

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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DAMIAN McELRATH, )  
 )  
Petitioner, )  
 )  
v. ) No. 22-721  
 )  
GEORGIA, )  
 )  
Respondent. )  
- - - - -

Pages: 1 through 68  
Place: Washington, D.C.  
Date: November 28, 2023

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v. ) No. 22-721

GEORGIA, )

Respondent. )

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Washington, D.C.

Tuesday, November 28, 2023

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:03 a.m.

APPEARANCES:

RICHARD A. SIMPSON, ESQUIRE, Washington, D.C.; on behalf of the Petitioner.

STEPHEN J. PETRANY, Solicitor General, Atlanta, Georgia; on behalf of the Respondent.

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P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 22-721, McElrath versus Georgia.

Mr. Simpson.

ORAL ARGUMENT OF RICHARD A. SIMPSON

ON BEHALF OF THE PETITIONER

MR. SIMPSON: Mr. Chief Justice, and may it please the Court:

The most fundamental principle of double jeopardy law, going back hundreds of years before even the adoption of the Constitution, is that if a jury in a court with jurisdiction returns a verdict of acquittal, that that verdict is final. It may not be -- the defendant may not be subjected to a second prosecution ever, no questions, end of discussion.

This case is the paradigm in which that example applies or that principle applies. Mr. McElrath went to trial before a jury in Georgia. The jury found him not guilty of malice murder by reason of insanity. No one has questioned that that jury deliberated in

1 accordance with Georgia processes. It returned  
2 a verdict in return -- in accordance with  
3 Georgia processes. The State and the defendant  
4 both affirmatively indicated they had no  
5 objection to the form of the verdict. The court  
6 accepted it and entered judgment. Accordingly,  
7 that is the end of it as far as the malice  
8 murder charge is concerned.

9           The State contends that Mr. McElrath  
10 can be subjected to a second trial because that  
11 acquittal is repugnant to a conviction on  
12 separate offenses. And this Court's analysis  
13 has always been offense by offense. He was  
14 found guilty but mentally ill as to felony  
15 murder and guilty but mentally ill as to  
16 aggravated assault. This repugnant verdict  
17 exception to the double jeopardy principle does  
18 not stand, cannot withstand analysis.

19           The State really makes two arguments.  
20 The first is that this Court's inconsistent  
21 verdict cases do not apply because they're --  
22 there's a difference between a repugnant verdict  
23 and an inconsistent verdict and, in particular,  
24 that with a repugnant verdict, there is no  
25 uncertainty as to what the jury did.

1                   That is wrong as a factual matter  
2                   because the uncertainty is the same, but, more  
3                   importantly, it does not matter because an  
4                   acquittal is final regardless. There -- it does  
5                   not matter why the jury reached that conclusion.  
6                   The acquittal is final and conclusive.

7                   I welcome the Court's questions.

8                   JUSTICE THOMAS: So your client filed  
9                   a motion to vacate the -- the conviction as  
10                  repugnant. What is the effect when -- when a  
11                  verdict is determined to be repugnant? What's  
12                  the effect of that?

13                  MR. SIMPSON: Well, this Court has  
14                  held in --

15                  JUSTICE THOMAS: No, I mean in the  
16                  Georgia court.

17                  MR. SIMPSON: In Georgia? In Georgia,  
18                  before this case -- and the Turner case in the  
19                  Georgia Supreme Court was -- is the leading  
20                  example -- the acquittal would stand and the  
21                  conviction would be vacated.

22                  In this case, the Georgia Supreme  
23                  Court for the first time held that both the  
24                  acquittal and the conviction should be vacated.

25                  JUSTICE THOMAS: I think the -- if I

1 understand the opinion below correctly, the  
2 Georgia Supreme Court says that because of the  
3 repugnancy there was no verdict. And that's  
4 what I'm trying to understand.

5 If you -- if -- with respect to your  
6 motion earlier, was it your goal, was the  
7 argument that the verdict was void because it  
8 was repugnant or simply that it should be  
9 vacated because it was repugnant?

10 MR. SIMPSON: Our argument was that  
11 the conviction should be vacated -- the  
12 convictions should be vacated because they were  
13 repugnant. Neither side in -- in McElrath I  
14 raised any question about the acquittal  
15 standing. So, on appeal, we argued to the  
16 Georgia Supreme Court you should throw out the  
17 conviction. But neither side argued that the  
18 acquittal was in question.

19 CHIEF JUSTICE ROBERTS: Well, as a  
20 general matter, do you agree that it's a matter  
21 of state law when jeopardy terminates? Because  
22 that's the -- that's the -- that's the basic  
23 question, right, whether the defendant is being  
24 put in jeopardy more than once. So you have to  
25 have the first jeopardy terminate before you can

1 get to the question of whether or not he's in  
2 jeopardy a second time. As a general matter, is  
3 that a question of state law?

4 MR. SIMPSON: As a general matter,  
5 yes, Mr. Chief Justice, but that is subject to  
6 this Court making the ultimate determination as  
7 to what constitutes an acquittal. This Court  
8 has held that jeopardy terminates when there is  
9 an acquittal. And so, within broad ranges, the  
10 state has discretion, subject to constitutional  
11 limitations, due process, speedy trial, et  
12 cetera, to set procedures.

13 CHIEF JUSTICE ROBERTS: What if one of  
14 the procedures is that the verdict form has to  
15 be signed by the jury foreman, okay, and the  
16 jury reaches a verdict, you know, 12 -- 12 to  
17 nothing or whatever, that the defendant is not  
18 guilty, but the jury foreman, you know, as he's  
19 presenting the verdict or whatever, decides, you  
20 know -- you know, I'm not -- I -- I have second  
21 thoughts, I'm not going to sign it? So, as a  
22 matter of state law, does that verdict terminate  
23 the first jeopardy or not?

24 MR. SIMPSON: No, because that -- the  
25 signing of the verdict is a procedural



1 requirement and the state is -- is free to  
2 enforce that procedural requirement.

3           The difference here -- and the Georgia  
4 Supreme Court opinions acknowledge this -- is  
5 that there was not one verdict; there were  
6 verdicts. No one questions there were verdicts.  
7 And to determine that that verdict was void, the  
8 -- the -- the acquittal, the Georgia Supreme  
9 Court looked at the acquittal, looked at the  
10 conviction, compared the two after the fact, and  
11 concluded that they were repugnant and,  
12 therefore, declared them to be void.

13           CHIEF JUSTICE ROBERTS: So you would  
14 say the question before us is whether Georgia as  
15 a matter of state law can say that a verdict --  
16 that jeopardy has not terminated until, for  
17 example, they determine that the verdicts are  
18 not repugnant?

19           They draw a distinction between  
20 inconsistent verdicts, on which, of course, we  
21 already have established law, and repugnant  
22 verdicts. So, I mean, what if they have a  
23 system where, once the jury has reached a  
24 verdict, it's not effective for a week to give  
25 the jurors a chance to ponder it a little bit

1 more, for the -- whatever reason? When would  
2 jeopardy terminate in that case?

3 MR. SIMPSON: The issue there, Mr.  
4 Chief Justice, would -- would focus on I would  
5 say due process in particular as to those  
6 procedures by which the verdict needed to be  
7 returned. What the state can't do --

8 CHIEF JUSTICE ROBERTS: Well, but what  
9 -- I asked about what the state did. Is that  
10 something they can do?

11 MR. SIMPSON: What they --

12 CHIEF JUSTICE ROBERTS: In other  
13 words, say, yes, the jury has determined, you  
14 know, not guilty, but, under state law, that's  
15 not effective for another week.

16 MR. SIMPSON: Well, no. Once -- once  
17 the --

18 CHIEF JUSTICE ROBERTS: And in that  
19 interim, of course, the juror dies or, you know  
20 --

21 MR. SIMPSON: No, no. Once -- I -- I  
22 -- I apologize. Once -- once the verdict has  
23 been returned -- this Court's cases, including  
24 Ball going back to 1896, would hold, once the  
25 verdict has been returned, that's what

1 terminates jeopardy.

2 CHIEF JUSTICE ROBERTS: Okay. So --  
3 well, let's say Georgia says that's not the  
4 verdict; that is the preliminary determination.  
5 So they turn into the court and now it's here.  
6 Our preliminary determination is unanimous that  
7 -- not guilty. And under Georgia law, that is a  
8 preliminary determination. It becomes the  
9 verdict after one week.

10 MR. SIMPSON: It -- it -- it would be,  
11 I believe, a due process question as to whether  
12 that procedure pass -- passes muster. The  
13 procedural aspects, the state has broad  
14 discretion. What they can't do is make a  
15 decision based on the content so that any --

16 JUSTICE JACKSON: And is that because  
17 it's a matter of federal law? I mean, I guess I  
18 don't understand your response to the Chief  
19 Justice's first question, which was is this  
20 question of when something is an acquittal a  
21 matter of state law or federal law.

