No. 125165

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Petitioner-Appellant, -vs- KEITH GAINES Defendant-Appellee	))))))))))	Appeal from the Appellate Court of Illinois, No. 3-16-0494. There on appeal from the Circuit Court of the Twelfth Judicial Circuit, Will County, Illinois, No. 15-CF-2835. Honorable Edward A. Burmila, Jr., Judge Presiding.

BRIEF AND ARGUMENT FOR DEFENDANT-APPELLEE

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POINTS AND AUTHORITIES Page

ISSUES PRESENTED FOR REVIEW

I. Whether the trial judge violated Keith Gaines' rights under the Double Jeopardy Clause where the judge *sua sponte* vacated Gaines' fully negotiated plea after the plea proceedings had terminated, and then subjected Gaines to a trial on the same charges.

II. Alternatively, whether the circuit court abused its discretion in vacating the negotiated agreement where it acted without a request to vacate the plea, without any legal basis to disturb the final agreement, and without following any recognized procedures.

STATEMENT OF FACTS

Any facts in addition to those described in the State's brief that are necessary for an understanding of the issues presented in this appeal will be included, together with appropriate record references, in the argument portion of this brief.

I. The circuit judge violated Keith Gaines' rights under the Double Jeopardy Clause where the judge *sua sponte* vacated Gaines' fully negotiated plea after the plea proceedings had terminated, and then subjected Gaines to a trial on the same charges.

STANDARD OF REVIEW

Double jeopardy claims are subject to *de novo* review. *People v. Smith,* 2019 IL 123901, ¶ 15. Whether the circuit court is required to enforce a plea agreement is a question of law subject to *de novo* review. *United States v. Fagan*, 996 F.2d 1009, 1013 (9th Cir. 1993).

ARGUMENT

On March 10, 2016, Gaines entered into a fully negotiated plea agreement in which he agreed to plead guilty to misdemeanor domestic battery and misdemeanor criminal damage to property. In exchange for his plea, Gaines was to be sentenced to 24 months' probation, 158 days' imprisonment considered time served, and completion of anger management classes. *People v. Gaines*, 2019 IL App (3d) 160494, ¶ 3. The circuit court heard the State's motion to dismiss the remaining charges, heard the sentencing recommendation, conducted a plea colloquy, accepted the plea agreement and all of its terms, heard the State's factual basis, and asked Gaines for a statement in allocution, all before *sua sponte* voiding Gaines' plea. *Id.,* ¶ 4. In Gaines' allocution, he stated, "I know it sounds bad in the statement that was given, but if it was to go to trial no one would be coming to court. Or if they did they would say that–." *Id.* Thereafter, the trial court interrupted Gaines, voided his plea, and ordered the case be set for trial. *Id*. At the subsequent trial, Gaines was convicted of misdemeanor domestic battery and criminal trespass

to a residence. *Id.,* ¶ 14.

On appeal, Gaines challenged the sufficiency of the evidence regarding his conviction for criminal trespass to a residence. The Third District Appellate Court agreed with Gaines' claim and vacated that conviction and sentence. Further, Gaines challenged his conviction for domestic battery on double jeopardy grounds. On this claim, the appellate court found that jeopardy attached to the misdemeanor domestic battery count when "the trial court unequivocally accepted the guilty plea." *Id.,* ¶ 30. Moreover, the court found that jeopardy was improperly terminated by the circuit court's actions of voiding Gaines' plea and forcing him to proceed to trial. *Id.*, ¶ 36. Because Gaines was twice placed in jeopardy, the appellate court determined that the circuit court's actions violated Gaines' rights under the Double Jeopardy Clause. As such, the appellate court reversed Gaines' domestic battery conviction and remanded the cause to the circuit court for the *vacatur* of the *mittimus*. *Id.*, ¶ 47. In so doing, the appellate court relied on the circuit court's *vacatur* of Gaines' plea to find that there was not a complete plea on which to impose a sentence, so specific performance of the plea could not be ordered. *Id*.

This Court should uphold the decision of the Third District Appellate Court finding that jeopardy attached once the circuit court unequivocally accepted Gaines' guilty plea; jeopardy terminated improperly due to the circuit court's actions voiding Gaines' plea; this double jeopardy violation constituted second-prong plain error; and Gaines' conviction for domestic battery could not stand because there were no pending charges on which the appellate court could order Gaines to be sentenced.

A. Jeopardy attached to Gaines' guilty plea.

1. This Court should adhere to prevailing Illinois authority finding that jeopardy attaches to a guilty plea once the court accepts the defendant's plea.

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment, provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const., amends. V, XIV. The same protection is afforded by the Illinois Constitution (Ill. Const.1970, art. I, § 10) and by statute (720 ILCS 5/3-4(a) (2014)). The Double Jeopardy Clause embodies three protections: "It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969). The Supreme Court has long held that a guilty plea constitutes a conviction. See *Kercheval v. United States*, 274 U.S. 220, 223 (1927). Here, Gaines pled guilty to two charges, then faced the same charges a second time at trial, implicating the second protection provided by the Double Jeopardy clause.

The underlying idea of the constitutional bar against double jeopardy:

> one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is 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. *Green v. United States*, 355 U.S. 184, 187-88 (1957).

