No. 22-721

IN THE

Supreme Court of the United States

DAMIAN MCELRATH,

Petitioner,

v.

GEORGIA,

Respondent.

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

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

The Georgia Supreme Court held that a jury's verdict of acquittal on one criminal charge and its verdict of guilty on a different criminal charge arising from the same facts were logically and legally impossible to reconcile. It called the verdicts "repugnant," vacated both of them, and subsequently held that the defendant could be prosecuted a second time on both charges. Does the Double Jeopardy Clause of the Fifth Amendment prohibit a second prosecution for a crime of which a defendant was previously acquitted?

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OPINIONS BELOW

The opinion of the Georgia Supreme Court (Pet. App. 1a-12a) is reported at 880 S.E.2d 518 (Ga. 2022) ("*McElrath II*"). An earlier related opinion of the Georgia Supreme Court (Pet. App. 14a-36a) is reported at 839 S.E.2d 573 (Ga. 2020) ("*McElrath I*").

JURISDICTION

The Georgia Supreme Court entered its judgment on November 2, 2022. Pet. App. 9a. On January 31, 2023, Petitioner filed a petition for a writ of certiorari, which was granted on June 30, 2023. The Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. V.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

INTRODUCTION

This case concerns the ability of a State to retry a defendant for a crime after he has been acquitted of that crime. As this Court has long recognized, the Double Jeopardy Clause prohibits retrying a defendant on acquitted charges. This prohibition, which traces back to ancient English practice, is absolute. Even if an acquittal is "egregiously erroneous" or utterly irreconcilable with a guilty verdict rendered at the same time, the State cannot retry a defendant on an acquitted charge.

In this case, the Georgia Supreme Court devised a "repugnancy" exception to this ironclad rule. The Georgia court acknowledged that the Double Jeopardy Clause prohibits retrial on an acquitted charge even if the acquittal is inconsistent with a guilty verdict rendered on another charge at the same time. It held,

however, that this principle does not apply when the acquittal and the conviction rest on "affirmative findings shown on the record that cannot logically or legally exist at the same time." Pet. App. 28a (*McElrath I*). In that situation, the Georgia court reasoned, the verdicts are not merely inconsistent but "repugnant" and so do not trigger double jeopardy protections. *Id.* 7a (*McElrath II*).

That conclusion is wrong. Permitting retrial based on repugnancy conflicts with this Court's unbroken line of decisions unequivocally prohibiting retrial following an acquittal rendered in a court with jurisdiction, undermines the purposes of the Double Jeopardy Clause, and is inconsistent with historical practice. This Court accordingly should reverse the decision below.

STATEMENT OF THE CASE

1. In 2017, the State of Georgia prosecuted Damian McElrath for the crimes of malice murder, felony murder, and aggravated assault, all predicated on a single incident in 2012 in which McElrath killed his adoptive mother. At trial, McElrath asserted an insanity defense to all charges. *See id.* 18a-20a (*McElrath I*).

Under Georgia law, a defendant is entitled to a "not guilty by reason of insanity" verdict if he proves by a preponderance of the evidence either that he lacked the mental capacity to distinguish right from wrong in

committing the alleged act or that his will was overpowered by some mental delusion such that he had no criminal intent to commit the act. O.C.G.A. §§ 16-3-2 to 16-3-3; *see Stevens v. Georgia*, 350 S.E.2d 21, 22 (Ga. 1986) (recognizing insanity defense if the defendant proves "by a preponderance of the evidence that he was insane at the time of the crime"). Alternatively, if the defendant fails to prove the insanity defense, the jury has the option of finding him "guilty but mentally ill at the time of the crime," which results in the Department of Corrections being charged with evaluating the defendant's mental health needs. O.C.G.A. § 17-7-131(b)(1)(D).

Under these rules, the jury in McElrath's case could render any of four possible verdicts as to each of the charges: Guilty; Guilty but Mentally Ill; Not Guilty By Reason of Insanity; or Not Guilty. *Id.* § 17-7-131(b)(1); J.A. 8a.

The jury rendered a split verdict, finding McElrath not guilty by reason of insanity on the malice murder charge and guilty but mentally ill on the felony murder and aggravated assault charges. *See* Pet. App. 14a-15a (*McElrath I*). The trial court accepted the verdicts and entered judgment accordingly. *Id.* 14a n.1.

2. Georgia law distinguishes between two situations in which a not guilty verdict conflicts with a simultaneously rendered guilty verdict. First, "inconsistent verdicts" occur when a jury in a criminal

case renders seemingly incompatible verdicts of guilty on one charge and not guilty on another charge. *Id.* 22a. Second, "repugnant verdicts" occur when the jury "make[s] affirmative findings shown on the record that cannot logically or legally exist at the same time." *Id.* 27a-28a.

Although Georgia law prohibits a criminal defendant from challenging a conviction on the ground that it is merely inconsistent with an acquittal, *id.* 24a, a defendant may challenge a conviction on the ground that it is repugnant to an acquittal rendered at the same time, *id.* 28a.

McElrath appealed his conviction on the felony murder charge, arguing that the conviction was "repugnant" to the verdict of not guilty on the malice murder charge and therefore could not stand. *Id.* 15a. The State did not cross-appeal McElrath's acquittal on the malice murder charge, nor did it argue that the acquittal should be overturned. Rather, the State argued only that McElrath's conviction for felony murder should be affirmed despite any inconsistency with or repugnancy to the acquittal on the malice murder charge. *See* Br. of Appellee by the Att'y Gen. at 50, *McElrath v. State*, No. S19A1361 (Ga.) (Aug. 19, 2019) ("Wherefore, Appellee prays that this Court affirm Appellant's convictions and sentences."); Br. of Appellee by the District Att'y at 41, *McElrath v. State*, No. S19A1361 (Ga.) (Aug. 26, 2019) ("Appellee, through its authorized representatives, respectfully

urges this Honorable Court to affirm the judgment of the Superior Court[.]").[1]