22 And I had understood it to be a  
23 federal question such that when we looked at  
24 due -- double jeopardy in prior cases, I'm  
25 thinking about Blueford versus Arkansas, for

1 example --

2 MR. SIMPSON: Yes.

3 JUSTICE JACKSON: -- we evaluated it  
4 as a matter of federal law, correct?

5 MR. SIMPSON: Well, ultimately, this  
6 Court determines what constitutes an acquittal.  
7 So, for example, Blueford is -- is an example of  
8 a case in which the jury failed to reach a  
9 verdict.

10 JUSTICE JACKSON: So no matter --

11 MR. SIMPSON: But --

12 JUSTICE JACKSON: -- what label the  
13 state puts on it, if the label -- you know,  
14 the -- the -- the state can have all kinds of  
15 procedures and it can say, well, you know, we're  
16 going to say that this particular result is not  
17 an acquittal.

18 We've held, I thought, that it's sort  
19 of a functional analysis and that as a matter of  
20 federal law, we look at what happened and  
21 determine what counts as -- as an acquittal.

22 MR. SIMPSON: Exactly, Justice  
23 Jackson. In Smalis, this case, the Pennsylvania  
24 Supreme Court had characterized the granting of  
25 a demurrer as not an acquittal. This -- this

1 Court held that it was an acquittal.

2 Similarly, in Evans, Michigan had held  
3 that the ruling by the court in a -- in a case  
4 in which the judge mistakenly thought there was  
5 an additional element was not an acquittal.  
6 This Court held it's an acquittal.

7 The definition of acquittal, just last  
8 term in the Smith case, this Court defined what  
9 an acquittal is, and that is a determination, a  
10 resolution of criminal culpability. So that --

11 JUSTICE ALITO: Well, to pick up on  
12 that --

13 CHIEF JUSTICE ROBERTS: Well, but --

14 JUSTICE ALITO: I'm sorry.

15 CHIEF JUSTICE ROBERTS: Sorry.

16 JUSTICE ALITO: To pick up on that,  
17 Mr. Simpson, it's my understanding that there  
18 are jurisdictions in which the rule is that if a  
19 jury returns an inconsistent verdict or some  
20 subcategory of a inconsistent verdict, the  
21 proper procedure for the trial judge is to  
22 instruct the jury, you can't do that, your  
23 verdicts are irreconcilable, go back and  
24 deliberate some more.

25 Is that your understanding too?

1           MR. SIMPSON: I'm not aware of a state  
2 that does that. Our -- our -- our position  
3 would be that -- that that would violate the  
4 Double Jeopardy Clause. But, of course, you  
5 don't need to reach that here because the  
6 verdict was accepted, but --

7           JUSTICE ALITO: Well, I -- I believe  
8 -- and I stand ready to be corrected if I'm  
9 wrong -- but that's the rule in Missouri, Kansas  
10 --

11          MR. SIMPSON: It -- it --

12          JUSTICE ALITO: -- Arizona.

13          MR. SIMPSON: I -- I -- it --

14          JUSTICE ALITO: So let's assume that  
15 that's -- that does not violate double jeopardy.

16                 If we were to hold that it does, then  
17 our decision here would have implications beyond  
18 Georgia. Assume that that's -- that that is the  
19 rule.

20          MR. SIMPSON: Yes.

21          JUSTICE ALITO: If that is the rule,  
22 then would it be a violation of double jeopardy  
23 for this to occur? The judge violates -- the  
24 trial judge violates state law, accepts the  
25 inconsistent verdicts, and accepts the

1 conviction on one count, acquittal on the other  
2 count. One of the parties says, no, you  
3 violated state law. There's an appeal. And the  
4 state supreme court says, no, this was a  
5 violation of state law, go back and retry both  
6 counts.

7 MR. SIMPSON: Once the verdict had --

8 JUSTICE ALITO: Would you draw a  
9 distinction between those two situations?

10 MR. SIMPSON: I -- I -- I would  
11 draw -- draw a distinction. And -- and I  
12 believe you're correct that Missouri does follow  
13 that process, or at least I've seen a case in  
14 which they did that.

15 The difference would be that once the  
16 verdict has been accepted, then going up on --  
17 on appeal, it could not be challenged, for much  
18 the same reasons that in the -- in the Evans  
19 case, notwithstanding that the judge quite  
20 explicitly based his decision on an element of  
21 the crime that didn't exist, this Court  
22 nonetheless held that's binding once that  
23 verdict was accepted.

24 JUSTICE KAGAN: Well, that seems to  
25 make the rule that you're asking us for, you

1 know, pretty insignificant, right, if -- if we  
2 come out of this case and it turns out that when  
3 the jury form is given to the judge, the judge  
4 can look at it and say, no, I don't think so,  
5 that looks inconsistent, that looks repugnant,  
6 whatever word you want to put on it, go back and  
7 try it again.

8           You know, then -- then, in the next  
9 case, the judge is just going to do that, and so  
10 this will be a one-case-only sort of ruling.

11           MR. SIMPSON: And, Justice Kagan, that  
12 is not our position. Our position is that once  
13 the jury returns the verdict, that that double  
14 jeopardy protection is triggered, that the  
15 jeopardy has ended.

16           I wanted to make the point that  
17 there's a distinction, that's not what happened  
18 here, but we believe that once the jury has  
19 returned the verdict and there is an acquittal,  
20 that's the end of it. The judge may not send it  
21 back.

22           Now that doesn't have to be decided in  
23 this case.

24           JUSTICE ALITO: Well, do you have -- I  
25 mean, you argue that a state can't take what's



1 really an acquittal and put some other label on  
2 it --

3 MR. SIMPSON: Yes.

4 JUSTICE ALITO: -- and say no, there  
5 wasn't an acquittal. But do you have any -- any  
6 double jeopardy precedent from this Court or,  
7 for that matter, from lower federal courts  
8 saying that a state cannot have a procedure like  
9 the Missouri procedure?

10 MR. SIMPSON: The repugnant -- oh, the  
11 --

12 JUSTICE ALITO: A state can't have a  
13 rule that says the trial judge is not to accept  
14 inconsistent verdicts --

15 MR. SIMPSON: I am not --

16 JUSTICE ALITO: -- or repugnant  
17 verdicts. That's a violation of double  
18 jeopardy.

19 MR. SIMPSON: I -- I -- I'm not aware  
20 of a case directly on point on that issue. The  
21 principle, I think, would be the same as -- as  
22 raised here.

23 JUSTICE ALITO: Another related  
24 question. This is my other point of concern  
25 about this case. You seem to agree in your

1 reply brief or at least you don't contest the  
2 proposition that if a jury returns inconsistent  
3 verdicts or repugnant verdicts on the same  
4 count, the Double Jeopardy Clause does not  
5 prohibit the judge from saying, no, you can't do  
6 that, go back and deliberate some more.

7 Is that a violation -- is that  
8 correct, that's not a violation of double  
9 jeopardy?

10 MR. SIMPSON: If -- if, in your -- in  
11 your hypothetical, from those inconsistent  
12 verdicts one cannot ascertain whether there has  
13 been an acquittal or a conviction, then we  
14 believe that is distinguishable.

15 And going back to your earlier  
16 question, going back again to 1896 and Ball,  
17 this Court did hold that the return of the  
18 verdict terminated jeopardy, notwithstanding  
19 that the indictment was -- was invalid  
20 ultimately. So I think that is -- is close to  
21 on point.

22 JUSTICE ALITO: So --

23 JUSTICE GORSUCH: Did --

24 JUSTICE ALITO: -- what principle  
25 distinguishes -- one more question along these

1 lines. What principle distinguishes the  
2 situation where there are inconsistent jury  
3 determinations on one count from the situation  
4 where there are logically irreconcilable jury  
5 determinations on two counts?

6 I -- I don't -- maybe there's a  
7 principle that explains that. Other than a --  
8 a -- a formal difference, I don't really -- it  
9 doesn't jump out at me why that should be  
10 different.

11 MR. SIMPSON: The -- the difference,  
12 Justice Alito, is that double jeopardy has  
13 always been analyzed on an offense-by-offense  
14 basis. So the question is -- is, was there a  
15 verdict on the particular offense?

16 And if what the jury returns does not  
17 show that there has been a verdict, you can't  
18 tell what the jury determined, then it's  
19 appropriate to ask them to delay -- deliberate  
20 further.

21 What -- what the Court can't do in  
22 that circumstance is to look at the content of  
23 two verdicts and say we're going to compare the  
24 jury's findings on this count with its findings  
25 on this separate offense and based on an

1 analysis of the contents between --

2 JUSTICE KAVANAUGH: Is there a -- is  
3 there a logical principle, though, that explains  
4 that, other than you just said it's always been  
5 that way?

