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 OF *AMICUS CURIAE* DISTRICT ATTORNEYS' ASSOCIATION OF GEORGIA IN SUPPORT OF RESPONDENT

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IDENTITY & INTEREST OF *AMICUS CURIAE*[1]

The District Attorneys' Association of Georgia ("the Association") is comprised of all district attorneys of the fifty judicial circuits of the State of Georgia. Since its founding in 1934, and especially since 1951, the Association has worked to enhance "the proficiency of the . . . prosecuting attorneys of the state" through continuing education programs and by providing a forum in which the District Attorneys may fulfill their obligation to "reform and improve the administration of criminal justice." 1970 Ga. Laws 938.

In Georgia, District Attorneys are independently elected Constitutional Officers in the Judicial Branch. Ga. Const. Art. VI, Sec. VIII, Para. I. Their duties are statutorily defined and include the prosecution of all felony cases and handling any appeals that result. O.C.G.A. § 15-18-6. When cases are appealed to this Court, the Attorney General is statutorily authorized to represent the State. O.C.G.A. § 45-15-9.

Prosecuting attorneys in the State of Georgia take an oath to uphold the Constitution of the United States and the Constitution of the State of Georgia. Prosecutors have an obligation to seek justice. At the heart of the pursuit of justice, due process must be safeguarded so both sides receive a fair trial. Seeking justice does

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[1] Counsel for a party did not author this brief in whole or in part, and no such counsel or party made a monetary contribution to fund its preparation or submission. No person or entity other than *amicus curiae* or its counsel made a monetary contribution to the preparation and submission of this brief.

not mean obtaining a guilty verdict by default due to obvious juror indecision. This case presents as a question of double jeopardy, and due to the nature of a defendant's special plea of insanity in Georgia, this case will affect prosecutions across the State and trial courts' ability to require a jury to provide a defendant with a unanimous and unequivocal decision on his special plea of insanity.

SUMMARY OF ARGUMENT

This is not a simple question of double jeopardy. It is an ill-advised battle, that if won by Petitioner, could lose the war for every defendant in Georgia who pleads "not guilty by reason of insanity." Allowing repugnant "verdicts" to stand in a case where a defendant has entered a special plea of insanity for a single criminal act will be a "win" for the prosecution.

McElrath confessed to stabbing his adoptive mother to death. Upon his special plea of insanity, the only question for the jury's resolution was whether he was insane at the time of his act. The jury failed to resolve this simple question. Given four verdict options, as the Georgia statute requires, the jury picked two: "not guilty by reason of insanity" for malice murder and "guilty but mentally ill" for felony murder. The jury found McElrath both insane and not insane at the moment of the attack.

When McElrath appealed his conviction, he argued that the two "verdicts" were "repugnant." He

argued he could not be both insane and sane at the time of the homicide. The jury's specific and express findings of fact regarding his sanity, being diametrically opposed to each other, meant that the trial court erred in accepting the jury's supposed "guilty but mentally ill" convictions.

The court agreed that the supposed verdicts were repugnant. The state supreme court held the jury made two selections regarding McElrath's sanity on the verdict form, instead of one. This dual selection failed to represent any decision by the jury on the issue of McElrath's *mens rea*. The Georgia Supreme Court logically ruled that the two repugnant "verdicts" were void because the jury had not actually decided the key question, akin to a mistrial when a criminal jury fails to reach a unanimous verdict. In other words, there was no verdict – no acquittal and no conviction. The Georgia Supreme Court vacated both purported verdicts and remanded the case for retrial.

A year later, dissatisfied with the opportunity a retrial on all counts represented, McElrath reversed his position and claimed that the jury's verdict of "not guilty by reason of insanity" was the only valid verdict, and retrying him on the malice murder count of the indictment would be double jeopardy. The Georgia Supreme Court disagreed, reaffirming the repugnant and void nature of the two opposing "verdicts." The Association agrees with the Georgia Supreme Court's analysis. McElrath was neither acquitted nor convicted, and a retrial is just a continuation of his one and only "continuing jeopardy."

Petitioner's double jeopardy question to this Court is the wrong question. The Double Jeopardy Clause of the Fifth Amendment prohibits a second prosecution for a crime of which a defendant was previously acquitted. The Association does not dispute this foundational principle. But McElrath was not previously acquitted of murdering his adoptive mother. Without such a finding, he and other similarly situated defendants in Georgia cannot and should not be able to invoke the protections of the Fifth Amendment to avoid trial on the charges they face.

