University of Cincinnati Law Review

Volume 81 | Issue 4 Article 7

9-18-2013

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Recommended Citation
Andrew Cassady, *No Rest for the Weary: Double Jeopardy Implications of Vacating a Defendant's Guilty Plea*, 81 U. Cin. L. Rev. (2013)
Available at: http://scholarship.law.uc.edu/uclr/vol81/iss4/7

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NO REST FOR THE WEARY: DOUBLE JEOPARDY IMPLICATIONS OF VACATING A DEFENDANT'S GUILTY PLEA

Andrew Cassady∗

I. INTRODUCTION

If Pedro Cabrera would have just kept his mouth shut, he would be a free man today. In March of 2004, the State of Illinois offered defendant Pedro Cabrera six years' imprisonment in exchange for his plea of guilty to one count of armed robbery.[1] After the typical Rule 11 colloquy,[2] Judge Leo Holt entered his findings regarding Cabrera's guilty plea: "Let the record reflect that there is a sufficient basis for the plea of guilty. Accordingly the plea of guilty is accepted. There will be a finding of guilty. Judgment is entered on the finding."[3] During sentencing, the State informed the court that Cabrera had four prior felony convictions, prompting Judge Holt to question Cabrera about his criminal record when given the opportunity to address the court.[4] After a brief exchange in which the court expressed its disbelief as to the mere six-year sentence for this now five-time convicted felon, one slip of the tongue would cost Cabrera an additional fourteen years in prison:

> I hate to tell you the truth, Your Honor, you know what I'm saying, I pled guilty because of my background. I can't show my innocence. That's the only thing wrong with my life. Can't show my innocence because of my background.[5]

In a stunning turn of events, Judge Holt vacated Cabrera's guilty plea and forced him to stand trial despite the defendant's avid protests.[6]

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1. Illinois v. Cabrera, 932 N.E.2d 528, 532 (Ill. App. Ct., 2010). Cabrera accepted the deal, and the State nol-prossed the remaining charges of the indictment. Cabrera was originally indicted on two counts of armed robbery, two counts of burglary, and two counts of aggravated unlawful restraint involving an encounter with a husband and wife and their two children as they were exiting their car. *Id*. The term nol-pros stems from the Latin *nolle prosequi*, and it refers to a situation where a prosecutor drops a criminal charge against a defendant either before trial or before a verdict is rendered. "Nolle prosequi" MERRIAM–WEBSTER DICTIONARY (2012), http://www.merriam-webster.com/.

2. Rule 11 of the Federal Rules of Criminal Procedure requires a court to, *inter alia*, determine that a defendant's guilty plea is voluntary and that there is a factual basis for such plea before the court accepts it. *See* FED. R. CRIM. P. 11. In this case, Judge Holt found that Cabrera voluntarily plead guilty, while the State's factual basis for Cabrera's guilty plea was stipulated to by the defense. *Cabrera*, 932 N.E. 2d at 533.

3. *Id.* at 533.

4. *Id*.

5. *Id*.

6. *Id*. The following is the entire exchange between Judge Holt and Cabrera. I include the entire excerpt because of how crucial it was to this particular case, and how meaningful it is to the broader topic of Double Jeopardy:

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Cabrera eventually chose to have a bench trial, where he was found guilty of all counts of the original indictment, including the armed robbery charge to which he pled guilty, and was sentenced to a staggering twenty-year prison term by none other than Judge Holt.[7]

Cabrera appealed, alleging that Judge Holt exposed him to double jeopardy by sua sponte vacating his guilty plea and setting his case for trial on all charges after accepting his plea of guilty to the count of armed robbery and granting the State's motion to nol-pros the remaining charges.[8] This Note specifically addresses the double jeopardy implications of vacating the defendant's guilty plea to the count of armed robbery, only to force him to stand trial on that very same charge.[9] Part II of this Note provides an introduction to the Double

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> THE COURT: Mr. Cabrera, you can't imagine how lucky you are. I don't even understand the sentence and the agreement that was made between your attorney and the state's attorney. It boggles my mind that you are a five time convicted felon and you committed an armed robbery which endangers the life of the people that you were robbing and you come out with a six year sentence. It just boggles my mind that you come out with the minimum. I don't understand it.
>
> THE DEFENDANT: I hate to tell you the truth, Your Honor, you know what I'm saying, I plead guilty because of my background. I can't show my innocence. That's the only thing wrong with my life. Can't show my innocence because of my background.
>
> THE COURT: Are you telling me that you are innocent of this charge?
>
> THE DEFENDANT: Yes, Your Honor. Yes, Your Honor.
>
> THE COURT: Well Mr. Cabrera, you're going to get a chance to prove your innocence. I don't take guilty pleas from people who are innocent of the crimes that they are charged with.
>
> THE DEFENDANT: But Your Honor, I prefer to take the time, sir.
>
> THE COURT: I'm not interested in what you prefer. You don't have a right to cause me to disgrace myself and the criminal justice system by accepting a plea of guilty from you when you are in fact not guilty. That's what you are telling me, that you didn't commit this crime. I'm not going to send you to the penitentiary for a crime you didn't commit. Just because that may be your desire. You don't have a right to impose that on me.
>
> THE DEFENDANT: Sir, I no I'm standing—I can't beat it at trial, sir.
>
> THE COURT: I don't care whether you can beat it or not. You're entitled to a trial if you are not guilty of the crime you are charged with.
>
> THE DEFENDANT: I been blessed already, you known what I'm saying. I've been blessed in the courtroom already.
>
> THE COURT: You're going to be blessed again because you're going to get a trial. Set this case for trial. The plea is ordered vacated. Waiving his right to trial by jury. The previous order vacating his-waiving his right to trial by jury is vacated. The plea of not guilty is reinstated.

Id.

7. *Id.* at 534. The twenty-year sentence included the one count of armed robbery to which Cabrera had pled guilty. Judge Holt also imposed a concurrent seven-year prison term for burglary. *Id*.

8. *Id.* at 534–35. The defendant also claimed ineffective assistance of counsel. The decision to nol-pros a certain charge may be made because the charges cannot be proved due to lack of evidence, because the evidence is flawed in light of the claims brought or may be made if the prosecutor becomes doubtful the accused is guilty; whatever the exact reason for the nolle prosequi, the decision to move for one lies solely in the prosecutor's discretion. Klopfer v. North Carolina, 386 U.S. 213, 215 (1967).

9. This Note will not address the double jeopardy implications of convicting the defendant on

Jeopardy Clause and then analyzes two competing lines of cases that examine the double jeopardy implications of vacating a defendant's guilty plea and forcing him to stand trial. Part III discusses the Illinois Appellate Court's decision in *Cabrera*, while Part IV comments on the merits of that decision and the more general circuit split. Finally, Part V concludes that a defendant's double jeopardy protection is violated in this context and suggests that the Supreme Court should enumerate a clear standard.

II. DOUBLE JEOPARDY LITERATURE

This Part provides a brief background to the Double Jeopardy Clause, specifically in the context of guilty pleas, and then traces two lines of cases which offer differing opinions on whether or not the sua sponte vacation of a defendant's guilty plea and subsequent enforcement of trial violates the United States Constitution.

