

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

DAMIAN McELRATH,)
)
) Petitioner,)
)
) v.) No. 22-721
)
) GEORGIA,)
)
) 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. According,
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 subject -- subjected to a second trial
11 because that acquittal is repugnant to a
12 conviction on separate offenses. And this
13 Court's analysis has always been offense by
14 offense. He was found guilty but mentally ill
15 as to felony murder and guilty but mentally ill
16 as to aggravated assault. This repugnant
17 verdict exception to the double jeopardy
18 principle does not stand, cannot withstand
19 analysis.

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

1 uncertainty as to what the jury did.

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

8 I welcome the Court's questions.

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

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

16 JUSTICE THOMAS: No, I mean the
17 Georgia -- court.

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

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

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

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

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

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

1 have the first jeopardy terminate before you can
2 get to the question of whether it -- or not he's
3 in jeopardy a second time. As a general matter,
4 is that a question of state law?

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

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

25 MR. SIMPSON: No, because that -- the

1 -- the signing of the verdict is a procedural
2 requirement and the state is -- is free to
3 enforce that procedural requirement.

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

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

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

1 the jurors a chance to ponder it a little bit
2 more, for the -- whatever reason? When would
3 jeopardy terminate in that case?

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

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

12 MR. SIMPSON: What they --

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

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

19 CHIEF JUSTICE ROBERTS: And in that
20 interim, of course, the juror dies or, you know
21 --

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

1 once the verdict has been returned, that's what
2 terminates jeopardy.

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

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

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

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

1 thinking about Blueford versus Arkansas, for
2 example --

3 MR. SIMPSON: Yes.

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

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

11 JUSTICE JACKSON: So no matter --

12 MR. SIMPSON: But --

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

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

23 MR. SIMPSON: Exactly, Justice
24 Jackson. In -- in Smalis, this case, the
25 Pennsylvania Supreme Court had characterized the

1 granting of a demurrer as not an acquittal.
2 This -- this Court held that it was an
3 acquittal.

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

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

13 JUSTICE ALITO: Well, to pick up on
14 that --

15 CHIEF JUSTICE ROBERTS: Well, but --

16 JUSTICE ALITO: I'm sorry.

17 CHIEF JUSTICE ROBERTS: Sorry.

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

1 more.

2 Is that your understanding too?

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

9 JUSTICE ALITO: Well, I -- I believe
10 -- and I -- I stand ready to be corrected if I'm
11 wrong -- but that's the rule in Missouri, Kansas
12 --

13 MR. SIMPSON: It -- it --

14 JUSTICE ALITO: -- Arizona.

15 MR. SIMPSON: I -- I -- it --

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

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

22 MR. SIMPSON: Yes.

23 JUSTICE ALITO: If that is the rule,
24 then would it be a violation of double jeopardy
25 for this to occur? The judge violates -- the

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

9 MR. SIMPSON: Once the verdict had --

10 JUSTICE ALITO: Would you draw a
11 distinction between those two situations?

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

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

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

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

14 MR. SIMPSON: And, Justice Kagan, that
15 is not our position. Our position is that once
16 the jury returns the verdict, that -- that that
17 double jeopardy protection is triggered, that
18 the jeopardy has ended.

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

25 Now that doesn't have to be decided in

1 this case.

2 JUSTICE ALITO: Well, do you have -- I
3 mean, you argue that a state can't take what's
4 really an acquittal and put some other label on
5 it --

6 MR. SIMPSON: Yes.

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

13 MR. SIMPSON: The repugnant -- oh, oh,
14 the --

15 JUSTICE ALITO: A state can't have a
16 rule that says the trial judge is not to accept
17 inconsistent verdicts --

18 MR. SIMPSON: I am not --

19 JUSTICE ALITO: -- or repugnant
20 verdicts. That's a violation of double
21 jeopardy.

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

1 JUSTICE ALITO: Another related
2 question. This is my other point of concern
3 about this case. You seem to agree in your
4 reply brief or at least you don't contest the
5 proposition that if a jury returns inconsistent
6 verdicts or repugnant verdicts on the same
7 count, the Double Jeopardy Clause does not
8 prohibit the judge from saying, no, you can't do
9 that, go back and deliberate some more.

10 Is that a violation -- is that
11 correct, that's not a violation of double
12 jeopardy?

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

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

25 JUSTICE ALITO: So --

1 JUSTICE GORSUCH: Did --

2 JUSTICE ALITO: -- what principle
3 distinguishes -- one more question along these
4 lines. What principle distinguishes the
5 situation where there are inconsistent jury
6 determinations on one count from the situation
7 where there are logically irreconcilable jury
8 determinations on two counts?

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

14 MR. SIMPSON: Now, the -- the
15 difference, Justice Alito, is that double
16 jeopardy has always been analyzed on an
17 offense-by-offense basis. So the question is --
18 is, was there a verdict on the particular
19 offense?

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

25 What -- what the Court can't do in

1 that circumstance is to look at the content of
2 two verdicts and say we're going to compare the
3 jury's findings on this count with its findings
4 on this separate offense and based on an
5 analysis of the contents --

6 JUSTICE KAVANAUGH: Is there a -- is
7 there a logical principle, though, that explains
8 that, other than you just said it's always been
9 that way?

10 MR. SIMPSON: In -- in -- in terms of,
11 Justice Kavanaugh, in -- in terms of?

12 JUSTICE KAVANAUGH: Offense by offense
13 versus, as Justice Alito says, one count.

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

20 JUSTICE GORSUCH: I -- I -- I -- I --

21 MR. SIMPSON: Each count is a
22 different crime, so, here --

23 JUSTICE GORSUCH: -- I had thought --
24 I had thought the distinction was -- was rather
25 more simple than that. I -- I had one of those

1 cases on the Tenth Circuit where the jury --

2 MR. SIMPSON: Yes, Shippley.

3 JUSTICE GORSUCH: -- the jury came
4 back on one count and said guilty and not
5 guilty.

6 MR. SIMPSON: Yes.

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

9 MR. SIMPSON: Yes.

10 JUSTICE GORSUCH: You've not returned
11 a verdict of acquittal. You've -- you've also
12 returned a verdict of guilty.

13 MR. SIMPSON: Yes.

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

19 MR. SIMPSON: Exactly, Justice
20 Gorsuch. And -- and the opinion you wrote in
21 the Shippley case didn't reach the double
22 jeopardy issue.

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

25 (Laughter.)

