No. _____

In the Supreme Court of the United States

EMANNUEL TOTAYE,

Petitioner,

v.

THE STATE OF IOWA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Iowa

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

i. Does an inconsistent verdict in a criminal case violate a defendant's right to a fair trial under the Sixth Amendment and their right to be found guilty beyond a reasonable doubt under the Fourteenth Amendment?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner to this Court is Emmanuel Totaye, who was the defendant-appellant in the proceedings below.

Respondent is the State of Iowa who was the plaintiff-appellee below.

There are no corporate parties involved in this case.

Related Proceedings

Iowa Court of Appeals

- *State v. Totaye*, No. 22-1169 (July 24, 2024)

Iowa district Court for Polk County

- *State v. Totaye*, FECR335644

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In the Supreme Court of the United States

NO. 24-_____

EMMANUEL TOTAYE,

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THE STATE OF IOWA,

Respondent.

PETITION FOR A WRIT OF CERTIOARI

Emmanuel Totaye respectfully petitions for a writ of certiorari to review the judgment of the Iowa Supreme Court in this matter.

OPINIONS BELOW

The Iowa Court of Appeals' unpublished opinion is available at 2024 WL 3518074 and is reproduced at App. 86a. The order of the Iowa Supreme Court denying Totaye's application for further review is reproduced at App. 118a.

JURISDICTION

On June 21, 2022, the honorable Celene Gogerty entered judgment in the District Court for Polk County, Iowa and sentenced Totaye to 75 years imprisonment. On July 24, 2024, the Iowa Court of Appeals affirmed the judgment of the district court. On September 26, 2024, the Iowa Supreme Court denied discretionary further review.

This court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment

The Fifth Amendment of the United States Constitution provides, in pertinent part, that: "No person … shall any person be subject for the same offence to be twice put in jeopardy of life or limb…."

The Sixth Amendment

The Sixth Amendment of the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Fourteenth Amendment

Section one of the Fourteenth Amendment of the United States Constitution provides, in pertinent part, that:

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

STATEMENT OF THE CASE

A. Legal Background

Inconsistent verdicts are verdicts where a jury decides two or more counts in a way that is irreconcilable. *Bravo-Fernandez v. United States*, 580 U.S. 5, 13 (1984).

At common law, the courts deemed inconsistent verdicts legally invalid, and courts set them aside automatically. Steven T. Wax, *Inconsistent and Repugnant Verdicts in Criminal Trials,* 24 N.Y.L. SCH. L.REV. 713, 732 (1979). As time has passed, courts have embraced a variety of approaches to address inconsistent verdicts, depending on the type of case at issue (criminal versus civil), the nature of the inconsistency, the number of parties that the verdict affects, and other factors. In the criminal context, an inconsistent verdict implicates multiple foundational constitutional principles, including double jeopardy and guilt beyond a reasonable doubt. *State v. Halstead*, 791 N.W.2d 805, 808 (Iowa 2010).

Despite the constitutional concerns, the Supreme Court of the United States permitted inconsistent verdicts in *Dunn v. United States*, 284 U.S. 390 (1932). According to the Court in *Dunn*, an inconsistent verdict can be explained by a jury choosing to exercise leniency over a defendant. *Id.* at 359. Because the inconsistent verdict resulted in a more favorable sentence to the defendant, judicial intervention was not required. *Id.* The Court revisited inconsistent verdicts in *United States v. Powell*, 469 U.S. 57, 65 (1984). Reaffirming *Dunn*, the *Powell* court held that a legally impossible verdict is valid and should not be disturbed on appeal. *Id.* at 69. Even though the Court recognized the jury had either made a mistake, engaged in compromise, or exercised leniency, the Court upheld the verdict because it was "unclear whose ox had been gored." *Id.* at 65, 69. The Court did not want an acquittal to have a preclusive effect on a new trial if the defendant was acquitted of one offense

(such as conspiracy) but found guilty on another (such as possession with intent to distribute). *Id.* at 59-60.

The Court did not address inconsistent verdicts again until *Yeager v. United States*, 557 U.S. 110, 129 (2009). In *Yeager*, the Court clarified that *Powell* allows a court to uphold a verdict where a jury acquits on one count but does not reach a unanimous verdict regarding other counts. *Id.* at 124. After the jury acquitted the defendant in *Yeager*, the government sought to retry him on the counts where the jury was hung. *Id.* at 123. The Court rejected this argument and found that the Double Jeopardy Clause barred a retrial because, for double jeopardy purposes, a hung count meant the same thing as an acquittal. *Id.* at 122-125.

In 2016, this Court decided *Bravo-Fernandez v. United States*, 580 U.S. 5 (2016). In *Bravo-Fernandez*, the defendant was charged with federal program bribery in violation of 18 U.S.C. § 666, conspiracy to violate § 666, and traveling in interstate commerce to further violations of § 666 in violation of the Travel Act, § 1952(a)(3)(A). *Id.* at 15. The jury convicted the defendant of the standalone bribery offense but acquitted him of the compound crimes. *Id.* The defendant obtained a new trial on appeal and argued that the acquittal had a preclusive effect for the underlying § 666 charge. *Id.* at 22. The Court determined that since the jury was hung on some of the counts, there was not an inconsistency, because not agreeing on a count is distinct from rendering an irreconcilable verdict on multiple counts. *Id.* at 8. The Court then held that the acquittal on the compound offenses barred the government from prosecuting those charges again. *Id.* at 24.