Nonetheless, the Georgia Supreme Court *sua sponte* vacated both the conviction and the acquittal, holding that the verdicts were repugnant and thus neither could stand. Pet. App. 29a (*McElrath I*). The court explained that the acquittal on the malice murder charge rested on the affirmative finding that McElrath was insane when he committed the alleged acts, but the guilty verdict on the other charges based on the same acts depended on an affirmative conclusion that McElrath was not insane. *Id.* The court reasoned that these conclusions could not be reconciled because it is "not legally possible for an individual to simultaneously be insane and not insane during a single criminal episode involving a single victim, even if the episode gives rise to more than one crime." *Id.*

The court concluded that because the verdicts were based on conflicting affirmative findings as to McElrath's mental state, they were legally and logically impossible to reconcile and thus repugnant. *Id.* The court then remanded the case for retrial on all

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[1] In criminal cases before the Georgia Supreme Court, both the Attorney General and the District Attorney who prosecuted the case in the trial court may file briefs. O.C.G.A. §§ 45-15-3(3), 15-18-6(7) (requiring district attorneys "[t]o attend before the appellate courts when any criminal case emanating from their respective circuits is tried").

charges, including the malice murder charge of which McElrath had been acquitted. *Id.*

3. On remand, McElrath filed a plea in bar, asserting that the Double Jeopardy Clause of the United States Constitution prohibited the State from subjecting him to a second trial on the malice murder charge. *Id.* 1a-4a (*McElrath II*). The trial court denied the plea in bar, and McElrath appealed. *Id.* 1a.

In its filing with the Georgia Supreme Court, the District Attorney argued that McElrath could be retried on all charges, including the malice murder charge. Br. of Appellee by the District Att'y at 15-16, *McElrath v. State*, No. S22A0605 (Ga. Mar. 8, 2022). In a separate brief, however, the Georgia Attorney General conceded that the Double Jeopardy Clause barred retrial on the acquitted charge. Br. of Appellee by the Att'y Gen. at 9 n.3, *McElrath v. State*, No. S22A0605 (Ga. Mar. 15, 2022) (quoting *Bullington v. Missouri*, 451 U.S. 430, 445 (1981)).

The Georgia Supreme Court affirmed. Pet. App. 2a (*McElrath II*). It acknowledged that "[t]he Fifth Amendment to the United States Constitution guarantees criminal defendants protection against double jeopardy" and that this Court has "previously noted" that "a fundamental principle of procedural double jeopardy is that a verdict of acquittal is an absolute bar to a subsequent prosecution for the same offense." *Id.* 4a-5a (internal quotation and citation

omitted). The court also recognized that, "[u]nder the general principles of double jeopardy and viewed in isolation, 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." *Id.* 6a (citing, *e.g.*, *Yeager v. United States*, 557 U.S. 110, 122 (2009)).

Nonetheless, the Georgia Supreme Court held that the Double Jeopardy Clause does not preclude retrial of the malice murder charge because the acquittal on that charge was "repugnant" to the verdicts on the other two charges. *Id.* 6a-7a. In so holding, it distinguished between a verdict of acquittal that is repugnant to another verdict rendered in the same trial and a verdict of acquittal that is merely inconsistent with another verdict. *Id.*

Referencing its ruling in *McElrath I*, the court reasoned that repugnant verdicts are "valueless" and thus "void" because "[t]here is no way to decipher what factual finding or determination" the verdicts represent. *Id.* 7a. Thus, the court held, "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.* In the court's view, "the purported verdicts returned by the jury were a nullity and should not have been accepted by the trial court." *Id.* 3a.

On that basis, the Georgia Supreme Court held that "the repugnant verdicts failed to result in an event that terminated jeopardy" but rather were "akin to a situation in which a mistrial is declared after a jury is unable to reach a verdict." *Id.* 7a. As a result, the court said, the Double Jeopardy Clause does not forbid a second trial on the charge for which McElrath secured an acquittal at the first trial. *Id*. 9a.

Justice Pinson concurred but wrote separately to express two doubts. First, he doubted whether jeopardy had failed to terminate, given this Court's rulings that "the finality of a verdict of acquittal holds," even where, as here, the acquittal is inconsistent with another verdict. *Id.* 10a (Pinson, J., concurring). Second, he doubted whether the "state-law-based legal fiction" upon which the Georgia Supreme Court's conclusion hinged could be reconciled "with the quite-absolute-sounding bar against retrying a defendant who has secured an acquittal verdict." *Id*. 11a (first citing *Bullington*, 451 U.S. at 445; then citing *Arizona v. Washington*, 434 U.S. 497, 503 (1978)).

SUMMARY OF THE ARGUMENT

The Double Jeopardy Clause prohibits a State from retrying a defendant on a charge of which he was previously acquitted, even if that acquittal was repugnant to another verdict simultaneously rendered.

1.a. This Court's precedents make clear that the accused is protected from a second trial on the same

charge following an acquittal. *See, e.g.*, *Green v. United States*, 355 U.S. 184, 187 (1957); *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977); *Ball v. United States*, 163 U.S. 662, 671 (1896); *Arizona*, 434 U.S. at 503. The same holds true "even though an acquittal may appear to be erroneous," *Green*, 355 U.S. at 188; *see also Fong Foo v. United States*, 369 U.S. 141, 143 (1962), including when the acquittal is inconsistent with another verdict rendered in the same case, *Bravo-Fernandez v. United States*, 580 U.S. 5, 8, 24 (2016); *see also Dunn v. United States*, 284 U.S. 390, 393 (1932).

b. The Georgia Supreme Court's holding that "repugnant verdicts" do not implicate the Double Jeopardy Clause is wrong.

A so-called "repugnant" verdict is simply a type of inconsistent verdicts, which this Court has described as verdicts that cannot be reconciled. *See, e.g.*, *Bravo-Fernandez*, 580 U.S. at 8 (giving the example of a jury "convicting on one count and acquitting on another count, where both counts turn on the very same issue of ultimate fact"). Consequently, the Double Jeopardy Clause's prohibition on retrial on acquitted charges applies equally to acquittals that are "repugnant" to other verdicts rendered simultaneously.

In concluding to the contrary, the Georgia Supreme Court held that "repugnant verdicts" are void and thus akin to a mistrial, a circumstance in which the Double

Jeopardy Clause does not prohibit a second trial on the same charge. But this attempt to avoid a constitutional requirement through an innovative interpretation of state law must fail. Although States have broad authority to determine when a verdict is void or a mistrial occurs, the Double Jeopardy Clause limits that power. A State may not circumvent the Double Jeopardy Clause by declaring that an otherwise valid acquittal is void, simply because it is inconsistent with another verdict. *Fong Foo*, 369 U.S. at 143; *Arizona*, 434 U.S. at 503.

