Fifth Amendment — Double Jeopardy — Acquittals — McElrath v. Georgia

The substantive law under which the accused are prosecuted can vary from state to state.[1] But no matter the jurisdiction, there are procedural backstops against successive prosecutions.[2] States, such as Georgia, have created their own guardrails for criminal proceedings by passing laws and amending their own constitutions.[3] The federal backstop, contained in the Fifth Amendment's Double Jeopardy Clause, is that "[n]o person" is to be prosecuted multiple times "for the same offence."[4] In *McElrath v. Georgia*,[5] the Supreme Court rightly vindicated this federal constitutional protection and reiterated the definition of acquittals for double jeopardy purposes.[6] In turn, the Georgia General Assembly should surpass the federal baseline, as it has before,[7] by codifying a statutory definition of an acquittal for double jeopardy purposes. This modification would help preserve the finality of the state adjudicative process, protect the legally innocent, and maintain the issues raised in *McElrath* within the province of Georgia juries, rather than reviewing courts.

The traditional bar against double jeopardy is not a panacea for the accused. For instance, some in popular discourse believe a potential mistrial in the case involving gang-related charges against acclaimed

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[1] *See* Engle v. Isaac, 456 U.S. 107, 128 (1982) ("States possess primary authority for defining and enforcing the criminal law. In criminal trials they also hold the initial responsibility for vindicating constitutional rights.").

[2] Comment, *Twice in Jeopardy*, 75 YALE L.J. 262, 262 n.3 (1965) ("[Almost all states] have constitutional double jeopardy provisions. The five states that do not, consider protection from double jeopardy a part of their common law.").

[3] *See, e.g.*, GA. CONST. art. I, § 1, ¶ 18 ("No 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. CODE ANN. § 16-1-8 (2024) (describing when a prosecution is barred by a former prosecution). State law can be more or less protective than federal law, granting states latitude to enact protections that diverge from those in the federal constitution. *See* Hans A. Linde, *E Pluribus — Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 179 (1984).

[4] U.S. CONST. amend. V. This protection against double jeopardy is rooted in an understanding that criminal prosecution subjects people "to embarrassment, expense and ordeal," and compels them to "live in a continuing state of anxiety and insecurity." Green v. United States, 355 U.S. 184, 187 (1957); *see also* Ohio v. Johnson, 467 U.S. 493, 498–99 (1984) ("[T]he bar to retrial following acquittal or conviction ensures that the State does not make repeated attempts to convict an individual, thereby exposing him to continued embarrassment, anxiety, and expense . . . ." (citing United States v. Wilson, 420 U.S. 332, 343 (1975); *Green*, 355 U.S. at 187–88)).

[5] 144 S. Ct. 651 (2024).

[6] *See id.* at 660–61.

[7] Marchman v. State, 215 S.E.2d 467, 467–68 (Ga. 1975) ("The 1968 Georgia Criminal Code has expanded the proscription of double jeopardy beyond that provided for in the United States and Georgia Constitutions." (quoting State v. Estevez, 206 S.E.2d 475, 477 (Ga. 1974))); *see also* GA. CODE ANN. § 16-1-7 (2024); *id.* § 16-1-8 (2024).

rapper Young Thug[8] would automatically trigger double jeopardy protections.[9] But unless a mistrial results from prosecutorial or judicial conduct "intended to 'goad'" the defense to move for a mistrial,[10] neither the Double Jeopardy Clause nor Georgia law bar a retrial.[11] Protections under the federal clause are modest at best.[12] Thus, the scope of state procedural protections has palpable stakes.[13]

Like the majority of people admitted to Georgia prisons, Damian McElrath was neither a household name nor even fully employed.[14] Leading up to the incident that led to his arrest, McElrath was overcome by delusions that his mother, Diane McElrath, was poisoning his food and drink with pesticides.[15] After his premature discharge from a mental health hospital,[16] McElrath killed his mother in a single bout.[17] He was subsequently indicted on three counts: malice murder, felony murder, and aggravated assault.[18] A jury rendered verdicts finding McElrath *not guilty* by reason of insanity for malice murder and *guilty* but mentally ill for felony murder and aggravated assault.[19] The court

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[8] *See* Holly Bailey, *The Long, Strange Drama of the Young Thug Trial in Atlanta*, WASH. POST (July 9, 2024, 2:20 PM), http://www.washingtonpost.com/nation/2024/07/03/young-thug-trial-halts-indefinitely [https://perma.cc/S6VJ-DS6B].

