No.

IN THE
Supreme Court of the United States

DAMIAN MCELRATH

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Georgia Supreme Court held that a jury's verdict of acquittal on one criminal charge and its verdict of guilty on a different criminal charge arising from the same facts were logically and legally impossible to reconcile. It called the verdicts "repugnant," vacated both of them, and subsequently held that the defendant could be prosecuted a second time on both charges. Does the Double Jeopardy Clause of the Fifth Amendment prohibit a second prosecution for a crime of which a defendant was previously acquitted?

RULE 14(B) STATEMENT

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

- *State v. McElrath*, No. 12-9-3972 (Ga. Super. Ct., Cobb Cnty.) (final order following jury verdict entered February 26, 2019; order denying double jeopardy plea in bar entered December 13, 2021).
- *McElrath v. State*, No. S19A1361 (Ga.) (judgment entered February 28, 2020).
- *McElrath v. State*, No. S22A0605 (Ga.) (judgment entered November 2, 2022).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Damian McElrath respectfully petitions for a writ of certiorari to review the judgment of the Georgia Supreme Court.

OPINIONS BELOW

The opinion of the Georgia Supreme Court (Pet. App. 1a-12a) is reported at 880 S.E.2d 518 (Ga. 2022). An earlier related opinion of the Georgia Supreme Court (Pet. App. 14a-36a) is reported at 839 S.E.2d 573 (Ga. 2020).

JURISDICTION

The Georgia Supreme Court entered its judgment on November 2, 2022. Pet. App. 9a. The Court has jurisdiction under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. V.

STATEMENT OF THE CASE

In 2017, Damian McElrath was tried, under Georgia law, for the crimes of malice murder, aggravated assault, and felony murder for attacking and killing Diane McElrath. Following trial, the jury rendered a split verdict. It found McElrath not guilty of malice murder by reason of insanity and guilty but mentally ill of felony murder and aggravated assault. *See* Pet. App. 14a-15a. McElrath appealed, claiming that the verdicts were "repugnant" under Georgia law and that the conviction must be reversed or vacated. *Id.*

Georgia law distinguishes between merely inconsistent verdicts and repugnant verdicts. According to the Georgia Supreme Court, "inconsistent verdicts" involve "seemingly incompatible" conclusions. *Id.* at 22a-25a. The "classic example," it said, is where the jury acquits a defendant on a predicate offense but then convicts on the compound offense. *Id.* at 22a. The Georgia Supreme Court has held that inconsistent verdicts should stand. *Id.* at 22a-25a.

By contrast, under Georgia law, repugnant verdicts occur when the jury must "make affirmative findings shown on the record that cannot logically or legally exist at the same time." *Id.* at 22a. In that circumstance, the verdicts are "a logical and legal impossibility" and both verdicts must be vacated and remanded for a new trial. *Id.* at 29a.

In McElrath's case, the Georgia Supreme Court held that the guilty but mentally ill and not guilty by reason of insanity verdicts are repugnant because "it is not legally possible for an individual to simultaneously be insane and not insane during a single criminal episode against a single victim." *Id.* Thus, the Georgia Supreme Court vacated both the conviction and the acquittal and remanded for a new trial on both charges. *Id.*

On remand, McElrath filed a plea in bar arguing that the Double Jeopardy Clause prohibited the State from subjecting him to a second trial on the malice murder charge because he had been acquitted on that charge at his first trial. *Id.* at 1a. The trial court denied his motion, *id.*, and McElrath appealed.

The Georgia Supreme Court affirmed. It acknowledged that "[t]he Fifth Amendment to the United States Constitution guarantees criminal defendants protection against double jeopardy" and that this Court has "previously noted" that "a fundamental principle of procedural double jeopardy is that a verdict of acquittal is an absolute bar to a subsequent prosecution for the same offense." *Id.* at 4a-5a (internal quotation and citation omitted). The court also recognized that "[u]nder the general principles of double jeopardy and viewed in isolation, the jury's purported verdict of not guilty by reason of insanity would appear to be an acquittal that precludes retrial, as not guilty verdicts are generally

inviolate." *Id.* at 6a (citing, *e.g.*, *Yeager v. United States*, 557 U.S. 110, 122 (2009)).

Nonetheless, the court held that the Double Jeopardy Clause does not preclude retrial of the malice murder charge. It distinguished between a verdict of acquittal that is repugnant to another verdict rendered in the same trial and a verdict of acquittal that is merely inconsistent with another verdict. *Id.* at 6a-7a. The court reasoned that repugnant verdicts are "valueless" and thus "void" because "[t]here is no way to decipher what factual finding or determination" the verdicts represent, and, here, "McElrath cannot be said with any confidence to have been found not guilty based on insanity any more than it can be said that the jury made a finding of sanity and guilt with regard to the same conduct." *Id.* at 7a.

On that basis, the Georgia Supreme Court held that "the repugnant verdicts failed to result in an event that terminated jeopardy," but instead were "akin to a situation in which a mistrial is declared after a jury is unable to reach a verdict." *Id.* As a result, the Double Jeopardy Clause of the Fifth Amendment does not forbid a second trial on the charge for which McElrath secured an acquittal at the first trial. *Id.* at 9a.

Justice Pinson concurred. He wrote separately to express two doubts: first, whether the acquittal in fact failed to terminate jeopardy because of its inconsistency with another verdict; and second,

whether the Georgia Supreme Court's conclusion could be reconciled "with the quite-absolute-sounding bar against retrying a defendant who has secured an acquittal verdict." *Id.* at 11a (Pinson, J., concurring dubitante) (citing *Bullington v. Missouri*, 451 U.S. 430, 445 (1981), and *Arizona v. Washington*, 434 U.S. 497, 503 (1978)).

REASONS FOR GRANTING THE WRIT

Allowing McElrath to be retried on the charge for which he was previously acquitted violates the Fifth Amendment's guarantee that no person shall be "twice put in jeopardy of life or limb." The Georgia Supreme Court's decision directly conflicts with this Court's precedents defining the scope of that guarantee, which protects the accused from being subject to a second trial on a charge for which he was acquitted, even if the acquittal is inconsistent with a simultaneously rendered conviction. No matter what label a court gives it, a so-called repugnant verdict is simply a particular type of inconsistent verdict.

This Court has long held that acquittals are final and unreviewable lest the accused be twice put in jeopardy for the same offense. *Ball v. United States*, 163 U.S. 662, 671 (1896) ("The verdict of acquittal was final, and could not be reviewed, on error or otherwise, without putting [the defendant] twice in jeopardy, and thereby violating the constitution."). Even an acquittal "based upon an egregiously erroneous foundation" enjoys the same protection. *Fong Foo v. United States*, 369 U.S. 141, 143 (1962). Accordingly,

once a defendant secures an acquittal, even if it is inconsistent with another verdict rendered in the same case, he cannot be subjected to a second trial for that offense without violating the Constitution. *Id.* ("[W]e cannot but conclude that the [Fifth Amendment's] guaranty was violated when the Court of Appeals set aside the judgment of acquittal and directed that the petitioners be tried again for the same offense."); *see also, e.g.*, *Bravo-Fernandez v. United States*, 580 U.S. 5, 8 (2016) (acknowledging that the Double Jeopardy Clause prevents a second prosecution even if the inconsistent conviction and acquittal verdicts "turn[ed] on the very same issue of ultimate fact"); *Arizona*, 434 U.S. at 503 ("[A]n acquitted defendant may not be retried even though 'the acquittal was based upon an egregiously erroneous foundation.'" (quoting *Fong Foo*, 369 U.S. at 143)). The Georgia Supreme Court's decision permitting McElrath to be retried on the acquitted charge thus directly conflicts with a legion of cases from this Court.

The issue presented is an important one, because the prohibition on exposing a person to double jeopardy is a fundamental constitutional right. If permitted to stand, the decision below would expand the circumstances under which people in Georgia may face a second trial on criminal charges far beyond what is permissible under this Court's precedents. This Court should grant review to correct the lower court's egregiously wrong decision.

I. The decision of the Georgia Supreme Court directly conflicts with this Court's precedents.

A. The Fifth Amendment states that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." This prohibition against double jeopardy protects the accused "from being subjected to the hazards of trial and possible conviction more than once for an alleged offense." *Green v. United States*, 355 U.S. 184, 187 (1957). "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense." *Id.*; *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 569 (1977).