1 MR. SIMPSON: I -- I -- I -- I -- you
2 did say it about three times.

3 JUSTICE GORSUCH: Well --

4 JUSTICE KAVANAUGH: How -- how --

5 JUSTICE JACKSON: And isn't -- isn't
6 --

7 JUSTICE KAVANAUGH: -- how -- how can
8 a --

9 JUSTICE GORSUCH: -- about four times.

10 JUSTICE KAVANAUGH: -- how can a --
11 defendant be both sane and insane?

12 MR. SIMPSON: It cannot be.

13 JUSTICE JACKSON: But -- but isn't the
14 principle that we have juries that are -- their
15 decision-making is sort of inviolate? In other
16 words --

17 MR. SIMPSON: Yes.

18 JUSTICE JACKSON: -- the jury can
19 nullify on a particular decision. We don't go
20 back and try to figure out the jury's thinking
21 with respect to inconsistent verdicts across
22 different counts --

23 MR. SIMPSON: Yes.

24 JUSTICE JACKSON: -- because they can
25 do whatever they want. That has been sort of a

1 time immemorial principle with respect to jury
2 deliberations, right?

3 MR. SIMPSON: Yes, Justice Jackson,
4 and that's exactly why we propose this test of
5 looking at the contents. What the State can't
6 do and what -- what it's -- is seeking to do
7 here is to look at the contents of the jury's
8 findings on two different crimes and say we're
9 going to compare those after the fact and throw
10 out the acquittal.

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

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

23 JUSTICE KAVANAUGH: Right.

24 MR. SIMPSON: No different from a
25 repugnant verdict. It -- it -- it -- that can't

1 be right. But this Court has consistently held
2 you can't look at it after the fact.

3 JUSTICE KAVANAUGH: And we allow -- I
4 guess the principle, we allow juries to
5 compromise in ways that are maybe not completely
6 logical, but when it gets down to one count,
7 they can't do guilty and not guilty. That's not
8 a acceptable compromise. Is that --

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

11 JUSTICE KAVANAUGH: That's not even a
12 compromise at all.

13 MR. SIMPSON: -- they haven't rendered
14 a verdict on the charge.

15 JUSTICE KAVANAUGH: Yeah.

16 MR. SIMPSON: So, here, for example,
17 the charge is malice murder. If they come back
18 and say guilty and not guilty, you don't know
19 what the jury did.

20 JUSTICE KAVANAUGH: Right.

21 JUSTICE SOTOMAYOR: You seem to have
22 accepted a premise -- you seem to have accepted
23 a premise that I'm doubtful about, which is you
24 can't be insane on one count and not insane on
25 another. But malice murder has a different mens

1 rea than assault, correct?

2 MR. SIMPSON: It -- it does, yes. It
3 --

4 JUSTICE SOTOMAYOR: And so you can be
5 not guilty by reason of insanity with respect to
6 a malice murder because you have to be able --
7 have mental capacity enough to form that intent,
8 but that's different than the assault intent,
9 correct? The assault intent only requires you
10 to injure. And this man could have had that.
11 He was delusional below -- delusional about the
12 reasons he was causing pain, but he knew he was
13 causing pain, correct?

14 MR. SIMPSON: The -- the elements of
15 the charges are different. And under Georgia
16 procedure, though, the State had to prove the
17 elements of each of those crimes to obtain --

18 JUSTICE SOTOMAYOR: What I'm saying is
19 they're not necessarily --

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

21 JUSTICE SOTOMAYOR: -- you're buying
22 the other side's argument that --

23 MR. SIMPSON: -- on -- on these facts,
24 we believe that the -- the -- that -- that they
25 are, in fact, inconsistent repugnant verdicts

1 because insanity is an affirmative defense in
2 Georgia, the defendant has to prove it by a
3 preponderance of the evidence, and, here, there
4 was one single episode.

5 Now, on different facts -- and -- and,
6 in fact, the Georgia Supreme Court in -- in
7 McElrath talks about a different case in which
8 you could be sane -- a -- a defendant could be
9 sane and insane at -- at different times. I
10 believe that one was shooting one person and
11 then going down the hall --

12 JUSTICE SOTOMAYOR: Yeah.

13 MR. SIMPSON: -- and shooting a
14 different person. But, here, it -- it --
15 because the issue is the affirmative defense,
16 it's exactly the same as to the three charges.

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

25 And, Justice Jackson, your point's

1 exactly right, you can't go back and -- and --
2 and question that. Once the jury comes back and
3 says not guilty, that's the end of it. And the
4 different --

5 JUSTICE BARRETT: But what are --
6 counsel, what are the limits on that? Because
7 the states can set some procedural parameters,
8 right?

9 MR. SIMPSON: Absolutely.

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

14 MR. SIMPSON: Yeah.

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

21 Does that count as a mistrial where
22 jeopardy doesn't --

23 MR. SIMPSON: Well -- well, what --
24 what -- what the Court has held, this Court has
25 held, is that in the mistrial context, it -- it

1 -- if -- there has to be management --

2 JUSTICE BARRETT: Well, no, I
3 understand the rule about mistrial --

4 MR. SIMPSON: Okay.

5 JUSTICE BARRETT: -- but I guess what
6 I'm saying is there, you know, the -- the judge
7 just waits, but the rule says, you know, at six
8 hours, it's a line, it's a mistrial, but the
9 jury does still come back and return a verdict
10 of acquittal. It's just that it violates this
11 procedural requirement.

12 Which side of the line does that fall
13 on? I mean, the jury's returned a verdict of
14 acquittal, but state law says it just doesn't
15 count if the jury's deliberated for more than
16 six hours.

17 MR. SIMPSON: Well, one of the
18 interests protected by the Double Jeopardy
19 Clause is the defendant's right to have a
20 decision by the jury that's empaneled. And so I
21 think the question would be, is a six-hour
22 period that automatically triggers a mistrial so
23 unreasonable that, in fact, violates double
24 jeopardy?

25 I -- I would think it would. It's a

1 judgment call as to how long. But the -- that
2 would be the issue. The -- can a state deprive
3 the defendant of his right, her right, to have a
4 decision by the particular jury that was
5 empaneled?

6 JUSTICE BARRETT: So what kinds of
7 procedural requirements can a state impose?

8 MR. SIMPSON: They have very broad
9 discretion, as I said, subject to due process
10 and right to jury trial, et cetera, but
11 evidentiary, we don't -- if you look at the
12 amicus brief here, we don't question evidentiary
13 rule -- rules can be set. Does the -- all of
14 the jurors sign the form or just the foreperson?
15 Do you poll the jury? Hours that are
16 deliberated? All -- all of those procedural
17 points.

