No. 126271

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- ANTWOINE TEDDY EUBANKS, Defendant-Appellant.	))))))))))	Appeal from the Appellate Court of Illinois, No. 3-18-0117. There on appeal from the Circuit Court of the Fourteenth Judicial Circuit, Rock Island County, Illinois, No. 10 CF 298. Honorable Frank R. Fuhr, Judge Presiding.

REPLY BRIEF FOR DEFENDANT-APPELLANT

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ARGUMENT

Defendant's videotaped statement was given during plea discussions where it was made to the prosecutor as part of an anticipated plea agreement.

In his opening brief, in the context of an ineffective assistance of counsel claim litigated during a post-conviction evidentiary hearing, defendant argued that his statement, given to investigating detectives with the prosecutor observing from outside the room and texting questions to the detectives, was inadmissable under Supreme Court Rule 402(f) and Illinois Rule of Evidence 410. More specifically, he asserted that his statement was given during the negotiation process because the prosecutor had the power to reject any plea deal if she determined that defendant's statement was not truthful, and even if his statement was given after the plea agreement was finalized, it should still be inadmissible given the policy considerations underlying Rules 402(f) and 410 (Defendant's brief at 10-39).

In response, the State argues that defendant's confession was made after the plea deal was finalized, and the Rules do not bar its admissibility; counsel opted not to challenge the admission of the statement under the Rules as a matter of sound trial strategy; and the result of the proceeding, a stipulated bench trial to preserve the admissibility of the statement, would not have been different if defendant's confession had been barred (State's brief at 14-30).

Given the parties' arguments, the threshold issue in this case is whether defendant's statement was made during the negotiation process or after the plea agreement had been finalized. The State asserts that the circuit court's finding, that the statement was made after negotiations had concluded, was a factual finding that should be reviewed for manifest error (State's brief at 25-27). The State is mistaken.

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Whether a statement is made during plea negotiations and inadmissible under Rules 402(f) and 410 is a question of law. *People v. Friedman*, 79 Ill. 2d 341 (1980). In accordance with *Friedman*, 79 Ill. 2d 341, and its progeny, *de novo* review is the appropriate standard for determining whether a statement was made as part of plea negotiations, and it is the appropriate standard here. See, *e.g.*, *People v. Wanke*, 303 Ill. App. 3d 772, 780 (2d Dist. 1999); *People v. Taylor*, 289 Ill. App. 3d 399, 402 (4th Dist. 1997). Therefore, no deference need be given to the trial court's finding on this legal point, and this Court can independently determine whether the statement was given during plea discussions.

Furthermore, the State cites to no disputed facts or findings of credibility. Indeed, fact-finding by the circuit court supports defendant's position. The circuit court judge found, "Well, the deal [was defendant] provide truthful -- a truthful statement. They had their opinion as to what the truth was, and I'm sure if he gave a statement that didn't comport to that, the deal would have been off." (R227). Thus, the court found, as a factual matter, that defendant was required to give a truthful statement, and it was up to the prosecutor to determine whether the statement was acceptable before the deal was "on". The State does not address this factual finding.

In any event, the record clearly shows that defendant's statement was given before the agreement had been finalized, and any finding to the contrary would be against the manifest weight of the evidence. Initially, the State utterly fails to address, or even acknowledge, defense counsel's statement at the end of the video-recorded confession. The video shows that defense counsel, Daniel Dalton, left the room after defendant had completed the statement to converse with Assistant State's Attorney (ASA) Norma Kauzlerich to "make sure we're good" (People's Ex. No. 2, audio file 2 at 54:30). Defense

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counsel's statement shows that it was up to the State to determine whether it would accept defendant's offered statement as truthful before there was an agreement; if the State had not been "good", it would not have agreed to the deal.

ASA Kauzlerich's presence at the interview was necessary to finalize the agreement. Had there been nothing left to negotiate and defendant was simply required to give a statement as part of the plea agreement, the statement could have simply been given to the detectives. ASA Kauzlerich's presence and direction was necessary to confirm that the statement was sufficient and to finalize the agreement.

