

IN THE LOUISIANA SUPREME COURT  
IN AND FOR THE STATE OF LOUISIANA

NO. 2006-KK-1041

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STATE OF LOUISIANA

v.

RICKY LANGLEY

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Supervisory Writ Application to Calcasieu Parish No. 10258-02  
Hon. Wilford Carter, Presiding

Third Circuit Court of Appeal  
*State v. Langley*, KW 05-01475 (3rd Cir. 02/08/2006), rehearing denied, No. KW-05-  
01475 (3rd Cir. 04/04/2005)  
(Peters, J., Genovese, J., Crooks, J.)

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF  
OF THE AMERICAN CIVIL LIBERTIES UNION  
IN SUPPORT OF PETITIONER

THIS IS A CAPITAL CASE

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**MOTION FOR LEAVE TO FILE AMICUS BRIEF  
AND REQUEST FOR ORAL ARGUMENT**

Comes now the American Civil Liberties Union (ACLU) and seeks leave to file an Amicus Brief to assist the Court in resolving whether the state and federal constitutions permit the retrial of a defendant on a charge for which he was previously acquitted, on the ground that the first trial was a nullity because of the trial court's absence at critical stages. The proposed Amicus Brief addresses the double jeopardy analysis from a national perspective, comparing the ruling of the Third Circuit with constitutional cases from Louisiana, other states, and federal courts. The brief also explores the historical context of the "nullity" exception to double jeopardy, an important piece of analysis not thoroughly addressed in the parties' briefs.

**STATEMENT OF INTEREST**

The ACLU is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution. The ACLU of Louisiana, one of the ACLU's statewide affiliates, has participated in many of the leading constitutional cases litigated in Louisiana. The ACLU Capital Punishment Project engages in public advocacy and litigation, including direct representation of capital defendants across the country. Given its longstanding commitment to protection of the constitution and due process, the proper resolution of the double jeopardy question is a matter of substantial importance to the ACLU, its members, and its clients.

Wherefore, the ACLU respectfully moves for leave to file an Amicus Brief addressing the issue of the double jeopardy questions presented by this case. The ACLU additionally respectfully requests that this Court designate additional time and grant leave for the ACLU to participate in oral argument.

Respectfully submitted,

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## STATEMENT OF RELEVANT FACTS AND SUMMARY OF ARGUMENT

Ricky Langley was indicted for first-degree murder. After hearing the state's evidence at a three-week trial held in the Fourteenth Judicial District Court for the Parish of Calcasieu, a properly assembled and instructed jury acquitted Langley of first-degree murder and convicted him of second-degree murder. State v. Langley, 896 So.2d 200, 202 (La. App. 2004). Langley was sentenced to life imprisonment without parole. Id. He appealed his conviction to the Third Circuit Court of Appeal. That court reversed and remanded for a new trial, holding that the trial judge's absence during voir dire and closing arguments -- combined with his cavalier attitude and comments throughout the trial -- constituted structural error. Id. at 210.

After correctly concluding that reversal was required, the Third Circuit Court of Appeal announced an unprecedented new legal proposition: "when a structural error destroys the validity of the proceedings, the trial and resulting verdict are an absolute nullity and can have no effect whatsoever" and double jeopardy protections do not apply. Id. at 211.<sup>1</sup> The court indicated that Langley could be tried again for first-degree murder and the state could seek his death by execution under this novel proposition. Id. at 212.

The Third Circuit's radical construction of the double jeopardy clause is contrary to over one hundred years of Louisiana and United States constitutional double jeopardy jurisprudence. The court's statement implicates -- and violates -- three overlapping threads of firmly-established precedent: (1) cases affirming the absolute finality of acquittals; (2) cases holding that defendants who successfully appeal their convictions for lesser-included offenses may only be re-tried on the lesser-included offenses; and, (3) cases construing the narrowing of the common law "nullity" exception to double jeopardy. Together, this precedent combines to form a bright line rule: even if a verdict is labeled a nullity because of fundamental error in the trial or proceedings below, double jeopardy will apply and prohibit retrial of a charge if the trial court had jurisdiction over the offense and if the defendant was *acquitted* -- either directly or implicitly by

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<sup>1</sup> In this statement, the Third Circuit erroneously conflated the narrow historical class of "nullity cases," which exempt from double jeopardy judgments by courts lacking in jurisdiction, with the much broader category of cases addressing "structural error."



conviction of a lesser offense -- after a judge or a jury had the "opportunity to return a verdict" on the charge. Price v. Georgia, 398 U.S. 323, 329 (1970).