2. Neither the purposes and values underlying the Double Jeopardy Clause nor historical practice supports the Georgia Supreme Court's "repugnancy" exception to the prohibition on retrying a defendant on acquitted charges.

a. A core function of the Double Jeopardy Clause's bar on retrying acquitted charges is to prevent abuse of prosecutorial power. A second prosecution increases the probability of a wrongful conviction and imposes a "heavy personal strain" on defendants. *United States v. Jorn*, 400 U.S. 470, 479 (1971). The Georgia Supreme Court's repugnancy exception directly undermines this function. That repugnancy exception also risks upsetting the finality interest served by the Double Jeopardy Clause. *See Crist v. Bretz*, 437 U.S. 28, 33 (1978). The finality of an acquittal depends on the acquittal being treated as conclusive regardless of the reason underlying the acquittal.

Additionally, the Georgia Supreme Court's repugnancy exception threatens the Double Jeopardy Clause's purpose to "fortify and guard [the] inestimable right of trial by jury." *United States v. Gibert*, 25 F. Cas. 1287, 1294 (C.C.D. Mass. 1834) (Story, J.). It erroneously grants the government power to overturn an acquittal it deems repugnant to another verdict, based merely on an inconsistency. Affording the government that authority risks usurping the jury's core function and endangering the protections a jury trial provides, including the jury's discretion to render verdicts that reflect lenity or compromise.

b. The repugnancy exception also conflicts with the history of the Double Jeopardy Clause. Historically, acquittals rendered on a valid indictment after trial in a court with jurisdiction were absolutely final, even if they were erroneous. To the extent this Court has deviated from history, it has held that the Double Jeopardy Clause provides even more protections to defendants who have been acquitted. Historical practice therefore provides no basis for the Georgia Supreme Court's repugnancy exception.

For all of these reasons, the Georgia Supreme Court's decision should be reversed.

ARGUMENT

I. The Double Jeopardy Clause prohibits retrying a defendant on a charge of which he has previously been acquitted.

As this Court has repeatedly recognized, if a defendant has been acquitted of a charge, the Double Jeopardy Clause prohibits the government from retrying him on that charge—even if the acquittal was inconsistent with another verdict or egregiously erroneous. Accordingly, although McElrath's acquittal on malice murder was repugnant to the verdict of guilty but mentally ill on the other counts, the Double Jeopardy Clause prohibits Georgia from retrying him for malice murder.

A. The Double Jeopardy Clause prohibits retrial on charges of which a defendant has been acquitted, even if the verdict was erroneous.

1. The Fifth Amendment provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." It thereby protects the accused "from being subjected to the hazards of trial and possible conviction more than once for an alleged offense." *Green*, 355 U.S. at 187. At its core, the Double Jeopardy Clause prohibits multiple prosecutions for the same offense. *See Martin Linen Supply Co.*, 430 U.S. at 569 (noting that "the 'controlling constitutional principle' focuses on

prohibitions against multiple trials" (quoting *United States v. Wilson*, 420 U.S. 332, 346 (1975))).

The Double Jeopardy Clause applies to the States via the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 787 (1969). It thus constrains both federal and state governments—"with all [their] resources and power"—from making "repeated attempts to convict an individual for an alleged offense." *Id.* at 796; *Martin Linen Supply Co.*, 430 U.S. at 569.

In applying the Double Jeopardy Clause's prohibition on retrial, this Court has drawn a sharp distinction between retrying a defendant on charges of which he has previously been convicted and retrying a defendant on charges of which he has previously been acquitted.

"When a conviction is overturned on appeal, '[t]he general rule is that the [Double Jeopardy] Clause does not bar reprosecution.'" *Bravo-Fernandez*, 580 U.S. at 18 (quoting *Justs. of Bost. Mun. Ct. v. Lydon*, 466 U.S. 294, 308 (1984)). Accordingly, so far as double jeopardy is concerned, a defendant may appeal a conviction and be subject to retrial if the conviction is overturned.

In contrast, retrials of acquitted charges are flatly prohibited. "The constitutional protection against double jeopardy unequivocally prohibits a second trial following an acquittal." *Arizona*, 434 U.S. at 503.

The Court has described this prohibition on subsequent prosecution following a "verdict of acquittal" as "[p]erhaps the most fundamental rule in the history of double jeopardy jurisprudence." *Martin Linen Supply Co.*, 430 U.S. at 571 (quoting *Ball*, 163 U.S. at 671).

The prohibition on a second trial following an acquittal applies "even if the acquittal is 'based upon an egregiously erroneous foundation.'" *Evans v. Michigan*, 568 U.S. 313, 318 (2013) (quoting *Fong Foo*, 369 U.S. at 143). It applies "however mistaken the acquittal may have been." *Id.* at 319. "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*, 434 U.S. at 503; *see also Green*, 355 U.S. at 188 ("[I]t 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." (citing*, e.g.*, *Ball*, 163 U.S. at 671)).

There is no exception to this broad principle where the verdicts rendered on different charges in a single case are inconsistent. To the contrary, "when a jury returns inconsistent verdicts, convicting on one count and acquitting on another count, where both counts turn on the very same issue of ultimate fact[,] . . . [t]he Government is barred by the Double Jeopardy Clause from challenging the acquittal[,] . . . [and] 'the acquittals themselves remain inviolate.'" *Bravo-*

Fernandez, 580 U.S. at 8, 24 (quoting *Bravo-Fernandez v. United States*, 790 F.3d 41, 51 (1st Cir. 2015)); *see also Dunn*, 284 U.S. at 393 ("Consistency in the verdict is not necessary.").

The prohibition on retrying a defendant on acquitted charges applies even when the defendant appeals a conviction on other charges rendered in the same verdict. *See Green*, 355 U.S. at 191 ("And even after appealing the conviction of second degree murder [the defendant] still could not have been tried a second time for first degree murder [for which the jury had refused to convict him] had his appeal been unsuccessful."). The *Green* Court further explained: "Conditioning an appeal of one offense on a coerced surrender of a valid plea of former jeopardy on another offense exacts a forfeiture in plain conflict with the constitutional bar against double jeopardy." *Id.* at 193-94. Thus, even in cases in which two verdicts are irreconcilable, double jeopardy precludes the government from challenging the acquittal or retrying the defendant on the acquitted charge.

