No. 13-5967

IN THE

SUPREME COURT OF THE UNITED STATES

ESTEBAN MARTINEZ, Petitioner,

-vs-

PEOPLE OF THE STATE OF ILLINOIS, Respondent.

On Petition For Writ Of Certiorari

To The Supreme Court Of Illinois

RESPONSE TO PETITION FOR REHEARING

MICHAEL J. PELLETIER
State Appellate Defender

ALAN D. GOLDBERG
Deputy Defender

DEBRA R. SALINGER
Supervisor – Counsel of Record
DARREN E. MILLER
Assistant Appellate Defender
Office of the State Appellate Defender
First Judicial District
203 N. LaSalle, 24th Floor
Chicago, IL 60601
1stDistrict@osad.state.il.us
(312) 814-5472

COUNSEL FOR PETITIONER

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INTRODUCTION

In 2006, Mr. Martinez was charged with the offenses of aggravated battery and mob action, and during his May 19, 2009 jury trial, the trial court granted his motion for a directed verdict after the State refused to present any evidence to the jury. Thereafter, both the Illinois appellate court and the Illinois Supreme Court held that Martinez was never at risk, and therefore, jeopardy never attached and he could be reprosecuted. On May 27, 2014, this Court issued a *per curiam* opinion which summarily reversed the opinion of the Illinois Supreme Court, and unanimously held that jeopardy attached when the jury was sworn, Martinez was truly acquitted when the trial court granted his motion for directed verdict, and that the Double Jeopardy Clause bars his reprosecution.

On June 23, 2014, the State filed a petition for rehearing with this Court. In its petition, the State does not dispute this Court's holding that the Double Jeopardy Clause bars reprosecution. Rather, the State claims that this case became moot when the circuit court granted its motion to *nolle prosequi* the charges on April 14, 2014, after the petition for writ of certiorari had been pending before this Court for nearly eight months, and 43 days before this Court issued its *per curiam* opinion. The Illinois Attorney General's office asserts that it was not aware that the Kane County State's Attorney's office had dismissed the charges until after this Court issued its opinion. The State asks that this Court vacate the *per curiam* order due to mootness, and vacate the decisions of the Illinois appellate and Illinois Supreme Court. On July 21, 2014, this Court requested Martinez to file a response to the State's petition for rehearing within 30 days.

Mr. Martinez responds that this appeal is not moot because he has a concrete interest in retaining the benefit of this Court's decision. This Court's opinion assures Martinez that the State will not be able to reinstate the charges and reprosecute him, and that the record will correctly reflect that the State failed to prove his guilt after a trial. The State has failed to meet its burden of establishing to this Court that this case is moot, or the heavy burden that it will not likely reprosecute Martinez if this Court were to vacate the *per curiam* order which bars reprosecution.

STATEMENT OF FACTS

Facts related to the *per curiam* order.

In 2006, the State charged Mr. Martinez with the offenses of aggravated battery and mob action, and after the State refused to present evidence to the empaneled and sworn jury, the circuit court granted Martinez' motion for directed verdict. (C. 9-10; R. 10-21) The State appealed, and the Illinois Appellate Court vacated the acquittals, reasoning that there were no true acquittals because jeopardy did not attach where the State presented no evidence at trial. *Martinez*, 2011 IL App (2d) 100498 ¶ 46, 62. Martinez appealed to the Illinois Supreme Court, which affirmed the judgment of the appellate court. *People v. Martinez*, 2013 IL 113475 ¶ 45. The Illinois Supreme Court held Martinez "was at no time in danger of being found guilty of any offense," and he was thus not placed in jeopardy. *Martinez*, 2013 IL 113475 ¶ 31. The Illinois Supreme Court found that the "acquittals" were not true acquittals, and that the State was authorized to appeal from the "dismissal" order and to reprosecute Martinez. *Martinez*, 2013 IL 113475 ¶¶ 39-40.