This Court has not addressed truly legally inconsistent verdicts in a criminal context since *Powell*. Instead, the circuit courts and state courts have been left to wrestle with *Powell*. Many courts have adopted *Powell* and upheld verdicts that make no sense legally or factually. Other courts have begun to distinguish and chip away at *Powell*. *See, e.g.*, *United States v. Randolph*, 794 F.3d 602, 612 (6th Cir. 2015) ("inconsistences in the same count as to the same defendant are different than *Powell* where the inconsistency is between counts.").

B. Procedural Background

The State of Iowa charged Emmanuel Totaye with one count of Robbery in the First Degree in violation of Iowa Code section 711.1(1)(A) and with three counts of Murder in the First Degree in violation of Iowa Code section 707.2(1). App. 001a. A co-defendant was charged with identical counts. Totaye and his co-defendant proceeded to a jury trial on all counts.

Trial commenced on April 4, 2022, and the jury began deliberations on April 21, 2022. Regarding the First-Degree Murder charges, the jury was given the following instruction:

> In Count I, the State must prove all of the following elements of Murder in the First Degree:
>
> 1. On or about the 30th day of January 2020, the defendant, individually, through joint criminal conduct or by aiding and abetting another, shot [the victim].
> 2. [The victim] died as a result of being shot.
> 3. The defendant acted with malice aforethought.
> 4. The defendant, individually, through joint criminal conduct or by aiding and abetting another,
> a. Acted willfully, deliberately, premeditatedly and with specific intent to kill [the victim], or

> b. Was committing the crime of Robbery in the First Degree when the killing occurred.
>
> If the State has proved all the elements, the defendant is guilty of Murder in the First Degree. If the State has failed to prove any one of the elements, the defendant is not guilty of Murder in the First Degree and you will then consider the charge of Murder in the Second Degree explained in [a subsequent instruction].

App. 010a.

On the first day of deliberations, the jury sent a question to the district court. App. 013a. The jury's first question asked: "If the defendant is deemed guilty of first-degree robbery, are they also automatically guilty of first-degree murder?" App. 013a. After conferring with the parties, the court answered: "You have received all the applicable law. Please reread the instructions." App. 014a.

On the next day, after seven hours of deliberations, the jury submitted a message to the court. It read: "We, as a jury, have come to a unanimous conclusion regarding the charges of one defendant. We are unable to come to a conclusion on any count regarding the second defendant." App. 017a. After conferring with the court, the parties agreed to discharge the jury for the day (a Friday), but to tell the jury they needed to continue deliberations on the following Monday. App. 018a.

After another day of deliberations, the jury returned its verdict. The co-defendant was found guilty of First-Degree Burglary and of First-Degree Murder. App. 044a–045a. The jury found also Totaye guilty of First-Degree Burglary, but it found him guilty of Second-Degree Murder—not first degree. App. 046a. Totaye polled the jury and confirmed that the verdict rendered was the verdict the jury intended. App. 047a–048a. Once the court discharged the jury, the court asked if any record

needed to be made. In response, Totaye's counsel said: "Your Honor, not at the moment, but I think the inconsistency of the verdict, we'll address at some point." App. 049a. In response, the court stated: "You're certainly free to file whatever motion you think is appropriate; any party can." App. 049a. In Iowa, the state of the law at the time was that parties can make an argument that jury verdicts are inconsistent in a motion for new trial. *See State v. Halstead*, 791 N.W.2d 805, 807 (Iowa 2010); *State v. Komeh,* No. 19-0477, 2020 WL 5944218, at *1-2 (Iowa Ct. App. 2020) (citing that post-trial motions serve as an error preservation tool in the case of an inconsistent verdict); *State v. Sassman*, 2022 WL 4361785, at *2 (Iowa Ct. App. 2022).

On May 25, 2022, Totaye moved for a new trial on the grounds there was insufficient evidence to support his conviction and that the verdict was legally impossible, among other things. App. 072a. The court denied this motion and sentenced Totaye to a term of imprisonment of 50 years for Second Degree Murder and 25 years for Burglary, set to run consecutively. App. 072a–082a. Totaye appealed, and the case was directed to the Iowa Courts of Appeals. App. 083a–086a.

At the Iowa Court of Appeals, Totaye argued that the inconsistent verdict was legally impossible and violated his right to a fair trial under the Sixth Amendment of the United States Constitution. App. 104a–110a. On July 24, 2024, the Iowa Court of Appeals affirmed Totaye's conviction. App. 116a. For the first time, and absent any prior notice, the Iowa Court of Appeals decided that in order for a criminal defendant to move for a mistrial based on an inconsistent verdict, they must bring that motion before the jury is discharged. App. 105a–108a. According to the court: "fundamental

principles of fairness do not allow Totaye to knowingly accept the allegedly inconsistent verdicts when it suits his interest then complain down the road after jeopardy has attached and retrial on the top charge may be thwarted." App. 108a (citing *Powell*, 469 U.S. at 65). The court also addressed the merits of Totaye's claim. In doing so, it attempted to rationalize the jury's verdict and accepted the explanation offered by the state that "perhaps the jury found the robbery was over before the killings." App. 109a. Totaye sought review of the Iowa Supreme Court. App. 118a. That court declined to exercise its discretionary review of Totaye's appeal. App. 147a.

This petition follows.