The provision "serves principally as a restraint on courts and prosecutors." *Brown v. Ohio,* 432 U.S. 161, 165 (1977). "Where successive prosecutions are at stake, the guarantee serves 'a constitutional policy of finality for the defendant's benefit.'" *Id.* (quoting *United States v. Jorn,* 400 U.S. 470, 479 (1971)).

Illinois courts have acknowledged that the Double Jeopardy Clause "protects an accused from the unfair harassment of successive trials." *People v. McCutcheon*,

68 Ill. 2d 101, 106 (1977). Unfair harassment occurs only if jeopardy has already attached to an offense charged. *Id.*; see also *People v. Bellmyer*, 199 Ill. 2d 529, 537 (2002). Courts "have found it useful to define a point . . . at which the constitutional purposes and policies are implicated by resort to the concept of 'attachment of jeopardy.'" *Bellmyer*, 199 Ill. 2d at 537 (citing *People v. Shields*, 76 Ill. 2d 543, 546 (1979), quoting *Serfass v. United States*, 420 U.S. 377, 388 (1975)). The time when jeopardy attaches serves as the linchpin for all double jeopardy jurisprudence. *Crist v. Bretz,* 437 U.S. 28, 38 (1978).

In Illinois, jeopardy attaches when a guilty plea is accepted by the trial court. *Bellmyer*, 199 Ill. 2d at 538 (citing *McCutcheon*, 68 Ill. 2d at 106, and 5 W. LaFave, J. Israel & N. King, Criminal Procedure § 25.1(d), at 640-43 (2d ed.1999)). This Court has determined that acceptance of a plea does not require sentencing on a count for jeopardy to attach. See *People v. Jackson,* 118 Ill. 2d 179, 189 (1987), *overruled on other grounds by People v. Stefan*, 146 Ill. 2d 324, 336-37 (1992); *People v. Guillen*, 2014 IL App (2d) 131216, ¶ 14; see also *United States v. Patterson*, 381 F.3d 859, 865 (9th Cir.2004). For instance, this Court found that jeopardy attached when "the defendant had been admonished as to the effect of his plea of guilty. He persisted in his plea of guilty and it was accepted by the court. Nothing further remained to be done to determine the defendant's guilt of the offense charged." *Jackson*, 118 Ill. 2d at 189.

In kind, jeopardy attached in the instant case once the circuit court found that Gaines voluntarily waived his rights and agreed to plead guilty, found the factual basis sufficient, and accepted the plea of guilty to misdemeanor domestic battery. *Gaines,* 2019 IL App (3d) 160494, ¶ 4. The State's claims that Gaines

"did not unequivocally plead guilty" are only uncited conclusions, which are not supported by the record as a whole (St. Br. 12). Here, Gaines stated that he understood that he did not have to plead guilty, yet he wished to persist in his plea (R20-21). Gaines also indicated that the factual basis given by the State accurately represented what the witnesses would testify to, even if he thought the State's factual basis sounded worse than the actual events (R26-27). And, Gaines did not want to fight the charges; that is why he sought a guilty plea (R26).

Despite any issue the State now has with Gaines' statements, the circuit court accepted Gaines' plea after many of the statements were made by stating: "Show the Court finds that defendant's plea of guilty and his waiver of his right to remain silent and his waiver of his right to a jury trial to be knowing and intelligently entered into and executed in writing, accepted by the Court" (R26). After the court accepted Gaines' plea, there was nothing left to be done to determine Gaines' guilt. See *Jackson*, 118 Ill. 2d at 189. All the court was left to do in this case was to formally impose the punishment; any further finding of guilt, like what the State argues for (St. Br. 11-13), was unnecessary because the defendant's plea confessed his guilt. There was nothing further for the court to find because there is a legal inference that the court found the defendant guilty. See *Witte v. Dowd*, 230 Ind. 485, 496 (1951) (citing *Griffith v. State,* 36 Ind. 406, 408 (1871)); *People v. Dodge*, 411 Ill. 549, 550 (1952). As such, jeopardy attached to Gaines' plea once the circuit court unequivocally accepted the plea. See 2019 IL App (3d) 160494, ¶ 30.

Contrary to the State's argument, *Jackson* does not stand for the proposition that a finding of guilty must be entered for jeopardy to attach (St. Br. 11-12). Instead,

Jackson found that a finding of guilt is not required in either a plea or trial setting for jeopardy to attach. *Jackson*, 118 Ill. 2d at 188 (citing *People v. Laws*, 29 Ill. 2d 221, 224 (1963), and *People v. Friason*, 22 Ill. 2d 563, 565 (1961)). As such, *Jackson* notes that in the guilty plea context, only acceptance of the plea is required, not a finding of guilty. *Jackson*, 118 Ill. 2d at 189. Further, this conclusion is supported by the case law cited in *Jackson*. In finding that only plea acceptance is required for the attachment of jeopardy, the court cited to *McCutcheon*, 68 Ill. 2d at 106, which stated that the plea attaches once the plea has been accepted–*i.e.*, once the court determines "whether the plea is voluntary and whether there is a factual basis for the plea." Thus, there is no need for a formal finding of guilt. As such, jeopardy attached to Gaines' plea once the court unconditionally accepted the plea.