The prosecutor's use of the term "proffer" to describe the agreement during the stipulated bench trial shows that she understood that defendant was giving his statement as an offer subject to the prosecutor's acceptance. The State attempts to dispel the prosecutor's use of the legal term of art, asserting that the term was only used on one occasion and the trial court was aware of the use of the term (State's brief at 27). The seasoned prosecutor, now a judge,[1] knew what she was saying. The term was used in a written stipulation; it was not an off-the-cuff remark made during argument (C325). Of course, the circuit court judge was aware that the prosecutor described the statement as a proffer; indeed, he found that defendant was required to give a truthful statement and that the State was at liberty to reject the deal if the statement was insufficient, showing that he knew it was a "proffer" (R225, 227). The prosecutor's use of the legal term of art affirms that she was free to reject the deal if she did not accept defendant's statement.

The State asserts, "[B]y the time defendant gave the video-recorded statement, there was nothing left to negotiate." (State's brief at 27). But, again, the trial court found

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[1] See, *e.g.*, *People v. McGhee*, 2020 IL App (3d) 180349 (noting Judge Norma Kauzlerich presided over the bench trial).

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that defendant was required to give a truthful statement in order to obtain the deal. The "truth" of defendant's statement was still at issue and subject to negotiation. It was up to the prosecutor to determine whether his statement was truthful. In fact, after the first portion of the statement, Dalton went out to speak to the prosecutor to "make sure we're good" (EX2, audio file 2 at 54:30). But the prosecutor apparently wanted more information before she would agree to the deal, so the detectives came back into the room and asked additional questions (EX2, audio file 1). Then, the State had the power to accept or reject the statement, or demand additional information, showing that the deal had not been finalized until the statement had been completed.

The State argues that Dalton's testimony at the evidentiary hearing showed that the statement was made after the deal had been reached (State's brief at 26). Dalton was asked, "Would it be fair to characterize that statement as part of the plea discussion?", and he answered, "of course" (R203). He went on to state, "It never would have been made but for that plea agreement." (R203). Dalton simply stated that defendant never would have confessed had there not been a potential deal and that the potential deal later became a finalized agreement. In any event, the circuit court resolved this factual question when it found that the State could reject the statement if it did not comport with its version of the facts (R227).

In his opening brief, defendant argued that this Court's decision in *People v. Mack*, 105 Ill. 2d 103 (1984), where this Court found that a deal had not been finalized where the State was waiting on the victim's family to agree to accept it, is on point. The State fails to address *Mack*.

Defendant also discussed a number of cases where statements were deemed inadmissible because they were given before the agreement was finalized. (Defendant's

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brief at 29-35 (citing *United States v. Grant*, 622 F.2d 308 (8th Cir. 1980); *United States v. Watkins*, 85 F.3d 498 (10th Cir. 1996); *United States v. Serna*, 799 F.2d 842 (2d Cir. 1986); *State v. Campoy*, 207 P.3d 792 (Ariz. Ct. App. 2009); *State v. Myrick*, 848 N.W.2d 743 (Wis. 2014); *State v. Jollo*, 685 P.2d 669 (Wash. Ct. App. 1984)). In order to show where the instant defendant's statement fell on the continuum, he compared this authority to cases where statements were found to be admissible because they were given after the agreement had been reached. (Defendant's brief at 35-37 (citing *People v. Saunders*, 135 Ill. App. 3d 594 (2d Dist. 1985); *United States v. Stirling*, 571 F.2d 708 (2d Cir. 1978); *United States v. Davis*, 617 F.2d 677 (D.C. Cir. 1979); *United States v. Knight*, 867 F.2d 1285 (11th Cir. 1989); *United States v. Lloyd*, 43 F.3d 1183 (8th Cir. 1994); *Grant*, 622 F.2d at 315-16, *Watkins*, 85 F.3d at 500; *Campoy*, 207 P.3d at 796; *Meece v. Commonwealth*., 348 S.W.3d 627 (Ky. 2011)).

The State fails to address defendant's comparison, it fails to even attempt to distinguish the cases defendant relies upon, and it utterly fails to identify any caselaw stating that a confession given before a deal had been reached was admissible. For all of these reasons, it is apparent that defendant's statement was given during the negotiation process and was therefore inadmissible.

Even if the statement was given after an agreement had been finalized, it still should be deemed inadmissible under Rules 402(f) and 410.[2] Initially, it is important to remember that the instant case does not involve an independent admission, nor does

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[2] In a footnote, the State argues, "[D]efendant has forfeited any suppression argument based on Rule 410 by neglecting to present it to the trial court below" (State's brief at 17-18). The State recognizes that defendant is not presenting a new claim, stating "Illinois courts have interpreted the two rules consistently," and, "So all of the People's arguments addressing Rule 402(f) would apply with equal force to Rule 410." Because the two Rules employ nearly identical language, they should be interpreted consistently, and this Court's decision should address both Rules.

