No. 126271

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	On Appeal from the Appellate Court of Illinois, Third Judicial District, No. 3-18-0117
Plaintiff-Appellee,	)	
	)	There on Appeal from the Circuit Court of Rock Island County,
v.	)	Illinois, No. 10 CF 298
	)	
ANTWOINE TEDDY EUBANKS,	)	The Honorable Erica L. Reddick,
Defendant-Appellant.	)	Judge Presiding.

BRIEF OF PLAINTIFF-APPELLEE
PEOPLE OF THE STATE OF ILLINOIS

Kwame Raoul
Attorney General of Illinois

Jane Elinor Notz
Solicitor General

Michael M. Glick
Criminal Appeals Division Chief

Jason F. Krigel
Assistant Attorney General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601-3218
(312) 814-2197
eserve.criminalappeals@atg.state.il.us

Counsel for Plaintiff-Appellee
People of the State of Illinois

E-FILED
6/15/2021 9:37 AM
Carolyn Taft Grosboll
SUPREME COURT CLERK

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

Page(s)

NATURE OF THE CASE 1

ISSUES PRESENTED FOR REVIEW 1

STATEMENT OF FACTS 1

I. Defendant Agrees to Plead Guilty and Cooperate in Exchange for a 35-Year Sentence. 3

A. Defendant Gives a Videorecorded Statement. 3

B. Defendant Enters a Guilty Plea. 5

II. Defendant Breaches the Plea Agreement by Withdrawing his Plea and Refusing Further Cooperation. 6

III. Defendant's New Counsel Seeks to Suppress the Videorecorded Statement. 9

IV. Defendant Is Convicted of Murder in a Stipulated Bench Trial. 10

V. Defendant Appeals and Seeks Postconviction Relief. 12

POINTS AND AUTHORITIES

ARGUMENT 14

People v. Bailey, 232 Ill. 2d 285 (2009) 14

Strickland v. Washington, 466 U.S. 668 (1984) 15

I. Counsel's Strategy Was Reasonable. 15

Engle v. Isaac, 456 U.S. 107 (1982) 16

Jones v. Barnes, 463 U.S. 745 (1983) 16

Jones v. Dupree, 2018 IL 122307 16

People v. Hobley, 182 Ill. 2d 404 (1998) 15

People v. Palmer, 162 Ill. 2d 465 (1994) 16

People v. Peterson, 2017 IL 120331 16

People v. West, 187 Ill. 2d 418 (1999) 15

Strickland v. Washington, 466 U.S. 668 (1984) 15

Amer. Bar Ass'n Criminal Justice Standards for the Defense Function § 4-5.2(d) (4th Ed. 2017) 15

II. Defendant Suffered No Prejudice. 17

People v. Bailey, 232 Ill. 2d 285 (2009) 17

A. A Suppression Motion Based on Rule 402(f) Would Have Failed. 17

People v. Hughes, 2015 IL 117242 18

People v. Neese, 2015 IL App (2d) 140368 18

1. The plain language of Rule 402(f) applies only to plea negotiations. 18

Corbett v. County of Lake, 2017 IL 121536 22

McNeil v. Wisconsin, 501 U.S. 171 (1991) 22

People v. Bennett, 222 Ill. App. 3d 188 (2d Dist. 1991) 19

People v. Chapman, 194 Ill. 2d 186 (2000) 23

People v. Connery, 296 Ill. App. 3d 384 (3d Dist. 1998) 19

People v. Friedman, 79 Ill. 2d 341 (1980) 19, 20, 21

People v. Hart, 214 Ill. 2d 490 (2005) 19, 20

People v. Page, 155 Ill. 2d 232 (1993) 25

People v. Pierson, 230 Ill. App. 3d 186 (5th Dist. 1992) 24

People v. Rivera, 2013 IL 112467 19

People v. Salem, 2016 IL 118693 18

People v. Saunders, 135 Ill. App. 3d 594 (2d Dist. 1985) 19, 21

People v. White, 2011 IL 109616 24

Santobello v. New York, 404 U.S. 257 (1971) 23

Strickland v. Washington, 466 U.S. 668 (1984) 23

United States v. Hare, 49 F.3d 447 (8th Cir. 1995) 20

United States v. Knight, 867 F.2d 1285 (11th Cir. 1989) 20

United States v. Lloyd, 43 F.3d 1183 (8th Cir. 1994) 20

United States v. Watkins, 85 F.3d 498 (10th Cir. 1996) 20

United States v. Mezzanatto, 513 U.S. 196 (1995) 22

2. The trial court's factual determination — that defendant's videorecorded statement was not part of any negotiation — was not against the manifest weight of the evidence 25