Moreover, this outcome is supported by the plain language of 720 ILCS 5/3-4 (2014). In *Jones*, this Court reviewed long-accepted principles of statutory construction applicable to this case:

> The primary objective of statutory interpretation is to determine or give effect to the legislature's intent.[Citation.] This inquiry properly begins by examining the language of the statue at issue. [Citation.] The statute should be read as a whole and construed so that no part of it is rendered meaningless or superfluous. [Citation.] *People v. Jones*, 214 Ill. 2d 187, 193 (2005).

The plain language of Section 5/3-4 indicates that a "prosecution is barred if the defendant was formerly prosecuted for the same offense, based upon the same facts, if that former prosecution: . . . was terminated improperly after . . . *a plea of guilty was accepted by the court*." 720 ILCS 5/3-4 (2014) (emphasis added).

According to the plain language of the statute, once the circuit court accepts the plea made by the defendant, then jeopardy attaches. *Id.* Accordingly, in an

instance such as this, where the circuit court used the exact language of the statute, there should be no doubt that jeopardy attached. *Gaines,* 2019 IL App (3d) 160494, ¶ 4. That was the finding of the appellate court, and Gaines asks that this finding be affirmed. *Gaines,* 2019 IL App (3d) 160494, ¶ 30.

2. Sentencing is not a requirement for jeopardy to attach.

In Illinois, the imposition of a sentence is not required for jeopardy to attach no matter the form of the proceedings. See *Jackson,* 118 Ill. 2d at 188 (citing *Laws,* 29 Ill. 2d at 224, and *Friason*, 22 Ill. 2d at 565). The State's argument that this Court should revisit *Jackson* because "a defendant whose guilty plea is vacated before sentencing suffers no consequence at all. . ." should not be persuasive to this Court (St. Br. 14). Namely, this Court has held that the concept of jeopardy "requires that the accused be on trial for the offense charged; that is, that he be present at a judicial proceeding aimed at reaching a final determination of his guilt or innocence of the offense charged." *People v. Chatman,* 38 Ill. 2d 265, 270 (1967). Accordingly, proceeding to sentencing is not a measure of whether jeopardy has attached in Illinois.

This Court should not read this new interpretation of Section 5/3-4 urged by the State into the statute because it would create inconsistencies between the attachment of jeopardy in guilty pleas and trials. Presently, the application of Section 5/3-4 to guilty pleas is consistent with its trial counterparts. For instance, jeopardy attaches at the point where the defendant subjects himself to judicial proceedings aimed at determining his guilt or innocence. See *id*. In a jury trial, jeopardy attaches when the jury has been impaneled and sworn; this is well before the sentencing phase. *Id.* The same is true for the attachment of jeopardy in a

bench trial; there, jeopardy attaches once the defendant has been charged and the first witness is sworn. *Id*. Accordingly, the same rules should apply to guilty pleas. Thus, sentencing on a charge is not required for jeopardy to attach, only the court's acceptance of the plea. See 720 ILCS 5/3-4 (2014). Adopting the State's argument that jeopardy should attach at sentencing in guilty-plea proceedings would misconstrue Section 5/3-4 and create inconsistencies within the law. See *id*.

Further, the procedures used to evaluate the *vacatur* of a guilty plea and the ordering of a mistrial without offending double jeopardy principles are presently similar, but would fundamentally change under the State's proposed amendment (St. Br. 14, 16). When the court vacates a guilty plea after it is accepted, the proceedings to evaluate whether jeopardy terminated properly are similar to, albeit not the same as, the court's evaluation of whether there was a manifest necessity to order a mistrial. See *People v. Cabrera*, 402 Ill. App. 3d 440, 449-50 (1st Dist,. 2010). To expound on this point, just as there are limited circumstances when the court may order a mistrial over the defendant's objections, there are also limited circumstances when the court may *sua sponte* vacate a defendant's plea and allow jeopardy to terminate properly before further prosecution. Compare *People v. Shoevlin*, 2019 IL App (3d) 170258, ¶¶ 25-30 (the appellate court found that Judge Burmila hastily called for a mistrial where the defendant did not acquiesce; thus, defendant's subsequent trial violated the Double Jeopardy Clause), to *Cabrera*, 402 Ill. App. 3d at 450-51, and *People v. Hancasky,* 410 Ill. 148, 154-55 (1951) (finding that the court may *sua sponte* withdraw a plea "in cases where the evidence shows that the defendant is insane, or under some similar disability, or where

the court has good reason to doubt the truth of the plea, or where it is affirmatively shown that the plea of guilty was induced by some promise on the part of the State's Attorney or others in authority, or where it is obvious that a defendant has been misinformed as to his rights"). In sum, this Court should uphold its prior findings and the plain language of Section 5/3-4to keep the attachment of jeopardy in guilty pleas consistent with the attachment of jeopardy in trials.

Contrary to the State's arguments, properly vacating a defendant's plea before sentencing subjects a defendant to the same caliber of consequences as declaring a mistrial before sentencing–the parties revert back to the *status quo ante*. Compare *Cabrera*, 402 Ill. App. 3d at 442-43, and *People v. Absher*, 242 Ill. 2d 77, 87 (2011) (by withdrawing the plea and vacating the judgment, the parties return to the *status quo ante*), to *People v. Palen*, 2016 IL App (4th) 140228, ¶¶ 10-13. Accordingly, this lends further support for Gaines' position that jeopardy does not attach at the sentencing phase in a guilty plea, as jeopardy does not attach at sentencing in any other context.

