

Questions Awaiting Justices In 'Repugnant' Verdicts Hearing

By **Brook Dooley and Cody Gray** (November 2, 2023)

In recent years, the U.S. Supreme Court has agreed to hear at least one consequential white collar case every term, and the court often uses those cases to rein in aggressive prosecutorial theories.

Although the court's docket for its October term is still not fully set, this term is shaping up to be relatively light on white collar criminal law matters. Indeed, there is no case currently teed up for argument that squarely presents a substantive question of white collar criminal law.

There are, however, a number of cases this term that should be of interest to all criminal law practitioners.

One such case is *McElrath v. Georgia*,^[1] which presents the question of whether the double jeopardy clause of the Fifth Amendment bars prosecutors from retrying a defendant for an offense for which the jury returned a not-guilty verdict that was later vacated because it was irreconcilable with the jury's guilty verdict on other charges.

In 2017, petitioner Damian McElrath was charged with malice murder, aggravated assault and felony murder during the aggravated assault, in connection with the 2012 stabbing death of his adoptive mother.

At trial in the Cobb County Superior Court, McElrath asserted an insanity defense. At the trial's conclusion, the jury returned verdicts of guilty but mentally ill on the aggravated assault and felony murder charges, but a verdict of not guilty by reason of insanity on the malice murder charge.

A verdict of guilty but mentally ill finds that a defendant is mentally ill, but the illness is not severe enough to relieve them of criminal responsibility. By contrast, a verdict of not guilty by reason of insanity finds that, due to the defendant's insanity, the defendant is not criminally responsible for their conduct.

McElrath appealed the guilty verdicts and, in 2020, the Georgia Supreme Court held that the verdicts were so contradictory that they could not stand.^[2]

The court distinguished between verdicts that are inconsistent — such as finding a defendant not guilty of conspiracy to possess cocaine with the intent to distribute it, but guilty of the use of a telephone to facilitate such a conspiracy — and verdicts that are "repugnant," which require the jury to "make affirmative findings ... that logically or legally cannot exist at the same time."^[3]

The court held that the McElrath verdicts were repugnant because they required affirmative findings of two mental states that could not exist at the same time.

In short, the court wrote, "it is not legally possible for an individual to simultaneously be insane and not insane during a single criminal episode."^[4]



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The court then vacated the verdict of guilty but mentally ill on the aggravated assault and felony murder charges and, on its own initiative, the verdict of not guilty by reason of insanity on the malice murder charge.

After remand, McElrath filed a peremptory plea arguing that the double jeopardy clause of the Fifth Amendment should prevent the state from retrying him on the malice murder charge of which the jury had found him not guilty by reason of insanity.

The Cobb County Superior Court denied the plea, and in 2022, the Georgia Supreme Court affirmed, holding that "[b]ecause the verdicts were repugnant, both are rendered valueless."^[5]

Analogizing this to a mistrial after the jury is unable to reach a verdict, the court held that "the repugnant verdicts failed to result in an event that terminated jeopardy," and thus there was no Fifth Amendment bar to retrying McElrath.^[6]

In his brief, McElrath now asks the U.S. Supreme Court to reverse what he calls the "Georgia Supreme Court's repugnancy exception" to the double jeopardy clause.

He argues that the double jeopardy clause is an "ironclad" prohibition on retrying a defendant for a crime after they have been acquitted of that crime, and that this "inviolable" bar applies even when the acquittal is based on an erroneous foundation.

McElrath further cites to Supreme Court case law holding that the ban on retrial following an acquittal applies even when the acquittal is inconsistent with other verdicts returned by the jury. And, he argues that the line the Georgia Supreme Court drew between inconsistent and repugnant verdicts "is a distinction without a difference."

In turn, Georgia argues that McElrath's "argument is a direct hit on the wrong target" because the issue is not whether McElrath can be retried after an acquittal, but whether there was an acquittal in the first place.