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it concern statements made to a grand jury or at a co-defendant's trial or statements. The instant discussion solely involves a truthful statement that was given to the prosecutor and investigating detectives as a term of a negotiated plea agreement.

As asserted in defendant's opening brief, Rules 402(f) and 410 are sufficiently broad to include pre-plea statements that are made in exchange for promised sentencing concessions, and nothing contained in the language of the Rules nor in its accepted purpose distinguishes between a statement made during plea negotiations and a statement that constitutes a term of the finalized agreement.

The State posits, "[T]his Court has consistently defined 'plea discussion,' in accordance with its plain meaning, as synonymous with plea negotiation or plea bargaining." (State's brief at 19). As observed in defendant's opening brief, the scenarios where this Court has addressed the issue involve the preliminary stages of the potential negotiation process (Defendant's brief at 13-14). Here, the question necessarily focuses on the opposite end of the deal-making process: the conclusion of discussions. This Court has not had the opportunity to interpret whether Rules 402(f) and 410 apply to a statement given just prior to the culmination of negotiations or as a requisite term of a finalized plea deal.

Furthermore, the rationale for barring statements made in anticipation of a plea deal and barring statements given after the agreement has been finalized, but in accordance with the terms of the agreement, is the same. The purpose underlying the Rules is "to encourage the negotiated disposition of criminal cases through elimination of the risk that the accused enter plea discussion at his peril." *Friedman*, 79 Ill. 2d at 351. Allowing the use of a defendant's statement given to a prosecutor in performance of a plea deal

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has a chilling effect on plea discussions and hinders the flexibility necessary to negotiate plea agreements, contrary to their benefit to the criminal justice system.

The State argues that barring confessions given in exchange for a plea agreement does nothing to encourage pleas because the negotiations are completed and there is nothing more to encourage (State's brief at 20-21). Plea discussions are necessary to obtain plea deals. Here, the State wanted defendant's confession. At least at some point during the plea-discussion process, the decision whether to give a confession as part of the deal was discussed. Defendant initially would have been reluctant to provide such a statement, given the devastating cost of having a confession admitted at a subsequent trial. His decision to give a statement was guided by promises from the State. If defendant knew his statement would be admissible, his incentive to negotiate a deal which required him to give a statement would have been reduced. Barring his confession in the event a deal falls through encourages defendants to agree to give statements in exchange for concessions from the State. Thus, allowing the use of statements that are given in performance of a plea deal will have a chilling effect on the negotiation process and ultimately reduce the number of guilty pleas.

The State further argues that prosecutors can insist that a defendant waive application of the Rules (State's brief at 22). Of course they can. Defendants can also seek the State's agreement not to use any statements made after, and pursuant to a plea agreement. The State could counter and negotiate that the statement would only be used if the defendant breached the deal. A defendant could counter asking for concessions in case the State breached the agreement, and so on.

The end result is that this negotiation and counter-negotiation inhibits and delays plea discussions. Wily prosecutors, and adept defendants could engage in a seemingly

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endless litany of provisions to account for a seemingly endless range of hypothetical scenarios. The dissent in the instant matter recognized that such strategic gamesmanship would only serve to frustrate the purpose of the Rules. *People v. Eubanks*, 2020 IL App (3d) 180117, ¶ 46 (McDade, J., dissenting). Barring a negotiated statement made to a prosecutor under Rules 402(f) and 410 would assuage such gamesmanship.

Furthermore, such a reading of the Rules encourages open and "truthful cooperation", which defendant agrees is a benefit to the criminal justice system (see State's brief at 22). If criminal defendants understand that their truthful statement could not be used against them even after the deal was finalized, such defendants would be more likely to be candid. On the other hand, if a defendant understood that the statement could be used against him, he would be more likely to bend the truth, inhibiting such truthful cooperation.

The State asserts that "defendants have no reason to fear making a statement after negotiating a plea agreement because the parties negotiated the terms of the agreement and thus reasonably expect that it will be carried out" (State's brief at 22). The instant case shows the folly of the State's overly broad statement.

