No. 22-721

In The Supreme Court of the United States

DAMIAN MCELRATH,

Petitioner,

v.

THE STATE OF GEORGIA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Georgia

BRIEF FOR RESPONDENT

CHRISTOPHER M. CARR
Attorney General
STEPHEN J. PETRANY
Solicitor General
Counsel of Record
ROSS W. BERGETHON
Principal Deputy
Solicitor General
JUSTIN T. GOLART
JAMES E. BARRETT
PAUL R. DRAPER
Deputy Solicitors General

OFFICE OF THE GEORGIA ATTORNEY GENERAL
40 Capitol Square SW, Atlanta, Georgia 30334
(404) 458-3408; spetrany@law.ga.gov
Counsel for Respondent

QUESTION PRESENTED

The State of Georgia prosecuted Damian McElrath for malice murder, felony murder, and aggravated assault, all arising out of a single criminal act: his killing his adoptive mother by stabbing her over 50 times. The jury purported to issue a verdict of "not guilty by reason of insanity" on the malice murder count while convicting on the felony murder and aggravated assault counts. McElrath challenged the supposed convictions on the theory that they were "repugnant" verdicts, impossible to reconcile with the jury's "finding" that he was insane. Applying state law, the Georgia Supreme Court agreed and held that there was, in fact, no verdict of any kind, because the jury failed to resolve the critical factual question of McElrath's sanity.

McElrath did not challenge that holding either in the Georgia Supreme Court or via a petition to this Court. Instead, he argued on remand that, despite the Georgia Supreme Court's holding that the jury never reached a valid verdict of any kind, the Double Jeopardy Clause prohibits retrial. The Georgia Supreme Court ultimately rejected that argument because, as it had previously held, McElrath was never acquitted. Retrial would merely be "continuing jeopardy."

The question presented is whether the Double Jeopardy Clause prohibits the State of Georgia from retrying Damian McElrath for murder where, as a matter of state law, no jury has issued a verdict on the charges at issue.

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Authorities	iv
Introduction	1
Statement	6
A. Georgia's "Repugnant Verdicts" Rule	6
B. Factual Background	8
C. Procedural Background	10
Summary of Argument	14
Argument	20
I. State law, not the Double Jeopardy Clause, defines the rules for when a jury has reached a valid verdict	21
A. The Double Jeopardy Clause prohibits retrial only where there has been a final determination of guilt	21
B. States have authority to decide the requirements for a jury to issue a final determination regarding guilt	24
II. Georgia's "repugnant verdicts" rule, which addresses when a jury has reached a valid verdict, is constitutional	32
A. Georgia has reasonably determined that a valid verdict cannot be based on affirmative, contradictory "findings"	33

TABLE OF CONTENTS—Continued

Page

B. This Court's cases on "inconsistent verdicts" do not undermine Georgia's rule because they say nothing about juries affirmatively contradicting themselves via special findings..... 38

III. Because the jury did not reach a verdict, McElrath's jeopardy never ended, retrial is appropriate, and this Court should affirm 43

A. The Georgia Supreme Court correctly held that McElrath can be retried 43

B. A decision for McElrath would undermine both state sovereignty and criminal defendants' rights in Georgia..... 45

Conclusion..... 49

TABLE OF AUTHORITIES

Page

CASES

Blueford v. Arkansas,
566 U.S. 599 (2012) 26

Bravo-Fernandez v. United States,
580 U.S. 5 (2016) 5, 15, 22, 33, 39, 41, 43, 44, 48

Brecht v. Abrahamson,
507 U.S. 619 (1993) 5, 16, 25

Brown v. State,
959 So. 2d 218 (Fla. 2007).....41

Burks v. United States,
437 U.S. 1 (1978) 22

Calderon v. Thompson,
523 U.S. 538 (1998) 20

Commonwealth v. Sattazahn,
563 Pa. 533 (2000).....30

Currier v. Virginia,
138 S. Ct. 2144 (2018).....31

Denezpi v. United States,
142 S. Ct. 1838 (2022).....6, 31

Duncan v. Tennessee,
405 U.S. 127 (1972) 32

Dunn v. United States,
284 U.S. 390 (1932) 4, 39, 40

Evans v. Michigan,
568 U.S. 313 (2013) 6, 7

Gamble v. United States,
139 S. Ct. 1960 (2019).....22

TABLE OF AUTHORITIES—Continued

Page

Heath v. Alabama,
474 U.S. 82 (1985) 25

Kahler v. Kansas,
140 S. Ct. 1021 (2020) 25, 46, 47

Kisor v. Wilkie,
139 S. Ct. 2400 (2019) 46

Kohlheimer v. State,
39 Miss. 548 (1860) 23

Leland v. Oregon,
343 U.S. 790 (1952) 25, 42

Lesslie v. State,
18 Ohio St. 390 (1868).....33

Loew v. Stocker,
61 Pa. 347 (1869).....37

McElrath v. State,
308 Ga. 104 (2020)
(*McElrath I*).....2, 7–9, 11, 13, 19, 44, 47, 48

McElrath v. State,
315 Ga. 127 (2022)
(*McElrath II*) 1, 2, 7, 8, 13, 14, 16, 33, 47

Medina v. California,
505 U.S. 437 (1992) 3, 17, 38

Medina v. State,
309 Ga. 432 (2020) 7, 26

Moore v. Harper,
143 S. Ct. 2065 (2023).....3, 16, 17, 28, 29, 31, 35

TABLE OF AUTHORITIES—Continued

Page

Moulding v. Prussing,
70 Ill. 151 (1873) 36

Mountain City Mill Co. v. J.A. Wood & Co.,
11 Ga. App. 486 (1912) 36

Patterson v. New York,
432 U.S. 197 (1977) 2, 16, 25

Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n,
460 U.S. 37 (1983) 28

Perry v. Thomas,
482 U.S. 483 (1987) 28

Phillips v. Wash. Legal Found.,
524 U.S. 156 (1998) 29

Rex v. Woodfall,
98 Eng. Rep. 398 (1770) 18, 36

Richardson v. United States,
468 U.S. 317 (1984) 22, 23

Robinson v. Lopinto,
601 F. Supp. 3d 55 (E.D. La. 2022) 26

Ruckelshaus v. Monsanto Co.,
467 U.S. 986 (1984) 27, 28

Sattazahn v. Pennsylvania,
537 U.S. 101 (2003) 29, 30

Smith v. Massachusetts,
543 U.S. 462 (2005) 30, 31, 45

Smith v. United States,
143 S. Ct. 1594 (2023) 1, 4–6, 19, 24, 38, 40

TABLE OF AUTHORITIES—Continued

Page

State v. Bray,
89 N.C. 480 (1883) 36

State v. Ferguson,
No. 2015-L-031, 2015 WL 8607683
(Ohio Ct. App. 2015) 26, 27

State v. McElrath,
No. 12903972
(Cobb Cnty. Super. Ct. Oct. 5, 2012) 9, 10, 12

State v. Nichols,
38 Ark. 550 (1882) 23

State v. Odell,
4 Blackf. 156 (Ind. 1836) 23

State v. Ross,
367 Or. 560 (2021) 7, 26

*Stop the Beach Renourishment, Inc. v.
Fla. Dep't of Env't Prot.*,
560 U.S. 702 (2010) 28

Tyler v. Hennepin Cnty.,
143 S. Ct. 1369 (2023) 28, 29

United States v. Ball,
163 U.S. 662 (1896) 15, 23

United States v. DiFrancesco,
449 U.S. 117 (1980) 6, 22, 47

United States v. Gaudin,
515 U.S. 506 (1995) 29, 37

United States v. Martin Linen Supply Co.,
430 U.S. 564 (1977) 7, 24

TABLE OF AUTHORITIES—Continued

Page

United States v. Perez,
22 U.S. 579 (1824) 23

United States v. Powell,
469 U.S. 57 (1984) 4, 8, 18, 29, 40, 42

United States v. Scheffer,
523 U.S. 303 (1998) 25, 46

United States v. Scott,
437 U.S. 82 (1978) 21, 22, 25

United States v. Shippley,
690 F.3d 1192 (10th Cir. 2012).....34

In re Winship,
397 U.S. 358 (1970) 25

STATUTORY AND CONSTITUTIONAL PROVISIONS

O.C.G.A. § 16-3-2–3.....10

O.C.G.A. § 17-7-131.....11

U.S. Const. amend. V 21

OTHER AUTHORITIES

Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (2012).....35

Edmund M. Morgan, *A Brief History of Special Verdicts and Special Interrogatories*,
32 Yale L.J. 575 (1923) 37

Joseph Story, *Familiar Exposition of the Constitution of the United States* (1840) 23

Ohio Crim. R. 31 26

INTRODUCTION

Petitioner Damian McElrath's argument is a direct hit on the wrong target. No one doubts that once a jury has returned a genuine verdict of acquittal, the Double Jeopardy Clause prohibits a second prosecution of the defendant as to that "offence." Georgia agrees with the basic point of McElrath's brief: "a jury's general verdict of acquittal categorically precludes retrial for the same offense under the Double Jeopardy Clause." *Smith v. United States*, 143 S. Ct. 1594, 1608 (2023). If a Georgia jury actually rendered a final verdict of acquittal on any charge, McElrath cannot be retried on that charge.