Moreover, adopting the State's position that sentencing and the attachment of jeopardy should align would result in the reconfiguration of guilty-plea procedures and framework in Illinois. If jeopardy attached as late as the sentencing hearing, as the State proposes, a defendant would be able to withdraw his plea at-will prior to sentencing because the attachment of jeopardy would not bind him to the plea until sentencing. The more arduous guilty-plea-withdrawal procedure, now presently used, would not attach to a defendant's plea until after he was sentenced. Thus, the current Illinois guilty-plea framework supports Gaines' argument that jeopardy attaches upon the acceptance of the plea.

3. Alternatively, if this Court adopts a rule that jeopardy does not attach until sentencing, this Court should find that the judge's acceptance of Gaines' fully negotiated plea operated as a de facto sentencing hearing

Jeopardy attached, at the latest here, when the judge accepted the fully negotiated plea, which also imposed the sentence. The State argued that the plea at issue "did not attach here because the circuit court did not impose sentence. Indeed, the circuit court did not even signal its intended sentence" (St. Br. 15). However, these statements misinterpret when the sentence is imposed in a fully negotiated plea.

Gaines' plea was fully negotiated. In order for a plea to be considered fully negotiated, the defendant must plead guilty in exchange for the imposition of a specific sentence recommended by the State. *People v. Lumzy*, 191 Ill. 2d 182, 185-86 (2000). In the instant case, the State described the fully negotiated plea agreement to the judge in the following terms:

> MS. RABENDA [ASSISTANT STATE'S ATTORNEY]: Your Honor, as to Mr. Gaines, the State would be recommending if the defendant were to plead to an amended Domestic Battery, Class A Misdemeanor on Count IV and Criminal Damage to Property on Count III.
>
> THE COURT: Are those all Class A Misdemeanors?
>
> THE COURT [*sic*]: Yes. 24 months of reporting probation, 158 days, day for day credit for time served, time considered served.
>
> THE COURT: How many days was that, please?
>
> MS. RABENDA: 158. I would make a motion to *nolle prosequi* all remaining counts and the defendant would attend an anger management program or provide proof of completion thereof.

Gaines, 2019 IL App (3d) 160494, ¶ 4. As indicated above, in exchange for Gaines' plea, he was to be sentenced to a definite period of probation and the remainder of his charges were to be dismissed. *Id.* Accordingly, Gaines entered into a fully

negotiated plea.

When the circuit court accepted Gaines' plea agreement, it accepted all the terms and conditions of the plea–including the agreed upon sentence. *People v. Salem,* 2016 IL App (3d) 120390, ¶ 45 (noting that a guilty plea is final after an agreed disposition of the sentence). This created a final judgment in Gaines' case. To allow any party, including the circuit court, to unilaterally modify the terms of a fully negotiated plea "'flies in the face of contract law principles,'" but in this case, specifically, it also violates Supreme Court Rule 402(d)(1). *Absher*, 242 Ill. 2d at 87 (quoting *People v. Evans*, 174 Ill. 2d 320, 327 (1996)). Neither the court nor the parties can unilaterally change the agreed upon terms because "the guilty plea and the sentence 'go hand in hand' as material elements of the plea bargain." *Id*. (quoting *Evans*, 174 Ill. 2d at 332). Accordingly, when a fully negotiated plea is accepted by the court, the agreed upon sentence is also imposed, creating a final judgment. The circuit court's only course of action when it does not agree to the proposed sentence is to decline to accept the plea or, in settings where a sentencing hearing is required, allow the defendant to withdraw the plea. See *id*. Thus, the circuit court's statements here that it could impose "any sentence allowed by law" were incorrect; the circuit court could not have imposed a sentence that departed from the negotiated plea after it accepted Gaines' plea and sentence. The only way to unwind this plea would be to initiate plea-withdrawal proceedings. Here, Gaines was never asked if he wished to withdraw his plea and, thus, when the court accepted his plea, the sentence was imposed and a final judgment was entered. As such, jeopardy attached, at the latest, when the plea and sentence were accepted by the court.

B. The circuit court improperly terminated jeopardy by *sua sponte* vacating Gaines' guilty plea, where he did not protest his innocence.

This Court should affirm the appellate court's finding that jeopardy terminated improperly and that the "defendant had made no claim that he was innocent of the charges to which he had pled guilty nor was there a reasonable basis for an inference that he was making such a claim." *Gaines*, 2019 IL App (3d) 160494, ¶ 43.

Double jeopardy bars reprosecution only where "jeopardy ended in such a manner that the defendant may not be retried." *Martinez v. Illinois,* 134 S. Ct. 2070, 2075 (2014). For instance, in a trial context, jeopardy terminates when the jury arrives at a verdict, or when the trial judge enters a final judgment of acquittal. *People v. Henry*, 204 Ill. 2d 267, 283 (2003). However, according to the concept of "continuing jeopardy," jeopardy does not terminate–and thus, a second prosecution is justified–where the criminal proceeding has not run its full course. *Justices of Boston Mun. Court v. Lydon*, 466 U.S. 294, 308 (1984). For instance, where a defendant successfully appeals the conviction or successfully moves for a mistrial, a new prosecution does not offend double jeopardy principles. *Richardson v. United States*, 468 U.S. 317, 325 (1984). The concept of continuing jeopardy is codified in Illinois law, which provides that a second prosecution for the same offense is barred if the former prosecution "was terminated improperly." 720 ILCS 5/3-4(a)(3) (2014); *People v. Cabrera*, 402 Ill. App. 3d 440, 449 (1st Dist. 2010).