Here, a major term of the agreement was rendered void by the prosecutor's factual basis. Defendant pled guilty to the offense of first degree murder in exchange for a 35-year sentence (C150; R241). The prosecutor presented the factual basis, stating that defendant shot Samuel Rush three times and shot Erick Childs two to three times (R246-47). The State's inclusion of language in the factual basis showing that defendant shot Rush with a firearm triggered a mandatory 25-year sentencing enhancement. *People v. White*, 2011 IL 109616, ¶ 27. His 35-year sentence was not statutorily authorized, and, at the time it was imposed, it was void as a result of the prosecutor's statement.

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White, 2011 IL 109616, ¶ 21; *People v. Arna*, 168 Ill. 2d 107, 113 (1995) (abrogated by *People v. Castleberry*, 2015 IL 116916).

The State argues that, had defendant cooperated, "he would have been permitted to withdraw his plea and enter a new plea to charges that did not include the firearm enhancement." (State's brief at 24). It cites to the trial judge's order stating that defendant would have been allowed to plead guilty to an amended count that eliminated the firearm language (C309-10). Amending the charge would not have been sufficient to allow defendant to escape the mandatory sentencing enhancement because the prosecutor's factual basis indicated that defendant personally discharged a firearm that resulted in death. Contrary to the State's position (State's brief at 24), *White* is clear; the parties can only negotiate away the enhancement so long as the factual basis does not include facts showing that the enhancement was applicable. See *White*, 2011 IL 109616, ¶ 27 (finding, "The version of the facts agreed to by the State and presented by it in the factual basis to the court established that a firearm was used in the commission of the offense", and the mandatory sentence enhancement was triggered, regardless of any amendment to the charge).

Given the State's use of language showing the offense was committed with a firearm during the factual basis, defendant was left in the ineluctable position of choosing between a void sentence (that the State could have challenged at any time) and breaching his plea agreement. Thus, defendant appropriately acted in his best interest and moved to withdraw his plea, a decision that was sanctioned by the circuit court.

The State further asserts, "[D]efendant is precluded from arguing that the plea agreement was 'void' because this was decided against him in the original criminal proceeding, and he never appealed that issue." (State's brief at 24-25). Defendant is

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not precluded from *arguing* that the plea was void. He is not raising a new issue or claim. Rather, he is demonstrating the inequities in allowing the State to use his statement against him after the State's factual basis invalidated his sentence.

Citing *Santobello v. New York*, 404 U.S. 257, 262 (1971), the State charges that constitutional safeguards protect a defendant against the State's use of a defendant's statement if the State breaches a plea agreement (State's brief at 23-24). *Santobello* stands for the proposition that, when a guilty plea rests in any significant degree on a promise of the prosecutor, so that the promise can be said to be part of the inducement or consideration, it must be fulfilled. See, *e.g.*, *People v. Whitfield*, 217 Ill. 2d 177, 189. In *People v. Pierson*, 230 Ill. App. 3d 186 (5th Dist. 1992), another case cited by the State, the prosecutor agreed not to charge the defendant with any criminal offenses if he gave a statement (State's brief at 24).

In the instant matter, the State did not agree that it would not use the confession against defendant and did not agree not to charge defendant if he gave a statement. Thus, there was no issue about "enforcing" the agreement, before or after the plea. There was no safeguard preventing the State from using the statement against defendant, regardless of who breached the deal. Without such a safeguard, defendants will be leery to enter agreements that require them to provide statements, stifling plea negotiations. This is precisely why this Court should read such a safeguard into Rules 402(f) and 410.

In his opening brief, defendant argued that it would be fundamentally unfair to admit statements made in exchange for sentencing concessions where defendant was not warned that the statement could be used against him (Defendant's brief at 18). The State responds, asserting that the record does not show that defendant was not advised

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of his rights against self-incrimination before he made the statement (State's brief at 23). But, the State has the burden of producing evidence that he was warned, not defendant. *Miranda v. Arizona*, 384 U.S. 436, 475 (1966). In the video, defendant was not advised of his rights against self-incrimination, and the State has not met its burden.

Next, contrary to the State's assertion, defendant was penalized for withdrawing his plea (State's brief at 25). If a defendant breaches the deal, his penalty for breaching a plea deal is the loss of the deal itself. See *Eubanks*, 2020 IL App (3d) 180117, ¶ 44 (McDade, J., dissenting); *Allgood v. State*, 522 A.2d 917, 927 (Md. 1987) ("breach of the agreement by the State goes to whether the defendant is entitled to have the agreement enforced; it does not affect the admissibility of the statement obtained under it").