This Court recently reconfirmed this principle against retrying a defendant on acquitted charges in *Bravo-Fernandez v. United States*. 580 U.S. 5 (2016). There, defendants were charged with bribing government officials, as well as conspiracy to commit bribery and traveling in interstate commerce to commit bribery. *Id.* at 15. A jury rendered inconsistent verdicts on the charges, convicting the

defendants of the substantive bribery offenses but acquitting them of the other charges. *Id.* at 16. After the convictions were vacated, the defendants argued that the acquittals had issue-preclusive effect that prohibited the government from retrying them for substantive bribery. *Id.*

This Court rejected that argument, holding that the acquittals did not preclude the government from retrying the defendants on the charges of which they had previously been convicted. But in so ruling, the Court emphasized that the acquittals themselves were "inviolate." *Id.* The acquittals, the Court said, "forever bar[] the Government from again prosecuting" the defendants on those charges. *Id.* at 24.

2. These principles establish that the Double Jeopardy Clause precludes Georgia from retrying McElrath on the malice murder charge of which he was acquitted.

A verdict of not guilty by reason of insanity is an acquittal.[2] *See Nagel v. State*, 427 S.E.2d 490, 491 (Ga. 1993) (holding that defendant was "acquitted for murder by reason of insanity"); *Shannon v. United States*, 512 U.S. 573 (1994) (referring throughout to verdict of not guilty by reason of insanity as an acquittal); *see also Riley v. State*, 353 S.E.2d 598, 599-

[2] Although the insanity defense comes in many different forms, it requires a verdict of not guilty if proven. *Kahler v. Kansas*, 140 S. Ct. 1021, 1030 (2020).

600 (Ga. Ct. App. 1987); O.C.G.A. § 17-7-131(d) (referring to individual who receives a not guilty by reason of insanity verdict as "the person so acquitted").

Based on this Court's precedents described above, McElrath's acquittal on the malice murder charge was final. The State cannot subject him to a second trial on that charge, full stop.

B. The Georgia Supreme Court's distinction between repugnant verdicts and merely inconsistent verdicts does not change the Double Jeopardy Clause analysis.

1. In concluding in *McElrath II* that the Double Jeopardy Clause does not prohibit retrial on the malice murder charge, the Georgia Supreme Court reiterated its previous holding in *McElrath I* that the verdicts were repugnant and thus should be treated differently from merely inconsistent verdicts. Pet. App. 3a, 7a ("Because the verdicts were repugnant, both are rendered valueless. . . . Accordingly, the general principles of double jeopardy do not bar McElrath's retrial on the malice murder charge.").

But for purposes of the Double Jeopardy Clause, that is a distinction without a difference; what the Georgia courts call "repugnant" verdicts are merely a type of inconsistent verdict, to which the Double Jeopardy Clause applies.

Inconsistent verdicts are verdicts that cannot be reconciled; one verdict necessarily requires findings that contradict findings required for the other verdict. *See, e.g.*, *Bravo-Fernandez*, 580 U.S. at 8 (giving the paradigmatic example of a jury "convicting on one count and acquitting on another count, where both counts turn on the very same issue of ultimate fact"). 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. 28a (*McElrath I*). Reading those definitions side-by-side shows that a "repugnant" verdict is simply a specific kind of inconsistent verdict.

All inconsistent verdicts rest on findings by the jury that cannot be reconciled; in other words, the jury necessarily made inherently contradictory findings that cannot logically or legally coexist. That the findings are explicit in one instance and implicit in another does not alter their fundamental character. Referring to the verdicts as "repugnant" is simply another way of saying that the verdicts are explicitly inconsistent. *Cf.* William Shakespeare, *Romeo and Juliet*, act II, sc. 2, ls. 47-48 ("What's in a name? [T]hat which we call a rose [b]y any other name would smell as sweet."). Thus, the repugnancy of an acquittal to a conviction on another charge based on the same set of facts provides no ground for an exception to the Double

Jeopardy Clause's prohibition on retrial on the acquitted charge.

Georgia is, of course, free to distinguish among types of inconsistent verdicts for purposes of determining whether to vacate a *conviction*, but that does not mean it may do so with respect to an *acquittal*.

2. The Georgia Supreme Court held that "repugnant" verdicts are void and, thus, do not terminate jeopardy but are, instead, akin to a mistrial. Pet. App. 7a (*McElrath II*). This conclusion is unwarranted.

It is true, of course, that the Double Jeopardy Clause does not preclude retrial if the first trial results in a mistrial, *Blueford v. Arkansas*, 566 U.S. 599, 601 (2012), or if the first verdict was void because rendered by a court without authority to hear the case, *Smith v. United States*, 143 S. Ct. 1594, 1609 (2023). It is also true that States have broad authority to dictate the jurisdiction of their courts and the circumstances that may result in a mistrial.

But States cannot circumvent the Double Jeopardy Clause by characterizing an acquittal rendered by a court with jurisdiction as void and analogizing to the circumstances of a mistrial, in which jeopardy is not terminated. To the contrary, 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; *Evans*, 568 U.S. at 324.