The problem for McElrath is that the jury did *not* acquit him, as a matter of state law. There was no verdict of any kind, no determination regarding guilt. The jury tried to declare, via special findings, that McElrath was both sane (thus capable of forming intent) with respect to felony murder and insane (thus *incapable* of forming intent) with respect to malice murder—at the same time, regarding the very same act. As the Georgia Supreme Court explained, under Georgia law, these "purported verdicts" are in fact "no verdict at all," and a "nullity" because the jury did not "resol[ve]" the critical factual question of criminal intent: that is, whether McElrath was sane. *McElrath v. State*, 315 Ga. 127, 127, 130 (2022) (*McElrath II*). Georgia refers to this type of jury failure to produce agreement as "repugnant verdicts."

The Georgia Supreme Court decided all of this in 2020, *McElrath v. State*, 308 Ga. 104, 112 (2020) (*McElrath I*), and McElrath neither sought reconsideration of that decision nor challenged it via a petition to this Court. Instead, he returned to the trial court and sought to bar retrial because the jury supposedly "acquitted" him. But because, as a matter of state law, the jury did not acquit (or convict) him of anything, the trial court ruled against him and the Georgia Supreme Court correctly held in the decision at issue here that, without any previous conclusion to jeopardy, retrial is not barred. *McElrath II*, 315 Ga. at 130–31. This Court has long recognized this "continuing jeopardy" rule: with no termination of jeopardy, a state can retry a defendant as part of his one (and only) jeopardy.

Put simply, the Double Jeopardy Clause prohibits retrial only where jeopardy has *terminated*. And to terminate jeopardy in this case, there has to be a decision—a verdict. But there was no verdict. Hence, retrial is appropriate. McElrath assumes there was a verdict, but that is the critical question, and under state law, there was not.

Remarkably, McElrath admits that states have "broad authority to determine when a verdict is void or a mistrial occurs," Pet.Br.11, yet fails to explain where the supposed error is in the Georgia Supreme Court's holding. It is fundamentally "within the power of the State to regulate procedures under which its laws are carried out." *Patterson v. New York*, 432 U.S. 197, 201 (1977) (quotation omitted). That includes, as McElrath must concede, the power to define the requirements for

a jury to render a verdict. States have authority to define, for instance, how many jurors must agree in order to issue an acquittal—is unanimity required, or is something less than unanimity sufficient? States have authority to determine what circumstances constitute a mistrial. States have authority to determine the form a jury verdict must take. Likewise, states have authority to decide the requirements for a valid verdict, and here, McElrath has no argument as to why the Georgia Supreme Court erred in holding that the jury failed to produce a valid verdict as a matter of state law.

There are, of course, constitutional limits on state authority over criminal law and procedure. States have the power to set procedural rules unless they "offend[] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Medina v. California*, 505 U.S. 437, 446 (1992) (quotation omitted). And states cannot "evade" substantive constitutional provisions through clever semantics. *Moore v. Harper*, 143 S. Ct. 2065, 2088 (2023).

But nothing about Georgia's rule approaches those outer bounds. Georgia's rule makes logical sense, aligns with basic principles of law in similar contexts, protects both the defendant and the State, and does not contravene any settled historical practice. Georgia has not sought to withdraw the jury's unreviewable power to enter a general verdict of acquittal, nor has it sought to undo a final verdict because it was based on a supposed error. Instead, Georgia has sensibly decided that a jury's affirmative declaration of contradictory findings reveals that it *failed* to decide a key element of

criminal liability and has in fact produced no verdict at all. A criminal defendant cannot, in Georgia, be both sane and insane at the same time. Other states can have different rules (and some do), but there is nothing constitutionally unsound about Georgia's rule.

McElrath mistakenly relies on the "inconsistent verdicts" doctrine as his primary justification for undoing the Georgia Supreme Court's decision, but that doctrine does not apply here. Georgia accepts—and applies—this Court's rule that where a jury returns a *general* verdict of "not guilty," even if that verdict seems to be inconsistent with other verdicts, that general acquittal must be affirmed. *United States v. Powell*, 469 U.S. 57, 63 (1984). That rule has nothing to do with *whether* a particular jury production is really a verdict. Rather, as this Court (and the Georgia Supreme Court) have explained, the inconsistent-verdicts cases depend on the notion that, where a jury returns a *general* verdict of "not guilty," no one knows *why* the jury did what it did. Maybe the jury simply extended leniency, which is hardly a matter of factual inconsistency. *See id.* at 65. Leniency would just be part of a "jury's historic function, in criminal trials, [to act] as a check against arbitrary or oppressive exercises of power by the Executive Branch." *Id*. Or maybe it was something else—but courts cannot inquire into why. *Smith*, 143 S. Ct. at 1608 ("When a jury returns a general verdict of not guilty, its decision 'cannot be upset by speculation or inquiry into such matters' by courts." (quoting *Dunn v. United States*, 284 U.S. 390, 393–94 (1932))). So these cases involve situations that, at

bottom, *might* be factually inconsistent but also might not—and courts affirm the verdicts because they cannot investigate what happened.

Georgia's repugnant-verdicts rule, by contrast, applies only where the jury specially "finds" inherently contradictory facts. Here, for instance, courts need not "delv[e] into the jurors' deliberations" to know what happened, *id.*, because the jury *told* everyone what happened. By reviewing the face of the jury's purported "verdict," the reviewing court can tell that the jury tried to find the same defendant *sane* and *insane* at the same time regarding the same act. In Georgia, that sort of incoherence does not constitute a valid verdict, and it has nothing to do with the inconsistent-verdicts cases, where juries have not affirmatively put forth anything necessarily contradictory.

On top of being wrong, a ruling for McElrath would unsettle states' long-held authority to decide their own rules of criminal procedure. This Court has always taken great pains to *avoid* "infring[ing] upon [state] sovereignty over criminal matters." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). And it "would be a high price indeed for society to pay" if states could not retry criminal defendants where juries merely fail to resolve the case. *Bravo-Fernandez v. United States*, 580 U.S. 5, 18–19 (2016) (quotation omitted).

Worse still, McElrath asks this Court to effectively demolish a generally *pro-defendant* rule. Georgia's rule rarely arises, but when it does, it has nothing to do with "wear[ing] down" a defendant over multiple trials,

the scenario the Double Jeopardy Clause is meant to preclude. *United States v. DiFrancesco*, 449 U.S. 117, 130 (1980). Without the repugnancy doctrine, Georgia courts could instead affirm purported convictions as well as purported acquittals, even when the jury has affirmatively declared contradictory facts. Under that regime, McElrath would stand convicted of murder *right now*. And even if McElrath manages to avoid that fate due to his particular procedural posture, he would have it so that the next person in his shoes will likely be stuck with convictions that, right now, defendants in Georgia can avoid.

As this Court has held in the context of the Double Jeopardy Clause specifically, "a law is defined by the sovereign that makes it, expressing the interests that the sovereign wishes to vindicate." *Denezpi v. United States*, 142 S. Ct. 1838, 1844 (2022). Georgia's rule requiring juries to avoid affirmative, contradictory findings supports its interest in finality and accuracy. The Double Jeopardy Clause does not limit Georgia's authority to pursue those interests here, and the Court should affirm.

STATEMENT

A. Georgia's "Repugnant Verdicts" Rule

It is common ground that "a jury's general verdict of acquittal categorically precludes retrial for the same offense under the Double Jeopardy Clause." *Smith*, 143 S. Ct. at 1608. And an acquittal is a "ruling that the prosecution's proof is insufficient to establish criminal liability." *Evans v. Michigan*, 568 U.S. 313, 318–19

(2013); *see also United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977).

But, not surprisingly, states have different requirements for a jury to issue a valid verdict. In Georgia, for instance, certain basic requirements include that a verdict be "unanimous, in writing, signed by the foreperson, and delivered in open court." *Medina v. State*, 309 Ga. 432, 435–36 (2020). But other states have different requirements even on these simple points, like Oregon, where an acquittal need *not* be unanimous. *State v. Ross*, 367 Or. 560, 573 (2021).

One area where Georgia's rules differ from some other states' is in the context of what Georgia calls "repugnant verdicts," where a jury purports to return a verdict but in fact contradicts itself explicitly, such that it actually returns "no verdict at all," because it does not "resol[ve]" the issue of guilt. *McElrath II*, 315 Ga. at 130–31 (quotation omitted). This rule is exceedingly narrow, applying only where the jury "make[s] *affirmative* findings . . . that cannot logically or legally exist at the same time," *McElrath I*, 308 Ga. at 111, such as dueling special "findings" that a defendant was both justified and not justified in committing the same act.

"Repugnant verdicts" are extremely rare, both because juries rarely affirmatively contradict themselves and because the doctrine does not apply to seemingly inconsistent *general* verdicts ("guilty" and "not guilty" without any specific fact findings). The rule in Georgia (and elsewhere) is that, if a jury in a multi-count criminal case returns general verdicts that seem to be

inconsistent (for example, guilty on one count but not guilty on a lesser included offense), courts will accept them as valid verdicts and enforce both the acquittal and the conviction. *See Powell*, 469 U.S. at 66. These types of general verdicts, even if seemingly inconsistent, are valid because one "cannot know and should not speculate why a jury acquitted on . . . [one] offense and convicted on . . . [another] offense." *McElrath I*, 308 Ga. at 109 (quotation omitted). Although a general verdict of acquittal might *seem* incongruous with a separate guilty verdict, a jury might have instead extended "lenity," *id.*, which is not factually incongruous with the convictions.