In isolation, the prosecution can point to the jury's determination that McElrath was "guilty but mentally ill." And, in isolation, McElrath can point to the jury's determination that he was "not guilty by reason of insanity." When an outside observer considers both determinations together, all parties are confronted with what the Georgia Supreme Court saw as obvious: these diametrically opposed special verdicts are meaningless, as they represented no decision by the jury. There was no valid verdict. With the jury's failure to return a valid verdict, jeopardy did not terminate.

Was the Georgia Supreme Court wrong? Appellee and his amicus contend it was. He now reverses his original position and claims that the jury's two opposing verdicts represented a valid, if inconsistent, verdict. The hope is to persuade this Court to accept the notion that subjecting him to retrial on malice murder is a violation of the Double Jeopardy Clause. What this position fails to reckon with is that the corollary conclusion must also be true. The repugnant verdict

should not have been vacated and the verdict of "guilty but mentally ill" was also a valid verdict. The question posited by McElrath is the wrong question.

The Association suggests the right question before this Court is, were the jury's "verdicts" a verdict at all, making retrial appropriate, or were they valid inconsistent verdicts that should not have been vacated? Under one set of circumstances, jeopardy did not terminate, and retrial may proceed; under the other set, jeopardy terminated, and McElrath should be remanded to prison for life.

McElrath now seeks to have both resolutions – an acquittal without a conviction. But even if McElrath obtained that "Goldilocks" outcome for himself, it would not be so for other criminal defendants in Georgia. This binary question has implications for every defendant in Georgia who enters a special plea of insanity.

If Georgia's courts are not authorized to reject repugnant "mix-n-match" verdicts on the sole "either-or" question of a defendant's sanity, then every repugnant verdict on insanity is an automatic "loss" for the defendant and a "win" for the prosecution. The guilty verdict will stand.

Re-categorizing a repugnant verdict from nonexistent to inconsistent, as Petitioner now urges this Court to do, means the finding of "not guilty by reason of insanity" constitutes an acquittal even where the jury has clearly also found to the contrary. Adopting this approach means a merely inconsistent acquittal coupled with a conviction precludes a Georgia

defendant from arguing that he deserves to be solely remanded to the Department of Behavioral Health and Developmental Disabilities (DBHDD) for a determination of civil commitment. With inconsistent "mix-n-match" insanity verdicts, the concurrent conviction, finding a defendant "guilty but mentally ill," remands him to the custody of the Georgia Department of Corrections (DOC). If it is a murder case, he will be sent there for life.

Overriding Georgia's repugnancy rule undermines Georgia's insanity defense at its core. In these cases, where it is not a question of whether the defendant committed the criminal act, a defendant deserves a definitive and unequivocal answer from his jury on the issue of whether he should be held criminally responsible for the act. How does the prosecution "winning" every repugnant insanity verdict serve Georgia defendants seeking an unequivocal decision about their criminal responsibility? Diametrically opposed special "verdicts" cancel each other out. This is what makes them repugnant and non-existent.

The Association urges this Court to affirm and uphold the Georgia Supreme Court's decision that the Double Jeopardy Clause does not prevent the State of Georgia from retrying McElrath on all the charges in his indictment, including malice murder. The Georgia Supreme Court saw that the diametrically opposed "verdicts" failed to represent a unanimous resolution by the jury. Thus, the jury did not return a valid verdict that terminated McElrath's jeopardy. It returned no verdict at all.

This is not a simple question of double jeopardy. It is a question of justice for all Georgia defendants who enter a special plea of insanity and seek an acquittal through a jury's unequivocal determination of their sanity and criminal responsibility at the time of the crime. "Mix-n-match" insanity verdicts ordinarily benefit the prosecution. The Double Jeopardy Clause does not demand that outcome.

ARGUMENT

I. REPUGNANT VERDICTS UNDER GEORGIA LAW

Is the Georgia Supreme Court's repugnancy determination, allowing retrial on all charges, the kind of government oppression that the Double Jeopardy Clause was designed to prevent, especially when McElrath, not the State, insisted that the "verdict" was repugnant? Before delving any further into the issue of double jeopardy, a deeper examination of the specific nuances of Georgia law and McElrath's case are necessary to fully explore why Georgia's repugnancy rule is a suitable solution to a jury purporting to issue diametrically opposed special verdicts.