For instance, in *Cabrera*, the appellate court found that if the circuit court *properly* exercises its discretion to vacate a guilty plea after it was accepted by the court, then jeopardy does not terminate and the defendant may be reprosecuted. 402 Ill. App. 3d at 445-46. There, the circuit judge initially accepted the defendant's

guilty plea. *Id.* at 442-43. However, prior to his sentencing, Cabrera spoke directly to his innocence:

THE COURT: Are you telling me that you are innocent of this charge?

THE DEFENDANT: Yes, Your Honor. Yes, Your Honor.

Id. at 443. After Cabrera's statements, the circuit judge vacated Cabrera's guilty plea and set the case for trial. *Id.*

Thereafter, on appeal, the *Cabrera* Panel determined that although jeopardy had attached to the guilty plea, a second prosecution was permissible because jeopardy terminated properly. *Id*. at 450, 452-53. The appellate court explained that the circuit court properly terminated jeopardy under the established rule that a circuit court has the discretion to reject a defendant's plea of guilty when the defendant asserts his or her innocence–*i.e.*, attempts to enter an *Alford* plea. *Id*. at 452; see also *Hancasky,* 410 Ill. at 154-55. Accordingly, the defendant's assertion of an *Alford* plea in the middle of the guilty plea hearing properly terminated the proceedings, and, thus, reprosecution was not barred by double jeopardy. *Cabrera,* 402 Ill. App. 3d at 452-54.

Unlike *Cabrera*, the record shows that Gaines was not attempting to enter into an *Alford* plea. "Prior to being interrupted by the court, defendant had made no claim that he was innocent of the charges to which he had pled guilty nor was there a reasonable basis for an inference that he was making such a claim." *Gaines,* 2019 IL App (3d) 160494, ¶ 43. Here, Gaines' statements were not proclamations of his innocence, unlike the statements in *Cabrera.* Instead, Gaines agreed that the State's witnesses would testify in accordance with the factual basis presented by the State. *Id.,* ¶ 4. Contrary to the State's argument (St. Br. 17), Gaines never

stated that the State's witnesses would contradict the State's factual basis. *Id.* Gaines merely sought leniency in allocution. Gaines' post-plea statements, at worst, questioned the subpoena powers of the State and attempted to explain the optics of the State's factual basis, especially considering that the State's factual basis included reference to conduct for which Gaines was not pleading guilty. *Gaines,* 2019 IL App (3d) 160494, ¶¶ 4, 42-44.

In sum, Gaines did not inform the court that he wished to vacate the plea, the sentence, or any part of the negotiated agreement. There was never an attempt to enter an *Alford* plea or to call into question the truth of the plea. Moreover, Gaines did not affirmatively consent to the *vacatur* of the plea. In fact, Gaines' comment that he "didn't want to be in here fighting [the charges]," indicated that he wished to continue with the plea (R26). The record shows that when the judge voided the plea agreement, he did so without any indication from Gaines that this was his intent. This Court should find that Gaines' post-plea comments about the factual basis for his plea were not intended to cast doubt on the plea or an attempt to enter into an *Alford* plea. Thus, Gaines' statements did not implicate any of the concerns outlined in *Cabrera* or under the principles of continuing jeopardy. As such, Gaines was reprosecuted in violation of the Double Jeopardy Clause.

C. Gaines' claims were properly addressed under the doctrine of plain error.

In his briefs, Gaines acknowledged that his trial counsel did not object to the circuit judge's decision to vacate his negotiated plea and then submit the case for trial. *Gaines*, 2019 IL App (3d) 160494, ¶ 26. Nonetheless, the appellate court

properly reviewed the issue for second-prong plain error and found that a structural error occurred here. *Id.*, ¶¶ 27-28, 45-46.

The plain error doctrine allows this Court to grant relief if (1) the evidence is closely balanced; or (2) regardless of whether the evidence was close, the error was so serious that it affected the fairness of the trial and the integrity of the judicial process. *People v. Thompson*, 238 Ill. 2d 598, 613-14 (2010); *People v. Herron*, 215 Ill. 2d 167, 178-79, 186-87 (2005); Ill. S. Ct. Rule 615(a). This Court should affirm the appellate court's determination that second-prong plain error occurred in this case. *Gaines*, 2019 IL App (3d) 160494, ¶ 46.

The protection against double jeopardy is "one of the fundamental rights established by the Fifth Amendment." *Sanabria v. United States*, 437 U.S. 54, 78 (1978). Accordingly, courts have held that a defendant's rights under the Double Jeopardy Clause are substantial rights that merit plain error review. For instance, in *People v. Henry*, 204 Ill. 2d 267, 288 (2003), the defendant was twice placed in jeopardy after the trial judge vacated its oral ruling granting a motion for directed verdict. Although defense counsel appeared to acquiesce in the trial court's ruling, this Court held that plain error review was warranted because the trial court's error violated the defendant's "substantial right to be free from double jeopardy." *Henry,* 204 Ill. 2d at 281; see also *People v. Howard*, 2014 IL App (1st) 122958, ¶ 9; *People v. Cervantes*, 2013 IL App (2d) 110191, ¶ 21; *People v. Brown*, 227 Ill. App. 3d 795, 797-798 (1st Dist. 1992). Moreover, one act, one crime violations–errors that implicate double jeopardy concerns but are far less serious than undergoing a second prosecution–are routinely reviewed as second-prong plain error. See, *e.g., In re Samantha V.*, 234 Ill. 2d 359, 378-79 (2009).