In this case, the parties negotiated a plea deal whereby defendant would plead guilty, provide a truthful statement, and provide additional cooperation in exchange for a 35-year term of imprisonment. When the plea was withdrawn, defendant lost his benefit of the bargain; the 35-year sentence, and the State lost its plea of guilty. But, the State was still allowed to use defendant's statement against him. A defendant should not have to endure an additional penalty where, as in this case, it was the prosecutor's mistake that voided a critical term of the plea. Indeed, the State concedes that whether defendant withdrew his plea or breached his agreement has nothing to do with whether a statement should be barred under Rule 402(f) (State's brief at 25).

The State cites a number of cases, in support of its argument (State's brief at 19-20 (citing *People v. Connery*, 296 Ill. App. 3d 384, 388 (3d Dist. 1998), *People v. Saunders*, 135 Ill. App. 3d 594, 606 (2d Dist. 1985), *United States v. Watkins*, 85 F.3d 498, 500 (10th Cir. 1996), *United States v. Hare*, 49 F.3d 447, 450 (8th Cir. 1995),

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United States v. Lloyd, 43 F.3d 1183, 1186 (8th Cir. 1994), *United States v. Knight*, 867 F.2d 1285, 1288 (11th Cir. 1989)). Defendant discussed most of these cases in his opening brief (Defendant's brief at 23-24, 28, 30-31, 35-36, 38).

Bennett, one case not discussed in defendant's opening brief, is clearly inapposite. There, the defendant's testimony during a hearing on a motion to withdraw guilty plea was used to impeach her trial testimony. *Bennett*, 222 Ill. App. 3d at 197. The instant defendant's confession was made well-before his plea, to investigating detectives and a prosecutor, clearly as part of some sort of plea deal, and was used as substantive evidence of his guilt. *Bennett* is not relevant to the instant discussion. For all of these reasons, this Court should find that, even if defendant's statement was given after the agreement was finalized, it should still be inadmissible under Rules 402(f) and 410.

The State alternatively argues that counsel's failure to seek to bar the confession under the Rules was a matter of sound strategy (State's brief at 15-17). If the Rules applied, and the statement was inadmissible, there can be no question that counsel preformed deficiently for not making this argument. *People v. Friedman*, 79 Ill. 2d 341, 353 (stating that the devastating effect of a confession admitted in contravention of Rule 402(f) is so prejudicial as to require reversal despite any objection); *People v. Tayborn*, 2016 IL App (3d) 130594, ¶ 21 (holding that counsel rendered deficient performance where a motion to suppress a confession would have been granted and there was a reasonable probability that the outcome of the trial would have been different). Furthermore, both the circuit court and appellate courts recognized that the issue was contingent on whether the statement was admissible under Rules 402(f) and 410 (C461; *People v. Eubanks*, 2020 IL App (3d) 180117, ¶¶ 32, 33). Simply stated, had counsel

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argued that the statement was inadmissible under Rules 402(f) and 410, defendant's confession would have been suppressed, as discussed above.

However, in the motion to suppress, attorney Nate Nieman did not cite to Rule 402(f) or 410. He did not state that he considered and rejected application of the Rules in his affidavit appended to defendant's post-conviction petition. Indeed, on direct appeal, the appellate court noted Nieman's "apparent unawareness concerning the application of Rule 402(f)". *People v. Eubanks*, 2014 IL App (3d) 130021-U, ¶ 37.

The State asserts, "Nieman's argument — that the agreement was 'statutorily void' — was [not] unreasonable" (State's brief at 16). Nieman had argued that the plea agreement was void in the motion to withdraw guilty plea (C170-71). In the motion to suppress, Nieman argued that the State could not legally offer a sentence of 35 years' imprisonment, and the State should not be permitted to benefit from a bargain that could not legally be fulfilled (C304-05).

But, in accordance with *White*, as explained above, the State could legally offer a sentence of 35 years' imprisonment in exchange for a guilty plea to first degree murder, so long as it did not include facts showing that defendant personally discharged a firearm during the commission of the offense as part of the factual basis. The State legally obtained the confession. It was only after the agreement was finalized that the State effectively voided the sentence when it presented a factual basis showing that defendant personally discharged a firearm during the offense.