On May 27, 2014, this Court issued an unanimous *per curiam* decision which

reversed the decision of the Illinois Supreme Court. This Court held that Martinez was acquitted when the trial judge granted his motion for directed verdict and that the Double Jeopardy Clause bars a reprosecution. *Martinez v. Illinois*, 572 U.S. __, 134 S.Ct. 2070, 2074-7 (2014).

Facts related to petition for rehearing and *nolle prosequi* order.

On June 23, 2014, the State filed a petition for rehearing with this Court. In its petition, the State argues that this Court should vacate this Court's *per curiam* opinion because it is moot. (Pet. rhg. at 7-8) The State asserts that the circuit court granted its motion to *nolle prosequi* (dismiss) on April 14, 2014, before the opinion of this Court was filed on May 27.

The State further claims that although it moved to dismiss the charges through the Kane County State's Attorney's office on April 14, the Illinois Attorney General's office did not learn of the dismissal until May 30, 2014. (Pet. rhg. at 6) The petition for rehearing does not assert that the Kane County State's Attorney's office was unaware that this matter was pending before this Court on April 14, nor does the petition explain why the Kane County State's Attorney's office did not notify the Illinois Attorney General's office of the dismissal. On July 21, 2014, this Court requested Martinez to file a response to the State's petition for rehearing within 30 days.

The Office of the State Appellate Defender (OSAD) represents Martinez on this appeal only, and has never represented Martinez in the circuit court on this matter. (A2-3) A privately retained attorney not affiliated with OSAD represented Martinez in the trial court when the State's request to dismiss this case was allowed on April 14. (Pet. rhg. at A27, 41) The State never notified OSAD prior to or on April 14 that it was

considering dismissing the charges. (A2-3) Further, after its motion to dismiss the charges was allowed, the State did not notify OSAD of the dismissal until June 23, 2014, the date it filed its petition for rehearing. OSAD was not made aware of the circuit court's dismissal order until after this Court issued its *per curiam* opinion. (A2-3)

The Kane County State's Attorney's office had actual notice that this matter was pending in this Court before it moved to dismiss the charges on April 14. On January 31, 2014, the Illinois Supreme Court sent a letter to the Clerk of this Court indicating, in response to this Court's request for the record, that it was providing a copy of this Court's request to the Illinois appellate court and the Kane County circuit court. Copies of that letter were forwarded to OSAD, the Illinois Attorney General's office, the Illinois State Appellate Prosecutor's office, and the Kane County State's Attorney's office. (A1) The Kane County State's Attorney's office moved to dismiss the charges on April 14 without first notifying the Attorney General's office, OSAD, or this Court. Further, the April 14 transcript shows that the Kane County State's Attorney's office did not inform the circuit court judge that this matter was pending before this Court, and that Martinez was not told in open court of any possible consequences a dismissal could have on his Supreme Court case. (Pet. rhg. at A41-59) The Kane County State's Attorney's office did not send notice to this Court or to OSAD after the dismissal order was entered, and the Illinois Attorney General's office asserts that it first learned of the dismissal from the Illinois State Appellate Prosecutor's office (not the Kane County State's Attorney's office) after the *per curiam* opinion issued. (Pet. rhg. at 6, A61)

On the same date that the Kane County State's Attorney's office dismissed the

charges at issue here, Martinez pled guilty to an unrelated 2012 charge. The State told the court that other pending 2012 charges "would be *nol prossed*" "in exchange" for the plea. (Pet. rhg. at A51) The charges at issue here were not scheduled for the April 14 court date, but the State made a "Motion to Nol Pros" these charges. (Pet. rhg. at A52) The State told the circuit court that the *nolle prosequi* of the charges at issue here was "somewhat pursuant to the plea" to the unrelated 2012 charges. (Pet. rhg. at A52) The State also informed the court that it was dismissing the charges because it still could not locate its witnesses, and that as a result, it would not be prepared to proceed. (Pet. rhg. at A52) Neither the written dismissal order nor the docket reflect that the charges at issue here were dismissed pursuant to a plea. (Pet. rhg. at A40, A29) The State opines in the Statement of Facts section of its petition for rehearing that the dismissal of the charges was "pursuant to a plea agreement." (Pet. rhg. at 5) For reasons detailed in Martinez' Argument portion of this response, Martinez asserts that the dismissal was not pursuant to a plea.