Because the Court of Appeal decision in Langley radically departs from this clear legal standard and over a century of constitutional precedent protecting and reaffirming the importance of the prohibition against double jeopardy, reversal is required. If affirmed, the Third Circuit's decision will seriously erode the protection of the double jeopardy clause and unfairly burden defendants' decisions to appeal meritorious assignments of error.

#### **I. THE THIRD CIRCUIT'S DECISION IS CONTRARY TO UNITED STATES SUPREME COURT DECISIONS AFFIRMING THE ABSOLUTE FINALITY OF ACQUITTALS**

The Third Circuit's radical construction of the double jeopardy clause directly contravenes that clause's absolute bar to retrial after acquittal. The state and federal constitutional prohibitions against double jeopardy include protection against retrial after both convictions and acquittals. North Carolina v. Pearce, 395 U.S. 711, 717 (1969), *overruled on other grounds by* Alabama v. Smith, 490 U.S. 794 (1989); State v. Doughty, 379 So.2d 1088, 1090 (La. 1980). While the law provides for a handful of exceptions to the double jeopardy bar to retrial after convictions (and cases that end before acquittal),<sup>2</sup> *no exceptions* permit retrial of a defendant acquitted by a fact finder, regardless of the basis of the error. See Sanabria v. United States, 437 U.S. 54, 64 (1978) *quoting* United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977) (internal quotations omitted) ("That 'a verdict of acquittal . . . may not be reviewed . . . without putting the defendant twice in jeopardy, and thereby violating the Constitution' has recently been described as 'the most fundamental rule in the history of double jeopardy jurisprudence.'"); Fong Foo v. United States, 369 U.S. 141, 142 (1962), *quoting* Ball v. United States, 163 U.S. 662, 671 (1896) ("The Court of Appeals thought, not without reason, that the acquittal was based upon an egregiously erroneous foundation.

Nevertheless, 'the verdict of acquittal was final, and could not be reviewed \* \* \* without

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<sup>2</sup> See e.g., Sanabria v. United States, 437 U.S. 54, 63 n. 15 (1978) (listing double jeopardy exceptions that permit a new trial: "where the defendant successfully appeals his conviction, where a mistrial is declared for a 'manifest necessity,' where the defendant requests a mistrial in the absence of prosecutorial or judicial overreaching, or where an indictment is dismissed at the defendant's request in circumstances functionally equivalent to a mistrial") (internal citations omitted).

putting (the petitioners) twice in jeopardy, and thereby violating the constitution."); Green v. United States, 355 U.S. 184, 188 (1957) ("[I]t is one of the elemental principles of our criminal law that the Government cannot secure a new trial by means of an appeal even though an acquittal may appear to be erroneous."); State v. Victor, 36 La. Ann. 978 (La. 1884) (no retrial on acquitted offense despite facially defective indictment); State v. Baskin, 301 So.2d 313, 316 (La. 1974)("[A] judgment of acquittal . . . bars any further criminal proceedings against the defendant for the same offense.")

This rule is an absolute one. Burks v. United States, 437 U.S. 1, 16 (1978) ("[W]e necessarily afford *absolute finality* to a jury's verdict of acquittal – no matter how erroneous its decision") (emphasis added); Burlington v. Missouri, 451 U.S. 430, 445 (1981)("A verdict of acquittal on the issue of guilt or innocence is, of course, *absolutely final.*") (emphasis added); Tibbs v. Florida, 457 U.S. 31, 41 (1982) ("a verdict of not guilty... *absolutely* shields the defendant from retrial") (emphasis added).

The absolute finality given to verdicts of acquittal, regardless of the scope or source of the error, rests on the public interest in the finality of criminal judgments and the law's recognition of the "evil" posed by multiple prosecutions. See Arizona v. Washington, 434 U.S. 497, 503 (1978), *quoting* Fong Foo v. United States, 369 U.S. 141, 143 ("The public interest in the finality of criminal judgments is so strong that an acquitted defendant may not be retried even though 'the acquittal was based upon an egregiously erroneous foundation.'"); United States v. Wilson, 420 U.S. 332, 348, 352 (1975) (discussing the evil of multiple prosecutions and noting that multiple trials would permit the prosecutor "to re-examine the weaknesses in his first presentation in order to strengthen the second").

In short, because a jury acquitted Langley of first-degree murder, he cannot be retried for that offense under the double jeopardy clauses of the federal and state constitutions. This Court must reverse.

