

Supreme Court of Louisiana

FOR IMMEDIATE NEWS RELEASE

NEWS RELEASE #031

FROM: CLERK OF SUPREME COURT OF LOUISIANA

The Opinions handed down on the 29th day of June, 2022 are as follows:

BY McCallum, J.:

2022-K-00064 STATE OF LOUISIANA VS. RONALD GASSER (Parish of Jefferson)

AFFIRMED. SEE OPINION.

Crichton, J., additionally concurs and assigns reasons.

SUPREME COURT OF LOUISIANA

No. 2022-K-00064

STATE OF LOUISIANA

VS.

RONALD GASSER

On Writ of Certiorari to the Court of Appeal, Fifth Circuit, Parish of Jefferson

McCALLUM, J.

“Fear and abhorrence of governmental power to try people twice for the same conduct is one of the oldest ideas found in western civilization.” *Cherry v. Dir., State Bd. of Corr.*, 613 F.2d 1262, 1266 (5th Cir. 1980)(quoting *Bartkus v. Illinois*, 359 U.S. 121, 151-155, 79 S.Ct. 676, 696 (Black, J., dissenting)). Indeed, in 355 B.C., Greek orator Demosthenes proclaimed that “the law forbids the same man to be tried twice on the same issue. . . .”¹ This principle was adopted by the framers of the United States Constitution in the Fifth Amendment’s guarantee that no person shall “for the same offence . . . be twice put in jeopardy of life or limb.” The double jeopardy prohibition applies to the states through the Fourteenth Amendment as established by *Benton v. Maryland*, 395 U.S. 784, 89 S.Ct. 2056 (1969). Louisiana’s constitution provides the same safeguard as well. Under Article I, §15, “[n]o person shall be twice placed in jeopardy for the same offense, except on his application for a new trial, when a mistrial is declared, or when a motion in arrest of judgment is sustained.”²

¹ David S. Rudstein, *A Brief History of the Fifth Amendment Guarantee Against Double Jeopardy*, 14 Wm. & Mary Bill Rts. J. 193, 198 (2005); *United States v. Jenkins*, 490 F.2d 868, 870 (2d Cir. 1973).

² Similarly, La. C.Cr.P. art. 591 provides: “No person shall be twice put in jeopardy of life or liberty for the same offense, except, when on his own motion, a new trial has been granted or judgment has been arrested, or where there has been a mistrial legally ordered under the provisions of Article 775 or ordered with the express consent of the defendant.”

We granted certiorari in this case to analyze the constitutional protection against double jeopardy in the context of a valid conviction later set aside as unconstitutional. We frame the issue more specifically as follows: when a non-unanimous jury finds a defendant guilty of a lesser, statutorily responsive verdict to a charged offense, valid at the time of its rendering, if the conviction is later set aside as unconstitutional, does double jeopardy preclude the State from retrying the defendant on the originally charged offense? The lower courts found that it does.

After our review of the procedural history of this case and relevant case law, we agree with the lower courts that double jeopardy bars the reinstatement and retrial of a defendant on a higher charge when he has been lawfully convicted of a lesser included offense, even though the conviction is later vacated. We further agree with the lower courts that, in this case, defendant's conviction of a lesser included offense operated as an implied acquittal of the higher charge. We thus affirm the trial court's ruling, granting defendant's motion to quash.

FACTS AND PROCEDURAL HISTORY

The underlying facts of this case are not pertinent to our decision and thus need not be set forth in detail.³ We review only those facts necessary for our discussion.

This case arises from a 2016 road rage incident that led to the shooting death of Joseph McKnight. A grand jury indicted the defendant, Ronald Gasser, on the charge of second degree murder in connection with Mr. McKnight's death. The case proceeded to a trial before a twelve-person jury in January, 2018. The jury was presented with a verdict sheet listing the crime of second degree murder and three responsive verdicts: guilty of manslaughter, guilty of negligent homicide and not guilty. By a vote of ten to two, the jury convicted defendant of the lesser included

³ The facts were fully set forth by the Fifth Circuit in *State v. Gasser*, 2018-531 (La. App. 5 Cir. 7/3/19), 275 So. 3d 976, 980, *writ granted, cause remanded*, 2019-01220 (La. 6/3/20), 296 So. 3d 1022, *and on reconsideration*, 18-531 (La. App. 5 Cir. 7/15/20), 307 So. 3d 1119 ("*Gasser I*").

offense of manslaughter and defendant was sentenced to thirty years imprisonment at hard labor.⁴ The conviction was upheld on appeal. *See Gasser I*.

Defendant filed a writ application in this Court and, while it was pending, the United States Supreme Court rendered its opinion in *Ramos v. Louisiana*, 590 U.S. ___, 140 S.Ct. 1390 (2020), holding that non-unanimous jury verdicts in state felony cases are unconstitutional. This Court then granted defendant's writ application and remanded the case to the Court of Appeal for further proceedings, including an error patent review based on *Ramos*.⁵ Thereafter, and in accordance with *Ramos*, the Fifth Circuit found that defendant's non-unanimous verdict entitled him to a new trial, vacated defendant's conviction and sentence, and remanded the case to the trial court. *State v. Gasser*, 18-531 (La. App. 5 Cir. 7/15/20), 307 So. 3d 1119, 1121 ("*Gasser II*").

After remand, the State filed a notice that it intended to retry defendant on the original charge of second degree murder. Defendant responded by filing a motion to quash in which he argued that double jeopardy and the right to appeal barred the State from reinstituting a prosecution on the higher, second degree murder charge. The trial court agreed with defendant and granted the motion to quash, finding that "when the jury came back with the ten to two verdict to convict defendant of manslaughter, it was a legal verdict and also a legal acquittal of the second degree murder charge." *State v. Gasser*, 21-255 (La. App. 5 Cir. 12/16/21), 335 So. 3d 342, 344 ("*Gasser III*"). The State appealed this ruling to the Fifth Circuit.