This Court has repeatedly emphasized, in a wide range of circumstances, that the Double Jeopardy Clause "unequivocally prohibits a second trial following an acquittal." *Arizona*, 434 U.S. at 503; *see also Green*, 355 U.S. at 192 (quoting *Ball*, 163 U.S. at 671) (noting that the "Court has uniformly adhered to th[e] basic premise" that "once a person has been acquitted of an offense he cannot be prosecuted again on the same charge"); *United States v. Scott*, 437 U.S. 82, 90-91 (1978) (recognizing "two venerable principles of double jeopardy jurisprudence," including that "[a] judgment of acquittal . . . may not

be appealed and terminates the prosecution when a second trial would be necessitated by a reversal").

A second trial after acquittal is barred even if the acquittal "was based upon an egregiously erroneous foundation." *Fong Foo*, 369 U.S. at 143 (holding that even where acquittal appears "egregiously erroneous," it is final and cannot be reviewed "without putting [the defendant] twice in jeopardy, and thereby violating the constitution"); *Evans v. Michigan*, 568 U.S. 313, 318 (2013) (emphasizing that "[i]t has been half a century since [this Court] first recognized that the Double Jeopardy Clause bars retrial following a court-decreed acquittal, even if the acquittal is 'based upon an egregiously erroneous foundation'" and collecting cases applying that principle (quoting *Fong Foo,* 369 U.S. at 143)); *Arizona*, 434 U.S. at 503.

For this reason, "when a jury returns inconsistent verdicts, convicting on one count and acquitting on another count, where both counts turn on the very same issue of ultimate fact[,] . . . [t]he Government is barred by the Double Jeopardy Clause from challenging the acquittal[,] . . . [and] 'the acquittals themselves remain inviolate.'" *Bravo-Fernandez*, 580 U.S. at 8, 24 (quoting *Bravo-Fernandez v. United States*, 790 F.3d 41, 51 (1st Cir. 2015)); *see also Dunn v. United States*, 284 U.S. 390, 393 (1932) ("Consistency in the verdict is not necessary."); *United States v. Powell*, 469 U.S. 57, 65 (1984) (explaining that, with respect to inconsistent verdicts, "the Government is precluded from appealing or otherwise

upsetting such an acquittal by the Constitution's Double Jeopardy Clause").

A straightforward application of these principles compels the conclusion that the Double Jeopardy Clause prohibits the State from subjecting McElrath to a second trial on the charge for which he was found not guilty by reason of insanity. Both Georgia and this Court have recognized that a verdict of not guilty by reason of insanity is an acquittal. *See Nagel v. State*, 427 S.E.2d 490, 491 (Ga. 1993) (holding that defendant was "acquitted for murder by reason of insanity"); *Shannon v. United States*, 512 U.S. 573 (1994) (referring throughout to verdict of not guilty by reason of insanity as an acquittal); *see also Riley v. State*, 353 S.E.2d 598, 599-600 (Ga. Ct. App. 1987); Ga. Code § 17-7-131(d) (referring to individual who receives a not guilty by reason of insanity verdict as "the person so acquitted"). Because the jury rendered a final judgment of acquittal, the State cannot subject McElrath to a second trial on that charge.[1]

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[1] In the Georgia Supreme Court, the Attorney General of Georgia agreed that the Double Jeopardy Clause precludes subjecting McElrath to a second trial on the malice murder charge. Under Georgia law, both the Attorney General and the District Attorney file briefs in criminal cases before the Georgia Supreme Court. Ga. Code § 45-15-3(3); § 15-18-6(6) (requiring district attorneys "[t]o attend before the appellate courts when any criminal case emanating from their respective circuits is tried"). In his brief, contradicting the position taken by the District Attorney, the Attorney General "acknowledge[d] that retrial of the malice murder charge would be precluded by double jeopardy under the

B. Although acknowledging these precedents, the Georgia Supreme Court held that double jeopardy does not preclude retrial of the charge on which McElrath was found not guilty because that verdict was repugnant to the verdict that the jury rendered on another charge. The fundamental error in the Georgia Supreme Court's decision is its premise that some verdicts—which the court calls "repugnant" verdicts—can be so inconsistent that a retrial after an acquittal is permissible. But there is no exception from double jeopardy principles for verdicts that are so inconsistent as to be "repugnant."

Under Georgia law, verdicts are "repugnant" when it is "logically and legally impossible" for both verdicts to be correct. But what the Georgia courts call "repugnant" verdicts is merely a subcategory of inconsistent verdicts. *See generally* Eric L. Muller, *The Hobgoblin of Little Minds? Our Foolish Law of Inconsistent Verdicts*, 111 HARV. L. REV. 771 (1998) (explaining the causes and consequences of those verdicts that are "utterly and intractably inconsistent with one another"). By definition, inconsistent verdicts are verdicts that cannot be reconciled; one verdict necessarily requires findings that contradict findings required for the other verdict. *See, e.g.*,

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law as it currently stands, as a verdict of acquittal 'is, of course, absolutely final.'" Br. Appellee by the Att'y Gen. at 9 n.3, *McElrath v. State*, 880 S.E.2d 518 (Ga. 2022) (quoting *Bullington*, 451 U.S. at 445).

Bravo-Fernandez, 580 U.S. at 8 (giving the paradigmatic example of a jury "convicting on one count and acquitting on another count, where both counts turn on the very same issue of ultimate fact"). Ultimately, referring to the verdicts as "repugnant" is simply another way of saying that the verdicts are highly inconsistent. Changing the label does not change the substance. *Cf.* WILLIAM SHAKESPEARE, Romeo and Juliet, act II, sc. 2, ls. 47-48 ("What's in a name? [T]hat which we call a rose [b]y any other name would smell as sweet.").

The "repugnant" verdict classification is a "state-law-based legal fiction that treats the jury's verdict as though it never happened." Pet. App. 11a (Pinson, J. concurring dubitante). That fiction does not change this Court's repeated holdings that even acquittals "based upon an egregiously erroneous foundation" are final and must stand, *Arizona*, 434 U.S. at 503 (citing *Fong Foo*, 369 U.S. at 143)—"no matter how erroneous" the jury's decision, *Burks v. United States*, 437 U.S. 1, 16 (1978)—and consequently prohibit a subsequent prosecution for the same offense, *Fong Foo*, 369 U.S. at 143. What is relevant for the purpose of the double jeopardy analysis is that the jury rendered a verdict of not guilty. *See, e.g.*, *Bravo-Fernandez*, 580 U.S. at 17 ("[V]acated convictions 'are jury decisions, through which the jury has spoken.'" (quoting *Bravo-Fernandez*, 790 F.3d at 51)). No matter if that verdict was inconsistent with another—even egregiously inconsistent—this Court's precedents are clear that the State is barred from

prosecuting McElrath a second time on the charge of which he was acquitted.[2]

C. The Georgia Supreme Court's decision not only contradicts this Court's precedents but also stands alone among state courts.[3] Some states, like Georgia,

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[2] The prohibition on allowing the government a "do-over" following an acquittal is particularly important where, as here, a defendant satisfied his burden of proof. McElrath had the burden to prove his affirmative defense of not guilty by reason of insanity. The acquittal was thus an exceedingly difficult verdict for the defense to obtain. Allowing the State another opportunity to prosecute McElrath for the same charge is especially egregious and pernicious because of the low probability that he would be able to secure another acquittal.

[3] State courts have reached conflicting results regarding whether a trial court may order a jury to deliberate further when the trial court refuses to accept inconsistent verdicts. The highest courts of two states have affirmed a trial court's decision to send a jury back for further deliberation when the jury first returned verdicts that the trial court believed to be legally inconsistent. *State v. Peters*, 855 S.W.2d 345 (Mo. 1993) (en banc) (finding no double jeopardy violation where the trial court rejected inconsistent conviction and acquittal verdicts and directed the jury to return for further deliberations on both counts); *People v. Salemmo*, 342 N.E.2d 579 (N.Y. 1976) (similar). An Arizona appellate court reached the opposite conclusion. *State v. Webb*, 925 P.2d 701 (Ariz. Ct. App. 1996) (holding that the trial court violated the Double Jeopardy Clause by directing the jury to deliberate further after it returned inconsistent verdicts). This Court has not ruled on this issue, which itself presents serious double jeopardy concerns. The Georgia Supreme Court is the only court to hold that the State may mount a second trial to prosecute a defendant for a crime of

permit a defendant to challenge inconsistent or so-called repugnant verdicts in an attempt to have a conviction vacated. But outside of Georgia, state courts consistently hold that the State may not prosecute a defendant a second time following entry of a verdict of acquittal, even where the inconsistent verdicts are "repugnant" or "legally and logically impossible."