The Court has long held that States may not avoid their constitutional obligations through innovative interpretations of state law. *Moore v. Harper*, 143 S. Ct. 2065, 2088-89 (2023). For example, States "may not sidestep the Takings Clause by disavowing traditional property interests." *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 167 (1998). Similarly, they cannot avoid the prohibition on enacting laws "impairing the Obligation of Contracts" by proclaiming that an otherwise valid contract was never made. *Moore*, 143 S. Ct. at 2088. And, although state courts may review redistricting legislation of state legislatures, they cannot circumvent the Elections Clause, which confers the districting power on the "legislature," by supplanting the state legislature's decisions based on unreasonable interpretations of state law. *Id.*

This principle applies with full force to the Double Jeopardy Clause, which embodies a core constitutional right. Just last term, this Court reaffirmed that labels are not dispositive, particularly in the context of determining the nature of an acquittal. *Smith*, 143 S. Ct. at 1609 ("[W]hat constitutes an 'acquittal' is not to be controlled by the form of [a] judge's action."); *Martin Linen Supply Co.*, 430 U.S. at 571; *see also Evans*, 568 U.S. at 322 ("We have emphasized that labels do not control our analysis in this context; rather, the

substance of a court's decision does." (internal quotation marks omitted)). For double jeopardy purposes, the "bottom-line question" for whether a judgment constitutes an acquittal is whether the judgment passed on the defendant's "criminal culpability." *Smith*, 143 S. Ct. at 1609 (quoting *Evans*, 568 U.S. at 324 n.6); *see also Martin Linen Supply Co.*, 430 U.S. at 571. "[A] merits-related ruling" that results in an "acquittal," regardless of the label affixed to that acquittal, "concludes proceedings absolutely." *Evans*, 568 U.S. at 319.

These precedents foreclose the Georgia Supreme Court's repugnant verdict exception to the Double Jeopardy Clause. Classifying a verdict as "repugnant" is a "state-law-based legal fiction that treats the jury's verdict as though it never happened." Pet. App. 11a (Pinson, J. concurring) (*McElrath II*). This Court should not permit the State to use that fiction to avoid the foundational constitutional requirement embodied in the Double Jeopardy Clause that acquittals, even if erroneous, are final and must stand—"no matter how erroneous" the jury's decision. *Burks v. United States*, 437 U.S. 1, 16 (1978); *Arizona*, 434 U.S. at 503 (citing *Fong Foo*, 369 U.S. at 143). An acquittal—any acquittal—absolutely prohibits a subsequent prosecution for the same offense. *Fong Foo*, 369 U.S. at 143.

Reflecting the consensus on this point, no other State has held that a defendant may be subject to a

second trial when the charge of which he has been acquitted is found to be repugnant to a conviction on another charge rendered by the same jury; Georgia stands alone.[3]

In sum, as this Court has repeatedly held, the Double Jeopardy Clause precludes retrial after acquittal even if the acquittal was erroneous. That rule decides this case. The jury acquitted McElrath of malice murder when it found him not guilty by reason of insanity. Georgia is accordingly barred from retrying McElrath on that charge. All that matters for purposes of the Double Jeopardy Clause is that the jury

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[3] Some States permit defendants to challenge *convictions* that are inconsistent with another verdict. *See, e.g.*, *DeSacia v. State*, 469 P.2d 369, 378 (Alaska 1970) (reversing conviction and holding that retrial of acquittal was "precluded by the double jeopardy clause of the fifth amendment" where two verdicts were necessarily inconsistent and "irrational"); *People v. DeLee*, 26 N.E.3d 210, 213-14 (N.Y. 2014) (similar); *Pleasant Grove City v. Terry*, 478 P.3d 1026, 1034 (Utah 2020) (similar); *State v. Halstead*, 791 N.W.2d 805, 816 (Iowa 2010) (similar); *Brown v. State*, 959 So.2d 218, 220 (Fla. 2007) (vacating only conviction that is "legally inconsistent" with acquittal); *State v. Peters*, 855 S.W.2d 345, 352 n.3 (Mo. 1993) (en banc) (Robertson, C.J., dissenting) (detailing that, when a jury renders inconsistent verdicts, Missouri permits retrial on the convicted charge but not on the acquitted charge); *People v. Jones*, 207 Ill. 2d 122, 133-34 (2003) (recognizing that defendants in Illinois may challenge *convictions* that are inconsistent with other convictions). But no other State follows Georgia's approach of permitting retrial on an acquitted charge based on a conflict between the acquittal and a conviction.

rendered a not guilty verdict. The fact that the acquittal was "repugnant" to the jury's conviction on the felony murder charge does not change the double jeopardy analysis; the jury acquitted McElrath of malice murder and that acquittal is "absolutely final," which precludes another trial on the same charge.

II. The Georgia Supreme Court's repugnancy exception conflicts with the purpose and history of the Double Jeopardy Clause.

Neither the values underlying the Double Jeopardy Clause nor historical practice supports a repugnancy exception to the prohibition on subjecting a defendant to a second prosecution on a charge of which he has been acquitted.

A. The values underlying the Double Jeopardy Clause do not support an exception for repugnant verdicts.

The prohibition on retrial after an acquittal serves several critical functions in criminal law. It limits the potential for the government to exercise its prosecutorial power in an arbitrary and oppressive way. It protects the finality of judgments. And it protects the criminal defendant's right to a trial by jury. The Georgia Supreme Court's repugnant verdict exception undermines all of these core values.

1. The rule against retrial following an acquittal protects the citizenry from abuse of prosecutorial

power. As this Court has explained, the rule reflects the "deeply ingrained" principle 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, 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." *Green*, 355 U.S. at 187-88. The "Double Jeopardy Clause . . . guards against" this sort of "Government oppression" by prohibiting subsequent prosecutions if the government is dissatisfied with an earlier acquittal. *United States v. Scott*, 437 U.S. 82, 99 (1978).

Permitting a retrial after acquittal because a State has determined that the acquittal is repugnant to another verdict directly contravenes this principle. The ability to force such a retrial would give the government a second opportunity to convince a jury of the defendant's guilt, and it would require the defendant to bear the "heavy personal strain" of facing prosecution again. *Jorn*, 400 U.S. at 479.

The Georgia Supreme Court's repugnant verdict exception to the Double Jeopardy Clause also raises acute concerns about the potential for wrongful convictions. There are many possible explanations for inconsistent verdicts, including those the Georgia Supreme Court calls repugnant. The inconsistency may signify a mistake by the jury, by acquitting when

it should have convicted or convicting when it should have acquitted. *See Bravo-Fernandez*, 580 U.S. at 13. But it may also be the product of uncertainty among the jurors about what happened or a compromise among jurors who disagree about the defendant's innocence or guilt. *Id.* These latter possibilities, in particular, present the real possibility that a retrial may result in a conviction of a defendant who is innocent.