⁴ The verdict complied with Louisiana law. At the time, and since the 1973 Constitutional Convention, La. Const. Art. I, § 17 provided that "[a] case in which the punishment is necessarily confinement at hard labor shall be tried before a jury of twelve persons, ten of whom must concur to render a verdict." Prior to that, the 1921 Constitution provided in Article 7, § 41 that cases "in which the punishment is necessarily at hard labor, [shall be tried] by a jury of twelve, nine of whom must concur to render a verdict."

⁵ *State v. Gasser*, 2019-01220 (La. 6/3/20), 296 So. 3d 1022.

In *Gasser III*, the Fifth Circuit affirmed the trial court’s grant of defendant’s motion to quash. The State had argued that defendant’s conviction by a non-unanimous jury was a nullity, and, as neither a conviction nor an acquittal, could not form the basis of a double jeopardy defense. In rejecting that argument, the court reasoned:

A conviction on a lesser included offense operates as an acquittal on the greater charged offense. La. C.Cr.P. art. 598; *State v. Graham*, 14-1801 (La. 10/14/15), 180 So. 3d 271, 277; *Green v. United States*, 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957). La. C.Cr.P. art. 598(A) provides: “When a person is found guilty of a lesser degree of the offense charged, the verdict or judgment of the court is an acquittal of all greater offenses charged in the indictment and the defendant cannot thereafter be tried for those offenses on a new trial.”

* * * * *

At the time of defendant’s trial in the present case, a unanimous verdict was not required by Louisiana law in order to acquit a defendant. Therefore, when the jury returned a ten to two verdict of guilty of manslaughter, it served as a valid acquittal of the second degree murder charge, precluding retrial of defendant for second degree murder based on the principles of double jeopardy.

Gasser III, 21-255, pp. 3-4, 335 So. 3d at 346-47.

We granted the State’s writ application to determine the correctness of the lower courts’ decisions. Because this case presents a legal issue, we apply a *de novo* standard of review. *State v. Jones*, 2015-1232, p. 3 (La. App. 4 Cir. 8/17/16), 200 So. 3d 950, 952, writ denied, 2016-1651 (La. 6/29/17), 222 So. 3d 48 (“As this matter presents an issue of law, we review it *de novo* to determine whether the trial court’s decision is legally correct.”).

LAW AND DISCUSSION

Our task is to determine whether double jeopardy principles bar the State from reinstituting the charge of second degree murder against defendant. The answer is found in two equally important considerations, either of which compels a finding

that, under the circumstances of this case, double jeopardy precludes the State from prosecuting defendant on the higher charge of second degree murder when he was lawfully convicted of the lesser offense of manslaughter. First, any other holding would thwart the underlying purpose of the double jeopardy doctrine and would run afoul of both the federal and our state constitutions and other duly enacted statutes. Second, well-settled case law reflects that the conviction of a lesser included offense is an implied acquittal of the higher charges. The importance of this concept is underscored in its codification by the Louisiana legislature in La. C.Cr.P. art. 598 A, *infra*.

Thus, although defendant's verdict was later vacated as unconstitutional, because the verdict was valid at the time it was rendered, double jeopardy attached and defendant cannot be retried for the originally charged offense of second degree murder. The trial court properly granted defendant's motion to quash.

"The double jeopardy clauses of the federal and state constitutions protect against three distinct abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense." *State v. Johnson*, 94-1077 (La. 1/16/96), 667 So. 2d 510, 514. Recognized as fundamental, this double jeopardy protection is an idea "that is deeply ingrained in . . . the Anglo-American system of jurisprudence." *Benton*, 395 U.S. at 796 (quoting *Green*, 355 U.S. at 187, 78 S.Ct. at 223). As the United States Supreme Court made clear, "[t]he prohibition [against double jeopardy] is not against being twice punished, but against being twice put in jeopardy; and the accused, whether convicted or acquitted, is equally put in jeopardy at the first trial." *See State v. Davenport*, 2013-1859, p. 7 (La. 5/7/14), 147 So. 3d 137, 142 (quoting *Ball v. United States*, 163 U.S. 662, 669, 16 S. Ct. 1192, 1194 (1896)).

The traditional tenets of double jeopardy were explained in *Yeager v. United States*, 557 U.S. 110, 117, 129 S. Ct. 2360, 2365 (2009) as follows:

[The double jeopardy] Clause embodies two vitally important interests. The first is the “deeply ingrained” principle 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, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty. . . .” The second interest is the preservation of “the finality of judgments.”

Id., 557 U.S. at 117-18, 129 S. Ct. at 2365-66 (Internal citations omitted).

There have been “an exceptionally large number of cases interpreting” the double jeopardy provision. *Yeager*, 557 U.S. at 117, 129 S. Ct. at 2365. This Court, however, has yet to address the precise type of double-jeopardy challenge presented by this case – the effect of a lawful verdict convicting a defendant of a lesser included offense that is later set aside as unconstitutional.

In determining whether the State is barred from retrying defendant on the higher charge of second degree murder, we first examine our statutory framework regarding double jeopardy, starting with the general rule that:

[d]ouble jeopardy exists in a second trial only when the charge in that trial is: (1) Identical with or a different grade of the same offense for which the defendant was in jeopardy in the first trial, whether or not a responsive verdict could have been rendered in the first trial as to the charge in the second trial. . . .

La. C.Cr.P. art. 596.

We next look to La. C.Cr.P. art. 598 A, which provides for the legal effect of a guilty verdict:

When a person is found guilty of a lesser degree of the offense charged, the verdict or judgment of the court is an acquittal of all greater offenses charged in the indictment and the defendant cannot thereafter be tried for those offenses on a new trial.

As the Official Comments to Article 598 indicate, “Louisiana follows the strong minority rule that a conviction of a lesser [included] offense is a tacit acquittal of the offense charged, and at the new trial the defendant can be tried only for the offense for which he was convicted. *State v. Harville*, 171 La. 256, 130 So. 348 (1930).” La. C.Cr.P. art. 598, Off. Rev. Cmt. (a).⁶

Article 598 A thus clearly suggests that, in the case at hand, defendant’s conviction of manslaughter operated as an acquittal of the higher charge of first degree murder. Our inquiry, however, does not end simply by relying on the express terms of Article 598 A. We must also consider the State’s argument that the jury’s non-unanimous verdict was a nullity, has no legal effect, and thus, cannot serve as the basis of a double jeopardy defense.