People v. Morgan, 212 Ill. 2d 148 (2004) 26

B. Even Without the Videorecorded Statement, There Is No Reasonable Probability that Defendant Would Have Prevailed at Trial. 28

People v. Palmer, 162 Ill. 2d 465 (1994) 28

Strickland v. Washington, 466 U.S. 668 (1984) 28

CONCLUSION 30

RULE 341(c) CERTIFICATE OF COMPLIANCE

PROOF OF FILING AND SERVICE

NATURE OF THE CASE

Defendant Antwoine Eubanks appeals from the appellate court's judgment affirming the denial of his postconviction petition following an evidentiary hearing. No question is raised on the pleadings.

ISSUES PRESENTED FOR REVIEW

1. Whether defense counsel's strategic decision to challenge the admissibility of his videorecorded statement under a contract-law theory, rather than under Illinois Supreme Court Rule 402(f), was constitutionally reasonable performance.

2. Whether the trial court committed clear error in finding no violation of Rule 402(f) — which bars the admission in evidence of withdrawn guilty pleas and "plea discussions" — where "[n]one of the plea discussions, nor the resulting plea, were used against this Defendant," and defendant gave his videorecorded statement *after* the conclusion of plea discussions.

3. Whether, even had the videorecorded statement been suppressed, defendant cannot show a reasonable probability of acquittal in light of the substantial unrebutted evidence of his guilt.

STATEMENT OF FACTS

On the afternoon of March 30, 2010, Rock Island police officer Jon Cary responded to a report of shots fired on a residential street, where he found Samuel Rush and Erick Childs in a bullet-hole-ridden car. C323.[1]

[1] "C," "R," "Peo. Exh.," "Def. Br.," "A," and "EX2." refer to the common law record, report of proceedings, the People's exhibits, defendant's brief and

Rush, who would later die from his gunshot wounds, lay in the front of the car with his head on the driver's seat, and Childs was seated behind Rush with his legs sticking out of the vehicle. *Id.* Childs told Cary that he did not see the shooter. *Id.* Cary canvassed the neighborhood and spoke to witnesses who had observed a dark green Lincoln Town Car at the crime scene, as well as a silver sedan "creeping" through a nearby alley. *Id.*

Meanwhile, an off-duty police officer heard the gunshots and observed a dark green Lincoln Town Car fleeing the area. C324. Police stopped the Town Car and arrested its occupants, Stephan Bogan a/k/a Phelps and Pashanet Reed. *Id.* Detectives interviewed Phelps and Reed, both of whom eventually implicated defendant as the shooter. C324-25.

Police located defendant two weeks later in Decatur, Illinois. C325. Defendant agreed to be interviewed about the case and told police that he fled to Decatur after learning he was a suspect in the shooting. *Id.*; Peo. Exh. 5 at 7:45-9:10 (video of April 4, 2010 interview of defendant). Defendant initially denied any involvement, although he admitted being with Phelps and Reed that day. *Id.* Upon further questioning, defendant began to cry and told police that Reed "set it up." R11.[2] Defendant then refused to speak further with detectives without an attorney. *Id.*

---

appendix, and the audio recording of defendant's April 2011 statement, respectively.

[2] Defendant stipulated at trial that People's Exhibit 5 "accurately and fairly depicts the defendant's statements on [April 14, 2010]," C325, but the record

The People charged defendant with the first degree murder of Rush and the aggravated battery with a firearm of Childs. C28-29. The trial court appointed Daniel Dalton to represent defendant, and the People provided Dalton with a "vast amount of discovery," which included statements from more than two dozen witnesses. C11, 50-51, 53; R20, 24, 28.