But in the rare situation where a jury affirmatively declares via special verdict that it has "found" contradictory facts, Georgia declares such supposed verdicts "repugnant." For instance, "it is not legally possible for an individual to simultaneously be insane and not insane during a single criminal episode against a single victim." *Id.* at 112. So if a jury finds a defendant "guilty" (thus necessarily sane) *and* "not guilty by reason of insanity" regarding the same act, the jury has not in fact resolved the defendant's mental state and there is "no verdict at all." *McElrath II*, 315 Ga. at 130.

B. Factual Background

On July 16, 2012, McElrath stabbed his mother, Diane, over 50 times, killing her. *McElrath I*, 308 Ga. at 104–05. Diane had adopted McElrath when he was two years old, and by the time he was eight, he began

exhibiting behavioral problems and encountering difficulties in school. *See* Jury Trial Tr. at 794, 796, *State v. McElrath*, No. 12903972 (Cobb Cnty. Super. Ct. Oct. 2, 2018), Dkt. No. 180. The problems intensified with age: on one occasion, he shoplifted five iPads; another time, he "had a quarrel with Diane that resulted in police being called to the home to investigate." *McElrath I*, 308 Ga. at 104 n.3. At least once, Diane "felt it was necessary to force McElrath to stay in an extended-stay hotel for approximately two months." *Id.*

About three years before McElrath killed Diane, he apparently began to have delusions that Diane was sneaking poisons into his food and drinks. *Id.* at 104–05 & n.4. And a day or so before the killing, McElrath believed that Diane had admitted that she had been poisoning him. *Id.* at 105.

McElrath's attack "began in an upstairs bedroom of the home . . . and ended at the front door." *Id.* There was blood on the upstairs wall, carpet, stairway banister, all the way to the front door. *Id.* After the murder, McElrath changed his clothes, washed the blood off his body, and wrote a note claiming that Diane had admitted to poisoning him: "she poisoned me so I killed her." *Id.* He called 911 and admitted to killing his mother because she was supposedly poisoning him. *Id.* Police arrived, took him into custody, and he continued to admit he killed Diane. *Id.* McElrath was "mad that she poisoned him" and declared that killing her was "right." *Id.*

C. Procedural Background

A grand jury indicted McElrath on three counts: malice murder, felony murder, and aggravated assault. Joint App'x at 7a. The indictment described the same conduct in support of each crime: for malice murder, McElrath "cause[d] the death of Diane McElrath by stabbing Diane McElrath"; for felony murder, McElrath "cause[d] the death of Diane McElrath by stabbing Diane McElrath"; for aggravated assault, McElrath "assault[ed] Diane McElrath with a knife, a deadly weapon." *Id.*

Initially, McElrath waived his right to a jury trial, and, after a bench trial, the judge found him "guilty but mentally ill" on all three counts and sentenced him to life in prison. *State v. McElrath*, No. 12903972 (Cobb Cnty. Super. Ct. Oct. 5, 2012), Dkt. Nos. 30, 57, 59. But McElrath moved for and obtained a new trial (on the basis of ineffective assistance of counsel), and this second trial was in front of a jury. *Id.* at Dkt. Nos. 61, 83, 104, 119.

There was no serious question at the jury trial as to whether McElrath killed Diane, but there were questions about his mental state. So, in addition to the usual outcomes (guilty and not guilty), the parties made arguments about McElrath's being "insane" or "mentally ill" as those terms are defined by Georgia law. If he was insane, he would be "not guilty by reason of insanity," he would be committed to a mental institution as long as he was considered dangerous, but he would be acquitted of the crime. O.C.G.A. §§ 16-3-2–3;

17-7-131(b)(3)(A), (c)(1). If mentally ill, he would be "guilty but mentally ill" and receive a prison sentence; he would also, at the discretion of the Department of Corrections, receive a "referral for temporary hospitalization." *Id.* § 17-7-131(a)(3), (b)(3)(B), (c)(2).

At the trial, there was a "general consensus" among various experts that McElrath "suffer[ed] from at least some delusions," *McElrath I*, 308 Ga. at 105–06, but that did not resolve whether he was culpable. One of Georgia's definitions of insanity is "delusional compulsion," an affirmative defense available when the defendant was "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." *Id.* at 107 (citations omitted). The defense argued that McElrath had been "acting under the false belief, though real to him, that he would die if he did not immediately protect himself against Diane." *Id.* at 106. In other words, the defense argued that McElrath acted in a form of (delusional) self-defense. The prosecution maintained that, while McElrath was mentally ill, he could not establish insanity because he was not justified in killing Diane, even *assuming* his delusions to be accurate. *See*, *e.g.*, Joint App'x at 24a, 63a.

The trial court charged the jury in detail, making clear that it could find McElrath: (1) not guilty; (2) not guilty by reason of insanity; (3) guilty but mentally ill; or (4) guilty. *Id.* at 79a–101a. The court also expounded on the difference between insanity (which meant

McElrath could not be culpable) and mental illness (which meant McElrath could be culpable). *Id.* The court instructed the jurors that if they found "the defendant not guilty by reason of insanity, then you must specify this in your verdict and your deliberations cease." *Id.* at 91a. "*If and only if* you do not find the defendant not guilty by reason of insanity, then you may consider whether or not the defendant was mentally ill." *Id.* at 97a (emphasis added). And, as with insanity, mental illness had to be specially found: "you must specify it in your verdict and the form of your verdict . . . would be . . . guilty but mentally ill at the time of the crime." *Id.*

Ultimately, the jury purported to find McElrath "not guilty by reason of insanity" of malice murder, while "guilty but mentally ill" of felony murder and aggravated assault. *Id.* at 8a–9a.

McElrath unsuccessfully moved the trial court to "vacate" the guilty counts as "repugnant verdicts." *State v. McElrath*, No. 12903972 (Cobb Cnty. Super. Ct. Dec. 4, 2017), Dkt. No. 170. Because the jury "returned a special verdict of not guilty by reason of insanity," McElrath argued, the jury "found as a matter of law and fact that [he] carried his burden of proving insanity." *Id.* That constituted a "complete defense," in his view, and so the purported guilty verdicts had to be vacated. *Id.* The trial court rejected McElrath's argument. *Id.* at Dkt. No. 202 ¶ 22.

On direct appeal, McElrath again argued that the guilty "verdicts" should be vacated as repugnant, and

this time he was successful. As the Georgia Supreme Court explained, this was not a mere case of "inconsistent" verdicts. *McElrath I*, 308 Ga. at 109. "[I]nstead of being left to speculate," the supposed "verdicts" at issue in McElrath's case made "transparent" the jury's failure to come to a conclusion. *Id.* at 111 (quotation omitted). "[T]he not guilty by reason of insanity verdict on malice murder and the guilty but mentally ill verdict on felony murder based on aggravated assault required affirmative findings of different mental states." *Id.* at 112. "Put simply, it is not legally possible for an individual to simultaneously be insane and not insane during a single criminal episode against a single victim." *Id.* Because there was no real "verdict," the court vacated the jury's purported verdicts and remanded for a new trial. *Id.*

Though McElrath had not requested that all three counts be vacated, he did not seek reconsideration, nor did he petition this Court for certiorari. Instead, back in the trial court, McElrath filed a pretrial "plea in bar," arguing that he could not be retried on the malice murder charge—or any other charge—because the jury had previously returned a verdict of acquittal. *McElrath II*, 315 Ga. at 126. After the trial court denied that motion, he again appealed to the Georgia Supreme Court. He made two arguments: (1) the court erred when, in its previous decision, it vacated the jury's purported verdict on malice murder, and (2) regardless, he could not be retried because of the Double Jeopardy Clause. *Id.* at 127–28.

The court rejected both arguments. Respecting vacatur, the court explained that the issue had already been decided and was law of the case. The court already "determined that the purported verdicts returned by the jury were a nullity." *Id.* at 127. That was because, "when findings in special verdicts are utterly and irreconcilably inconsistent with, or repugnant to, each other, they neutralize, nullify, or destroy each other." *Id.* (quotation omitted). Moreover, it held that the Double Jeopardy Clause did not preclude retrial. The court recognized that a "verdict of acquittal is an absolute bar to a subsequent prosecution for the same offense," but the jury's "purported acquittal" was "valueless." *Id.* at 129–30. It was "no verdict at all." *Id.* at 130. Because they represented no decision at all, the purported "verdicts failed to . . . terminate[] jeopardy." *Id.* And there was no collateral estoppel because "any judgment and sentence entered on repugnant verdicts are void." *Id.* (quotation omitted).

McElrath petitioned this Court to review the Georgia Supreme Court's decision that retrial does not violate the Double Jeopardy Clause, and this Court granted review.

SUMMARY OF ARGUMENT

The Georgia Supreme Court correctly ruled that McElrath can be retried for malice murder. To bar retrial, McElrath must establish that his previous jeopardy *ended*. That means he needs to point to a final ruling on his substantive guilt—in this case, that

would be a jury verdict. If there was no verdict, then his jeopardy never ended, and he can be retried.

