 U.S. 57 (1984); *Yeager*, 557 U.S. 110 (2009); *Evans v. Michigan*, 568 U.S. 313 (2013); *Bravo-Fernandez*, 580 U.S. 5 (2016); *see also Yeager*, 557 U.S. at 117 ("[W]e have decided an exceptionally large number of cases interpreting this provision."). The regularity with which this Court has considered the issue itself suggests the problem is common, not rare.

In sum, there is no reasonable basis to believe the State's argument that "repugnant" verdicts will be

exceedingly rare. And even if the State were right that such cases will be rare, this Court must correct the decision below, which creates a category of cases in which Georgia state courts are permitted to violate this Court's controlling precedents regarding a fundamental constitutional right.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

F. ANDREW HESSICK
160 Ridge Road
Chapel Hill, NC 27599

H. MADDOX KILGORE
CARLOS J. RODRIGUEZ
KILGORE & RODRIGUEZ, LLC
36 Ayers Avenue
Marietta, GA 30060

RICHARD A. SIMPSON
COUNSEL OF RECORD
ELIZABETH E. FISHER
WILEY REIN LLP
2050 M Street NW
(202) 719-7314
rsimpson@wiley.law

Counsel for Petitioner

April 14, 2023