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

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INTEREST OF *AMICUS CURIAE* GACDL

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

[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

Damian McElrath was indicted for malice murder, felony murder, and aggravated assault. The basis for the indictment was McElrath's stabbing of his adoptive mother which occurred in a single episode.

McElrath entered a "not guilty" plea and was tried by a jury of his peers. At trial, McElrath presented unrebutted evidence of his insanity at the time of the crime that can best be described as a single, continuous encounter between McElrath and his mother. The jury accepted this evidence and found McElrath not guilty of malice murder by reason of insanity. The jury also found McElrath guilty but mentally ill of felony murder and aggravated assault. McElrath appealed his convictions. Georgia did not appeal the acquitted charge of malice murder.

In an unprecedented ruling, the Georgia Supreme Court improperly vacated McElrath's acquittal *sua sponte* in *McElrath v. Georgia*, 839 S.E.2d 573 (Ga. 2020) ("*McElrath I*"). The court wholly usurped the power of the jury when it vacated McElrath's acquittal and declared it "valueless." *McElrath v. Georgia*, 880 S.E.2d 518, 521 (Ga. 2022) ("*McElrath II*"). It did so based on "a state-law-based legal fiction that treats the jury's verdict as though it never happened." *Id.* at 523 (Pinson, A., concurring).

Of particular importance are the avenues taken by the Georgia Supreme Court in its analysis of the verdicts in *McElrath I*. For the malice murder acquittal, the court looked to and relied on *the evidence presented at trial* in finding that the jury was authorized to acquit. Conversely, the court relied on *its own speculations* into jury deliberations in concluding the jury also could have found McElrath guilty but mentally ill of felony murder and aggravated assault.

The felony murder and aggravated assault convictions were derived from the same single, continuous event as the malice murder acquittal because McElrath lacked the required *mens rea*. As acknowledged by the court in *McElrath I*, Georgia presented no evidence of a change in McElrath's state of mind during his actions killing his mother nor did it seek to prove that the crime occurred at different times or through distinct acts. The court's speculations as to why the jury may have reached inconsistent verdicts cannot serve as the basis to vacate McElrath's acquittal that was not appealed nor briefed.

In addition, the court wholly disregarded McElrath's proof of insanity that Georgia failed to rebut and the jury accepted. Had the court properly applied McElrath's continued presumption of insanity to its analysis of the guilty but mentally ill verdicts in *McElrath I*, it would have reversed on those counts. Georgia presented *no evidence* to show that McElrath was sane when the crime occurred.

As the court acknowledged, *all experts* agreed that McElrath was mentally ill and suffering from delusions, including the delusion that he was being poisoned by his mother. *McElrath I* 839 S.E.2d at 576.

The threshold to succeed on an insanity defense is often insurmountable,[2] but Damian McElrath overcame that hurdle when all experts agreed that he did not have the *mens rea* to commit the single, continuous crime that was the basis of all three counts of the indictment. Neither McElrath nor Georgia ever sought to have the acquittal appealed or vacated. In fact, Georgia's Attorney General "'acknowledge[d] that retrial of [McElrath's] malice murder charge would be precluded by double jeopardy under the law as it currently stands.'" *Id.*

Georgia failed to prove McElrath's criminal culpability for malice murder. This is seen not only in the jury's verdict on this count, but also in the court's endorsement of this verdict in *McElrath I*. Because Georgia failed to meet its burden, Damian McElrath was properly acquitted when the jury found him not guilty of malice murder. His acquittal is absolute.

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[2] Louis Kachulis, Note, *Insane in the Mens Rea: Why Insanity Defense Reform Is Long Overdue* 26 S. Cal. Interdisc. L. J. 357, 362 (2017) (noting that the insanity defense "is raised in less than 1 percent of all criminal cases, and is thought to be successful in no more than 30 percent of those cases").

It was improper for the Georgia Supreme Court to rule on an issue that was not before the court and to wholly disregard the jury's findings regarding McElrath's insanity. Permitting Georgia to retry McElrath despite his prior acquittal is a fundamental violation of the constitutional protection against double jeopardy and a due process violation of the most basic sort.

Prior to *McElrath I*, Georgia had a repugnant verdict rule that provided greater protections for criminal defendants than the federal constitution through this Honorable Court. Had the Georgia Supreme Court applied the pre-*McElrath* repugnant verdict rule, Damian McElrath's acquittal would have remained untouched, and his convictions would have been reversed. For unknown reasons, the court deviated from its pre-*McElrath* repugnant verdict rule and created a much broader rule that leaves the door open for courts and prosecutors to arbitrarily disturb acquittals where the ultimate conclusions of fact and law have been decided by a jury with inconsistent verdicts. Such a rule cannot stand.

Amicus curiae urges this Honorable Court to reverse the holdings of the Georgia Supreme Court that now permits Georgia to retry a defendant on any charge where the defendant was previously acquitted.