18 And the test that we think captures it
19 is looking at the contents, and that -- that's
20 the red line that the State crossed here, is
21 that they acknowledged -- the -- the Georgia
22 Supreme Court acknowledged it had two verdicts
23 in front of it, no question. It had the --
24 Justice Pinson in his concurrence dubitante
25 pointed out it's a fiction, it's a legal fiction

1 here, that we have two verdicts and we're going
2 to look at the contents, compare them and, based
3 on that comparison, refuse to honor a jury
4 verdict.

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

8 JUSTICE BARRETT: Thank you.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

11 Justice Thomas?

12 Justice Alito?

13 Justice Gorsuch?

14 Justice Jackson?

15 Okay. Thank you, counsel.

16 MR. SIMPSON: Thank you.

17 CHIEF JUSTICE ROBERTS: General
18 Petrany.

19 ORAL ARGUMENT OF STEPHEN J. PETRANY

20 ON BEHALF OF THE RESPONDENT

21 MR. PETRANY: Mr. Chief Justice, and
22 may it please the Court:

23 Petitioner Damian McElrath assumes
24 again and again that there was a verdict in this
25 case, but that's simply not true according to

1 state law as determined by Georgia's highest
2 court. Under Georgia's narrow, sensible
3 repugnancy rule, a jury cannot issue special
4 affirmative findings that facially contradict
5 each other. These incoherent, contradictory
6 statements do not constitute a verdict in the
7 first place. They don't resolve the factual
8 inquiry.

9 In practice, this rule means a jury
10 cannot declare a man both sane and insane at the
11 exact same time with respect to the exact same
12 act, as the jury purported to do here. That's
13 why the Georgia Supreme Court held there was no
14 verdict, no acquittal, and no convictions.

15 McElrath does not challenge that
16 underlying Georgia Supreme Court decision,
17 which, of course, benefited him, and he doesn't
18 explain why we should ignore it now, why we
19 should assume that there was a verdict, even
20 though state law tells us there wasn't.

21 To the contrary, you have to look to
22 the underlying state law to identify whether
23 there is some final verdict or judicial order
24 that could even potentially terminate jeopardy
25 in the first place. And, here, because there's

1 no verdict, there's no termination of jeopardy,
2 then the Double Jeopardy Clause doesn't apply.

3 Now other states can have different
4 rules about verdicts, but I think that Georgia's
5 repugnancy rule, if anything, is the most
6 sensible way of responding to a very rare set of
7 circumstances. It's a generally pro-defendant
8 rule that ensures the parties obtain an actual
9 determination of the critical facts. And the
10 critical fact of McElrath's sanity was not
11 determined here. Therefore, he can be retried.

12 I welcome the Court's questions.

13 JUSTICE THOMAS: If you only had one
14 charge here, malice murder, would there have
15 been a verdict?

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

18 JUSTICE THOMAS: Well, but -- just --

19 MR. PETRANY: -- but yes.

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

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

24 JUSTICE THOMAS: So, if that's -- if
25 this constitutes a verdict if there were only

1 one, why does it not constitute a verdict when
2 there are two?

3 MR. PETRANY: Because Georgia does not
4 ascribe to the legal fiction that the jury is
5 finding different facts when they're looking at
6 the exact same --

7 JUSTICE THOMAS: No, that's not what
8 it's -- it's -- so you have a verdict. You say
9 that if there -- if it's only malice murder that
10 we're concerned about, that you would have a
11 verdict here.

12 MR. PETRANY: If that was -- yes, if
13 that was all that was in the case, if that was
14 the only thing going on, yeah, I don't see any
15 --

16 JUSTICE THOMAS: And just everything
17 in the case is exactly the same, except there's
18 only one charge.

19 MR. PETRANY: Yeah.

20 JUSTICE THOMAS: Would this constitute
21 a verdict?

22 MR. PETRANY: Yeah, I think, under
23 Georgia law as it exists today, that that --
24 that would be a verdict, yes.

25 JUSTICE THOMAS: So the problem is

1 that up to that point, until you void the
2 verdict, you have what constitutes a verdict.
3 It's not procedurally defective. There's not a
4 jurisdictional problem. You have a verdict that
5 is subsequently voided because it's inconsistent
6 with a separate charge.

7 And I don't know how you get around
8 the notion -- and -- and that requires you, by
9 the way, to look at the substance of the
10 verdict. And I don't know how you get around
11 the notion that before you can do that, there
12 actually is a verdict.

13 MR. PETRANY: Well, no, Your Honor, to
14 be clear, here, in this case, there was never a
15 verdict because, again, the jury issued
16 something simultaneously. It said at the same
17 time, speaking out of both sides of its mouth,
18 he's both sane and insane at the same time.

19 And these were special findings. As
20 we explain in our brief, there's a big
21 distinction between a jury coming back with a --
22 you know, a general verdict of not guilty,
23 which, you know, a jury has the authority to --
24 to do that for any reason or no reason at all --

25 JUSTICE SOTOMAYOR: How do you define

1 general verdict? Guilty, not guilty of both
2 counts?

3 MR. PETRANY: Well, a general verdict
4 --

5 JUSTICE SOTOMAYOR: I don't know,
6 isn't he --

7 MR. PETRANY: -- of not guilty just
8 says not guilty and you're done basically. And
9 it doesn't -- it doesn't go into any special
10 findings as to what the --

11 JUSTICE SOTOMAYOR: The -- but the
12 only special finding here had to do with his --
13 with whether it was excusable because of mental
14 illness or because of insanity, correct?

15 MR. PETRANY: Yeah, the -- the special
16 findings in this case --

17 JUSTICE SOTOMAYOR: It's not a special
18 finding with respect to the one charge that
19 changes any of the facts of the acquittal.

20 MR. PETRANY: Well, no, Your Honor,
21 the special finding is that he was insane. If
22 he had not been insane, he would have been
23 guilty of -- of --

24 JUSTICE JACKSON: But that wasn't the
25 question that was posed to the jury standing

1 alone. I mean, I understand your argument if
2 you're saying the jury was asked is this person
3 insane, and their answer was simply yes in one
4 situation or with respect to one count and no
5 with respect to the other.

6 But the jury was asked about the
7 elements of a particular crime and whether he
8 was guilty or not guilty. So their verdict was
9 not guilty by reason of insanity with respect to
10 one of them and guilty, right --

11 MR. PETRANY: Well, Yes, Your Honor,
12 but --

13 JUSTICE JACKSON: -- with respect to
14 the other?

15 MR. PETRANY: -- but not guilty by
16 reason of insanity by definition means that you
17 did commit the crime and the only reason that we
18 have said you're not guilty is because you are,
19 in fact, insane.