As the foregoing arguments evidence, jeopardy attached to Gaines' fully negotiated guilty plea and jeopardy improperly terminated when the court hastily vacated Gaines' plea even though he was not protesting his innocence. Accordingly, Gaines was twice placed in jeopardy in violation of both the United States and Illinois Constitutions. This error violated notions of fundamental fairness and called into question the integrity of the proceedings. Furthermore, the fairness of the proceeding was undermined by the judge's disregard for Gaines' individual right to plead guilty, as well as by the judge's failure to follow any recognized post-plea procedure. Thus, despite trial counsel's failure to preserve this issue, this Court should affirm the appellate court's determination that second-prong plain error occurred.

D. This Court should affirm the remedy outlined by the appellate court.

1. Gaines' conviction of and sentence for domestic battery were properly reversed.

The appellate court's order remanding "the matter to the trial court with directions to vacate the mittimus and order Gaines's release" should be affirmed by this Court. *Gaines*, 2019 IL App (3d) 160494, ¶ 47. At the conclusion of the appeal, the appellate court surveyed the outstanding decisions–the circuit court's *vacatur* of Gaines' plea to domestic battery, the acquittal of Gaines of felony criminal damage to property, misdemeanor damage to property, and aggravated assault charges, and the appellate court's reversal of Gaines' conviction for criminal trespass to a residence–and determined that there were no charges to proceed on. Gaines did not have any outstanding charges. And, although the appellate court found that the Double Jeopardy Clause had been violated, the court maintained that the prior plea was left vacated by the circuit court. *Id*. Contrary to the State's argument that Gaines should have been sentenced on the "incomplete" count of

domestic battery, this count was not incomplete–it was vacated (St. Br. 18). Accordingly, the appellate court determined that Gaines could not be sentenced on a nullified count, yet he could not be recharged based on the appellate court's double jeopardy determinations. *Id.* Thus, the court remanded the matter to the circuit court to vacate the mittimus because it could not order specific performance of the guilty plea when there were no charges pending against Gaines.

Although Gaines originally asked for specific performance, the appellate court's apt analysis renders *Patterson* distinguishable. In *Patterson*, the Ninth Circuit not only held that there was a double jeopardy violation in a situation similar to Gaines' case, the court also went so far as to say that the district court "did not have the authority to vacate the plea over Patterson's objections." *Patterson*, 381 F.3d at 862 (indicating that "although the district court is free to reject the plea agreement after accepting a guilty plea, it is not free to vacate the plea either on the government's motion or *sua sponte*"). In sum, the Ninth Circuit reversed the district court's decision to vacate the initial plea because the district court never had the authority to act. Thus, in *Patterson*, even though jeopardy attached to the plea, on remand the plea was still pending and incomplete, so the State could proceed with the plea agreement.

Illinois law and Gaines' case are markedly different. As previously addressed, the circuit court does have the authority to *sua sponte* withdraw a defendant's plea of guilty in limited circumstances:

> a court may set aside or withdraw a plea of guilty, on its own motion and without the consent of a defendant, in cases where the evidence shows that the defendant is insane, or under some similar disability, or where the court has good reason to doubt the truth of the plea, or where it is affirmatively shown that the plea of guilty was induced by some promise on the part of the State's Attorney or others in authority, or where it is obvious that a defendant has been

misinformed as to his rights. *Hancasky*, 410 Ill. at 154-55.

However, for the previously addressed reasons, these circumstances did not apply to the facts of Gaines' case. Thus, in Gaines' case, the circuit court had the authority to act, the court just misapprehended the law and acted without satisfying one of the exceptions outlined in *Hancasky*. However, the appellate court could not have reversed the circuit court's decision to vacate the plea because the failed guilty plea proceeding was not a " proceeding[] subsequent to or dependent upon the judgment or order from which the appeal [wa]s taken." Ill. S. Ct. Rule 615(b)(2). In sum, the circuit court had the authority to act the way it did and the appellate court did what it could to mitigate the incorrect actions taken by the circuit court. Thus, the appellate court came to the appropriate decision when it found that the Double Jeopardy Clause precluded Gaines' trial and further prosecution, upheld the circuit court's order vacating the plea, and vacated Gaines' conviction for domestic battery because there were no pending counts to proceed to sentencing with in the circuit court.

2. Alternatively, this Court should reinstate the guilty plea and remand the cause for resentencing.

If this court determines that the Double Jeopardy Clause was violated but does not agree with the remedy set forth above, or finds that jeopardy attached to Gaines' fully negotiated plea which operated as a sentencing hearing (Supra I(A)(3)), then this Court should reverse the order of the appellate court and remand the cause to the circuit court for further proceedings. See *Patterson*, 381 F.3d at 863 (where double jeopardy is violated, it is appropriate to reinstate the plea agreement with instructions to impose a sentence according to terms of initial agreement).

II. Alternatively, the circuit court abused its discretion in vacating the negotiated agreement where it acted without a request to vacate the plea, without any legal basis to disturb the final agreement, and without following any recognized procedures.