INTRODUCTION

The insanity defense is deeply rooted in this nation's history,[3] and it has long been recognized that insanity may absolve an individual of criminal responsibility. The underlying rationale is that individuals who are deemed legally insane at the time of the relevant acts are incapable of forming the requisite *mens rea* to commit a crime, and thus, lack culpability.

The application of an insanity defense under federal law was first recognized by this Court in *Davis v. United States*, 160 U.S. 469 (1895).

> One who takes human life cannot be said to be actuated by malice aforethought, or to have deliberately intended to take life, or to have 'a wicked, depraved, and malignant heart,' or a heart 'regardless of society duty and fatally bent on mischief,' *unless at the time he had sufficient mind to comprehend the criminality or the right and wrong of such an act*. Although the killing of one human being by another human being with a deadly weapon is presumed to be malicious until the contrary appears, yet, 'in order to constitute a crime, a person must have intelligence and capacity enough to have a criminal intent and purpose; and if his reason and mental powers are

[3] "Few doctrines are as deeply rooted in our common-law heritage as the insanity defense." *Kahler v. Kansas*, 140 S.Ct. 1021, 1039 (2020) (Breyer, S., dissenting).

> either so deficient that he has no will, no conscience, or controlling mental power, or if, through the overwhelming violence of mental disease, his intellectual power is for the time obliterated, *he is not a responsible moral agent, and is not punishable for criminal acts*.'

Davis, 160 U.S. at 485 (emphasis added).

One of the earliest Georgia cases addressing insanity and the delusional compulsion defense came before the Georgia Supreme Court in 1847. *Roberts v. Georgia*, 3 Ga. 310 (Ga. 1847). The court in *Roberts* found,

> [t]o punish an insane man, would be to rebuke Providence. Hence, in all definitions of murder, of which I have knowledge, the requirement is found, that the slayer must be of sound mind. Our own statutory definition requires him to be "a person of sound memory and discretion." Accountability for crime, presupposes a criminal intent, and that requires a power of reasoning upon the character and consequences of the act; a will subject to control. For this reason it is, that a homicide, committed under the influence of incontrollable passion, is not murder. The reason is dethroned, the will is not subject to control, and in tenderness to human infirmity, he is considered as not having a malicious, murderous intent.

Id. at 328.

Georgia has long recognized the necessity of shielding those deemed insane from criminal prosecution. Georgia's Penal Code of 1817 provided that "[a] lunatic or person insane, without lucid intervals, shall not be found guilty of any crime with which he or she may be charged; *provided* the act so charged as criminal have been committed in the condition of such lunacy." Georgia Penal Code 1817, Vol. III 611, Sec. V, Par. 18. In 1860, Georgia enacted several statutes that addressed insanity and how those deemed insane were to be treated in the courts.[4]

In *Long v. Georgia*, 38 Ga. 491 (Ga. 1868), the Georgia Supreme Court found that:

> If the prisoner was insane at the commission of the act, he is not guilty; he may prove his condition under that plea. It is, in all crimes, one of the ingredients of the offence that there shall be a joint operation of act and intent, and an insane person cannot, in a legal sense, have any intent. Indeed, in murder, soundness of mind, in the perpetration of the act, is a part of the definition of the crime.

Long, 38 Ga. at 507.

Damian McElrath was properly acquitted of malice murder when the jury found him not guilty by reason of insanity because all experts agreed he was insane at the time of his relevant actions that

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[4] *See* Ga. Code. Ann. 1860 §§ 4192 Sec. V, 4195 Sec. VIII, 4559 Sec. XLIV.

were a single, continuous encounter attacking his mother. The finality of McElrath's acquittal is absolute. The jury accepted McElrath's unrebutted evidence of his insanity and the Georgia Supreme Court acknowledged that it was authorized to do so in *McElrath I*. Neither McElrath nor Georgia appealed the acquittal or argued that McElrath could be retried on the acquitted charge. By vacating the acquittal *sua sponte*, the court wholly usurped the power of the jury. Had the court applied the proper pre-*McElrath* repugnant verdict rule in *McElrath I,* McElrath's acquittal would have remained untouched, and his conviction that were appealed would have been reversed.

It was error for the court to affirm *McElrath I*'s legal fiction repugnant verdict rule in *McElrath II,* and it was error for the court to affirm the denial of McElrath's plea in bar. Permitting Georgia to retry McElrath notwithstanding his acquittal is a violation of both Double Jeopardy and Due Process. The court's rulings must be reversed.

a. Damian McElrath was properly acquitted of malice murder by reason of insanity.

In Georgia, like most states, there is a rebuttable presumption of sanity. O.C.G.A. § 16-2-3. However, "when the proof of insanity is overwhelming, juries may no longer rely solely on the presumption of sanity[.]" *Stevens v. Georgia*, 350 S.E.2d 21, 22 (Ga. 1986).