It is true that the general rule set forth in Article 598 A is not absolute. Nor is the Fifth Amendment’s prohibition against double jeopardy absolute. *See Justices of Boston Mun. Court v. Lydon*, 466 U.S. 294, 308, 104 S.Ct. 1805 (1984)(“[t]he Double Jeopardy Clause is not an absolute bar to successive trials.”). This was made clear by the Supreme Court in *Burks v. United States*, 437 U.S. 1, 14, 98 S. Ct. 2141, 2149 (1978): “The principle that [the Double Jeopardy Clause] does not preclude the Government’s retrying a defendant whose conviction is set aside because of an error in the proceedings leading to conviction is a well-established part of our constitutional jurisprudence.” (Citation omitted).

Consistent with this general rule, certain circumstances allow the State to retry a defendant on an original charge after his conviction on a lesser included offense has been set aside. A conviction obtained in a court lacking jurisdiction, for

⁶ In *Harville*, the defendant was charged with murder but convicted of manslaughter. Because of improper jury instructions, the verdict was set aside. On the issue of whether the defendant was entitled to bail (manslaughter was a bailable offense whereas murder was not), this Court held that “retrial is granted only on the offense on which there has been a conviction” and thus, “the only charge pending against [defendant] is that of manslaughter.” *Id.*, 130 So. at 350.

example, “is, without doubt, a null conviction” and therefore void. *State v. Langley*, 2006-1041, p. 8 (La. 5/22/07), 958 So. 2d 1160, 1165.

Other examples of circumstances that allow a retrial include those situations where there is no actual determination of a defendant’s guilt. A mistrial ordered when a jury deadlocks, obviously, does not raise double jeopardy concerns when a defendant is retried. *See Blueford v. Arkansas*, 566 U.S. 599, 132 S. Ct. 2044 (2012); *Sattazahn v. Pennsylvania*, 537 U.S. 101, 123 S. Ct. 732 (2003).⁷

Nor is the prohibition against double jeopardy invoked when a jury’s verdict does not expressly convict or acquit defendant of an offense. In the recent decision of *State v. Broussard*, 2020-547 (La. App. 3 Cir. 4/14/21), 318 So. 3d 319, *writ denied*, 2021-00669 (La. 9/27/21), 324 So. 3d 91, for example, the defendant was charged with manslaughter and aggravated obstruction of a highway (the felony underlying the manslaughter charge). The charges were severed and after a trial on the manslaughter charge, the defendant was convicted by an eleven-to-one verdict of negligent homicide. After the conviction was set aside based on *Ramos*, the State sought to retry the defendant on the negligent homicide and obstruction of a highway charges. The defendant moved to quash the bill of information, arguing that, in convicting him of negligent homicide, the jury rejected the State’s claim that the homicide occurred during the aggravated obstruction of a highway. Thus, the defendant argued, double jeopardy precluded the State from trying him on the aggravated obstruction of a highway charge. The trial court agreed and granted the motion to quash. The Third Circuit reversed.

⁷ In *Blueford*, a jury was presented with several offenses, ranging from capital murder to negligent homicide. During deliberations, the jury reported that it could not reach a verdict and upon questioning by the trial judge about its progress, advised that it was unanimous against guilt for capital murder and first-degree murder, was deadlocked on manslaughter and had not voted on negligent homicide. A mistrial was ultimately declared and when the State sought to retry the defendant, he moved to dismiss the charges of capital murder and first-degree murder. The Court held that, because the jury was unable to return a verdict, it neither convicted nor acquitted the defendant of any offense and thus, double jeopardy did not “stand in the way of a second trial on the same offenses.” *Id.*, 566 U.S. at 610, 132 S. Ct. at 2053.

The *Broussard* decision focused mainly on *State v. Goodley*, 423 So. 2d 648, 651 (La.1982),⁸ the invalidity of the verdict under *Ramos*, and a discussion of whether the State was collaterally estopped from charging the defendant with aggravated obstruction of a highway at his retrial. Of importance to the instant matter, the Court also found that double jeopardy did not apply on other grounds as well. Noting that there were multiple possibilities for the jury's verdict, this rendered any attempt to determine whether the jury made a finding on the aggravated obstruction of a highway charge "a speculative endeavor." *Id.*, 2020-547, p. 17, 318 So. 3d at 329. Thus, because the jury had not unambiguously decided whether the defendant committed aggravated obstruction of a highway, double jeopardy did not bar the State from trying the defendant on the aggravated obstruction of a highway charge. *Id.*, 2020-547, p. 8, 318 So. 3d at 324.

Similarly, in *In re State ex rel. M.L.L.*, 2008-363 (La. App. 3 Cir. 8/20/08), 994 So. 2d 600, 605, the trial judge found that the State failed to prove that a minor committed the charged offense of aggravated burglary. The minor was adjudicated delinquent for one or more of the seven lesser included offenses; however, the adjudication was unclear as to which of the offenses he had committed. While the court's acquittal of the higher offense was affirmed under La. C.C.Pr. art. 598 A, the purported adjudication of lesser included offenses was not valid, warranted the reversal of the adjudication, and a remand to the trial court for further proceedings.

Likewise, in *State v. Campbell*, 95-1409, (La. 3/22/96), 670 So. 2d 1212, the jury returned verdicts of "attempted" jury tampering to the charge of jury tampering. Noting that "attempted jury tampering is jury tampering" and neither a lesser included nor responsive verdict, this Court found the verdicts to be illegal. *Id.*, 95-

⁸ In *Goodley*, we found that a non-unanimous verdict of manslaughter in a capital murder trial was invalid and, thus, was equivalent to no verdict, either of a conviction or an acquittal. Thus, the State could retry the defendant for capital murder when the conviction was set aside. We discuss *Goodley* more fully *infra*.