ARGUMENT

In its petition for rehearing, the State asserts that this Court should vacate its summary opinion in this matter, which held that trial court truly acquitted Mr. Martinez and that any reprosecution would violate the Double Jeopardy Clause. (Pet. rhg. at 7-8) According to the State, because its motion to *nolle prosequi* was granted while Martinez' petition for certiorari was pending before this Court, this case is moot. (Pet. rhg. at 7-8)

The effect of granting the State the requested relief would be to vacate the one order that prohibits it from reprosecuting Martinez. However, this case is not moot

because Martinez has a concrete interest in retaining the outcome of the unanimous conclusion by this Court in its *per curiam* opinion that he was in fact acquitted of these charges years ago, and that he cannot be reprosecuted. If this Court were to vacate its decision as the State requests in its petition for rehearing, Martinez would face the threat that the State could reinstate the charges and reprosecute him, and his record would not correctly reflect that he was in fact acquitted of these charges. Because of these interests in the outcome of this appeal, this matter is not moot.

When a party claims that a matter before this Court has become moot, that party bears the burden of proving mootness. *Cardinal Chemical Co. v. Morton Intern., Inc.*, 508 U.S. 83, 98, 113 S.Ct. 1967 (1993). "[I]f an event occurs while a case is pending on appeal that makes it impossible for the court to grant any effectual relief whatever to a prevailing party, the appeal must be dismissed." *Church of Scientology of California v. U.S.*, 506 U.S. 9, 12, 113 S.Ct. 447 (1992)(Internal quotation and subsequent citation omitted). See also *Chafin v. Chafin*, __U.S. __, 133 S.Ct. 1017, 1023 (2013)(observing that a case becomes moot on appeal only when it is impossible for a court to grant any effectual relief). "As long as the parties have a concrete interest, **however small**, in the outcome of the litigation, the case is not moot." *Chafin*, __U.S. __, 133 S.Ct. at 1023 (Internal quotations omitted, emphasis added). If "there is no reasonable expectation that the wrong will be repeated," then a Court cannot grant any effectual relief to the prevailing party and the case is moot. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287, 120 S.Ct. 1382 (2000). Thus, in order to obtain the extraordinary remedy of vacating an opinion of this Court due to mootness, the State here bears the burden of convincing this Court that it is impossible for the relief granted in the *per*

curiam order to be "effectual relief" because it *nolle prossed* the underlying charges, and that Martinez does not have even the smallest concrete interest in the decision. The State has failed in this regard.

More than eight months after Martinez filed a petition for writ of *certiorari*, and while the petition was still pending before this Court, without offering notice to any of the attorneys representing the parties before this Court, on April 14, 2014, the State made an oral motion in the Kane County circuit court to *nolle prosequi* the charges. (Pet. rhg. at A52) The Kane County circuit court granted this request. (Pet. rhg. at A40) In Illinois, a "*nolle prosequi* is not an acquittal of the underlying conduct that served as the basis for the original charge but, rather, it leaves the matter in the same condition as before the prosecution commenced." *People v. Hughes*, 2012 IL 112817 ¶ 23. The Illinois Supreme Court has held that if a *nolle prosequi* is entered before jeopardy attaches, the State may reprosecute the defendant. *Hughes*, 2012 IL 112817 ¶ 23. See *People v. Norris*, 214 Ill.2d 92, 104 (2005) (Illinois Supreme Court also recognizing that a *nolle prosequi* is not an acquittal, and that the State may reprosecute the defendant in the future if it is entered before jeopardy attaches); *People v. Daniels*, 187 Ill.2d 301, 312 (1999) (same). See also *People v. Milka*, 211 Ill.2d 150, 176 (2004) (Illinois Supreme Court finding that "while a *nolle prosequi* discharges a defendant on the charging document or count which was *nol-prossed*, there is nothing inherent in the nolle prosequi itself which causes it to operate as an acquittal.") In fact, in *Milka*, the Illinois Supreme Court held that a *nolle prosequi* entered after jeopardy attaches is not an automatic acquittal. Thus, in *Milka*, the defendant was not deemed to be acquitted of predatory criminal sexual assault of a child despite the fact that the