[9] *See, e.g.*, @hoodzndnewzmedia, INSTAGRAM (July 9, 2024), http://www.instagram.com/reel/C9OlM3ft6a4/?igsh=NGJuZm1mcWtoYWt5 [https://perma.cc/8PGZ-ECJC] ("The trial is effectively over because double jeopardy is going to attach.").

[10] Oregon v. Kennedy, 456 U.S. 667, 674, 676 (1982).

[11] United States v. Perez, 22 U.S. (9 Wheat.) 579, 580 (1824); *see Kennedy*, 456 U.S. at 674, 676; Williams v. State, 491 S.E.2d 377, 379 (Ga. 1997) ("The only relevant intent is the intent to terminate the trial, not the intent to prevail at . . . trial by impermissible means." (alteration in original) (quoting United States v. Oseni, 996 F.2d 186, 188 (7th Cir. 1993))).

[12] *See* Daniel C. Richman, *Bargaining About Future Jeopardy*, 49 VAND. L. REV. 1181, 1188 n.23 (1996) (collecting critiques of federal double jeopardy doctrine's inadequacy); *see, e.g.*, United States v. Felix, 503 U.S. 378, 389 (1992) ("[A] substantive crime and a conspiracy to commit that crime are not the 'same offence' for double jeopardy purposes."); United States v. Lanza, 260 U.S. 377, 382 (1922) (holding that the Double Jeopardy Clause does not apply when each prosecution is brought by a separate sovereign). Notably, the Double Jeopardy Clause does not categorically bar subsequent trials after mistrials or hung juries because the initial jeopardy is not understood to have ended. *Perez*, 22 U.S. (9 Wheat.) at 580 (announcing that the Double Jeopardy Clause does not prevent a criminal defendant from being retried after a trial ends in a hung jury); *see also* Roopali H. Desai, Case Note, State v. Minnitt*: Extending Double Jeopardy Protections in the Context of Prosecutorial Misconduct*, 46 ARIZ. L. REV. 415, 419 (2004). It does not bar subsequent trials following trial errors, the admission of inadmissible evidence, or conviction reversals for reasons other than insufficient evidence. *Id.* at 417–19. Also, acquittals rendered by courts lacking jurisdiction present "no bar to subsequent indictment." United States v. Ball, 163 U.S. 662, 669 (1896).

[13] Georgia has the seventh-highest rate of incarceration of any state. Emily Widra, *States of Incarceration: The Global Context 2024*, PRISON POL'Y INITIATIVE (June 2024), http://www.prisonpolicy.org/global/2024.html [https://perma.cc/S7XY-FN8R].

[14] *See* GA. DEP'T OF CORR., INMATE STATISTICAL PROFILE 14 (2023); Joint Appendix at 62a, *McElrath*, 144 S. Ct. 651 (No. 22-721), 2023 WL 5669075.

[15] Joint Appendix, *supra* note 14, at 35a, 36a.

[16] *See id.* at 32a.

[17] *Id.* at 7a, 145a.

[18] *Id.* at 7a.

[19] McElrath v. State (*McElrath I*), 839 S.E.2d 573, 574–75 (Ga. 2020). McElrath had originally been convicted in a bench trial before being granted a new trial before a jury. *Id.* at 574 n.1.

accepted the jury's verdicts.[20] Consequently, McElrath filed a motion to vacate only the guilty verdicts under the state's "repugnant verdicts" rule.[21] Under this Georgia rule, a verdict can be set aside if it involves "affirmative findings by the jury that are not legally and logically possible of existing simultaneously."[22] The trial judge denied the motion and sentenced McElrath to life imprisonment for felony murder.[23]

When McElrath appealed his conviction on repugnancy grounds, Georgia's highest court agreed with him but vacated both the conviction *and the acquittal*.[24] The court took issue with the jury making affirmative findings that suggested McElrath, someone the jury found to be insane, was at the same time guilty of a crime that only sane people can commit.[25] The jury's irreconcilable findings prompted the court to vacate both the guilty and not guilty verdicts as "repugnant."[26] On remand, the judge denied McElrath's motion to halt the prosecution on double jeopardy grounds.[27]

On appeal from this denial, the Supreme Court of Georgia affirmed.[28] The court cited the Georgia Constitution's double jeopardy provision, but it did not apply it or any other related state enactment.[29] After rejecting a challenge to its previous decision to vacate the verdicts,[30] it bypassed the Double Jeopardy Clause analysis in two ways. First, the court insisted that McElrath's acquittal and conviction were not just repugnant but always void, analogizing the outcome to a mistrial or hung jury.[31] Second, it held that the doctrine of collateral estoppel was inapplicable since the verdicts were void.[32] The court adhered

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[20] *See id.* at 574 n.1.