A. Burden of Proof for a Defendant's Special Plea of Insanity

McElrath confessed, in both his 911 call and his statement to police, that he killed his adoptive mother

by stabbing her to death. *McElrath v. State*, 308 Ga. 104, 104-105, 839 S.E.2d 573, 575 (2020) (*McElrath I*). It was not in dispute at trial that McElrath had suffered mental illness for approximately three years prior to the homicide and had been diagnosed with schizophrenia or a related schizoaffective disorder. *Id.* He was indicted for three felony crimes all arising out of the single act of the homicide: malice murder (O.C.G.A. § 16-5-1(a) and (b)), felony murder (O.C.G.A. § 16-5-1(c)), and aggravated assault (O.C.G.A. § 16-5-21). McElrath entered a special plea of "not guilty by reason of insanity." O.C.G.A. § 17-7-131.

Upon his special plea of insanity, McElrath bore the burden of proving to the jury, by a preponderance of the evidence, that he was insane at the time of the attack. *Buford v. State*, 300 Ga. 121, 121-122, 793 S.E.2d 91, 92 (2016); see *Keener v. State*, 254 Ga. 699, 701-702, 334 S.E.2d 175, 178 (1985) (this burden on the defendant is Constitutional); accord, *Leland v. Oregon*, 343 U.S. 790 (1952); *Rivera v. Delaware*, 429 U.S. 877 (1976); *Patterson v. New York*, 432 U.S. 197 (1977); *Grace v. Hopper*, 566 F.2d 507 (5th Cir. 1978).

Under Georgia law, sanity is presumed. O.C.G.A. § 16-2-3. Contrary to *amicus* GACDL's position, at trial O.C.G.A. § 24-14-21 has no application as "the presumption of a mental state once proved to exist" only becomes relevant when a defendant who has previously been adjudicated insane seeks release from the Georgia Department of Behavioral Health and Developmental Disabilities and the "introduction into evidence of the insanity order raises a counter-presumption."

Durrence v. State, 287 Ga. 213, 214-216, 695 S.E.2d 227, 229-230 (2010). "Because Georgia law presumes every person is of sound mind and discretion, criminal trials begin with the rebuttable presumption that the defendant is sane and this presumption is evidence." *Id.*

The State has no burden to disprove a defendant's insanity beyond a reasonable doubt. O.C.G.A. § 17-7-131(c). In Georgia, proof of sanity is not an element of the prosecution's case; rather the defendant bears the burden of persuasion to prove either insanity or mental illness. *Spivey v. State*, 253 Ga. 187, 187-189, 319 S.E.2d 420, 425-26 (1984). As such, the cases heavily relied upon by McElrath, such as *Burks v. United States*, 437 U.S. 1 (1978) can be distinguished. The question in *Burks* was "whether a defendant may be tried a second time when a reviewing court has determined that in a prior trial the evidence was insufficient to sustain the verdict of the jury." *Id.* at 5. The answer was "no." But sufficiency is not the issue here and the burden of proof in *Burks* was different. Burks was tried in a United States District Court for the crime of robbing a federally insured bank in Tennessee by use of a dangerous weapon. The government had the burden of disproving insanity beyond a reasonable doubt once a prima facie defense of insanity had been raised. *Id.* at 2-4. That is not the standard in Georgia.

If a Georgia jury finds that a defendant failed to meet his preponderance burden for his claim of insanity, the jury may find that he met his burden of proving, beyond a reasonable doubt, that he was mentally ill at

the time of the offense. O.C.G.A. § 17-7-131(c)(2); see *Keener*, 254 Ga. at 701-702, 334 S.E.2d at 178.

McElrath presented evidence of his ongoing mental illness and delusions. *McElrath I*, 308 Ga. at 105-106, 839 S.E.2d at 576. He argued that he was insane because he was acting under a delusional compulsion. *Id.*; O.C.G.A. § 16-3-3. In Georgia, three elements comprise this defense: "(1) that the defendant was laboring under a delusion; (2) that the criminal act was connected with the delusion under which the defendant was laboring; and (3) that the delusion was as to a fact which, if true, would have justified the act." *Stevens v. State*, 256 Ga. 440, 442, 350 S.E.2d 21, 22 (1986).