**II. THE THIRD CIRCUIT'S DECISION CONFLICTS WITH DECISIONS BY THE UNITED STATES SUPREME COURT HOLDING THAT A DEFENDANT WHO SUCCESSFULLY APPEALS A CONVICTION FOR A LESSER-INCLUDED OFFENSE MAY ONLY BE RETRIED ON THE LESSER-INCLUDED OFFENSE**

As the decisions of the United States Supreme Court make clear, the Third Circuit misunderstood the permissible scope of a retrial after a successful appeal from a conviction for a lesser-included offense. The rule is clear and simple: a defendant who successfully appeals a conviction for a lesser-included offense may only be retried on the lesser-included offense, not the greater offense.

In the seminal case of Green v. United States, 355 U.S. 184 (1957), the Supreme Court addressed the double jeopardy ramifications when a defendant successfully appeals a conviction for a lesser-included offense. In Green, as in Langley, the defendant was indicted on first-degree murder and convicted of second degree murder. Id. at 185-96. His conviction was reversed because of insufficient evidence. Id. at 186. On retrial, the government sought to retry him for first-degree murder. Id. The Supreme Court held that this retrial was prohibited by the Double Jeopardy Clause, explaining that the defendant's jeopardy on the first-degree murder charge ended when the jury "was given a full opportunity to return a verdict on that charge and instead reached a verdict on the lesser charge." Price, 398 U.S. at 329 (discussing Green, 355 U.S. at 191-92).

The Supreme Court in Green also rested its double jeopardy holding on the fact that permitting the retrial on the greater offense would be profoundly unfair to the defendant -- by forcing him to choose between foregoing a valid appeal or filing the valid appeal and risking conviction on the acquitted, greater offense at retrial. 355 U.S. at 192-93. The Court explained that the Constitution does not countenance such a Hobson's choice:

Reduced to plain terms, the Government contends that in order to secure the reversal of an erroneous conviction of one offense, a defendant must surrender his valid defense of former jeopardy not only on that offense but also on a different offense for which he was not convicted and which was not involved in his appeal. Or stated in the terms of this case, he must be willing to barter his constitutional protection against a second prosecution for an offense punishable by death as the price of a successful appeal from an erroneous conviction of another offense for which he has been sentenced to five to twenty years' imprisonment. As the Court of Appeals said in its first opinion in this case, a defendant faced with such a 'choice' takes a 'desperate chance' in securing the reversal of the erroneous conviction. The law should not, and in our judgment does not, place the defendant in such an incredible dilemma.

Green v. United States 355 U.S. 184, 193 (1957).<sup>3</sup>

Shortly after Green, the Supreme Court returned to the double jeopardy ramifications of an appeal of a conviction for a lesser offense. Price v. Georgia, 398 U.S. 323 (1970). In Price, the Court again made explicit the connection between the finality of acquittals and constitutional requirement that a retrial be limited to the lesser-included offense:

[T]his court has consistently refused to rule that jeopardy for an offense continues after an acquittal, whether that acquittal is express or implied by a conviction on a lesser included offense *when the jury was given a full opportunity to return a verdict on the greater charge*.

398 U.S. at 329 (emphasis added).

Because a jury acquitted Langley of first-degree murder at the earlier trial and because he successfully appealed only his conviction for second-degree murder, he may only be retried for second-degree murder without doing violence to his constitutional right against double jeopardy.

### **III. THE THIRD CIRCUIT'S DECISION MISCONSTRUES AND MISAPPLIES THE COMMON LAW "NULLITY" EXCEPTION TO THE DOUBLE JEOPARDY DOCTRINE AND IS CONTRARY TO DECISIONS BY THE UNITED STATES SUPREME COURT AND OTHER COURTS, INCLUDING THIS COURT, NARROWLY CONSTRUING THE EXCEPTION**

The Third Circuit's interpretation of the "nullity" exception to double jeopardy protection falls outside of the scope of the exception as defined at common law. It is also wholly inconsistent with decisions by the United States Supreme Court and other courts, including this Court, which have drastically curtailed – indeed, *amicus* would maintain, have eliminated -- the common law “nullity” exception to double jeopardy.

Although today many courts use the term "nullity" loosely in a variety of contexts,<sup>4</sup> in the double jeopardy context, the term "nullity" is a legal term of art of now

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<sup>3</sup> As explained in petitioner's brief, in State v. Goodley, 423 So. 2d 648 (La. 1983), this Court reached a similar conclusion through its reading of article I, § 19 of the Louisiana Constitution and article 912.1 of the Louisiana Code of Criminal Procedure.

