

# Turns Out It's Really Useful to Have a Former Public Defender on the Supreme Court

[Mark Joseph Stern](#) Feb 21, 2024 4:00 PM



Justice Ketanji Brown Jackson's unanimous, uncompromising opinion for the court doubled as a strong endorsement of the right to trial by jury. Photo illustration by Slate. Photos by Jacquelyn Martin/Pool/Getty Images and Kevin Dietsch/Getty Images.

The Supreme Court delivered a remarkable victory for the rights of criminal defendants on Wednesday, applying the constitutional bar against double jeopardy to prohibit a sneaky end run around a jury's acquittal. Justice Ketanji Brown Jackson's unanimous, uncompromising opinion for the court doubled as a strong endorsement of the right to trial by jury—including a jury's unquestionable authority to acquit a defendant for any reason it

chooses, including a belief that the charges are unjust. Jackson, the first former public defender to serve on SCOTUS, served up a forceful rebuke to the Georgia judiciary's attempt to undermine this "inviolable" principle.

Wednesday's case, [\*McElrath v. Georgia\*](#), involves a tragic set of facts. Damian McElrath spent several years slipping into schizophrenia before, in a fit of delusional paranoia, he stabbed his mother to death, convinced she was poisoning his food. Georgia prosecutors charged him with malice murder, felony murder, and aggravated assault. At trial, McElrath pleaded insanity, presenting a persuasive case that he could not distinguish right from wrong at the time of his crime. The jury partially agreed and returned a split verdict. On the charge of malice murder, the jury found McElrath "not guilty by reason of insanity"—an acquittal, but one that committed him to a mental hospital indefinitely. On the two other charges, the jury found him "guilty but mentally ill"—a conviction that subjected him to prison time, with the possibility of mental health treatment. The trial judge accepted the verdict and sentenced McElrath to life in prison.

After a complicated appeal, the Georgia Supreme Court declared that the [jury's split verdicts](#) on malice murder (acquitted) and felony murder (convicted) were "repugnant" under state law. The court insisted that it was impossible for McElrath to have had different mental states at the same time, so the verdicts could not be reconciled. Thus, the court vacated *both* verdicts, effectively allowing the state to retry McElrath for malice murder despite the jury's acquittal. McElrath argued that this retrial would violate double jeopardy, but [the court disagreed](#), reasoning that the two verdicts were "valueless," indistinguishable from a mistrial due to a hung jury.

Could it really be that easy to evade the Fifth Amendment's guarantee against double jeopardy? Can a court just proclaim that an acquittal doesn't count because it doesn't make sense? No, Jackson reasoned in her opinion on Wednesday: The Georgia Supreme Court got it wrong. To explain why, the justice went back to first principles. The Fifth Amendment states that no

person may “be subject for the same offence to be twice put in jeopardy of life or limb.” That means that “a verdict of acquittal is final” and serves as “a bar to a subsequent prosecution for the same offense.” An acquittal encompasses “any ruling that the prosecution’s proof is insufficient to establish criminal liability for an offense.” A jury’s acquittal is “inviolable” and cannot be reviewed, let alone overturned, by a higher court. This “bright-line rule” [preserves the jury’s duty](#) “to stand between the accused and a potentially arbitrary or abusive government that is in command of the criminal sanction.”

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Most reasonably informed citizens probably know all that. What they might not recognize, however, is that a jury can acquit for any reason it wants, or for no reason at all. “An acquittal might reflect a jury’s determination that the defendant is innocent of the crime charged,” Jackson noted. But it might also reflect “the result of compromise, compassion, lenity, or misunderstanding of the governing law.” For the purposes of double jeopardy, the basis of the verdict is irrelevant; “an acquittal is an acquittal.” That rule has a straightforward application to this case, Jackson concluded: “We simply cannot know why the jury in McElrath’s case acted as it did, and the Double Jeopardy Clause forbids us to guess.” Georgia is therefore forbidden from retrying him for malice murder.

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It’s worth dwelling on the pernicious potential of Georgia’s “repugnant

verdict” rule and the importance of Jackson’s wholesale rejection of it. Juries constitute a crucial component of American democracy and are, in fact, the [most diverse institution](#) of government. The right to trial by jury gives 12 citizens absolute authority to stop the state from taking away a person’s liberty. This guarantee [has long functioned](#) as a key safeguard against government oppression. (It is a shame, then, that the overwhelming majority of criminal defendants do not [go to trial](#).) The power held by juries is so sweeping that jurors may, as Jackson noted, vote to acquit for any reason whatsoever.

Typically, a jury acquits because the prosecution has failed to prove the defendant’s guilt beyond a reasonable doubt. But juries may also engage in “nullification,” [refusing to apply](#) a particular criminal law because they believe that it is unfair or unfairly applied to the defendant before them. The jury may exercise “compassion” or “lenity” and decide that, while the defendant is surely guilty of the crime, he does not deserve the punishment sought by the state. Georgia’s “repugnancy” [rule is rooted](#) in a tacit rejection of this proposition. It awards judges the power to review and set aside a jury’s acquittal because they don’t think the verdict makes sense.

But a jury’s acquittal does not [have to make sense](#). The Fifth and Sixth amendments were designed, in part, to disempower judges—who are, after all, employees of the state—and hand over the final determination of guilt to a dozen citizens drawn from the community. Had the Supreme Court upheld Georgia’s practice, it would have invited every other state to enact a similar scheme, letting courts reject an acquittal on the grounds that the jury simply *must* have misunderstood the law. Wednesday’s decision forestalled any such attack on double jeopardy.

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Jackson brought special insight to this case, which may be why Chief Justice John Roberts assigned the opinion to her. As a public defender, she [focused on appeals](#), representing clients who sought to have their convictions

overturned. The justice surely recognizes that the deck is stacked against criminal defendants from the start and that, unfortunately, many would rather take a guilty plea than risk a trial. It is especially egregious, then, that McElrath—a man who risked trial and obtained an acquittal on the most serious charge—saw his victory disappear in the hands of a higher court. Jackson could not let that injustice stand, and she marshaled a unanimous court to join her in rejecting it in the strongest possible terms.

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