I. Defendant Agrees to Plead Guilty and Cooperate in Exchange for a 35-Year Sentence.

In early 2011, the parties reached a plea agreement. As the prosecutor and Dalton would later explain to the trial court, defendant agreed to plead guilty to murder and to "truthfully cooperate and, if necessary, truthfully testify" against Phelps and Reed. R241-43. In exchange, the People agreed to dismiss the aggravated battery count and recommend a 35-year sentence. *Id.*

A. Defendant Gives a Videorecorded Statement.

As part his agreement to cooperate, defendant met with detectives in April 2011 and gave a videorecorded statement. C325, 333-34 (stipulation describing statement); Peo. Exh. 6 (partial video of April 2011 interview of defendant); EX2 (complete audio recording of same interview). Dalton was present during the interview, during which defendant told the detectives that he met up with Phelps and Reed on the morning of March 30, 2010. EX2, file

---

before this Court contains only a portion of the video. During a pre-trial hearing, Detective Gene Karzin described defendant's incriminating statement, made towards the end of the April 2010 interview, that Reed "set it up." R11.

2 at 5:20-6:40. The three then drove around together for several hours, smoking cannabis and drinking. *Id.* The discussion turned to their shared animosity towards Childs (whom they referred to as "Little E"). *Id.* at 15:45-18:15, 47:50-48:20. Defendant commented that Childs had been hiding, but Phelps knew that Childs could be found with Rush (whom they referred to as "Miah"), as Phelps and Rush had been in communication that morning. *Id.* Reed said that someone should "murk that nigger," meaning that someone should murder Childs. *Id.* Defendant said he might do it, and Phelps suggested that defendant kill both Childs and Rush, to eliminate a potential witness. *Id.*

The trio then made a plan to kill Rush and Childs. *Id.* at 39:30-40:40. They drove to Phelps's girlfriend's apartment to pick up his gun, an XDM 9-millimeter. *Id.* at 14:50-16:00, 19:35-20:40, 52:35-53:05. Next, they drove to a barbershop in downtown Davenport, Iowa, where they knew they would find Rush and Childs. *Id.* at 7:00-7:20, 18:15-18:35, 35:30-36:35. But defendant declined to act on the plan because of nearby security cameras. *Id.* Instead, the group decided to lure Rush and Childs to Fifth Street and Nineteenth Avenue in Rock Island. *Id.* at 18:30-19:10, 32:25-33:20, 35:00-36:00, 39:55-40:40. To do so, Phelps called Rush and offered to sell him cannabis. *Id.*

Defendant then dropped off Phelps and Reed, who drove separately to the scene of the crime, in a Green Lincoln. *Id.* at 18:30-19:15, 38:30-38:50,

42:40-43:25. Defendant, driving a rental car borrowed from his brother, parked in a nearby alley and awaited the arrival of his victims. *Id.* at 9:45-10:10, 19:00-19:55. Reed called defendant to let him know that Rush and Childs were arriving and that Cassia Leigh (referred to as "Tia") was also a passenger in Rush's car. *Id.* at 21:25-22:05. Defendant then came out of the alley, clad in a black hooded sweatshirt and black pants and carrying Phelps's gun. *Id.* at 19:20-19:55, 23:55-24:05. Rush was standing by Reed's car, and Childs was in the backseat of Rush's car. *Id.* at 24:05-24:50. Defendant approached Rush's car from behind. *Id.* at 24:50-25:05. Before Childs could look up, defendant fired two or three shots at Childs through the car window. *Id.* at 25:05-25:35, 45:40-46:00. Leigh ducked down. *Id.* at 25:35-25:55. Rush ran back towards his car, and defendant fired three shots at him. *Id.* at 25:05-25:35, 25:55-27:00.

Defendant, Phelps, and Reed had planned to meet back in Davenport after the shooting. *Id.* at 34:35-35:00. But as defendant drove away, he observed in his rearview mirror that police were chasing Reed's car. *Id.* at 27:25-27:45. Defendant spent the night in a Davenport hotel with his brother, and when he learned that the police were looking for him the next day, he took a bus to Decatur, Illinois to stay with his mother. *Id.* at 28:45-31:30.