<sup>4</sup> See e.g., Kroeplin Farms Gen. Partnership v. Heartland Crop Ins., Inc., 430 F.3d 906 (8th Cir. 2005) (discussing nullity in terms of contract disputes); Rosborough Mfg. Co. v. Trimble, 301 F.3d 482 (6th Cir. 2002) (referring to statutes as "nullities" under the Ohio Supreme Court's interpretation); Fafel v. DiPaolo, 399 F.3d 403, 410 (1st Cir. 2005) (distinguishing in the habeas context between errors in the exercise of jurisdiction which render a case merely voidable and the "total want of jurisdiction" which renders the case a nullity). A federal appellate court characterized the same structural error that occurred in this case -- the absence of a trial court at a critical stage of trial -- as a nullity,

chiefly historical importance. At common law, “nullity” referred to cases in which the lower court lacked jurisdiction and cases with facially defective indictments. Early double jeopardy cases held that nullity cases were an exception to double jeopardy. Two critical United States Supreme Court cases, however, Ball v. United States, 163 U.S. 662 (1896) and Benton v. Maryland, 395 U.S. 784 (1969), rejected the nullity doctrine when applied to acquittals. As a consequence, the term “nullity” today has little if any significance for double jeopardy purposes. To the extent that the nullity exception survives at all for double jeopardy purposes, it applies only to cases where the trial court lacked the fundamental power to hear the case. See e.g., Block v. State, 286 Md. 266 (Md. 1979).

The development – and subsequent narrowing– of the nullity exceptions to the application of double jeopardy can only be understood within its historical context. The history of the prohibition against double jeopardy is deep and long, stretching back before the development of American and English common law. Benton, 395 U.S. at 795 (“The fundamental nature of the guarantee against double jeopardy can hardly be doubted. Its origins can be traced to Greek and Roman times, and it became established in the common law of England long before this Nation’s independence.”). In England, at common law, courts did not extend double jeopardy protection to cases where the court lacked jurisdiction or where there was a defective indictment. Ball, 163 U.S. at 666-67. In the eyes of the law, the defendant was never truly at risk if the court lacked jurisdiction,<sup>5</sup> and so accordingly there was no bar to later placing a defendant – for the first time – in jeopardy on a new indictment or by a trial in front of a court with jurisdiction. Id. The common law termed those cases with defective jurisdiction as “void.” Id. at 669 (“An acquittal before a court having *no jurisdiction* is, of course, like all the proceedings in the case, *absolutely void*, and therefore no bar to subsequent indictment and trial in a court which has jurisdiction of the offense.”) (emphasis added).

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*but not when interpreting the double jeopardy doctrine.* See United States v. Mortimer, 161 F.3d 240, 241 (3rd Cir. 1998).

<sup>5</sup> A defective indictment was considered a jurisdictional defect at common law. See e.g., Ex parte Bain, 121 U.S. 1, 2-13, (1887) (“We are of the opinion that an indictment found by a grand jury was indispensable to the power of the court to try the petitioner for the crime with which he was charged.”), *overruled by* United States v. Cotton, 535 U.S. 625 (2002).

In contrast, "if the court had jurisdiction of the cause and of the party, its judgment is not void, but only voidable." *Id*; see also, Wilcox v. Jackson, 38 U.S. 498 (1839), quoting Elliot et al vs. Peirsol's Lessee, 26 U.S. 328 (1828) ("[W]here a Court has jurisdiction, it has a right to decide every question which occurs in the cause; and whether its decision be correct or otherwise, . . . its judgments and orders are regarded as nullities. They are not voidable, but simply void.")<sup>6</sup>

The structural error at Langley's trial -- the absence of the trial court at critical stages -- does not qualify as a "nullity" under the historical common law definition: the error was neither a lack of jurisdiction by the trial court nor a defective indictment. In the language of the common law, because the court in this case "had jurisdiction of the cause and of the party," the jury's verdict is "not void, but only voidable." Ball, 163 U.S. at 669.<sup>7</sup> Even under the common law, therefore, the Third Circuit misapplied the nullity doctrine.