A. The Double Jeopardy Clause and Guilty Pleas

Rooted in the Fifth Amendment to the United States Constitution, the Double Jeopardy Clause provides, "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb."[10] Jeopardy simply means exposure to the risk of a determination of guilt or innocence,[11] and thus this provision affords a defendant three basic safeguards: it protects against a second prosecution for the same offense after acquittal; protects against a second prosecution for the same offense after conviction; and protects against multiple punishments for the same offense.[12] Although the precise origins of

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the charges that were nol-prossed, since that topic has been addressed by the Supreme Court and much has been written about it. *See* Ohio v. Johnson, 467 U.S. 493 (1984) (where a defendant pleads guilty to only some of the charges and pleads not guilty to the more serious charges, the pleas of guilty to not resolve all charges brought by the State and the principles of finality are not implicated to bar prosecution on the remaining charges based on double jeopardy). *But see* Brown v. Ohio, 432 U.S. 161 (1977) (prohibiting the prosecution of a defendant for auto theft and joyriding after the defendant had already pled guilty to joyriding stemming from the same incident and spent thirty days in jail); *see also* Daniel Richman, *Bargaining About Future Jeopardy*, 49 VAND. L. REV. 1181, 1193 n.38 (1996) (explaining that jeopardy does not attach to dismissed charges); Michael H. Hoffheimer, *The Rise and Fall of Lesser Included Offenses*, 36 RUTGERS L. J. 351, 354 (2005) ("American jurisdictions recognize lesser included offenses as a device that permits a jury to acquit a defendant of a charged offense and instead to convict of a less serious crime that is necessarily committed during the commission of the charged offense.").

10. U.S. CONST. amend. V.

11. United States v. Combs, 634 F.2d 1295, 1300 (10th Cir. 1980) (McKay, J., concurring in part, dissenting in part).

12. *Johnson*, 467 U.S. at 498.

the guarantee against double jeopardy are uncertain,[13] it is indeed a storied and fundamental right.[14] These protections not only seek to achieve the goals of finality and repose for the defendant, but also guard against prosecutorial overreaching:

> The underlying idea . . . 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.[15]

Although these underlying principles have been applied in both jury trial and guilty plea proceedings, the respective double jeopardy implications of both situations have not directly mirrored each other.[16] Because the double jeopardy ramifications of a jury verdict may differ from those of a guilty plea, a few concepts arise in this latter context that are important to understanding the issue at hand. First, if a defendant by his own motion causes a guilty plea to be set aside, he waives his constitutional protection against being "twice put in jeopardy."[17] Second, the Supreme Court has explicated that a guilty plea constitutes a conviction: "A plea of guilty differs in purpose and effect from a mere admission or an extrajudicial confession; it is itself a conviction. Like a verdict of a jury it is conclusive. More is not required; the court has nothing to do but give judgment and sentence."[18]

Amidst this backdrop, while it is clear that a defendant "does not have an absolute right under the Constitution to have his guilty plea accepted by the court,"[19] once the plea is accepted, the federal circuits are divided on whether the Double Jeopardy Clause prevents a court from sua

13. David S. Rudstein, *A Brief History of the Fifth Amendment Guarantee Against Double Jeopardy*, 14 WM. & MARY BILL OF RTS. J. 193, 196 (2005).

14. *Id*. at 197 (noting that the protection against double jeopardy can be traced all the way back to the Old Testament); Bartkus v. Illionis, 359 U.S. 121, 151–52 (1929) (Black, J. dissenting) ("Fear and abhorrence of governmental power to try people twice for the same conduct is one of the oldest ideas found in western civilization."); Benton v. Maryland, 395 U.S. 784, 786 (1969) ("The fundamental nature of the guarantee against double jeopardy can hardly be doubted.").

15. Green v. United States, 355 U.S. 184, 187–88 (1957).

16. *See* Sally C. Quillan, Ohio v. Johnson*: Prohibiting the Offensive Use of Guilty Pleas to Invoke Double Jeopardy Protection*, 19 GA. L. REV. 159, 172–73 (1984).

17. United States v. Jerry, 487 F.2d 600, 606 (3rd Cir. 1973); *accord* United States v. Jorn, 400 U.S. 470, 485 (1971) (reasoning that the constitutional policy of finality for the defendant's benefit is not offended where the defendant has requested that the court remove him from the jeopardy of the guilty plea).

18. Kercheval v. United States, 274 U.S. 220, 223 (1927); *accord* Boykin v. Alabama, 395 U.S. 238, 242 (1969).

19. North Carolina v. Alford, 400 U.S. 25, 38 (1970).

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sponte vacating the plea and proceeding to trial.[20]

B. Circuits Finding No Double Jeopardy Violation

Some courts have found a trial judge's decision to sua sponte vacate a defendant's guilty plea and force him to stand trial perfectly within the confines of the Double Jeopardy Clause, as evident in *Gilmore v. Zimmerman*.[21] Although the defendant there stated that he had no recollection of killing his wife, he nonetheless pled guilty to involuntary manslaughter because his counsel advised that it would be in his best interests to do so.[22] After the judge told the defendant that the court was not bound by the plea agreement, the judge ended the Rule 11 colloquy by asserting, "I will allow the guilty plea to be entered."[23] At the sentencing proceeding, the court gave the defendant the decision to either stand on his plea (and thus be subjected to the judge's sentence) or withdraw his plea and stand trial.[24] The defendant chose the former, but after his attorney dodged a question from the court, the judge, over the defense's objections, said, "the guilty plea is struck off. A not guilty plea is entered for the defendant, and he will stand trial."[25] In finding no

20. This wide, well-established circuit split was actually identified in *Cabrera v. Acevedo*, No. 11-C-1390, slip. Op. at *2 (N.D. Ill. Mar. 6, 2012), which was Pedro Cabrera's habeas case. That court's opinion, though it did identify the circuit split, was altogether unhelpful in resolving the question at hand; it merely opined that until the Supreme Court resolves the issue, the defendant could not meet the stringent habeas standards under 28 U.S.C. § 2254(d)(2) (2006).

21. 793 F.2d 564 (3rd Cir. 1986).

22. *Id*. at 566.

23. *Id*.

24. *Id.* at 567. The prosecutor offered a five-year prison sentence, opining that it would be unable to obtain a jury verdict higher than involuntary manslaughter. *Id*.

25. *Id*. The judge vacated the guilty plea because he found an inadequate factual basis to support the defendant's equivocal guilty plea. Similar to the *Cabrera* case, the entire colloquy is important for fully understanding the context of the court's decision:

> THE COURT: Dr. Gilmore, Trooper Pease has stated in his report that you admitted to him that you gave your wife vitamin B-12 and meperidine. Do you recall making that statement to him, or do you deny making it to him, or do you admit making it to him?
>
> [DEFENSE ATTORNEY]: Your Honor, if it please the Court, I have advised Dr. Gilmore that in line with the plea as we have entered it, I don't think that those matters are relevant at this time. We have entered a plea on the record. We have stated our position on the record, and I do not believe that it's appropriate to develop into anything else other than what is pertinent at this time, which is the sentence.
>
> THE COURT: Well, then that makes it very easy . . . . Then in accordance with Rule 320 of the Rules of Criminal Procedure, the guilty plea is struck off. A not guilty plea is entered for the defendant, and he will stand trial. Trial is fixed for March the 21st, 1983.
>
> [DEFENSE ATTORNEY]: If it please the Court, before the Court proceeds, I'd like to know why the Court is taking the position that he's taking, and I would like to confer with Dr. Gilmore. I've merely stated my position. THAT DOESN'T MEAN THAT HE WOULD NOT RESPOND.*
>
> THE COURT: . . . there are too many unanswered questions in this whole matter, and therefore, I think the appropriate procedure is that the matter go to trial, and that's why I

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double jeopardy violation, the Third Circuit opined that since the defendant pled guilty to a lesser included offense while a more serious charge remained pending, the fact that his plea was stricken put him in no better position than that of a defendant whose plea remained intact, and added that the defendant's prosecution would "at most result in only one" conviction.[26]

The First Circuit in *United States v. Santiago Soto* similarly found the trial court's sua sponte vacation of a defendant's guilty plea and subsequent mandate of trial constitutionally permissible.[27] The *Santiago* court accepted the defendant's guilty plea to a misdemeanor offense stemming from his removal and opening of mail addressed to someone else.[28] After the defendant asserted, in mitigation, "I am paying the restitution for the things that I have not done," the court sua sponte vacated his guilty plea and dismissed the case.[29] Although the government objected, the defendant did not.[30] A few months later, however, a grand jury indicted the defendant with the felonies of obstruction of correspondence and theft of mail matter, and a jury subsequently found him guilty.[31] In finding no double jeopardy violation, the First Circuit stressed that jeopardy attaches only at "the point at which the risks of injury are so great that the government should have to shoulder the heavy burden of showing manifest necessity for repetitious proceedings."[32] The court proffered, "the mere acceptance of a guilty plea does not carry the same expectation of finality and tranquility that comes with a jury's verdict," and concluded that when the judge accepted the guilty plea but then soon rejected it in the same proceeding, the defendant was not placed in jeopardy in any meaningful sense.[33]

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struck the guilty plea.