Georgia law also presumes the continued existence of a mental state like insanity once it is proved to exist. O.C.G.A. § 24-14-21. A presumption of insanity, once proved, prevails over the weaker presumption of sanity. *Gilbert v. Georgia*, 220 S.E.2d 262 (Ga. 1975). A not guilty by reason of insanity acquittal in Georgia creates a continuing presumption of insanity, thereby cancelling "the previously existing presumption of sanity and ma[kes] it necessary for the state to rebut that presumption[.]" *Milam v. Georgia*, 341 S.E.2d 216, 218 (Ga. 1986). To rebut a presumption of insanity, Georgia bears the burden of proving the defendant was sane when the crimes were committed. *Durrence v. Georgia,* 695 S.E. 2d 227, 230 (Ga. 2010).

To establish insanity in Georgia, an individual must prove, by a preponderance of the evidence, that at the time of the crime, they (a) did not have the mental capacity to distinguish between right and wrong in relation to the criminal act or (b) acted because of a delusional compulsion which overmastered their will to resist committing the crime. O.C.G.A. §§ 16-3-2, 16-3-3. McElrath presented unrebutted evidence of his insanity. McElrath met his burden at trial because all experts for Georgia and McElrath agreed that he was insane at the time of his actions that killed his mother.

When a defendant in Georgia raises an insanity defense based on a delusional compulsion, as McElrath did, the defendant shall be found not guilty if it is shown that: "(1) [] the defendant was

laboring under a delusion; (2) [] the criminal act was connected with the delusion under which the defendant was laboring; and (3) [] the delusion was as to a fact which, if true, would have justified the act." *Stevens v. Georgia*, 350 S.E.2d 21, 22 (Ga. 1986).

The evidence at McElrath's trial showed that he suffered from either schizophrenia or a related schizoaffective disorder which caused him to operate under several delusions. *McElrath I*, 839 S.E.2d at 575. The week before the stabbing occurred, McElrath was hospitalized in a mental health facility because of his behavior and thoughts, including McElrath's delusion that he was an FBI agent who had killed people and travelled to Russia regularly. *Id.*

McElrath began to believe that he was being poisoned by his mother at least three years before the stabbing. He believed his mother had confronted him and admitted to poisoning him the day before the stabbing (or slightly earlier). *McElrath I* at 575.

Thus, the basis of the insanity defense was that McElrath believed his life was in imminent danger when the stabbing occurred due to his delusion that he was being poisoned by his mother.

Georgia did not present any evidence to rebut McElrath's insanity. In fact, Georgia's own witnesses gave testimony that *supported* McElrath's insanity at the time of the encounter with his mother. Four expert witnesses testified at trial and

only one was hired by the defense. All the experts agreed that McElrath was mentally ill and suffering from delusions, including the delusion that he was being poisoned by the victim. *Id.* at 576.

Dr. Richards, a forensic psychologist hired by the defense, "testified specifically that McElrath was suffering from a multifaceted delusion, one in which he believed *both* that [the victim] was poisoning him *and* that he was in imminent danger of death at the time that he attacked [the victim]." *Id.* (Emphasis in original). Other experts "testif[ied] that such a delusion [of imminent danger] could affect a person's ability to control his behavior." *Id.*, n.11.

Dr. Dorney, "one of the State's experts, [] testified that a paranoid delusion can contain the additional component that one's life is in immediate danger." *McElrath I* at 576, n.7. Dr. Perri, a state psychologist who worked for the State Department of Behavioral Health and Developmental Disabilities, testified that he read the reports created by Dr. Richards *and* Dr. Dorney, "and he agreed with their conclusions that McElrath suffered from a schizophrenia-type illness coupled with delusions." *Id.,* n.7. Dr. Wright, also an employee of the State Department of Behavioral Health and Developmental Disabilities, did not testify to the contrary.

The stabbing was a single, continuous event. "No evidence of a deliberate interval during the stabbing was presented to the jury to support a finding that McElrath's mental state changed at any time[.]" *McElrath I*, 839 S.E.2d at 581. "Nor did the

State seek to prove, or the trial court instruct the jury, that the crimes occurred at different times or through distinct acts." *Id.* at 580, n.15.

In *McElrath I*, the Georgia Supreme Court held that the jury's verdict finding McElrath not guilty of malice murder by reason of insanity based on his delusional compulsion defense was supported by the evidence.[5] O.C.G.A. §§ 16-3-2, 16-3-3.

It correctly found that McElrath's "'absurd or unfounded'" belief that he was being poisoned by his mother and that his life was in imminent danger "authorized the jury to determine that, under the facts *as McElrath believed them to be*, his actions were justified." *McElrath I* at 576 (emphasis in original). "'Malice means the intent to take a life *without legal justification* or mitigation.'" *Pace v. Georgia*, 548 S.E.2d 307, 309 n.5 (Ga. 2001) (emphasis added).

Thus, the court found that the evidence at trial was sufficient for the jury to find that McElrath proved he was justified and therefore not guilty of malice murder by reason of insanity.[6] Stated

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[5] "The delusional compulsion defense is available only when the defendant is 'suffering under delusions of an absurd and unfounded nature [and] was compelled by that delusion to act in a manner that would have been lawful and right if the facts had been as the defendant imagined them to be.'" *McElrath I*, 839 S.E.2d at 576.