Additionally, the proposed exception raises heightened concerns about the significant personal effect on defendants resulting from retrial. *Jorn*, 400 U.S. at 479. A repugnant verdict means that the jury acquitted the defendant of a charge while also making findings establishing the defendant's guilt on another charge arising from the same set of facts. Those findings supporting guilt mean that a defendant would have good reason to fear that he may face a second prosecution on the acquitted charge, putting him under a persistent cloud of fear that a prosecutor may decide to retry the case.

Moreover, although all retrials force defendants to bear the burdens of a second prosecution, retrials of acquittals following repugnant verdicts are bound to be particularly harrowing because the finding by the first jury on the convicted charge makes a guilty verdict on the acquitted charge more likely following the government's "do over." This is exactly why the Court stated in *Green* that "[t]he law should not, and in [the

Court's] judgment does not, place the defendant in such an incredible dilemma" of choosing between appealing a conviction and surrendering a plea of former jeopardy on an acquitted charge. *Green*, 355 U.S. at 193.

2. The prohibition on retrial following acquittal also "represents a constitutional policy of finality for the defendant's benefit." *Jorn*, 400 U.S. at 479; *Crist*, 437 U.S. at 33 (stating that "[a] primary purpose served by" the prohibition on double jeopardy is "to preserve the finality of judgments"). That finality is not only for the defendant's benefit; the judiciary and the public also have an interest in avoiding the costs of repeatedly resolving the same charges, as well as a general public interest in learning whether a criminal law has been violated. An acquittal provides a final resolution to that question.

The Georgia Supreme Court's holding contravenes the finality interest protected by the prohibition on a retrial of acquitted charges. In particular, the court's holding erroneously focused on the reasons for the acquittal, as opposed to the fact of acquittal. That approach does not satisfy the core finality interest underlying the prohibition. An acquittal establishes conclusively that a defendant may not be held accountable for the crime charged. That finality interest will be served regardless of the reason for an acquittal or whether the jury's reasoning can be deciphered. Simply put, the Double Jeopardy Clause

protects a criminal defendant's right to rely on a verdict of acquittal, regardless of the reason for the verdict.

3. Allowing retrial after an acquittal is particularly unwarranted where, as here, the acquittal is rendered by a jury rather than a judge. "The Sixth Amendment right to a jury trial is fundamental to the American scheme of justice." *Ramos v. Louisiana*, 140 S. Ct. 1390, 1397 (2020). The right protects against arbitrary and oppressive exercises of government power by ensuring that the people, as opposed to government officials, determine whether an individual should be punished for a crime. *See Duncan v. Louisiana,* 391 U.S. 145, 155-56 (1968) ("Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge."). As Justice Story explained almost two hundred years ago, a central function of the Double Jeopardy Clause is to "fortify and guard this inestimable right of trial by jury." *Gibert*, 25 F. Cas. at 1294; *see also* Joseph Story, *Familiar Exposition of the Constitution of the United States* § 387, at 230 (1840) (listing the Double Jeopardy Clause as "secur[ing] th[e] great palladium of liberty, the trial by jury, in criminal cases, from all possibility of abuse" and "add[ing] greatly to the original constitutional barriers against persecution and oppression"). The prohibition ensures that the government cannot circumvent the jury trial right by

bringing a second prosecution if it is dissatisfied with the first jury's verdict.

The Georgia Supreme Court ruled that permitting retrial when an acquittal is repugnant to another verdict does not undermine the right to trial by jury because the repugnancy renders the jury's verdict "valueless" and "akin to a situation in which a mistrial is declared after a jury is unable to reach a verdict." Pet. App. 7a (*McElrath II*). This conclusion cannot withstand scrutiny.

Even when an acquittal is repugnant to another verdict, it still represents a judgment as to the defendant by a jury of his peers. This Court has held unequivocally that a jury is under no obligation to render consistent verdicts: "Consistency in the verdict is not necessary" to the validity of a verdict. *Dunn,* 284 U.S. at 393. "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." *United States v. Powell*, 469 U.S. 57, 67 (1984); *see United States v. Maybury*, 274 F.2d 899, 903 (2d Cir. 1960) (Friendly, J.) ("[I]t has not yet been deemed wise that this process of rationalization should be carried to the point of requiring consistency in a jury's verdict in a criminal trial."). Inconsistency accordingly does not affect the validity of the verdict.

In short, contrary to the Georgia Supreme Court's assertion, repugnant verdicts are neither valueless nor do they signify that the jury was unable to reach a verdict. They instead constitute the jury's collective decision on the charges the State chose to prosecute. Allowing the State a second chance to prosecute based merely on an inconsistency risks usurping the functions and protections of the jury, including the jury's power to render verdicts that reflect lenity or compromise.

B. History confirms that repugnancy is not a basis for permitting retrial on a charge of which the defendant has been acquitted.

The prohibition on retrying a person following an acquittal has deep historical roots tracing back to ancient times. "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." *Bartkus v. Illinois*, 359 U.S. 121, 151-52 (1959) (Black, J., dissenting).

1. Early English courts embraced this foundational principle.[4] Blackstone stated, for

[4] Bracton recognized it in his thirteenth century treatise, stating that a person against whom an appeal (at that time, "appeal" referred to a criminal proceeding brought by an individual) was brought "may except against the appeal by saying that he had earlier been appealed of the same deed by another and had

example, that it is a "universal maxim of the common law of England, that no man is to be brought into jeopardy of his life, more than once, for the same offence." 4 William Blackstone, *Commentaries* *335; *see* 2 William Hawkins, *A Treatise of the Pleas of the Crown, or, A System of the Principal Matters Relating to That Subject, Digested Under Their Proper Heads*, Ch. 35, § 1, at 368 (London, Eliz. Nutt & R. Gosling 1721) (recounting the "Maxim, That a Man shall not be brought into Danger of his Life for one and the same Offence, more than once"). "The existence of this maxim as a fundamental rule of the common law in the administration of criminal justice, may be constantly found recognised by elementary writers and courts of justice from a very early period down to the present times." *Gibert*, 25 F. Cas. at 1294 (Story, J.).