[DEFENSE ATTORNEY]: Your Honor—

THE COURT: Court is adjourned.

Id.

26. *Id*. at 570. The court added that the Double Jeopardy Clause's prohibition against successive prosecutions for the same offense was not implicated in the situation before it. *Id*.

27. 825 F.2d 616 (1st Cir. 1987).

28. *Id*. at 617. Although a Postal Service inspector presented a complaint accusing the defendant of two felonies, the United States merely decided to charge him with a misdemeanor. *Id*.

29. *Id*. The court proffered, "how are we going to find this man guilty and condemn him when he says he did not do it?" *Id*.

30. *Id*.

31. *Id*.

32. *Id*. at 618. Unlike the case before it, where the trial court unconditionally accepted the defendant's guilty plea, the court noted that some circuits hold that jeopardy does not attach when the trial court only conditionally accepts the plea. *Id.*; *see also* United States v. Sanchez, 609 F.2d 761, 763 (5th Cir. 1980).

33. *Santiago Soto*, 825 F.2d at 620.

Following suit, the Fifth Circuit in *United States v. Kim* found no double jeopardy violation after the district court vacated the defendant's guilty plea and forced him to stand trial.[34] The defendant there pled guilty to one of the three counts of tax evasion in exchange for the dismissal of the other charges.[35] The court ensured that the defendant voluntarily pled guilty.[36] After the defendant presented evidence at sentencing to prove that he lacked the requisite willfulness for the crime, however, the court granted the government's motion to withdraw the plea, holding that the defendant had rejected the plea agreement by taking a position that undermined the factual basis for his guilty plea.[37] While the court noted that jeopardy attaches with the acceptance of a guilty plea, it stressed that attachment alone does not settle the issue, opining that when a defendant repudiates the plea bargain, there are no double jeopardy ramifications.[38]

C. Circuits Finding a Double Jeopardy Violation

Other courts, such as the First Circuit in *United States v. Cruz*,[39] have found that the sua sponte vacation of a defendant's guilty plea and ensuing prosecution of that defendant at trial does indeed violate the Double Jeopardy Clause. The *Cruz* defendant was indicted under a felony drug charge, but pursuant to a subsequent plea agreement with the government, he pled guilty to a mere misdemeanor.[40] After strictly following the Rule 11 protocol, the district court judge declared, "I will accept the [guilty plea] . . . and a judgment of guilty would be entered . . . ."[41] At the sentencing proceeding, however, the court rejected the plea bargain on the basis that the presentence report indicated that the defendant had more involvement in the crime than he had initially stated.[42] On appeal, the First Circuit acknowledged that many circuits hold that jeopardy attaches upon the court's acceptance of a guilty plea,[43] and noted that "once the court accepted the

34. 884 F.2d 189 (5th Cir. 1989).

35. *Id*. at 191.

36. *Id*.

37. *Id*.

38. *Id*.

39. 709 F.2d 111 (1st Cir. 1983).

40. *Id*. at 111–12. The defendant had three co-defendants, two of whom also pleaded guilty. *Id*.

41. *Id*. at 112.

42. *Id*.

43. *Id*. at 113; *see* United States v. Sanchez, 609 F.2d at 762; United States v. Cambindo Valencia, 609 F.2d 603, 637 (2d Cir. 1979); United States v. Jerry, 487 F.2d 600, 606 (3d Cir. 1973) (asserting that the defendant "must be considered to have been convicted by the entry of his plea of guilty just as if a jury had found a verdict of guilty against him"); United States v. Dawson, 77 F.3d 180, 182 (7th Cir. 1996).

agreement . . . it could not simply change its mind" later.[44] The court qualified this statement, however, by providing that jeopardy need not attach automatically in all instances when a guilty plea is accepted,[45] and the court specifically noted that the defendant was never in jeopardy of conviction on any charge except the lesser offense to which his plea was offered.[46] Nonetheless, the First Circuit held that jeopardy attached when the defendant's plea was accepted since the district court's actions undermined the protection afforded the defendant by the Federal Rules of Criminal Procedure: "Rule 11 appears to speak unequivocally; if the plea is accepted . . . the mere postponement of sentencing itself to a future date does not authorize the judge to remake or vacate the plea bargain for whatever reasons later seem appropriate to her."[47]

Likewise, in *Morris v. Reynolds*,[48] the Second Circuit found a violation of the Double Jeopardy Clause. Although the defendant in that case pled guilty to a misdemeanor after the greater felony offense was dismissed,[49] the district court reinstated the felony charge several months later when preparing for sentencing.[50] In attempting to balance both "the defendant's interest in finality and the state's interest in having one full and fair opportunity to convict,"[51] the court sided with the defendant since the felony offense was not pending at the time the plea was accepted.[52] Thus, the Second Circuit held that, "the double jeopardy bar arises, after a conviction but before sentencing, when a defendant pleads guilty to a lesser included offense, the prosecution did not object to the plea, and there was no greater offense pending at the time the plea was accepted."[53] Citing to the Supreme Court, the Second Circuit highlighted the fact that a guilty plea constitutes a conviction: "a guilty plea is . . . itself a conviction. Like a verdict of a jury it is

44. *Cruz*, 709 F.2d at 114–15.

45. *Id*. at 114 (noting that "acceptance of a guilty plea to a lesser offense carries no implied acquittal of the greater offense and for this reason is not the same as a verdict.").

46. *Id*.

47. *Id*. at 115; *accord* United States v. Blackwell, 694 F.2d 1325, 1338 (D.C. Cir. 1982).

48. 264 F.3d 38 (2d Cir. 2001).

49. *Id*. at 42. The misdemeanor was Criminal Possession of a Weapon in the Fourth Degree, while the felony was Criminal Possession of a Weapon in the Third Degree. The latter was dismissed by the court for insufficiency of evidence. There was some ambiguity as to whether the trial judge reinstated the felony count before the defendant pled guilty to the misdemeanor, but the Court of Appeals resolved that ambiguity in favor of the defendant. *Id*.

50. *Id*. at 43.

51. *Id*. at 44.

52. *Id*. at 50. The Court distinguished the facts at hand from *Ohio v. Johnson* by noting that in the latter case, the greater included offenses were still pending against the defendant when he pled guilty, and added that unlike *Johnson*, the *Morris* defendant did not attempt to used double jeopardy "as a sword to prevent the State from completing its prosecution on the remaining charges." *Id*. at 49–50.