[6] Georgia's standard of review on the issue of insanity looks to the sufficiency of the evidence and "whether after reviewing the evidence *in a light most favorable to the state*, a rational

differently—Georgia failed to prove beyond a reasonable doubt that McElrath was culpable for the crime. Georgia did not present any evidence to rebut the overwhelming evidence of McElrath's insanity.

The jury's verdict finding McElrath not guilty of malice murder created a presumption of his insanity that Georgia failed to rebut. Once McElrath proved the existence of his insanity, it became necessary for Georgia to present evidence showing that McElrath was sane when the crime occurred. O.C.G.A. § 24-14-21. It failed to do so.

McElrath's presumption of insanity would have continued to date had the Georgia Supreme Court not vacated his acquittal. However, because the court improperly vacated the acquittal, his presumption of insanity has effectively been vacated as well. McElrath's presumption of insanity, and the jury's finding as to his insanity, have been treated as if they never happened. This is so despite Georgia's failure to present *any* evidence rebutting McElrath's insanity.

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trier of fact could have found that the defendant failed to prove by a preponderance of the evidence, that [he] was insane at the time of the crime." *Milam*, 341 S.E.2d at 218 (emphasis added). Because not guilty by reason of insanity acquittals are unreviewable, Georgia does not appear to have a standard of review for those cases. However, the court's analysis of McElrath's insanity acquittal in *McElrath I* and its finding that the jury was authorized to acquit McElrath by reason of insanity appears to track the same logic and reasoning of the standard set forth in *Milam*.

Malice is negated where there is legal justification or mitigation. McElrath's justification was insanity by way of delusional compulsion. The jury accepted this justification defense when it acquitted him of malice murder. The Georgia Supreme Court's finding in *McElrath I* that the jury was authorized to acquit McElrath of malice murder was, in effect, a "ruling that the prosecution's proof is insufficient to establish criminal liability for an offense[,] … [and] a 'factual finding [that] necessarily establish[es] the criminal defendant's lack of criminal culpability[.]'" *Evans v. Michigan*, 568 U.S. 313, 319 (2013).[7] It "represents a resolution, correct or not, of some or all of the factual elements of the offense charged." *Martin Linen Supply Co.*, 430 U.S. at 571.

As this Court recently acknowledged, "'[c]ulpability is the touchstone' for determining whether retrial is permitted under the Double Jeopardy Clause. When a trial terminates with a finding that the defendant's 'criminal culpability had not been established,' **retrial is prohibited**. … [This] also extends to 'essentially factual defense[s]' that negate culpability by 'provid[ing] a legally adequate justification for otherwise criminal acts.'" *Smith v. United States*, 143 S. Ct. 1594, 1608 (2023)

[7] *See also Burks v. United States*, 437 U.S. 1, 10 (1978) ("By deciding that the Government had failed to come forward with sufficient proof of petitioner's capacity to be responsible for criminal acts, that court was clearly saying that Burks' criminal culpability had not been established.")

(emphasis added) (citation and punctuation omitted).

"A judgment of acquittal, whether based on a jury verdict of not guilty or on a ruling by the court that the evidence is insufficient to convict, may not be appealed and terminates the prosecution when a second trial would be necessitated by a reversal." *United States v. Scott*, 437 U.S. 82, 91 (1978).

Georgia failed to prove McElrath's criminal culpability for malice murder. Because Georgia failed to meet its burden, Damian McElrath was properly acquitted when the jury found him not guilty of malice murder by reason of insanity. His acquittal is absolute.

b. A verdict of not guilty by reason of insanity is an outright acquittal.

As recognized by the Georgia Supreme Court, "a verdict of not guilty by reason of insanity excuses the person's prior conduct and *results in outright acquittal*. See OCGA §§ 17-7-131 (d) ('Whenever a defendant is found not guilty by reason of insanity at the time of the crime, ... *the person [is] acquitted* ....')[.]" *Int. of T.B.*, 874 S.E.2d 101, 109 (Ga. 2022) (emphasis added).

An acquittal by reason of insanity is treated the same as any other acquittal because it establishes a failure of proof by the government as to the defendant's culpability. The presumption of innocence and the government's burden of proving

guilt beyond a reasonable doubt are fundamental doctrines in American law.

The presumption of innocence is a "bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.'" *In re Winship*, 397 U.S. 358, 363 (1970). "[T]his presumption is an instrument of proof created by the law in favor of one accused, whereby his innocence is established until sufficient evidence is introduced to overcome the proof which the law has created." *Davis*, 160 U.S. at 487.

The government cannot overcome the presumption of innocence unless and until it proves guilt *beyond a reasonable doubt*. "These rules are historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property." *In re Winship*, 397 U.S. at 362 (punctuation and citations omitted).