The common law exception for "nullities" was first narrowed by the United States Supreme Court over a hundred years ago, in Ball v. United States, 163 U.S. 662 (1896). There, the defendant, Fillmore Ball, was acquitted of murder after a jury trial. His two codefendants, who were convicted and sentenced to death, appealed their convictions by

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<sup>6</sup> The distinction between challenges to cases as "absolutely void" (or null) and "voidable" was of importance in early habeas corpus jurisprudence: cases lacking in jurisdiction, or "null" or "void" cases, could be challenged in collateral proceedings, whereas "voidable" cases could only be challenged in direct appellate proceedings. See e.g., Clarke D. Forsythe, The Historical Origins of Broad Federal Habeas Review Reconsidered, 70 Notre Dame L. Rev. 1079, 1132-33 (1995) (discussing Judge Seymour Thompson's 1883 article on habeas corpus jurisdiction) ("Thompson wrote that the law distinguished between court judgments which are 'merely void and those which are voidable in a direct proceeding instituted for the purpose of vacating them, setting them aside, or reversing them. A void judgment is, in law, a nullity. It is as nothing. If a void judgment was enforced by imprisoning a defendant, it could be attacked collaterally and the prisoner discharged through habeas corpus. However, if the error did not render the judgment 'absolutely void' collateral relief was not available and the defendant could only seek to correct the error by appeal or writ of error."); Noble v. Union River Logging R. Co., 147 U.S. 165, 173 (1893) ("It is true that, in every proceeding of a judicial nature, there are one or more facts which are strictly jurisdictional, the existence of which is necessary to the validity of the proceedings, and without which the act of the court is a mere nullity; . . . [s]o, if the court appoint an administrator of the estate of a living person . . . the act is not voidable merely, but void. In these and similar cases the action of the court or officer fails for want of jurisdiction over the person or subject-matter. The proceeding is a nullity, and its invalidity may be shown in a collateral proceeding.")

<sup>7</sup> To the extent that a nullity exception is recognized in the double jeopardy clause of the United States Constitution, the exception's breadth can be no broader than the common law existing at the time of the enactment of the Bill of Rights. See e.g., Crawford v. Washington, 541 U.S. 36, 53-54 (2004); Mattox v. United States, 156 U.S. 237, 243 (1895).

challenging their collective indictment as defective. 163 U.S. at 663. The Supreme Court quashed the indictments. *Id.* at 664-665. The state then obtained a new indictment from the grand jury, indicting all three co-defendants, including Fillmore Ball, who had not appealed. Ball, along with the other defendants, was tried, over his plea of double jeopardy, and all three were convicted of murder. *Id.* at 665-66.

Ball appealed his conviction to the Supreme Court on double jeopardy grounds. The Court began its analysis by reviewing the British common law rule that an acquittal upon a defective indictment would not give rise to a double jeopardy defense. *Id.* at 666-67. The Court then noted that while an early American decision applied this rule, it did so over the vigorous dissent of justices who contended that the indictment exception to double jeopardy did not "comport with that universal and humane principle of criminal law 'that no man shall be brought into danger more than once for the same offense.'" *Id.* at 668, *quoting* People v. Barrett, 1 Johns. 66 (N.Y. 1806) (J. Livingston, dissenting).

In Ball, the Supreme Court sided with the earlier dissenters - breaking with the English common law - and held that "in this country a general verdict of *acquittal* upon the issue of not guilty to an indictment undertaking to charge murder, and not objected to before the verdict as insufficient in that respect, is a bar to a second indictment for the same killing." 163 U.S. at 669 (emphasis added). The Supreme Court rejected the common law exception to double jeopardy protection for cases with defective indictments as "unsatisfactory in the grounds on which it proceeds, as well as unjust in its operation upon those accused of crime." *Id.* The Court held that Ball's first acquittal of murder protected him from retrial on that charge -- despite the facially defective indictment -- thereby rejecting the nullity exception in the context of an acquittal.

Decades later, in the late 1960s, the State of Maryland tried to resuscitate the nullity exception to double jeopardy for cases lacking in jurisdiction or with defective indictments. In Benton v. Maryland, 395 U.S. 784, 785 (1969), the defendant initially had been charged with counts of both burglary and larceny. At a jury trial, he was convicted of the burglary count, but acquitted of the larceny charge. *Id.* He appealed his conviction and while his case was on appeal, the Maryland Supreme Court ruled that both his grand and petite juries were unconstitutional. *Id.* at 785-86. Maryland re-indicted the

defendant for both the burglary *and* the larceny charge, even though he had previously been acquitted of the larceny charge. *Id.* at 786. At the second trial, the defendant was convicted of both charges. *Id.* He appealed his larceny conviction on double jeopardy grounds.<sup>8</sup>

The United States Supreme Court soundly rejected Maryland's argument that double jeopardy protection did not apply to the larceny conviction because the unconstitutionality of the defendant's first indictment rendered his conviction a nullity.