1409, p. 4, 670 So. 2d at 1213 (Emphasis supplied). That is, because the jury’s verdicts were “insolubly ambiguous[,] . . . the jury did not clearly convict or acquit relators of the charged offenses.” *Id.*, 95-1409, p. 5, 670 So. 2d at 1213. Accordingly, there was no implied acquittal of the higher charge as provided by Article 598 A. *See also State v. Joshlin*, 2000-2921, p. 5 (La. App. 1 Cir. 11/9/01), 804 So. 2d 106, 109 (where a verdict of attempted insurance fraud was invalid because “attempted insurance fraud is insurance fraud,” double jeopardy concerns did not bar a retrial on the higher charge; the court could not say “that the jury’s return of the purportedly lesser verdict of attempt necessarily and implicitly acquitted the defendant of any material element of the charged offense, or that the verdict necessarily represented an expression of jury lenity despite the weight of the evidence presented.”).

The foregoing cases are illustrative of circumstances under which the State may reinstitute a higher charge against a defendant when his conviction on a lesser charge is set aside. One common factor predominates in these cases. Unlike the case at hand, in the cases in which the retrial of a defendant on a higher charge was permitted, the vacated verdicts were invalid because there was no decision made as to the ultimate question of the defendant’s guilt and, thus, there were no double jeopardy implications. We note that, when a verdict is invalid at its rendering, a trial court is not without recourse. Under La. C.Cr.P. art. 813, “[i]f the court finds that the verdict is incorrect in form or is not responsive to the indictment, it shall refuse to receive it, and shall remand the jury with the necessary oral instructions.” As our jurisprudence indicates, where a “verdict is clearly non-responsive,” it should [be] refused by the trial court in accordance with Article 813.” *State v. Thibodeaux*, 380 So. 2d 59, 61 (La. 1980). *See also, State v. Latique*, 2018-622, p. 13 (La. App. 3 Cir. 2/20/19), 265 So. 3d 93, 103, *writ denied*, 2019-00707 (La. 10/8/19), 280 So. 3d 593 (where “the first jury verdict did not clearly convey the jury’s intention[,]

[in] accordance with [La. C.Cr.P.] art. 813, the trial court properly refused to receive the first verdict, properly re-instructed the jury, and properly returned the jury for further deliberation with a new verdict form.”).

Notably, though, where a decision has been made as to a defendant’s guilt through a valid verdict by a jury (or judge), double jeopardy concerns are raised. An outright acquittal, of course, “terminates the original jeopardy.” *Richardson v. United States*, 468 U.S. 317, 325, 104 S. Ct. 3081, 3086 (1984). Whether a valid verdict of a lesser included offense, later vacated as unconstitutional, implicates double jeopardy as to the higher offense is an issue unprecedented in this State. We are guided, however, by the abundant jurisprudence addressing double jeopardy issues.

We start with the early Supreme Court decision of *Ball*, *supra*, which emphasized the absolute finality of an acquittal. Although *Ball* did not involve the retrial of a defendant on a higher charge after his conviction on a lesser included offense was set aside, we find the decision to be instructive.

In *Ball*, two out of three defendants were found guilty of murder; the third was found not guilty. After the convictions were set aside because of a fatally defective indictment, all three were retried and found guilty. As to the defendant who had previously been found not guilty, the Supreme Court held that “[t]he verdict of acquittal was final, and could not be reviewed, on error or otherwise, without putting him twice in jeopardy, and thereby violating the constitution.” *Id.*, 163 U.S. at 671, 16 S. Ct. at 1195. Thus, “a verdict of acquittal . . . is a bar to a subsequent prosecution for the same offense.” *Id.* The other defendants, however, were properly retried, because, as the Court reasoned, “a defendant who procures a judgment against him upon an indictment to be set aside may be tried anew upon the same indictment, or upon another indictment, for the same offense of which he had been convicted.” *Id.*, 163 U.S. at 672, 16 S. Ct. at 1195

The Supreme Court has continued to follow *Ball* and hold that an acquittal, no matter how flawed, is final and unassailable. In the oft-cited Supreme Court case of *Green, supra*, the defendant was charged with arson and felony murder in the commission of arson; he was convicted of arson and the lesser included offense of second degree murder. The jury expressed no finding on the felony murder charge. After he successfully appealed his second degree murder conviction, the defendant was retried under the original indictment and found guilty of felony murder. He then appealed the conviction on the basis that the second trial violated his constitutional right against double jeopardy.

Noting that under the Fifth Amendment, “a verdict of acquittal is final, ending a defendant’s jeopardy,” the Supreme Court held that the “second trial for first degree murder placed Green in jeopardy twice for the same offense in violation of the Constitution.” *Id.*, 355 U.S. at 188, 78 S.Ct. 223-24. The Court reasoned:

When given the choice between finding [Green] guilty of either first or second degree murder[,] [the jury] chose the latter. In this situation the great majority of cases in this country have regarded the jury’s verdict as an implicit acquittal on the charge of first degree murder. But the result in this case need not rest alone on the assumption, which we believe legitimate, that the jury for one reason or another acquitted Green of murder in the first degree. For here, the jury was dismissed without returning any express verdict on that charge and without Green’s consent. Yet it was given a full opportunity to return a verdict and no extraordinary circumstances appeared which prevented it from doing so. Therefore it seems clear, under established principles of former jeopardy, that Green’s jeopardy for first degree murder came to an end when the jury was discharged so that he could not be retried for that offense. *Wade v. Hunter*, 336 U.S. 684, 69 S.Ct. 834, 93 L.Ed. 974. In brief, we believe this case can be treated no differently, for purposes of former jeopardy, than if the jury had returned a verdict which expressly read: ‘We find the defendant not guilty of murder in the first degree but guilty of murder in the second degree.’

Id., 355 U.S. at 190-91, 78 S. Ct. at 225.

The *Green* Court, thus, found that the jury considered the higher charge, but rejected it in favor of the lesser included offense; its silence was equivalent to an acquittal of the higher charge. Of course, double jeopardy would have attached if the jury had specifically entered a not-guilty verdict on the higher charge. As we can infer from *Green*, there is no appreciable difference between a jury’s expressly entering a not-guilty verdict on a higher charge and its opting to convict on a lesser included charge, when, although silent on the higher charge, the jury had the opportunity to weigh both charges. By contrast, “where the jury expressly indicates that it is unable to reach an agreement on the greater charge, a conviction on a lesser included offense does not constitute an implied acquittal of the greater offense and presents no bar to retrial on the greater offense.” *United States v. Williams*, 449 F.3d 635, 645 (5th Cir. 2006)(quoting *United States v. Bordeaux*, 121 F.3d 1187, 1193 (8th Cir. 1997)).