In *DeSacia v. State*, 469 P.2d 369 (Alaska 1970), for example, the defendant was charged with two counts of manslaughter arising from an accident that caused another car to veer off the road into a river, killing two people in the other car. The jury convicted the defendant of manslaughter as to one victim but acquitted him as to the other. Recognizing that "there [was] no conceivable way in which appellant's conduct toward [one decedent] could be found to differ from his conduct toward [the other]," because they were riding in the same car, the *DeSacia* court held that the verdicts were necessarily inconsistent and "irrational." *Id.* at 374, 378. Based on the inconsistency in the verdicts, the court reversed the conviction. As to the acquittal, the court held that "retrial is precluded by the double jeopardy clause of the fifth amendment of the United States

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which he was previously acquitted because the verdict of acquittal rendered at the first trial was inconsistent with another verdict rendered at the same trial. *See* Pet. App. 7a.

Constitution, and by the similar clause of the Alaska Constitution." *Id*. at 378.

In *People v. DeLee*, 26 N.E.3d 210 (N.Y. 2014), the defendant was charged with first-degree manslaughter and the separate offense of first-degree manslaughter as a hate crime based on the same facts. The jury acquitted the defendant of first-degree manslaughter but convicted on the other charge. The Court of Appeals held that the verdicts were "repugnant" because "it is legally impossible—under all conceivable circumstances—for the jury to have convicted the defendant on one count but not the other." *Id*. at 213. It affirmed the appellate court's reversal of the conviction. The court explained that, on remand, the defendant could be retried only on the charge of which he was convicted because double jeopardy principles precluded retrial on the charge of which he was acquitted. *Id*. at 215.

In *Pleasant Grove City v. Terry*, 478 P.3d 1026 (Utah 2020), the jury found the defendant not guilty of domestic violence but convicted him of domestic violence in the presence of a child, based on the same conduct underlying the acquittal. The court determined that the verdicts were "legally impossible" because there is no way "to reconcile the different determinations that the jury would have had [to] make to render them." *Id*. at 1030. Because the verdicts in question were legally impossible, the court vacated the conviction. It noted that "the double jeopardy provisions [of the federal and state

constitutions] may effectively preclude a retrial of the acquittal" and potentially the conviction. *Id*. at 1033. The court explained that "the inability to retry a defendant is far preferable to defendants being convicted of and punished for crimes that—according to the jury's acquittal on the predicate offense—they never could have committed." *Id*.

In *State v. Halstead*, 791 N.W.2d 805 (Iowa 2010), the defendant was convicted of assault while participating in a felony, which was predicated on the felony of theft in the first degree for which the defendant was also charged but on which the jury acquitted him. *Id*. at 807. The court found the verdicts "truly inconsistent" and reversed the defendant's conviction. *Id*. at 816. With respect to the acquittal, the court held that "[i]t is clear under double-jeopardy principles that the defendant may not be tried on the offenses for which he was acquitted." *Id*.

All of these cases honor this Court's precedents that a second trial on a charge for which the defendant was previously acquitted violates the Double Jeopardy Clause, even though they recognize that some verdicts may be so inconsistent as to be repugnant. The Georgia Supreme Court's decision stands in stark contrast by recognizing an exception to double jeopardy principles when faced with highly inconsistent verdicts—an exception that directly conflicts with this Court's precedents.

II. The Georgia Supreme Court's decision strips criminal defendants in Georgia of a fundamental constitutional right.

The prohibition on double jeopardy is a fundamental right protected by the Constitution. *See Benton v. Maryland*, 395 U.S. 784, 794 (1969) ("[T]he double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage.").

Under the decision below, prosecutors in Georgia may now retry a defendant for a crime of which he was acquitted so long as that acquittal is accompanied by another verdict so inconsistent with the acquittal as to be deemed "repugnant" under state law. Pet. App. 1a. As explained above, this holding unsettles what to date has been a consensus understanding of what it means to be free from double jeopardy.

The decision below has obvious, immediate, and critically important ramifications in Georgia. Because the Georgia Supreme Court is the final arbiter of Georgia law, its decisions "bind all other [Georgia] courts as precedents." Ga. Const. art. VI, § 6, ¶ VI. McElrath surely will not be the only defendant to face retrial after acquittal. Under the decision below, courts in Georgia will classify a subset of inconsistent verdicts as "repugnant," and, on that basis, deny defendants the protections this Court has held the Double Jeopardy Clause provides all citizens.

The Court should grant the petition for a writ of certiorari to correct a decision that flatly conflicts with this Court's precedents regarding a fundamental constitutional right.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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January 31, 2023

APPENDIX

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APPENDIX A — OPINION OF THE SUPREME COURT OF THE STATE OF GEORGIA, FILED NOVEMBER 2, 2022

In the Supreme Court of Georgia

Decided November 2, 2022

S22A0605.

McELRATH

v.

THE STATE

BETHEL, Justice.

This is the second appearance of Damien McElrath's case before this Court. In 2017, a jury found McElrath guilty but mentally ill as to felony murder but not guilty by reason of insanity as to malice murder following a single, continuous encounter between McElrath and his mother, Diane McElrath. The trial court did not recognize the verdicts as repugnant and accepted them. On appeal, we held that the verdicts were repugnant, and thus we vacated the verdicts and remanded McElrath's case for retrial. See *McElrath v. State*, 308 Ga. 104 (839 S.E.2d 573) (2020). On remand, McElrath filed a plea in bar, alleging that retrial was precluded on double jeopardy grounds, and the trial court denied this motion.

In this appeal, McElrath argues that this Court should have reversed rather than vacated his felony murder conviction in his previous appeal. He also challenges the trial court's ruling on his plea in bar, contending that retrial on all of the counts is barred because the jury

previously found him not guilty by reason of insanity on the malice murder count. As we discuss below, however, both of these arguments fail. We therefore affirm the trial court's denial of McElrath's plea in bar.

1. McElrath first argues that this Court erred in his prior appeal when we determined that the jury's verdicts should be vacated because they were repugnant. See *McElrath*, 308 Ga. at 108-112 (2). McElrath argues that, instead, our Court should have allowed the jury's verdict of not guilty by reason of insanity on the malice murder count to stand and should have reversed the guilty but mentally ill verdict on the felony murder count (and the underlying aggravated assault on which it was predicated). However, this issue has already been conclusively decided in McElrath's earlier appeal before this Court, where we determined that the jury's verdicts on the malice murder and felony murder counts were repugnant because they could not logically or legally exist simultaneously. This was

> because the not guilty by reason of insanity verdict on malice murder and the guilty but mentally ill verdict on felony murder based on aggravated assault required affirmative findings of different mental states that could not exist at the same time during the commission of those crimes as they were indicted, proved, and charged to the jury.

Id. at 112 (2) (c).

Put simply, we determined, based on the evidence presented at trial, that it was not legally possible for McElrath to simultaneously be both sane (guilty but

mentally ill) and insane (not guilty by reason of insanity) during the single episode of stabbing his mother. See id. Thus, we determined that the purported verdicts returned by the jury were a nullity and should not have been accepted by the trial court. See id. See also 89 C.J.S. Trial § 1156 (2022) (stating that when findings in special verdicts "are utterly and irreconcilably inconsistent with, or repugnant to, each other, they neutralize, nullify, or destroy each other"). Accordingly, we vacated both the guilty but mentally ill and the not guilty by reason of insanity verdicts as to the malice murder and felony murder charges, respectively, and remanded the case for a new trial. See *McElrath*, 308 Ga. at 112 (2) (c).

Our decision in McElrath's prior appeal is law of the case. "Under the 'law of the case' rule, 'any ruling by the Supreme Court or the Court of Appeals in a case shall be binding in all subsequent proceedings in that case in the lower court and in the Supreme Court or the Court of Appeals as the case may be.'" *Langlands v. State*, 282 Ga. 103, 104 (2) (646 S.E.2d 253) (2007) (quoting OCGA § 9-11-60 (h)). "It is well-established that the law of the case doctrine applies to holdings by appellate courts in criminal cases." *Hollmon v. State*, 305 Ga. 90, 90-91 (1) (823 S.E.2d 771) (2019). Therefore, the questions of whether McElrath's conviction for felony murder should have been reversed rather than vacated and the not guilty verdict allowed to stand have already been decided in this case by this Court, and our decision was binding on the trial court when it considered McElrath's plea in bar upon remand. See *Love v. Fulton County Board of Tax Assessors*, 311 Ga. 682, 693 (3) (a) (859 S.E.2d 33) (2021) (noting that an earlier appellate decision became the law of the case and bound the trial court in its consideration of the case

upon remand). See also *Hollmon*, 305 Ga. at 91 (1); *Hicks v. McGee*, 289 Ga. 573, 578 (2) (713 S.E.2d 841) (2011) ("Georgia's appellate courts are required to adhere to the law of the case rule in all matters which they consider. . . . [A]ppellate rulings remain binding as between parties to a case, so long as the evidentiary posture of the case remains unchanged, despite all contentions that prior rulings in the matter are erroneous." (citation omitted)).