The Supreme Court reasoned:

Maryland argues that Green does not apply to this case because petitioner's original indictment was absolutely void. One cannot be placed in 'jeopardy' by a void indictment, the state argues. This argument sounds a bit strange, however, since petitioner could quietly have served out his sentence under this 'void' indictment had he not appealed his burglary conviction. Only by accepting the option of a new trial could the indictment be set aside; at worst the indictment would seem only avoidable at the defendant's option, not absolutely void.

Benton, 395 U.S. at 796-97. In dissenting on other grounds,<sup>9</sup> Justice Harlan took a similar view of Maryland's "nullity" argument:

The state's contention that petitioner's first trial was a complete nullity because the trial court 'lacked jurisdiction' is unconvincing. As has been noted, it appears that the State would willingly have been petitioner serve out the burglary sentence imposed in consequence of that trial.

*Id.* at 811-12 (Harlan, J., dissenting). Thus, the United States Supreme Court unanimously agreed that the issue for double jeopardy purposes is not whether a case can be characterized as void or a nullity. Rather, the correct constitutional question is whether the defendant would serve a sentence but for the appeal. Here, like in Benton, it cannot be tenably denied that Langley would have served out his sentence but for his appeal.

Remarkably, a series of early decisions by this Court reached the same conclusions as the United States Supreme Court reached in these cases years later. Thus, even before the United States Supreme Court limited the application of the nullity

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<sup>8</sup> Before addressing the nullity argument, the Supreme Court first considered whether the exacting double jeopardy standard required by the Bill of Rights applied to the States. *Id.* at 794. The Supreme Court answered that question in the affirmative, holding that the "double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage, and that it should apply to the States through the Fourteenth Amendment." *Id.*

<sup>9</sup>Justice Harlan disagreed with the majority that the Fifth Amendment applies to the states. *Id.* at 808.



common law exception in Ball in 1896, this Court recognized the importance of the double jeopardy implications of a conviction on a defective indictment for a defendant appealing a lesser-included offense. State v. Foster, 7 La. Ann. 255 (La. 1852); State v. Victor, 36 La. Ann. 978 (1884); State v. Fradella, 162 La. 1067 (La. 1927). In Foster, the defendant was charged with murder and convicted by a jury of manslaughter. 7 La. Ann. 255. Under the statutory scheme, a defendant had to be prosecuted within one year of the offense, unless the defendant absconded or fled. Id. The defendant in Foster was indicted two years after the offense and the indictment failed to charge that he had absconded or fled. The Supreme Court of Louisiana set aside the verdict and arrested the judgment because of the defective indictment. The Court concluded its opinion by noting that the defendant could be prosecuted on a proper indictment for the crime of *manslaughter*. Id.

The Court again stressed the double jeopardy implications of a jury acquittal – even in the face of a defective indictment - in State v. Victor, 36 La. Ann. 978 (1884). The prosecution in Victor committed the same error as in Foster: it neglected to allege the basis for prosecuting a murder charge more than one year after the offense. Id. (describing the indictment as facially "insufficient and illegal"). In Victor, as in Foster, the defendant was convicted of the lesser charge of manslaughter and appealed. This Court again ruled that the conviction had to be set aside without prejudice to the prosecution for retrying the manslaughter charge. The Court explained:

[The defendant] cannot be tried for murder, for he stands, by the effect of the verdict, acquitted of that charge, but following the precedents established in the case of State v. Foster, 7 Ann. 255, and Same v. Same, 8 Ann. 290, we shall, while annulling the verdict and sentence and arresting the judgment, do so without prejudice to a legal prosecution for the crime of manslaughter.

36 La. Ann. 978.

In State v. Fradella, 162 La. 1067 (La. 1927), this Court read the Louisiana Constitution to prohibit a retrial on a count for which the defendant was acquitted, despite an "illegal" verdict. Id. at 1068. The Court stressed the importance of the double jeopardy principle, holding that a defendant's "most substantial right, perhaps, is the one which, under the Constitution of the state, he became invested by his acquittal to plead as a defense that he cannot be put in jeopardy twice for the same crime." Id. at 1072. This

early case recognized the importance of the double jeopardy doctrine to the right to appeal:

If a verdict is set aside on a motion either for a new trial or in arrest of judgment, the defendant's life or liberty may be put in jeopardy again for the crime which he was illegally convicted of, but not for a crime which he was acquitted of by the verdict; otherwise, a defendant charged with murder and convicted of manslaughter could not file a motion for a new trial or in arrest of judgment without putting his life and liberty in jeopardy again for the crime of murder.