Reasons for Granting this Petition

This Court has not addressed the issue of inconsistent verdicts since its decision in *United States v. Powell*, 469 U.S. 57, 69 (1984). According to *Powell*, "there is no reason to vacate [a defendant's] conviction merely because the verdicts cannot be rationally reconciled." 469 U.S. at 69. In the 40 years since this Court decided *Powell*, inconsistent verdicts have continued to plague both the federal circuit courts as well as state appellate courts. *Powell* has become unworkable and led to unjust outcomes, both when courts apply *Powell* and when courts do not apply *Powell*. When courts strictly apply *Powell*, the court upholds verdicts that are repugnant to the Constitution. When courts deviate from *Powell*, the courts create hyper-specific and fact dependent tests. To solve these problems, this Court should overturn *Powell* and set forth a new standard.

Inconsistent verdicts appear in many different forms. Some courts encounter "factually inconsistent" verdicts, where the verdict rendered is inconsistent with the facts presented at trial. *See*, *e.g.*, *DeSacia v. State*, 469 P.2d 369, 371-377-78 (Alaska 1970). Then, there are "legally inconsistent" verdicts, where the verdict rendered is legally impossible. *See*, *e.g.*, *State v. Arroyo*, 844 A.2d 163, 171 (R.I. 2004). The classic example of a legally inconsistent verdict is where a jury convicts a defendant of a compound crime but acquits the defendant of the predicate crime. *See*, *e.g.*, *Gonzalez v. State,* 440 So.2d 514, 515 (Fla. Dist. Ct. App. 1983) (finding conviction for robbery with a firearm did not require a conviction of possession of a firearm in commission of a felony). Further complicating matters, courts sometimes treat an inconsistent civil verdict differently than an inconsistent criminal verdict. *Compare City of Los Angeles v. Heller*, 475 U.S. 796, 804-06 (1986) (Stevens, J., dissenting), *with Powell*, 469 U.S. at 69.

The Court's lack of guidance has led to 40 years of more inconsistency. Some federal circuit courts strictly follow *Powell* and its predecessor *Dunn v. United States*, 284 U.S. 390 (1932) by upholding inconsistent verdicts on appeal. *See*, *e.g.*, *Covidien LP v. Esch*, 993 F.3d 45, 56 (1st Cir. 2021); *Ali v. Kipp*, 891 F.3d 59, 65 (2d Cir. 2018); *United States v. Legins*, 34 F.4th 304, 316 (4th Cir. 2022); *United States v. Duldulao*, 87 F.4th 1239, 1266 (11th Cir. 2023); *United States v. Brown*, 504 F.3d 99, 102-03 (D.C. Cir. 2007). Other circuits order a new trial when they encounter an inconsistent verdict on appeal. *See*, *e.g.*, *Malley-Duff & Associates, Inc. v. Crown Life Ins. Co.*, 734 F.2d 133, 145 (3rd Cir. 1984); *Global Van Lines, Inc. v. Nebeker*, 541 F.2d 865, 868

(10th Cir. 1976). Some circuits instruct their district courts to refuse to accept an inconsistent verdict, and instead instruct the jury to keep deliberating until any apparent inconsistency is cured. *See*, *e.g.*, *University Computing Co. v. Lykes-Youngstown Corp.*, 504 F.2d 518, 547 (5th Cir. 1974); *Hopkins v. Coen*, 431 F.2d 1055, 1059 (6th Cir. 1970); *Alston v. West*, 340 F.2d 856, 858 (7th Cir. 1965).

There is also a split amongst state courts on how to properly deal with inconsistent verdicts. A majority of state courts—like the federal circuits—follow *Powell* and *Dunn*. *See, e.g., People v. Frye,* 898 P.2d 559, 569–70 (Colo.1995); *People v. Jones,* 797 N.E.2d 640, 644–47 (2003); *Beattie v. State,* 924 N.E.2d 643, 649 (Ind.2010); *State v. Brown,* 132 N.H. 321, 565 A.2d 1035, 1039–40 (1989); *State v. Eason*, 69 N.E.3d 1202, 1216-29 (Ohio Ct. App. 2016); *Hammonds v. State*, 7 So.3d 1055 (Al. 2008). Other states do not tolerate inconsistent verdicts in any capacity. *See*, *e.g.*, *Price v. State,* 949 A.2d 619, 628-29 (2008); *DeSacia v. State*, 469 P.2d 369 (Alaska 1970). And some states compromise and require an inquiry into the verdict where the court attempts to reconcile a jury's irrational finding. *State v. Aune*, 953 N.W.2d 601, 604 (N.D. 2021) ("Reconciliation of a verdict includes an examination of both the law and the case in order to determine whether the verdict is logical and probable, and therefore consistent, or illogical and clearly contrary to the evidence."). Even within some states, the approach to dealing with inconsistent verdicts can be inconsistent from case to case. *Compare Gonzalez*, 440 So.2d at 733, *with Cuevas v. State*, 741 So. 2d 1234 (Fla. Dist. Ct. App. 1999) (Harris, J., concurring specially).

This petition is the ideal and proper vehicle for addressing the circuit split. It presents an issue of profound importance—an inconsistent verdict in a criminal case calls into question whether the jury found the defendant guilty beyond a reasonable doubt and implicates double jeopardy concerns as well. *See State v. Halstead*, 791 N.W.2d 805, 808 (Iowa 2010). The Court should not allow legally impossible verdicts to stand. First, they undermine "our confidence in the outcome of the trial" because for a defendant to be "be convicted for a crime on which the jury has actually found that the defendant did not commit an essential element, whether it be one element or all[,] ... is not merely inconsistent with justice, but is repugnant to it." *Pleasant Grove City v. Terry*, 478 P.3d 1026, 1032 (Utah 2020) (quoting *People v. Tucker*, 55 N.Y.d 1, 6, 431 N.E.2d 617, 619, 447 N.Y.S2d 132, 134 (1981)). Second, upholding legally inconsistent verdicts diminishes the integrity of the justice system:

> When liberty is at stake, we do not think a shrug of the judicial shoulders is a sufficient response to an irrational conclusion. We are not playing legal horseshoes where close enough is sufficient. It is difficult to understand why we have a detailed trial procedure, where the forum is elaborate and carefully regulated, and then simply give up when the jury confounds us.