6 MR. SIMPSON: In -- in -- in terms of,  
7 Justice Kavanaugh, in terms of?

8 JUSTICE KAVANAUGH: Offense by offense  
9 versus, as Justice Alito says, one count.

10 MR. SIMPSON: Yes. Historically, each  
11 offense was brought in a separate indictment.  
12 This Court held I believe in Dunn that when you  
13 have a multi-count indictment, it's still  
14 offense by offense. And the logical principle,  
15 it's a different crime.

16 JUSTICE GORSUCH: I -- I -- I --

17 MR. SIMPSON: Each count is a  
18 different crime, so, here --

19 JUSTICE GORSUCH: -- I had thought --  
20 I had thought the distinction was -- was rather  
21 more simple than that. I -- I had one of those  
22 cases on the Tenth Circuit where the jury --

23 MR. SIMPSON: Yes, Shippley.

24 JUSTICE GORSUCH: -- the jury came  
25 back on one count and said guilty and not

1 guilty.

2 MR. SIMPSON: Yes.

3 JUSTICE GORSUCH: And the judge said,  
4 I -- well, I don't know what to do.

5 MR. SIMPSON: Yes.

6 JUSTICE GORSUCH: You've not returned  
7 a verdict of acquittal. You've -- you've also  
8 returned a verdict of guilty.

9 MR. SIMPSON: Yes.

10 JUSTICE GORSUCH: Go back and figure  
11 this out, folks. And -- and that seems to me a  
12 world away from a verdict on any count that says  
13 this individual is not guilty in the eyes of his  
14 peers.

15 MR. SIMPSON: Exactly, Justice  
16 Gorsuch. And -- and the opinion you wrote in  
17 the Shippley case didn't reach the double  
18 jeopardy issue.

19 JUSTICE GORSUCH: Oh, I was -- I took  
20 care not to come close to this case.

21 (Laughter.)

22 MR. SIMPSON: I -- I -- I -- I -- you  
23 did say it about three times.

24 JUSTICE GORSUCH: Well --

25 JUSTICE KAVANAUGH: How -- how --

1 JUSTICE JACKSON: And isn't -- isn't

2 --

3 JUSTICE KAVANAUGH: -- how -- how can

4 a --

5 JUSTICE GORSUCH: -- about four times.

6 JUSTICE KAVANAUGH: -- how can a

7 defendant be both sane and insane?

8 MR. SIMPSON: It cannot be.

9 JUSTICE JACKSON: But -- but isn't the

10 principle that we have juries that are -- their

11 decision-making is sort of inviolate? In other

12 words --

13 MR. SIMPSON: Yes.

14 JUSTICE JACKSON: -- the jury can

15 nullify on a particular decision. We don't go

16 back and try to figure out the jury's thinking

17 with respect to inconsistent verdicts across

18 different counts --

19 MR. SIMPSON: Yes.

20 JUSTICE JACKSON: -- because they can

21 do whatever they want. That has been sort of a

22 time immemorial principle with respect to jury

23 deliberations, right?

24 MR. SIMPSON: Yes, Justice Jackson,

25 and that's exactly why we propose this test of

1 looking at the contents. What the State can't  
2 do and what -- what it is -- is seeking to do  
3 here is to look at the contents of the jury's  
4 findings on two different crimes and say we're  
5 going to compare those after the fact and throw  
6 out the acquittal.

7 JUSTICE KAVANAUGH: But how is it  
8 different from Justice Gorsuch's question to say  
9 the defendant's both guilty and not guilty, and  
10 then, in the next case, the jury says the  
11 defendant's both sane and not sane?

12 MR. SIMPSON: The difference is that  
13 those verdicts in the second example are on  
14 separate offenses. And so it's like -- it's no  
15 different than one of the cases this Court has  
16 dealt with, the defendant is convicted of  
17 conspiracy to possess cocaine but acquitted of  
18 possession of cocaine. That's impossible.

19 JUSTICE KAVANAUGH: Right.

20 MR. SIMPSON: No different from a  
21 repugnant verdict. It -- it -- that can't be  
22 right. But this Court has consistently held you  
23 can't look at it after the fact.

24 JUSTICE KAVANAUGH: And we allow -- I  
25 guess the principle, we allow juries to

1       compromise in ways that are maybe not completely  
2       logical, but when it gets down to one count,  
3       they can't do guilty and not guilty. That's not  
4       an acceptable compromise. Is that --

5               MR. SIMPSON: Well, exactly, in the  
6       sense that they haven't --

7               JUSTICE KAVANAUGH: That's not even a  
8       compromise at all.

9               MR. SIMPSON: -- they haven't rendered  
10      a verdict on the charge.

11              JUSTICE KAVANAUGH: Yeah.

12              MR. SIMPSON: So, here, for example,  
13      the charge is malice murder. If they come back  
14      and say guilty and not guilty, you don't know  
15      what the jury did.

16              JUSTICE KAVANAUGH: Right.

17              JUSTICE SOTOMAYOR: You seem to have  
18      accepted a premise -- you seem to have accepted  
19      a premise that I'm doubtful about, which is you  
20      can't be insane on one count and not insane on  
21      another. But malice murder has a different mens  
22      rea than assault, correct?

23              MR. SIMPSON: It does, yes.

24              JUSTICE SOTOMAYOR: And so you can be  
25      not guilty by reason of insanity with respect to



1 a malice murder because you have to be able to  
2 have mental capacity enough to form that intent,  
3 but that's different than the assault intent,  
4 correct? The assault intent only requires you  
5 to injure. And this man could have had that.  
6 He was delusional -- delusional about the  
7 reasons he was causing pain, but he knew he was  
8 causing pain, correct?

9 MR. SIMPSON: The -- the elements of  
10 the charges are different. And under Georgia  
11 procedure, though, the State had to prove the  
12 elements of each of those crimes to obtain --

13 JUSTICE SOTOMAYOR: What I'm saying is  
14 they're not necessarily --

15 MR. SIMPSON: On these -- on these --

16 JUSTICE SOTOMAYOR: -- you're buying  
17 the other side's argument that --

18 MR. SIMPSON: -- on these facts, we  
19 believe that the -- the -- that they are, in  
20 fact, inconsistent repugnant verdicts because  
21 insanity is an affirmative defense in Georgia,  
22 the defendant has to prove it by a preponderance  
23 of the evidence, and, here, there was one single  
24 episode.

25 Now, on different facts -- and, in

1 fact, the Georgia Supreme Court in -- in  
2 McElrath talks about a different case in which  
3 you could be sane -- a defendant could be sane  
4 and insane at -- at different times. I believe  
5 that one was shooting one person and then going  
6 down the hall --

7 JUSTICE SOTOMAYOR: Yeah.

8 MR. SIMPSON: -- and shooting a  
9 different person. But, here, it -- it --  
10 because the issue is the affirmative defense,  
11 it's exactly the same as to the three charges.

12 The point again, though, is the jury  
13 can go back -- can nullify, and we don't know  
14 why they did what they did. It could just --  
15 the uncertainty is the same. We don't know why  
16 they found him sane on one count and insane on  
17 the other, just like we don't know why the jury  
18 convicted on possession with intent to sell but  
19 not on possession.

20 And, Justice Jackson, your point's  
21 exactly right, you can't go back and -- and --  
22 and question that. Once the jury comes back and  
23 says not guilty, that's the end of it. And the  
24 different --

25 JUSTICE BARRETT: But what are --

1 counsel, what are the limits on that? Because  
2 the states can set some procedural parameters,  
3 right?

4 MR. SIMPSON: Absolutely.

5 JUSTICE BARRETT: So what if there was  
6 a rule that said, listen, if a jury -- if this  
7 has gone on, deliberation's gone on for more  
8 than two days, automatically it's a mistrial?

9 MR. SIMPSON: Yeah.

10 JUSTICE BARRETT: And then, at the --  
11 at the very beginning -- or let -- let me make  
12 it hours so it works better -- say, six hours,  
13 it's automatically a mistrial, and then, at six  
14 hours and 10 minutes, the jury returns a verdict  
15 of acquittal.

16 Does that count as a mistrial where  
17 jeopardy doesn't --

18 MR. SIMPSON: Well, what -- what --  
19 what the Court has held, this Court has held, is  
20 that in the mistrial context, it -- there has to  
21 be management --

22 JUSTICE BARRETT: Well, no, I  
23 understand the rule about mistrial, but I guess  
24 what I'm saying is there, you know, the judge  
25 just waits, but the rule says, you know, at six

1 hours, it's a line, it's a mistrial, but the  
2 jury does still come back and return a verdict  
3 of acquittal. It's just that it violates this  
4 procedural requirement.