162 La. at 1072.

These early Louisiana cases implicitly reconcile the doctrine of absolute finality for acquittals with the common law doctrine of nullity by applying the nullity doctrine only to the retrial of convictions. For example, in Foster and Victor the Court recognized the indictments to be facially defective and annulled the verdicts, seeming to apply the nullity doctrine. The Court explicitly held, however, that while the defendant could be retried for the lower charge of manslaughter he could not be retried for the murder charge.

Other state courts have also had occasion to consider the argument that various defects in the indictment or jurisdiction of the court rendered the trial a "nullity" and thus are exceptions to the double jeopardy rule. In Block v. State, 286 Md. 266 (Md. 1979), Maryland once more raised the "nullity" defense -- this time in connection with the trial court's lack of jurisdiction. The trial court had entered a verdict of not guilty upon a post-trial motion. The state argued that the trial court lacked jurisdiction to enter the verdict because it granted the motion outside of the time limit for ruling. Id. at 269-270. The Maryland Supreme Court assumed, without deciding, that the trial court lacked jurisdiction, but found that this lack of jurisdiction did not invoke the nullity exception. Id. at 270. The court explained that "jurisdiction" in the application to the nullity exception to double jeopardy was a term with a precise and limited meaning:

[I]t is clear ... that the 'jurisdiction' of the court for purposes of this principle of double jeopardy law means jurisdiction in the most basic sense. It does not mean that an error in the exercise of jurisdiction permits judicial proceedings to be treated as a nullity.

Id. The court held that the critical – and only – question for double jeopardy purposes is whether the court had jurisdiction over the offense. Id. at 273-74 ("The cases make it clear that an improper or defective exercise of jurisdiction does not deprive an acquittal

of its finality. Instead, as long as the court rendering a non-guilty verdict has jurisdiction over the offense, the verdict is a bar to further criminal proceedings on the same charge.")

The California Supreme Court also rejected the nullity exception to double jeopardy based on a jurisdictional defect in People v. Marks, 820 P.2d 613 (Cal.1991) (en banc). The defendant in Marks was charged with capital murder and convicted of what was ultimately classified as second-degree murder.<sup>10</sup> Because at the original trial the judge failed to order a competency hearing, his second-degree murder was overturned and the case was remanded for a competency determination. 820 P.2d at 613, 614.

On remand, the defendant was found competent to stand trial and the state moved to re-indict the defendant on first-degree murder charges. Under California law, the trial court loses jurisdiction over the criminal proceedings once a competency hearing is necessitated and ordered. Id. at 616. The state argued that the trial court was lacking in jurisdiction at the first trial under this law, and accordingly, that the first trial and conviction were a "nullity," and the double jeopardy clause was inapplicable. Id.

The California Supreme Court disagreed. The Supreme Court characterized the jurisdictional defect at the trial as an "excess of jurisdiction" rather than a lack of subject matter jurisdiction. Id. at 617. Like the Maryland Court, the California Court explained that jurisdiction in a "fundamental sense" means only the power of the court to proceed on the merits. Id. (citing United States v. Williams, 341 U.S. 58, 68 (1951)). The court concluded that "[a]lthough the judgment may be a nullity, for double jeopardy purposes the proceedings are not." Id. at 620.

An Illinois court adopted a similarly narrow reading of the jurisdictional nullity exception in People v. Rolland, 221 Ill. App. 3d 195 (App. Ill. 1991). In Rolland, the trial court accepted a guilty plea to misdemeanor battery entered into by the defendant as part of a plea agreement with a deputy sheriff while the assigned prosecutor filed a second indictment, charging attempted first-degree murder, armed violence, and aggravated battery. The state sought to have the guilty plea set aside on the ground that the trial court lacked power to enter the order and that the "void judgment" was a

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<sup>10</sup> At the first trial, the jury convicted of murder and imposed a verdict of death; however, the jury failed to specify the degree of the murder conviction and accordingly, under California law, the defendant could only be convicted of the lesser, second-degree murder charge. Id. at 622-23.