The problem for McElrath is that he never received a verdict. McElrath assumes, without argument, that he was "acquitted" of malice murder, but under state law he simply was not. The jury purported to find him simultaneously sane and insane with respect to the same criminal act, and under Georgia law that is not a valid verdict. The jury never determined his mental state. That means he can be retried.

I. The Double Jeopardy Clause bars retrial only after a jury (or court) has determined substantive guilt—that is, issued a valid verdict. The Clause has never been understood to bar all retrials. In many situations, defendants can be retried because their "jeopardy" never ended. Where there is a hung jury or a mistrial, jeopardy continues and retrial is appropriate. *See Bravo-Fernandez*, 580 U.S. at 18. Similarly, where a court lacks jurisdiction entirely, a defendant is never *in* jeopardy, and even an ostensible jury verdict does nothing to bar a later trial by a court with jurisdiction. *See*, *e.g.*, *United States v. Ball*, 163 U.S. 662, 669 (1896) ("An acquittal before a court having no jurisdiction is, of course, . . . absolutely void, and therefore no bar to subsequent indictment and trial in a court which has jurisdiction."). In other words, merely because a trial has *ended* or a jury *purports* to have decided something does not mean that jeopardy has terminated.

Critically, it is state law, not the Double Jeopardy Clause, that determines whether a jury has validly

rendered a verdict. McElrath concedes that states have "broad authority" to define the requirements for a valid verdict, Pet.Br.11, and that has to be the case. Not only do "[s]tates possess primary authority for defining and enforcing the criminal law," *Brecht*, 507 U.S. at 635 (quotation omitted), but nothing in the Constitution (and certainly not the Double Jeopardy Clause) provides a comprehensive code of state criminal law or procedure. States *must* determine what is necessary for a valid verdict, from jury forms to whether unanimity is required for acquittal.

Accordingly, Georgia's "repugnant verdicts" rule, like any state rule of criminal procedure, is presumptively valid *background* on which constitutional questions depend. Unless Georgia's rule violates "some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Patterson*, 432 U.S. at 201–02 (quotation omitted), it comports with the Constitution's procedural guarantees. And unless it seeks to "evade" some substantive constitutional provision, it comports with the Constitution's substantive guarantees. *Moore*, 143 S. Ct. at 2088.

II. Georgia's rule easily satisfies those standards. Georgia requires its juries to actually find the relevant facts, not issue incoherent, metaphysically impossible "findings." Contradictory special findings are "no verdict at all," a "nullity" that shows the jury failed to "resol[ve]" anything. *McElrath II*, 315 Ga. at 127, 130. Put simply, when a Georgia jury *affirmatively*

asserts two contradictory things, it has not decided. Georgia requires clarity.

And lest it be unclear, this is a generally pro-defendant rule. In Georgia, as in many states (and in federal court), where two valid verdicts are seemingly inconsistent, the rule is to affirm them both. So, using this case as an example, if Georgia accepted the jury's "verdicts," McElrath would be in prison, convicted of felony murder. But because the jury did *not* determine his mental state, he stands convicted of nothing, still able to attempt to convince a jury he is not guilty across the board. Georgia's rule seeks *accuracy* and *closure*; it does not favor prosecutors.

McElrath has hardly even tried to identify a constitutional flaw in Georgia's rule, and there is none. It does not "evade" the protections of the Double Jeopardy Clause, *Moore*, 143 S. Ct. at 2088, nor does it conflict with any "fundamental" principle of criminal procedure, *Medina*, 505 U.S. at 446. Georgia's rule flows from the basic principle that jeopardy terminates when a jury *decides*, not when it *fails* to decide. There is nothing particularly special about this rule, nor does it matter that it differs from some other state rules. By analogy, suppose ten jurors declared they had acquitted a defendant. Georgia requires unanimity, so that is not an acquittal, even if the jury claimed it was and even if in other states with different requirements it would have been. Similarly here, Georgia requires juries to actually decide the facts, and a jury's declaration is not a verdict even if the jury claims it was, and even if in another state it would be.

Georgia's rule is also exceedingly narrow. It applies only when a jury produces contradictory special findings that affirmatively reveal it failed to decide a necessary issue of fact. It never applies where a jury issues a *general* verdict of acquittal, which can always coexist with other findings. A general verdict of acquittal does not affirmatively reveal any specific factual finding; it could simply be a matter of jury leniency. *Powell*, 469 U.S. at 65. Georgia, like all states and the federal government, accepts such an acquittal as valid regardless of any potential *seeming* inconsistencies.

Georgia's rule is consistent with historical understanding. Although special verdicts were unusual in criminal cases historically, they were known, and courts would refuse to accept jury responses that failed to decide necessary factual issues or provided unintelligible answers. *See*, *e.g.*, *Rex v. Woodfall*, 98 Eng. Rep. 398, 402 (1770) ("If a doubt arises from an ambiguous and unusual word in the verdict, the Court ought to lean in favour of a venire de novo."). At the very least, there is no support for some sort of deeply rooted, fundamental rule holding to the contrary.

McElrath relies almost exclusively on this Court's "inconsistent verdicts" cases, Pet.Br.18, but those cases complement Georgia's rule. Inconsistent-verdicts cases involve situations where a general verdict of acquittal *seems* inconsistent with some verdict of conviction, like the classic case of a conviction for an offense and an acquittal on a lesser-included offense. These cases all rely on the idea that courts cannot "inquir[e]" into the reasons behind a jury's general verdict

of acquittal—which Georgia courts need not and do not do. *Smith*, 143 S. Ct. at 1608 (quotation omitted); *McElrath I*, 308 Ga. at 109. But the cases also take for granted that there *are* verdicts at issue; the jury could have simply nullified on one of the charges, which is not factually inconsistent at all. Georgia's repugnancy rule applies to the inverse situation, where the jury affirmatively reveals, on the face of its "verdict," that it failed to decide a material factual point and thus failed to issue a verdict at all. Georgia's rule thus fits comfortably next to this Court's inconsistent-verdicts cases.

III. Because the jury here never reached a verdict, the Georgia Supreme Court correctly held that jeopardy never terminated. The jury found that McElrath assaulted and stabbed his mother to death but announced contradictory conclusions about whether he was sane or insane at the time. The jury did not determine his mental state, so the jury did not render a verdict—either an acquittal or a conviction. Because McElrath's arguments wrongly assume that he secured a final verdict of acquittal, they fall short.

Any other holding would create great uncertainty and likely redound to the detriment of criminal defendants. As of now, states create their own criminal procedures, and the Constitution then applies to those procedures. McElrath would transmute specific protections, like the Double Jeopardy Clause, into fonts of ex ante procedural requirements. That would drag the judiciary into resolving questions the Constitution does

not resolve, and it would "inflict a profound injury to the [State's] powerful and legitimate interest in punishing the guilty." *Calderon v. Thompson*, 523 U.S. 538, 556 (1998) (quotation omitted). Moreover, a ruling for McElrath would almost certainly mean that future defendants, presented with the same situation, will be stuck with contradictory "verdicts" that land them in prison. McElrath has the opportunity to defend himself against the State's charges, which no jury has finally resolved. There is no reason to stretch the Double Jeopardy Clause to preclude retrial here, and the Court should affirm.

ARGUMENT

The issue in this case is whether McElrath's jeopardy ever terminated. The Georgia Supreme Court correctly held that it did not. The basis for that decision was not a "repugnant verdict exception to the Double Jeopardy Clause." Pet.Br.22. Instead, the decision was based on the fundamental point that there was no termination of the initial jeopardy because there was no verdict. Georgia law requires juries to avoid affirmative, contradictory "findings," and here the jury did not do so. The jury gave two answers to a single question on the face of its "verdict" and so did not determine McElrath's mental state. That means there was no verdict, which means there was no end to jeopardy, which means there is no double jeopardy.

McElrath does not really try to undermine the validity of Georgia's rule on "repugnant verdicts," and what little he musters is unavailing. The rule is an

eminently reasonable legal principle, consistent with common sense, history, and this Court's cases. It supports the State's interest in accuracy and closure and is generally a favorable rule for *defendants*, not prosecutors. This Court should affirm.

I. State law, not the Double Jeopardy Clause, defines the rules for when a jury has reached a valid verdict.

Georgia agrees that "retrials of acquitted charges are flatly prohibited." Pet.Br.14. But the Double Jeopardy Clause does not define the requirements for a jury to validly render a verdict. That is a question of state criminal law, where state sovereignty is at its height. McElrath even admits that states have "broad authority to determine when a verdict is void or a mistrial occurs." Pet.Br.11. That is the relevant point in this case.

A. The Double Jeopardy Clause prohibits retrial only where there has been a final determination of guilt.

The Double Jeopardy Clause provides that no person shall be "subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. The "origin and history of the Double Jeopardy Clause are hardly a matter of dispute." *United States v. Scott*, 437 U.S. 82, 87 (1978). "The constitutional provision had its origin in the three common-law pleas of *autrefois acquit*, *autrefois convict*, and pardon. These three pleas prevented the retrial of a person who had previously been acquitted, convicted, or pardoned for the

same offense." *Id.*; *see also Gamble v. United States*, 139 S. Ct. 1960, 1969 (2019).