State *nol-prossed* that charge at the close of its case. Because the defendant in *Milka* was not acquitted of predatory criminal sexual assault of a child, his conviction for felony murder predicated on that offense was proper. *Milka*, 211 Ill.2d at 177.

A *nolle prosequi* is clearly distinguishable from an acquittal. A *nolle prosequi* is the formal entry of record by the prosecution whereby it declares that it is unwilling to prosecute a case. *Daniels*, 187 Ill.2d at 312. As this Court has correctly recognized, an acquittal is "any ruling that the prosecution's proof is insufficient to establish criminal liability for an offense." *Evans v Michigan*, 568 U S __ , 133 S.Ct. 1069, 1074-5 (2013). Therefore, a *nolle prosequi* is not a ruling on the merits, and is essentially a dismissal without prejudice which can be reprosecuted so long as jeopardy has not attached. To the contrary, an acquittal is a ruling on the merits that the State presented insufficient evidence at trial, and reprosecution is always barred after an acquittal. Indeed, this Court has specifically asserted that it rejects the notion that this Court is incapable of distinguishing between "rulings which relate to the ultimate question of guilt or innocence" and those which serve other purposes." *United States v. Scott*, 437 U.S. 82, 98 n. 11, 98 S.Ct. 2187 (1978) (citation and internal quotations omitted). An acquittal necessarily encompasses a lack of criminal culpability whereas a dismissal does not. *Scott*, 437 U.S. at 98.

Under the facts of this case, Martinez has a concrete interest in retaining the outcome of this Court's *per curiam* opinion that he was truly acquitted of the charges at issue and that the Double Jeopardy Clause prohibits any reprosecution. The very purpose of the appeal before this Court was to determine whether the State has a right to continue to prosecute Martinez, and whether the trial court's acquittal of him on all

charges was a true acquittal for double jeopardy purposes. Should this Court vacate its unanimous summary reversal of the holdings of the Illinois appellate and Illinois Supreme Court, there would be no legal bar to the State reinstating the charges and reprosecuting Martinez. At some point in the future, the State could re-file the charges and simply assert that it has the authority to reinstate *nolle prossed* charges because jeopardy never attached. The State could again claim that jeopardy never attached after the first trial on the charges because the trial was a sham and that there was no true acquittal.

In *Davis v. Wilson*, 622 S.E.2d 325 (Ga. 2005), the defendant filed a motion for discharge and acquittal due to a speedy trial violation, and the judge thereafter entered a *nolle prosequi* on the charges. The defendant then filed a petition for mandamus relief which asked the court to direct the judge to rule on his motion for discharge, and the court denied the petition as being moot due to the entry of the *nolle prosequi*. The Georgia Supreme Court reversed and held that the entry of the *nolle prosequi* did not render the motion for discharge moot. The Court reasoned that the matter was not moot because "after a *nolle prosequi*, the State may re-indict a defendant for the crimes at issue." *Davis*, 622 S.E.2d at 326. The holding in *Davis* makes sense, and its rationale is applicable here. Mr. Martinez faces a similar threat of reprosecution, and the State here has failed to meet it burden of establishing that Martinez does not possess even a small concrete interest in retaining this Court's decision that holds reprosecution is barred.