The effect of an acquittal was also at issue in *Fong Foo v. United States*, 369 U.S. 142, 82 S. Ct. 671 (1962). There, during the course of a trial, the judge ordered the jury to acquit the defendants.⁹ Because the trial judge had no authority to direct an acquittal, the prosecutors moved to set it aside, at which time, the defendants raised the defense of double jeopardy. Relying on *Ball*, the *Fong Foo* Court made two important observations – (1) the defendants had been tried under a valid indictment, and (2) the case did not terminate prior to the entry of a final judgment. Rather, it “terminated with the entry of a final judgment of acquittal as to each petitioner.” *Id.*, 369 U.S. at 143, 82 S. Ct. at 672. Under these circumstances, although, “the acquittal was based upon an egregiously erroneous foundation,” it was final and double jeopardy barred a retrial. *Id.*, 369 U.S. at 143, 82 S. Ct. at 672.

⁹ The trial court’s action “was based upon one or both of two grounds: supposed improper conduct on the part of the Assistant United States Attorney who was prosecuting the case, and a supposed lack of credibility in the testimony of the witnesses for the prosecution who had testified up to that point.” *Id.*, 369 U.S. 142, 82 S. Ct. at 671.

See also, Evans v. Michigan, 568 U.S. 313, 318, 133 S. Ct. 1069, 1074 (the trial court’s directed verdict during trial, based the erroneous requirement of an extra element for the charged offense, was an acquittal for double jeopardy purposes; “A mistaken acquittal is an acquittal nonetheless.”).

That an acquittal serves to bar a subsequent prosecution has been repeatedly reiterated by the Supreme Court. *See Arizona v. Washington*, 434 U.S. 497, 503, 98 S. Ct. 824, 829 (1978)(“The constitutional protection against double jeopardy unequivocally prohibits a second trial following an acquittal. 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.’”)(Citation omitted); *United States v. DiFrancesco*, 449 U.S. 117, 132, 101 S. Ct. 426, 435 (1980)(“It is acquittal that prevents retrial even if legal error was committed at the trial.”); *United States v. Scott*, 437 U.S. 82, 91, 98 S. Ct. 2187, 2194 (1978)(“[T]he law attaches particular significance to an acquittal. To permit a second trial after an acquittal, however mistaken the acquittal may have been, would present an unacceptably high risk that the Government, with its vastly superior resources, might wear down the defendant so that ‘even though innocent, he may be found guilty.’”); *Burks*, 437 U.S. at 16, 98 S. Ct. at 2150 (“[W]e necessarily afford absolute finality to a jury’s *verdict* of acquittal—no matter how erroneous its decision”)(Emphasis supplied).

The general rule set forth in *Ball*, *Green* and *Fong Foo* – that the Fifth Amendment’s prohibition against double jeopardy attaches to a verdict of acquittal, even one that is clearly erroneous – has been consistently applied by this Court and other courts of this state as well. *See, e.g., State v. Hurst*, 367 So. 2d 1180, 1181 (La. 1979) (even where “an acquittal was clearly erroneous,” “a verdict of acquittal is final, ending a defendant’s jeopardy, and . . . is a bar to a subsequent prosecution for the same offense.”)(Citation omitted); *State v. Sims*, 53,791, p. 20

(La. App. 2 Cir. 6/30/21), 322 So. 3d 902, 913 (although “a verdict that is both non-responsive and a non-crime is wholly invalid and can serve neither as a conviction or acquittal, we nevertheless find such a verdict is an *implicit* acquittal of the crime charged, and as an acquittal, express or implied, it is a bar to any subsequent prosecution of the charged offense.”)(Emphasis supplied).

More importantly for our purposes in this case, our jurisprudence clearly reflects that an acquittal may be express or “implied by conviction of a lesser included offense when a jury is given a full opportunity to convict a defendant on the greater charge.” *State v. Sloan*, 32,101, p. 7 (La. App. 2 Cir. 8/18/99), 747 So. 2d 101, 106 (citing *Price v. Georgia*, 398 U.S. 323, 90 S.Ct. 1757 (1970)); *Ohio v. Johnson*, 467 U.S. 493, 502, 104 S. Ct. 2536, 2542 (1984)(an “‘implied acquittal’ . . . results from a verdict convicting a defendant on lesser included offenses rendered by a jury charged to consider both greater and lesser included offenses.”); *See also, Green, supra*. In *Price*, the Supreme Court made clear that a verdict of a lesser included offense allows a retrial “limited to the lesser offense,” observing that the 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.” *Id.*, 398 U.S. 323, 327-29, 90 S. Ct. 1757, 1760-61 (1970).

That this is a long-standing rule is evidenced by this Court’s early decision in *State v. Elmore*, 155 So. 896, 899 (La. 1934):

[W]here an accused is prosecuted for murder and convicted of manslaughter, the result of such conviction is an acquittal of the charge of murder, and, in case the conviction for manslaughter is set aside on appeal and the case is remanded for retrial, the accused cannot again be prosecuted for murder, and, if tried again, must be tried for manslaughter.

We again examined this principle in *State v. Langley*, 2006-1041 (La. 5/22/07), 958 So. 2d 1160. There, the defendant was tried and convicted of first

degree murder. His conviction was later vacated because of improprieties in the grand jury indictment. He was re-indicted for first degree murder and convicted of the lesser offense of second degree murder. This conviction, too, was set aside because of reversible error on the trial judge's part in absenting himself from portions of the trial. The court of appeal found this error to render the verdict absolutely null, resulting in neither a conviction of second degree murder nor an acquittal of first degree murder. When the State again indicted the defendant for first degree murder, he moved to quash the indictment on double jeopardy grounds. The trial court granted the motion and limited the defendant's retrial to the charge of second degree murder. The appellate court reversed, based on its earlier determination that the verdict was an absolute nullity.