McElrath argued that he was under the delusion that his mother was poisoning his food. Thus, he was justified in stabbing her to death in the stairwell of their home. *McElrath I*, 308 Ga. at 105-106, 839 S.E.2d at 576. The Georgia Supreme Court reviewed the trial transcript, the evidence presented at trial, and the conflicting expert testimony to determine if the trial evidence was sufficient to support the conflicting "verdicts" under *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). The Georgia Supreme Court does not speculate into the jury's deliberations with a sufficiency analysis. Instead, it looks to see if there was some competent evidence to support each fact necessary to make out the State's case. *Gude v. State*, 313 Ga. 859, 861-862, 874 S.E.2d 84, 89 (2022).

The Georgia Supreme Court held that at least one expert provided sufficient testimony to support a

jury finding McElrath was insane by a preponderance of the evidence. *McElrath I*, 308 Ga. at 105-106, 839 S.E.2d at 576. The Georgia Supreme Court also determined there was sufficient evidence for a jury to find, beyond a reasonable doubt, that McElrath was "guilty but mentally ill" at the time of the homicide. *McElrath I*, 839 S.E.2d at 576-577.

Contrary to *amicus* GACDL, a Georgia jury is not bound by the opinions of expert witnesses. *Boswell v. State*, 275 Ga. 689, 691-692, 572 S.E.2d 565, 568 (2002). A Georgia jury may determine what credibility and weight to give an expert opinion and may assess a defendant's conduct, demeanor, motive, words, and actions for itself. *Id.* Therefore, the evidence at trial supported the jury determination of "guilty but mentally ill" simply because McElrath's delusion that his mother was poisoning him, if true, did not justify the act of stabbing her fifty times, causing her death in the stairwell.

B. Special Instructions to the Jury: Form of the Verdict

A Georgia trial court is required to provide the jury with the law regarding the defendant's special plea of insanity, including two specific instructions relating to the special plea: the form of the jury's verdict and the incarceration results of each verdict. O.C.G.A. § 17-7-131(c).

The jury is given four options for the form of its verdict. J.A. 8a. Before considering a defendant's special

plea of insanity, a jury must find beyond a reasonable doubt that the defendant committed the acts alleged in the indictment. J.A. 91a. The jury may return a general verdict of "guilty" or a general verdict of "not guilty." The jury is also given the option to make specific and express findings about the defendant's insanity or mental illness with a special verdict declaring their findings. O.C.G.A. § 17-7-131(b) and (c).

Here, the jury was instructed that it could only return a special verdict of "not guilty by reason of insanity" if the defendant proved, by a preponderance of the evidence, that he was insane at the time of the crime. J.A. 96a. The jury was also properly instructed that only after rejecting a finding of insanity, could it consider whether the evidence showed, beyond a reasonable doubt, that McElrath was "guilty but mentally ill" at the time of the crime. J.A. 97a. It has been a bright line rule in Georgia, since 1985, that the jury may not find a defendant both insane and not insane. *Keener*, 254 Ga. at 702-703, 334 S.E.2d at 179.

McElrath's jury filled out its verdict form with the four options and picked two. The jury did not return any general verdicts on any of the three counts in the indictment. *McElrath I*, 308 Ga. at 104-105, 839 S.E.2d at 574-575; J.A. 8a. The jury did not find McElrath "guilty," nor did it find him "not guilty." *Id.*

Of the remaining special verdict options, the jury picked both. It checked off diametrically opposed specific and express findings of fact. The jury specifically found McElrath to have intentionally stabbed his

mother, which resulted in her death, when it returned "guilty but mentally ill" verdicts to the felony murder and aggravated assault charges. In other words, the jury found him legally sane but mentally ill, beyond a reasonable doubt, at the time of the homicide. The disparity was created when, as to malice murder, the jury returned a completely opposite special verdict finding McElrath insane at the time of the homicide.

This was not a decision that represented any resolution to the only contested factual element of the offense charged: McElrath's *mens rea*. It was no decision at all and void. It was the equivalent of a mistrial.

C. Special Instructions to the Jury: Punishment

A defendant's special plea of insanity is unique in Georgia law. Commonly in Georgia, the jury in a criminal trial is only tasked with returning a general verdict of "guilty" or "not guilty," and a jury is not to concern itself with punishment. *Wilson v. State*, 233 Ga. 479, 481-482, 211 S.E.2d 757, 760 (1975). Therefore, inconsistent verdicts are allowed to stand and neither the defendant nor the State may appeal them. *Milam v. State*, 255 Ga. 560, 562, 341 S.E.2d 216, 218 (1986); accord, *Collins v. State*, 312 Ga. 727, 734, 864 S.E.2d 85, 94-95 (2021) (expressly declining to overrule *Milam* and rejecting as meritless the assertion that a felony murder conviction had to be reversed because it was inconsistent with an acquittal on the predicate offense of aggravated assault).