However, as set forth above and in defendant's opening brief, under Rules 402(f) and 410, defendant's confession was inadmissible. Therefore, these Rules provided the only appropriate basis for seeking suppression of the confession in this case. Sound strategy required the instant argument.

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Finally, the State argues that defendant cannot show that he was prejudiced even if his video-taped confession was not admissible (State's brief at 28-30). The State's argument is precluded by the circuit court's findings. The trial court found, "[W]ithout the confession, the evidence against the defendant was not so overwhelming as to make th[e] failure to challenge a confession on 402(f) grounds harmless" (C443).

Similarly, on direct appeal, the appellate court found that it could not decide the question of prejudice because it could not discern from the record whether plea negotiations had begun before the statement or the nature of any negotiations. *Eubanks*, 2014 IL App (3d) 130021-U, ¶ 37. The reviewing court had before it the same facts presented at the stipulated bench trial that appear before this Court, yet it did not determine that defendant could not show prejudice due to the allegedly overwhelming evidence of guilt.

The State opines that defendant should have called witnesses and presented evidence as to his likelihood of acquittal at the evidentiary hearing, and, because he did not, he is relying on "conjecture and speculation" to challenge the evidence against him (State's brief at 28-29). The State fails to recognize that the judge had found that defendant sufficiently established prejudice *before* the evidentiary hearing (C443). Since the court had already decided the issue, there was no reason to contest the prejudice prong at the evidentiary hearing.

More significantly, defendant proceeded by way of a stipulated bench trial. The only issue preserved was whether his statement was admissible. If counsel had not performed deficiently and suppressed the confession, defendant never would have proceeded by way of a stipulated bench trial and waived his rights to a jury trial, to present evidence, to testify, and to confront and cross-examine witnesses against him.

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The State fails to cite a single case where a confession, or any evidence for that matter, was improperly admitted, defendant proceeded by way of a stipulated bench trial to preserve the admissibility issue, and a reviewing court found that the evidence was so strong that it would not have mattered whether the evidence was admitted or not. Defendant posits that no such case exists.

And, absent the stipulations, the evidence presented at the trial was inadmissible. The evidence against defendant included police reports, videotaped statements of co-defendants, and defendant's confession. It is well-settled that police reports are inadmissible hearsay not subject to any recognized exception to the hearsay rule. *People v. Williams*, 240 Ill. App. 3d 505, 506 (1st Dist. 1992). The co-defendants' video-recorded statements also amounted to hearsay. See, *e.g.*, *People v. Leach*, 2012 IL 111534, ¶ 66 (citing Ill. R. Evid. 801(c) (eff. Jan. 1, 2011)) (hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."). It is the State that is relying on conjecture and speculation in arguing that the suppression of the confession would not have changed the result of the proceeding.

If harmlessness was a consideration on appellate review from a stipulated bench trial, there would be no incentive to proceed by way of a stipulated bench trial. Defendants would be loathe to accept police reports or stipulate to the admission of otherwise inadmissible evidence. Instead, they would demand live testimony, would conduct cross-examination, and would object to inadmissible material. In other words, a criminal defendant facing a potential finding of harmlessness on appeal from a stipulated bench trial would demand a full-blown trial, defeating the rationale underlying the truncated proceedings allowed by a stipulated bench trial and causing additional strain on the

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judicial system. This cannot be what this Court intended when it allowed for stipulated bench trials in order to preserve issues for appellate review.

Even if the witnesses had testified in accordance with discovery, the evidence was still not so overwhelming that this Court should conclude that there was no prejudice to defendant by the admission of his confession. This Court recognizes the devastating effect of a confession and has repeatedly held that the error in admitting such evidence in violation of Rule 402(f) is so prejudicial as to require reversal, even "despite overwhelming evidence of the defendant's guilt". *Friedman*, 79 Ill. 2d at 353 (citing *People v. Hill*, 78 Ill. 2d 465 (1980), and *People v. Steptore*, 51 Ill. 2d 208 (1972)); see also *People v. Wanke*, 303 Ill. App. 3d 772, 778 (2d Dist. 1999); *People v. Ousley*, 297 Ill. App. 3d 758, 765 (3d Dist. 1998); *People v. Cowherd*, 114 Ill. App. 3d 894, 899 (2d Dist. 1983); *People v. Hardiman*, 85 Ill. App. 3d 347, 354-55 (5th Dist. 1980); *People v. Morris*, 79 Ill. App. 3d 318, 331-32 (1st Dist. 1979).