5 Which side of the line does that fall  
6 on? I mean, the jury's returned a verdict of  
7 acquittal, but state law says it just doesn't  
8 count if the jury's deliberated for more than  
9 six hours.

10 MR. SIMPSON: Well, one of the  
11 interests protected by the Double Jeopardy  
12 Clause is the defendant's right to have a  
13 decision by the jury that's empaneled. And so I  
14 think the question would be, is a six-hour  
15 period that automatically triggers a mistrial so  
16 unreasonable that it, in fact, violates double  
17 jeopardy?

18 I -- I would think it would. It's a  
19 judgment call as to how long. But that would be  
20 the issue. Can a state deprive the defendant of  
21 his right, her right, to have a decision by the  
22 particular jury that was empaneled?

23 JUSTICE BARRETT: So what kinds of  
24 procedural requirements can a state impose?

25 MR. SIMPSON: They have very broad

1 discretion, as I said, subject to due process  
2 and right to jury trial, et cetera, but  
3 evidentiary, we don't -- if you look at the  
4 amicus brief here, we don't question evidentiary  
5 rule -- rules can be set. Does the -- all of  
6 the jurors sign the form or just the foreperson?  
7 Do you poll the jury? Hours that are  
8 deliberated? All of those procedural points.

9           And the test that we think captures it  
10 is looking at the contents, and that -- that's  
11 the red line that the State crossed here, is  
12 that they acknowledged -- the Georgia Supreme  
13 Court acknowledged it had two verdicts in front  
14 of it, no question. It had -- Justice Pinson in  
15 his concurrence dubitante pointed out it's a  
16 fiction, it's a legal fiction here, that we have  
17 two verdicts and we're going to look at the  
18 content, compare them and, based on that  
19 comparison, refuse to honor a jury verdict.

20           We're not aware of -- of any other  
21 state that allows that, and we think it's a  
22 clear-cut violation of double jeopardy.

23           JUSTICE BARRETT: Thank you.

24           CHIEF JUSTICE ROBERTS: Thank you,  
25 counsel.

1 Justice Thomas?

2 Justice Alito?

3 Justice Gorsuch?

4 Justice Jackson?

5 Okay. Thank you, counsel.

6 MR. SIMPSON: Thank you.

7 CHIEF JUSTICE ROBERTS: General

8 Petrany.

9 ORAL ARGUMENT OF STEPHEN J. PETRANY

10 ON BEHALF OF THE RESPONDENT

11 MR. PETRANY: Mr. Chief Justice, and

12 may it please the Court:

13 Petitioner Damian McElrath assumes  
14 again and again that there was a verdict in this  
15 case, but that's simply not true according to  
16 state law as determined by Georgia's highest  
17 court. Under Georgia's narrow, sensible  
18 repugnancy rule, a jury cannot issue special  
19 affirmative findings that facially contradict  
20 each other. These incoherent, contradictory  
21 statements do not constitute a verdict in the  
22 first place. They don't resolve the factual  
23 inquiry.

24 In practice, this rule means a jury  
25 cannot declare a man both sane and insane at the

1 exact same time with respect to the exact same  
2 act, as the jury purported to do here. That's  
3 why the Georgia Supreme Court held there was no  
4 verdict, no acquittal, and no convictions.

5 McElrath does not challenge that  
6 underlying Georgia Supreme Court decision,  
7 which, of course, benefited him, and he doesn't  
8 explain why we should ignore it now, why we  
9 should assume that there was a verdict, even  
10 though state law tells us there wasn't.

11 To the contrary, you have to look to  
12 the underlying state law to identify whether  
13 there is some final verdict or judicial order  
14 that could even potentially terminate jeopardy  
15 in the first place. And, here, because there's  
16 no verdict, there's no termination of jeopardy,  
17 then the Double Jeopardy Clause doesn't apply.

18 Now other states can have different  
19 rules about verdicts, but I think that Georgia's  
20 repugnancy rule, if anything, is the most  
21 sensible way of responding to a very rare set of  
22 circumstances. It's a generally pro-defendant  
23 rule that ensures the parties obtain an actual  
24 determination of the critical facts. And the  
25 critical fact of McElrath's sanity was not

1 determined here. Therefore, he can be retried.

2 I welcome the Court's questions.

3 JUSTICE THOMAS: If you only had one  
4 charge here, malice murder, would there have  
5 been a verdict?

6 MR. PETRANY: Well, I suppose it  
7 depends on what the jury comes back with --

8 JUSTICE THOMAS: Well, just --

9 MR. PETRANY: -- but yes.

10 JUSTICE THOMAS: -- everything is the  
11 same except it's only one charge.

12 MR. PETRANY: Yeah. In that case, you  
13 would -- you would have a verdict because --

14 JUSTICE THOMAS: So, if that's -- if  
15 this constitutes a verdict if there were only  
16 one, why does it not constitute a verdict when  
17 there are two?

18 MR. PETRANY: Because Georgia does not  
19 ascribe to the legal fiction that the jury is  
20 finding different facts when they're looking at  
21 the exact same facts.

22 JUSTICE THOMAS: No, that's not what  
23 -- so you have a verdict. You say that if there  
24 -- if it's only malice murder that we're  
25 concerned about, that you would have a verdict



1 here.

2 MR. PETRANY: If that was -- yes, if  
3 that was all that was in the case, if that was  
4 the only thing going on, yeah, I don't see --

5 JUSTICE THOMAS: And just everything  
6 in the case is exactly the same, except there's  
7 only one charge.

8 MR. PETRANY: Yeah.

9 JUSTICE THOMAS: Would this constitute  
10 a verdict?

11 MR. PETRANY: Yeah, I think, under  
12 Georgia law as it exists today, that that would  
13 be a verdict, yes.

14 JUSTICE THOMAS: So the problem is  
15 that up to that point, until you void the  
16 verdict, you have what constitutes a verdict.  
17 It's not procedurally defective. There's not a  
18 jurisdictional problem. You have a verdict that  
19 is subsequently voided because it's inconsistent  
20 with a separate charge.

21 And I don't know how you get around  
22 the notion -- and that requires you, by the way,  
23 to look at the substance of the verdict. And I  
24 don't know how you get around the notion that  
25 before you can do that, there actually is a

1 verdict.

2 MR. PETRANY: Well, no, Your Honor, to  
3 be clear, here, in this case, there was never a  
4 verdict because, again, the jury issued  
5 something simultaneously. It said at the same  
6 time, speaking out of both sides of its mouth,  
7 he's both sane and insane at the same time.

8 And these were special findings. As  
9 we explain in our brief, there's a big  
10 distinction between a jury coming back with a --  
11 you know, a general verdict of not guilty,  
12 which, you know, a jury has the authority to --  
13 to do that for any reason or no reason at all --

14 JUSTICE SOTOMAYOR: How do you define  
15 general verdict? Guilty, not guilty of both  
16 counts?

17 MR. PETRANY: Well, a general verdict  
18 --

19 JUSTICE SOTOMAYOR: Obviously --

20 MR. PETRANY: -- of not guilty just  
21 says not guilty and you're done basically. And  
22 it doesn't -- it doesn't go into any special  
23 findings as to what the --

24 JUSTICE SOTOMAYOR: The -- but the  
25 only special finding here had to do with his --

1 with whether it was excusable because of mental  
2 illness or because of insanity, correct?

3 MR. PETRANY: Yeah, the -- the special  
4 findings in this case --

5 JUSTICE SOTOMAYOR: It's not a special  
6 finding with respect to the one charge that  
7 changes any of the facts of the acquittal.

8 MR. PETRANY: Well, no, Your Honor,  
9 the special finding is that he was insane. If  
10 he had not been insane, he would have been  
11 guilty.

12 JUSTICE JACKSON: But that wasn't the  
13 question that was posed to the jury standing  
14 alone. I mean, I understand your argument if  
15 you're saying the jury was asked is this person  
16 insane, and their answer was simply yes in one  
17 situation with respect to one count and no with  
18 respect to the other.

19 But the jury was asked about the  
20 elements of a particular crime and whether he  
21 was guilty or not guilty. So their verdict was  
22 not guilty by reason of insanity with respect to  
23 one of them and guilty, right --

24 MR. PETRANY: Well, Yes, Your Honor,  
25 but --

1 JUSTICE JACKSON: -- with respect to  
2 the other?

3 MR. PETRANY: -- but not guilty by  
4 reason of insanity by definition means that you  
5 did commit the crime and the only reason that we  
6 have said you're not guilty is because you are,  
7 in fact, insane.