Insanity strikes at the heart of guilt and creates an inference of reasonable doubt. "How [ ] can a verdict of guilty be properly returned, if the jury entertain a reasonable doubt as to the existence of a fact which is essential to guilt, namely, the capacity in law of the accused to commit that crime?" *Davis,* 160 U.S. at 488. As explained in *Davis*,

> If the whole evidence, including that supplied by the presumption of sanity, *does not exclude beyond reasonable doubt the hypothesis of insanity*, of which some proof is adduced, *the accused is entitled to an acquittal of the specific offense charged.*

> His guilt cannot be said to have been proved beyond a reasonable doubt-his will and his acts cannot be held to have joined in perpetrating the murder charged-if the jury, upon all the evidence, have a reasonable doubt whether he was legally capable of committing crime[.]

Davis, 160 U.S. at 488 (emphasis added).

As this Honorable Court explained in *Scott*, *supra*, "*Burks* necessarily holds that there has been a 'failure of proof' requiring an acquittal when the Government does not submit sufficient evidence to rebut a defendant's essentially factual defense of insanity, though it may otherwise be entitled to have its case submitted to the jury." 437 U.S. at 98 (punctuation and citation omitted).

Classifying not guilty by reason of insanity verdicts as acquittals is premised on the government's failure to prove beyond a reasonable doubt that the individual had the requisite mental capacity to be held responsible. "[I]f the jury entertain a doubt on the whole showing, including the question of insanity, they must give the benefit of that doubt to the accused and acquit." *Wilson v. Georgia*, 70 S.E. 1128, 1133 (Ga. Ct. App. 1911).

In *Danforth v. Georgia*, 75 Ga. 614, 623 (Ga. 1886), the Georgia Supreme Court found that an insanity defense must be made under a plea of not guilty because "it goes to the very vitals of the case, and if satisfactorily made out would *finally acquit* the defendant of the charge preferred against him

and entitle him to go without a day absolutely freed and discharged of the offense for which he was indicted." (Emphasis added). See also *Choice v. Georgia*, 31 Ga. 424, 469 (Ga. 1860)("if insane, he was entitled to a verdict of acquittal; and there can be no intermediate ground"); *Ryder v. Georgia*, 28 S.E. 246 (Ga. 1897)("In order to render the distinctive defense of insanity available as a basis for an acquittal […]"); *Flanagan v. Georgia*, 30 S.E. 550, 553 (Ga. 1898)("If the accused was, under the law, responsible for his acts, he is guilty[.] If he was not so responsible, he is entitled to an acquittal."); *Ryder v. Georgia*, 28 S.E. 246 (Ga. 1897) ("In order to render the distinctive defense of insanity available as a basis for an acquittal…"); *Wilson*, 70 S.E. at 1133 ("the jury should acquit because of insanity wherever the facts are sufficient to raise a reasonable doubt in their minds that the act in question was the product of mental disease"); *Baughn v. Georgia*, 28 S.E. 68, 69, aff'd sub nom. *Nobles v. State of Ga.*, 168 U.S. 398 (1897) ("'A lunatic or person insane, without lucid intervals, shall not be found guilty of any crime[.]['] … If insane at the time the act is committed, he shall not be convicted."); and *Long,* 38 Ga. at 507-508 ("If the prisoner was insane at the commission of the act, he is not guilty[]"); *Carr v. Georgia*, 22 S.E. 570, 570 (Ga. 1895)("[H]e may show under [a] plea [of not guilty] that he was insane at the time the alleged crime was committed, and therefore legally irresponsible for the same. The rules [] are well established in the criminal procedure of this state,

and no citation of authority in support of them need be made.")

Contrary to the Georgia Supreme Court's opinions, the finality of McElrath's acquittal *is* absolute and not subject to further review. It was error for the court to hold otherwise.

c. The repugnant verdict rule established by the Georgia Supreme Court in *McElrath I* and affirmed in *McElrath II* impermissibly authorizes courts to arbitrarily reverse acquittals when a conviction is appealed, and it expanded the number of cases where this improper rule can be applied.

Prior to the Georgia Supreme Court's decision in *McElrath I*, Georgia had a repugnant verdict rule that provided greater protections for criminal defendants than the federal constitution. Had the court properly applied the pre-*McElrath* repugnant verdict rule in *McElrath I,* Damian McElrath's acquittal would have remained untouched, his convictions would have been reversed, and his case would not currently be before this Court.

The pre-*McElrath* repugnant verdict rule is best illustrated in *Turner v. Georgia*, 655 S.E.2d 589 (Ga. 2008). Georgia courts have the authority to expand protections to a defendant under these extremely rare circumstances. Turner was charged with malice murder, felony murder and aggravated assault. Turner admitted he killed the victim but

maintained that it was self-defense at his jury trial. Like McElrath, the jury found Turner not guilty of malice murder, expressly finding that he was justified on the verdict form. *Id.* at 590. However, the jury also found Turner guilty of aggravated assault and felony murder with express findings that it was neither justified nor mitigated on that jury form. Turner appealed, arguing that the verdicts were mutually exclusive.