53. *Id*. at 51.

conclusive. More is not required; the court has nothing to do but give judgment and sentence."[54] The court thus reasoned that since the Double Jeopardy Clause protects against a second prosecution for the same offense after conviction, the Clause likewise prohibits a second prosecution for the same offense following a guilty plea.[55]

The Ninth Circuit has also concluded that the sua sponte vacation of a defendant's guilty plea and subsequent conviction of that defendant at trial violates the Double Jeopardy Clause.[56] The defendant in *United States v. Patterson* pled guilty to manufacturing marijuana, but since the number of marijuana plants was in dispute, the plea agreement stated that the number of plants would be litigated at sentencing.[57] While the district court accepted the plea, it retained discretion to reject the agreement until after it had considered the Presentence Report.[58] Months later, the government successfully argued that the guilty plea should be set aside since the defendant was not informed of the number of marijuana plants when he pled guilty, prompting the district court to vacate the plea and force the defendant to stand trial, where he was found guilty.[59] In observing that "an accused must suffer jeopardy before he can suffer double jeopardy," the Ninth Circuit concluded that jeopardy attached when the district court accepted the defendant's plea, and as such, "the court did not have the authority to vacate the plea on the government's motion."[60] The court distinguished a guilty plea from the plea agreement, asserting that although a district court may 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; instead, "when the court accepts a guilty plea but rejects the plea agreement, it becomes the defendant's choice whether to stand by the plea or to withdraw" it.[61] Because the district court did not have authority to vacate the plea over the defendant's objections, the Ninth Circuit remanded to reinstate his original guilty plea and sentence him accordingly.[62]

54. *Id*. at 49.

55. *Id*.

56. United States v. Patterson, 381 F.3d 859 (9th Cir. 2004).

57. *Id*. at 861.

58. *Id*. at 862.

59. *Id*.

60. *Id*. at 864.

61. *Id*. at 865; *accord* United States v. Partida-Parra, 859 F.2d 629, 634 (9th Cir. 1988); United States v. Vinyard, 539 F.3d 589, 592 (7th Cir. 2008) (emphasizing, "the important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed in the event of prejudicial prosecutorial or judicial error").

62. *Patterson*, 381 F.3d at 865.

III. *CABRERA V. ACEVEDO*

The Illinois Appellate Court in *Cabrera v. Acevedo* found no double jeopardy violation in Judge Holt's sua sponte vacation of the defendant's guilty plea and subsequent conviction of him at trial.[63] Writing for the court, Justice Garcia began by highlighting the purposes underlying the prohibition against double jeopardy, specifically noting that it is "designed to prevent the State from engaging in more than one attempt to convict an individual, thereby subjecting him to embarrassment, expense, continuing anxiety and insecurity, and increasing the possibility that he may be found guilty even if innocent."[64] While the Double Jeopardy Clause furthers the constitutional policy in favor of finality for the defendant, the court asserted that the double jeopardy analysis should not be applied "if the interests the clause seeks to protect are not endangered or where its mechanical application would frustrate society's interest in enforcing criminal laws."[65] Justice Garcia's opinion acknowledged the three situations in which jeopardy may attach, specifically conceding that it so attaches at a guilty plea hearing when the guilty plea is accepted by the trial court.[66]

The court first turned its analysis to the defendant's claims that the Double Jeopardy Clause barred the subsequent trial on offenses that the State nol-prossed.[67] The court explained that whether jeopardy attaches to offenses to which no guilty pleas have been entered turns on when the State's motion to nol-pros those charges is entered.[68] The court concluded that jeopardy attaches at a guilty plea hearing only to those offenses to which a defendant actually pleads guilty and only when that guilty plea is subsequently accepted by the trial court.[69] Relying on *Ohio v. Johnson*,[70] the court asserted that "logic dictates that jeopardy would attach only to the crime pleaded to since there has been no

63. People v. Cabrera, 932 N.E.2d 528, 542 (Ill. App. Ct., 2010).

64. *Id*. at 536.

65. *Id*.

66. *Id*. Jeopardy may also attach at a jury trial when the jury is empaneled and sworn and at a bench trial when the first witness is sworn and the court begins to hear evidence. *Id*. at 539.

67. *Id*. at 537.

68. *Id*.

> If the allowance of a motion to nol-pros is entered before the jeopardy attaches, the nolle prosequi does not operate as an acquittal, and a subsequent prosecution for the same offense could legally proceed. Conversely, the granting of a motion to nol-pros after jeopardy attaches has the same effect as an acquittal, and the State may not pursue those charges in a subsequent trial.

Id.

69. *Id*.

70. 467 U.S. 493 (1984).

finding of any sort as to the charges nol-prossed."[71]

Justice Garcia's opinion then delved into a discussion of the double jeopardy implications of the trial court's decision to sua sponte vacate Cabrera's plea of guilty to armed robbery and force him to stand trial on that charge.[72] While asserting that jeopardy attached to the armed robbery charge when the trial court accepted Cabrera's plea of guilty to that count, the court did not find that determinative; rather, "to trigger the double jeopardy bar, jeopardy must not only attach, but terminate."[73] In explaining the concept of "continuing jeopardy," the court stated, "[a] prosecution is barred if the defendant was formerly prosecuted for the same offense, based upon the same facts, if such former prosecution: (3) Was terminated improperly."[74] Interests supporting the continuing jeopardy principle, according to the court, are fairness to society, lack of finality, and limited waiver.[75] Based on these policy considerations, the court equated a guilty plea hearing to a jury trial, opining that "much like jeopardy that attaches following the impaneling of a jury . . . which 'continues' throughout the course of trial, the jeopardy that attached following Judge Holt's acceptance of the defendant's plea of guilty continued throughout the course of his guilty plea hearing."[76] Thus, for the *Cabrera* court, just like a proper declaration of a mistrial in the course of a trial does not preclude another prosecution, a proper termination of a guilty plea hearing did not trigger a double jeopardy bar to Cabrera's prosecution at trial.[77]

After a brief discussion of the mechanics of a guilty plea proceeding,[78] the court observed, "[w]e perceive no constitutional distinction between a state practice that bars accepting guilty pleas when coupled with protestations of innocence and allowing a circuit court to accept or reject such pleas in the exercise of sound judicial discretion."[79] The court found no reason why Judge Holt's entry of his finding of guilty as to the armed robbery charge precluded him from considering Cabrera's later protestations of innocence:

71. People v. Cabrera, 932 N.E.2d 528, 537 (Ill. App. Ct., 2010).

72. *Id*. at 538.

73. *Id.* (citing Richardson v. United States, 468 U.S. 317, 325 (1984)).

74. *Cabrera*, 932 N.E.2d at 538.

75. *Id.*; *accord* Justices of Boston Mun. Court v. Lydon, 466 U.S. 294, 308 (1984) (holding that "acquittals, unlike convictions, terminate the initial jeopardy").

76. *Id*. at 539.

77. *Id*. Since the court determined that Judge Holt acted within his discretion in "rejecting the defendant's plea of guilty" there was no double jeopardy violation. *Id*.

78. The court essentially just noted that a State may bar its courts from accepting equivocal guilty pleas and likewise observed that the state has permission to change a plea of guilty to not guilty. *Id*. at 540.

79. *Id*. The court elaborated at length on why Judge Holt exercised sound discretion, but the gist of its reasoning was that Judge Holt had good reason to doubt the truth of Cabrera's guilty plea.