STANDARD OF REVIEW

The decision to grant or deny a motion to withdraw a guilty plea is reviewed for abuse of discretion. *People v. Delvillar*, 235 Ill. 2d 507, 519 (2009).

ARGUMENT

Alternatively, the circuit judge's decision to vacate the fully negotiated plea agreement amounted to an abuse of discretion. The judge acted without an express request from the parties and without any recognized legal basis for its decision. Moreover, the manner in which the judge proceeded did not follow the Supreme Court rules pertaining to guilty pleas. See Ill. S. Ct. Rule 604(d).

While a defendant has an individual right to enter a guilty plea, the defendant has no right to withdraw the guilty plea once it is entered. *People v. Pullen*, 192 Ill. 2d 36, 39-40 (2000). Rather, a defendant is permitted to withdraw a guilty plea only "as required to correct a manifest injustice under the facts involved." *Id.* The burden is on the defendant to demonstrate to the trial court "the necessity of withdrawing the plea." *People v. Dougherty,* 394 Ill. App. 3d 134, 140 (3d Dist. 2009). The decision whether to allow a defendant to withdraw a guilty plea under Rule 604(d) is left to the discretion of the trial court and is reviewed on appeal for an abuse of discretion. *Pullen,* 157 Ill. 2d at 40; see also *People v. Ware*, 2014 IL App (1st) 120485, ¶ 24.

In considering whether to allow the withdrawal of a guilty plea, "the court shall evaluate whether the guilty plea was entered through a misapprehension of the facts or of the law, or if there is doubt of the guilt of the accused and the ends of justice would better be served by submitting the case to a trial." *Pullen,* 157 Ill. 2d at 39-40. This Court has also held that a court's *sua sponte vacatur* of a plea is justified:

> in cases where the evidence shows that the defendant is insane, or under some similar disability, or where the court has good reason to doubt the truth of the plea, or where it is affirmatively shown that the plea of guilty was induced by some promise on the part of the State's Attorney or others in authority, or where it is obvious that a defendant has been misinformed as to his rights. *People v. Hancasky,* 410 Ill. 148, 154-55 (1951).

In this case, none of these factors were present when the judge *sua sponte* vacated Gaines' plea agreement. Gaines' statements regarding the subpoena powers of the State did not constitute a legal basis to vacate the negotiated agreement. Gaines did not claim that he misapprehended the facts or law. Gaines did not claim that his plea was involuntary or unknowing. Gaines did not claim that he was misinformed about his rights or the nature of his plea. Gaines did not attest to his innocence, cite to any reasonable doubt of his guilt, or otherwise call into doubt the truth of his guilty plea. And, the record shows that the court's admonishments substantially complied with Illinois Supreme Court Rule 402 (R23-26).

In short, none of the factors listed in *Hancasky* were present here such that the circuit court had to take the drastic step of *sua sponte* vacating the plea agreement. No case has held that such legally insignificant, post-plea complaints satisfy the narrow standard for unraveling a completed plea agreement. Contrast

People v. Holm, 2014 IL App (3d) 130583, ¶¶ 14-16 (allowing defendant to vacate his guilty plea as manifestly unjust where he had represented himself and pled guilty to an act that was not criminal). Further, a defendant has a personal, constitutional right to plead guilty, *People v. Campbell,* 208 Ill. 2d 203, 210 (2003), and at least one court has held that due to the fundamental and personal nature of the right to choose one's plea, a court may not allow the withdrawal of a guilty plea "without an affirmative indication, by affidavit or in open court, that the accused, not just his or her attorney, personally desires withdrawal." *Parker v. State,* 679 P.2d 1271, 1272-73 (Nev. 1984). Here, the judge failed to ask Gaines if he wished to withdraw the plea. However, earlier in the proceedings, Gaines indicated that he "didn't want to be in here fighting [the charges]" (R26). As such, it appears from the record that Gaines in no way desired to withdraw his plea. Accordingly, the judge's *sua sponte vacatur* of the negotiated plea agreement was an abuse of discretion.

Even if the judge had a lawful basis to justify vacating the plea, he abused his discretion by acting without regard to the rules governing post-plea proceedings. The judge short-circuited the post-plea process that is well established in Illinois. When a defendant wishes to challenge a plea, Illinois Supreme Court Rules require the filing of a written post-plea motion, and the rules provide that defendants are entitled to counsel in the preparation of that motion. Ill. S. Ct. Rule 605(c)(2),(5); see also *People v. Perry*, 2014 IL App (1st) 122584, ¶ 6 (where defendant's *pro se* filing following a guilty plea "manifest[ed] an interest in appealing from a judgment," the judge had "an affirmative duty to ascertain whether [he] desire[d] counsel" (internal quotation marks omitted)). The rules thus generally contemplate

a post-plea hearing that allows for fact-finding and an adversarial process. See *People v. Tejada-Soto*, 2012 IL App (2d) 110188, ¶ 14 (holding that a defendant seeking to withdraw his plea is entitled to a "meaningful" hearing that is not a "purely formal exercise").

Here, however, the judge did not inquire as to whether Gaines wished to exercise his right to counsel. Nor did the court allow Gaines to confer with his counsel and prepare a post-plea motion. Nor did the court even allow for a meaningful response before it vacated the plea and continued the case for trial. Upon hearing Gaines' comments, the judge immediately responded by vacating the entire plea. The judge's hasty reaction to Gaines' comments defied the reasoned process established in Illinois for addressing post-plea challenges to a final judgment following a guilty plea.