The Georgia Supreme Court acknowledged that this Court abolished the inconsistent verdicts rule in *Powell*, *supra*. However, the court recognized an exception:

> when instead of being left to speculate about the unknown motivations of the jury the appellate record makes transparent the jury's reasoning why it found the defendant not guilty of one of the charges, "[t]here is ... no speculation, and the policy explained in *Powell* and adopted in *Milam*, supra, ... does not apply." *Turner*, 655 S.E.2d at 592.

According to the court, the malice murder verdict form in *Turner* "ma[de] it clear the jury determined [Turner] was not guilty of malice murder because the jury found his action in shooting the victim to have been justified." *Id.* at 592.

The court acknowledged that the jurors in *Turner* were instructed that a person's conduct being justified is a defense to any prosecution for that conduct. The jury in *Turner* was also instructed

twice that it was to first consider whether or not Turner's conduct in shooting the victim was justified and, if justified, the jury should acquit Turner on all counts. *Id.* "All the crimes for which [Turner] was tried were based on his conduct of shooting the victim and the jury found that conduct to have been justified." *Id.*

The court held that the jury's finding that Turner was justified on the malice murder charge should have applied equally to the felony murder and aggravated assault charges based on the same conduct. *Id.* It reversed Turner's convictions on those two counts and it did so without delving further into the jury's deliberations and speculating about the reasons for the inconsistent verdicts. It simply looked to the finding of justification on the malice murder charge on the jury verdict form and the evidence in the record.

Thus, *Turner* established a repugnant verdict rule that provided additional protections for defendants where the government fails to establish a fact essential for a determination of guilt or innocence. It looked to the basis of the acquittal rather than the basis of the conviction. Because the jurors were authorized to find Turner acted in self-defense when he shot the victim, the court applied his successful justification defense to the underlying aggravated assault and felony murder counts since they were all based on the same conduct.

Under this *Turner* rule, Geogia courts carved out a rare exception that gave criminal defendants

additional protection for a verdict that was repugnant. As modified in *McElrath I* and *II*, this rule has been broadly expanded and could arbitrarily reverse both acquittals and convictions when the verdicts are inconsistent. The previously narrow exception of *Turner* has been broadly expanded as far as the number of cases that will fall under this umbrella. In addition to the number of cases that this new rule will now affect, the Georgia Supreme Court has authorized the arbitrary reversal and retrial for criminal defendants of charges after they have been acquitted of those same charges. This new rule applying to inconsistent verdicts results in arbitrary discretion that permits judges to reverse acquittals in violation of the Double Jeopardy Clause and the right to due process.

d. McElrath's acquittal of malice murder bars subsequent prosecution.

This Court has repeatedly and consistently held that acquittals are final and not subject to further review, regardless of how erroneous or egregious the acquittal may be. By vacating the jury's verdict of not guilty of malice murder by reason of insanity *sua sponte* and permitting Georgia to retry McElrath notwithstanding his acquittal, the Georgia Supreme Court wholly disregarded this Court's longstanding jurisprudence on the issue of double jeopardy and the finality of an acquittal.

As this Court recently explained in *Smith*, supra,

> When a jury returns a general verdict of not guilty, its decision 'cannot be upset by speculation or inquiry into such matters' by courts. *To conclude otherwise would impermissibly authorize judges to usurp the jury right*. …
>
> This rationale is consistent with the general rule that '[c]ulpability ... is the touchstone' for determining whether retrial is permitted under the Double Jeopardy Clause. *When a trial terminates with a finding that the defendant's 'criminal culpability had not been established,' retrial is prohibited*. This typically occurs with 'a resolution, correct or not, of some or all of the factual elements of the offense charged. But it also extends to "essentially factual defense[s]" that negate culpability by "provid[ing] a legally adequate justification for otherwise criminal acts."

Smith, 143 S. Ct. at 1608 (emphasis added) (citations and punctuation omitted).

"Perhaps the most fundamental rule in the history of double jeopardy jurisprudence has been that '(a) verdict of acquittal . . . could not be reviewed, on error or otherwise, without putting (a defendant) twice in jeopardy, and thereby violating the Constitution.'" *Martin Linen Supply Co.*, 430 U.S. at 571 (citing *Ball*, 163 U.S. at 671). "[T]he Government is precluded from appealing or otherwise upsetting such an acquittal by the Constitution's Double Jeopardy Clause." *United*

States v. Powell, 469 U.S. 57, 65 (1984). "'[A]cquittals, unlike convictions, terminate the initial jeopardy.' Thus, whether the trial is to a jury or to the bench, subjecting the defendant to postacquittal factfinding proceedings going to guilt or innocence violates the Double Jeopardy Clause." *Smalis v. Pennsylvania,* 476 U.S. 140, 145–146 (1986) (citations and punctuation omitted).[8]

"When a defendant has been acquitted of an offense, the Clause guarantees that the State shall not be permitted to make repeated attempts to convict him[.]" *United States v. Wilson*, 420 U.S. 332, 343 (1975). "[A] defendant once acquitted may not be again subjected to trial without violating the Double Jeopardy Clause." *United States v. Scott*, 437 U.S. 82, 96 (1978).