B. Defendant Enters a Guilty Plea.

In May 2011, defendant entered a guilty plea to the first degree murder charge. As the prosecutor and the judge explained on the record,

defendant had agreed to plead guilty in exchange for his truthful cooperation. R241-43. Upon completing his cooperation, defendant expected that he would be sentenced to 35 years in prison and that the People would dismiss the aggravated battery charge. *Id.* Defendant confirmed that he understood the terms of the agreement. R241-47. He understood that, if he went to trial, he faced 20 years to life in prison without parole, "depending upon aggravating factors and things that could be proved." R243-44. By entering the plea, defendant agreed that the People would be able to prove that he conspired with Phelps and Reed to lure Rush and Childs to Rock Island, where defendant fatally shot Rush. R246-47.

II. Defendant Breaches the Plea Agreement by Withdrawing his Plea and Refusing Further Cooperation.

Several months later, in November 2011, defendant filed a pro se motion to withdraw his guilty plea. C140-41. He alleged that the "plea was not voluntarily or intelligently made in that the defendant was lied to [by his lawyer and the prosecutor] about the [prison] time he was facing." *Id.* The trial court permitted Dalton to withdraw from the representation and appointed attorney Nate Nieman to take over the defense. C143-44.

Nieman consulted with defendant and filed an amended motion to withdraw the guilty plea. C160-65. Nieman's motion alleged that Dalton misadvised defendant that he faced a minimum of 60 years in prison if found

guilty; when, in fact, the true minimum was 20 years. *Id.*[3] Defendant also filed an affidavit stating that he would not have pleaded guilty if he had understood that he faced a minimum sentence of 20, rather than 60, years in prison. C167-68. Defendant averred that the plea agreement "as I understood it, required me to plead guilty to the Class M felony First Degree Murder charge, provide a true statement as to my involvement in the murder, and testify, if necessary, against the other co-defendants, [Reed and Phelps]." *Id.* In exchange for his plea, "the State would recommend a sentence of thirty-five (35) years [ ] and would dismiss the Count II Aggravated Battery with a Weapon charge." *Id.*

Nieman later amended the motion a second time to allege that the plea agreement was "statutorily void" because the trial court did not have authority to sentence defendant to less than 45 years in prison. C170-73. Nieman alleged that because the factual basis for the plea included the allegation that defendant shot Rush with a firearm, the trial court would have been required to impose a mandatory 25-year firearm enhancement. *Id.*

At the ensuing hearing on the motion to withdraw the plea, Judge Meersman admonished defendant that, under the terms of the plea, he would

---

[3] Defendant would have faced a minimum sentence of 20 years in prison only if convicted of murder without any firearm enhancement. *See* 730 ILCS 5/5-4.5-20(a) (establishing 20- to 60-year sentencing range for first degree murder). If a factfinder determined that defendant personally discharged a firearm, causing Rush's death, defendant would have faced a mandatory 25-year enhancement on top of the minimum 20-year sentence. 730 ILCS 5/5-8-1(a)(1)(d)(iii).

be sentenced to 35 years in prison. C288. The court explained that to achieve the agreed 35-year sentence, the prosecutor would amend the charging instrument to remove the firearm enhancement. C288-89. If defendant withdrew his plea and proceeded to trial, he would face a minimum of 45 years in prison if his sentence included the firearm enhancement. C289-90.

The prosecutor stated for the record that the agreement had been for defendant to be sentenced to 35 years "in exchange for his truthful cooperation." C290. The prosecutor warned that if defendant withdrew his plea, the People could use his videorecorded statement against him at trial and that, if convicted, defendant would face a sentence at least 10 years longer than the agreed sentence. C290-91. The court asked defendant if he understood these consequences of withdrawing his plea, and defendant confirmed that he did. C291.

The court then asked defendant why he wanted to withdraw his plea. *Id.* Defendant said that he would not have accepted the deal except that his "lawyer told [him] to take it." *Id.* The court expressed its disbelief that despite receiving "a hell of deal," defendant now wanted to proceed to trial. C291-92. The court reminded defendant that he had already agreed that the People would be able to prove the factual basis of the plea — that defendant fatally shot Rush. C292. Despite these admonishments, defendant persisted

in his request to withdraw his plea. *Id.* The court permitted defendant to withdraw the plea and set the case for trial. C293.