8 JUSTICE JACKSON: I understand.

9 MR. PETRANY: And I think it's --

10 JUSTICE JACKSON: But what do we do  
11 with the not guilty part of it? I mean, the  
12 jury was not asked a special -- on a special  
13 verdict form just the pure question of insanity  
14 in the way you sort of set it up at the  
15 beginning.

16 MR. PETRANY: Well, actually, as a  
17 practical matter, Your Honor, I think that --  
18 that they were. I mean, this -- even setting  
19 aside the -- the more mundane aspects of this  
20 case where the entire trial was about sanity,  
21 they were given a special verdict form that has  
22 four options. The judge did, in fact, instruct  
23 them that they could say not guilty. They  
24 always had that authority.

25 So it's not like Georgia is somehow

1 trying to force the jury into, you know, giving  
2 up its general power to just say not guilty for  
3 any reason. And part of the -- the reason that  
4 we think this case is different from, you know,  
5 the -- you know, the seemingly facially  
6 inconsistent verdict cases is precisely because,  
7 in this case, the jury didn't do that. It  
8 actually made special determinations about --

9 JUSTICE GORSUCH: Counsel?

10 MR. PETRANY: -- special -- yes?

11 JUSTICE GORSUCH: Just looking through  
12 the briefs, I didn't see another state that has  
13 a scheme like Georgia's that allows an acquittal  
14 to be rendered invalid based on its repugnancy  
15 with other guilty verdicts. Is that correct?

16 MR. PETRANY: As far as I'm aware,  
17 there's no state that has addressed this  
18 particular issue, Your Honor. I mean, these are  
19 rare circumstances. It's not ordinary for a  
20 jury to issue special findings on a particular  
21 issue --

22 JUSTICE GORSUCH: I'm -- I'm -- I'm  
23 just --

24 MR. PETRANY: -- going both ways, but,  
25 yes --

1 JUSTICE GORSUCH: -- generally  
2 speaking.

3 MR. PETRANY: -- you are -- as far as  
4 I know, there's no --

5 JUSTICE GORSUCH: This is it?

6 MR. PETRANY: -- other state that has  
7 addressed this issue at all.

8 JUSTICE GORSUCH: Now shouldn't that  
9 tell us something?

10 (Laughter.)

11 JUSTICE GORSUCH: That 230 years in  
12 this -- in this country's history, we have  
13 respected acquittals without looking into their  
14 substance and without looking into how they fit  
15 with other counts and said a jury is a check on  
16 judges, it's a check on prosecutors, it's a  
17 check on overreach, it's part of our democratic  
18 system, and we do not ever talk about whether  
19 they make sense to us.

20 They may be products of compromise.  
21 They may be inconsistent with verdicts on other  
22 counts. We don't question them. And this is  
23 the first time this issue has arisen here.  
24 Shouldn't that tell us something?

25 MR. PETRANY: I don't think so, Your

1 Honor. As we point out in our briefs, the fact  
2 that Georgia has a different rule from other  
3 states -- and, again, I would hasten to add it's  
4 not clear that the rule is different so much as  
5 other states just haven't addressed this issue.

6 In a lot of states, you might not have  
7 the same sort of defenses or states of mind that  
8 would so easily come into conflict, although,  
9 again, here, I think this is a rare  
10 circumstance.

11 But, to get to your point, absolutely,  
12 a jury's general verdict of acquittal is one of  
13 the most sacrosanct things in American  
14 constitutional law, and we're not trying to  
15 undermine that at all.

16 But I do think it's important to point  
17 out that that's simply not what happened here.  
18 They had the option to do that, and, instead,  
19 they gave completely contradictory answers about  
20 a single factual question.

21 JUSTICE GORSUCH: Well, and -- and  
22 that raises the question about Missouri's brief,  
23 for example, and their concern seems to be  
24 within a single count that some states do that,  
25 the case I had, you know, where you just

1 couldn't tell what the jury's verdict was on a  
2 count and send the jury back to figure it out.

3 None of that's at stake here, right?

4 MR. PETRANY: Well, I think the  
5 principle of the matter arguably extends there.  
6 I mean, I --

7 JUSTICE GORSUCH: You'd have to extend  
8 it. But it isn't at issue here?

9 MR. PETRANY: Well, I think -- I think  
10 the logic is the same. The only difference  
11 between here and --

12 JUSTICE GORSUCH: No, the logic isn't  
13 the same. I mean, I'm sorry, I just have to  
14 reject that. Assume I disagree with that --

15 MR. PETRANY: Okay.

16 JUSTICE GORSUCH: -- because the logic  
17 for 230 years is a verdict on a count is  
18 sacrosanct, okay?

19 Here, we're dealing with not -- not  
20 two counts, we're dealing with one count, and we  
21 cannot tell what the jury did. The judge  
22 doesn't know what to do. He doesn't have his  
23 instructions from the jury.

24 MR. PETRANY: Well, Your Honor, I want  
25 to be clear about the 230 years. Every time the



1 Court has talked about this and every time the  
2 Court has made rulings about this, it's always  
3 talking about a general verdict of acquittal.

4 It's not talking about a circumstance  
5 where you have special findings that did not  
6 have the same sort of status, the same sort of  
7 --

8 JUSTICE GORSUCH: Why does that make a  
9 difference? An acquittal is an acquittal is an  
10 acquittal --

11 MR. PETRANY: Oh, I think it makes --

12 JUSTICE GORSUCH: -- since time  
13 immemorial. Now you're telling us an acquittal  
14 isn't an acquittal if it's a special verdict  
15 form?

16 MR. PETRANY: No, what I'm saying is  
17 it's not an acquittal if the jury did not, in  
18 fact, resolve the factual question that  
19 supposedly underlies that acquittal. And in  
20 this particular case, we know because they said  
21 two contradictory things that they didn't, in  
22 fact, resolve that particular factual point.

23 JUSTICE GORSUCH: We also know that  
24 the jury was polled. They stood by this  
25 verdict. We know that there were no objections

1 contemporaneously by Georgia prosecutors. And I  
2 think we also know that the attorney general at  
3 least below said that acquittal is an acquittal.

4 MR. PETRANY: Well, no. What the  
5 attorney -- well, what the brief below said --  
6 and it was a tangential footnote that really  
7 wasn't getting into the issue -- is that where  
8 there's an acquittal, double jeopardy applies.  
9 And we're not contesting that at all, much like  
10 McElrath here today and throughout his briefing  
11 sort of assumed --

12 JUSTICE GORSUCH: I thought -- I  
13 thought the attorney general said that retrying  
14 Petitioner on the murder count would, of course,  
15 violate double jeopardy.

16 MR. PETRANY: Assume -- yeah, on the  
17 basis that there was an acquittal. But that  
18 brief didn't really get into that issue. And  
19 the primary brief in the case, the DA brief, did  
20 reject that particular position.

21 What I'd also say, going back to,  
22 well, did Georgia, you know, have a problem with  
23 this at the time, well, no, because Georgia  
24 wanted everything to stay the way it was, of  
25 course.

1                   From Georgia's perspective, from the  
2 prosecution's perspective, it was -- it got what  
3 it wanted, right? There was, in fact, a -- you  
4 know, in -- in its -- to the extent that you  
5 accept these as verdicts, to the extent you  
6 don't accept Georgia's repugnancy rule, McElrath  
7 would be in prison for life.

8                   So the only -- the only one who had an  
9 incentive to challenge this was McElrath, and he  
10 did, and his theory was --

11                   JUSTICE GORSUCH: It's not unusual --

12                   MR. PETRANY: -- well, these are  
13 repugnant verdicts.

14                   JUSTICE GORSUCH: -- for a defendant  
15 to -- to challenge the guilty verdicts.

16                   MR. PETRANY: Oh, absolutely. I'm not  
17 -- I'm not --

18                   JUSTICE GORSUCH: I mean, that's what  
19 appeals all are about. Are you saying -- I  
20 mean, maybe you can get rid of the repugnancy  
21 rule allowing him to say that the guilty  
22 verdicts are repugnant given the acquittal, but  
23 I don't see how it works the other way around.

24                   MR. PETRANY: Well, the point is that  
25 his theory was a Georgia rule that as the

1 Georgia Supreme Court, the highest arbiter of  
2 Georgia law, says, says there's no verdict at  
3 all. That's the theory behind this rule. And  
4 if there is a verdict, the rule doesn't really  
5 make sense anymore.

6 JUSTICE KAGAN: But, General, before  
7 our inconsistency cases, there might have been a  
8 lawyer standing where you were saying our state  
9 has decided that when a jury comes back with two  
10 inconsistent verdicts, we're going to say that  
11 there's no verdict at all because, after all,  
12 how can there be a verdict if there's  
13 inconsistency.

14 And you're saying that there's -- and  
15 we rejected that out of hand and in numerous  
16 cases. So you're saying that there's a  
17 difference between that and this repugnancy  
18 situation. I guess I just don't understand what  
19 it is, so could you explain it to me a little  
20 bit more?