Halstead, 791 N.W.2d at 815.

The Iowa Court of Appeals rejected these constitutional concerns, and the Iowa Supreme Court denied further review, thus upholding Totaye's conviction. Pet. App. 147a. This petition follows.

I. The Question Presented is Worthy of this Court's Review.

Courts and commentators alike have criticized *Powell* for its sweeping conclusion. One commentator summarize the *Powell* rationale as "[it is better that

ten innocent defendants be convicted than that ten guilty defendants be denied the boon of unlawful jury nullification." Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 213 (1989). Others describe the hands-off approach of *Powell* as "distressing" because it allows district courts to identify a problem—that a jury has failed to follow the court's instructions in some manner—but provides courts with no authority or guidance on how to remedy that problem. Eric L. Muller, *The Hobgoblin of Little Minds? Our Foolish Law of Inconsistent Verdicts*, 111 HARV. L. REV. 771, 834 (1998). In these criticisms, commentators have identified numerous solutions to inconsistent verdicts, such as refusing to accept them or allowing the defendant to opt for a retrial. *Id.* at 821-34. Indeed, many courts have heard these critiques; a split amongst the federal circuit courts of appeals has become apparent in the years following *Powell*. And that split becomes deeper when examining how state courts choose to deal with inconsistent verdicts. Only this court can resolve this question in light of the constitutional issues involved.

a. This Court should grant review to resolve the longstanding circuit split regarding inconsistent verdicts.

Amongst the federal circuit courts of appeal, three distinct approaches have emerged to address inconsistent verdicts in criminal matters. The first approach is to follow *Powell* and allow an inconsistent verdict—no matter how impossible it is legally or factually—to go undisturbed. *United States v. Legins*, 34 F.4th 304, 316 (4th Cir. 2022). According to courts that use this approach, "as long as the guilty verdict is supported by sufficient evidence, it must stand, even in the face of an

inconsistent verdict on another count." *United States v. Mitchell*, 146 F.3d 1338, 1345 (11th Cir. 1998). Acquiescing to the jury, courts following this approach have stated: "[T]he jury, though presumed to follow the instructions of the trial court, may make its ultimate decisions for impermissible reasons, such as mistake, compromise, or lenity" thus negating appellate review of the verdict. *United States v. Moran-Toala*, 726 F.3d 334, 341-42 (2nd Cir. 2013) (cleaned up); *see also Grady v. Truitt*, 74 F.4th 515, 520 (7th Cir. 2023) (rejecting a claim for post-conviction relief despite trial counsel's failure to argue an inconsistent verdict warranting a new trial on appeal).

Another approach has emerged. Other circuits have found that *Powell* is not a "hard-and-fast rule" and that "relief may be warranted" when a verdict appears to be arbitrary or irrational. *See United States v. Lawrence*, 555 F.3d 254, 263 (6th Cir. 2009). Rejecting *Powell's* broad language, the Sixth Circuit has reversed a conviction and remanded for acquittal when the verdict is truly irreconcilable. *United States v. Randolph*, 794 F.3d 602, 612 (6th Cir. 2015) (finding an exception to *Powell* when a special-verdict finding negates an essential element of the offense). The Second Circuit cited this approach favorably in *United States v. Pierce*, 940 F.3d 817, 823-24 (2nd Cir. 2019). Similarly, the Eighth Circuit, when reviewing a fraud conviction, ordered acquittal when the jury rendered a verdict inconsistent with its answers to special interrogatories. *United States v. Mitchell*, 476 F.3d 539, 542-43 (8th Cir. 2007). According to these circuits, an inconsistent verdict shows the government failed to meet its burden of proving a defendant guilty beyond a reasonable doubt. *Randolph*, 794, F.3d at 612; *United States v. Bailey*, 607 F.2d 237, 245 (9th Cir. 1979)

(citing *Kotteakos v. United States*, 328 U.S. 750, 772 (1946)). For example, in *Pierce*, a jury found a defendant guilty of engaging in a conspiracy to distribute narcotics, but also found that none of the drugs charged were actually involved in the conspiracy. *Pierce*, 940 F.3d at 824. Because such a verdict was "metaphysically impossible" the Second Circuit felt it had no choice other than to set aside the guilty verdict. *Id.*

Other circuits have adopted another approach. Then Judge, now Justice Gorsuch, writing for the Tenth Circuit, affirmed a guilty verdict where the district court determined there was an inconsistency and instructed the jury to either deliberate further or stand on their flawed verdict. *United States v. Shippley*, 690 F.3d 1192, 1193-94 (10th Cir. 2012); *see also United States v. Gatlin*, 90 F.4th 1050, 1068-70 (11th Cir. 2024) (finding a district court's instruction to keep deliberating to cure an inconsistent verdict did not violate the Fifth and Sixth Amendments); *Harrison v. Gillespie*, 640 F.3d 888, 889 (9th Cir. 2011) ("The court may ... reject the jury's verdict if it is inconsistent or ambiguous."). Despite deviating from *Powell* and the circuits that follow it, the Ninth, Tenth, and Eleventh circuits agree that this "deliberate more" approach does not violate *Powell*. *Gatlin*, 90 F.4th at 1068. Telling the jury to deliberate more prevents jeopardy from attaching and avoids the concerns of "whose ox was gored" described in *Powell*. *Shippley*, 690 F.3d at 1196.