[21] Joint Appendix, *supra* note 14, at 146a.

[22] *McElrath I*, 839 S.E.2d at 579. According to the Georgia Supreme Court, there are three main classes of contradictory verdicts under the state's law. *Id.* at 577–80. (1) Mutually exclusive verdicts, that is two *guilty* verdicts that cannot possibly exist simultaneously, must be retried. *See* Dumas v. State, 471 S.E.2d 508, 511 (Ga. 1996). (2) Inconsistent verdicts, such as a conviction on a compound offense and an acquittal on a predicate offense, may be disagreeable but do not require reversal. *See* King v. Waters, 598 S.E.2d 476, 477 (Ga. 2004) ("[T]he appellate court cannot know and should not speculate why a jury acquitted on the predicate offense and convicted on the compound offense."). (3) Repugnant verdicts, which are intolerably inconsistent because a jury makes affirmative findings that pull back the curtain on its own illogical or illegal reasoning, are to be thrown out. *See* Turner v. State, 655 S.E.2d 589, 591–92 (Ga. 2008).

[23] *McElrath I*, 839 S.E.2d at 574 n.1. The aggravated assault conviction merged into the felony murder conviction. *Id.*

[24] *Id.* at 575.

[25] *Id.* at 580.

[26] *Id.* at 582.

[27] McElrath v. State *(McElrath II)*, 880 S.E.2d 518, 519 (Ga. 2022).

[28] *Id.*

[29] *Id.* at 521 (citing GA. CONST. art. I, § 1, ¶ 18).

[30] *Id.* at 520.

[31] *Id.* at 521–22 ("Because the verdicts were repugnant, both are rendered valueless." *Id.* at 521.).

[32] *See id.* at 522.

to its own taxonomy of contradictory verdicts,[33] avoiding the question of whether federal law might still define one of the verdicts as an acquittal.

The Supreme Court granted certiorari and unanimously reversed.[34] The Court first held that federal law, not state law, determines whether there has been an acquittal under the Double Jeopardy Clause.[35] To have held otherwise would have allowed state law to control which acquittals deserve federal double jeopardy protections. Justice Jackson articulated that this functionalist inquiry turns on the substance of the outcome, rather than its label.[36] The standard for recognizing an event as an acquittal under the Fifth Amendment is whether there has been "any ruling that the prosecution's proof is insufficient to establish criminal liability for an offense."[37] The ruling must also relate to the "ultimate question of guilt or innocence."[38] Although this holding appears self-evident, it is not tautological. At bottom, a jury acquits a person when, after considering the state's proof, it "act[s] on its view that the prosecution ha[s] failed to prove its case."[39] While the rule does not automatically resolve every permutation, it relies on the same substance-form distinction that permits successive prosecutions after trial errors[40] or prosecutions initiated in the wrong venue.[41]

Justice Jackson rejected Georgia's contention that specific affirmative findings that contradict each other can overcome the rule against second-guessing acquittal verdicts.[42] Georgia proposed a carveout that would have placed *plainly inconsistent verdicts* outside the definition of an acquittal because the jury had exposed its "mistake, compromise, or lenity,"[43] such that the error is self-evident, obviating the danger of a court inquiring into a verdict.[44] The Court found this distinction between acquittals in the form of general verdicts versus "special findings" untenable.[45] Moreover, at oral argument, Georgia admitted that the same "special findings" by a jury considering a single count in isolation would not render the verdict void.[46] Ultimately, the bright-line rule

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[33] *Id.* at 521–22; *see supra* note 22.

[34] McElrath v. Georgia, 143 S. Ct. 2688 (2023) (mem.); *McElrath*, 144 S. Ct. at 655, 661.

[35] *McElrath*, 144 S. Ct. at 659.

[36] *Id.* at 660 (quoting Evans v. Michigan, 568 U.S. 313, 322 (2013)).

[37] *Id.* at 658 (quoting *Evans*, 568 U.S. at 318).

[38] *Id.* at 659 (quoting United States v. Scott, 437 U.S. 82, 98 n.11 (1978)).

[39] *Id.* at 660 (quoting *Evans*, 568 U.S. at 325).

[40] *See supra* note 12.