> We perceive no reason that the entry of a finding of guilty pursuant to a defendant's plea of guilty is a point beyond which a trial judge must turn a deaf ear to a defendant's protestation of innocence else risk leaving the State with no adjudication of the charge should vacating the guilty plea trigger double jeopardy.[80]

The court further reasoned that because a defendant does not have an absolute right to have his guilty plea accepted by the trial court, the mere acceptance of a defendant's plea of guilty did not terminate the jeopardy that attached when the guilty plea was accepted by the trial court.[81]

Finally, the *Cabrera* court justified its holding by concluding that the acceptance of a guilty plea is not a conviction, which was important for Justice Garcia to emphasize because the Double Jeopardy Clause protects against a second prosecution for the same offense after conviction.[82] The court proffered that the mere acceptance of a guilty plea is not a conviction because a "sentence is a necessary part of a complete judgment of guilt."[83] Thus, because there was no judgment of conviction, the jeopardy that attached upon Judge Holt's acceptance of Cabrera's guilty plea never terminated.[84] The court additionally rejected any notion that a guilty plea is itself a conviction, reiterating the fact that "a guilty plea does not carry the same expectation of finality and tranquility that comes with a jury's verdict . . . ."[85]

IV. DISCUSSION

Perhaps no person better appreciates the axiom, "Think before you speak," than Pedro Cabrera. To concede that he would have been smarter to simply keep his mouth shut does not change the fact that the court got it wrong, and the number of circuits that would agree with the Illinois Appellate Court[86] indicate that these decisions are the product of a confused and standard-less precedent in a rare situation not previously encountered in many of these circuits. A court's sua sponte vacation of a defendant's guilty plea and subsequent enforcement of trial does

80. *Id*. The court quoted *United States v. Santiago Soto*, 825 F.2d 616, 620 (1st Cir. 1987) ("The mere acceptance of a guilty plea does not carry the same expectation of finality and tranquility that comes with a jury's verdict or with an entry of judgment and sentence . . . .").

81. *Cabrera*, 932 N.E. 2d at 541. The court dismissed Cabrera's contention that his subsequent conviction at his bench trial violated the Double Jeopardy Clause's prohibition against multiple punishments since the bench trial was part of the same continuous prosecution. The fact that Judge Holt imposed a harsher sentence was insufficient to amount to a constitutional violation. *Id*. at 542.

82. *Id*. at 541.

83. *Id*.

84. *Id*.

85. *Id*. at 542.

86. *Id.*

indeed violate the Fifth Amendment, as such an act runs afoul of Supreme Court precedent, ignores the literal language of the Double Jeopardy Clause, and offends the Fifth Amendment's underlying principles.[87]

A Guilty Plea is a Conviction

The Supreme Court has clearly asserted that a guilty plea is a conviction: "A plea of guilty . . . is itself a conviction. Like a verdict of a jury it is conclusive. More is not required; the court has nothing to do but give judgment and sentence."[88] Thus, Cabrera was convicted upon the court's acceptance of his guilty plea. That he was not sentenced yet is irrelevant, for the Supreme Court's assertion that a guilty plea is a conviction and the court has nothing to do but give judgment and sentence implies that the imposition of a sentence is not a prerequisite for a conviction.[89] The Supreme Court has also clearly asserted that the Double Jeopardy Clause protects defendants against, *inter alia*, a second prosecution for the same offense after conviction.[90] Thus, Cabrera was convicted of armed robbery when the court accepted his guilty plea, and he was then prosecuted a second time for armed robbery after that conviction[91] when the court vacated his plea and forced him to stand trial. Therefore, the Double Jeopardy Clause was violated.

The *Cabrera* court was wrong when it said, "[w]e expressly disagree with the assertion . . . that a plea of guilty is equivalent to a conviction."[92] The rest of the court's analysis notwithstanding, it simply failed to follow binding Supreme Court precedent in that regard. So too was the First Circuit in *Santiago-Soto* mistaken when it provided, "[u]nderlying *Johnson* is the proposition that an acceptance of a guilty plea is legally different from a conviction based on a jury's verdict."[93] The *Johnson* Court merely posited that jeopardy did not attach when the trial court accepted the defendant's guilty plea to a lesser included offense while a more serious charge remained pending; it was silent on the relationship between being convicted via a guilty plea and being convicted pursuant to a jury verdict.[94] The actual proposition

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87. U.S. CONST. amend. V.

88. Kercheval v. United States, 274 U.S. 220, 223 (1927); *accord* Boykin v. Alabama, 395 U.S. 238, 242 (1969).

89. *See infra* Part IV(B)(2).

90. Ohio v. Johnson, 467 U.S. 493, 498 (1984).

91. The *Cabrera* defendant was also prosecuted for the charges that had been nol-prossed. 932 N.E. 2d at 534.

92. *Id.* at 542.

93. United States v. Santiago Soto, 825 F.2d 616, 619 (1st Cir. 1987).

94. *Johnson*, 467 U.S. at 501–02.

underlying *Johnson* was that the acceptance of a guilty plea to a lesser included offense does not imply an acquittal to the more serious counts that remain pending at the time of acceptance. An implied acquittal is irrelevant in the context of prohibiting a "second prosecution for the same offense after conviction," as the acceptance of a guilty plea to a specific charge constitutes a conviction on that charge, thus barring the subsequent prosecution of that charge.

B. Textualism and the Double Jeopardy Clause

The acceptance of a guilty plea is a conviction. The Fifth Amendment prohibits a second prosecution for the same offense following a conviction. Therefore, prosecuting a defendant for a charge to which he pled guilty should violate double jeopardy. Because this seems so obvious, why has this situation led to such incongruous results? Many circuits finding no double jeopardy violation in such a context maneuver around the "guilty plea as a conviction" principle by making much ado about the attachment and termination of a guilty plea. In so doing, these courts simply fail to examine the actual language of the Double Jeopardy Clause: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb,"[95] where jeopardy is defined as "exposure to the risk of a determination of guilt or innocence."[96]

Based on the mere meaning of the word "jeopardy," the oft-cited analogy between a jury trial and a guilty plea hearing has been misguided to the extent of their respective double jeopardy implications. In comparing when jeopardy attaches and terminates in a jury trial versus when it attaches and terminates in a guilty plea hearing, both sides to this debate have employed faulty reasoning by failing to simply read the text of the Fifth Amendment.

1. Attachment of Jeopardy

Although at least one circuit has held otherwise,[97] the circuits are nearly unanimous in holding that jeopardy attaches upon the trial court's

95. U.S. CONST. amend. V.

96. United States v. Combs, 634 F.2d 1295, 1300 (10th Cir. 1980) (McKay, J., concurring in part, dissenting in part). Merriam–Webster's Dictionary provides the following synonyms for jeopardy: distress, endangerment, harm's way, imperilment, danger, peril, risk, and trouble. "Jeopardy." MERRIAM–WEBSTER DICTIONARY (2012), http://www.merriam-webster.com/.

97. *E.g.*, United States v. Santiago Soto, 825 F.2d 616, 618 (1st Cir. 1987) (holding that jeopardy only attaches at the point at which the risks of injury are so great that the government should have to shoulder the heavy burden of showing manifest necessity for repetitious proceedings).

acceptance of a defendant's guilty plea[98] just as jeopardy attaches when a jury is empaneled and sworn in a jury trial or when evidence is first produced in the course of a bench trial.[99] Despite the lack of disagreement among the circuits in this regard, their consensus that jeopardy attaches upon the acceptance of a guilty plea runs counter to the text of the Double Jeopardy Clause. It makes sense to conclude that jeopardy attaches when a jury is empaneled in a jury trial or when the first witness is called in a bench trial because, starting from that point, the defendant is exposed to the risk of either being found guilty or being found innocent. Because jeopardy attaches when a defendant risks a determination of factual guilt, it is nonsensical to hold that jeopardy attaches upon the court's acceptance of his guilty plea because a guilty plea is itself a conviction. At that point, there is no longer any risk of being found guilty; rather, at that point, the defendant has been found guilty.[100] In the context of guilty pleas therefore, jeopardy should attach at the inception of the guilty plea hearing. That is, jeopardy should attach when the court is attempting to determine the voluntariness of the plea and the factual basis for it, as well as ensuring that the defendant understands his rights,[101] for it is at that moment that the defendant is exposed to the risk of being found guilty. Just as jeopardy attaches in a jury trial long before the jury convicts a defendant by rendering a verdict, so too should jeopardy attach before the judge convicts the defendant by accepting his plea.