21 MR. PETRANY: Yes, Your Honor. The  
22 first point that I would make is that all of  
23 those inconsistent verdicts cases assume that  
24 there are verdicts to begin with. In none of  
25 them was the Court looking at, well, was there a

1 --

2 JUSTICE KAGAN: But -- but is --  
3 but -- but, again, a lawyer could have come up  
4 here and say, as a matter of state law, we're  
5 going to just say that there's not a verdict  
6 when the verdict is -- when the supposed verdict  
7 is inconsistent with another one.

8 MR. PETRANY: No, I --

9 JUSTICE KAGAN: So, you know, the  
10 State could have made the exact same argument.  
11 And, surely, we decided against that argument --

12 MR. PETRANY: Well --

13 JUSTICE KAGAN: -- when we -- when we  
14 had -- when we decided those cases.

15 MR. PETRANY: Well, my point was  
16 simply that no one was making that argument.  
17 Powell itself, the paradigm case on this --

18 JUSTICE KAGAN: If somebody had been  
19 making that argument, surely, we would have  
20 rejected it.

21 MR. PETRANY: Yes, I think you would  
22 have, but I think the reason that you would have  
23 -- and I think that this Court has said this --  
24 it said it in Smith, it's -- last year, it's  
25 said it elsewhere -- is that there's something

1 special about a general verdict of not guilty.

2 It said this in Powell.

3 This is something that goes back  
4 hundreds of years, that a jury's authority to  
5 say not guilty even if we believe that he is, in  
6 fact, guilty is something that goes, you know,  
7 prior to the founding and beyond, and this Court  
8 --

9 JUSTICE KAGAN: I mean, it seems --

10 JUSTICE BARRETT: But even if --

11 JUSTICE KAGAN: -- to me that it's  
12 the -- the exact same thing really. I mean,  
13 when -- when a jury comes back with inconsistent  
14 verdicts, we don't really know what happened. I  
15 mean, one possibility of what happened is the  
16 jury made a humdinger of a mistake.

17 And another possibility of what  
18 happened is that the jury made no mistake at all  
19 but instead decided to compromise something out  
20 or decided to show leniency of a kind that it is  
21 within the right of a jury to show. And so too  
22 here, the jury might have made a humdinger of a  
23 mistake in the way that you're suggesting, but,  
24 in addition, the jury might have decided to  
25 compromise things out or to show leniency.

1                   And in that sense, we would be  
2 intruding into the jury's deliberations as much  
3 in your case as in the inconsistency cases if we  
4 adopted your rule.

5                   MR. PETRANY: No, and the reason I  
6 don't think that that's true, Justice Kagan, is,  
7 when a jury issues a verdict of -- a general  
8 verdict of not guilty, you don't know what the  
9 jury did and you can't look into why. Here, you  
10 still aren't going to look into why, but they  
11 told you what they did. They said we found him  
12 both guilty -- or, sorry, both sane and insane.

13                   And so it's just a very different  
14 thing. We're not hunting for some sort of  
15 internal thoughts of the jury or something like  
16 that. We have in front of us two different  
17 things that the jury said about the same  
18 question.

19                   JUSTICE JACKSON: But isn't it --

20                   JUSTICE KAGAN: We found him both sane  
21 on one count and insane on another count, one of  
22 which led to a guilty verdict and the other of  
23 which led to an acquittal because -- let's  
24 imagine -- we wanted to compromise. It's the  
25 exact same thing that you're asking us to look

1 into, which we have always said we will not look  
2 into.

3 MR. PETRANY: Well, I disagree,  
4 Justice Kagan, because I think, in the -- in the  
5 case of a general verdict of not guilty, as this  
6 Court has said many times over the years and,  
7 again, even pre-founding, there's something  
8 special about that authority, as this Court has  
9 said, for instance, in Gaudin, a case that we  
10 cite, courts by the time of the founding  
11 couldn't force juries to issue special findings  
12 precisely because there was something special  
13 about this general verdict of not guilty. It  
14 allowed the jury the space to say you are not  
15 guilty and we're not going to tell you why.

16 But, in this circumstance, although  
17 the jury had the authority to do that, was  
18 instructed on doing that, they didn't do that.  
19 Instead, they came out and said: We think he's  
20 sane and insane at the same time.

21 So I do think that that's a -- that's  
22 a fundamentally different out -- you know, issue  
23 from the jury. And I think, when a court looks  
24 at that and says, actually, you've decided the  
25 same issue in two different ways, I think it is



1 a bit legally fictitious to say: Well, they  
2 were really deciding two different factual  
3 issues.

4 I mean, I know it's at least a little  
5 bit legally fictitious because, you know, this  
6 Court, you know, applies collateral estoppel  
7 rules to jury findings on a particular count.  
8 So we all acknowledge that there really is one  
9 fact that's being decided here, which is his  
10 insanity at the time of the crime, and the jury  
11 said yes and no.

12 And just -- just to give one example  
13 of why I think McElrath's argument here is -- is  
14 a little bit formalistic, suppose the jury form  
15 were slightly different and suppose it had an  
16 option for guilt and then it had a different  
17 option for insanity, and they said guilty on all  
18 counts on insanity -- or on -- on the guilt  
19 question, but then, on insanity, they said yes  
20 and no. I mean, that's -- that's the same  
21 circumstance that we're in here. It's -- it's  
22 not fundamentally different. It's a jury not  
23 actually deciding whether or not they have come  
24 to a conclusion.

25 JUSTICE BARRETT: General, are you

1 saying that you can never have plainly  
2 inconsistent general verdicts?

3 MR. PETRANY: As a fact --

4 JUSTICE BARRETT: Are you just saying,  
5 I mean, because it kind of sounds like you're  
6 saying --

7 MR. PETRANY: Yes, as a factual -- as  
8 a factual matter, yes, I actually think that's  
9 true because you could never know -- the jury  
10 might have just said, yeah, the -- you're --  
11 you're guilty as sin, all the facts are there,  
12 but we don't care, we're going to say not guilty  
13 anyway.

14 So you can never know that what they  
15 did was factually inconsistent. They might have  
16 just said, yeah, you did it all, but we're going  
17 to let you off on this particular count. So I  
18 think it's just a matter of -- of logic. You  
19 can never know that two general verdicts are  
20 absolutely inconsistent with one another.

21 That's why in our brief we refer to it  
22 as kind of seemingly inconsistent, but because  
23 the jury could be deciding this on a totally  
24 non-factual basis, you can't know that they're  
25 actually inconsistent.

1 JUSTICE JACKSON: But wasn't Justice  
2 Gorsuch's point that even if we know that they  
3 are inconsistent, so what? I mean, the point is  
4 that we've said a jury can issue inconsistent  
5 verdicts. So your -- your argument seems to be,  
6 well, there's -- the distinction that Justice  
7 Kagan was asking you about is that in one  
8 situation, we don't know it's inconsistent, and  
9 in another situation, this situation, we do  
10 know.

11 Okay. I mean, fine. So it's  
12 inconsistent. Why -- why does that mean that  
13 the court gets to say you aren't able to do  
14 that, jury? You know, you can retry this person  
15 or you have to set it up so he can be retried  
16 because that's not a valid thing for the jury to  
17 do.

18 MR. PETRANY: Well, two points, Your  
19 Honor. The first is it's not -- you know, I'm  
20 not speaking from nothing when I say that the  
21 inconsistent verdicts cases are different  
22 because we don't know what the jury has done.  
23 This is what the Court has said. We don't know  
24 what the jury has done.

25 But the second reason is I think the

1 reason that the jury can issue a -- a verdict of  
2 not guilty, a general verdict of not guilty, and  
3 a state can't say, oh, that's not really a  
4 verdict because it may or may not be  
5 inconsistent with this other one is because of  
6 the right to a jury trial and the fact that, as  
7 this Court has explained on numerous occasions,  
8 a jury always has that authority. A state can't  
9 say you don't have the authority to issue this  
10 general verdict of not guilty.

11 And we cite several things in our  
12 brief, I don't think McElrath even denies --

13 JUSTICE JACKSON: I guess my question  
14 is why --

15 MR. PETRANY: -- that with special  
16 verdicts --

17 JUSTICE JACKSON: -- I -- I guess my  
18 question is why is it -- and I think your  
19 argument is turning on this -- that a state can  
20 tell the jury they have to be factually  
21 consistent? So, even if I accept your  
22 distinction that you are drawing with Justice  
23 Kagan in that -- you know, in this particular  
24 world, we have evidence that there's a factual  
25 inconsistency with respect to the way they

1 rendered their verdicts, why is it okay for the  
2 state to say you can't do that?