[41] *See* Smith v. United States, 143 S. Ct. 1594, 1600 (2023).

[42] *McElrath*, 144 S. Ct. at 660.

[43] United States v. Powell, 469 U.S. 57, 65 (1984).

[44] Brief for Respondent at 39–41, *McElrath*, 144 S. Ct. 651 (No. 22-721), 2023 WL 6880206.

[45] *See McElrath*, 144 S. Ct. at 660.

[46] *See* Transcript of Oral Argument at 31–32, *McElrath*, 144 S. Ct. 651 (No. 22-721), http://www.supremecourt.gov/oral_arguments/argument_transcripts/2023/22-721_3e04.pdf [https://perma.cc/Y2CA-86D5].

against second-guessing a jury's reasoning remained unchanged[47]: "Once rendered, a jury's verdict of acquittal is *inviolate*."[48] The Court barred McElrath's retrial on the malice murder count, reversed the Supreme Court of Georgia, and remanded.[49]

Justice Alito concurred.[50] He reasoned that the malice murder verdict qualified as an acquittal because, one, the jury *returned* a not guilty verdict and, two, the trial judge *entered* a judgment of acquittal.[51] However, Justice Alito noted that federal law neither prescribes nor proscribes accepting inconsistent verdicts.[52] He argued that the Court's opinion should not be overread to say that states can never empower trial court judges to direct the jury to continue deliberating or refuse an inconsistent verdict.[53]

Normally, the Supreme Court cannot ensure that constitutional backstops are reliably applied in every state criminal case, like it did for McElrath. Although the Supreme Court can dispose of a considerable number of cases "summarily by unsigned order[],"[54] state courts received an estimated 15.6 million incoming criminal cases in 2022,[55] while the Court has only issued written opinions in fifty-two criminal cases arising from state courts in the previous ten Terms.[56] By going no further than affirming the federal protections against double jeopardy, *McElrath* preserved the states' ability to enforce standards beyond the constitutional baseline and placed the onus on Georgia to protect the accused. The Georgia legislature should take this opportunity to codify a statutory

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[47] *See* Evans v. Michigan, 568 U.S. 313, 318 (2013) ("[T]he Double Jeopardy Clause bars retrial following a court-decreed acquittal, even if the acquittal is 'based upon an egregiously erroneous foundation.'" (quoting Fong Foo v. United States, 369 U.S. 141, 143 (1962) (per curiam))).

[48] *McElrath*, 144 S. Ct. at 658 (emphasis added).

[49] *Id.* at 661. McElrath must still contend with civil commitment and a potential retrial on the remaining counts. *See id.* at 657, 661 n.5.

[50] *Id.* at 661 (Alito, J., concurring).

[51] *Id.* ("[T]here was indisputably an acquittal.").

[52] *Id.* (citing United States v. Powell, 469 U.S. 57, 68–69 (1984); Dunn v. United States, 284 U.S. 390, 393–94 (1932)).

[53] *Id.*

[54] *See Orders of the Court — Term Year 2023*, SUP. CT. OF THE U.S., http://www.supremecourt.gov/orders/ordersofthecourt/23 [https://perma.cc/2BT4-9WTT]; *see, e.g.*, Moyle v. United States, 144 S. Ct. 2015 (2024) (mem.) (per curiam). The unanimity and brevity of the majority opinion, *McElrath*, 144 S. Ct. at 655–59, suggest that a per curiam opinion could have resolved the case.

[55] *Court Statistics Project Releases Trial Court Caseload Trends*, NAT'L CTR. FOR STATE CTS. (Mar. 6, 2024), http://www.ncsc.org/newsroom/at-the-center/2024/court-statistics-project-releases-trial-court-caseload-trends [https://perma.cc/5A36-NCDC].

[56] *See The Supreme Court, 2022 Term — The Statistics*, 137 HARV. L. REV. 490, 504 (2023); *The Supreme Court, 2021 Term — The Statistics*, 136 HARV. L. REV. 500, 515 (2022); *The Supreme Court, 2020 Term — The Statistics*, 135 HARV. L. REV. 491, 504 (2021); *The Supreme Court, 2019 Term — The Statistics*, 134 HARV. L. REV. 610, 625 (2020); *The Supreme Court, 2018 Term — The Statistics*, 133 HARV. L. REV. 412, 427 (2019); *The Supreme Court, 2017 Term — The Statistics*, 132 HARV. L. REV. 447, 461 (2018); *The Supreme Court, 2016 Term — The Statistics*, 131 HARV. L. REV. 403, 416 (2017); *The Supreme Court, 2015 Term — The Statistics*, 130 HARV. L. REV. 507, 520 (2016); *The Supreme Court, 2014 Term — The Statistics*, 129 HARV. L. REV. 381, 394 (2015); *The Supreme Court, 2013 Term — The Statistics*, 128 HARV. L. REV. 401, 415 (2014).

definition of an acquittal for double jeopardy purposes in order to preserve the finality of the adjudicative process, safeguard the legally innocent, and help maintain the issues raised in *McElrath* within the province of Georgia juries.