The Clause's purpose is likewise uncontroversial: avoiding the "unacceptably high risk that the Government, with its superior resources," could "wear down" the defendant over multiple prosecutions. *DiFrancesco*, 449 U.S. at 130. "The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding. This is central to the objective of the prohibition against successive trials." *Burks v. United States*, 437 U.S. 1, 11 (1978).

But the Double Jeopardy Clause is not an absolute bar to retrial. The Clause bars retrial only where an event "such as an acquittal . . . terminates the original jeopardy." *Richardson v. United States*, 468 U.S. 317, 325 (1984). The Clause allows retrial where nothing has in fact terminated jeopardy.

For example, where a defendant is convicted but obtains reversal of that conviction on appeal, this Court has explained that there is no "double" jeopardy because the defendant's jeopardy did not end with the conviction. "This continuing jeopardy rule neither gives effect to the vacated judgment nor offends double jeopardy principles. Rather, it reflects the reality that the criminal proceedings against an accused have not run their full course." *Bravo-Fernandez*, 580 U.S. at 18 (quotation omitted).

Likewise, where a defendant's guilt has not been adjudicated, as in the case of a mistrial, retrial is again

permissible. As this Court put it two centuries ago, "[t]he prisoner has not been convicted or acquitted, [so he] may again be put upon his defence." *United States v. Perez*, 22 U.S. 579, 580 (1824). This Court has consistently and repeatedly held that "the failure of the jury to reach a verdict is not an event which terminates jeopardy." *Richardson*, 468 U.S. at 325; *see also*, *e.g.*, Joseph Story, *Familiar Exposition of the Constitution of the United States*, § 391, at 232 (1840) (no double jeopardy concerns if "the jury ha[s] been discharged without giving any verdict").

Even if a jury *seems* to have issued a verdict, sometimes it has not, as in the case of a court that lacked jurisdiction. In such a circumstance, there was no jeopardy to begin with, so the Clause does not apply. *See*, *e.g.*, *Ball*, 163 U.S. at 669 ("An acquittal before a court having no jurisdiction is, of course, like all the proceedings in the case, absolutely void, and therefore no bar to subsequent indictment and trial in a court which has jurisdiction of the offense."). This rule, too, is longstanding: claims of *autrefois acquit* (and the Double Jeopardy Clause) require "a *lawful* acquittal or conviction; for if the acquittal or conviction is not *lawful*, his life was never in jeopardy." *Kohlheimer v. State*, 39 Miss. 548, 552 (1860); *see also*, *e.g.*, *State v. Odell*, 4 Blackf. 156, 156–57 (Ind. 1836) ("The justice had no jurisdiction to try" the case and so the "judgment . . . is a nullity; and the defendant's plea . . . , relying on that judgment, is no defense."); *State v. Nichols*, 38 Ark. 550, 551 (1882) ("A justice of the peace having no jurisdiction to try one accused of a felony, his

judgment of acquittal, or conviction, is no bar to an indictment for the same offense in the Circuit Court.").

By contrast, a valid acquittal terminates jeopardy because it "represents a resolution, correct or not, of some or all of the factual elements of the offense charged." *Martin Linen*, 430 U.S. at 571. The correctness of an acquittal does not matter because "[w]hen a jury returns a general verdict of not guilty, its decision cannot be upset by speculation or inquiry into" its rationale, as to do so "would impermissibly authorize judges to usurp the jury right." *Smith*, 143 S. Ct. at 1608 (quotation omitted). When the jury *in fact* determines, through a valid final verdict, whether the defendant was guilty or not guilty, jeopardy has ended. But if the jury did not do so, jeopardy does not terminate and the Double Jeopardy Clause does not kick in. *Id*.

B. States have authority to decide the requirements for a jury to issue a final determination regarding guilt.

The Double Jeopardy Clause does not provide a code of criminal procedure regarding the requirements for a jury to issue a valid, final verdict. Even McElrath admits that states have "broad authority" to define the requirements for a valid verdict. Pet.Br.11.

McElrath's admission makes sense, because there is no doubt that rules of criminal law and procedure, like the requirements for a jury to reach a valid verdict, are primarily the states' domain. "The States possess primary authority for defining and enforcing the

criminal law." *Brecht*, 507 U.S. at 635. "Foremost among the prerogatives of sovereignty is the power to create and enforce a criminal code." *Heath v. Alabama*, 474 U.S. 82, 93 (1985). And "it is normally within the power of the State to regulate procedures under which its laws are carried out." *Patterson*, 432 U.S. at 201 (quotation omitted).

"[U]nless [a rule] offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," *id.* at 202 (quotation omitted), states plainly can differ in their requirements for verdicts, just as they differ on so many other matters of criminal procedure. For instance, a state cannot depart from the "unanimous [historical] adherence" to the "beyond a reasonable doubt" standard for culpability, *In re Winship*, 397 U.S. 358, 361 (1970), but states *can* use different rules on the admissibility of evidence, *United States v. Scheffer*, 523 U.S. 303, 308 (1998). With almost all criminal law and procedure questions, state law is the primary determinant. *See*, *e.g.*, *Kahler v. Kansas*, 140 S. Ct. 1021, 1027–29 (2020) (states can differ in their definitions of an insanity defense); *Leland v. Oregon*, 343 U.S. 790, 798–99 (1952) (states can differ as to their burdens of proof to establish an insanity defense).

Indeed, state law *must* provide the rules for determining how a jury renders a valid verdict. To implicate the Double Jeopardy Clause, there must be "a resolution . . . , correct or not, of some or all of the factual elements of the offense charged." *Scott*, 437 U.S. at 96–97 (quotation omitted). And not everything a jury

"says" constitutes such a final resolution. If a jury asks a question, that is not necessarily a resolution of the facts charged. If a jury comes out of the jury room and declares that the moon landing was a hoax, that might be something the jury *said*, but it is not a resolution of the facts necessary to the criminal indictment. A jury might even informally declare that it has agreed to acquit on a particular crime—but that still may not be a final verdict under state law. *See*, *e.g.*, *Blueford v. Arkansas*, 566 U.S. 599, 604–05 (2012) (foreperson announced that jury had reached a verdict of acquittal on some crimes, but "[a]ccording to the State Supreme Court, the foreperson's report had no effect on the State's ability to retry Blueford, because the foreperson was not making a formal announcement of acquittal when she disclosed the jury's votes" (quotation omitted)). If state law did not provide the procedure and rules for juries and verdicts, nothing would.

Unsurprisingly, states differ on the requirements for a jury to issue a verdict, just as they differ on many other procedural rules. Georgia, for instance, requires unanimity among jurors to render a verdict; Oregon does not, with respect to acquittals. *Compare Medina*, 309 Ga. at 435–36, *with Ross*, 367 Or. at 573; *see also Robinson v. Lopinto*, 601 F. Supp. 3d 55, 64 (E.D. La. 2022) (historically, Louisiana did not require unanimous acquittals, and whether it still does is "undisputedly a state law issue"). Likewise, Georgia requires the jury foreperson to sign the verdict; other states require *all* jurors to sign a verdict. *Compare Medina*, 309 Ga. at 435–36, *with, e.g.*, Ohio Crim. R. 31(a) *and State v.*

Ferguson, No. 2015-L-031, 2015 WL 8607683 at *3 (Ohio Ct. App. 2015) (explaining that all jurors must sign the verdict form, but they need only sign it once, rather than for each separate count).

Critically, the Double Jeopardy Clause itself has little to say about whether these state rules defining the requirements for valid verdicts are constitutional. Questions of how to convene a jury, how many jurors are required, what they are allowed to see during trial, when they are allowed to deliberate, what form the verdict must take, when jurors can be polled—these are all state-law questions. To use the unanimity example, a defendant in Oregon can be acquitted by ten jurors and is then protected by the Double Jeopardy Clause, whereas a defendant in Georgia would *not* be acquitted if only ten jurors voted to acquit—that would result in a mistrial, and he could be retried. The Clause just tells us that, *once* there is a valid verdict (as provided by Georgia, Oregon, another state, or the federal government), the bar applies.

Even McElrath seems to acknowledge that the question whether there is a verdict is analogous to numerous other areas where state law provides the foundation upon which a federal constitutional rule depends. *See* Pet.Br.21. The most obvious analogy is the Takings Clause and property rights. The Takings Clause protects property rights, but "property interests are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Ruckelshaus v.*

Monsanto Co., 467 U.S. 986, 1001 (1984) (alterations adopted). "Generally speaking, state law defines property interests." *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot.*, 560 U.S. 702, 707 (2010). With the state-defined property right in hand, courts examine whether a state (or the federal government) initiated a taking, but the "Takings Clause does not itself define property." *Tyler v. Hennepin Cnty.*, 143 S. Ct. 1369, 1375 (2023). In the same way, the Double Jeopardy Clause does not *define* the state rules and requirements for valid verdicts.

Other examples of federal rules depending on state law abound. A state legislature must define voting districts for federal office, but "the exercise of such authority in the context of the Elections Clause is subject to the ordinary constraints on lawmaking in the *state constitution*." *Moore*, 143 S. Ct. at 2085 (emphasis added). Likewise, federal courts apply the First Amendment, but the level of scrutiny for government forums changes drastically based on the *state's* rules for how it uses a forum. *See*, *e.g.*, *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 45–46 (1983) ("[T]he state may reserve the forum for its intended purposes."). And federal statutes also often depend on state law principles—for example, in the context of arbitration. *See*, *e.g.*, *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987) (generally applicable state contract law can invalidate an arbitration clause, but a "state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not

comport" with federal law protecting arbitration agreements).