Further, "[a] citizen has the right to expect fair dealing from his government, and this entails in the present context treating the government as a unit rather than

as an amalgam of separate entities." *S & E Contractors, Inc. v. United States*, 406 U.S. 1, 10, 92 S.Ct. 1411 (1972) (internal citation omitted). In Illinois, county State's Attorneys are deemed to be "agents of a single principal: the State or the People." *People v. Gray*, 336 Ill. App.3d 356, 366-67 (4th Dist. 2003). The State of Illinois prosecuted this matter through the Kane County State's Attorney's office, the State Appellate Prosecutor's office, and the Illinois Attorney General's office. Although Martinez takes the Illinois Attorney General's office at its word that it did not obtain actual knowledge that the Kane County State's Attorney's office dismissed the charges until after this Court held Martinez to be acquitted of all charges, the fact remains that the State is seeking to now use this to its advantage by asking this Court to vacate a decision by this Court that is unfavorable to the State. If the State is truly not interested in reprosecuting Martinez, there would be no purpose in asking this Court to vacate its opinion.

The "[v]oluntary cessation does not moot a case or controversy unless subsequent events ma[ke] it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 719, 127 S.Ct. 2738 (2007) (internal quotation marks omitted). The party claiming mootness bears "a heavy burden" to establish that the allegedly wrong conduct is not reasonably expected to recur. *Id*. This Court's "interest in preventing litigants from attempting to manipulate the Court's jurisdiction to insulate a favorable decision from review further counsels against a finding of mootness." *Pap's A.M.*, 529 U.S. at 288-89. Here, the State has not met its heavy burden of establishing that the allegedly improper conduct (continuing to prosecute

Martinez on the charges) is not reasonably expected to recur. Moreover, the State should not be allowed to manipulate this Court's jurisdiction by claiming mootness after this Court has already rendered a decision adverse to the State, particularly where the Kane County State's Attorney's office did not disclose the status of this case to the circuit court, failed to obtain the consent of OSAD before securing a dismissal, and did not immediately notify OSAD or this Court after obtaining a dismissal. The State should not be allowed to benefit under these circumstances, and Martinez maintains that the State has not met the heavy burden of showing that reprosecution cannot be reasonably expected to recur.

When evaluating whether a case is moot, this Court looks to whether a party retains an interest in the outcome of the appeal despite a dismissal of the underlying charges. Contrary to the State's assertion, a case does not automatically become moot simply because the State dismissed the charges. See, *Kentucky v. King*, __ U.S. __, 131 S.Ct. 1849, n. 2 (2011), (State's dismissal of charges in the circuit court after the Kentucky Supreme Court held that the defendant's motion to suppress was improperly denied did not render the State's petition for writ of *certiorari* moot, because a reversal of the Kentucky Supreme Court's decision would reinstate the defendant's convictions and sentence); See also *United States v. Villamonte-Marquez*, 462 U.S. 579, 581, n2, 103 S.Ct. 2573 (1983) (Holding that case was not moot despite the fact that the indictments had been dismissed after the court of appeals reversed the convictions at issue).

Even the century-old case the State relies upon in its brief, *Lewis v. United States*, 216 U.S. 611, 613, 30 S.Ct. 438 (1910), which the State cites for the proposition

that a defendant is not legally aggrieved by a dismissal with prejudice, observed that the charges at issue in that case could not possibly be reinstated. In a footnote in *Parr v. United States*, 351 U.S. 513, n. 8, 76 S.Ct. 912 (1956), this Court observed that impossibility of reprosecution was not the determinative factor in *Lewis*. However, given the more recent clarifications by this Court in *King* and *Villamonte-Marquez* that the State retains an interest in a dismissed case and charges are not moot when the State appeals to this Court, as well as the Georgia Supreme Court's holding in *Davis*, it is clear that an appeal is not automatically moot simply because the State dismisses the underlying charges without prejudice. This distinction is particularly true here, where the entire controversy involved whether Martinez was actually acquitted by the trial court and whether the Double Jeopardy Clause bars reprosecution. Here, Martinez has a concrete interest in restoring the circuit court's acquittal order, much like the State had an interest in *King* and *Villamonte-Marquez* in restoring the convictions of the respective defendants.