State criminal law rulings, even those that are incorrect on their own state grounds, are part of a state's dominion over the interpretation and invocations of its laws.[57] The Supreme Court, for example, did not examine the Georgia Supreme Court's application of its "repugnant verdicts" rule in *McElrath*[58] — and rightly so. For the Court to reach these state law grounds would violate longstanding principles of federalism[59] and exceed its jurisdiction.[60] Furthermore, correcting the Georgia Supreme Court's error on federal grounds was sufficient to resolve the case.[61] Insofar as *McElrath* encroached on the states' domain, it went no further than previous double jeopardy jurisprudence,[62] which state courts are bound to respect.[63]

Despite past legislative efforts in Georgia to protect the accused, the current statutory provisions would not have guided the state courts to the correct result on McElrath's double jeopardy question. Over fifty years ago, the general assembly "expanded the proscription of double jeopardy beyond that provided for in the United States and Georgia Constitutions."[64] The legislature enshrined a "statutory test[] for determining double jeopardy questions."[65] As such, Georgia law bars a subsequent prosecution where the "former prosecution" results in "either a conviction or an acquittal."[66] But the Georgia Code does not supply a definition of an acquittal for double jeopardy purposes. While the statute bars subsequent proceedings for a person who is "adjudged not

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57 *See* Arizonans for Off. Eng. v. Arizona, 520 U.S. 43, 80 (1997) (leaving interpretation of a state's law to its highest court even while acknowledging that a federal court may later need to rule on federal rights).

58 *McElrath*, 144 S. Ct. at 658.

59 *See* Mullaney v. Wilbur, 421 U.S. 684, 691 (1975) ("[S]tate courts are the ultimate expositors of state law . . . ." (citing Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1875); Winters v. New York, 333 U.S. 507 (1948))).

60 *See* 28 U.S.C. § 1257.

61 *See McElrath*, 144 S. Ct. at 661.

62 The Court had already established that an acquittal "encompass[es] any ruling that the prosecution's proof is insufficient to establish criminal liability for an offense," Evans v. Michigan, 568 U.S. 313, 318 (2013) (citing United States v. Scott, 437 U.S. 82, 98 & n.11 (1978); Burks v. United States, 437 U.S. 1, 10 (1978); United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977)), which includes but is not limited to when a trial court "act[s] on its view that the prosecution ha[s] failed to prove its case," *id.* at 325.

63 U.S. CONST. art. VI, cl. 2. ("This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby . . . .").

64 State v. Estevez, 206 S.E.2d 475, 477 (Ga. 1974).

65 Stephens v. Hopper, 247 S.E.2d 92, 94 (Ga. 1978).

66 GA. CODE ANN. § 16-1-8(a) (2024). Georgia protections go as far as to prohibit subsequent prosecutions for a crime that the accused *could have been convicted* of in the prior prosecution, *id.* § 16-1-8(b)(1), and place restrictions on state prosecutions that share concurrent jurisdiction with a previous federal prosecution, *id.* § 16-1-8(c).

guilty,"[67] the state code provides no formula for courts to determine whether an acquittal actually occurred. Whether McElrath's irreconcilable jury verdicts constituted an acquittal could not be determined in this *state law* vacuum, so the Georgia Supreme Court based its decision on its understanding of *federal law*.[68]

However, the Georgia legislature can, in fact, delineate the scope of the state bar against successive prosecutions by first incorporating the acquittal analysis in the Supreme Court's majority opinion into the existing statutory tests.[69] To be on par with the federal understanding of an acquittal for double jeopardy purposes, the test must functionally recognize any judicial ruling or act on the part of a jury on its view that the prosecution has failed to establish liability for an offense as an acquittal.[70] From there, Georgia can prevent other successive prosecutions by expanding the statutory definition of an acquittal to include "final order[s] or judgment[s] . . . that required a determination inconsistent with any fact or legal proposition necessary to a conviction in the subsequent prosecution"[71] or precluding prosecutions that contain charges that the prosecutor was required to include in a previous prosecution.[72] Georgia need not take Justice Alito's commentary[73] as a requirement to include the court's entry of an acquittal judgment into the definition of an acquittal for double jeopardy purposes. Rather, the state can shore up protections for the accused in its state courts by deeming any jury verdict of acquittal as sufficient for purposes of barring subsequent prosecutions. Doing so would further Georgia's previous effort to "expand[]" the constitutional proscription on double jeopardy.[74]