Thereafter, this Court reinstated the trial court's order limiting the prosecution to second degree murder. Although we recognized that the trial judge's absence required the reversal of the defendant's conviction, we held that "the unanimous verdict of guilty of second degree murder returned by [the] jury . . . implicitly acquitted him of first degree murder." *Id.*, 2006-1041, 958 So. 2d at 1170. We further noted that "the verdict rendered by the jury was a legal verdict and should be given effect pursuant to La. C.Cr.P. art. 598(A)." *Id.*

We reached the same result in *Graham, supra*. There, the defendant was charged with aggravated incest and at the close of trial, when it became evident that the State could not meet its burden of proof on that charge, the trial court allowed it to add the charge of molestation of a juvenile as a responsive verdict. The jury convicted the defendant of the responsive verdict. This Court found that, although molestation of a juvenile is not a lesser included offense of aggravated incest, and the trial was rendered "fundamentally unfair" by the State's adding the "responsive verdict," the jury had been given a full opportunity to return a guilty verdict on the charged offense and chose not to. *Id.*, 2014-1801, p. 2 (La. 10/14/15), 180 So. 3d at

273. Thus, we held that “the jury’s return of what it was instructed was a lesser responsive verdict is an implied acquittal of the charge of aggravated incest, which ended defendant’s jeopardy and is a bar to a subsequent prosecution.” *Id.*, 2014-1801, p. 11, 180 So. 3d at 278.¹⁰

Applying these principles to the instant case, only one conclusion can be drawn. Defendant’s conviction of the lesser included offense of manslaughter was an implied acquittal of the second degree murder charge and the State may not retry defendant for second degree murder. The State is limited to the charge of manslaughter.

The jury in this case, after a full trial on the merits, chose not to convict defendant of the greater charge of second degree murder. For reasons known only to it, the jury instead convicted him of the lesser included offense. Although defendant’s conviction for manslaughter was vacated, the conviction still operated as an implied acquittal of second degree murder. The jury had the opportunity to convict defendant of second degree murder and did not. The acquittal thus bars a retrial on that charge. As the Supreme Court noted in *Burks*, the prosecution has “one fair opportunity to offer whatever proof it [can] assemble” to obtain a conviction. *Burks*, 437 U.S. at 16, 98 S. Ct. at 2150. “The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding;” this concept is “central to the prohibition against successive trials.” *Id.*, 437 U.S. at 11, 98 S. Ct. at 2147.

¹⁰ See also, *State v. Thomas*, 05-2373, p. 2 (La.4/17/06), 926 So. 2d 490, 491 (the “jury’s return of a lesser verdict of attempted aggravated burglary at [defendant’s] first trial thereby acquitted him of the charged offense of aggravated burglary.”); *State v. Wooten*, 67 So. 366, 366 (1915)(“a verdict for manslaughter. . . had the effect of acquitting the accused of murder, and reducing the charge against him to manslaughter, and of precluding his ever being tried again on the same facts for murder.”); *State v. Breaux*, 96-1516, p. 2 (La. App. 3 Cir. 4/30/97), 693 So. 2d 326, 327 (“the defendant, having already been found guilty of a lesser included offense, may not be retried on a charge of aggravated damage to property. To do so would be to expose him to double jeopardy.”).

This is not a case where the jury’s verdict was invalid. We recognize that defendant could not today be convicted by a ten-to-two verdict, as a non-unanimous jury is no longer constitutionally permissible. But, at the time that the verdict was rendered, Louisiana law only required ten jurors for a felony conviction. The verdict was legal and, accordingly, double jeopardy attached. Although it was subsequently set aside, this does not change the basic nature of the verdict as an implied acquittal of the higher charge. Like a mistaken acquittal, an implied acquittal is an acquittal nonetheless. And, a “verdict of acquittal [is] final, and [cannot] be reviewed . . . without putting [the defendant] twice in jeopardy, and thereby violating the constitution. *Fong Foo*, 369 U.S. at 143, 82 S. Ct. at 672 (quoting *Ball*, 163 U.S. at 671, 16 S.Ct. at 1195).

At this point, we address two of the cases cited by the State – *Davenport*, *supra*, on which the State heavily relies, and *State v. Mayeux*, 498 So. 2d 701 (La. 1986). In both cases, we found that principles of double jeopardy did not bar the retrial of the defendants because the verdicts were deemed invalid or illegal at their rendering.

In *Davenport*, the trial judge, acting without authority, ordered the jury to acquit the defendant during the course of trial and, after realizing his mistake, then declared a mistrial. This Court found that, although the mistrial was properly granted, the trial court’s directed verdict, taken without legal authority, “is *ultra vires* and . . . of no effect.” *Id.*, p. 20, 147 So. 3d at 150. Accordingly, it did not bar “a subsequent prosecution for the same offense.” *Id.*, p. 22, 147 So. 3d at 151. Citing *Goodley*, we explained that “a verdict rendered contrary to constitutional and statutory authority is invalid and illegal. . . . Thus, an illegal verdict acts as neither an acquittal nor a conviction.” *Id.*, pp. 20-21, 147 So. 3d 150 (Internal citations omitted).

Similarly, in *Mayeux*, the defendant was charged with aggravated battery and the jury convicted him of attempted aggravated battery, a crime not recognized under Louisiana law, but presented to the jury as a responsive verdict. Also relying on *Goodley*, this Court found the verdict to be illegal because it contained a “nonwaivable defect,” and was “simply [a] conviction of a non-crime. *Id.*, 498 So. 2d at 705. Thus, double jeopardy did not bar the State from retrying the defendant under those circumstances.