20 JUSTICE JACKSON: I understand.

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

22 JUSTICE JACKSON: But what do we do
23 with the not guilty part of it? I mean, the
24 jury was not asked a special -- on a special
25 verdict form just the pure question of insanity

1 in the way you sort of set it up at the
2 beginning.

3 MR. PETRANY: Well, actually, as a
4 practical matter, Your Honor, I think that --
5 that they were. I mean, this -- even setting
6 aside the -- the more mundane aspects of this
7 case where the entire trial was about sanity,
8 they were given a special verdict form that has
9 four options. The judge did, in fact, instruct
10 them that they could say not guilty. They
11 always had that authority.

12 So it's not like Georgia is somehow
13 trying to force the jury into, you know, giving
14 up its general power to just say not guilty for
15 any reason. And part of the -- the reason that
16 we think this case is different from, you know,
17 the in -- you know, the seemingly facially
18 inconsistent verdict cases is precisely because,
19 in this case, the jury didn't do that. It
20 actually made special determinations about --

21 JUSTICE GORSUCH: Counsel?

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

23 JUSTICE GORSUCH: Just looking through
24 the briefs, I -- I didn't see a -- another state
25 that has a scheme like Georgia's that allows an

1 acquittal to be rendered invalid based on its
2 repugnancy with other guilty verdicts. Is that
3 correct?

4 MR. PETRANY: As far as I'm aware,
5 there's no state that has addressed this
6 particular issue, Your Honor. I mean, these are
7 rare circumstances. It's not ordinary for a
8 jury to issue special findings on a particular
9 issue --

10 JUSTICE GORSUCH: I'm -- I'm -- I'm
11 just --

12 MR. PETRANY: -- going both ways, but,
13 yes --

14 JUSTICE GORSUCH: -- generally
15 speaking.

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

18 JUSTICE GORSUCH: This is it?

19 MR. PETRANY: -- other state that has
20 addressed this issue at all.

21 JUSTICE GORSUCH: Now shouldn't that
22 tell us something?

23 (Laughter.)

24 JUSTICE GORSUCH: The 230 years in
25 this -- in this country's history, we have

1 respected acquittals without looking into their
2 substance and without looking into how they fit
3 with other counts and said a jury is a check on
4 judges, it's a check on prosecutors, it's a
5 check on overreach, it's part of our democratic
6 system, and we do not ever talk about whether
7 they make sense to us.

8 They may be products of compromise.
9 They may be inconsistent with verdicts on other
10 counts. We don't question them. And this is
11 the first time this issue has arisen here.
12 Shouldn't that tell us something?

13 MR. PETRANY: I don't think so, Your
14 Honor. As we point out in our briefs, the fact
15 that Georgia has a different rule from other
16 states -- and, again, I would hasten to add it's
17 not clear that the rule is different so much as
18 other states just haven't addressed this issue.

19 In a lot of states, you might not have
20 the same sort of defenses or states of mind that
21 would so easily come into conflict, although,
22 again, here, I think this is a rare
23 circumstance.

24 But, to get to your point, absolutely,
25 a jury's general verdict of acquittal is one of

1 the most sacrosanct things in American
2 constitutional law, and we're not trying to
3 undermine that at all.

4 But I do think it's important to point
5 out that that's simply not what happened here.
6 They had the option to do that, and, instead,
7 they gave completely contradictory answers about
8 a single factual question.

9 JUSTICE GORSUCH: Well, and -- and
10 that raises the question about Missouri's brief,
11 for example, and their concern seems to be
12 within a single count that some states do that,
13 and the case I had, you know, where you just
14 couldn't tell what the jury's verdict was on a
15 count and send the jury back to figure it out.

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

17 MR. PETRANY: Well, I think the
18 principle of the matter arguably extends there.
19 I mean, I -- I --

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

22 MR. PETRANY: Well, I think -- I think
23 the logic is the same. The only difference
24 between --

25 JUSTICE GORSUCH: No, the logic isn't

1 the same. I mean, I -- I'm sorry, I just have
2 to reject that. Assume I disagree with that --

3 MR. PETRANY: Okay.

4 JUSTICE GORSUCH: -- because the logic
5 set for 230 years is a verdict on a count is
6 sacrosanct, okay?

7 Here, we're dealing with not -- not
8 two counts, we're dealing with one count, and we
9 cannot tell what the jury did. The judge
10 doesn't know what to do. He doesn't have his
11 instructions from the jury.

12 MR. PETRANY: Well, Your Honor, I want
13 to be clear about the 230 years. Every time the
14 Court has talked about this and every time the
15 Court has made rulings about this, it's always
16 talking about a general verdict of acquittal.

17 It's not talking about a circumstance
18 where you have special findings that did not
19 have the same sort of status, the same sort of
20 --

21 JUSTICE GORSUCH: Why does that make a
22 difference? An acquittal is an acquittal is an
23 acquittal --

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

25 JUSTICE GORSUCH: -- since time

1 immemorial. Now you're telling us an acquittal
2 isn't an acquittal if it's a special verdict
3 form?

4 MR. PETRANY: No, what I'm saying is
5 it's not an acquittal if the jury did not, in
6 fact, resolve the factual question that
7 supposedly underlies that acquittal. And in
8 this particular case, we know because they said
9 two contradictory things that they didn't, in
10 fact, resolve that particular factual point.

11 JUSTICE GORSUCH: We also know that
12 the jury was polled. They stood by this
13 verdict. We know that there were no objections
14 contemporaneously by Georgia prosecutors. And I
15 think we also know that the attorney general at
16 least below said that acquittal is an acquittal.

17 MR. PETRANY: Well, no. What the
18 attorney -- well, the -- what the brief below
19 said -- and it was a tangential footnote that
20 really wasn't getting into the issue -- is that
21 where there's an acquittal, double jeopardy
22 applies. And we're not contesting that at all,
23 much like McElrath here today and throughout his
24 briefing, he just sort of assumed --

25 JUSTICE GORSUCH: I thought -- I

1 thought the attorney general said that retrying
2 Petitioner on the murder count would, of course,
3 violate double jeopardy.

4 MR. PETRANY: Assume -- yeah, on the
5 basis that there was an acquittal. But that
6 brief didn't really get into that issue. And
7 the primary brief in the case, the -- the DA
8 brief, did reject that particular position.

9 But I'd also say, going back to, well,
10 did Georgia, you know, have a problem with this
11 at the time, well, no, because Georgia wanted
12 everything to stay the way it was, of course.