This is true even if the acquittal was entered in error. "A mistaken acquittal is an acquittal nonetheless[.]" *Evans v. Michigan*, 568 U.S. 313, 318 (2013) (citing *Fong Foo*, 369 U.S. at 143). **"[I]ts finality is unassailable.**" *Yeager v. United States*, 557 U.S. 110 (2009) (emphasis added) (citation and punctuation omitted). In deciding what constitutes

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[8] See also *Green v. United States*, 355 U.S. 184, 187-88 (1957) ("[I]t has long been settled under the Fifth Amendment that a verdict of acquittal is final[.]"); *Bullington v. Missouri*, 451 U.S. 430, 445-446 (1981)("A verdict of acquittal on the issue of guilt or innocence is, of course, absolutely final."); *Burks,* 437 U.S. at 16 (emphasis in original)("Since we necessarily afford absolute finality to a jury's *verdict* of acquittal—no matter how erroneous its decision—"…); *Fong Foo v. United States*, 369 U.S. 141, 143 (1962)("'[T]he verdict of acquittal was final, and could not be reviewed…").

an acquittal, courts "must determine whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." *Martin Linen Supply Co.*, 430 U.S. at 571.

An acquittal includes "any ruling that the prosecution's proof is insufficient to establish criminal liability for an offense. Thus an 'acquittal' includes 'a ruling by the court that the evidence is insufficient to convict,' a 'factual finding [that] necessarily establish[es] the criminal defendant's lack of criminal culpability,' and any other 'rulin[g] which relate[s] to the ultimate question of guilt or innocence.'" *Evans*, 568 U.S. at 318-319 (citations omitted).

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

There are some instances where double jeopardy may not be implicated, e.g., when a conviction is reversed for trial error unrelated to guilt or innocence or where the defendant seeks to have the trial terminated before the issue of guilt or innocence is submitted to the fact finder. And "it 'has long been the rule that when a defendant obtains a reversal of a prior, unsatisfied conviction, he may be retried in the normal course of events.'" *Smith*, 143

S. Ct. at 1601. However, "[w]hen a trial terminates with a finding that the defendant's 'criminal culpability had not been established,' **retrial is prohibited**." *Id.* at 1609 (emphasis added).

The prohibition against double jeopardy is deeply rooted in Georgia law. It was first recognized as a constitutional and fundamental right in the Georgia Constitution of 1861, which provided that "[n]o person shall be put in jeopardy of life or liberty more than once for the same offence." Ga. Con. 1861, Art. I, Sec. I.

Georgia's Constitution was amended in 1865 and the double jeopardy clause was modified to include instances where retrial was permitted. The 1865 Georgia Constitution (and nearly all subsequent versions) provided that "[n]o person shall be put in jeopardy of life or liberty more than once for the same offence, save on his or her own motion for a new trial after conviction or in case of mistrial." Ga. Const. 1865, Art. I, Par. IX. [9]

In 1868, the Georgia Supreme Court found that a party who was once acquitted and subsequently indicted for the same offense under a different name "may plead his discharge and acquittal under the first indictment, in bar of the second." *Holt v.*

[9] Art. I, Sec. I, Par. XVIII of the Georgia Constitution of 1983, now in effect: "No person shall be put in jeopardy of life or liberty more than once for the same offense except when a new trial has been granted after conviction or in case of mistrial."

Georgia, 38 Ga. 187, 187 (Ga. 1868). According to *Holt*,

> The question to be answered is, has the defendant been arraigned and put upon his trial upon a sufficient legal accusation, for the *same criminal acts* with which he is charged the *second time*? If he has, then he has been put in jeopardy, within the true intent and meaning of the constitution, and cannot be tried the second time for the same criminal acts, under the same, or a different named offence.
>
> To hold otherwise, would be to hold that provision of the constitution which declares, "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb," for all *practical* purposes, to be a mere shadow, and delusion.

Holt, 38 Ga. at 187 (emphasis in original).

Georgia provides greater Double Jeopardy protections than those in the Georgia and United States Constitution and "all 'questions of Double Jeopardy in Georgia must be determined under OCGA §§ 16–1–6, 16–1–8 and 16–1–7.'" *Prater v. Georgia*, 545 S.E.2d 864, 868 (Ga. 2001) (footnote omitted).