The State cites *Parr* for the proposition that a dismissal of criminal charges does not injure a defendant, and that the dismissal of criminal charges renders a case moot. (Pet. rhg. at 7) *Parr* involved a defendant's appeal from a dismissal order after the prosecution filed identical charges in a different venue. *Parr*, 351 U.S. at 516. This Court observed in *Parr* that when a trial court dismisses an indictment, "an appeal from its dismissal will not lie because petitioner has not been aggrieved," and "[o]nly one injured by the judgment sought to be reviewed can appeal." *Parr*, 351 U.S. at 516. *Parr* did not involve the question at issue here of whether a *nolle prosequi* order renders moot a subsequent decision by this Court which held that further prosecution

is barred by the Double Jeopardy Clause. Nor did the 1956 *Parr* decision consider the effect of a *nolle prosequi* and the threat of reprosecution under the current standard that a case is not moot "as long as the parties have a concrete interest, however small, in the outcome of the litigation." *Chafin*, __U.S. __, 133 S.Ct. at 1023 (Internal quotations omitted).

In the present case, Martinez did not appeal from a dismissal order as was the situation in *Parr*; rather, here the State appealed from an acquittal. The very issue in this case is and has always been whether Martinez was acquitted and whether any further prosecution of the charges is impermissible. Martinez will be aggrieved if this Court vacates its *per curiam* opinion, as the relief granted by this Court assures he can never again be prosecuted on charges. He has more than the requisite small, concrete interest in the outcome of this litigation. *Chafin*, __U.S. __, 133 S.Ct. at 1023 Again, the subsequent decisions in *King*, *Villamonte-Marquez*, and *Davis* demonstrate that a *nolle prosequi* order does not automatically render an appeal moot, and the threat of reprosecution after a dismissal is a concrete interest and militates against a finding of mootness simply because the prosecution dismissed the charges.

Additionally, the State cites no case by this Court that has found a case to be moot when the State dismissed the charges while a petition for writ of certiorari was pending before this Court, but waits until after this Court issues an opinion adverse to its interests to bring the issue to this Court's attention. Indeed, it does not appear that any such case exists. Nor does the State cite any case where the State appealed from an acquittal, convinced an appellate court to find that the defendant was not truly acquitted, then held that a defendant has no concrete interest in having this Court find

that the trial court correctly acquitted him. Again, it does not appear that any such case exists.

The State asserts in its statement of facts to its petition for rehearing that the dismissal was pursuant to a plea to an unrelated charge (Kane County Case Number 12 CF 733). (Pet. rhg. at 5) However, the *nolle prosequi* of the charges at issue here (Kane County Case Number 06 CF 1731) was not part of the plea to 12 CF 733. The record does not reflect that the dismissal of the 2006 charges was pursuant to a plea to the unrelated 2012 charge. The State clearly dismissed two charges under case 12 CF 733 pursuant to the plea to another charge in case 12 CF 733. The dismissal of the two 2012 charges were "in exchange" for the plea. (Pet. rhg. at A51)

When reciting the terms of the plea agreement to the circuit court, the Kane County State's Attorney's office clearly stated without equivocation, "in exchange for that [plea], Judge, counts 1 and 2 [two counts from 12 CF 733] would be nol prossed." (Pet. rhg. at A51) However, the Kane County State's Attorney's office made an ambiguous record for the charges at issue here. Unlike the charges dismissed in case 12 CF 733, the State did not assert that the charges at issue here would be dismissed pursuant to the plea. Rather, the State made a separate motion to dismiss the charges 2006 charges at issue here. The State said it was making that motion "somewhat" pursuant to the plea, "but also because repeated attempts to try to find two named victims...have not been fruitful." (Pet. rhg. at A52) The State indicated that it would not be ready for trial, so it was moving to *nolle pros* the charges at issue here. (Pet. rhg. at A52)