Of course, "where the exercise of federal authority or the vindication of federal rights implicates questions of state law, [federal courts] have an obligation to ensure that state court interpretations of that law do not evade federal law." *Moore*, 143 S. Ct. at 2088. Just as states cannot strategically define property interests to circumvent the Takings Clause, states cannot define verdicts in a way that circumvents double jeopardy or due process guarantees. For example, a state may not effectively take a piece of property by labeling its action a "tax," *Tyler*, 143 S. Ct. at 1375, and it may not effectively expose someone to double prosecution by defining jeopardy-terminating "verdicts" to include only guilty verdicts. *See also*, *e.g.*, *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 167 (1998) (States "may not sidestep the Takings Clause by disavowing traditional property interests"). Nor may a state impinge on juries' historic power to "check" the executive and exercise leniency by banning general verdicts and requiring special findings. *Powell*, 469 U.S. at 65; *United States v. Gaudin*, 515 U.S. 506, 512–13 (1995). But barring that sort of extreme attempt to circumvent constitutional protections, the choice of rules—including rules regarding the valid issuance of verdicts—is left in the hands of the states.

This Court has itself repeatedly looked to state law to determine whether a particular order or event constituted a verdict. In *Sattazahn v. Pennsylvania*, 537 U.S. 101 (2003), for example, the Court looked to

Pennsylvania law to understand whether a defendant had been "acquitted" of a capital sentence. The jury convicted the defendant of murder but deadlocked as to sentence. *Id.* at 104–05. As required by Pennsylvania statute, the trial court "discharged the jury as hung" and imposed a sentence of life imprisonment. *Id.* at 105. The defendant was able to overturn his conviction, but on remand the jury convicted him again and this time sentenced him to death. *Id*. He then argued in this Court that the trial court's entry of life imprisonment was really a verdict of acquittal as to the death penalty and thus capital punishment should be barred. The Court acknowledged that if the state court had imposed the sentence based on a "trial-like sentencing phase," it might have been an acquittal, but according to *state law*, that was not what happened. *Id.* at 107, 109. "Under Pennsylvania's sentencing scheme, . . . [t]he judge makes no findings and resolves no factual matter." *Id.* at 109–10 (quoting *Commonwealth v. Sattazahn*, 563 Pa. 533, 548 (2000)).

Similarly, in *Smith v. Massachusetts*, 543 U.S. 462 (2005), the Court again explicitly acknowledged that what a state court order *is* depends on state law, not some undiscovered addendum to the Double Jeopardy Clause. In that case, the Court held that a state court's dismissal of an indictment, mid-trial, for insufficiency of the evidence, was a final judicial acquittal that barred retrial. *Id.* at 473. But it explicitly acknowledged that had the order been non-final, the Clause would not have applied, because "as a general matter state law may prescribe that a judge's midtrial

determination of the sufficiency of the State's proof can be reconsidered." *Id.* at 470. The Court looked to *state law* to determine that the order was in fact a final order. *Id.* at 471–72. So the Double Jeopardy Clause applied, but only on the basis that state law made clear this was a final judicial verdict.

And it makes sense that states have the authority to define the rules for issuing a valid verdict. They are the sovereigns trying to effectuate their own criminal law. "[A] law is defined by the sovereign that makes it, expressing the interests that the sovereign wishes to vindicate." *Denezpi*, 142 S. Ct. at 1844. The very reason that separate sovereigns can file duplicative charges against a single defendant is that different laws address different sovereign interests. *Id.* at 1844–45. And procedural rules, like the requirements for a jury to reach a verdict, are integral parts of that sovereign interest. "Procedure, after all, is often used as a vehicle to achieve substantive ends." *Moore*, 143 S. Ct. at 2086. So while the Double Jeopardy Clause *applies* to the procedural choices a state makes, it does not, as a general matter, *define* the procedural choices a state must make.

As an analogy, with respect to state *substantive* law, the Clause prohibits retrial where separate offenses have identical elements, but it does not define state offenses themselves. *See*, *e.g.*, *Currier v. Virginia*, 138 S. Ct. 2144, 2153 (2018) (the Double Jeopardy Clause precludes a "second trial" only if the charged offense, under state law, has the same statutory elements as the offense charged in the first trial). This

Court has even dismissed a case as improvidently granted once it realized that the fundamental question was not the Double Jeopardy Clause's scope but the particular elements of state crimes. *See Duncan v. Tennessee*, 405 U.S. 127 (1972). The same basic point holds here. A state cannot retry a defendant who has been acquitted, but it can decide the procedural requirements for acquittal, and the Clause has little to say about those rules.

II. Georgia's "repugnant verdicts" rule, which addresses when a jury has reached a valid verdict, is constitutional.

Based on its inherent power to define the requirements for a valid verdict, Georgia has determined that what it calls "repugnant verdicts"—a situation where a jury purports to affirmatively find contradictory facts—are not verdicts at all. Other states can have different rules, but Georgia's rule is reasonable and aligns with logic, history, and precedent. In arguing for reversal, McElrath relies almost exclusively on this Court's inconsistent-verdicts cases, but those cases are inapposite because repugnant verdicts are not simply a "type" of "inconsistent verdicts." Pet.Br.10. Georgia's rule is not about how to handle general verdicts that *might be* inconsistent. Instead, Georgia's rule is that a jury has produced no verdict at all when we *know* its "findings" are contradictory.

A. Georgia has reasonably determined that a valid verdict cannot be based on affirmative, contradictory "findings."

A jury's purpose is to decide the relevant facts, and Georgia's repugnancy rule is a recognition of the reality that sometimes a jury fails to achieve its purpose. The rule applies in the extraordinarily rare situation where a jury affirmatively contradicts itself and reveals, via special finding, that it failed to find the relevant facts. When a jury declares something to be both true and untrue at the same time, it has determined nothing. The purported verdicts are "no verdict at all," a "nullity" that shows the jury failed to "resol[ve]" anything. *McElrath II*, 315 Ga. at 127, 130 (quotation omitted).

Georgia's rule flows from the basic notion that "only a jury's decisions, not its failures to decide, identify what a jury necessarily determined at trial." *Bravo-Fernandez*, 580 U.S. at 14 (quotation omitted). Just as a "hung count reveals nothing more than a jury's failure to reach a decision," *id.*, repugnant (special) verdicts reveal nothing more than a jury's failure to reach a decision. *See McElrath II*, 315 Ga. at 130 (jury's failure to issue a coherent verdict is equivalent to a hung jury). A defendant cannot be both sane and insane as to the same act. A defendant cannot be both justified and not justified as to the same act. A jury that purports to claim as much has only declared it *failed* to determine the relevant fact. *See*, *e.g.*, *Lesslie v. State*, 18 Ohio St. 390, 395 (1868) (rejecting purported jury verdicts of acquittal and conviction where the jury

attempted to both acquit and convict the defendant of a crime).

Georgia's rule recognizes that just because a jury *purported* to achieve its goal doesn't mean it *did*. As McElrath concedes, "labels" don't necessarily determine substance. Pet.Br.21–22. If, for example, a jury were to declare that it had reached a verdict, but its verdict were unintelligible gibberish, a state court would be within its power to rule that such a *purported* verdict is no verdict at all. Similarly, if a jury purports to acquit but isn't unanimous, or addresses the wrong charges, or returns a "verdict" before all the evidence has been presented, the verdict is not necessarily valid. All of these would be state law questions. Following the same logic, if a jury purports to decide the same fact in two opposite ways, it isn't a verdict in Georgia.

Suppose, for instance, a jury purported to find a defendant both guilty and not guilty of the same crime. That is incoherent. It is "metaphysically impossible." *United States v. Shippley*, 690 F.3d 1192, 1195 (10th Cir. 2012) (Gorsuch, J.). Georgia's rule holds similarly with respect to affirmative contradictions that are apparent on the face of a jury's purported verdict. A determination that someone is both justified and not justified—or, as here, both sane and not sane with respect to a single act—is nonsensical. It is not an inconsistency that can be explained away by a jury's leniency; it is just incoherent, a failure to actually *decide*.

Other states can operate differently. States can and do differ on questions like burdens of proof for affirmative defenses or the requirements for a valid jury verdict. Other state procedures can, for instance, engage the legal fiction that a jury deciding multiple counts is really "finding" separate facts with respect to each count, even when the counts are all different legal violations based on the same factual conduct. Unless some constitutional provision limits state discretion, differentiation among states is a *feature*, not a bug, of our federal system.

But whatever other states choose to do, no constitutional provision is in tension with Georgia's rule. In particular, the Double Jeopardy Clause itself, the only constitutional provision that McElrath relies on, does not *define* when a jury has reached a valid verdict (and thus concluded jeopardy) any more than the Takings Clause defines property. Georgia's rule is plainly not an attempt to "evade" the constitutional bar against repeated prosecutions. *Moore*, 143 S. Ct. at 2088. It is not like a state redefining a taking as a "tax." It is in fact a generally pro-defendant, common-sense rule requiring a jury to actually find the relevant facts.