And, as a matter of Georgia law, the state's argument continues, verdicts that are based on irreconcilable affirmative factual findings are not verdicts at all. Thus, according to the state, the double jeopardy clause is not implicated by a retrial.

Georgia goes on to argue that the line of cases involving inconsistent verdicts relied upon by McElrath is distinguishable because it involves general verdicts of acquittal, not contradictory affirmative findings.

As we look ahead to oral argument — set for Nov. 28 — and the court's opinion, several questions arise about the case and how the court might resolve it.

First, why did the court agree to hear McElrath in the first place?

The issue presented is a narrow one. Indeed, McElrath argues, and the state does not dispute, that Georgia is the only state that permits retrial under the circumstances presented in this case.

Furthermore, the decision to grant review does not align with the current court's generally pro-prosecution bent when it comes to questions of criminal procedure.

Based on a broad view of the court's criminal procedure jurisprudence, one might have expected the court to let the Georgia Supreme Court's opinion stand.

On the other hand, just last term, the court granted review in another double jeopardy case, *Smith v. U.S.*,^[7] and unanimously affirmed the U.S. Court of Appeals for the Eleventh Circuit's ruling that the double jeopardy clause does not bar a retrial after a guilty verdict is overturned following a trial in the wrong judicial district.

Second, can the court's unanimous decision last term in *Smith* shed light on how the court will rule in *McElrath*?

The opinion in *Smith* focused heavily on the text, history and precedent of the U.S. Constitution's venue and vicinage clauses, but there is language in the opinion for both sides in *McElrath* to look to for support.

On the one hand, the court emphasized that it is the substance of the jury's determination, not its form, that determines whether a retrial is permitted.

The court noted that "'culpability ... is the touchstone' for determining whether retrial is permitted under the Double Jeopardy Clause," and that "[w]hat constitutes an 'acquittal' is not to be controlled by the form of the judge's action."

Such statements align with *McElrath*'s argument that the jury in his case found him factually innocent of the malice murder charge, a result that Georgia law on repugnant verdicts cannot undo.

On the other hand, the *Smith* court framed the double jeopardy bar as applying to "general verdict[s] of not guilty," and noted the prohibition on inquiring into a jury's grounds for such a general verdict.

This language is consistent with the distinction Georgia draws between the court's precedent on inconsistent verdicts and the repugnant verdicts rule.

Third, which formulation of the issue presented will the court take up?

In their briefing, the parties are something like the proverbial ships passing in the night. *McElrath*'s argument focuses on whether the double jeopardy clause permits retrial after his verdict of not guilty was vacated. Georgia's argument, on the other hand, focuses on whether there was a verdict in the first place.

How the question is framed matters to the ultimate resolution.

McElrath has strong arguments that Supreme Court precedent holds that even inconsistent verdicts for acquittal bar retrial. And, the distinction on which Georgia relies to sidestep that precedent — i.e., the distinction between general not guilty verdicts and specific affirmative findings of fact — does not bear the weight that the state puts on it.

On the other hand, Georgia argues persuasively that states have wide latitude to determine the requirements for a valid verdict, and that the state's rule that repugnant verdicts are not verdicts at all falls within the permissible bounds of its authority.

Finally, what outcome can we expect in *McElrath*?

It can be difficult to anticipate how the court will rule in any case, and especially so in less politically and ideologically charged matters.

That said, the Supreme Court's strong precedent holding that even inconsistent and mistaken verdicts for acquittal bar retrial suggests that the court will reverse the Georgia Supreme Court's decision and bar the state from prosecuting McElrath on the malice murder charge of which he was acquitted.

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[1] No. 22-721.

[2] McElrath v. State, 839 S.E.2d 573 (Ga. 2020).

[3] Id. at 578.

[4] Id. at 580.

[5] McElrath v. State, 880 S.E.2d 518, 521 (Ga. 2022).

[6] Id. at 522.

[7] 599 U. S. ____ (2023).