III. Defendant's New Counsel Seeks to Suppress the Videorecorded Statement.

Before trial, Nieman moved for a substitution of judge, arguing that Judge Meersman's comments at the hearing on the motion to withdraw the plea showed that he "has already formulated an opinion of defendant's guilt" and could not give defendant an impartial hearing. C177-79. Judge Fuhr granted the substitution motion, and the case was reassigned to Judge Fuhr. R68-69.

Nieman then filed a motion to suppress defendant's April 2011 videorecorded statement. C301-305. The motion argued that the plea agreement had been "statutorily void" because the trial court would not have been authorized to impose a 35-year sentence. *Id.* Because defendant had given his videorecorded statement "in reliance on a promise by the State that could not legally be kept," the motion contended, the prosecution should not be permitted to use the statement at trial. *Id.*

Judge Fuhr denied the motion to suppress in a written order, rejecting defendant's argument that a 35-year sentence was unavailable. C309-10. The court held that had defendant completed his cooperation, he would have been permitted to withdraw his original plea and enter a new plea to charges that did not include the firearm enhancement, and the court could have imposed the agreed 35-year sentence. *Id.* Because the People were prepared

to honor the plea deal, while defendant breached the agreement by refusing to provide the bargained for cooperation, defendant could not bar the People from using his videorecorded statement at trial. *Id.*

IV. Defendant Is Convicted of Murder in a Stipulated Bench Trial.

Having failed to convince the court to suppress his videorecorded confession, defendant elected to proceed by way of stipulated bench trial. As the trial court admonished defendant, the purpose of proceeding in this manner was to preserve any errors — "specifically my earlier denial of your motion to suppress" — for appeal. R97. Defendant acknowledged that he understood and waived his right to be tried by a jury, to cross-examine the People's witnesses, to call his own witnesses, and to testify in his defense. R99-100. And defendant acknowledged that in choosing a stipulated bench trial, he would necessarily be found guilty and sentenced to a minimum of 45 years in prison. R98.

The parties then entered a series of stipulations describing the evidence the People would present. C323-34; R101-28. In addition to videos of defendant's April 2010 and April 2011 interviews, the People would present testimony from Phelps and Reed, both of whom would testify that they were riding around with defendant on the morning of March 30, 2010, in a silver rental car that defendant borrowed from his brother. C327-28, 330. While they were riding around, defendant began discussing Childs, whom he accused of "plant[ing] a gun" at the home of defendant's brother, leading to

the brother's arrest. C328, 330-31. Defendant told Phelps that he "was going to fuck [Childs] up." C331.

According to Reed, Phelps spoke on the phone with Rush and reported to defendant that Rush and Childs were together. C328. Defendant, Phelps, and Reed drove to the home of Phelps's girlfriend and retrieved a gun, which Phelps gave to defendant. *Id.* Later, Phelps and Reed drove together to Fifth Street and Nineteenth Avenue in Rock Island, where they met up with Rush, purportedly to sell Rush cannabis. C329. Reed called defendant to let him know where they were meeting Rush and again to alert him when Rush and Childs arrived. *Id.*

Phelps would testify that it was Reed — and not he — who arranged the cannabis transaction with Rush. C331. But Phelps and Reed agreed that they met up with Rush and Childs in Rock Island. C331-32. When Rush approached their car, Reed called defendant. *Id.* Defendant emerged from between some nearby houses and began shooting. C329, 332. Defendant first shot at Childs and then at Rush. *Id.* As Reed and Phelps fled the scene, they were stopped by police. *Id.*

In addition to this stipulated testimony, the People presented recorded statements that Phelps and Reed had given shortly after the shooting, in which they implicated defendant. C324-25; Peo. Exhs. 1, 2, 3, 4. Other testimony established that police recovered defendant's cell phone at the scene. C325.