Like the federal circuit courts, state courts have largely adopted the rule of *Powell* without any further analysis. *See, e.g., State v. Veleta*, 538 P.3d 51, 63-64 (N.M. 2023); *People v. Frye*, 898 P.2d 559, 569–70 (Colo.1995); *People v. Jones*, 797

N.E.2d 640, 644-47 (2003); *Beattie v. State*, 924 N.E.2d 643, 649 (Ind. 2010); *State v. Brown,* 565 A.2d 1035, 1039-40 (N.H. 1989). This has created a conflict with the longstanding view that a criminal verdict should be free of any and all ambiguities—allowing otherwise lowers the burden of proof that the jury is certain of guilt beyond a reasonable doubt. *See*, *e.g.*, *In re Winship*, 397 U.S. 358, 364 (1970); *Yeager v. People*, 462 P.2d 487, 489 (1969); *Hyslop v. State*, 68 N.W.2d 698, 702 (1955); *Barnhill v. State*, 41 So.2d 329, 331 (Fla. 1949).

As such, state courts have begun chipping away at *Dunn* and *Powell*. A number of states have deemed legally impossible verdicts to be invalid. *See*, *e.g.*, *Brown v. State*, 959 So. 2d 218, 220-23 (Fla. 2007); *Commonwealth v. Gonzalez*, 892 N.WE.2d 255, 262 n.8 (Md. 2008); *State v. Martinez*, 6 P.3d 310, 313 (Ariz. Ct. App. 2000) ("An attempt by a jury to return a verdict that is not accepted by the trial judge is not a verdict. A verdict is not binding until the court accepts it and the jury is discharged."); *see also State v. Goins*, 92 P.3d 181, 188-89 (Wash. 2004) (Sanders, J., dissenting). The Alaska Supreme Court declared inconsistent verdicts invalid 20 years prior to *Powell* in *DeSacia v. State*, 469 P.2d 369, 371 (Alaska 1970). Even though *DeSacia* rejected an inconsistent verdict, this did not result in an automatic acquittal for the defendant. *Id.* Instead, the court remanded the case for a retrial on the charge that resulted in conviction. *Id.* at 379. "The fact that a marked majority of state court cases adopt *Dunn* and *Powell*, of course, is not determinative on the [state] law question presented in this case as the persuasiveness of authority is not determined by the pound, but by the quality of the analysis." *Halstead*, 791 N.W.2d at 810-11.

b. Lower courts need the Supreme Court's Guidance.

The different approaches to handling an inconsistent verdict raises the question of why courts deviated from *Powell* and *Dunn*. As then Judge Gorsuch stated in *Shippley*, "nothing in *Powell* ... speaks either explicitly or implicitly about what a court's to do in these circumstances, let alone suggests the district court committed an error of constitutional magnitude (or otherwise) in proceeding." 690 F.3d at 1195. Since *Powell* was decided, litigants in both civil and criminal cases have challenged the validity of their verdicts when the jury does something illogical. But courts have been increasingly reluctant to accept these verdicts because they contain clear legal errors. *See*, *e.g., Price*, 949 A.2d at 630.

Without guidance from this Court, lower courts often look to the rules of civil procedure to craft a more workable standard. *See State v. Bringas*, 494 P.3d 1168, 1179 (Haw. 2021) (McKenna, J. dissenting) ("I do not agree that our decision should be based on a civil rule that a jury's verdict will only be set aside if it is 'irreconcilably inconsistent.'"); *see Price v. State*, 949 A.2d 619, 628-29 (Md. 2008) (holding that Maryland law does not tolerate inconsistent verdicts in civil cases, therefore, they cannot be tolerated in criminal cases either); *Halstead*, 791 N.W.2d at 813 ("While the standards in a civil case for dealing with inconsistent verdicts are not necessarily determinative in this criminal case, they may nonetheless be instructive."). Federal courts do this through Fed. R. Crim. P. 57(b). *See Shippley*, 690 F.3d at 1195. This is problematic, as civil cases do not require the same burden of proof and heightened due process requirements present in criminal cases. *See Halstead*, 791 N.W.2d at 815

("It is also difficult to justify that we would afford less protection in a criminal matter than in a civil matter involving money damages.").

Yet, it is the rules of civil procedure which have inspired the "deliberate more" approach. *See Shippley*, 690 F.3d at 1195. While this approach (adopted by the Ninth, Tenth, and Eleventh circuits) is better than accepting inconsistent verdicts in all circumstances, it is not without its flaws. When given a question from the jury, or upon receiving instructions to deliberate further, district court judges can taint the deliberations and commit reversible error. A judge may be tempted to issue a supplemental jury instruction to clear up the confusion amongst the jury. *See, e.g., United States v. Dougherty*, 473 F.2d 1113, 1137 (D.C. Cir. 1972). The risk of such an "explicit instruction" is that it "conveys an implied approval that runs the risk of degrading the legal structure...." and invites a jury to issue a verdict contrary to the law. *Id.*; *see also Moran-Toala*, 726 F.3d at 343 (finding a judge's supplemental instruction amounted to plain error because the judge essentially instructed the jury what their verdict should be).