Should this Court vacate its *per curiam* opinion, the threat of reprosecution

remains real to Martinez. It is at least arguable that a dismissal "somewhat" pursuant to a plea is not the same as a dismissal pursuant to a plea. It is the State's burden to establish mootness, and the State fails to meet this burden both due to not arguing the point in its petition for rehearing, and due to a record that does not support such a position. The State could have unambiguously put on the record that the charges at issue here were dismissed pursuant to the plea, if that was the case. It did not. Instead, the State clearly indicated that two 2012 charges were being dismissed pursuant to the plea, but told the court that it was moving to dismiss the charges at issue here "somewhat" because of the plea but also because it was not ready for a trial. The State left the door open for it to argue in the future that the charges at issue here were not dismissed as part of the plea, and the ambiguous representations regarding the plea render a possibility of reprosecution very real, should this Court vacate its *per curiam* opinion holding that reprosecution is barred. In fact, although the State asserts in its Statement of Facts that the dismissal of the instant charges was pursuant to a plea, the State does not assert in its Argument that this case is moot because the dismissal was part of a plea.

Even if one were to assume, *arguendo*, that the dismissal of the charges at issue here was pursuant to a plea, the case is not moot. Under Illinois law, Martinez could file a petition for relief from judgment until up to two years after he pled guilty. 735 ILCS 5/2-1401 (2014). This statute provides a procedure to vacate judgments more than 30 days from their entry. *People v. Vincent*, 226 Ill.2d 1, 7 (2007). It is a civil remedy that also applies to criminal cases. *Vincent*, 226 Ill.2d at 8. "Relief under section 2–1401 is predicated upon proof, by a preponderance of evidence, of a defense

or claim that would have precluded entry of the judgment in the original action and diligence in both discovering the defense or claim and presenting the petition." *Vincent*, 226 Ill.2d at 7-8. Martinez could possibly move to vacate his guilty plea under this provision for any number of reasons in the future, including the failure of the State to inform the circuit court of the pendency of this matter before this Court when it accepted the plea. Should Martinez successfully litigate such a petition, his plea would be vacated, and the charges at issue here would be reinstated. In such a case, if the *per curiam* opinion were vacated, the State could reprosecute Martinez. This threat of possible reprosecution could also have a chilling effect on Martinez and cause him to not pursue a meritorious 2-1401 petition out of fear of reprosecution of the charges at issue here. Thus, even if one assumes, *arguendo*, that the charges at issue here were dismissed as part of a plea, Martinez nevertheless retains a concrete interest in this Court's decision that reprosecution is barred by the Double Jeopardy Clause.

Apart from the threat of reprosecution, Martinez maintains that he has a concrete interest in letting the world know that he was actually acquitted of the charges at issue here. Again, a *nolle prosequi* is the formal entry of record by the prosecution whereby it declares that it is unwilling to prosecute a case. *Daniels*, 187 Ill.2d at 312, whereas an acquittal is "any ruling that the prosecution's proof is insufficient to establish criminal liability for an offense." *Evans*, 133 S.Ct. at 1074-5. There is a legal distinction between an acquittal and a *nolle prosequi*. Simply put, an acquittal means the State could not prove its case, and a *nolle prosequi* merely means that it has chosen not to present a case. As this Court made clear in its *per curiam* order, Martinez was acquitted of the charges at issue here when the trial judge

granted Martinez' motion for directed verdict and found that the State presented inadequate evidence. Martinez has a concrete interest in a legal and societal recognition of this fact.

Also, Martinez has an interest in retaining this Court's decision in case he ever wishes to pursue a claim of malicious prosecution. In Illinois, there are five elements to a claim for malicious prosecution: "(1) the commencement or continuation of an original criminal or civil judicial proceeding by the defendant; (2) the termination of the proceeding in favor of the plaintiff; (3) the absence of probable cause for such proceeding; (4) the presence of malice on the part of defendant; and (5) damages resulting to the plaintiff." *Johnson v. Target Stores, Inc.*, 341 Ill. App.3d 56, 72 (1st Dist. 2003). Further, in Illinois a *nolle prosequi* of charges is not a "favorable termination" for a claim of malicious prosecution where the dismissal is "not indicative of the accused's innocence." *Aguirre v. City of Chicago*, 382 Ill. App.3d 89, 96 (1st Dist. 2008). Should Martinez ever pursue a malicious prosecution claim, he would bear the burden of proving a favorable termination. *Swick v. Liautaud*, 169 Ill.2d 504, 513 (1996). Therefore, Martinez has an interest in retaining this Court's holding that he was acquitted of the charges here in the event he elects to pursue a malicious prosecution claim in Illinois.