Georgia's rule aligns with numerous well-known legal principles. In statutory interpretation, for instance, the unintelligibility canon holds that "[a]n unintelligible text is inoperative." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 134 (2012). The canon "is readily applicable when language makes no sense, or when two provisions are irreconcilable." *Id*. In other words, where a

statute blatantly contradicts itself, there is in effect no operable statutory provision. Likewise, contracts are ordinarily void if they have unintelligible or repugnant terms. *See*, *e.g.*, *Moulding v. Prussing*, 70 Ill. 151, 154 (1873) (written contract "void" because the terms were "entirely repugnant, one to the other"); *cf. Mountain City Mill Co. v. J.A. Wood & Co*., 11 Ga. App. 486, 486 (1912) (looking to parol evidence only where "the contract would be unintelligible" otherwise). It is a common point of law that unintelligible means void.

Georgia's rule is also consistent with historical principles. Courts would refuse to accept what a jury *claimed* to be a verdict when the jury failed to coherently decide all of the necessary factual issues. For example, in the English criminal-libel case *Rex v. Woodfall*, 98 Eng. Rep. at 398, "the jury found [the defendant] guilty of the printing and publishing, only," and in response the defendant argued that the jury had rendered a verdict of acquittal because it failed to find that he had the culpable criminal intent. But the court, in an opinion written by Lord Chief Justice Mansfield, held that "[c]learly, there can be no judgment of acquittal: because the fact found by the jury is the very crime they were to try[,]" and because it was "impossible to say, with certainty," what the jury determined as to intent, the proper result was "venire de novo." *Id.* at 401–02. That practice was also adopted by at least some courts in the United States. *See*, *e.g.*, *State v. Bray*, 89 N.C. 480, 481 (1883) (vacating a purported acquittal and awarding a "*venire de novo*" because the "special verdict [was] defective, in that the

intent [was] not found as a fact"); *cf. Loew v. Stocker*, 61 Pa. 347, 352 (1869).

Courts also rejected some verdicts when the jury purported to resolve the factual issues but provided contradictory or incomprehensible answers. As one example, although the practice of demanding special findings in cases of supposed self-defense faded by the eighteenth century, in earlier cases a court could require the jury to make special findings and, when those findings contradicted its verdict in favor of an affirmative defense, the court could "adjudge[] the accused guilty of a felony." Edmund M. Morgan, *A Brief History of Special Verdicts and Special Interrogatories*, 32 Yale L.J. 575, 589–91 (1923).

Surely, if courts could reject verdicts and declare defendants *guilty* when there was contradiction, then the Constitution does not preclude Georgia from rejecting *all* the contradictory "verdicts." At the very least, there appears to be no support in historical sources for the idea that contradictory fact findings *must be* taken as valid acquittals.

To be sure, a tradition eventually developed that juries were "entitled to deliver a general verdict pronouncing the defendant's guilt or innocence"—that is, courts could not *require* special findings. *Gaudin*, 515 U.S. at 513. That too is entirely consistent with Georgia's rule, as juries have the option of issuing a general verdict of not guilty—no one is forcing them to put forward unintelligible special findings. Because "repugnant verdicts" will arise only where the jury has

purported to issue a *special* finding, the "unreviewable power" of the jury to issue a general verdict of acquittal for any reason remains wholly untouched. *Smith*, 143 S. Ct. at 1608 (quotation omitted). Juries need not hopelessly contradict themselves if they just want to acquit a defendant on a particular charge. They always retain the power to issue an unreviewable, "general verdict of not guilty." *Id*.

For all the same reasons, there is no due process problem here either (and McElrath has not even argued that there is). No deeply rooted, "fundamental" principle requires Georgia to make its rules in the way McElrath would prefer. *Medina*, 505 U.S. at 446 (quotation omitted). In Georgia, juries must find facts without affirmatively contradicting themselves to render a valid verdict. The Constitution does not require otherwise.

B. This Court's cases on "inconsistent verdicts" do not undermine Georgia's rule because they say nothing about juries affirmatively contradicting themselves via special findings.

McElrath argues that Georgia's repugnancy rule runs afoul of this Court's cases dealing with so-called "inconsistent verdicts." Pet.Br.18. These cases involve seeming inconsistencies between a jury's general verdict of acquittal and other convictions—the classic example being a conviction on an offense and an acquittal on a lesser-included offense. The Court has held that courts can affirm even seemingly inconsistent

convictions and that general verdicts of acquittal remain "inviolate." *Bravo-Fernandez*, 580 U.S. at 24 (quotation omitted). In McElrath's view, a repugnant-verdicts case, as Georgia defines it, is just a "type" of inconsistent-verdicts case, so the purported "acquittal" must be affirmed here, too. Pet.Br.10.

McElrath is wrong. Georgia accepts and applies this Court's rule on inconsistent general verdicts, but those cases—which always begin with the unchallenged assumption that there *are* valid verdicts at issue—depend on the fact that courts cannot *know* what a jury has decided when it issues a general verdict without explanation. The term "inconsistent verdicts" is somewhat of a misnomer, precisely because courts do not *know* whether the jury reached truly inconsistent verdicts or instead exercised lenity. Georgia's repugnancy rule, by contrast, applies only where the jury has *expressly* contradicted itself via special findings. This is not a merely technical distinction: Georgia's rule protects the unreviewable power of a jury to issue a general verdict of acquittal for any reason, and it avoids ever trying to peer into the jury room. But it simultaneously avoids the problem of a jury facially contradicting itself. No part of this runs afoul of this Court's cases.

1. The inconsistent-verdicts cases generally stand for the proposition that where there are seemingly inconsistent general verdicts, courts can affirm the convictions, even if they appear to be in tension with the acquittals. As early as *Dunn v. United States*, this Court explained that judges cannot peer behind

the door of the jury room to determine the jury's rationale—the jury's decision might have been the result of "lenity, . . . compromise, . . . [or] mistake," but "verdicts cannot be upset by speculation or inquiry into such matters." 284 U.S. at 393–94 (quotation omitted). Accordingly, the verdicts just stand. *Id.* This Court ultimately confirmed that rule in *United States v. Powell*, 469 U.S. 57 (1984).

The *Powell* Court also reaffirmed that the justification for the inconsistent-verdicts rule is precisely that a court cannot *know* what the jury has done: the reason for the seeming inconsistency could be "mistake, compromise, or lenity." *Id.* at 65.[1] So the reason that inconsistent verdicts stand is that courts cannot delve into the potential reasons for a jury's (unexplained) decision.

And a jury that issues a general verdict of acquittal might have rejected the charge for *non-factual* reasons. The jury, after all, has an "unreviewable power . . . to return a verdict of not guilty." *Id.* at 63 (quotation omitted); *see also Smith*, 143 S. Ct. at 1608. The ability to reject a charge not on the basis of fact but on the basis of mercy is part of the jury's "historic function, in criminal trials, [to act] as a check against arbitrary or oppressive exercises of power by the Executive Branch." *Powell*, 469 U.S. at 65. Because general "verdicts can be the result of lenity," they "therefore do not

---

[1] The *Dunn* Court had put forward a potential rationale based on res judicata principles that the *Powell* Court expressly rejected. *Powell*, 469 U.S. at 64.

always speak to the [factual] guilt or innocence of the defendant." *Brown v. State*, 959 So. 2d 218, 220 (Fla. 2007). The inconsistent-verdicts cases do not, then, "necessarily" implicate "contradictory findings." *Contra* Pet.Br.19.

To use this case as an example, if the jury had issued a general verdict of acquittal without explanation, there would be no repugnancy and the jury would have reached a verdict. Courts would not be able to inquire *why* the jury did what it did. By contrast, the jury here *explicitly stated* its "findings"—sane and insane, at the same time—so there is no uncertainty. Courts can tell that the jury necessarily failed to find a fact because that is what the jury told everyone on the face of its "verdict."

Ultimately, there is no disagreement with McElrath's point that, even where verdicts are *seemingly* inconsistent, a general verdict of acquittal "remain[s] inviolate." *Bravo-Fernandez*, 580 U.S. at 24 (quotation omitted). A genuine verdict of acquittal is always inviolate. *See supra* § I.A. That just isn't relevant here. The paramount point is that Georgia's repugnancy rule precludes a verdict *at all* where a jury has, via contradictory affirmative "findings," made clear that it failed to reach a conclusion.

McElrath suggests that because Georgia is the only state with this rule, the rule is somehow problematic, Pet.Br.22–23, but that is mistaken. To start, it is an oversimplification of the legal landscape. Many other states seem to have not addressed the question,

which is hardly surprising, given how rare it is for a jury to specially find opposite results regarding the same question. McElrath's cited state cases involve the far more common situation of seemingly inconsistent *general* verdicts, not situations where a jury specially finds contradictory facts. *See* Pet.Br.23 n.3 (collecting cases). Regardless, a state rule is not unconstitutional merely "because another method may seem to our thinking to be fairer or wiser" or because a "large number of states" take a different view. *Leland*, 343 U.S. at 798–99. The question is whether Georgia's rule offends some constitutional provision, and it does not. Other states can come to different conclusions, but whatever the varying policy justifications might be for different rules, Georgia's rule is *constitutionally* sound.