A comprehensive statutory definition of an acquittal that encompasses or exceeds the federal standard[75] could have resolved McElrath's double jeopardy issue before it reached the reviewing courts and would help keep any acquittals within the domain of Georgia juries. Under Georgia law, state courts are "not privileged to invade the province of the jury."[76] Likewise under federal law, juries are understood to wield

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[67] *Id.* § 16-1-8(d)(2).

[68] *See supra* note 62; *McElrath II*, 880 S.E.2d 518, 521–22 (Ga. 2022).

[69] *See* GA. CODE ANN. § 16-1-8 (2024); *Stephens*, 247 S.E.2d at 94 (recognizing "statutory tests for determining double jeopardy questions").

[70] *See McElrath*, 144 S. Ct. at 658; Evans v. Michigan, 568 U.S. 313, 318, 325 (2013); United States v. Scott, 437 U.S. 82, 98 n.11 (1978) (differentiating between acquittals, which "relate to 'the ultimate question of guilt or innocence,'" and rulings which release a defendant "for reasons required by the Constitution or laws, but which are unrelated to factual guilt or innocence" (quoting Stone v. Powell, 428 U.S. 465, 490 (1976))).

[71] 720 ILL. COMP. STAT. ANN. 5/3-4(a) (West 2016).

[72] *See* Andrew Manuel Crespo, *The Hidden Law of Plea Bargaining*, 118 COLUM. L. REV. 1303, 1325 (2018).

[73] *McElrath*, 144 S. Ct. at 661 (Alito, J., concurring).

[74] State v. Estevez, 206 S.E.2d 475, 477 (Ga. 1974); *see* GA. CODE ANN. § 16-1-7 (2024); *id.* § 16-1-8 (2024).

[75] *See* Crespo, *supra* note 72, at 1331.

[76] Jackson v. State, 198 S.E.2d 666, 667 (Ga. 1973).

"unreviewable power . . . to return a verdict of not guilty" for permissible as well as "impermissible reasons," including "compromise, compassion, lenity, or misunderstanding of the governing law."[77] However, without a state law definition of an acquittal, the outermost reaches of what constitutes an acquittal for double jeopardy purposes will be defined by court precedent. Without a statutory definition of an acquittal for state courts to follow, Georgia courts may have to depend solely on judicial discretion in these edge cases,[78] which is how error arose in McElrath's case.[79]

The lack of a statutory test for an acquittal comes at the expense of criminal defendants of all stripes, especially those found legally innocent in the first instance. The specter of incarceration disproportionately haunts Black communities in Georgia,[80] but it can reach any community and directly affect a community's children, parents, or political and cultural leaders. At the start of 2011, one in seventy adults in Georgia was behind bars.[81] The accused may also face "a seemingly endless string of separate prosecutions."[82] Relying on the "[l]ax double jeopardy doctrine"[83] and the federal definition of an acquittal allows prosecutors to attempt to convict an individual multiple times, "enhancing the possibility that even though innocent he may be found guilty."[84] In the face of overcriminalization, robust statutory protections are essential to safeguard those facing the "whole power of the state arrayed against" them.[85]

The state judiciary further failed to protect the accused in two significant ways, highlighting the importance of *legislative* intervention. First, if the Georgia Supreme Court had applied the "repugnant verdicts" rule it claimed to apply, McElrath's acquittal would have remained intact. After *United States v. Powell*[86] held that inconsistent

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[77] Bravo-Fernandez v. United States, 137 S. Ct. 352, 358 (2016) (quoting United States v. Powell, 469 U.S. 57, 63 (1984) (alteration in original)). Thus, even "a mistaken acquittal" is nonetheless an acquittal. Evans v. Michigan, 568 U.S. 313, 318 (2013).

[78] *See supra* note 22.