Finally, even the State recognizes the unfairness of simply vacating the *per curiam* order after this Court has already ruled against it. (Pet. rhg. at 10-11) The State's recommended solution is for this Court to vacate both the Illinois appellate and Illinois Supreme Court opinions, in addition to vacating the *per curiam* opinion. (Pet. rhg. at 11) Although this recommended solution is certainly far better than simply

vacating the *per curiam* opinion, this procedure would not adequately protect Martinez. If this Court were to only vacate its *per curiam* opinion and leave intact the Illinois appellate decisions, the State could use the State decisions as authority to reprosecute Martinez. If this Court were to vacate the Illinois appellate opinions in addition to vacating its *per curaim* opinion, there would be no Illinois case directly authorizing reprosecution. However, in that case, because this Court would be vacating its *per curiam* opinion which held that Martinez was truly acquitted, there would be no binding authority to prohibit the State from reprosecuting Martinez. Thus, the State's proposal is an inadequate solution. The only way to assure that Martinez' concrete interest in not being reprosecuted is effectively protected is to leave intact this Court's unanimous opinion which held that Martinez was in fact truly acquitted of the charges, and that reprosecution is barred by the Double Jeopardy Clause.

CONCLUSION

For the foregoing reasons, this Court should find that this matter is not moot and deny the State's petition for rehearing.

Respectfully submitted,

ALAN D. GOLDBERG
Deputy Defender

_____
DEBRA R. SALINGER-Counsel of Record

DEBRA R. SALINGER
Supervisor – Counsel of Record
DARREN E. MILLER
Assistant Appellate Defender
Office of the State Appellate Defender
First Judicial District
203 N. LaSalle, 24th Floor
Chicago, IL 60601
(312) 814-5472
1stDistrict@osad.state.il.us

COUNSEL FOR PETITIONER

APPENDIX

No. 13-5967

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SUPREME COURT OF THE UNITED STATES

ESTEBAN MARTINEZ, Petitioner,

-vs-

PEOPLE OF THE STATE OF ILLINOIS, Respondent.

On Petition For Writ Of Certiorari

To The Supreme Court Of Illinois

NOTICE AND PROOF OF SERVICE

TO: Lisa Madigan, Attorney General, 100 W. Randolph St., Chicago, IL 60601, 312 814-3312;

Mr. Lawrence Bauer, Deputy Director, State's Attorneys Appellate Prosecutor, 2032 Larkin Avenue, Elgin, Illinois 60123;

Mr. Esteban Martinez, 13 N 463 High Chapparel, Elgin, IL 60124.

The undersigned, a member of the Bar of this Court, certifies that, on August 5, 2014, in compliance with Rules 29, 33.2, and 44, she caused to be filed an original and ten copies of Petitioner's Response to Petition for Rehearing, and that she caused to be served State's Attorneys Appellate Prosecutor three copies of that Response, by mail by depositing the copies of the Response with the United States Postal Service in Chicago, Illinois, with no less than first-class postage prepaid, addressed to the proper address noted above. Undersigned also certifies that on that same date she caused copies of said Response to be served upon the Attorney General of Illinois by delivering three copies to an employee authorized to accept service at that office at the above stated address.

DEBRA R. SALINGER
Supervisor – Counsel of Record
DARREN E. MILLER
Assistant Appellate Defender
Office of the State Appellate Defender
First Judicial District
203 N. LaSalle, 24th Floor
Chicago, IL 60601
1stDistrict@osad.state.il.us
(312) 814-5472