Based on the foregoing, it is clear that this appeal is not a proper vehicle for challenging this Court's earlier decision in this case that the repugnant verdicts reached by the jury in McElrath's trial must be vacated. Under our Court's rules, McElrath could have filed a motion for reconsideration contesting that decision during the reconsideration period for the prior appeal, see Supreme Court Rule 27, but he did not do so. Accordingly, we do not reconsider here our earlier ruling that the jury's repugnant verdicts must be vacated.

2. McElrath next argues that because the jury found him not guilty by reason of insanity on the malice murder count, he cannot be retried on any of the counts in the indictment because of the constitutional prohibition against double jeopardy and the doctrine of collateral estoppel. We disagree.

The Fifth Amendment to the United States Constitution guarantees criminal defendants protection against double jeopardy. See U. S. Const. Amend. V. Likewise, the Georgia Constitution provides that "[n]o person shall be put in jeopardy of life or liberty more than once for the same offense except when a new trial has been granted after conviction or in case of mistrial." Ga.

Const., Art. I, Sec. I, Par. XVIII. The doctrine of double jeopardy encompasses both "procedural" and "substantive" aspects, the former barring multiple *prosecutions* for crimes arising from the same conduct, and the latter barring multiple *punishments* for such crimes. See *Williams v. State*, 307 Ga. 778, 779 (1) (838 S.E.2d 235) (2020). As the United States Supreme Court and this Court have previously noted, a fundamental principle of procedural double jeopardy is that a "verdict of acquittal is an absolute bar to a subsequent prosecution for the same offense." *Williams v. State*, 288 Ga. 7, 8 (2) (700 S.E.2d 564) (2010) (citing *Green v. United States*, 255 U. S. 184, 188 (78 S.Ct. 221, 2 L.E.2d 199) (1957)). See also *Bullington v. Missouri*, 451 U. S. 430, 445 (IV) (101 S.Ct. 1852, 68 L.E.2d 270) (1981); *Burks v. United States*, 437 U. S. 1, 16 (III) (98 S.Ct. 2141, 57 L.E.2d 1) (1978) (noting that "we necessarily afford absolute finality to a jury's verdict of acquittal").

The bar against double jeopardy also encompasses the doctrine of collateral estoppel, which precludes the re-litigation of an ultimate fact issue that was determined by a valid and final judgment. See *Giddens v. State*, 299 Ga. 109, 112-113 (2) (a) (786 S.E.2d 659) (2016).[1] As the United States Supreme Court has explained,

1. "Under this doctrine, when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." (Citation and punctuation omitted.) *Giddens*, 299 Ga. at 112-113 (2) (a). Collateral estoppel therefore precludes "retrial of the factual decisions that necessarily underlie the legal determination of acquittal." (Citation omitted.) Id. at 113 (2) (a). To assert this protection in a subsequent trial, the defendant bears the burden of proving from the record what facts were actually and necessarily decided in his favor in an earlier trial. See *Giddens*, 299 Ga. at 113 (2) (a).

> '[c]ollateral estoppel' is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has once been determined *by a valid and final judgment*, that issue cannot again be litigated between the same parties in any future lawsuit.

(Emphasis supplied.) *Ashe v. Swenson*, 397 U. S. 436, 443 (90 S.Ct. 1189, 25 L.E.2d 469) (1970). See also *Roesser v. State*, 294 Ga. 295, 296 (751 S.E.2d 297) (2013) ("When there is 'a critical issue of ultimate fact in all of the charges against [the defendant], a jury verdict that necessarily decided that issue in his favor protects him from prosecution for any charge for which that is an essential element.'" (quoting *Yeager v. United States*, 557 U. S. 110, 123 (129 S.Ct. 2360, 174 L.E.2d 78) (2009)).

Based on these principles, McElrath argues that the jury's verdict of not guilty by reason of insanity as to the malice murder charge bars retrial as to that charge, as well as the other charges in the indictment. Under the general principles of double jeopardy and viewed in isolation, the jury's purported verdict of not guilty by reason of insanity would appear to be an acquittal that precludes retrial, as not guilty verdicts are generally inviolate. See *Yeager*, 557 U. S. at 122 (II) ("Even if the verdict is based upon an egregiously erroneous foundation, its finality is unassailable." (citation and punctuation omitted)); *Richardson v. United States*, 468 U. S. 317, 325 (104 S.Ct. 3081, 82 L.E.2d 242) (1984) ("[T]he protection of the Double Jeopardy Clause by its terms applies only

if there has been some event, such as an acquittal, which terminates the original jeopardy[.]"). Viewed in context alongside the verdict of guilty but mentally ill, however, the purported acquittal loses considerable steam. Because the verdicts were repugnant, both are rendered valueless. There is no way to decipher what factual finding or determination they represent, and McElrath cannot be said with any confidence to have been found not guilty based on insanity any more than it can be said that the jury made a finding of sanity and guilt with regard to the same conduct. See *McElrath*, 308 Ga. at 111 (2) (c) ("Where a jury renders repugnant verdicts, both verdicts must be vacated and a new trial ordered for the same reasons applicable to mutually exclusive verdicts." (citing *Dumas v. State*, 266 Ga. 797 (471 S.E.2d 508) (1996)). Thus, (2) the repugnant verdicts failed to result in an event that terminated jeopardy, akin to a situation in which a mistrial is declared after a jury is unable to reach a verdict. Cf. *Richardson*, 468 U. S. at 325-326 (holding that a re-trial following a hung jury generally does not violate the Double Jeopardy Clause because the jury's failure to reach a verdict does not terminate the original jeopardy). Accordingly, the general principles of double jeopardy do not bar McElrath's retrial on the malice murder charge.

But that does not end our analysis. McElrath has further argued that the doctrine of collateral estoppel, which is encompassed by the prohibition against double jeopardy, would also bar retrial. We disagree.

As detailed in Division 1 above, the verdicts returned by the jury were repugnant, and "any judgment and

sentence entered on repugnant verdicts are void." See *State v. Owens*, 312 Ga. 212, 216 (1) (a) (862 S.E.2d 125) (2021) ("In considering whether verdicts were repugnant and thus void, we have held that no *valid judgment* may be entered on a void verdict. (emphasis supplied; citations and punctuation omitted)). Simply stated, a repugnant verdict of the sort rendered in McElrath's first trial is no verdict at all because it did not "represent a resolution, correct or not, of some or all of the factual elements of the offense charged." *United States v. Martin Linen Supply Co.*, 430 U. S. 564, 571 (II) (97 S.Ct. 1349, 51 L.E.2d 642) (1977). And collateral estoppel only applies once there has been a valid and final judgment. See *Ashe*, 397 U. S. at 443 (noting that a "valid and final judgment" is required before collateral estoppel bars retrial).

Moreover, while it is true that collateral estoppel "may completely bar a subsequent prosecution where one of the facts necessarily determined in the former proceeding is an essential element of the conviction sought," *Malloy v. State*, 293 Ga. 350, 354 (2) (a) (744 S.E.2d 778) (2013), this case does not call for a straightforward application of the collateral estoppel rule.

McElrath argues that the issue of his insanity at the time he stabbed Diane to death was an issue the jury actually and necessarily decided in his favor when it found him not guilty by reason of insanity on the malice murder count. However, the jury spoke through both an acquittal by reason of insanity and convictions of guilty but mentally ill – finding McElrath both insane and sane at the time of the stabbing. See *McElrath*, 308 Ga. 112 (2)

(c). "The whole collateral estoppel analysis is premised on the proposition that the jury acted rationally and lawfully." *Giddens*, 299 Ga. at 118. Where it did not, as here, the Court cannot infer facts, such as the defendant's sanity (or lack thereof), that must have been decided in order for the jury to return the verdicts it reached. Cf. id. ("The problem is that the same jury reached inconsistent results; once that is established principles of collateral estoppel – which are predicated on the assumption that the jury acted rationally and found certain facts in reaching its verdict – are no longer useful." (citation omitted)). (3) Because it cannot be said with any confidence that the jury made a finding of innocence based on insanity any more than it can be said that it made a finding of sanity and guilt, the doctrine of collateral estoppel does not bar retrial.

Accordingly, neither the doctrine of collateral estoppel nor the more general principles of double jeopardy bar McElrath from being retried as to all counts of the indictment. These claims for relief therefore fail.

Judgment affirmed. All the Justices concur.

PINSON, Justice, concurring.

I concur in the Court's opinion, but with reservations.