Notably, both defendants in *Davenport* and *Mayeux* thereafter sought and obtained habeas relief in federal court. In *Davenport*, the federal court held that “applicable federal constitutional standards [were] not met” when the defendant was subjected to the second trial, concluding that “the State of Louisiana is barred from subjecting Petitioner to a second trial for the aggravated rape charge for which he was acquitted by the Louisiana district judge” and ordered the defendant “release[d] . . . immediately.” *Davenport v. Richardson*, 2016 WL 285060 (W.D. La. Jan. 20, 2016). In the underlying Report and Recommendation adopted by the court, the magistrate stated:

. . . the trial judge’s acquittal in this case bars a second trial no matter whether the judge was mistaken regarding his assessment of the adequacy of the evidence or whether he was in violation of state procedural law when he entered the acquittal. It is no more ultra vires for a trial judge to violate a procedural rule than to invent new elements of a crime or otherwise violate substantive law, and the Supreme Court has rejected a second trial in those situations.

Davenport v. Richardson, No. 14-CV-1092, 2015 WL 9906262, at *7 (W.D. La. Apr. 29, 2015).

In *Mayeux*, the federal court found that by returning a verdict of “guilty of attempted aggravated battery,” the jury implicitly acquitted [the defendant] of the crime of “aggravated battery.” *Mayeux v. Belt*, 737 F. Supp. 957, 960 (W.D. La. 1990). The Court stated:

Even though the verdict of the jury at Mayeux’s first trial could operate neither as a conviction nor acquittal of the non-crime of “attempted aggravated battery”, there is no reason why it could not operate as an acquittal of the charge of aggravated battery, because the judge’s instructions so directed. Even though the judge’s instructions concerning a possible verdict of “attempted aggravated battery” were egregiously erroneous, that judicial error does not give the State a basis for retrying Mr. Mayeux.

Id., 737 F. Supp. at 961-62.

Several decisions of this Court questioned the continued viability of *Mayeux*. (See *State v. Graham*, 2014-1801, p. 10 (La. 10/14/15), 180 So. 3d 271, 278; *Campbell*, 96-1405, p. 4, 670 So. 2d at 1214). Other courts have continued to follow the ruling in *Mayeux*, despite the federal court’s decision. See, e.g., *State v. Anderson*, 2017-0927 (La. App. 1 Cir. 4/6/18), 248 So. 3d 415, writ denied, 2018-0738 (La. 3/6/19), 266 So. 3d 901; *State v. Marsh*, 2017-0584 (La. App. 4 Cir. 11/8/17), 231 So. 3d 736; *State v. Nazar*, 96-0175 (La. App. 4 Cir. 5/22/96), 675 So. 2d 780.

This Court has now foreclosed any doubt as to *Mayeux*’s continued validity. In *State v. Brown*, 2021-1336, p. 4, 2021-01336 (La. 2022), --- So. 3d ----, we “explicitly overrule[d] that portion of the *Mayeux* decision that found that a conviction ‘for a crime unresponsive [to the charged offense] and unspecific in our criminal law . . . operate[s] neither as a conviction nor acquittal.’” In *Brown*, we found that the defendant’s conviction for attempted aggravated flight from an officer, a non-crime, but one presented to the jury as responsive to the offense of flight from an officer, was properly set aside. However, in agreement with the federal court’s rationale in *Mayeux*, we found that, although the trial court’s instructions to the jury were erroneous, “that error did not give the State a basis for retrying defendant for aggravated flight from an officer in violation of the Double Jeopardy Clause.” *Id.*, p. 5, --- So. 3d at ----.

Neither this Court nor any other court of this State has considered whether our decision in *Davenport* remains legally sound and we need not address its continued viability at this time. We can readily distinguish *Davenport* from the case at hand. Unlike *Davenport*, where the *trial judge* ordered the defendant's acquittal, here, the *jury* returned a verdict to which double jeopardy clearly attached.

We also find it necessary to reconsider our decision in *Goodley*, a case upon which the Fifth Circuit relied in *Gasser III*, and on which the State relies in this case. In *Goodley*, the defendant was indicted on the charge of first degree murder, but convicted by a ten-to-two jury of manslaughter. On appeal, he raised only the issue of the excessiveness of his sentence. In an error patent review, however, this Court found the verdict to be invalid because a unanimous verdict is required on a capital murder charge, even for a responsive verdict. The trial court's instruction to the jury that only ten had to agree to a responsive verdict was therefore reversible error. Although, ordinarily, a conviction of a lesser included offense has the effect of an acquittal of a higher offense, under the circumstances presented, the defendant had not been validly convicted of manslaughter and thus, he had not been acquitted of first degree murder. We found that double jeopardy did not bar the state from retrying the defendant on the first degree murder charge.¹¹

Based on our decision in *Brown* and our finding therein overruling *Mayeux*, we now conclude that the evolving case law regarding double jeopardy mandates that we now also overrule *Goodley*. The trial judge in *Goodley*, like the trial judge in *Mayeux*, improperly instructed the jury. Although the trial judge was egregiously

¹¹ We note that, in a later decision, this Court found that *Goodley* could not be retried for first degree murder; however, the decision was not based on the any double jeopardy concerns. In fact, we reiterated that principles of double jeopardy did not preclude the defendant's retrial on first degree murder and found that there was no verdict because "the ten to two verdict handed down by the jury at [the] first trial could constitute neither a conviction of manslaughter nor an acquittal of murder." *State v. Goodley*, 423 So. 2d 648, 650 (La. 1982). We did, however, find that a retrial for first degree murder would unconstitutionally impair the defendant's right to appeal. *Id.*, 423 So. 2d at 650. We reached this conclusion because of the "unique factual situation presented" and our finding that a second prosecution for first degree murder would have a "chilling effect" on his right to appeal insofar as he would again face the possibility of a death sentence.

erroneous in his instruction to the jury that it could convict the defendant of manslaughter by a ten to two verdict, consistent with *Brown*, the error in *Goodley* did not allow the State to retry him for capital murder. To the contrary, the State should have been limited to the charge of manslaughter on retrial.

We do, however, take note of certain language from *Goodley*. Our holding in *Goodley* was premised on the principle that “[w]here *no valid judgment* has been obtained, the defendant’s double jeopardy interests simply cannot be considered to extend so far as to compel society to relinquish its interest in punishing one whose guilt is clear by means of a fair and procedurally accurate trial.” *Id.*, 423 So. 2d at 651. (Emphasis added). This continues to comport with double jeopardy principles when a verdict is vacated because it does not validly convict a defendant of an offense, as the decisions in *Broussard*, *Campbell* and *Joshlin* indicate. The corollary to this principle is that a very different result is reached when a *valid* judgment has been obtained, as double jeopardy clearly attaches to a valid judgment.