3 MR. PETRANY: Again, two points, Your  
4 Honor. The first is I think that as a matter of  
5 sensibility, the jury is supposed to find facts.  
6 If they don't find the facts, if they instead  
7 tell you two opposite things, it makes a lot of  
8 sense to say the jury has not, in fact, found  
9 this fact.

10 But the second one I would say is it's  
11 McElrath's burden to identify why a state can't  
12 do this. It is the strong presumption that a  
13 state does have authority over its own criminal  
14 laws and procedures. And unless there's  
15 something in the, you know, kind of fundamental  
16 right to a jury trial or something like this --

17 JUSTICE JACKSON: Isn't it the  
18 Constitution? I mean, I thought -- I guess my  
19 question is, isn't there -- isn't this a matter  
20 of federal law as to whether or not what is  
21 happening here is an acquittal or not an  
22 acquittal for the purpose of the Double Jeopardy  
23 Clause?

24 MR. PETRANY: So what a state order or  
25 finding or something like that, the effect that

1 it has for the purposes of double jeopardy is  
2 ultimately a federal question. But what the  
3 state order is and whether it exists in the  
4 first place, that's not necessarily a federal  
5 question. And I would point the Court to Smith  
6 versus Massachusetts and Sattazahn versus  
7 Pennsylvania.

8 In Smith versus Massachusetts, the  
9 Court did hold that this mid-trial judicial  
10 acquittal triggered the Double Jeopardy Clause,  
11 but it said, if Massachusetts had a rule that  
12 this wasn't a final order, that it could be  
13 revisited, that they could come back to it  
14 later, well, then it wouldn't trigger double  
15 jeopardy.

16 CHIEF JUSTICE ROBERTS: Well, so what  
17 if the state had a rule that the foreman has to  
18 sign the verdict in blue ink, all right, and he  
19 signed it in -- in black ink, and the judge --  
20 you know, it's supposed to be blue ink; go back.  
21 He goes back, and then one of the jurors changes  
22 their mind. Is that rule of state law  
23 sufficient to constitute a determination of when  
24 jeopardy was terminated?

25 MR. PETRANY: Yeah, I think, if -- if

1 the state has a rule --

2 CHIEF JUSTICE ROBERTS: You think it  
3 is?

4 MR. PETRANY: Yeah. I think, if the  
5 state has a procedural rule that has to be  
6 complied with, and by the time that it was  
7 complied with, the jury has -- is not unanimous,  
8 I think the general presumption would be, yes,  
9 it's fine. If there's -- if there's something  
10 about that that --

11 CHIEF JUSTICE ROBERTS: You wouldn't  
12 think that that's a -- whatever, a frivolous  
13 rule that shouldn't impede the federal law  
14 determination?

15 MR. PETRANY: So -- well, this is what  
16 I was going to say, Your Honor. As this Court  
17 has -- has said many times in many contexts,  
18 whether it be property or last year in the  
19 Elections Clause, you know, at some point, if a  
20 state -- if a state rule is so outside the  
21 bounds of kind of normal reasonable legislation  
22 or -- or adjudication, then you might say, well,  
23 you're just evading, you know, some federal  
24 right here. So, in the property context, you  
25 can't just redefine a taking --

1 CHIEF JUSTICE ROBERTS: Well, I  
2 suppose --

3 MR. PETRANY: -- via tax or something  
4 like that. But --

5 CHIEF JUSTICE ROBERTS: Right.

6 MR. PETRANY: -- the presumption would  
7 be, you know, the state is allowed to do this  
8 unless there's some way in which it's evading  
9 federal constitutional guarantees.

10 CHIEF JUSTICE ROBERTS: Well, and I  
11 guess the argument would be, even in the context  
12 of your understanding, that it's the only state  
13 that has done this in 230 years, and maybe  
14 that's outside the normal understanding.

15 MR. PETRANY: Yeah, so that is -- at  
16 the very least, that's the right kind of  
17 argument that McElrath should be making here,  
18 but the reason I reject that is because, first  
19 of all, I don't -- I don't accept the notion  
20 that no other state has ever had a rule anything  
21 like this.

22 It's true that no other state appears  
23 to have actually come across facts exactly like  
24 this, but we point to examples in our brief, and  
25 the Missouri amicus brief has others of kind of



1 similar situations, where they do, in fact, have  
2 rules that appear at least similar or analogous  
3 to -- to our rule here.

4 And we also point to cases like in the  
5 Morgan article from before the founding where --  
6 where cases -- especially where special verdicts  
7 seemed to be inconsistent with even general  
8 verdicts of --

9 JUSTICE KAVANAUGH: You -- you hang a  
10 lot on the special findings being different from  
11 a general verdict, but couldn't the inconsistent  
12 or repugnant special findings be the product of  
13 compromise or leniency?

14 MR. PETRANY: Well, I think that this  
15 goes back to my answer to Justice Kagan earlier,  
16 which is we don't look behind what the jury did  
17 to sort of understand their motivation. So they  
18 issued special verdicts that are completely  
19 incomprehensible when put together.

20 JUSTICE KAVANAUGH: But they could --  
21 couldn't they be the product -- I guess, to go  
22 back to my question, couldn't they be the  
23 product of compromise or leniency?

24 MR. PETRANY: Yeah, they could have --  
25 I mean, what the jury did, I have no idea. I

1 wasn't in the room. And that's kind of the  
2 point.

3 JUSTICE KAVANAUGH: But it -- but it  
4 could be compromise?

5 MR. PETRANY: It's at least  
6 theoretically possible that the -- the jury  
7 wanted to do something like be lenient or  
8 something like this. But the reason that a  
9 general verdict is so different --

10 JUSTICE KAVANAUGH: Or -- or  
11 compromise, right?

12 MR. PETRANY: Yeah, although I don't  
13 take the court's -- I don't take the court's  
14 mention of compromise in the inconsistent  
15 verdicts cases to be sort of blessing that as  
16 something that's like good for a jury to be  
17 doing necessarily. It's just you can't tell.  
18 They could have done any number of things.

19 JUSTICE GORSUCH: Well, the founders  
20 certainly thought it was important. And, you  
21 know, go back to the trial of John Zenger, he  
22 was guilty as heck and yet the jury acquitted  
23 him, and that was considered one of the great  
24 moments in American history leading up to the  
25 adoption of -- of the Seventh Amendment.

1                   And so I guess Justice Kavanaugh and I  
2 think Justice Kagan have put their finger on it.  
3 The minute you admit that it could be a product  
4 of leniency or compromise, we're done, aren't  
5 we?

6                   MR. PETRANY: Well, Your Honor --

7                   JUSTICE GORSUCH: Because then -- then  
8 we have to respect that verdict regardless of  
9 whether we think it's rational or what we would  
10 do. It's supposed to be a check on -- on us  
11 judges and you prosecutors.

12                  MR. PETRANY: Your Honor, prior to the  
13 founding, there was a period of time when courts  
14 would try to sort of corral juries by forcing  
15 them to issue special verdicts.

16                  And what came out of this was that the  
17 way we were going to make sure your right to a  
18 jury trial is always a check on the executive,  
19 the legislative, whoever else, is by making sure  
20 you can always get a general verdict of not  
21 guilty.

22                  JUSTICE GORSUCH: All right. I -- I  
23 -- I --

24                  MR. PETRANY: So that's how I would --

25                  JUSTICE GORSUCH: -- I guess if you'd

1 answer the -- the question, though. The moment  
2 you admit that you are -- that that verdict  
3 could be a product of compromise or leniency,  
4 why isn't that the end of the game?

5 MR. PETRANY: Because I don't think  
6 that the jury necessarily -- I don't think the  
7 right to a jury trial includes the right for the  
8 jury to try to issue completely incomprehensible  
9 special findings to sort of game out what  
10 they're doing. So, in this case, for instance,  
11 --

12 JUSTICE GORSUCH: Or -- or is it  
13 really you're saying that the jury doesn't have  
14 a right to do leniency and compromise?

15 MR. PETRANY: No, Your Honor, they  
16 obviously do and they could have in this case  
17 with a general verdict of not guilty. But, to  
18 be clear, when they issued this, you know,  
19 purported verdict, assume you accept it, it has  
20 consequences for McElrath.

21 So the -- the idea that the jury can,  
22 you know, consign him to a mental health  
23 hospital until he is, you know, determined not  
24 to be dangerous anymore as sort of some version  
25 of leniency I think is getting way outside of

1 the ordinary general verdict of not guilty as  
2 the jury's ultimate --

3 CHIEF JUSTICE ROBERTS: Well, I'm  
4 not -- that's one thing that, well, I'm  
5 interested in your view on. You seem to say  
6 this is different than inconsistent verdicts,  
7 which could be explained by juror compromise,  
8 leniency, whatever.