[79] *Compare McElrath*, 144 S. Ct. at 658 (applying Court precedent to "define[] an acquittal to encompass any ruling that the prosecution's proof is insufficient to establish criminal liability for an offense" (citing *Evans*, 568 U.S. at 318)), *with McElrath II*, 880 S.E.2d 518, 522 (Ga. 2022) (applying Georgia precedent to hold that double jeopardy proscriptions do not apply to "repugnant verdicts").

[80] INCARCERATION TRENDS IN GEORGIA, VERA INST. OF JUST. 1 (2019), http://www.vera.org/downloads/pdfdownloads/state-incarceration-trends-georgia.pdf [https://perma.cc/5Q9P-66QX] ("In Georgia, Black people constituted 32% of state residents, but 51% of people in jail and 60% of people in prison.").

[81] MICHAEL P. BOGGS & CAREY A. MILLER, REPORT OF THE GEORGIA COUNCIL ON CRIMINAL JUSTICE REFORM 16 (2017).

[82] Crespo, *supra* note 72, at 1323, 1329.

[83] William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 507, 531 (2001).

[84] Green v. United States, 355 U.S. 184, 187–88 (1957).

[85] Powell v. Alabama, 287 U.S. 45, 72 (1932).

[86] 469 U.S. 57 (1984).

verdicts are odious but permissible,[87] the Georgia high court did away with its previous rule[88] that had banned inconsistent verdicts entirely.[89] From there, Georgia courts abrogated the remnants of the "repugnant verdicts" rule[90] up until the Georgia Supreme Court changed course sua sponte in its first *McElrath* decision.[91] The court claimed to apply precedent that had revived the rule.[92] However, in the cited authority the court had reversed the entry of only the guilty verdicts, not the acquittal.[93] And even prior to *Powell*, Georgia courts applied the "repugnant verdicts" rule only to convictions, not acquittals.[94] Moreover, if McElrath's verdicts had truly been void, as the Georgia Supreme Court suggested,[95] it would have been unnecessary to vacate the judgments[96] under Georgia law, since they would already be mere nullities.[97]

Second, the state courts in *McElrath* mistakenly overlooked Georgia statutory law that should have been the starting point for the double jeopardy question. The Georgia Supreme Court has held that "questions of double jeopardy in Georgia must now be determined under the expanded statutory proscriptions."[98] Defendants lose their statutory double jeopardy protections when they are "*expressly* abandoned."[99] The

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[87] *See id.* at 65 ("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.").

[88] *See* Wiley v. State, 185 S.E.2d 582, 584 (Ga. Ct. App. 1971) ("Verdicts which are repugnant . . . cannot be allowed to stand.").

[89] Milam v. State, 341 S.E.2d 216, 218 (Ga. 1986) (abolishing rule that inconsistent verdicts must be reversed).

[90] *See* Blevins v. State, 808 S.E.2d 740, 750 (Ga. Ct. App. 2017) ("[W]e find it appropriate to apply *Milam*'s reasoning to repugnant verdicts . . . . In so doing, we overrule *Wiley* and any progeny." (citation omitted)); *see also* Carter v. State, 785 S.E.2d 274, 275 (Ga. 2016) (noting the Georgia Supreme Court had never adopted the *Wiley* rationale).

[91] *See McElrath I*, 839 S.E.2d 573, 580 n.16 (Ga. 2020) (overruling *Blevins* and reestablishing the "repugnant verdicts" rule).

[92] *See id.* at 579 ("Though we did not use the term 'repugnant verdicts' expressly, we did describe them in *Turner*." (citing Turner v. State, 655 S.E.2d 589, 592 (Ga. 2008))).

[93] *Turner*, 655 S.E.2d at 592 (involving an acquittal for malice murder and a guilty verdict for felony murder and aggravated assault for the same conduct).

[94] *See, e.g.*, Wiley v. State, 185 S.E.2d 582, 584 (Ga. Ct. App. 1971) (reversing denial of motion in arrest of judgment on "repugnant" conviction); Kuck v. State, 99 S.E. 622, 623–24 (Ga. 1919) (reversing denial of motion to set aside guilty verdict on "repugnancy" grounds).

[95] *McElrath II*, 880 S.E.2d 518, 522 (Ga. 2022).

[96] *McElrath I*, 839 S.E.2d at 575.

[97] GA. CODE ANN. § 17-9-4 (2024) ("The judgment of a court . . . [being] void for any other cause, is a mere nullity . . . ."); *see* Shotkin v. State, 35 S.E.2d 556, 561 (Ga. Ct. App. 1945); *see also* Wright v. State, 596 S.E.2d 587, 588 (Ga. 2004) (recognizing well-established rule that "motion to vacate a judgment will not lie in a criminal case" (citing Lacey v. State, 324 S.E.2d 471 (Ga. 1985); Waye v. State, 238 S.E.2d 923 (Ga. 1977))).