Because we have found that the State may not retry defendant on the charge of second degree murder, we find it unnecessary to address defendant’s argument that there would be a chilling effect on his constitutional right to appeal if the State is allowed to retry him on the higher charge of second degree murder. We therefore pretermitt a discussion of that issue.

We likewise find it unnecessary to address the issue of whether a non-unanimous verdict is required for an acquittal post-*Ramos*. First, *Ramos* only addressed the constitutionality of non-unanimous verdicts to convict and made no findings with respect to acquittals. Second, the only issue before this Court is whether the State may retry defendant on the higher charge of second degree murder. Whether a unanimous jury is required for an acquittal has no impact on the issue in this case. Even assuming, for purposes of argument, that a unanimous verdict is required for an acquittal post-*Ramos*, because defendant’s conviction for

manslaughter was legal and valid at the time that it was rendered, it operated as an acquittal of second degree murder, as we have found. Thus, although we express no opinion on this issue at this time, even if unanimity is now required for an acquittal, this rule cannot invalidate a lawful acquittal, even one implied by the conviction of a lesser included offense. Again, an acquittal is unassailable. The issue of unanimity in a jury's acquittal is simply not before the Court in this case and we decline to issue any prospective advisory opinion on this issue.

DECREE

For the foregoing reasons, we find that defendant's conviction of the lesser included offense of manslaughter impliedly acquitted him of the higher charge of second degree murder and, thus, double jeopardy bars the State from retrying defendant on the higher charge. As the Supreme Court found in *Price* and we found in *Langley*, a retrial is limited to the lesser offense of manslaughter. Defendant's motion to quash the second degree murder indictment was properly quashed and we therefore affirm the lower courts' rulings.

AFFIRMED

SUPREME COURT OF LOUISIANA

No. 2022-K-0064

STATE OF LOUISIANA

VS.

RONALD GASSER

**On Writ of Certiorari to the Court of Appeal,
Fifth Circuit, Parish of Jefferson**

Crichton, J., additionally concurring:

I agree with the majority that the constitutional protections against double jeopardy would be violated by retrying defendant for the originally charged crime here. I write separately, because I also believe defendant’s constitutional right to appeal would be impermissibly chilled if he was retried for second degree murder after his conviction for the lesser included offense of manslaughter was set aside on appeal. *See generally* La. Const. art. 5, § 10 (providing for appellate jurisdiction over criminal cases); La. Const. art. 1, § 22 (“All courts shall be open, and every person shall have an adequate remedy by due process of law and justice, administered without denial, partiality, or unreasonable delay, for injury to him in his person, property, reputation, or other rights.”).

Due process of law requires that avenues of appellate review, once established, must be kept free of obstacles that impede open and equal access to the courts. *Rinaldi v. Yeager*, 384 U.S. 305 (1966). Any penalization, even incidental, for those who choose to exercise constitutional rights “would be patently unconstitutional.” *United States v. Jackson*, 390 U.S. 570, 581-82 (1968). Appeals have always been favored in Louisiana. *Davidge v. Magliola*, 346 So. 2d 177 (La. 1977) (“The law favors appeals.”).

This Court discussed the right to appeal in *State v. Goodley*, 423 So. 2d 648 (La. 1982). Though this Court now overrules the portion of *Goodley* that concluded double jeopardy did not bar retrial of that defendant, it is important, in my view, to emphasize that the Court today leaves intact the portion of *Goodley* concerning the right to appeal—the issue that this Court ultimately found prevented Goodley’s retrial.

In that case, the State charged defendant in *Goodley* with first degree murder and the jury returned a nonunanimous verdict of guilty on the responsive charge of manslaughter. The court sentenced him to 15 years imprisonment at hard labor, and Goodley appealed only his sentence on the basis that it was unconstitutionally excessive. This Court, finding as an error patent the nonunanimous jury verdict,¹ vacated the conviction and sentence. On remand, the State sought to retry defendant on a charge of first degree murder and defendant filed a motion to quash, alleging a violation of his right to appeal and the prohibition against double jeopardy. This Court found that although retrying defendant on a charge of first degree murder did not violate the prohibition against double jeopardy—a finding overruled today—it did violate defendant’s right to appeal. This Court summarized the right to appeal and its implications as follows:

Louisiana Code of Criminal Procedure article 912.1 and Article I, § 19 of the 1974 Louisiana Constitution guarantee a defendant in a felony case a right to appeal. Appeals have always been favored in the law of this state. *Davidge v. Magliola*, 346 So. 2d 177 (La.1977).

In exercising his right to appeal, Goodley did not attack his conviction for manslaughter. He raised only the issue of the excessiveness of his sentence. Now, as a result of this court’s patent error reversal of that conviction, the State is attempting to retry Goodley for first degree murder. Should the State be allowed to do so, the defendant would be facing a possible death sentence or life imprisonment as a result of an appeal through which he sought only to have this court review the

¹ Even before the 2019 amendments and the Supreme Court decision in *Ramos*, Louisiana required a unanimous verdict for *any* conviction in a first degree murder case, including for lesser included offenses, as was the case here.

excessiveness of his sentence for manslaughter. Such a result is unconscionable.

Goodley, 423 So. 2d at 651 (footnote omitted). As noted above, this portion of the analysis remains in force today.

Defendant in the present case successfully appealed his unconstitutional nonunanimous conviction for manslaughter, and, as in *Goodley*, he cannot be penalized for seeking that appeal by being subjected to a second trial on a charge for which he has already been acquitted. Defendant would face a mandatory life sentence if convicted of second degree murder. R.S. 14:30.1. He should not be forced to choose between letting an unconstitutional conviction stand or risk spending the rest of his life in prison. Such a “chilling effect” on defendant’s right to appeal would be impermissible and unconstitutional. *Jackson*, 390 U.S. at 582; *Goodley*, 423 So. 2d at 652.