"[I]t has long been settled under the Fifth Amendment that a verdict of acquittal is final, ending a defendant's jeopardy, and even when 'not followed by any judgment, is a bar to a subsequent prosecution for the same offence.'" *Green v. United States*, 355 U.S. 184, 188 (78 S.Ct. 221, 2

LEd2d 199, 77 Ohio Law Abs. 202) (1957) (quoting *Ball v. United States*, 163 U.S. 662, 671 (16 S.Ct. 1192, 41 LEd 300) (1896)). And the United States Supreme Court has explained that the finality of a verdict of acquittal holds "even though the acquittal was based upon an egregiously erroneous foundation," *Arizona v. Washington*, 434 U.S. 497, 503 (II) (98 S.Ct. 824, 54 L.E.2d 717) (1978) (cleaned up), and even "when a jury returns inconsistent verdicts, convicting on one count and acquitting on another count, where both counts turn on the very same issue of ultimate fact[.]" *Bravo-Fernandez v. United States*, 580 U.S. 5, 8 (137 S.Ct. 352, 196 LEd2d 242) (2016) (explaining that, in such circumstances, "[t]he Government is barred by the Double Jeopardy Clause from challenging the acquittal").

The Court nonetheless concludes here that the State may seek to retry McElrath on a count for which the jury returned an acquittal verdict. I follow the logic: as a matter of Georgia law, the acquittal was a "repugnant" verdict; a repugnant verdict is "void," which means that, unlike other merely "erroneous" verdicts, it is not a verdict at all; and so the jury never reached a verdict that ended the defendant's jeopardy. Further, precedent supports the general idea that a "void" acquittal is "no bar to subsequent indictment and trial." *Ball*, 163 U.S. at 669 (making this point with respect to "[a]n acquittal before a court having no jurisdiction," which "is, of course, like all the proceedings in the case, absolutely void"). See also *United States v. Slape*, 44 F4th 356, 361-62 (5th Cir. 2022) ("[T]he mere *appearance* of a successive prosecution—and even the erroneous *conviction* or *acquittal* of a defendant in certain invalid proceedings—does not suffice for the

attachment of jeopardy where a 'fatal defect' in a criminal prosecution renders the proceedings 'void.'" (quoting *Ball*, 163 U.S. at 669)). And the Court's analogy to a retrial following a "hung jury" makes some sense. See *Richardson v. United States*, 468 U.S. 317, 324, 325 (104 S.Ct. 3081, 82 L.E.2d 242) (1984) (reaffirming that "a retrial following a 'hung jury' does not violate the Double Jeopardy Clause" because "the failure of the jury to reach a verdict is not an event which terminates jeopardy").

And yet, I can't quite shake the doubt that these points can reconcile the Court's decision fully with the quite-absolute-sounding bar against retrying a defendant who has secured an acquittal verdict. See, e.g., *Bullington v. Missouri*, 451 U.S. 430, 445 (IV) (101 S.Ct. 1852, 68 LEd2d 270) (1981) ("A verdict of acquittal on the issue of guilt or innocence is, of course, absolutely final."); *Arizona v. Washington*, 434 U.S. at 503 (II) ("The constitutional protection against double jeopardy unequivocally prohibits a second trial following an acquittal."). This case is not quite like the cases where the verdict was void because the court lacked jurisdiction from the outset, because jeopardy did actually attach here. Nor is it quite like the hung-jury cases, because the jury here did actually reach a verdict. So the Court's conclusion here that jeopardy did not end—and so McElrath can be retried—depends on a state-law-based legal fiction that treats the jury's verdict as though it never happened. To be sure, the law can and must depend on legal fictions all the time. But this one bears a lot of weight, and I am not confident that it carries the Court's decision over the absolute bar against retrying a defendant after an acquittal verdict.

Indeed, the Attorney General "acknowledges that retrial of [McElrath's] malice murder charge would be precluded by double jeopardy under the law as it currently stands."

This lingering doubt is not enough to justify dissenting from an otherwise unanimous Court, so I concur in the Court's opinion. But consider me *dubitante*.

I am authorized to state that Justice McMillian joins in this concurrence.

APPENDIX B — ORDER OF THE SUPERIOR COURT OF COBB COUNTY, STATE OF GEORGIA, FILED DECEMBER 13, 2021

IN THE SUPERIOR COURT
OF COBB COUNTY
STATE OF GEORGIA

CRIMINAL ACTION # 12-3972

STATE OF GEORGIA

V.

DAMIAN CORNELL MCELRATH

ORDER

The above-styled case came before this Court on June 16, 2021 for a hearing on Defendant's Double Jeopardy Plea in Bar filed on March 19, 2021. Defendant was present and represented by counsel. In accordance with the Georgia Supreme Court's directive in *McElrath v. State*, 308 Ga. 104 (2020), and after considering the record, the applicable law and arguments of counsel, Defendant's Plea in Bar is HEREBY DENIED.

This the 10th day of December, 2021.

/s/_____
THE HONORABLE ANGELA Z. BROWN
Cobb County Superior Court
Cobb Judicial Circuit

APPENDIX C — OPINION OF THE SUPREME COURT OF THE STATE OF GEORGIA, FILED FEBRUARY 28, 2020

Supreme Court of Georgia

Decided February 28, 2020

S19A1361.

McELRATH

v.

THE STATE

OPINION

MELTON, Chief Justice.

On December 11, 2017, a jury found Damian McElrath guilty but mentally ill of the felony murder and aggravated assault of his adoptive mother, Diane, whom McElrath killed by stabbing over 50 times in a single episode.[1] Based

1. On October 4, 2012, McElrath was indicted for malice murder, felony murder predicated on aggravated assault, and aggravated assault — all based on the stabbing death of Diane. McElrath was originally convicted in a bench trial, but the trial court granted a motion for new trial filed by McElrath on June 21, 2016. McElrath was subsequently retried before a jury. On December 11, 2017, the jury found McElrath not guilty by reason of insanity for the malice murder of Diane, and guilty but mentally ill of felony murder and its predicate of aggravated assault. On December 14, McElrath was sentenced to life imprisonment for felony murder, and the aggravated assault count was merged into the conviction for felony murder for

on the same episode, McElrath was also found not guilty of the malice murder of Diane by reason of insanity. McElrath now appeals, contending among other things that the jury's verdicts were repugnant and that his conviction for felony murder must be reversed or vacated. McElrath also appeals the trial court's separate order that, upon his discharge from evaluation at a state mental health facility, he should be placed in the custody of the Department of Corrections.[2] Under the specific facts of this case, we conclude that McElrath's verdicts are repugnant. Accordingly, we vacate both verdicts and remand McElrath's case for a new trial. We also vacate the trial court's order placing McElrath in the Department of Corrections's custody pursuant to the verdicts which now stand vacated.

1. The Evidence at Trial.

(a) The evidence presented at trial showed that McElrath, who was 18 at the time of the stabbing, had suffered from either schizophrenia or a related schizoaffective disorder.

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sentencing purposes. On the same day, in a separate order, the trial court committed McElrath to a state mental health facility for evaluation pursuant to OCGA § 17-7-131. On December 28, 2017, McElrath filed a motion for new trial. The trial court denied the motion on April 26, 2019. McElrath timely filed a notice of appeal, and his case was docketed to the August 2019 term of this Court. The case was orally argued on October 22, 2019.

2. While his motion for new trial was still pending, McElrath filed a separate notice of appeal from this decision; however, on July 1, 2019, this Court dismissed that appeal for failing to follow the interlocutory procedures under OCGA § 5-6-34 (b) and informed McElrath that he could raise any challenge to this order as part of the present appeal.

As a result of this disorder, McElrath had a long history of disciplinary problems, including difficulties with Diane.[3] Over time, McElrath began to believe that Diane was poisoning his food and beverages.[4] Although the timeline is not exact, this delusion began approximately three years before Diane's death. The week before the stabbing occurred, McElrath had to be hospitalized in a mental health facility because of his behavior and thoughts, which included delusions that he was an FBI agent who regularly traveled to Russia and who had killed a number of people as such an agent. On the day before the stabbing, or slightly earlier, McElrath believed that Diane confronted him and admitted that she had been poisoning him.

On July 16, 2012, McElrath stabbed Diane more than 50 times in an attack that began in an upstairs bedroom of the home Diane and McElrath shared and ended at the front door. There, Diane collapsed and died. After the stabbing, McElrath changed his clothes, cleaned Diane's blood off of his body, and washed a wound on his hand that he sustained during the stabbing. He wrote a note titled "My Antisocial Life," claiming that Diane told him that she had been poisoning him. In the note, McElrath stated that he was not sorry about what he had done and that "she poisoned me so I killed her." He added that "I think I am right for doing it." McElrath then called 911 and reported that he killed

3. For example, McElrath shoplifted five iPads on one occasion, and, in a separate incident, he had a quarrel with Diane that resulted in police being called to the home to investigate. At one point, Diane felt it was necessary to force McElrath to stay in an extended-stay hotel for approximately two months.

