

# Wiley Files Supreme Court Petition for Certiorari in *McElrath v. Georgia*

February 28, 2023

Washington, DC – Working with the Supreme Court Program at the University of North Carolina School of Law, Wiley Rein LLP filed a petition for a writ of certiorari in *McElrath v. Georgia*. The petition asks the U.S. Supreme Court to review whether a 2022 ruling of the Supreme Court of Georgia, which held that the petitioner, Damien McElrath, could be retried for a crime even though a jury already acquitted him of the same charge, violates the Double Jeopardy Clause of the Fifth Amendment.

The Double Jeopardy Clause guarantees that no person can be “twice put in jeopardy of life or limb.” In light of this constitutional protection, the Supreme Court has long held that verdicts of acquittal are final and unreviewable, even if the acquittal is inconsistent with a simultaneously rendered conviction. Reprosecuting a defendant for a crime of which he was acquitted would put him in jeopardy again, violating the Constitution.

In permitting McElrath to be retried on the acquitted charge, the Supreme Court of Georgia distinguished between two kinds of verdicts: those that are “repugnant” to another verdict rendered in the same trial, and those that are merely inconsistent with another verdict. It likened repugnant verdicts to mistrials or hung juries, instances where no verdict is reached at all. The Supreme Court of Georgia said because there was “no way to decipher what factual finding or determination” the jury made in McElrath’s original trial, the verdicts were so inconsistent that they were repugnant, and the Double Jeopardy Clause does not forbid retrying McElrath on the malice murder charge.

## Related Professionals

Richard A. Simpson  
Partner, Deputy General Counsel  
202.719.7314  
rsimpson@wiley.law

Elizabeth Fisher  
Associate  
202.719.4526  
eefisher@wiley.law

## Practice Areas

Issues and Appeals  
Litigation

The petition asks the U.S. Supreme Court to review whether the Supreme Court of Georgia erred when it ruled that certain kinds of inconsistent verdicts – those so inconsistent that they are “repugnant” to one another – are not subject to the protections of the Double Jeopardy Clause. The petition argues that no matter what label a court applies, a so-called repugnant verdict is simply a particular type of inconsistent verdict, so McElrath cannot face trial again for the malice murder charge of which he was already acquitted.

If permitted to stand, the decision of the Supreme Court of Georgia would expand the circumstances under which people in Georgia may face a second trial on criminal charges far beyond what is permissible under current precedent of the U.S. Supreme Court.

McElrath is represented on a pro bono basis by Wiley partner Richard A. Simpson and associate Elizabeth E. Fisher. The Wiley team filed the petition along with co-counsel Professor F. Andrew Hessick of the University of North Carolina School of Law and H. Maddox Kilgore and Carlos J. Rodriguez of Kilgore & Rodriguez, LLC, in Marietta, Georgia. Law student Adam C. Gillette and Wiley project assistant Sophia Winston-Mendoza also participated in preparing the petition.