2. Termination of Jeopardy

Much more divisive among the circuits is the issue of when jeopardy terminates. Although both attachment and termination of jeopardy were required by the Supreme Court in *Richardson* to trigger double jeopardy protection,[102] the Court there dealt with a situation in which it essentially had to determine if there was even an acquittal or a conviction upon which to premise a double jeopardy violation.[103] In

98. United States v. Cruz, 709 F.2d 111, 113 (1st Cir. 1983); United States v. Sanchez, 609 F.2d 761, 762 (5th Cir. 1980); United States v. Cambindo Valencia, 609 F.2d 603, 637 (2d Cir. 1979); United States v. Jerry, 487 F.2d 600, 606 (3rd Cir. 1973); United States v. Dawson, 77 F.3d 180, 182 (7th Cir. 1996); United States v. Patterson, 381 F.3d 859, 864 (9th Cir. 2004).

99. Serfass v. United States, 420 U.S. 377, 388 (1975). Even the Illinois Appellate court conceded that jeopardy attached to the armed robbery charge when Judge Holt accepted Cabrera's guilty plea to that count. People v. Cabrera, 932 N.E.2d 528, 538 (Ill. App. Ct., 2010).

100. *See infra* Part IV(B)(2).

101. This is required by FED. R. CRIM. P. 11.

102. Richardson v. United States, 468 U.S. 317, 325 (1984).

103. The Court in *Ohio v. Johnson*, 467 U.S. 493, 498 (1984), provided that the Double Jeopardy Clause protects against a second prosecution for the same offense following acquittal or conviction.

asserting that there must be some event to terminate the original jeopardy, the *Richardson* Court held that the declaration of a mistrial following a hung jury was no such event, despite the defendant's contention that the declaration of a mistrial was akin to an acquittal.[104] Thus, the Court invoked the concept of "continuing jeopardy" to hold that the Double Jeopardy Clause was not violated since the defendant's risk of being found guilty never vanished. Similarly, the *Cabrera* court noted that jeopardy continues if a conviction is reversed on appeal or if a trial ends in a mistrial.[105] This makes sense, as the defendant voluntarily exposes himself to the risk of an appellate court affirming his conviction on appeal, and in a mistrial, the jury usually has not rendered a verdict. In other words, the question of guilt or innocence has not been answered with finality, and the risk of being found guilty persists. Unlike *Richardson* and many other cases involving Fifth Amendment claims where the "continuing jeopardy" principle is invoked because the risk of conviction still exists,[106] in *Cabrera*, the defendant pled guilty, and, in so doing, was convicted. Not only was there no more jeopardy (because there was no more risk of conviction), but by having his guilty plea accepted, Cabrera actually foreclosed the possibility that he would be spared the risk of conviction.

While the Supreme Court has asserted that, "[a]cquittals, unlike convictions, terminate the initial jeopardy," the situation before the *Justices of Boston*[107] Court was very different from the context of vacating a defendant's guilty plea. The Court there opined that jeopardy should continue when the criminal proceedings against a defendant have not run their full course, and thus, because the defendant requested a new trial after being convicted, the second proceeding did not amount to double jeopardy.[108] In fact, the Court noted that the second proceeding actually afforded the defendant more protection than is given to most people in his position.[109] In *Cabrera*, the defendant was not appealing

104. Richardson v. United States, 468 U.S. 317, 325 (1984).

105. People v. Cabrera, 932 N.E.2d 528, 538 (Ill. App. Ct., 2010). The court there also noted that jeopardy may continue where a judge terminates a guilty plea hearing properly. *Id*. at 539.

106. *See infra* Part IV(C).

107. Justices of Boston Mun. Court v. Lydon, 466 U.S. 294, 308 (1984).

108. *Id.* at 308.

109. *Id*. The Court explained why double jeopardy is not implicated when a defendant appeals his conviction:

> While different theories have been advanced to support the permissibility of retrial, of greater importance than the conceptual abstractions employed to explain the *Ball* principle are the implications of that principle for the sound administration of justice. Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading

his conviction; he was not availing himself of another trial; he was not exposing himself to the risk of being convicted. Rather, he was trying to merely stand on his conviction. In noting that convictions do not terminate the initial jeopardy, the *Justices of Boston* Court was faced with a situation in which the defendant was trying to use jeopardy as a sword to claim that he should not be twice-exposed to the risk of being found guilty despite the fact that he voluntarily exposed himself to that risk. The reasoning behind the blanket statement that "convictions do not terminate the initial jeopardy" surely did not account for a situation like Cabrera's, where he was actually trying to uphold his conviction over the court's voluntary vacation of it.

The *Cabrera* court observed that just like when jeopardy attaches in a jury trial upon the impaneling of a jury and continues throughout the course of trial, so too should jeopardy continue throughout the course of a guilty plea hearing.[110] The guilty plea hearing ended when Judge Holt accepted Cabrera's guilty plea, that is, when Cabrera was convicted. Thus, despite the contention that jeopardy attaches upon the acceptance of a guilty plea, it should terminate there as well. While the *Cabrera* court held that "[t]he sentence is a necessary part of a complete judgment of guilt," and "[i]n the absence of a sentence, a judgment of conviction is not final,"[111] sentencing adds nothing to the jeopardy a defendant faces at the moment of his conviction. The Supreme Court in *United States v. Ball* indicated that a defendant is eligible for double jeopardy protection before an official judgment: "[A] verdict of acquittal, although not followed by any judgment, is a bar to a subsequent prosecution for the same offense."[112] Cabrera was convicted upon the acceptance of his guilty plea, not upon his sentencing, which is perfectly logical because, as the *Ball* Court observed, "[t]he prohibition is not against being twice punished, but against being twice put in jeopardy."[113] This suggests that once that risk is gone by actually coming to fruition via a conviction, the sentencing has no effect on the now-terminated jeopardy. The Supreme Court has highlighted the fact that a sentence is not a requirement for a conviction to exist: "A plea of guilty . . . is itself a conviction . . . . More is not required; the court has

to conviction.

Id.

110. *Cabrera*, 932 N.E.2d at 539.

111. *Id.* at 541.

112. 163 U.S. 662, 671 (1896).

113. *Id.* at 669. While the Supreme Court has indicated that one of the protections the Double Jeopardy Clause affords a defendant is the prohibition against multiple punishments, *Ohio v. Johnson*, 467 U.S. 493, 498 (1984), the literal language of the text merely prohibits placing a defendant at risk of being convicted more than once. Cabrera was exposed to the risk of being found guilty once, and was convicted. He cannot be exposed to that risk again consistence with the Fifth Amendment.

nothing to do but give judgment and sentence."[114] The mere separation of "conviction" and "sentence" suggests that the two are distinct concepts.[115] Because the Double Jeopardy Clause prohibits a defendant from being twice-exposed to the risk of conviction, rather than being twice-exposed to sentencing, the entry of judgment at the time of sentencing adds nothing to the jeopardy a defendant faces at the moment of his actual conviction, which in *Cabrera* was the moment Judge Holt unconditionally accepted Cabrera's guilty plea.