4. According to McElrath, Diane was putting ammonia in his lemonade and spraying insect poison on his ice.

his mother because she poisoned him. McElrath asked the dispatcher if he was wrong to do that.

Shortly thereafter, police arrived at the scene. McElrath was transported to the police station for interrogation, where he admitted that "I killed my Mom because she poisoned me." When the detective attempted to clarify any difficulties McElrath may have had with Diane, McElrath stated that he was only mad that she poisoned him. When the detective asked him if he thought stabbing Diane was right or wrong, McElrath stated, "It was right to me."

The evidence at the scene, including blood spatter on the upstairs wall, blood on the upper landing carpet, and blood on the stairway bannister and wall, suggested that the attack began on the upper level of the house and continued toward the front door where Diane ultimately died. The medical examiner determined that Diane had been stabbed more than 50 times, and that the wounds were primarily located on her face, neck, upper torso, and upper extremities.[5]

A number of experts testified at McElrath's trial.[6] There was a general consensus that McElrath was, in fact,

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5. Due to the number of wounds, the medical examiner could not make an accurate determination as to which stab cut Diane's jugular vein.

6. The experts included: Dr. Kevin Richards, a forensic psychologist hired by the defense; Dr. Julie Rand Dorney, a psychiatrist hired by the State; and Dr. Samuel Perri and Dr. Kiana Wright, both of whom worked for the State Department of Behavioral Health and Developmental Disabilities.

mentally ill and suffering from at least some delusions, including the delusion that he was being poisoned by Diane. Dr. Kevin Richards, the defense expert, testified that, at the time McElrath stabbed Diane, McElrath was acting under the delusion that he was in imminent danger of death.[7] In other words, McElrath was acting under the false belief, though real to him, that he would die if he did not immediately protect himself against Diane.[8]

(b) As an initial matter, this evidence authorized the jury to find that McElrath was not guilty of malice murder by reason of insanity at the time that he stabbed his mother.

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7. Dr. Richards classified McElrath's thoughts as a "multifaceted delusion" including "[t]he delusion [Diane] was poisoning him; the delusion that [McElrath] was about to die; the delusion that [Diane] was going to keep poisoning him; the delusion [Diane] wanted to kill him. All of it's — it's all delusional. [Diane] wasn't poisoning him. So his belief that he was in [imm]inent danger was delusional." Dr. Julie Rand Dorney, one of the State's experts, also testified that a paranoid delusion can contain the additional component that one's life is in immediate danger. And, Dr. Samuel Perri, a state psychologist, testified that he read the reports generated by Dr. Richards and Dr. Dorney, and he agreed with their conclusions that McElrath suffered from a schizophrenia-type illness coupled with delusions.

8. Dr. Richards testified: "The reason [McElrath] killed [Diane] is because she was poisoning him, and not only that she was poisoning him, that he was in imminent danger because now she had admitted it… ." Dr. Richards further testified: "[McElrath] said he [stabbed Diane] that day because [Diane] admitted [to poisoning him] and now she knew that he knew and he was going to die now; [McElrath] was sure of it and he was in [imm]inent danger."

> In Georgia, a defendant is presumed to be sane and "a defendant asserting an insanity defense has the burden to prove by a preponderance of the evidence that he was insane at the time the crime was committed." *Buford* [*v. State*], 300 Ga. [121, 122 (1) (b) (793 S.E.2d 91) (2016)] (citing *Alvelo v. State*, 290 Ga. 609 (3) (724 S.E.2d 377) (2012)). A defendant may prove insanity by showing that, at the time of the incident, he lacked the mental capacity to distinguish right from wrong or that he was suffering from a delusional compulsion. See OCGA §§ 16-3-2[9] and 16-3-3;[10] *Buford*, [supra], 300 Ga. [at 124-125].

Bowman v. State, 306 Ga. 97, 100 (1) (c) (829 S.E.2d 139) (2019). The delusional compulsion defense is available only when the defendant is "suffering under delusions of an

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9. This statute provides:

> A person shall not be found guilty of a crime if, at the time of the act, omission, or negligence constituting the crime, the person did not have mental capacity to distinguish between right and wrong in relation to such act, omission, or negligence.

10. This statute provides:

> A person shall not be found guilty of a crime when, at the time of the act, omission, or negligence constituting the crime, the person, because of mental disease, injury, or congenital deficiency, acted as he did because of a delusional compulsion as to such act which overmastered his will to resist committing the crime.

absurd and unfounded nature [and] was compelled by that delusion to act in a manner that would have been lawful and right if the facts had been as the defendant imagined them to be." (Footnote omitted.) *Lawrence v. State*, 265 Ga. 310, 313 (2) (454 S.E.2d 446) (1995).

Here, Dr. Richards testified specifically that McElrath was suffering from a multifaceted delusion, one in which he believed *both* that Diane was poisoning him *and* that he was in imminent danger of death at the time that he attacked Diane.[11] This "absurd or unfounded" delusion authorized the jury to determine that, under the facts *as McElrath believed them to be*, his actions were justified.

(c) But there was also sufficient evidence to allow the jury to find beyond a reasonable doubt that McElrath was guilty but mentally ill of felony murder based on aggravated assault for stabbing Diane.[12] As to guilt,

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11. Although other experts did not directly testify at trial that McElrath was acting under a delusion of imminent danger at the time of the stabbing, they did testify that such a delusion could affect a person's ability to control his behavior.

12. OCGA § 17-7-131 (a) (3) defines "mentally ill" as

> having a disorder of thought or mood which significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life. However, the term "mental illness" shall not include a mental state manifested only by repeated unlawful or antisocial conduct.

OCGA § 17-7-131 (c) (2) provides, in turn:

> The defendant may be found "guilty but mentally ill

McElrath admitted that he stabbed Diane, and his confession was amply corroborated by the forensic and other evidence. As to mental illness, it is largely undisputed that McElrath was mentally ill at the time of the crime and, in fact, had been so for years. And, while there was evidence that McElrath suffered from delusions at times, the jury was authorized to determine that McElrath was not delusional at the time of the stabbing or that, even if he was, any delusion that he was experiencing did not justify the stabbing. For example, the jury could have accepted that McElrath suffered from the delusion that Diane had been poisoning him, but rejected that he had any delusion that his life was in imminent danger. Under such a scenario, the stabbing would not be justified, and the jury could have concluded that McElrath stabbed Diane because he was admittedly angry with her. The evidence thus supported the jury's alternative determination that McElrath was guilty but mentally ill of the felony murder of Diane based on aggravated assault under the standard set forth in *Jackson v. Virginia*, 443 U. S. 307 (99 S.Ct. 2781, 61 L.E.d.2d 560) (1979).

2. Classification of McElrath's Contradictory Verdicts.

The jury's verdicts in this case are marked by an inherent contradiction. As such, it becomes necessary to

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at the time of the crime" if the jury, or court acting as trier of facts, finds beyond a reasonable doubt that the defendant is guilty of the crime charged and was mentally ill at the time of the commission of the crime. If the court or jury should make such finding, it shall so specify in its verdict.

determine how to characterize those verdicts. There are three main classes of contradictory verdicts: "inconsistent verdicts," "mutually exclusive verdicts," and "repugnant verdicts."[13] We will analyze each in turn.

(a) **Inconsistent verdicts.** As a general rule, inconsistent verdicts occur when a jury in a criminal case renders seemingly incompatible verdicts of *guilty* on one charge and *not guilty* on another. In Georgia, as explained below, we have abolished the rule that inconsistent verdicts require reversal. *Milam v. State*, 255 Ga. 560, 562 (2) (341 S.E.2d 216) (1986). Perhaps the classic example of inconsistent verdicts occurred in *United States v. Powell*, 469 U. S. 57 (105 S.Ct. 471, 83 L.E.2d 461) (1984). In *Powell*, the defendant was acquitted of conspiring to possess cocaine with the intent to distribute but convicted of the "compound offenses of using the telephone in 'committing and in causing and facilitating' certain felonies — 'conspiracy to possess with intent to distribute and possession with intent to distribute cocaine.'" Id. at 60. Though the Supreme Court recognized the internal inconsistency in these verdicts, it nonetheless allowed them to stand, explaining that

> where truly inconsistent verdicts have been reached, "[t]he most that can be said … is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that

13. Cases from Georgia appellate courts and elsewhere have often conflated these categories, in particular using "inconsistent" to describe all types of contradictory verdicts.