2. If anything, Georgia's repugnant-verdicts rule *complements* the Court's inconsistent-verdicts cases. The inconsistent-verdicts cases address a situation of *valid* verdicts where a court cannot *know* why a jury did what it did. Georgia's repugnancy rule addresses the inverse situation where there is *no* verdict because the jury specifically *declared* contradictory "findings." The court need not and cannot ask *anything* about what happened in the jury room—the special finding(s) are either facially contradictory or the rule does not apply.

Georgia's repugnancy rule thus *both* maintains the jury's status as a "check" on prosecutors, *Powell*, 469 U.S. at 65, *and* avoids peering into the jury room. These attributes of the repugnancy rule refute McElrath's *amici*'s suggestion that Georgia's rule

somehow undermines the sanctity of the jury room or the unreviewable power of a jury to declare someone "not guilty." NACDL Br. at 26–30. Repugnant verdicts are so rare *precisely because* they require contradictory special findings (so that no one needs to speculate about the jury proceedings), and juries can always issue general verdicts of not guilty (maintaining the jury's privileged role as a check against executive overreach). Georgia's rule supports accuracy and closure; it does not undermine the jury in the least.

III. Because the jury did not reach a verdict, McElrath's jeopardy never ended, retrial is appropriate, and this Court should affirm.

McElrath does not even challenge, much less refute, the Georgia Supreme Court's initial determination that there was no verdict—no resolution of culpability—in this case. Accordingly, the Georgia Supreme Court correctly held that McElrath can be retried. Affirmance here would reaffirm state sovereignty in these areas, avoid confusion, and pose no threat to the rights of criminal defendants.

A. The Georgia Supreme Court correctly held that McElrath can be retried.

The Georgia Supreme Court's decision was a straightforward (and correct) application of the "continuing jeopardy" rule. *Bravo-Fernandez*, 580 U.S. at 18. McElrath's jeopardy never ended because, as a matter of state law, there was no verdict. While McElrath is correct that "States cannot circumvent the Double Jeopardy Clause by characterizing an

acquittal rendered by a court with jurisdiction as void," Pet.Br.20, that is not what happened here. The repugnancy doctrine is not, contrary to McElrath's view, a "legal fiction." *Id.* at 22 (quotation omitted). It evinces factual *reality*—the jury really did affirmatively declare that McElrath was simultaneously sane and insane. The jury really did fail to determine his mental state. That means there was no verdict under Georgia law, and the Double Jeopardy Clause does not tell us otherwise.

McElrath's real gripe is with the Georgia Supreme Court's earlier holding that the jury never reached a verdict resolving the relevant charges. *McElrath I*, 308 Ga. 104.[2] But the Double Jeopardy Clause does not address that question; its requirements *turn* on the answer to that question. If the jury resolved guilt, the Double Jeopardy Clause applies; if not, then not.

McElrath could have argued (both in the Georgia Supreme Court and by seeking certiorari) that the repugnant-verdicts doctrine violates, for instance, the right to a trial by jury, by taking the ultimate decision out of the jury's hands. To be sure, the doctrine does no such thing—it always remains the jury's prerogative to

---

[2] McElrath's lack of argument as to the Georgia Supreme Court's initial decision is notable because even one of his *amici* briefly takes aim at Georgia's repugnant-verdicts rule, as applied in *McElrath I*. Br. of Ga. Ass'n Crim. Def. Lawyers at 20–23. The argument is wrong for all the reasons noted above, but it is also missing entirely from McElrath's own merits brief.

decide liability—but that would be the appropriate *type* of argument.

Arguing that the Double Jeopardy Clause applies, even though a state rule makes clear there is no acquittal to enforce, makes no sense. It is like trying to assert a regulatory-takings claim for property that, in a wholly separate matter, you lost to adverse possession years ago. Maybe that adverse possession ruling was somehow wrong, but *that* was the ruling to challenge. McElrath specifically chose not to challenge the real object of his ire here.

Regardless, even if McElrath's challenge somehow implicates the Double Jeopardy Clause, for all the reasons already explained, his challenge fails. Georgia's repugnant-verdicts rule is an ordinary exercise of state sovereignty, aimed at ensuring that juries return genuine verdicts that resolve the factual issues. As applied here, that means McElrath never received a verdict and retrial is appropriate. The Court should affirm.

B. A decision for McElrath would undermine both state sovereignty and criminal defendants' rights in Georgia.

A ruling for McElrath would open the doors for federal review of all kinds of state criminal procedural rules. It would unsettle previously settled understandings that states can determine what their own orders and procedures mean. *See*, *e.g.*, *Smith*, 543 U.S. at 471–72. Currently, there is an easy line for states and courts to understand: the Double Jeopardy Clause prohibits retrial after jeopardy is terminated, but states have

the primary responsibility to fashion the rules and procedures (including what is required for a valid, final acquittal). *Cf. Kisor v. Wilkie*, 139 S. Ct. 2400, 2421 (2019) (plurality) ("[C]larity promotes compliance." (quotation omitted)).

Reversing would open a new category of constitutional claims attacking state rules of criminal procedure. As just one example, if the Double Jeopardy Clause includes an implicit requirement as to how states must go about issuing verdicts, why wouldn't the right to a jury trial include evidentiary requirements? Is it really a jury trial if the jury does not get to see *everything* the defendant wants to show them? A McElrath-style argument would suggest maybe so. *But see Scheffer*, 523 U.S. at 308 ("[S]tate and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials."). This Court has not invited that type of litigation before and should not start now.

A ruling for McElrath would make particularly little sense because this case involves Georgia's insanity defense, and in particular its delusional-compulsion defense. This Court recently affirmed that, even if states must recognize some kind of insanity defense, the exact contours of that defense are for each state to determine. *See Kahler*, 140 S. Ct. at 1027–29. And Georgia has chosen to exercise that discretion by permitting a delusion defense—but with the caveat that juries must render coherent verdicts. If a jury wishes to find a defendant not guilty by reason of insanity, it must resolve the question of sanity. McElrath would

essentially deprive states of discretion under the guise of the Double Jeopardy Clause. On his view, a state is required to acquit a defendant based on insanity even if the jury fails to determine the defendant's mental state. *See* Pet.Br.19–20. Such an intrusive rule would threaten the states' "paramount role" in this area, *Kahler*, 140 S. Ct. at 1028, and potentially disincentivize states from permitting a more expansive defense altogether.

McElrath suggests that retrial here would "undermine[]" the "core values" of the Double Jeopardy Clause, Pet.Br.24, but the opposite is true. The Clause is meant to prevent the government from "wear[ing] down" a defendant through successive prosecutions for the same conduct. *DiFrancesco*, 449 U.S. at 130. Affirming here would do nothing of the sort. A judge convicted McElrath in a bench trial, and then McElrath obtained a new trial based on an ineffective-assistance argument. At that trial, the jury failed to conclusively determine whether he was sane at the time of his crime, and the State did not appeal—*he* did. He successfully invoked the repugnant-verdicts rule and obtained a ruling that there was no verdict, *see McElrath I*, 308 Ga. at 112, and then he argued that the non-verdict somehow bars his retrial, *see McElrath II*, 315 Ga. at 128, 130. This is not the situation the Double Jeopardy Clause was meant to address.

Particularly unsupported is McElrath's concern that somehow Georgia would expand the rule to "overturn" valid acquittals and drag defendants through burdensome retrials. Pet.Br.12, 20. The rule applies in

specific, rare circumstances, where affirmative, special jury "findings" are incoherent. The rule is not only easy to apply, it is almost never invoked, with few other occurrences in Georgia's history.

And of course, while McElrath wants to have his cake (erase the purported convictions) and eat it too (keep the purported acquittal), the next defendant would not be so lucky. If this Court holds that Georgia *cannot* define the requirements for a verdict as it has done, McElrath's rule would treat these sorts of purported jury verdicts as valid across the board, meaning that the convictions would stand as well. *See* Pet.Br.19 ("[A] 'repugnant' verdict is simply a specific kind of inconsistent verdict."); *McElrath I*, 308 Ga. at 108–09 (Georgia courts should affirm convictions where verdicts are merely "inconsistent"). So whatever victory McElrath could achieve for himself would be a loss for whoever comes next, as they would be stuck with both the "acquittal" and the "conviction." This Court has noted that "it is at least doubtful that appellate courts would be as zealous as they now are in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution." *Bravo-Fernandez*, 580 U.S. at 19 (quotation omitted). A ruling for McElrath here would likewise encourage Georgia and other states to adopt generally pro-prosecution rules to avoid being forced to apply a rule biased against conviction. There is no reason to tread that path.

CONCLUSION

The judgment of the Georgia Supreme Court should be affirmed.

OCTOBER 13, 2023

Respectfully submitted,

CHRISTOPHER M. CARR
Attorney General
STEPHEN J. PETRANY
Solicitor General
Counsel of Record
ROSS W. BERGETHON
Principal Deputy
Solicitor General
JUSTIN T. GOLART
JAMES E. BARRETT
PAUL R. DRAPER
Deputy Solicitors General

OFFICE OF THE GEORGIA
ATTORNEY GENERAL
40 Capitol Square SW
Atlanta, Georgia 30334
(404) 458-3408
spetrany@law.ga.gov
Counsel for Respondent