13 From Georgia's perspective, from the
14 prosecution's perspective, it was -- it got what
15 it wanted, right? There was, in fact, a -- a --
16 you know, in -- in its -- to the extent that you
17 accept these as verdicts, to the extent you
18 don't accept Georgia's repugnancy rule, McElrath
19 would be in prison for life.

20 So the only -- the only one who had an
21 incentive to challenge this was McElrath, and he
22 did, and his theory was --

23 JUSTICE GORSUCH: It's not unusual --

24 MR. PETRANY: -- well, these are
25 repugnant verdicts.

1 JUSTICE GORSUCH: -- for a defendant
2 to -- to challenge the guilty verdicts.

3 MR. PETRANY: Oh, absolutely. I'm not
4 -- I'm not --

5 JUSTICE GORSUCH: I mean, that's what
6 appeals all are about. Are you saying -- I -- I
7 mean, maybe you can get rid of the repugnancy
8 rule allowing him to say that the guilty
9 verdicts are repugnant given the -- the
10 acquittal, but I don't see how it works the
11 other way around.

12 MR. PETRANY: Well, the point is that
13 his theory was a Georgia rule that as the
14 Georgia Supreme Court, the highest arbiter of
15 Georgia law, says, says there's no verdict at
16 all. That's the theory behind this rule. And
17 if there is a verdict, the rule doesn't really
18 make sense anymore.

19 JUSTICE KAGAN: But, General, before
20 our inconsistency cases, there might have been a
21 lawyer standing where you were saying our state
22 has decided that when a jury comes back with two
23 inconsistent verdicts, we're going to say that
24 there's no verdict at all because, after all,
25 how can there be a verdict if there's

1 inconsistency.

2 And you're saying that there's -- and
3 we rejected that out of hand and in numerous
4 cases. So you're saying that there's a
5 difference between that and this repugnancy
6 situation. I guess I just don't understand what
7 it is, so could you explain it to me a little
8 bit more?

9 MR. PETRANY: Yes, Your Honor. I --
10 the first point that I would make is that all of
11 those inconsistent verdicts cases assume that
12 there are verdicts to begin with. In none of
13 them was the Court looking at, well, was there a
14 --

15 JUSTICE KAGAN: But -- but is -- but a
16 -- but, again, a -- a lawyer could have come up
17 here and say, as a matter of state law, we're
18 going to just say that there's not a verdict
19 when the verdict is -- when the supposed verdict
20 is inconsistent with another one.

21 MR. PETRANY: No, I --

22 JUSTICE KAGAN: So, you know, the
23 State could have made the exact same argument.
24 And, I -- surely, we decided a -- against that
25 argument --

1 MR. PETRANY: Well --

2 JUSTICE KAGAN: -- when we -- when we
3 had -- when we decided those cases.

4 MR. PETRANY: Well, my point was
5 simply that no one was making that argument.
6 Powell itself, and the -- the paradigm case on
7 this --

8 JUSTICE KAGAN: If somebody had been
9 making that argument, surely, we would have
10 rejected this.

11 MR. PETRANY: Yes, I think you would
12 have, but I think the reason that you would have
13 -- and I think that this Court has said this --
14 it said it in Smith, it's -- last year, it's
15 said it elsewhere -- is that there's something
16 special about a general verdict of not guilty.
17 It said this in Powell.

18 This is something that goes back
19 hundreds of years, that a jury's authority to
20 say not guilty even if we believe that he is, in
21 fact, guilty is something that goes, you know,
22 prior to the founding and beyond, and --

23 JUSTICE KAGAN: I -- I mean, it seems
24 --

25 JUSTICE BARRETT: Even if --

1 JUSTICE KAGAN: -- to me that it's
2 the -- the exact same thing really. I mean,
3 when -- when a jury comes back with inconsistent
4 verdicts, we don't really know what happened. I
5 mean, one possibility of what happened is the
6 jury made a humdinger of a mistake.

7 And another possibility of what
8 happened is that the jury made no mistake at all
9 but instead decided to compromise something out
10 or decided to show leniency of a kind that it is
11 within the right of a jury to show. And so too
12 here, the jury might have made a humdinger of a
13 mistake in the way that you're suggesting, but,
14 in addition, the jury might have decided to
15 compromise things out or to show leniency.

16 And in that sense, we would be
17 intruding into the jury's deliberations as much
18 in your case as in the inconsistency cases if we
19 adopted your rule.

20 MR. PETRANY: No, and the reason I
21 don't think that that's true, Justice Kagan, is,
22 when a jury issues a verdict of -- a general
23 verdict of not guilty, you don't know what the
24 jury did and you can't look into why. Here, you
25 still aren't going to look into why, but they

1 told you what they did. They said we found him
2 both guilty -- or, sorry, both sane and insane.

3 And so it's just a very different
4 thing. We're not hunting for some sort of
5 internal thoughts of the jury or something like
6 that. We have in front of us two different
7 things that the jury said about the same
8 question.

9 JUSTICE BARRETT: But isn't it --

10 JUSTICE KAGAN: We found him both sane
11 on one count and insane on another count, one of
12 which led to a guilty verdict and the other of
13 which led to an acquittal because -- let's
14 imagine -- we wanted to compromise. It's the
15 exact same thing that you're asking us to look
16 into, which we have always said we will not look
17 into.

18 MR. PETRANY: Well, I disagree,
19 Justice Kagan, because I think, in the -- in the
20 case of a general verdict of not guilty, as this
21 Court has said many times over the years and,
22 again, even pre-founding, there's something
23 special about that authority, as this Court has
24 said, for instance, in Gaudin, a case that we
25 cite, courts by the time of the founding

1 couldn't force juries to issue special findings
2 precisely because there was something special
3 about this general verdict of not guilty. It
4 allowed the jury the space to say you are not
5 guilty and we're not going to tell you why.

6 But, in this circumstance, although
7 the jury had the authority to do that, was
8 instructed on doing that, they didn't do that.
9 Instead, they came out and said: We think he's
10 sane and insane at the same time.

11 So I do think that that's a -- that's
12 a fundamentally different out -- you know, issue
13 from the jury. And I think, when a court looks
14 at that and says, actually, you've decided the
15 same issue in two different ways, I think it is
16 a bit legally fictitious to say: Well, they
17 were really deciding two different factual
18 issues.

19 I mean, I know it's a -- at least a
20 little bit legally fictitious because, you know,
21 the -- this Court, you know, applies collateral
22 estoppel rules to jury findings on a particular
23 count. So we all acknowledge that there really
24 is one fact that's being decided here, which is
25 his insanity at the time of the crime, and the

1 jury said yes and no.