For this reason, at common law, the State could not prosecute a defendant a second time for a crime of which he had previously been acquitted. "[A] former acquittal by judgment [was] . . . a bar of a new indictment for the same offense." 2 Matthew Hale, *Historia Placitorum Coronae: The History of the Pleas of the Crown* 243 (London, E. & R. Nutt & R. Gosling 1736); *see also* 4 Blackstone, *Commentaries* *335 ("[W]hen a man is once fairly found not guilty upon any indictment, or other prosecution, he may plead such

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departed quit by judgment." 2 *Bracton on the Laws and Customs of England* 397 (George E. Woodbine ed., Samuel E. Thorne trans., 1968).

acquittal in bar of any subsequent accusation for the same crime."). Thus, as then-judge Kelyng observed in the *Raven's case* (1664), 84 Eng. Rep. 1065, 1068, a person "formerly indicted for burglary in breaking the house . . . and acquitted . . . cannot now be indicted again for the same burglary for breaking the house." Prosecutors could not avoid this bar by seeking a new trial following an acquittal. *See The King v. Read* (1660), 83 Eng. Rep. 271 (K.B.) (1 Lev. 9). Instead, the rule was that a defendant "being acquitted, cannot be tried again." *Id.*

It did not matter in this regard whether the prior acquittal was erroneous. Rather, it was "settled, That the Court cannot set aside a Verdict which acquits a Defendant of a Prosecution properly criminal. . . . for having been given contrary to Evidence, and the Directions of the Judge." 2 Hawkins, *supra*, Ch. 47, § 11, at 442; *see also* Thomas Starkie, *Treatise on Criminal Pleading, with Precedents of Indictments, Special Pleas* 353 (1824) ("An acquittal in fact is available by way of plea, without regard to any mistake or error on the part of the jury or of the court in which the verdict was given.").

Moreover, historically the government could not appeal in a criminal case. *United States v. Sanges*, 144 U.S. 310, 312 (1892) ("[F]rom the time of Lord Hale to that of Chadwick's Case [decided in 1847], the text-books, with hardly an exception, either assume or assert that the defendant (or his representative) is the

only party who can have either a new trial or a writ of error in a criminal case, and that a judgment in his favor is final and conclusive"); 2 Hawkins, *supra*, Ch. 50, § 10, at 461 ("[A] writ of error to reverse . . . Felony may be brought as well by the executor as by the heir of the party, but no other Person whatsoever.").[5]

To be sure, the common law recognized a limited exception to the rule prohibiting a second prosecution under certain circumstances in which the defendant could not have been lawfully convicted at the first trial. For example, an acquittal rendered by a court without jurisdiction was not a bar to retrial. 2 Hawkins, *supra*, Ch. 35 § 10, at 372; 4 Blackstone, *Commentaries* *335 (stating that an acquittal barred a second prosecution if rendered by a "court having competent jurisdiction of the offence"); *see Smith*, 143 S. Ct. at 1606. Nor did an acquittal bar a subsequent prosecution where the first trial was premised on an insufficient indictment that did not truly put the defendant in jeopardy. *Vaux's Case* (1591), 76 Eng. Rep. 992, 993 (K.B.); *see* 2 Hawkins, *supra*, Ch. 35 § 8, at 372; Joseph Chitty, *A*

[5] Stray statements in the treatises of Coke and Hale raise the possibility that an acquittal could be vacated and the defendant retried if the "whole record" demonstrated an error. 2 Hale, *supra*, at 314; 3 Coke's Inst. 214. But this Court has long doubted the accuracy of those statements. *See Sanges*, 144 U.S. at 312 ("[T]he theory that at common law the King could have a writ of error in a criminal case after judgment for the defendant has little support beyond sayings of Lord Coke and Lord Hale, seeming to imply, but by no means affirming it.").

Practical Treatise on the Criminal Law 454 (1816) (noting "the great general rule . . . that the previous indictment must have been one upon which the defendant could legally have been convicted-upon which his life or liberty was not merely in imaginary, but in actual danger"). In those limited circumstances, the errors rendered conviction in the first suit legally impossible, and therefore, the defendant was thought "never in danger of his Life." 2 Hawkins, *supra*, Ch. 35, § 8, at 372.

But this exception did not apply where an acquittal was rendered in a court of competent jurisdiction based on a valid indictment. Such an acquittal was final and served as a complete bar to a second prosecution for the same offense. This was true even where a verdict of acquittal was inconsistent or irreconcilable with another verdict.[6]

In those cases, the defendant was in danger of his life or liberty because the jury could have ruled against him and so the bar to a second prosecution applied. *See Gibert*, 25 F. Cas. at 1296 (Story, J.) ("As soon as a capital case is fully committed to a jury, the life of the

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[6] In *King v. Melling* (1697), 87 Eng. Rep. 698, a jury rendered a guilty verdict on a perjury charge but not on the more specific charge of wilful and corrupt perjury. Despite describing the verdicts as "repugnant" with each other and "both ways," the court refused to grant a new trial because "when a cause is tried at Bar, a new trial is never granted for the single reason that the jury went against the evidence." *Id.* at 699.

prisoner is in their hands, and he stands in jeopardy of his life upon the verdict of the jury. He is in the truest sense put upon his deliverance from the peril."). As one eighteenth century treatise concisely explained, "it is generally taken by all the Books, as an undoubted Consequence, that where a Man is once found Not guilty on an Indictment of 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." 2 Hawkins, *supra*, Ch. 35, § 1, at 368.

2. Early American law followed these principles. Most States adopted the common law of England, including the prohibition on retrial after acquittal. *See* 1 James Kent, *Commentaries on American Law* 515-16 & nn. a-b (George F. Comstock ed., 11th ed. 1867). In *Hannaball v. Spalding*, 1 Root 86 (Conn. Super. 1783), for example, the Connecticut appellate court held that a prosecutor could not obtain a new trial in a criminal case following an acquittal. *See also, e.g.*, Arthur P. Scott, *Criminal Law in Colonial Virginia* 102 (1930) (stating that, in Virginia, "[o]n a verdict of not guilty, the prisoner was forever discharged so far as that particular accusation was concerned"); *Green*, 355 U.S. at 200 (Frankfurter, J., dissenting) ("A principle so deeply rooted in the law of England, as an indispensable requirement of a civilized criminal procedure, was inevitably part of the legal tradition of the English Colonists in America.").