There are two exceptions to the standard general verdict form and the forbidden consideration of punishment in Georgia: special pleas of insanity and death penalty cases.

Unlike insanity cases, Georgia death penalty cases have a guilt-innocence phase and a separate sentencing phase. O.C.G.A. § 17-10-31. During the sentencing phase, the jury is incapable of both recommending a sentence of death and recommending a sentence of life with the possibility of parole.[2] The same should be true with a defendant's special plea of insanity because it is both an affirmative defense and a sentencing recommendation.

With a defendant's special plea of insanity, the trial court instructs the jury about the consequences of the verdicts. O.C.G.A. § 17-7-131(b)(3). These instructions correct any misconceptions jurors may have about the result of their verdict and allow the jury to focus solely on the mental condition of the defendant. The intent is for the jury to decide that issue free from

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[2] This is why *Bullington v. Missouri*, 451 U.S. 430, 445 (1981) can be distinguished. Bullington's jury did not return a special verdict both imposing the death penalty and not imposing the death penalty. The jury in *Bullington* made one finding. It declined to impose the death penalty. Upon successful appeal by Bullington, this Court held that Missouri was precluded from seeking the death penalty again, as a jury had made an unequivocal finding that the State had failed to prove the necessary facts to support imposition of the death penalty. *Id*. McElrath's jury did not make one finding of fact. It made two, which is akin to imposing the death penalty and not imposing the death penalty at the same time.

concerns about punishment. *Foster v. State*, 306 Ga. 587, 592, 832 S.E.2d 346, 351 (2019).

Here, the trial court instructed the jury that if they found McElrath insane, he would be committed to "a state mental health facility until such time, if ever, that the court is satisfied that he or she should be released pursuant to law." J.A. 96a; O.C.G.A. § 17-7-131(b)(3)(A). The trial court also instructed the jury that if they found McElrath guilty but mentally ill, he would "be placed in the custody of the Department of Corrections which will have responsibility for the evaluation and treatment of the mental health needs of the defendant." J.A. 97a; O.C.G.A. § 17-7-131(b)(3)(B). The jury's verdict left McElrath in physical limbo.

McElrath had a good reason for advocating that the "verdicts" were repugnant: he wanted freedom. By the time of appeal, the Georgia Department of Behavioral Health and Developmental Disabilities determined that he did not meet the criteria for inpatient civil commitment. However, due to the jury's other special verdict of "guilty but mentally ill," McElrath was released from DBHDD to the Georgia Department of Corrections, not to freedom. See Br. of Appellant at 43, 45-46, *McElrath v. State*, No. S19A1361 (Ga.) (July 15, 2019) (McElrath sought to have the trial court's order, remanding him to the custody of the DOC, reversed "having failed to apply the correct statutory subsection in removing Appellant from the physical custody of the DBHDD . . . ").

McElrath had to find a way to resolve his practical problem of being physically remanded to the custody of the DOC. *McElrath I*, 308 Ga. at 115-116, 839 S.E.2d at 582. McElrath could not assert that the "verdicts" were merely inconsistent, because seemingly inconsistent general verdicts are affirmed. *Milam v. State*, 255 Ga. at 562, 341 S.E.2d at 218 (abolishing the inconsistent verdict rule in Georgia). Consequently, in McElrath's first appeal to the Georgia Supreme Court, he advocated for repugnancy, urging the Georgia Supreme Court to vacate the jury's special verdict of "guilty but mentally ill." See Br. of Appellant at 30-37, *McElrath v. State*, No. S19A1361 (Ga.) (July 15, 2019).

D. "Both Verdicts Must be Vacated and a New Trial Ordered"

In the first appeal, McElrath succeeded in convincing the Georgia Supreme Court that his verdicts were repugnant, "as the guilty and not guilty verdicts reflect affirmative findings by the jury that are not legally and logically possible of existing simultaneously." *McElrath I*, 308 Ga. at 110, 839 S.E.2d at 575, 579. Because this was not a case where the jury made a positive finding of fact as to one charge and failed to make a positive finding of fact as to the other charge, the Georgia Supreme Court rejected both the District Attorney's and the Georgia Attorney General's positions that the jury's two verdicts were merely inconsistent. *McElrath I*, 308 Ga. at 110, 839 S.E.2d at 578, 580-582.