2 And just -- just to give one example
3 of why I think McElrath's argument here is -- is
4 a little bit formalistic, suppose the jury form
5 were slightly different and suppose it had an
6 option for guilt and then it had a different
7 option for insanity, and they said guilty on all
8 counts on insanity -- or on -- on the guilt
9 question, but then, on insanity, they said yes
10 and no. I mean, that's -- that's the same
11 circumstance that we're in here. It's -- it's
12 not fundamentally different. It's a jury not
13 actually deciding whether or not they have come
14 to a conclusion. That --

15 JUSTICE BARRETT: General, are you
16 saying that you can never have plainly
17 inconsistent general verdicts?

18 MR. PETRANY: As a fact --

19 JUSTICE BARRETT: Are you just saying,
20 I mean, because it kind of sounds like you're
21 saying --

22 MR. PETRANY: Yes, as a factual --
23 yes, as a factual matter, yes, I actually think
24 that's true because you could never know -- the
25 jury might have just said, yeah, the -- you're

1 -- you're guilty as sin, all the facts are
2 there, but we don't care, we're going to hold --
3 say not guilty anyway.

4 So you can never know that what they
5 did was factually inconsistent. They might have
6 just said, yeah, you did it all, but we're going
7 to let you off on this particular count. So I
8 think it's just a matter of -- of logic. You
9 can never know that two general verdicts are
10 absolutely inconsistent with one another.

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

16 JUSTICE JACKSON: But wasn't Justice
17 Gorsuch's point that even if we know that they
18 are inconsistent, so what? I mean -- the -- the
19 point is that we've said a jury can issue
20 inconsistent verdicts. So your -- your argument
21 seems to be, well, there's -- the distinction
22 that Justice Kagan was asking you about is that
23 in one situation, we don't know it's
24 inconsistent, and in another situation, this
25 situation, we do know.

1 Okay. I mean, fine. So it's
2 inconsistent. Why -- why does that mean that
3 the court gets to say you aren't able to do
4 that, jury? You -- you know, you can retry this
5 person or you have to set it up so he can be
6 retried because that's not a valid thing for the
7 jury to do.

8 MR. PETRANY: Well, two points, Your
9 Honor. The first is it's not -- you know, I'm
10 not speaking from nothing when I say that the
11 inconsistent verdicts cases are different
12 because we don't know what the jury has done.
13 This is what the Court has said. We don't know
14 what the jury has done.

15 But the second reason is I think the
16 reason that the jury can issue a -- a verdict of
17 not guilty, a general verdict of not guilty, and
18 a state can't say, oh, that's not really a
19 verdict because it -- it may or may not be
20 inconsistent with this other one is because of
21 the right to a jury trial and the fact that, as
22 this Court has explained on numerous occasions,
23 a jury always has that authority. A state can't
24 say you don't have the authority to issue this
25 general verdict of not guilty.

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

3 JUSTICE JACKSON: I guess my question
4 is why --

5 MR. PETRANY: -- that with special
6 verdicts --

7 JUSTICE JACKSON: -- I -- I guess my
8 question is why is it -- and I think your
9 argument is turning on this -- that a state can
10 tell the jury they have to be factually
11 consistent? So, even if I accept your
12 distinction that you are drawing with Justice
13 Kagan in that -- you know, in this particular
14 world, we have evidence that there's a factual
15 inconsistency with respect to the way they
16 rendered their verdicts, why is it okay for the
17 state to say you can't do that?

18 MR. PETRANY: Again, two points, Your
19 Honor. The first is I think that as a matter of
20 sensitivity, the jury is supposed to find facts.
21 If they don't find the facts, if they instead
22 tell you two opposite things, it makes a lot of
23 sense to say the jury has not, in fact, found
24 this fact.

25 But the second one I would say is it's

1 McElrath's burden to identify why a state can't
2 do this. It is the strong presumption that a
3 state does have authority over its own criminal
4 laws and procedures. And unless there's
5 something in the, you know, kind of fundamental
6 right to a jury trial or something like this --

7 JUSTICE JACKSON: Isn't it the
8 Constitution? I mean, I thought -- I -- I -- I -- I
9 guess my question is, isn't there -- isn't this
10 a matter of federal law as to whether or not
11 what is happening here is an acquittal or not an
12 acquittal for the purpose of the Double Jeopardy
13 Clause?

14 MR. PETRANY: So what a state order or
15 finding or something like that, the effect that
16 it has for the purposes of double jeopardy is
17 ultimately a federal question. But what the
18 state order is and whether it exists in the
19 first place, that's not necessarily a federal
20 question. And I would point the Court to Smith
21 versus Massachusetts and Sattazahn versus
22 Pennsylvania.

23 In Smith versus Massachusetts, the
24 Court did hold that this mid-trial judicial
25 acquittal triggered the Double Jeopardy Clause,

1 but it said, if Massachusetts had a rule that
2 this wasn't a final order, that it could be
3 revisited, that they could come back to it
4 later, well, then it wouldn't trigger double
5 jeopardy.

6 CHIEF JUSTICE ROBERTS: Well, so then
7 -- well, what if the state had a rule that the
8 foreman has to sign the verdict in blue ink, all
9 right, and he signed it in -- in black ink, and
10 the judge -- you know, it's supposed to be blue
11 ink; go back. He goes back, and then one of the
12 jurors changes their mind. Is that rule of
13 state law sufficient to constitute a
14 determination of when jeopardy was terminated?

15 MR. PETRANY: Yeah, I think, if -- if
16 the state has a rule --

17 CHIEF JUSTICE ROBERTS: You think it
18 is?

19 MR. PETRANY: Yeah. I think, if the
20 state has a procedural rule that has to be
21 complied with, and by the time that it was
22 complied with, the jury is -- is -- is not
23 unanimous, I think the general presumption would
24 be, yes, it's fine. If there's -- if there's
25 something about that that --

1 CHIEF JUSTICE ROBERTS: You wouldn't
2 think that that's a -- whatever, a frivolous
3 rule that shouldn't impede the federal law and
4 determination?

5 MR. PETRANY: So -- well, this is what
6 I was going to say, Your Honor. As this Court
7 has -- has said many times in many contexts,
8 whether it be property or last year in the
9 Elections Clause, at -- you know, at some point,
10 if a state -- if a state rule is so outside the
11 bounds of kind of normal reasonable legislation
12 or -- or adjudication, then you might say, well,
13 you're just evading, you know, some federal
14 right here. So, in the property context, you
15 can't just redefine a taking --

16 CHIEF JUSTICE ROBERTS: Well, I
17 suppose --

18 MR. PETRANY: -- via tax or something
19 like that. But --

20 CHIEF JUSTICE ROBERTS: Right, and --

21 MR. PETRANY: -- the presumption would
22 be, you know, the state is allowed to do this
23 unless there's some way in which it's evading
24 federal constitutional guarantees.