C. Interests Underlying the Double Jeopardy Clause

As propounded by the Supreme Court, the Double Jeopardy Clause was designed to prevent the State from making "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."[116] Courts have frequently balanced these Fifth Amendment objectives of finality and repose for the defendant and the prevention of prosecutorial overreaching with the State's interest in having one full and fair opportunity to convict.[117] Not only were the goals of finality and repose for Cabrera not achieved, but the State fully enjoyed its interest in having one fair opportunity to convict him.

The goals sought by the Double Jeopardy Clause were overlooked by the *Cabrera* court,[118] and the reasoning illuminated by the circuits that hold otherwise is unpersuasive. In finding no double jeopardy violation in the Judge Holt's sua sponte vacation of a defendant's guilty plea, the Illinois Appellate Court asserted, "[t]he mere acceptance of a guilty plea does not carry the same expectation of finality and tranquility that comes with a jury's verdict or with an entry of judgment and sentence as in *Brown*."[119] Neither the *Cabrera* court[120] nor the First Circuit in

114. Kercheval v. United States, 274 U.S. 220, 223 (1927).

115. *Accord* FED. R. CRIM. P. 32(j)(1)(A): "If the defendant pleaded not guilty and was convicted, after sentencing the court must advise the defendant of the right to appeal the conviction." It is elementary to conclude that since sentencing takes place after conviction, sentencing itself is not part of the conviction. *Accord* Morris v. Reynolds, 264 F.3d 38 (2d Cir. 2001) ("[T]he double jeopardy bar arises, after a conviction but before sentencing . . . ."); United States v. Cruz, 709 F.2d 111, 115 (1st Cir. 1983) ("The mere postponement of sentencing itself to a future date does not authorize the judge to remake or vacate the plea bargain for whatever reasons later seem appropriate to her.").

116. Green v. United States, 355 U.S. 184, 187–88 (1957).

117. *Morris*, 264 F.3d at 44.

118. People v. Cabrera, 932 N.E.2d 528 (Ill. App. Ct., 2010).

119. *Id*. at 542 (quoting United States v. Santiago Soto, 825 F.2d 616, 620 (1st Cir. 1987)).

120. *Cabrera*, 932 N.E.2d at 528.

Santiago Soto[121] offered an explanation as to why the acceptance of a guilty plea differs from a jury verdict with respect to the sentiments of finality and tranquility. Perhaps the *Santiago Soto* court was defending this assertion when it concluded that because the judge rejected the guilty plea immediately after he had accepted it, the defendant was not placed in jeopardy.[122] Nowhere in the double jeopardy jurisprudence, however, has a court expressed the notion that some certain amount of time must elapse before the finality expectation sets in. While this expectation is undoubtedly stronger after serving a full sentence, as was the case in *Brown*,[123] that is not to say that the sentiment of finality is nonexistent where a defendant's already-accepted guilty plea is vacated over his objections in the same proceeding. Certainly Cabrera had some sense of finality and repose upon Judge Holt's acceptance of his plea; his conviction was definite at that point and, although he still had to be officially sentenced, he must have felt some relief upon learning that he would not have to endure the anxiety and embarrassment that comes with a trial.

This policy favoring a sense of finality also serves to avoid a defendant's continual state of anxiety and insecurity because "one consequence of allowing the government to re-prosecute after a conviction would be to allow it to seek a higher sentence for the same conviction,"[124] which is exactly what happened to Cabrera. Thus, this sense of finality is the "reason that the entry of a finding of guilty pursuant to a defendant's plea of guilty is a point beyond which a trial judge must turn a deaf ear to a defendant's protestation of innocence . . . ."[125] A key distinguishing factor between the defendant in *Santiago Soto*[126] and Cabrera was that the former did not complain about the unsolicited vacation of his guilty plea, which suggests that he had no strong sentiment of finality in his conviction. Conversely, Cabrera adamantly objected to Judge Holt's actions, proving that he had already accepted his fate. His repose, albeit brief, was thus being

121. 825 F.2d at 616.

122. *Id*. At the risk of belaboring the point, the court there first misapplied the concept of jeopardy. If anything, the court should have said that jeopardy had not terminated, but to say that the defendant was never placed in jeopardy ignores the literal meaning of the word. The defendant had indeed been placed in jeopardy since he was already exposed to the risk of being found guilty.

123. Brown v. Ohio, 432 U.S. 161 (1977).

124. WAYNE LAFAVE ET AL., CRIMINAL PROCEDURE § 25.1, at 1203 (5th ed. 2009).

125. *Cabrera*, 932 N.E. 2d at 540. While the court exclaimed that there is no difference between a state practice that bars accepting guilty pleas and allowing a circuit court to accept or reject such pleas, it fails to account for a crucial fact: Judge Holt accepted Cabrera's guilty plea! Thus, the appellate case was not dealing with the validity of rejecting or accepting pleas; instead, it was faced with determining the constitutionality of vacating an already-accepted plea.

126. United States v. Santiago Soto, 825 F.2d 616 (1st Cir. 1987).

stripped from him. Interestingly, the *Gilmore*,[127] *Santiago-Soto*,[128] and *Kim*[129] courts all dealt with unconditional acceptances of guilty pleas. Had any of the trial courts in these cases only conditionally accepted the pleas, the defendants would not have been able to assert any cognizable interests in finality since their factual guilt was being put on hold.[130] Moreover, unlike in *Justices of Boston*,[131] Cabrera did not attempt to use the Double Jeopardy Clause as a sword to prevent a second prosecution after initially appealing his conviction. Rather, his finality interest was illustrated by the fact that he actually fought to stand on his guilty plea.

The *Gilmore* court's reasoning is equally unpersuasive and is arguably inapplicable to Cabrera's situation.[132] Basing its decision on the reasoning employed by the *Johnson* Court,[133] the Third Circuit found nothing unconstitutional about vacating a guilty plea to a lesser included offense and instead convicting him of a greater offense.[134] The court asserted, "the fact that his plea was stricken obviously puts him in no better position than that of a defendant whose plea remains intact," and claimed that his prosecution would at most result in only one conviction.[135] The *Cabrera* court encountered a much different situation, as there were no charges pending when it accepted the defendant's guilty plea.[136] Thus, not only was the finality interest much weaker in *Gilmore*,[137] but the State there had not yet fully and fairly completed its prosecution. While the stricken plea in *Gilmore* did not put the defendant in a better position than a defendant whose plea remained intact (since the other charges were still pending),[138] Cabrera

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127. Gilmore v. Zimmerman, 793 F.2d 564 (3rd Cir. 1986).

128. 825 F.2d at 616.

129. United States v. Kim, 884 F.2d 189 (5th Cir. 1989).

130. In *Gilmore*, 793 F.2d at 564, the trial judge told the defendant that he was not bound by the plea agreement. While that was correct, he said this before actually accepting the guilty plea. Post-acceptance, the finality expectation had set in, and the court should not have been authorized to vacate the plea. As stated by LaFave:

> The easiest cases are those in which the government and the defendant have entered into an agreement that a greater charge will be dismissed in exchange for the defendant's plea to a lesser charge. In this situation, once the court has accepted unconditionally the plea agreement and the defendant's guilty plea, the Double Jeopardy Clause prohibits proceeding with the greater charge.

See LAFAVE ET AL., *supra* note 124, at 1209.

131. 466 U.S. 294 (1984).

132. 793 F.2d at 564.

133. 467 U.S. 493 (1984).

134. *Gilmore*, 793 F.2d at 569–70.

135. *Id*. at 570.

136. People v. Cabrera, 932 N.E.2d 528 (Ill. App. Ct., 2010). The other charges had been nol-prossed. *Id*. at 532.

137. *Gilmore*, 793 F.2d at 564.

138. *Id*. at 570.