> they were not convinced of the defendant's guilt." *Dunn* [*v. United States*, 284 U. S. 390, 393 (52 S.Ct. 189, 76 L.E. 356) (1932)]. The rule that the defendant may not upset such a verdict embodies a prudent acknowledgment of a number of factors. First, as the above quote suggests, inconsistent verdicts — even verdicts that acquit on a predicate offense while convicting on the compound offense — should not necessarily be interpreted as a windfall to the Government at the defendant's expense. It is equally possible that the jury, convinced of guilt, properly reached its conclusion on the compound offense, and then through mistake, compromise, or lenity, arrived at an inconsistent conclusion on the lesser offense. But in such situations the Government has no recourse if it wishes to correct the jury's error; the Government is precluded from appealing or otherwise upsetting such an acquittal by the Constitution's Double Jeopardy Clause.

(Citations omitted.) Id. at 64-65. The Supreme Court then further concluded:

> Inconsistent verdicts therefore present a situation where "error," in the sense that the jury has not followed the court's instructions, most certainly has occurred, but it is unclear whose ox has been gored. Given this uncertainty, and the fact that the Government is precluded from challenging the acquittal, it is hardly

> satisfactory to allow the defendant to receive a new trial on the conviction as a matter of course.

Id. at 65.

Eventually, we followed the United States Supreme Court's approach to inconsistent verdicts.

> In *Milam v. State*, [supra], this Court abolished the rule that inconsistent verdicts in irreconcilable conflict in criminal cases warranted reversal (see *Hines v. State*, 254 Ga. 386, 387 (329 S.E.2d 479) (1985)), adopting the rationale set out by the U. S. Supreme Court in *United States v. Powell*, [supra], in its exercise of supervisory powers over the federal criminal process. Id. at 65… . In our cases endorsing the abolition of the inconsistent verdict rule, we have determined it is not generally within the court's power to make inquiries into the jury's deliberations, or to speculate about the reasons for any inconsistency between guilty and not guilty verdicts. *Dumas v. State*, 266 Ga. 797 (2) (471 S.E.2d 508) (1996). As we observed in *King v. Waters*, 278 Ga. 122 (1) (598 S.E.2d 476) (2004), appellate courts "cannot know and should not speculate why a jury acquitted on … [one] offense and convicted on … [another] offense. The reason could be an error by the jury in its consideration or it could be mistake, compromise, or lenity… ."

Turner v. State, 283 Ga. 17, 20 (2) (655 S.E.2d 589) (2008).

Appendix C

For reasons that will be made clear in Division 2 (c), infra, McElrath's verdicts cannot be classified simply as "inconsistent verdicts."

(b) **Mutually exclusive verdicts.** The term "mutually exclusive" generally applies to *two guilty* verdicts that cannot legally exist simultaneously. In such cases, where it is "both legally and logically impossible to convict [on] both counts, a new trial [should be] ordered." *Dumas*, supra, 266 Ga. at 799 (2). In *Dumas*, we explained:

> [V]irtually all ... Georgia cases affirming Georgia's abolition of the inconsistent verdict rule involve jury verdicts of guilty and not guilty that are alleged to be inconsistent. These cases are in accordance with the principle that it is not generally within the trial court's power to make inquiries into the jury's deliberations, or to speculate about the reasons for any inconsistency between guilty and not guilty verdicts. However, this appeal presents an entirely different scenario, because it involves two verdicts of guilty that not only were inconsistent, but also were mutually exclusive.

(Footnotes and emphasis omitted.) Id. We went on to point out that

> where there are mutually exclusive convictions, it is insufficient for an appellate court merely to set aside the lesser verdict, because to do so is to speculate about what the jury might have done if properly instructed, and to usurp

> the functions of both the jury and trial court. *Thomas v. State*, 261 Ga. 854 (413 S.E.2d 196) (1992).

Dumas, supra, 266 Ga. at 800 (2).

Dumas illustrates the problem of mutually exclusive verdicts. In that case, the jury found the defendant guilty of malice murder, vehicular homicide, and driving under the influence. Thereafter, the trial court instructed the jury it had rendered contradictory verdicts, and, as a result, the trial court sent the jury back for further deliberations. The jury later returned verdicts finding the defendant guilty of malice murder and driving under the influence. On appeal, the defendant argued both that the trial court was obligated to accept the jury's first verdicts and that the essential elements of malice murder and vehicular homicide contradicted each other, making those verdicts mutually exclusive. Id. at 798 (1).

We ultimately affirmed the defendant's conviction based on the second set of verdicts. We ruled that the first verdicts could not be accepted because the guilty verdicts for malice murder, an offense requiring a showing of the *presence* of malice aforethought, and vehicular homicide, requiring a showing of the *absence* of malice aforethought, were mutually exclusive and therefore vacated. Id. at 800 (2).[14]

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14. This result, however, should be contrasted with *State v. Springer*, 297 Ga. 376 (774 S.E.2d 106) (2015). In *Springer*,

> the jury found Springer not guilty of felony murder but returned guilty verdicts on charges of aggravated

As McElrath's verdicts are not two contradictory guilty verdicts, his verdicts cannot be classified as "mutually exclusive."

(c) **Repugnant verdicts.** Though they do not involve two guilty convictions, repugnant verdicts suffer from a similar infirmity as mutually exclusive verdicts; they

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> assault and involuntary manslaughter predicated on the offense of reckless conduct. The trial court charged the jury as to both the [OCGA § 16-5-20] (a) (1) and (a) (2) definitions of assault, authorizing the jury to return a verdict based on either definition, and the jury's verdict as to aggravated assault did not specify on which subsection it was based, leaving the possibility that the jury determined Springer both committed the assault with the intent to harm the victim and, at the same time, consciously disregarded a substantial and unjustifiable risk that his act of shooting a gun in a public parking lot would cause harm or endanger the safety of another.

Id. at 383 (3). We concluded that these verdicts, however, were not mutually exclusive, as

> the essential distinction between these crimes [is] the level of mental culpability. Such distinction does not mean that findings of guilt as to both offenses are irreconcilable or that if the State proves the greater mens rea, a jury would not be authorized to convict of the lesser included crime based on the finding of the greater. One cannot and should not be allowed to defend against a lesser included charge by proving that he is more culpable. Accordingly, we conclude that multiple guilty verdicts for the same conduct that are based on varying levels of mens rea are not mutually exclusive.

(Citation and footnote omitted.) Id. at 381 (1).

occur when, in order to find the defendant not guilty on one count and guilty on another, the jury must make *affirmative* findings shown on the record that cannot logically or legally exist at the same time. Where a jury renders repugnant verdicts, both verdicts must be vacated and a new trial ordered for the same reasons applicable to mutually exclusive verdicts. See *Dumas*, supra. Though we did not use the term "repugnant verdicts" expressly, we did describe them in *Turner*, supra. There, we explained that,

> when[,] instead of being left to speculate about the unknown motivations of the jury [regarding its return of contradictory verdicts,] the appellate record makes transparent the jury's reasoning why it found the defendant not guilty of one of the charges, "[t]here is … no speculation, and the policy explained in *Powell* and adopted in *Milam*, supra, … does not apply." *King v. Waters*, supra, 278 Ga. at 123.

Turner, supra, 283 Ga. at 20-21 (2). See also *Guajardo v. State*, 290 Ga. 172 (2) (718 S.E.2d 292) (2011).

(1) This case falls into the category of repugnant verdicts, as the guilty and not guilty verdicts reflect affirmative findings by the jury that are not legally and logically possible of existing simultaneously. This is because the not guilty by reason of insanity verdict on malice murder and the guilty but mentally ill verdict on felony murder based on aggravated assault required affirmative findings of different mental states that could

not exist at the same time during the commission of those crimes as they were indicted, proved, and charged to the jury.[15] Put simply, it is not legally possible for an individual to simultaneously be insane and not insane during a single criminal episode against a single victim, even if the episode gives rise to more than one crime.

In this case, the jury must have determined that McElrath was legally insane at the time that he stabbed Diane in order to support the finding that he was not guilty of malice murder by reason of insanity. Nonetheless, the jury went on to find McElrath guilty but mentally ill of felony murder based on the same stabbing — a logical and legal impossibility. For this reason, the verdicts in this case are repugnant, both verdicts must be vacated, and McElrath's case must be remanded for a new trial.[16]

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15. In McElrath's indictment, there was no real differentiation between the three counts regarding McElrath's alleged conduct. For malice murder, McElrath was accused of "unlawfully and with malice aforethought, caus[ing] the death of Diane McElrath by stabbing [her]." For felony murder, McElrath was accused of "caus[ing] the death of Diane McElrath by stabbing her" during "the commission of the felony offense of Aggravated Assault." And, for aggravated assault, McElrath was accused of "assault[ing] Diane McElrath with a knife, a deadly weapon." Nor did the State seek to prove, or the trial court instruct the jury, that the crimes occurred at different times or through distinct acts. See, e.g., *Gomez v. State*, 301 Ga. 445, 455 (4) (b) (801 S.E.2d 847) (2017) (describing the concept of a "deliberate interval" between acts).