[98] State v. Estevez, 206 S.E.2d 475, 477 (Ga. 1974).

[99] Garrett v. State, 702 S.E.2d 470, 473 (Ga. Ct. App. 2010) (emphasis added) (quoting Henderson v. State, 426 S.E.2d 264, 265 (Ga. Ct. App. 1992)). Concerningly, the Georgia Supreme Court has not taken up the issue of statutory abandonment, even though it has ruled that the statutory protections are controlling, *see Estevez*, 206 S.E.2d at 477.

courts' omissions signal a disregard for state statutory protections that the General Assembly must rectify before more defendants are affected.

With concerns about prosecutorial misconduct in Georgia criminal cases ranging from President Donald Trump's to that of sixty-one Stop Cop City activists,[100] it is incumbent on the legislature to enact a more protective standard barring successive prosecutions — alongside other reforms. Federal backstops need not be the only guardrails. Many states have elevated their protections above the federal baseline, including by articulating a double jeopardy bar that applies "where the prosecutorial misconduct is so egregious that . . . it clearly denied a defendant his or her right to a fair trial," regardless of intent.[101] The legislature could also prevent defendants from surrendering the double jeopardy protections carved into Georgia law by preventing state courts from discounting them at hearings.[102] Finally, Georgia could "effectively eliminate threats of serial prosecution" by precluding any future charges that the prosecutor *should* have known about when she filed the initial case.[103] Substantively, the legislature should resume its project of restructuring the felony threshold for certain crimes,[104] expanding parole eligibility,[105] and reforming misdemeanor bail practices,[106] which previously coincided with a nearly thirteen percent decline in the Georgia prison population.[107] At minimum, a statutory definition of an acquittal and additional procedural protections could have been at the crux of the correct outcome in McElrath's state court proceedings, and could precipitate "[re]thinking . . . how to coordinate penalties," prosecutions, and protections for the accused in Georgia.[108]

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[100] *See* Richard Fausset & Danny Hakim, *Trump Seeks to Appeal Ruling Allowing Prosecutor to Keep Georgia Case*, N.Y. TIMES (Mar. 18, 2024), http://www.nytimes.com/2024/03/18/us/trump-georgia-fani-willis-appeal.html [https://perma.cc/25WX-RB97]; Timothy Pratt, *Petition Aims to Dismiss Atlanta's Bid to Use Rico Law Against "Cop City" Activists*, THE GUARDIAN (June 26, 2024, 10:30 AM), http://www.theguardian.com/us-news/article/2024/jun/26/cop-city-protesters-atlanta [https://perma.cc/VYA7-QPD9].

[101] Emily McEvoy, Note, *When Double Jeopardy Should Bar Retrial in Cases of Prosecutorial Misconduct: A Call for Broader State Protections*, 122 COLUM. L. REV. 173, 189–93 (2022) (quoting State v. Rogan, 984 P.2d 1231, 1249 (Haw. 1999) (finding that protection within the state constitution)).

[102] *See Garrett*, 702 S.E.2d at 473 (finding that the defendant abandoned additional state law protections).

[103] *See* Crespo, *supra* note 72, at 1325 & n.63.

[104] *See* ELIZABETH PELLETIER, BRYCE PETERSON & RYAN KING, URB. INST., ASSESSING THE IMPACT OF GEORGIA'S SENTENCING REFORMS 4 (2017).

[105] Hannah Riley, *Too Little, Too Late*, INQUEST (Dec. 16, 2021), https://inquest.org/too-little-too-late [https://perma.cc/273R-MYZG].

[106] Abigail L. Howd & Alisa M. Radut, *SB 407 — Sentencing and Punishment*, 35 GA. ST. U. L. REV. 45, 64, 73 (2018).

[107] Wilborn P. Nobles III, *Georgia Prisons Grow as Tough-on-Crime Laws Return*, AXIOS (Mar. 1, 2024), https://www.axios.com/local/atlanta/2024/03/01/georgia-prison-population-data [https://perma.cc/2MB2-RTZU] ("Between 2012 and 2022, [Georgia's prison population] fell by nearly 13%.").

[108] *See* Jacqueline E. Ross, *Damned Under Many Headings*: *The Problem of Multiple Punishment*, 29 AM. J. CRIM. L. 245, 322 (2002).