The trial court found defendant guilty and sentenced him to 50 years in prison: 25 years for murder, plus 25 years because he personally discharged a firearm. R128-29, 170; *see* 730 ILCS 5/5-8-1(a)(1)(d)(iii) (mandatory firearm enhancement).

V. Defendant Appeals and Seeks Postconviction Relief.

On appeal, defendant abandoned the suppression argument that he had raised in the trial court and argued instead that his confession should have been barred by Illinois Supreme Court Rule 402(f), which provides that "[i]f . . . a plea of guilty . . . is withdrawn . . . neither the plea discussion nor any resulting agreement, plea, or judgment shall be admissible against the defendant in any criminal proceeding." *People v. Eubanks*, 2014 IL App (3d) 130021-U, ¶ 30. Defendant acknowledged that the issue had been forfeited but asked the appellate court to excuse his forfeiture as plain error or because Nieman had been ineffective in failing to argue the Rule 402(f) issue. *Id.* ¶ 31. The appellate court affirmed, holding that plain error did not apply, and the ineffective-assistance claim "involve[d] factual matters outside the scope of this record." *Id.* ¶¶ 34-37.

Defendant then filed a pro se postconviction petition, arguing that his videorecorded statement "was inadmissible at trial under Supreme Court Rule 402(f)" and his "counsel was ineffective" for failing to raise the Rule 402(f) argument. C382. Defendant attached to his petition affidavits from Dalton and Nieman. C401-07. Dalton averred that

> [Defendant]'s videotaped statement [ ] was unquestionably provided by him as part of his fully negotiated plea agreement with the State. The State's offer was made prior to [defendant] giving the statement. I would not have advised him to give the videotaped statement that he gave if it was not part of the plea agreement reached with the State prior to giving it.

C406. And Nieman averred that he "elected to challenge the admission of the statement under a contract theory because the State obtained [defendant's] videotaped statement and his agreement to testify against the co-defendants in exchange for its sentencing recommendation." C403.

The trial court appointed new counsel for defendant, who filed an amended petition arguing that Rule 402(f) barred admission of defendant's statement because it was given "during plea negotiations," and Nieman had provided ineffective assistance by arguing for suppression only under a contract theory when "Rule 402(f) provided the obvious basis for challenging the admission of the statement." C434-35.

The trial court advanced the case to a third stage evidentiary hearing, C443-44, where defendant presented two witnesses. First, Dalton testified about the terms of the plea agreement and explained that he had ensured that the agreement was fully negotiated before he permitted defendant to make his videorecorded statement. R201-03. Dalton "would have never had [defendant] go and give a statement without knowing what the deal was ahead of time on a murder case." R209. Second, defendant testified that he agreed with Dalton's testimony and that "prior to" giving his videorecorded

statement, Dalton explained to him, and he understood, the terms of the plea deal. R213-15.

Following the hearing, the trial court denied defendant's postconviction petition. C460-61. The court explained that Rule 402(f) would have prevented the People from introducing evidence of defendant's withdrawn plea and any "plea discussion." R460. But here, "[t]he plea discussions and the resulting agreement and initial guilty plea of this Defendant were not used against him at the stipulated bench trial." R461. The videorecorded statement, given *after* the parties finished negotiating an agreement, was merely a "result of those plea discussions, not part of the plea discussions." *Id.*

Defendant appealed, and the appellate court affirmed, holding that Rule 402(f) does not apply to statements made after a plea agreement has been reached, and that "the testimony at the third-stage evidentiary hearing established that a plea deal had been reached before defendant provided his videotaped statement." A19-22.

ARGUMENT

The trial court correctly denied defendant's postconviction claim that his trial counsel rendered ineffective assistance by failing to argue that Rule 402(f) barred admission of his videorecorded statement. Defendant's evidence at the third-stage hearing failed to establish either that (1) his attorney's performance fell below an objective standard of reasonableness, or (2) counsel's errors resulted in prejudice, *People v. Bailey*, 232 Ill. 2d 285, 289

(2009) (citing *Strickland v. Washington*, 466 U.S. 668 (1984)), both of which were required to prevail on his claim.