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was much worse off after having his plea vacated and would ultimately enjoy none of the interests sought to be protected by the Fifth Amendment. Additionally, the second prosecution of Cabrera would result in two convictions since he was first convicted when Judge Holt accepted his guilty plea.[139]

Even assuming that no finality interests would have been implicated by vacating Cabrera's guilty plea over his objections, the circuits finding such an act constitutional fail to account for the other interests sought to be protected by the Double Jeopardy Clause. Cabrera had to endure the expense, embarrassment, and ordeal of a trial despite the fact that he specifically tried to avoid all of the above by pleading guilty. He undoubtedly lived in a state of anxiety and insecurity from the time of Judge Holt's vacation of his plea throughout the course of the bench trial. Perhaps the most important consideration underlying the Double Jeopardy Clause, the Fifth Amendment was intended to curb the enhanced possibility that, even though innocent, a defendant may be found guilty with repeated attempts by the State to convict him.[140] Although a trial court may constitutionally reject a guilty plea from a defendant who simultaneously professes his innocence,[141] and while much has been written about the inequity of the plea bargaining process even for innocent defendants,[142] it seems paradoxical to assert that there is no factual basis for a guilty plea while simultaneously convicting a defendant of the charge to which he attempted to plead guilty. Even more absurd was the fact that Judge Holt convicted Cabrera after previously telling him, "I'm not going to send you to the penitentiary for a crime you didn't commit."[143] Despite Cabrera's professed innocence, he thought it was in his best interest to plead guilty based on his prior criminal record, and for good reason.[144] If Cabrera was actually innocent, not only did he feel forced to take a plea because the perceived

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139. *See supra* Part II(A).

140. Green v. United States, 355 U.S. 184, 188 (1957).

141. North Carolina v. Alford, 400 U.S. 25 (1970).

142. *See, e.g.*, John H. Blume & Rebecca K. Helm, *The Unexonerated: Factually Innocent Defendants who Plead Guilty* (Cornell Legal Studies Research Paper 2011), *available at* http://ssrn.com/abstract=2103787; John G. Douglass, *Fatal Attraction? The Uneasy Courtship of Brady and Plea Bargaining*, 50 EMORY L.J. 437 (2001); Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931 (1983).

143. *Cabrera*, 932 N.E.2d at 533.

144. *Id.* That many innocent people are incarcerated is undisputed. For example, there have been over three-hundred post-conviction DNA exonerations alone in the United States in the past two decades, and that number is growing as the so called "innocence problem" is slowly being recognized. *DNA Exonerations Nationwide*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Facts_on_PostConviction_DNA_Exonerations.php (last visited May 24, 2013).

(and perhaps real) inequity in the criminal justice system,[145] but he was subjected to two attempts by the State to convict him of something that he may not have done. The *Cabrera* court completely ignored the interest expounded by the Supreme Court in *Green*[146] in preventing the increased possibility of convicting an innocent defendant when it failed to even discuss the possibility that the defendant was convicted not once, but twice, for a crime that he maintains he did not commit.

Notwithstanding the finality implications that may or may not have been present in each case discussed in this Note, these other interests mentioned above were never even addressed by the courts. The interests sought to be protected are not an elements-based test whereby if one of them is lacking, the Double Jeopardy Clause is not implicated. The circuits finding no constitutional violation, however, seem to treat them that way. Even so, the one goal to be balanced against these pro-defendant interests was not implicated: that the State in *Cabrera* had one full and fair opportunity to convict is evidenced by the fact that the prosecution agreed to the guilty plea before the guilty plea hearing. Unlike in *Johnson*,[147] where the defendant offered only to resolve part of the charges against him while the State objected to disposing of any of the other counts, in *Cabrera* the State of Illinois agreed to nol-pros the other counts and prosecute him solely on one charge.[148] The prosecution thus not only reached an agreement with Cabrera, but come time for the guilty plea hearing, it did nothing to assert that the plea did not fully satisfy its right to one full and fair opportunity to convict him.

V. CONCLUSION

Like many defendants in similar predicaments, Cabrera made the calculated choice to plead guilty yet maintain his innocence at the same time. It is uncontestable that a district court may refuse to accept such a plea,[149] but once it accepts the plea, the defendant has been convicted. A court's ensuing sua sponte vacation of the plea violates a defendant's constitutional protection against "being twice put in jeopardy," for such an act ignores Supreme Court precedent, offends the language of the Fifth Amendment,[150] and runs counter to the principles underling the

145. *See generally*, Paul Butler, *Affirmative Action: Diversity of Opinions*: *Affirmative Action and the Criminal Law*, 68 U. COLO. L. REV. 841 (1997).

146. Green v. United States, 355 U.S. 184, 188 (1957).

147. 467 U.S. 493 (1984).

148. *Cabrera*, 932 N.E.2d at 533. Interestingly, the *Santiago Soto* court faced the opposite situation: the State objected to the government's vacation of the plea, while the defendant was apparently fine with it. 825 F.2d at 617.

149. *Alford*, 400 U.S. at 38.

150. U.S. CONST. amend. V.

Double Jeopardy Clause.

A simple illustration of the transitive property proves that the Double Jeopardy Clause is violated in such an instance: the Double Jeopardy Clause protects against a second prosecution for the same offense following conviction;[151] a guilty plea is a conviction;[152] thus, the Clause is violated by vacating a defendant's guilty plea and forcing him to stand trial a second time on the same charge. Courts have evaded such a finding by encumbering themselves in a discussion regarding the attachment of jeopardy and a morass of conflicting jurisprudence regarding the termination of it. The oft-cited analogy between a guilty plea hearing and a trial can be helpful in clarifying this area of the law. Because the word "jeopardy" denotes "exposure to risk," it is nonsensical to hold that jeopardy attaches once the court has accepted a guilty plea since it is at that moment that the defendant is actually convicted, thus transforming any risk of conviction into the finality of it. Thus, jeopardy should attach at the inception of the guilty plea hearing, just as it attaches upon the impaneling of a jury in a jury trial or the calling of the first witness in a bench trial. Likewise, just like jeopardy terminates in a trial upon the jury's verdict, so too should jeopardy terminate in a guilty plea hearing upon the judge's acceptance of the guilty plea. In holding that "more is not required" after a conviction but to "give judgment and sentence," the Supreme Court has implicitly noted that a sentence is distinct from a conviction and thus the former has no double jeopardy consequences.[153]

The principles underlying the Double Jeopardy Clause additionally illustrate the unconstitutionality of a district court's sua sponte vacation of a defendant's guilty plea. The feelings of repose and finality for a defendant are no less implicated by a court's acceptance of his guilty plea than they are by the rendering of a verdict by the jury, and courts that hold otherwise offer no explanation for such an assertion. Cabrera was perhaps the victim of the greatest injustice the Double Jeopardy Clause was meant to prevent: being convicted twice of a crime that he may have not committed. Another discussion for another time, the fact that Judge Holt professed Cabrera's innocence when he vacated the latter's guilty plea, but then personally found him guilty at the ensuing bench trial, is startling, and it serves as a caution that the double jeopardy jurisprudence needs some refining. As for *Cabrera*, the case should have been an easy one. By simply harkening to former Supreme Court precedent, the mere language of the Double Jeopardy Clause, and the driving principles of the Fifth Amendment, courts should reach the

151. *Johnson*, 467 U.S. at 498.

152. Kercheval v. United States, 274 U.S. 220, 223 (1927).

153. *Id*.

conclusion that the sua sponte vacation of a defendant's guilty plea and subsequent mandate of trial violates his protection against "being twice put in jeopardy of life or limb."[154]

154. U.S. CONST. amend. V.