"nullity," unprotected by double jeopardy clauses of the state and federal constitutions. The court rejected this argument, concluding that the judgment was not void within the meaning of double jeopardy.

In 1997, a Pennsylvania court also rejected application of a nullity exception based on a jurisdictional defect. Commonwealth v. Hall, 692 A.2d 283 (Pa. Commw. Ct.1997). There, at a bench trial the assigned judge heard all of the evidence and received post-evidence briefing before becoming ill. A second judge was appointed and he entered a verdict of not guilty. The government contended that the "substitution of a judge in a non-jury criminal trial, after the presentation of all the evidence, but prior to the entry of a verdict, constitutes reversible error, so that any verdict rendered is a nullity." Id. at 284. Despite the obvious error, the trial court rejected the nullity argument, holding that "even when an acquittal is based on an erroneous foundation, once such verdict is rendered, double jeopardy has attached." Id. at 285.

Most recently, a Florida appellate court rejected the nullity exception to double jeopardy. Moody v. Florida, 931 So.2d 177, 179 (June 7, 2006). The defendant in Moody was charged with five felony counts, including first-degree murder. The jury convicted him of third-degree murder, a lesser-included offense of the first-degree charge, and acquitted him on all other counts. Id. at 179. The judge granted a new trial and ruled that the defendant could be tried on all accounts, holding that a breakdown of jury deliberations meant that the "verdicts should be treated as a nullity." The Florida appellate court overruled the trial judge's "novel" reasoning, noting that an acquittal is a "bright line" with no exceptions under double jeopardy jurisprudence. Id. at 181. The court also held that the double jeopardy clause does not permit a trial judge to penalize a defendant for raising a meritorious claim on appeal. Id. 182.

The argument that double jeopardy should not apply because of the fundamental nature of the alleged trial or indictment error is not always packaged under the guise of the "nullity" exception. In Fong Foo, for example, the federal government argued that double jeopardy did not apply because the verdict rested on "an egregiously erroneous foundation." Although the district court directed a verdict of acquittal without the authority to enter such a verdict, the United States Supreme Court rejected the

government's argument that it should be permitted to retry the defendant on the same offense, again relying on the importance of the acquittal. As the Court would later explain: "The fundamental nature of [the Double Jeopardy rule] is manifested by its explicit extension to situations where an acquittal is 'based upon an egregiously erroneous foundation.'" Sanabria, 437 U.S. at 64, *quoting* Fong Foo v. United States, 369 U.S. 184 (1962).

If the nullity exemption can survive constitutional scrutiny at all, and amicus would submit it cannot, it can do so only if interpreted either -- as this Court did in its early decisions -- as applying solely to *convictions* or -- as the courts in California, Florida, Illinois, and Pennsylvania have done -- by recognizing that the jurisdictional defect must be absolutely fundamental: the court must have utterly lacked power to hear the case, such as perhaps a traffic court hearing and rendering a verdict in a murder case. Because the jury in Langley's prior trial returned a verdict of acquittal on the first-degree murder charge and it cannot be tenably claimed that the trial court was utterly lacking in power to hear his case, this Court must reverse the Third Circuit.

### CONCLUSION

The Third Circuit's radical construction of the double jeopardy clause cannot be reconciled with Louisiana and United States constitutional double jeopardy jurisprudence. The Third Circuit decision: (1) violates the double jeopardy principle according absolute finality to acquittals, Sanabria, 437 U.S. at 64; Baskin, 310 So.2d at 316; (2) violates the double jeopardy principle that a defendant who successfully appeals a conviction for a lesser-included offense may only be retried on the lesser-included offense, Price, 398 U.S. at 329; Fradella, 162 La. at 1072; and, (3) misconstrues and misapplies the nullity doctrine, despite clear Louisiana and United States Supreme Court precedent to the contrary, Benton, 395 U.S. at 795; Victor, 36 La. Ann. 978. Because Ricky Langley was acquitted of first-degree murder and convicted of the lesser-included offense of second-degree murder, because he successfully appealed his conviction for second-degree murder, and because the trial court that sat at his earlier trial had the power to hear the case, the Third Circuit must be reversed. Its decision represents a radical departure from a century of constitutional precedent protecting and reaffirming the

importance of the prohibition against double jeopardy. Accordingly, this Court must reverse.

Respectfully submitted,

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### CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Motion to Leave to File Amicus Curiae Brief of the American Civil Liberties Union and Proposed Amicus Brief was sent via Federal Express, overnight delivery, on this the 10th day of November, 2006, to:

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