In 1784, prior to the adoption of the Federal Bill of Rights, New Hampshire adopted a constitutional prohibition on retrial after an acquittal. N.H. Const. of 1784, art. XVI ("No subject shall be liable to be tried, after an acquittal, for the same crime or offense."). In 1790, Pennsylvania adopted a clause in its constitution precluding retrial after an acquittal that is substantively the same as the Federal Double Jeopardy Clause. Pa. Const. of 1790, art. IX, § 10 ("No person shall, for the same offence, be twice put in jeopardy of life or limb.").[7] Nothing suggests that these

[7] In later years, numerous other States adopted constitutions with similar provisions prohibiting retrial after acquittal, not to mention other state constitutions that include double jeopardy clauses that are identical or substantively similar to the Federal Clause. *See* Ark. Const. of 1868, art. I, § 9 ("[N]o person after having once been acquitted by a jury, for the same offence, shall be again put in jeopardy of life or liberty[.]"); Iowa Const. of 1846, art. 1, § 12 ("No person shall, after acquittal, be tried for the same offense."); Mich. Const. of 1850, art. VI, § 29 ("No person after acquittal upon the merits shall be tried for same offense."); Mo. Const. of 1820, art. XIII, § 10 ("That no person, after having been once acquitted by a jury for the same offence, be again put in jeopardy of life or limb[.]"); Miss. Const. of 1890, art. III, § 22 ("No person's life or liberty shall be twice placed in jeopardy for the same offense; but there must be an actual acquittal or conviction on the merits to bar another prosecution."); N.J. Const. of 1844, art. I, § 10 ("No person shall, after acquittal, be tried for the same offense."); Okla. Const. of 1907, art. II, § 21 ("[N]or shall any person, after having been once acquitted by a jury, be again put in jeopardy of life or liberty for that of which he has been acquitted."); R.I. Const. of 1842, art. I, § 7 ("No person shall, after an acquittal, be tried for the same offence."); S.C. Const. of 1868, art. I, § 18 ("No person, after having been once acquitted by a jury,

States recognized an exception to the prohibition on retrying acquitted charges if an acquittal was repugnant to, irreconcilable with, or otherwise inconsistent with another verdict rendered at the same time.

It was against this historical backdrop that the Fifth Amendment prohibition on double jeopardy was adopted. The history of that adoption establishes that the clause prohibits retrying a defendant following an acquittal by a competent jury, even if the basis for the acquittal is utterly wrong. Justice Story reached the same conclusion. After canvassing the history of the prohibition on double jeopardy, he was "of opinion that this court does not possess the power to grant a new trial, in a case of a good indictment, after a trial by a competent and regular jury, whether there be a verdict of acquittal or conviction." *Gibert*, 25 F. Cas. at 1301.

The debates surrounding the adoption of the Double Jeopardy Clause confirm this view. James Madison initially proposed as language for the amendment that "[n]o person shall be subject . . . to more than . . . one trial for the same offence." 1 ANNALS OF CONG. 451-52 (Joseph Gales ed., 1834). Some objected to this formulation on the ground that it would prevent a defendant who was wrongly convicted from securing a new trial. *See, e.g., id.* at 782 (statement of Egbert

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shall again, for the same offence, be put in jeopardy of his life or liberty.").

Benson) (criticizing the prohibition on more than one trial because "it was well known, that [defendants] were entitled to more than one trial"). But no one disagreed with the proposition that a person acquitted of a crime should not be subject to a second prosecution. *See, e.g.*, *id.* (statement of Samuel Livermore) ("[I]t is the universal practice in Great Britain, and in this country" to prohibit a second trial of a person who "for want of evidence may be acquitted."); *id.* (statement of Roger Sherman) ("If the person was acquitted on the first trial, he ought not to be tried a second time; but if he was convicted on the first and anything should appear to set the judgment aside he was entitled to a second, which was certainly favorable to him.").

Notably absent from the debates is any suggestion of permitting the retrial of a defendant after acquittal if the acquittal is repugnant to another verdict rendered by the jury or otherwise erroneous.

3. Indeed, even if pre-constitutional history *did* recognize a repugnant verdict exception to the prohibition on retrials after acquittal, that history would not justify reading that exception into the Double Jeopardy Clause because it was meant to provide *more* protection than did the common law. As Joel Prentiss Bishop stated in his seminal treatise, the constitutional prohibition on double jeopardy is "fundamental and unyielding, superseding the adjudged common law if differing therefrom." 1 Joel Prentiss Bishop, *New Commentaries on the Criminal*

Law upon a System of Legal Exposition § 981, at 592 (8th ed. 1892).

Following this same reasoning, the Court has refused to recognize certain common law exceptions to the prohibition on retrying acquitted charges based on non-jurisdictional errors. For example, in *Ball v. United States*, the Court rejected the common law practice permitting an acquittal to be vacated and the defendant retried if the indictment was defective for any reason other than the court lacking jurisdiction. "However it may be in England," this Court stated, under the Fifth Amendment, an acquittal "is a bar to a subsequent prosecution for the same offense." *Ball*, 163 U.S. at 671.

Similarly, in *Smith v. Massachusetts*, the Court held that the protections provided by the Double Jeopardy Clause are not limited to the historical prohibition on retrials after acquittals rendered by a jury but also extend to retrials following acquittals rendered by a judge. "Although the common-law protection against double jeopardy historically applied only to charges on which a jury had rendered a verdict," the Court has "long held that the Double Jeopardy Clause of the Fifth Amendment prohibits reexamination of a court-decreed acquittal to the same extent it prohibits reexamination of an acquittal by jury verdict." *Smith*, 543 U.S. 462, 466-67 (2005); *see also* Bishop, *supra*, § 992.2, at 597 (stating that under the Double Jeopardy Clause, "a verdict of acquittal . . .

can never afterward, on the application of the prosecutor, be set aside and a new trial granted," even if the acquittal is the product of "a mistake of the jury, or their refusal to obey the instructions of the court, or any other like cause.").

* * * * *

In short, historical practice provides no basis for a repugnant verdict exception to the Double Jeopardy Clause's prohibition on retrial following an acquittal. To the contrary, the relevant history reflects a consistent and constant guiding principle that a verdict of acquittal rendered by a jury in a court with jurisdiction bars retrial, even if that acquittal was egregiously wrong or irreconcilable with another verdict on a different charge.

CONCLUSION

The Georgia Supreme Court's decision should be reversed.

Respectfully submitted.

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