In short, the judge's decision to vacate the plea was hastily made and not in accordance with any recognized law or procedure. The judge's ruling was therefore an abuse of discretion. Thus, this Court should vacate the domestic battery conviction and remand this cause to the circuit court for further plea proceedings.

A. This issue rises to the level of plain error.

Gaines acknowledges that his defense counsel did not object to the circuit judge's decision to vacate the negotiated plea agreement and submit the case to trial. This issue, however, can be reviewed for plain error or, alternatively, as a claim of ineffective assistance of counsel.

The plain error doctrine allows this Court to grant relief if (1) the evidence is closely balanced; or (2) regardless of whether the evidence was close, the error was so serious that it affected the fairness of the trial and the integrity of the judicial

process. *People v. Thompson*, 238 Ill. 2d 598, 613-14 (2010); *People v. Herron*, 215 Ill. 2d 167, 178-79, 186-87 (2005); Ill. S. Ct. Rule 615(a). In this case, review is warranted under the second prong of the plain-error test.

Gaines submits that second-prong plain error applies because clear error occurred, and the error was so serious that it affected the fairness of the proceedings and challenged the integrity of the judicial process. Here, the error violated notions of fundamental fairness and called into question the integrity of the proceedings, where Gaines' plea was vacated without any indication this was his intention and the court did not follow any of the recognized procedures for withdrawing guilty pleas. See Ill. S. Ct. Rules 604(d) & 605(c). The court's failure to follow any formalized procedure in vacating Gaines' guilty plea not only violated Illinois rules of procedure but it also violated Gaines' constitutional rights. Ill. S. Ct. Rules 604(d) & 605(c); *People v. Campbell,* 208 Ill. 2d 203, 210 (2003); *People v. Tejada-Soto*, 2012 IL App (2d) 110188, ¶ 14. In essence, Gaines was forced to proceed to trial, and abandon his prior guilty plea, because the court did not provide him any type of adversarial hearing on the *vacatur* of his plea even though he indicated to the court that he wished to proceed with his guilty plea. Accordingly, an error this substantial erodes the integrity of the judicial process and undermines the fairness of Gaines' proceedings. See *People v. Thompson*, 238 Ill. 2d 598, 613-14 (2010). This Court should therefore treat this error as second-prong plain error.

B. Trial counsel was ineffective for acquiescing to the double jeopardy violation and the judge's capricious *vacatur* of the negotiated plea agreement.

Alternatively, defense counsel was ineffective for failing to even acknowledge the error here. Counsel is ineffective where (1) his performance is professionally unreasonable and (2) but for his errors, the outcome of the proceedings would have

been different. *Strickland v. Washington,* 466 U.S. 668, 687 (1984).

Competent counsel would have raised this meritorious claim upon the trial court's *vacatur* of the plea. Reasonable trial counsel would have recognized the well established rule that to withdraw a plea, the defendant is entitled to an adversarial proceeding in line with Supreme Court Rules 604(d) and 605(c). Thus, competent counsel would have objected to the trial court's unilateral decision to vacate the plea after it was accepted by the court. Competent counsel also would have raised these issues in his post-trial motion. Counsel, however, did not even acknowledge the constitutional and procedural implications of vacating Gaines' plea. Thus, counsel's performance was unreasonable.

Also, Gaines was prejudiced by counsel's deficient performance. Had counsel objected to the unilateral *vacatur* of Gaines' plea and the judge's arbitrary procedures, Gaines likely would not have faced a subsequent trial on the charges because Gaines would have been able to persist in his plea of guilty. Further, if counsel had objected to the judge's arbitrary *vacatur* of Gaines' plea, at the very least, there would be a complete and proper record of Gaines' plea withdrawal following the constitutional and procedural guidelines.

In sum, the trial judge erred when he *sua sponte* vacated Gaines' negotiated plea agreement. The judge abused his discretion by vacating the plea, where Gaines did not request that he do so, where there was no recognized basis in the law to withdraw the plea, and where the judge failed to follow any recognized procedure when reacting to Gaines' post-plea comments. Accordingly, if this Court does not adopt the decision of the appellate court finding a violation of the Double Jeopardy Clause, this Court should, instead, reverse Gaines' conviction and sentence for domestic battery and remand this cause for further plea proceedings.

CONCLUSION

For the foregoing reasons, Keith Gaines, defendant-appellee, respectfully requests that this Court affirm the appellate court's order vacating Gaines' conviction for domestic battery. Alternatively, Gaines requests that this court reverse his conviction and sentence for domestic battery and remand this cause for further plea proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342, is 27 pages.

/s/Amber Hopkins-Reed
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No. 125165

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Petitioner-Appellant, -vs- KEITH GAINES Defendant-Appellee	))))))))))	Appeal from the Appellate Court of Illinois, No. 3-16-0494. There on appeal from the Circuit Court of the Twelfth Judicial Circuit, Will County, Illinois, No. 15-CF-2835. Honorable Edward A. Burmila, Jr., Judge Presiding.

NOTICE AND PROOF OF SERVICE

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On March 26, 2020, the Brief and Argument was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the defendant-appellee in an envelope deposited in a U.S. mail box in Ottawa, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Brief and Argument to the Clerk of the above Court.

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