25 CHIEF JUSTICE ROBERTS: Well, and I

1 guess the argument would be, even in the context
2 of your understanding, that it's the only state
3 that has done this in 230 years, and maybe
4 that's outside the -- or -- normal
5 understanding.

6 MR. PETRANY: Yeah, so that is -- at
7 the very least, that's the right kind of
8 argument that McElrath should be making here,
9 but I -- the reason I reject that is because,
10 first of all, I don't -- I don't accept the
11 notion that no other state has ever had a rule
12 anything like this.

13 It's true that no other state appears
14 to have actually come across facts exactly like
15 this, but we point to examples in our brief, and
16 the Missouri amicus brief has others of kind of
17 similar situations, where they do, in fact, have
18 rules that appear at least similar or analogous
19 to -- to our rule here.

20 And we also point to cases like in the
21 Morgan article from before the founding where --
22 where cases -- especially where special verdicts
23 seemed to be inconsistent with even general
24 verdicts of --

25 JUSTICE KAVANAUGH: You -- you hang a

1 lot on the special findings being different from
2 a general verdict, but couldn't the inconsistent
3 or repugnant special findings be the product of
4 compromise or leniency?

5 MR. PETRANY: Well, I think that this
6 goes back to my answer to Justice Kagan earlier,
7 which is we don't look behind what the jury did
8 to sort of understand their motivation. So they
9 issued special verdicts that are completely
10 incomprehensible when put together.

11 JUSTICE KAVANAUGH: But they could --
12 couldn't they be the product -- I guess, to go
13 back to my question, couldn't they be the
14 product of compromise or leniency?

15 MR. PETRANY: Yeah, they could have --
16 I mean, what the jury did, I have no idea. I
17 wasn't in the room. And that's kind of the
18 point.

19 JUSTICE KAVANAUGH: But it -- but it
20 could be compromise?

21 MR. PETRANY: It's at least
22 theoretically possible that the -- the jury
23 wanted to do something like be lenient or
24 something like this. But the reason that a
25 general verdict is so different --

1 JUSTICE KAVANAUGH: Or -- or
2 compromise, right?

3 MR. PETRANY: Yeah, although I don't
4 take the court's -- I don't take the court's
5 mention of compromise in the inconsistent
6 verdicts cases to be sort of blessing that as
7 something that's like good for a jury to be
8 doing necessarily. It's just you can't tell.
9 They could have done any number of things.

10 JUSTICE GORSUCH: Well, the founders
11 certainly thought it was important. And, you
12 know, go back to the trial of John Zenger, he
13 was guilty as heck and yet the jury acquitted
14 him, and that was considered one of the great
15 moments in American history leading up to the
16 adoption of -- of the Seventh Amendment.

17 And so I guess Justice Kavanaugh and I
18 -- I think Justice Kagan have put their finger
19 on it. The minute you admit that it could be a
20 product of leniency or compromise, we're done,
21 aren't we?

22 MR. PETRANY: Well, Your Honor --

23 JUSTICE GORSUCH: Because then -- then
24 we have to respect that verdict regardless of
25 whether we think it's rational or what we would

1 do. It's supposed to be a check on -- on us
2 judges and you prosecutors.

3 MR. PETRANY: Your Honor, prior to the
4 founding, there was a period of time when courts
5 would try to sort of corral juries by forcing
6 them to issue special verdicts.

7 And the -- what came out of this was
8 that the way we were going to make sure your
9 right to a jury trial is always a check on the
10 executive, the legislative, whoever else, is by
11 making sure you can always get a general verdict
12 of not guilty.

13 JUSTICE GORSUCH: All right. I -- I
14 -- I --

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

17 JUSTICE GORSUCH: -- I -- I guess if
18 you'd answer the -- the question, though. The
19 moment you admit that you are -- that that
20 verdict could be a product of compromise or
21 leniency, why isn't that the end of the game?

22 MR. PETRANY: Because I don't think
23 that the jury necessarily -- and I don't think
24 the right to a jury trial includes the right for
25 the jury to try to issue completely

1 incomprehensible special findings to sort of
2 game out what they're doing. So, in this case,
3 for instance, --

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

7 MR. PETRANY: No, Your Honor, they
8 obviously do and they could have in this case
9 with a general verdict of not guilty. But, to
10 be clear, when they issued this, you know,
11 purported verdict, assume you accept it, it has
12 consequences for McElrath.

13 So it -- the -- the idea that the jury
14 can, you know, consign him to a mental health
15 hospital until he is, you know, determined not
16 to be dangerous anymore as sort of some version
17 of leniency I think is getting way outside of
18 the ordinary general verdict of not guilty as
19 the jury's ultimate --

20 CHIEF JUSTICE ROBERTS: Well, I'm
21 not -- that's one thing that, well, I'm
22 interested in your view on. You seem to say
23 this is different than inconsistent verdicts,
24 which could be explained by juror compromise,
25 leniency, whatever.

1 I don't know why the same thing
2 doesn't apply to repugnant verdicts. I don't
3 know that the jury necessarily would be as
4 sophisticated as the counsel today in explaining
5 what's a repugnant verdict versus what's an
6 inconsistent verdict. And after back and forth,
7 they might just -- it might be compromise.

8 Okay, we're going to say he's sane for
9 this and -- and guilty, he's not guilty by
10 reason of sanity, you know, this group is fine
11 with one, that group is fine with another.

12 I don't know that they thrashed
13 through the law about whether they would have to
14 be reconciled or not.

15 MR. PETRANY: Yeah, Your Honor, I
16 think that the reason a general verdict of not
17 guilty is different is because of leniency. I
18 don't think that a state is powerless to
19 basically say, no, you're not allowed to, like,
20 compromise by coming to completely
21 incomprehensible conclusions.

22 I do think a state is prohibited from
23 keeping a jury from issuing a general verdict of
24 not guilty because of the jury's historic
25 function as a check on the executive. And I

1 think, in this case, the jury had the authority
2 to do that. It had the power to do that. It
3 chose not to do that. Instead, it issued
4 special findings that nobody knows necessarily
5 the motivation, the internal motivation of the
6 jury for that. But what we know is what they
7 actually did.

8 JUSTICE SOTOMAYOR: I -- I -- you keep
9 talking about general and special verdicts, and
10 having tried so many cases, I think of special
11 verdicts as verdicts where you ask each element
12 of the offense separately, and then you come to
13 the judge then decides whether that's a guilty
14 or not guilty.