In line with Georgia's rule on mutually exclusive verdicts, the Georgia Supreme Court recognized that "repugnant verdicts suffer from a similar infirmity as mutually exclusive verdicts" because to have a jury find a defendant both sane and insane, "the jury must make *affirmative* findings shown on the record that cannot logically or legally exist at the same time." *McElrath I*, 308 Ga. at 111, 839 S.E.2d at 579 (emphasis in original); see *Booth v. State*, 311 Ga. 374, 376-377, 858 S.E.2d 39, 42 (2021); *Middleton v. State*, 846 S.E.2d 73, 83 (2020); *Dumas v. State*, 266 Ga. 797, 800 471 S.E.2d 508, 511 (1996) (a mutually exclusive verdict in Georgia is where a jury makes affirmative findings of diametrically opposed *mens rea*, which does not terminate jeopardy since the verdicts are void).

Thus, for McElrath's repugnant verdicts, the Georgia Supreme Court, consistent with other rules in Georgia, stated, "both verdicts must be vacated and a new trial ordered." *McElrath I*, 308 Ga. at 111, 839 S.E.2d at 579; accord, *Dumas* 266 Ga. at 800, 471 S.E.2d at 510.

E. McElrath's Second Bite at the Apple

A year later, upon proceeding to retrial, McElrath filed a plea in bar based on double jeopardy. Despite the entire verdict having been declared a nullity and vacated by the Georgia Supreme Court at his urging, McElrath now claimed that he was found not guilty. The trial court, bound by the "law of the case" rule

found in O.C.G.A. § 9-11-60(h) and the Georgia Supreme Court's determination that the malice murder "verdict" was void, denied the motion. *McElrath v. State*, 315 Ga. 126, 128, 880 S.E.2d 518, 520 (2022) (*McElrath II*).

Appealing the trial court's denial of his plea in bar, "McElrath next argue[d] that because the jury found him not guilty by reason of insanity on the malice murder count, he cannot be retried on any of the counts in the indictment because of the constitutional prohibition against double jeopardy and the doctrine of collateral estoppel." *Id.* The Georgia Supreme Court disagreed.

In *McElrath II*, Petitioner argued that repugnancy did not mean the repugnant verdicts had to be vacated and remanded for retrial so a jury could make a valid determination as to the ultimate issue of fact – whether he was insane or not insane at the time of the homicide. Rather, McElrath argued that the Georgia Supreme Court should somehow apply the jury's purported "verdict" on malice murder to his felony murder and aggravated assault charges. See Br. of Appellant at 23, *McElrath v. State*, No. S22A0605 (Ga.) (February 16, 2022) ("The controlling legal precedent should have resulted in this Court's reversal of Appellant's judgment of conviction on felony murder and aggravated assault.").

The Georgia Supreme Court rejected McElrath's arguments. The two diametrically opposed findings of *mens rea*, as to the one act of homicide, cancelled each

other out, leaving McElrath with meaningless, diametrically opposed, special "verdicts" representing no decision by the jury. At this point, the question of whether there had been a verdict was law of the case. See O.C.G.A. § 9-11-60(h). With the jury's failure to return a valid verdict, jeopardy did not terminate. Where jeopardy has not terminated, there is no violation of the Double Jeopardy Clause in proceeding to retrial. *McElrath II*, 315 Ga. at 130, 880 S.E.2d at 522.

F. McElrath's Third Bite at the Apple

McElrath and *amici* presently seek a ruling from this Court that retrial on malice murder constitutes double jeopardy, ignoring his prior claim that the trial court erred in accepting the repugnant verdicts, which brought him here. He wants his cake, and he wants to eat it too.

McElrath now asserts that the "verdicts" *were* valid, he was acquitted of malice murder with the jury's verdict of "not guilty by reason of insanity," and the Double Jeopardy Clause prevents his retrial, because even if the verdicts were repugnant, they were merely another type of inconsistency and not a wholly void verdict.[3]

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[3] Petitioner does not argue that this is an issue of collateral estoppel, but *amicus* GACDL asserts that McElrath was acquitted of malice murder with a valid final judgment and that 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. Br. of Ga. Assoc. of Criminal Defense Lawyers at 30-32.

Thus, to get to the question of double jeopardy, this Court must decide whether the jury's "verdicts" were really a verdict at all, making retrial appropriate, or were they valid inconsistent verdicts that should not have been vacated?