9 I don't know why the same thing  
10 doesn't apply to repugnant verdicts. I don't  
11 know that the jury necessarily would be as  
12 sophisticated as counsel today in explaining  
13 what's a repugnant verdict versus what's an  
14 inconsistent verdict. And after back and forth,  
15 they might just -- it might be compromise.

16 Okay, we're going to say he's sane for  
17 this and -- and guilty, he's not guilty by  
18 reason of sanity, you know, this group is fine  
19 with one, that group is fine with another.

20 I don't know that they thrashed  
21 through the law about whether they would have to  
22 be reconciled or not.

23 MR. PETRANY: Yeah, Your Honor, I  
24 think that the reason a general verdict of not  
25 guilty is different is because of leniency. I

1 don't think that a state is powerless to  
2 basically say, no, you're not allowed to, like,  
3 compromise by coming to completely  
4 incomprehensible conclusions.

5 I do think a state is prohibited from  
6 keeping a jury from issuing a general verdict of  
7 not guilty because of the jury's historic  
8 function as a check on the executive. And I  
9 think, in this case, the jury had the authority  
10 to do that. It had the power to do that. It  
11 chose not to do that. Instead, it issued  
12 special findings that nobody knows necessarily  
13 the motivation, the internal motivation of the  
14 jury for that. But what we know is what they  
15 actually did.

16 JUSTICE SOTOMAYOR: I -- you keep  
17 talking about general and special verdicts, and  
18 having tried so many cases, I think of special  
19 verdicts as verdicts where you ask each element  
20 of the offense separately, and then you come to  
21 the judge then decides whether that's a guilty  
22 or not guilty.

23 A general verdict is are you guilty or  
24 not guilty but based on the elements -- based on  
25 whatever special defenses. And almost always

1 you had is he guilty by reason of insanity or  
2 not. That's what they did here, right, on the  
3 malice murder?

4 MR. PETRANY: It was not guilty by  
5 reason of insanity, yes.

6 JUSTICE SOTOMAYOR: Right. They  
7 didn't ask did he have malice, the intent to  
8 kill, did he kill this person, did he do -- they  
9 just said is he guilty by reason of insanity or  
10 guilty but with mental illness, correct, and  
11 they just checked off which of the elements were  
12 --

13 MR. PETRANY: Yeah, they had -- yes,  
14 they had four options.

15 JUSTICE SOTOMAYOR: All right. So, in  
16 Smith last year, we said an acquittal takes  
17 place when there is a merits-related  
18 "resolution," correct or not, "of some or all of  
19 the factual elements of the crime charged."

20 Here, the jury was given malice  
21 murder. Some of the facts -- one of the factual  
22 elements is the mental state, guilty by reason  
23 of insanity or not. They said not. I don't  
24 know how this doesn't fit Smith's definition of  
25 what an acquittal is.

1                   You want to call it a general verdict.  
2       But Smith said all we're looking at is what the  
3       jury did. And the jury said not guilty by  
4       reason of insanity. You told Justice Thomas  
5       that if it just stood alone that way, jeopardy  
6       attached.

7                   I still don't understand how you  
8       unattach it simply because there's a second  
9       charge with a potential inconsistency that you  
10      now admit could have been by reason of jury  
11      compromise.

12                   CHIEF JUSTICE ROBERTS: Briefly,  
13      counsel.

14                   MR. PETRANY: Yeah, Your Honor, I  
15      don't think states are prohibited from trying to  
16      avoid incomprehensible compromises. I think  
17      it's just leniency that they have to leave in  
18      there with general verdicts of not guilty.

19                   As far as whether this is a special  
20      verdict or not, the Georgia Supreme Court  
21      understood it that way. McElrath understood it  
22      that way. You know, that was the basis of his  
23      argument all the way along, including in his  
24      plea and bar in this case.

25                   And so the big difference ultimately



1 is that the jury always has the authority to  
2 just say not guilty, we don't want you to be  
3 guilty of this crime. I don't think there's any  
4 historical or other support for the idea that a  
5 jury must have the authority to issue  
6 incomprehensible special findings.

7 CHIEF JUSTICE ROBERTS: Thank you,  
8 counsel.

9 Rebuttal, Mr. Simpson?

10 Oh, I'm sorry, I'm sorry, we skipped  
11 the --

12 (Laughter.)

13 MR. SIMPSON: I'm ready to jump in.

14 (Laughter.)

15 CHIEF JUSTICE ROBERTS: Yeah. Excuse  
16 me. Anything further, Justice Alito?

17 (Laughter.)

18 CHIEF JUSTICE ROBERTS: Justice?

19 JUSTICE KAVANAUGH: I -- I -- I do --  
20 I do have some further. Sorry.

21 (Laughter.)

22 JUSTICE KAVANAUGH: If you do not  
23 prevail in this case, I have two questions. One  
24 is, can't Georgia going forward solve the  
25 problem that you've identified by simply saying

1 that the guilty verdicts stand even if  
2 repugnant?

3 MR. PETRANY: Yes. So, if we were to  
4 lose this case, I think not only could they, but  
5 that is the only logical thing for the Georgia  
6 Supreme Court to do because the basis of this  
7 rule was there are no verdicts at all.

8 Georgia accepts the basic idea that if  
9 -- if these are seemingly inconsistent, we'll  
10 just -- we'll just accept them as they are.

11 The basis for this rule was we don't  
12 think these are verdicts at all. If this Court  
13 says, yeah, they are, then I think basically  
14 whether McElrath or the next person in his shoes  
15 is just going to be stuck with the  
16 life-in-prison conviction.

17 JUSTICE KAVANAUGH: Is that still  
18 possible in this case?

19 MR. PETRANY: Yes, I think so. I  
20 mean, obviously, it's going to be up to the  
21 Georgia Supreme Court to figure out what to do  
22 going forward, but the initial decision was  
23 based on the idea that there was no verdict  
24 here.

25 And so, if this Court were to vacate

1 and remand and say, no, there was a verdict  
2 here, then we -- presumably, the Georgia Supreme  
3 Court would at least take seriously the argument  
4 of, okay, well, then we just reinstate the  
5 judgment because the United States Supreme Court  
6 just said there was a verdict.

7 JUSTICE KAVANAUGH: Thank you.

8 CHIEF JUSTICE ROBERTS: Justice  
9 Barrett?

10 Justice Jackson?

11 Thank you, counsel.

12 Mr. Simpson, rebuttal.

13 REBUTTAL ARGUMENT OF RICHARD A. SIMPSON  
14 ON BEHALF OF THE PETITIONER

15 MR. SIMPSON: Mr. Chief Justice, and  
16 may it please the Court:

17 Justice Thomas, you're exactly right  
18 that under Georgia law, each of these counts, if  
19 it had been charged separately, at -- at the  
20 verdict would be a final verdict under state  
21 law. It's only by comparison them -- comparing  
22 them that you get to repugnancy.

23 It is true that Mr. McElrath appealed  
24 in this case. He had the right to do that under  
25 Georgia law. And going to Justice Kavanaugh's

1 question, under Powell, states may, as the  
2 federal government does when there are  
3 inconsistent acquittals and convictions, may  
4 allow the conviction to stand. They can't touch  
5 the appeal. It's "may," not "must." Many  
6 states throw out the conviction. It's a state  
7 choice at that level.

8           And there was -- the -- the Georgia  
9 Supreme Court in the Turner case in 2006, I  
10 believe, dealt with what it had said is  
11 repugnant verdicts, and it did exactly that. It  
12 let the acquittal stand, but it vacated the --  
13 threw out the conviction.

14           We would hope that Georgia would  
15 continue to follow that rule. It'll be its  
16 decision, but there's nothing about a decision  
17 by this Court that would require Georgia to  
18 change its rule. And in the -- in the context  
19 of Turner, it reached exactly the result of  
20 allowing the -- the acquittal to stand and  
21 throwing out the conviction.

22           In -- in terms of repugnancy, I think  
23 the key point, as the questions indicated, there  
24 really isn't a principal difference. Here, Mr.  
25 McElrath was acquitted of the most serious

1 charge, convicted of the lesser charge. Could  
2 have been leniency, could have been compromise.  
3 We don't know why the court reached -- I'm  
4 sorry, the jury reached that verdict.

5 And then, finally, the reference to  
6 issue preclusion. Where there's a conviction  
7 and an acquittal, this Court has held there's --  
8 that issue preclusion is not mandatory. So,  
9 again, Georgia may but is not required to.

10 Unless there are additional questions,  
11 I would yield the remainder of my time.

12 CHIEF JUSTICE ROBERTS: Thank you,  
13 counsel.

14 The case is submitted.

15 (Whereupon, at 11:03 a.m., the case  
16 was submitted.)

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## Official - Subject to Final Review

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