Requiring a jury to deliberate more, even with a valid supplemental jury instruction, can invite further error. "In response to the trial court's command to resume deliberations, a jury bent on leniency would have two unpalatable choices (other than deadlocking): acquit on the original count of conviction or convict on the original count of acquittal." Muller, 111 HARV. L. REV. at 827. This concern is particularly prescient when the jury has already demonstrated it is willing to render

an irrational result. *See Pierce*, 940 F.3d at 821 ("care must be taken in drafting interrogatories to minimize the risk of inconsistent verdicts.").

The wisdom of this approach is further diminished by the facts of this case. The jury in Totaye's case submitted two questions indicating they were struggling to apply the court's instructions. App. 013a, 017a. Both times, the court instructed the jury to keep deliberating and apply the law that they had been given. App. 014a, 018a. If the court read the jury verdict, the inconsistency became apparent, and the court instructed the jury to deliberate more, the outcome likely would not have changed.

c. Inconsistent verdicts are likely to reoccur and even appear more frequently.

Courts often think inconsistent verdicts are a fringe scenario which does not require comprehensive guiding precedent to resolve. After all, the courts and parties usually spend considerable care crafting and giving jury instructions. However, as the varied approaches above demonstrate, inconsistent verdicts occur frequently. *See* John McElhaney, *Inconsistent Jury Verdicts in Civil Actions,* 37 NEB. L. REV. 596, 596 (1958) ("The problem of inconsistent jury verdicts arises frequently, and, because the facts do not always follow any standard pattern, the courts do not always treat the problem in the same manner."). These verdicts are not just a modern phenomenon either; the split amongst the federal circuit courts dates back to the 1920s. *See*, *e.g.*, *Murphy v. United States*, 18 F.2d 509 (8th Cir. 1927) (rejecting an inconsistent verdict); *Hohenadel Brewing Co. v. United States*, 295 F. 489, 490 (3d Cir. 1924); *Rosenthal v. United States*, 276 F. 714, 715 (9th Cir. 1921); *Gozner v. United States*,

9 F.2d 603 (6th Cir. 1925) ("the mere fact that such verdict appears to the court to be illogical, or the result of a misconception of fact or mistake of judgment by the jury, or to be otherwise unreasonable and contrary to fact, does not affect its sufficiency or validity….").

The modern addition of compound crimes, such as the RICO statute 18 U.S.C. §§1961-1962 (1994), has contributed to inconsistent verdicts becoming more common. *See* Muller, 111 HARV. L. REV. at 784 ("To be sure, compromise verdicts are undoubtedly quite common…."); *see also People v. Bullis*, 30 A.D2d 470, 472 (N.Y. 1968) (discussing an inconsistent verdict arising from an anti-sodomy law). Inconsistent verdicts are "a reality" in the United States. *Bravo-Fernandez*, 580 U.S. at 9. As long as juries render verdicts, inconsistent verdicts will continue to appear. And as these verdicts continue to appear, courts will continue trying to reconcile the irreconcilable.

II. The Minority View is Correct—Inconsistent Verdicts Violate the Sixth and Fourteenth Amendments.

The proper approach is the one used by the Second, Sixth, and Eighth Circuits: reject the inconsistent verdict and order a new trial on the count(s) that resulted in a conviction. Because some verdicts are metaphysically impossible, they are distinct from *Powell*. *Randolph*, 794 F.3d at 612. Because Totaye's conviction of burglary necessitated a first-degree murder conviction, and the jury was not afforded an opportunity to correct its verdict, "the appropriate remedy…was to set aside the guilty verdict." *See Pierce*, 940 F.3d at 824.

a. The Court should overturn *Powell*.

Under stare decisis, precedents are entitled to careful and respectful consideration, but adherence to precedent is not an exorable command. *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215, 262 (2022). Stare decisis is at its weakest when the Court interprets the Constitution because it is more important that the court correct its mistake regarding the highest law of the land. *Id.* The Court looks at five factors when deciding whether to overturn precedent: the nature of the court's error, the quality of the reasoning, workability, effect on other areas of law, and reliance interests. *Id.* at 268-88. All five factors supporting overturning *Powell*.

Regarding the nature of the court's error, the court looks to whether the decision betrays some fundamental principle of the United State. *Id.* at 268 (citing *Plessy v. Ferguson*, 163 U.S. 537 (U.S. 1896) as a decision that was rightly overturned because it violated a commitment to equality before the law). As discussed *infra*, inconsistent verdicts stand in opposition to many fundamental principles of the United States, such as a jury needing to be unanimous in its finding of guilty and the burden of proof being on the government beyond a reasonable doubt. *See State v. Halstead*, 791 N.W.2d 805, 808 (Iowa 2010).

Next is the quality of the reasoning. Reading *Powell* and *Dunn* together, the Supreme Court offers three reasons to leave inconsistent verdicts undisturbed. First, the Court assumed that most if not all inconsistent verdicts are the result of a jury exercising leniency. *Dunn*, 284 U.S. at 393. Second, inquiring into why the jury rendered an impossible verdict would violate the province of the jury and be and

"imprudent" and "unworkable" task. *Powell*, 469 U.S. at 66. Lastly, the Court also concluded that sufficiency of the evidence appeals provide sufficient safeguards against inconsistent verdicts. *Id.* at 67. Each rationale has come under fire.