Pursuant to O.C.G.A. § 16-1-8(a)(1), "[a] prosecution is barred if the accused was formerly prosecuted for the same crime based upon the same material facts, if such former prosecution[]

[r]esulted in either a conviction or an acquittal[.]" Under O.C.G.A. § 16-1-8(d)(2), a prosecution is not barred if "[s]ubsequent proceedings resulted in the invalidation, setting aside, reversal, or vacating of the conviction, *unless the accused was thereby adjudged not guilty or unless there was a finding that the evidence did not authorize the verdict*." (Emphasis added)

After *McElrath I*, McElrath filed a plea in bar to prevent Georgia from prosecuting him on charges identical to those in his first prosecution. The Georgia Supreme Court erroneously affirmed the trial court's denial of McElrath's plea in bar in *McElrath II,* rendering his double jeopardy protections "a mere shadow, and delusion." *Holt,* 38 Ga. at 187.

McElrath's charge of malice murder does not fall within the category of cases where retrial is permissible under Georgia or Federal law. In *McElrath I,* McElrath appealed **only** the felony murder and aggravated assault convictions. Georgia did not cross-appeal or appeal the acquittal in any manner. The acquittal was never challenged by McElrath or Georgia in *McElrath I* as it was understood (or at least implied) that the acquittal was final and not subject to further review. Georgia, through its Attorney General, conceded as much in its brief to the court. Only after the court improperly vacated the acquittal in *McElrath I* did it become a subject of dispute.

In *McElrath II,* the court acknowledged that double jeopardy encompasses collateral estoppel and that collateral estoppel "'may completely bar a subsequent prosecution where one of the facts necessarily determined in the former proceeding is an essential element of the conviction sought[.]'" *McElrath II*, 880 S.E.2d at 522. However, the court wholly disregarded these fundamental rules of law and erroneously affirmed the trial court's denial of McElrath's plea in bar.

As described in the preceding sections, McElrath was properly acquitted of malice murder because Georgia failed to prove his culpability beyond a reasonable doubt. Relying on *the evidence presented at trial* and not speculations into the jury's deliberations, the Georgia Supreme Court accepted the jury's acquittal in *McElrath I*. Contrary to the court's decisions, McElrath's acquittal was *a valid final judgment* and is not subject to further review.

The court acknowledged that under general double jeopardy principles 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***." *McElrath II*, 880 S.E.2d at 521 (Ga. 2022) (emphasis added).

There is nothing "purported" about the jury's verdict as to McElrath's insanity. The jury expressly found that McElrath was insane on the malice murder charge. And the Georgia Supreme Court authorized this finding based on evidence in the

record. Its findings on the felony murder and aggravated assault convictions were based on speculations the court was not permitted to make. Jeopardy attached once the jury reached the valid final judgment acquitting McElrath of malice murder, and the court was wrong to hold otherwise.

As for the issue of collateral estoppel, the court found that it "cannot infer facts, such as the defendant's sanity (or lack thereof), that must have been decided in order for the jury to return the verdicts it reached." *Id.* at 522. Yet this is exactly what it did in its analysis of the felony murder and aggravated assault guilty but mentally ill verdicts in *McElrath I.*

Under the analysis of McElrath's guilty but mentally ill convictions in *McElrath I*, the court speculated as to how the jurors may have reached the inconsistent verdicts. "For example, the jury could have accepted that McElrath suffered from the delusion that [the victim] had been poisoning him, but rejected that he had any delusion that his life was in imminent danger." *McElrath I*, 839 S.E.2d at 577.

This speculation is what the court relied on in declaring the verdicts repugnant, thereby vacating McElrath's acquittal without ever being asked to do so.

Retrial is prohibited not only under the Georgia and United States constitutions but also under Georgia law. Pursuant to O.C.G.A. § 16-1-8(a)(1),

Georgia is barred from retrying McElrath on the same charges from his first trial (malice murder, felony murder, and aggravated assault) because they are based on the same material facts and because his first trial resulted in an acquittal.

"When there is 'a critical issue of ultimate fact in *all of the charges* against [the defendant], a jury verdict that necessarily decided that issue in his favor protects him from prosecution for any charge for which that is an essential element.'" *Roesser*, 751 S.E.2d at 298 (emphasis added).

The jury decided the critical issue of ultimate fact regarding McElrath's sanity when it found him not guilty of malice murder by reason of insanity. This issue of ultimate fact should have been applied to the underlying felony murder and aggravated assault charges. McElrath presented unrebutted evidence of his insanity, and Georgia failed to present any evidence showing that McElrath was sane when the crime was committed. This was a single event with no deliberate intervals that could have reflected a change in McElrath's state of mind. Cf. *Milam*, 341 S.E.2d at 219. Thus, McElrath's insanity applies equally to the underlying charges.

Because McElrath's acquittal of malice murder was a valid final judgment, double jeopardy and collateral estoppel apply. Georgia is barred from retrying McElrath.

Amicus curiae maintains that there are instances where a repugnant verdict rule such as the one set

forth in *Turner* is necessary. However, the new post-*McElrath* repugnant verdict rule invites courts and prosecutors to disturb acquittals where the ultimate conclusions of fact and law have been decided by a jury. Such a rule permitting Georgia to retry a defendant after they have been acquitted cannot stand.

CONCLUSION

The Georgia Supreme Court's decision should be reversed.

Respectfully submitted.

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