II. DOUBLE JEOPARDY DOES NOT APPLY HERE, WHERE THE JURY NEVER REACHED A VERDICT

Petitioner's question is the wrong question. The right question is, was there a verdict at all? The Double Jeopardy Clause holds such a sacrosanct place in the legal lexicon that it is hard to imagine that the concept was ever up for discussion or dispute. And yet it has been discussed and disputed endlessly due to developing changes in the law.

This Court has exhaustively explored the history of the Double Jeopardy Clause and the meaning of the words "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. Amend. V.; see *Evans v. Michigan*, 568 U.S. 313,

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This is simply not the case. This argument blatantly ignores the jury's other diametrically opposed decision, on the critical issue of ultimate fact, finding him not insane. The assertion that any Court could then "apply" the insanity finding to the jury's other express and specific finding that McElrath acted with intent is unsupported by law. See *Bravo-Fernandez v. United States*, 580 U.S. 5, 12 (2016) (the burden is on the defendant to demonstrate that the issue whose re-litigation he seeks to foreclose was actually decided by a prior jury's verdict of acquittal).

318-320, 323-333, 334-338 (2013); *Green v. United States*, 355 U.S. 184, 187-189, 199-219 (1957).[4]

Formulated over time, the basic rules under the Double Jeopardy Clause allow a defendant to be retried when his conviction is set aside due to an error in the proceedings but not when the reversal is based upon insufficient evidence. *Burks v. United States*, 437 U.S. 1, 11 (1978); *United States v. Tateo*, 377 U.S. 463, 465 (1964). This Court in *Green* also stated that jeopardy is not regarded as having come to an end such that it bars a second trial where unforeseeable circumstances during the first trial, such as the failure of the jury to agree on a verdict, makes its completion impossible. *Green*, 355 U.S. at 187-188. Here, McElrath's jury did not agree on the critical ultimate fact of whether he could form the necessary intent to commit the homicide. As the two purported verdicts were void, jeopardy did not terminate. Does a retrial on all charges under these circumstances constitute government oppression and abuse?

What government abuse were the Founders trying to avoid with this prohibition on double jeopardy? "[T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense," because it would compel that individual to suffer an ongoing ordeal and would enhance "the possibility that even though innocent he may be found guilty." *Id.*

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[4] Georgia has its own version, providing the same protection with exemptions. See Ga. Const. Art. I, § I, Para. XVIII.

The State is to have one fair opportunity to prove, beyond a reasonable doubt, that a defendant is guilty of the crimes charged. *Burks*, 437 U.S. at 16. Here, as in most insanity cases, there was no issue as to whether McElrath committed the criminal act. He entered a special plea of insanity asking his jury to decide his criminal responsibility. It was a binary question.

In this case, upon rational examination, the jury's selection of two competing special verdicts only communicated that the jury had failed to make a decision as to the one question of McElrath's special plea of insanity. Was McElrath legally insane at the time of homicide or was he sane? The jury's answer was "yes," which was a failure to answer the question at all. "Both" was not an option, yet the jury issued that response. Such jury indecision, equivalent to a hung jury and mistrial, is a permissible reason for the retrial of a defendant.

Is the Georgia Supreme Court's repugnancy determination and remand for retrial on all counts, the kind of government oppression that the Double Jeopardy Clause was meant to prevent? The answer is "no."

Diametrically opposed special verdicts make clear that the jury simply failed to decide, but when such "verdicts" are treated as valid, albeit inconsistent, they favor the prosecution. This is what makes them repugnant and void.

The Association's position is that the Georgia Supreme Court was correct in its logic. A repugnant verdict is not equivalent to, nor a subset of, an inconsistent

verdict – it is just not a verdict at all. Vacating the diametrically opposed special verdicts and remanding the case for a retrial on all counts is what happens with a repugnant verdict.

Once again, Petitioner's question is the wrong question. Of course, the Double Jeopardy Clause of the Fifth Amendment prohibits a second prosecution for a crime of which a defendant was previously acquitted. But in order to be acquitted, a determination of "[c]ulpability (i.e. the "ultimate question of guilt or innocence") is the touchstone" and here, no such decision was made by McElrath's jury. *Evans*, 568 U.S. at 324, 336-337. Since no jury has issued a verdict on the charges in the indictment, retrial is appropriate, so that a jury can make a definitive, unequivocal determination on the only question that still, to this day, requires resolution.