First, the Court in *Powell* assumed that all inconsistent verdicts are the product of leniency from the jury. This assumption has proven to be untrue with the passage of time. The leniency theory loses its muster in light of verdicts where there is an acquittal of the predicate offense, but a conviction of the compound offense. *See Pleasant Grove City*, 478 P.3d at 1036. If the jury was trying to exercise leniency, it would follow that this kind of jury would render a verdict of not guilty on the compound offense (usually a more serious offense) and not the predicate offense. It is equally possible that animus, not lenity, can cause an inconsistent verdict. *Halstead*, 791 N.W.2d at 814 (citing Muller, 111 HARV. L. REV. at 798, 834). "Appellate reversal of all inconsistent convictions could never strip any defendant of a lenient verdict. Only appellate reversal of inconsistent acquittals could do that." Muller, 111 HARV. L. REV. at 795.

Next, the Court has mistakenly believed that an inconsistent verdict can only be corrected after speculating as to why the jury rendered the verdict. *Dunn*, 284 U.S. at 394. This is not the case. On appellate review, courts can focus solely on the elements of the crimes, the verdict, and the jury instructions. *Tucker*, 431 N.W.2d at 619-21. Making a legal determination to correct an error at law (like a legally impossible verdict) does not require probing into the jury's minds at all. *See McNeal v. State*, 44 A.3d 982, 992-93 (Md. 2012) ("A reviewing court, distanced from a jury,

is equipped to evaluate independently the legal elements of charged crimes and make a determination as to whether the verdicts are compatible with these elements."). Legal analysis of whether a verdict is impossible would only ask appellate courts to engage in a type of review they already do. *See Pleasant Grove City*, 478 P.3d at 1036 ("We do not peer into the jury's black box. Instead, much like we view an error of law as an automatic abuse of discretion, so too we should view legally impossible verdicts—in which a defendant is acquitted on the predicate offense but convicted on the compound offense—as an automatically invalid legal error.").

Lastly, the Court's reliance on sufficiency of the evidence reviews as a mechanism to reverse inconsistent verdicts is misplaced. "An acquittal of the predicate offense clashes emphatically with the conviction of the compound offense. But a review for sufficiency of the evidence does not address that irrationality. It simply ignores it, instead asking us to rely only on the conviction." *Pleasant Grove City*, 478 P.3d at 1037. Whether or not there is sufficient evidence for conviction does nothing to make an impossible verdict legally sound. Allowing an appellate court to decide whether a hypothetical, more rational jury could have rendered the same verdict does not uphold a defendant's right to be found guilty beyond a reasonable doubt. Instead, "it substitutes an appellate court for the rational jury the defendant never had" in violation of the Sixth Amendment. Muller, 111 HARV. L. REV. at 819.

The workability factor refers to whether the rule it imposes can be understood and applied in a consistent and predictable manner. *Montejo v. Louisiana*, 556 U.S. 778, 792 (2009). As discussed *supra*, both the federal circuit courts and the state

appellate courts have had great difficulty in applying *Powell*. The federal circuit courts of appeal have adopted at least three distinct approaches to addressing inconsistent verdicts in criminal matters. The state courts are just as fractured. A simpler rule is needed for workability.

The most obvious effect on other areas of the law would be inconsistent jury verdicts in civil contexts. *See Shippley*, 690 F.3d at 1195. This is actually preferable, as with the inconsistent approaches after *Powell*, the civil rules are what courts are using for guidance on inconsistent criminal jury verdicts. *See*, *e.g.*, *Price v. State*, 949 A.2d 619, 628-29 (Md. 2008); *Halstead*, 791 N.W.2d at 813; *Shippley*, 690 F.3d at 1195. As noted *infra*, this is a problem, as civil cases do not require the same burden of proof and heightened due process requirements present in criminal cases. *See Halstead*, 791 N.W.2d at 815. Nor do they have the double jeopardy clause issues lurking in the background. *Id.*

There is also a lack of traditional reliance interest supporting *Powell*. Traditional reliance interests arise "where advance planning of great precision is most obviously a necessity." *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215, 287–88 (2022). Because getting an abortion is generally an unplanned activity, the Court did not think traditional reliance interests applied when overturning *Roe v. Wade*, 410 U.S. 113 (1973). *Id.* Inconsistent verdicts also only occur when something has gone awry, and are generally unplanned, so traditional reliance interests also do not apply.

b. Inconsistent verdicts violate double jeopardy, the right to be proven guilty beyond a reasonable doubt, and the rule of law

This petition is the ideal vehicle for the court finally overturning *Powell* and resolving the continued circuit split and inconsistent approaches that the lower courts have accumulated. It presents an issue of profound importance—an inconsistent verdict in a criminal case diminishes the confidence that the jury followed the instruction to only find the defendant guilty beyond a reasonable doubt, and potentially violates the prohibition against double jeopardy. *See State v. Halstead*, 791 N.W.2d 805, 808 (Iowa 2010).

The first reason inconsistent verdicts are anathema to the constitution is that inconsistent verdicts violate Double Jeopardy. Allowing the government to submit a defendant to additional factfinding proceedings on the same charges in the hopes of obtaining a less ambiguous verdict is "a classic instance of impermissible double jeopardy." *United States v. Fernandez*, 722 F.3d 1, 39 (1st Cir. 2013). "It is well-established that the Constitution gives a criminal defendant the right to demand that a jury find him guilty of all of the elements of the crime with which he is charged. Where a jury's special verdict finding negates an essential element of the offense, the defendant must be acquitted and cannot be retried on that offense." *Randolph*, 794 F.3d at 612. The lower courts' continued reliance on *Powell* undermines this Court's holding in *Yeager* that retrial on hung counts inconsistent with acquittal is precluded by the prohibition against Double Jeopardy. *See Yeager*, 557 U.S. at 129.