15 A general verdict is are you guilty or
16 not guilty but based on the elements -- based on
17 whatever special defenses. And almost always
18 you had is he guilty by reason of insanity or
19 not. That's what they did here, right, on the
20 malice murder?

21 MR. PETRANY: It was not guilty by
22 reason of insanity, yes.

23 JUSTICE SOTOMAYOR: Right. They
24 didn't ask did he have malice, the intent to
25 kill, did he kill this person, did he do -- they

1 just said is he guilty by reason of insanity or
2 guilty but with mental illness, correct, and
3 they just checked off which of the elements were
4 --

5 MR. PETRANY: Yeah, they had -- yes,
6 they had four options.

7 JUSTICE SOTOMAYOR: All right. So, in
8 Smith last year, we said an acquittal takes
9 place when there is a merits-related
10 "resolution," correct or not, of some or all of
11 the factual elements of the [crime] charged."

12 Here, the jury was given malice
13 murder. Some of the fact -- one of the factual
14 elements is the mental state, guilty by reason
15 of insanity or not. They said not. I don't
16 know how this doesn't fit Smith's definition of
17 what an acquittal is.

18 You want to call it a general verdict.
19 But Smith said all we're looking at is what the
20 jury did. And the jury said not guilty by
21 reason of insanity. You told Justice Thomas
22 that if it just stood alone that way, jeopardy
23 attached.

24 I still don't understand how you
25 unattach it simply because there's a second

1 charge with a potential inconsistency that you
2 now admit could have been by reason of jury
3 compromise.

4 CHIEF JUSTICE ROBERTS: Briefly,
5 counsel.

6 MR. PETRANY: Yeah, Your Honor, I
7 don't think states are prohibited from trying to
8 avoid incomprehensible compromises. I think
9 it's just leniency that they have to leave in
10 there with general verdicts of not guilty.

11 As far as whether this is a special
12 verdict or not, the Georgia Supreme Court
13 understood it that way. McElrath understood it
14 that way. You know, that was the basis of his
15 argument all the way along, including in his
16 plea and bar in this case.

17 And so the big difference ultimately
18 is that the jury always has the authority to
19 just say not guilty, we don't want you to be
20 guilty of this crime. I don't think there's any
21 historical or other support for the idea that a
22 jury must have the authority to issue
23 incomprehensible special findings.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel.

1 Rebuttal, Mr. Simpson?

2 JUSTICE KAVANAUGH: Chief.

3 CHIEF JUSTICE ROBERTS: Oh, I'm sorry,
4 I'm sorry, we skipped the --

5 (Laughter.)

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

7 (Laughter.)

8 CHIEF JUSTICE ROBERTS: Yeah. Excuse
9 me. Anything further, Justice Alito?

10 (Laughter.)

11 CHIEF JUSTICE ROBERTS: Justice?

12 JUSTICE KAVANAUGH: I -- I -- I do --
13 I do have some further. Sorry.

14 (Laughter.)

15 JUSTICE KAVANAUGH: If you do not
16 prevail in this case, I have two questions. One
17 is, can't Georgia going forward solve the
18 problem that you've identified by simply saying
19 that the guilty verdicts stand even if
20 repugnant?

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

1 Georgia accepts the basic idea that if
2 -- if these are seemingly inconsistent, we'll
3 just -- we'll just accept them as they are.

4 The basis for this rule was we don't
5 think these are verdicts at all. If this Court
6 says, yeah, they are, then I think basically
7 whether McElrath or the next person in his shoes
8 is just going to be stuck with the
9 life-in-prison conviction.

10 JUSTICE KAVANAUGH: Is that still
11 possible in this case?

12 MR. PETRANY: I -- yes, I think so. I
13 mean, obviously, it's going to be up to the
14 Georgia Supreme Court to figure out what to do
15 going forward, but the initial decision was
16 based on the idea that there was no verdict
17 here.

18 And so, if this Court were to vacate
19 and remand and say, no, there was a verdict
20 here, then we -- I -- presumably, the Georgia
21 Supreme Court would at least take seriously the
22 argument of, okay, well, then we just reinstate
23 the judgment because the United States Supreme
24 Court just said there was a verdict.

25 JUSTICE KAVANAUGH: Thank you.

1 CHIEF JUSTICE ROBERTS: Justice
2 Jackson?

3 Justice Jackson?

4 Thank you, counsel.

5 Mr. Simpson, rebuttal.

6 REBUTTAL ARGUMENT OF RICHARD A. SIMPSON

7 ON BEHALF OF THE PETITIONER

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

10 Justice Thomas, you're exactly right
11 that under Georgia law, each of these counts, if
12 it had been charged separately, would -- at --
13 at the verdict would be a final verdict under
14 state law. It's only by comparing them --
15 comparing them that you get to repugnancy.

16 It is true that Mr. McElrath appealed
17 in this case. He had the right to do that under
18 Georgia law. And going to Justice Kavanaugh's
19 question, under Powell, states may, as the
20 federal government does when there are
21 inconsistent acquittals and convictions, may
22 allow the -- the conviction to stand. They
23 can't touch the appeal. It's "may," not "must."
24 Many states throw out the conviction. It's --
25 it's a state choice at that level.

1 And there was the -- the -- the
2 Georgia Supreme Court in the Turner case in
3 2006, I believe, dealt with what it had said is
4 repugnant verdicts, and it did exactly that. It
5 let the acquittal stand, but it vacated the --
6 threw out the conviction.

7 We would hope that Georgia would
8 continue to follow that rule. It'll be its
9 decision, but there's nothing about a decision
10 by this Court that would require Georgia to
11 change its rule. And in the -- in the context
12 of Turner, it reached exactly the result of
13 allowing the -- the acquittal to stand and
14 throwing out the conviction.

15 In -- in terms of repugnancy, I -- I
16 think the key point, as the questions indicated,
17 there really isn't a principal difference.
18 Here, Mr. McElrath was acquitted of the most
19 serious charge, convicted of the lesser charge.
20 Could have been leniency, could have been
21 compromise. We don't -- we don't know why the
22 court reached -- I'm sorry, the jury reached
23 that verdict.

24 And then, finally, the reference to
25 issue preclusion. Where there's a conviction

1 and an acquittal, this Court has held there's --
2 the -- issue preclusion is not mandatory. So,
3 again, Georgia may but is not required to.

4 Unless there are additional questions,
5 I would yield the remainder of my time.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel.

8 The case is submitted.

9 (Whereupon, at 11:03 a.m., the case
10 was submitted.)

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