16. We note that, in *Blevins v. State*, 343 Ga. App. 539 (808 S.E.2d 740) (2017), the Court of Appeals, while analyzing *Carter v. State*, 298 Ga. 867 (785 S.E.2d 274) (2016), ruled that *Carter* supported the broad application of *Milam*'s inconsistent verdict rule to abolish repugnant verdicts. In *Carter*, we explicitly stated that

3. Milam and Shepherd Do Not Control.

Contrary to the State's arguments, McElrath's case is not controlled by either *Milam*, supra, or *Shepherd v. State*, 280 Ga. 245 (626 S.E.2d 96) (2006).

(a) **Milam. In Milam**, unlike here, there was evidence to support a finding that the defendant's mental state changed during the commission of the charged crimes. More specifically, in *Milam*, the defendant contended that he was suffering from delusions that made him very angry and made him want "to blast away everybody." *Milam*, supra, 255 Ga. at 561. On the day of the crimes,

> [Appellant] went to his father's bedroom and obtained a single-barreled, single-shot shotgun belonging to his father. As [Ben] Cheese exited

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> we need not decide the question whether the rule that we announced in *Milam*, supra — which forbids a defendant from attacking as inconsistent a verdict of guilty on one count and not guilty on a different count — is just as applicable in repugnant verdict cases as it is in other inconsistent verdict cases.

Id. at 869. As is evident from the discussion above, *Milam*'s inconsistent verdict rule does not abolish repugnant verdicts altogether. To the extent *Blevins* states otherwise, it is hereby overruled.

We note that Carter inaccurately stated that, at the time of that opinion, this Court had not analyzed the concept of repugnant verdicts in relation to this Court's abolition of the "inconsistent verdict" rule. As discussed above, we did, in fact, consider repugnant verdicts in Turner, supra, and in Guajardo, supra, prior to the time that Carter was decided.

> the bathroom appellant shot him. [Walter] Beasley testified that he opened his bedroom door after hearing the gunshot and walked down a hallway toward Horace Milam's bedroom. Appellant, who was standing inside the bedroom, yelled for Beasley to get back, and Beasley returned to his room. Horace Milam stepped over Cheese and went into his own bedroom, where he was shot by appellant.

Id. at 560. The jury found Milam to be not guilty by reason of insanity for the murder of Cheese and guilty but mentally ill of the murder of Horace Milam. We analyzed the conflicting verdicts as follows:

> Initially, we note that, although the psychiatrist testified, first, that [Appellant] told him that he had heard voices in the past and that on the day of the killings those voices had made him very angry, and second, that he was of the opinion that appellant was mentally ill, he did not testify that appellant did not know the difference between right and wrong at the time of the crime. Moreover, … the state did present evidence of sanity in this case [to rebut the prior finding of insanity]. In this regard the record shows that appellant reloaded the gun after shooting Ben Cheese, and that when he saw Walter Beasley, he merely told Beasley to get back, instead of shooting him. After Beasley retreated, appellant shot and killed Horace Milam when Horace entered the bedroom.

Appendix C

> From appellant's warning to Beasley, the jury could infer that appellant knew that killing was wrong; that he did not want to kill Beasley; and that the demons he claimed to hear actually did not "make him want to blast away everybody." In addition, appellant's flight from the house is evidence which a rational juror could consider as a factor indicating that appellant knew that his actions were wrong. Finally, the arresting officers testified that appellant was calm and cooperative following his arrest, thus contradicting appellant's testimony that, at the time of the killings, voices were driving him mad and he did not know what he was doing.

Id. In other words, there was evidence that supported the jury's determination that Milam's mental state shifted between the distinct acts of shooting Cheese and shooting Horace Milam, which were separated by Milam's act of reloading the gun he was shooting and his conscious decision to warn away an intervening person rather than shooting that person as well. This evidence allowed the verdicts in *Milam* to be logically and legally consistent, and, therefore, not repugnant.

In this case, however, McElrath was indicted for stabbing Diane in a single episode. No evidence of a deliberate interval during the stabbing was presented to the jury to support a finding that McElrath's mental state changed at any time as he stabbed Diane.

(b) *Shepherd. Shepherd v. State*, supra, on which the State largely relies, is distinguishable from the present

case, at least as to the result of that opinion. In *Shepherd*, the defendant shot and killed his half-sister, and the jury found him not guilty by reason of insanity for malice murder, but found him guilty but mentally ill of felony murder predicated on aggravated assault, felony murder predicated on possession of a firearm by a convicted felon, aggravated assault, possession of a firearm by a convicted felon, and possession of a firearm during the commission of a crime. In sentencing Shepherd, the trial court merged the counts of felony murder predicated upon aggravated assault, aggravated assault, and possession of a firearm by a convicted felon into the felony murder count predicated upon the possession of a firearm by a convicted felon. Id. at 245 n.1.

The defendant contended that these verdicts were mutually exclusive. This Court rejected the defendant's claim, explaining that only two contradictory *guilty* verdicts fall into the category. *Shepherd*, 280 Ga. at 248 (1). We went on to discuss the verdicts as inconsistent, and determined that, despite the fact that the crimes occurred at one time and against the same victim,[17] the rule that

17. With regard to the circumstances surrounding the murder of his half-sister, Shepherd stated in a police interview that

> his sister "tried to run up behind me [and] … assault me" because "I wouldn't have sex with her and her friends"; that she went to the kitchen sink to get a knife with which to attack him; and as she turned toward him, he opened fire striking her at least twice. Shepherd stated that he shot her again in the neck as she was trying to get away; he then pulled her away from the doorway; tossed his pistol in the backyard; and went across the street to call 911. He also disclosed that he had a prior

inconsistent verdicts require reversal had been abolished by *Milam*. With this background, we concluded that the inconsistent verdicts in *Shepherd* did not require reversal. Id. at 248-250 (1). We did not, as we do in the present case, consider whether the verdicts were *repugnant*.

As to that unaddressed issue, there was evidence to logically and legally support both a finding that the defendant was not guilty by reason of insanity for malice murder and a finding that the defendant was guilty of the ongoing offense of possession of a firearm by a convicted felon and felony murder predicated on that crime. The defendant had admitted that he knew that, as a convicted felon, he was not allowed to be in possession of the handgun, the felonious possession of which was the proximate cause of the victim's death.[18] See *Shepherd*, supra, 280 Ga. at 250 (2).

The jury's verdicts that the defendant in *Shepherd* was guilty but mentally ill of aggravated assault and felony murder predicated on aggravated assault are more problematic, given our analysis of the similar verdicts in this case. But, even if we should have decided that those verdicts were repugnant with regard to the verdict of not guilty by reason of insanity of malice murder, such that those verdicts should have been vacated, the result

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> felony conviction for eluding the police. When asked by a detective if he was sorry about the events, Shepherd answered, "No, I think I'm right."

Shepherd, supra, 280 Ga. at 246-247.

18. The defendant purchased the handgun three months before he killed his half-sister.

in *Shepherd* would have been the same, because the defendant was ultimately convicted and sentenced only on the non-repugnant verdict of guilty but mentally ill of felony murder based on possession of a firearm by a convicted felon. See id. at 245 n.1. To the extent that the analysis in *Shepherd* diverges from our analysis in this case, however, *Shepherd* is disapproved.

4. The Order Remanding McElrath to the Department of Corrections.

McElrath argues that the trial court improperly discharged him from a state mental health facility and remanded him to the custody of the Department of Corrections by applying an inappropriate subsection of OCGA § 17-7-131. Specifically, McElrath contends that the trial court should have applied subsections applicable to a defendant found not guilty by reason of insanity rather than guilty but mentally ill. Given our conclusion in Division 2 (c), supra, we need not reach McElrath's argument. Here, McElrath's verdicts are repugnant, and both must be vacated. Therefore, at this juncture, the provisions of OCGA § 17-7-131 are not applicable to McElrath, and the trial court's order considering McElrath's placement under OCGA § 17-7-131 (g) (which relates to the placement of a defendant who has been convicted as guilty but mentally ill) must be vacated.

5. McElrath's Remaining Contentions.

McElrath's remaining enumerations all relate specifically to his contention that he was improperly found guilty but mentally ill of and convicted for felony murder

based on aggravated assault. Because we conclude that both of McElrath's verdicts must be vacated as repugnant, we need not reach these remaining arguments.

Judgment vacated and case remanded with direction. All the Justices concur.