III. INCONSISTENT VERDICTS ARE ALMOST ALWAYS A WIN FOR THE STATE

This is not a simple question of double jeopardy. It is an ill-advised battle, that if won by McElrath, could potentially lose the war for every defendant in Georgia who pleads "not guilty by reason of insanity." McElrath's position is the proverbial double-edged sword. If the State is precluded from retrying McElrath for malice murder because the Georgia Supreme Court erred in determining his jury's two verdicts were repugnant, then in any future case where a defendant enters a special plea of insanity and the jury

finds him both insane and not insane, his repugnant verdict will be deemed inconsistent and not subject to appeal on that basis. The guilty part of the supposed "verdict" will stand. The conviction finding him "guilty but mentally ill" determines his sentence, not the purported acquittal.

Ironically, during this battle, McElrath swapped horses midstream. He has forsaken his prior repugnancy argument – the very argument that brought him here. He now advocates that his jury returned valid inconsistent verdicts, as this better serves him, and only him, in this short-sighted battle. Overriding Georgia's repugnancy rule, means that repugnant verdicts will almost always be a "win" for the prosecution, which in turn undermines Georgia's insanity defense at its core.

With a special plea of insanity in Georgia, there is no question the defendant committed the criminal act, and the defendant bears the burden to present the jury with evidence, that while he suffers from mental illness, at the time of the crime he was legally insane. He must show the jury why he was not criminally responsible for his actions, and why he should be treated differently from those who are sane and intentionally commit felonies. A criminal defendant deserves a definitive and unequivocal answer from his jury on this issue. If his jury cannot decide the one "either-or" issue before it, our system allows another jury be empaneled to see if it can decide the issue. Mistrials are not a bar to further prosecution. *United States v. Perez*, 22 U.S.

(9 Wheat.) 579, 580 (1824); *United States v. DiFrancesco*, 449 U.S. 117, 130 (1980). Allowing a jury to find a defendant both insane and not insane, undermines a defendant's special plea and defense, in favor of the prosecution.

The real question to be decided here is, were the jury's two diametrically opposed "verdicts" void repugnant verdicts requiring retrial or a valid inconsistent verdict that should not have been vacated?

The Association believes the Georgia Supreme Court correctly held that under Georgia law, two diametrically opposed "verdicts" which fail to represent a resolution by the jury of a defendant's sole defense is not really a verdict at all. Courts should be authorized to reject supposed "verdicts," where the jury has come to two opposing answers on the sole "either-or" question of a defendant's sanity, if for no other reason than the windfall the position provides to prosecution appears to undermine due process.

McElrath's jeopardy continues to this day, as no one can say that his first trial resulted in an undisputed determination regarding his special plea of insanity and under Georgia law, no jury has issued a valid verdict on the charges alleged in the indictment.

CONCLUSION

The Association sees the wisdom of categorizing opposing special verdicts as repugnant, so McElrath

and the State may secure, if they can, an unequivocal determination on the issue of McElrath's insanity at a retrial. The Association asks this Court to affirm the Georgia Supreme Court's logical analysis that these repugnant verdicts, void of a decision, did not terminate jeopardy. Especially since no verdict exists.

The danger in determining that McElrath's repugnant verdicts may stand, and be called inconsistent, is that future Georgia trial courts will be powerless to reject the jury's indecision on the defendant's issue of insanity. And in Georgia, the defendant would then be incapable of appealing the blatant and obvious indecision that resulted in the inconsistency. Should Georgia juries be authorized to "mix-n-match" on a defendant's specific "either-or" plea of insanity, where "mix-n-match" only benefits the prosecution?

Thus, this is a question of justice for all future Georgia defendants who enter a special plea of insanity and seek an acquittal through a jury's unequivocal determination regarding their criminal responsibility at the time of the crime. Under these circumstances, re-categorizing repugnant special verdicts as inconsistent provides an automatic, and undeserved, windfall to the prosecution. How does the prosecution "winning" whenever the jury returns diametrically opposed insanity verdicts serve Georgia defendants?

Petitioner's dogged desire to win this battle, at the cost of other future defendants' rights to an unequivocal determination on their special plea of

insanity, is irony itself. The Association urges upholding the decision of the Georgia Supreme Court so that under these rare circumstances, Georgia courts may comply with Georgia law and reject specific and express jury "findings" that reflect obvious indecision and require a genuine verdict as to the defendant's issue of insanity.

Respectfully submitted,

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