The second reason inconsistent verdicts violate the constitution is they undermine the right to be proven guilty beyond a reasonable doubt. "By reaching a compromise verdict, the jury dishonors the reasonable doubt standard, because each faction on the jury surrenders its honestly held beliefs on the question of proof beyond a reasonable doubt." Muller, 111 Harv. L. Rev. at 784. "A hung jury has followed its instructions not to surrender honestly held views on whether the government has proven guilt beyond a reasonable doubt, but a jury that compromises defies those same instructions and sacrifices the reasonable doubt standard in the name of expediency." *Id.* at 796. "The reasonable doubt standard is designed to protect the defendant, not the government. Thus, while a compromise verdict burdens the defendant and the government simultaneously, it does not burden them equally." *Id.*

Finally, allowing inconsistent verdicts undermines the very fabric of the rule of law, that decisionmakers should proceed on a rational basis and not caprice. *Id.* at 801. Every conceivable explanation for an inconsistent jury verdict, from lenity to mistake, confusion, compassion, or hostility, is based not on the law and the facts, but on the arbitrary decision of the jury that the court refuses to regulate. *Id.* While it is important to allow the jury to deliberate in secret, the Court blinds itself to the most important warning sign that something has gone away and the most public part of the jury's deliberation: their verdict. *Id.* at 835. To do otherwise is to avoid a very real warning that someone was wronged due to the misapplication of the rule of law. *Id.*

c. Mr. Totaye's verdict is impossible and irreconcilable.

The jury in this case rendered a legally impossible and irreconcilable verdict. By finding Mr. Totaye guilty of robbery in the first-degree, a guilty verdict for first-degree murder was required under the law. App. 010a. Finding Mr. Totaye guilty of second-degree murder contradicted the law and was legally impossible. This impossible verdict was rendered despite the court's response directing the jury to apply the law it had been given. App. 014a.

This is the kind of arbitrary or irrational verdict the Sixth Circuit found warrants relief. *See Randolph*, 794 F.3d at 611 (quoting *United States v. Lawrence*, 555 F.3d 254, 263 (6th Cir. 2009)). The jury's questions indicate that this verdict was arbitrary or irrational. The jury struggled to apply the law as instructed. *See* App. 013a–018a.; *see also United States v. Lawrence*, 555 F.3d 254, 268 (6th Cir. 2009) (stating a jury's failure to follow jury instructions warrants appellate relief). After asking the court for guidance once, the foreman indicated in their second message there was some kind of division amongst the jurors regarding Totaye's charges during deliberations. App. 017a. This creates doubt that Totaye received a fair trial as required by the Sixth Amendment. *See Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993) ("It would not satisfy the Sixth Amendment to have a jury determine that the defendant is probably guilty.").

Not only are Totaye's convictions legally irreconcilable, they are also factually impossible. *See DeSacia*, 469 P.2d at 381. At trial, the State argued that Mr. Totaye perpetrated a robbery with a co-defendant. App. 001a–002a. Then, during the

commission of the robbery, either one or both of the defendants committed the murders. Under Iowa's felony murder rule, a defendant and anyone who participates in the felony, is guilty of first-degree murder. *State v. Harrison*, 914 N.W.2d 187, 192 (Iowa 2018) (citations omitted); *Conner v. State*, 362 N.W.2d 449, 455 (Iowa 1985). The jury found Totaye's co-defendant guilty of first-degree murder. App. 044a. Therefore, based on that factual determination, the jury should have also found Totaye guilty of first-degree murder. This is more than just an inconsistency between Totaye's counts—it is inconsistent with the jury's factual findings as a whole. Because this jury rendered an arbitrary and impossible verdict, a new trial is warranted.

III. The question at issue is critically important to the integrity of the criminal justice system.

Public trust in the criminal justice system is waning. In recent years, the belief that the system is fair to criminal defendants has reached a recent low: 49% of Americans believe the system is unfair to defendants. Megan Brenan, *Americans More Critical of U.S. Criminal Justice System*, GALLUP (Nov. 16, 2023).[1] A core role of the judiciary is to preserve public trust and confidence in the justice system. James C. Duff, *Strategic Plan for the Federal Judiciary*, JUDICIAL CONFERENCE OF THE UNITED STATES (Sept. 2020).[2] Inconsistent verdicts erode public trust in the system.

The Sixth Amendment requires that defendants are afforded a fair trial, which requires "a jury find them guilty of all elements of the crime with which he is

[1] https://news.gallup.com/poll/544439/americans-critical-criminal-justice-system.aspx
[2] https://www.uscourts.gov/sites/default/files/federaljudiciary_strategicplan2020.pdf

charged." *United States v. Gaudin*, 515 U.S. 506, 511 (1995). Refusing to address jury verdicts that are contrary to the law and repugnant to the Constitution diminishes public trust in the criminal justice system. Allowing inconsistent verdicts to stand "subjects criminal defendants to punishment on the basis of bias, incompetence, and caprice, mocking our claim of adherence to the rule of law. Reality does not evaporate when courts refuse to receive proof of it." Alschuler, U. CHI. L. REV. at 228-29. Due process requires courts to at least question a jury verdict when it is impossible. *See* Muller, 111 Harv. L. Rev. at 816.

CONCLUSION

Emmanuel Totaye respectfully requests that the Supreme Court grant his petition for a writ of certiorari for all the reasons stated herein.

Respectfully submitted,

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