And, the evidence was not overwhelming. The only two occurrence witnesses were highly intoxicated at the time of the incident (C327-28, 330). They were accomplices, and their testimonies would be subject to careful scrutiny. *People v. Wilson*, 66 Ill. 2d 346, 349 (1977). Both provided two inconsistent statements to police (Compare People's Ex. No. 1 (Phelps' statement given on Mar. 30, 2010), with People's Ex. No. 4 (Phelps' statement given on Jul. 26, 2012); and People's Ex. No. 2 (Reed's statement given on Mar. 30, 2010), with People's Ex. No. 3 (Reed's statement given on Apr. 27, 2012)). At the stipulated bench trial, both co-defendants were not under oath, were not subject to cross examination, their statements were not subject to the rules of evidence, and defendant refused to stipulate to the truthfulness of the witnesses statements (R112).

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Furthermore, scant physical evidence tied defendant to the offense. The firearm was never recovered, and defendant's prints were not found near Rush's car. Admittedly, the stipulated evidence showed that a cellular telephone with the associated number of (402) 987-8997 was found near the scene of the shooting (C325). The stipulations further stated that defendant had obtained a SIM card with a cell phone number of (402) 987-8997 (C325). However, defendant reported the phone stolen and told the police that Reed or Phelps had stolen it (People's Ex. No. 5 5:30-6:00, 18:00). Therefore, without defendant's confession, the proof of defendant's involvement in the instant shootings would have hinged on the potential testimony of the intoxicated accomplices.

The State asserts that defendant made an incriminating statement prior to the statement at issue (State's brief at 29 (citing R11)). At the preliminary hearing, Detective Gene Karzin said that defendant told him Reed had set up the murder (R11). However, the stipulated evidence showed only that defendant denied any involvement when he was first arrested (C325).

The April 2010 interview was video-recorded and the exhibit was admitted as evidence (People's Exhibit No.5). However, the relevant portion of the exhibit before this Court is unviewable, and the State has offered no suitable alternative. Therefore, this evidence was never admitted at trial, and the purported statement is not of record before this Court.

Given this evidence, the fact-finder's determination of guilt or innocence would have been based on a fiercely contested credibility contest, and the evidence in this case was sufficiently close such that there is a reasonable probability that the result of the proceeding would have been different if defendant's admission had been barred. Consequently, defendant has shown that he was prejudiced by counsel's failure to move

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to bar his confession under Rules 402(f) and 410 as explicitly found by the circuit court judge and implicitly held by the appellate court.

Accordingly, for the reasons stated here and in his opening brief, defendant respectfully requests that this Honorable Court find that defendant's statement was inadmissible under Rules 402(f) and 410, trial counsel was ineffective for not moving to suppress the statement, the trial court erroneously denied defendant's post-conviction petition, and the appellate court erred in affirming the circuit court's denial of defendant's post-conviction petition.

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CONCLUSION

For the foregoing reasons, Antwoine Teddy Eubanks, defendant-appellant, respectfully requests that this Court reverse the appellate court's decision affirming the circuit court's denial of his post-conviction petition, reverse defendant's conviction, and remand this matter for further proceedings..

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this reply brief conforms to the requirements of Rules 341(a) and (b). The length of this reply brief, excluding pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is 19 pages.

/s/Bryon Kohut
BRYON KOHUT
Supervisor

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No. 126271

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- ANTWOINE TEDDY EUBANKS, Defendant-Appellant.	))))))))))	Appeal from the Appellate Court of Illinois, No. 3-18-0117. There on appeal from the Circuit Court of the Fourteenth Judicial Circuit, Rock Island County, Illinois, No. 10 CF 298. Honorable Frank R. Fuhr, Judge Presiding.

NOTICE AND PROOF OF SERVICE

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Mr. Antwoine Teddy Eubanks, Register No. M32508, Menard Correctional Center, P.O. Box 1000, Menard, IL 62259

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On July 14, 2021, the Reply Brief was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the defendant-appellant in an envelope deposited in a U.S. mail box in Ottawa, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Reply Brief to the Clerk of the above Court.

/s/Nicole Weems
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