I. Counsel's Strategy Was Reasonable.

Defendant cannot show that his lawyer rendered deficient performance. "Judicial scrutiny of counsel's performance must be highly deferential"; the court must view the challenged conduct "from counsel's perspective at the time" and avoid the "distorting effects of hindsight." *Strickland*, 466 U.S. at 689. Counsel's strategic choices are generally immune to after-the-fact challenges. *People v. West*, 187 Ill. 2d 418, 432-33 (1999). And the decision whether to file a motion to suppress evidence and what arguments to raise are quintessential strategic choices. *People v. Hobley*, 182 Ill. 2d 404, 454 (1998); *see also* Amer. Bar Ass'n Criminal Justice Standards for the Defense Function § 4-5.2(d) (4th Ed. 2017) ("how to craft [ ] motions" and "what motions and objections should be made" are "[s]trategic and tacticial decisions" for defense counsel).

The record confirms that Nieman had strategic reasons for proceeding as he did. Nieman's affidavit, attached to defendant's postconviction petition, explains that strategy. C402-03. The trial court appointed Nieman after defendant filed a pro se motion to withdraw his guilty plea. *Id.* Nieman amended defendant's pro se motion, arguing that the plea agreement had been "statutorily void" because the court did not have authority to impose the agreed 35-year sentence. *Id.* After the trial court permitted defendant to withdraw his plea, Nieman filed a motion to suppress, arguing that the

People should not be able to benefit from the allegedly void agreement by using the videorecorded statement at trial. *Id.*

While Nieman's argument was ultimately unsuccessful, viewed from Nieman's perspective at the time, it was a reasonable strategy. Indeed, defendant does not suggest that Nieman's argument — that the agreement was "statutorily void" — was unreasonable. Nor can he, since his brief in this Court presses the same argument. *See* Def. Br. 17-18 (arguing that agreement for 35-year sentence was "void").

Although Nieman could have also raised a Rule 402(f) argument, *Strickland* does not require counsel to raise every nonfrivolous argument. *Cf. Jones v. Barnes*, 463 U.S. 745, 751-52 (1983). An attorney may reasonably "overlook or ch[oose] to omit" certain arguments "while pursuing other avenues of defense." *Engle v. Isaac*, 456 U.S. 107, 133-34 (1982). "[T]he fact that another attorney might have pursued a different strategy is not a factor in the competency determination." *People v. Palmer*, 162 Ill. 2d 465, 476 (1994).

And even if Nieman's strategic choice appears erroneous in hindsight, "a mistake in trial strategy or an error in judgment by defense counsel will not alone render representation constitutionally defective." *People v. Peterson*, 2017 IL 120331, ¶ 80. Defendant must show that his attorney "was not functioning as the 'counsel' guaranteed by the sixth amendment." *People v. Dupree*, 2018 IL 122307, ¶ 44. Overall, Nieman provided zealous

representation. He assisted defendant by amending the pro se motion to withdraw the guilty plea. When it appeared to counsel that Judge Meersman was likely to permit the People to use defendant's videorecorded statement at trial, Nieman successfully moved for a substitution of judge. And Nieman then advanced a reasonable argument in favor of suppression.

In short, because Nieman made reasonable strategic decisions, *Strickland* does not permit defendant to relitigate his statement's admissibility, and the trial court correctly rejected his ineffective-assistance claim.

II. Defendant Suffered No Prejudice.

Defendant also failed to establish prejudice from his attorney's performance. Where, as here, a defendant argues that counsel was ineffective for failing to advance a particular suppression theory, he must show that (1) the omitted argument would have been meritorious, and (2) there is a reasonable probability that, absent the excluded evidence, the verdict would have been different. *Bailey*, 232 Ill. 2d at 289. Defendant can make neither showing.

A. A Suppression Motion Based on Rule 402(f) Would Have Failed.[4]

Defendant cannot demonstrate *Strickland* prejudice because, even assuming that counsel had sought suppression under Rule 402(f), his

[4] As an initial matter, defendant's brief in this Court cites both Rule 402(f) and Illinois Rule of Evidence 410, which, similar to Rule 402(f), provides that "[e]vidence of a plea discussion" is inadmissible against a criminal defendant.

videorecorded statement would not have been suppressed because it was not a "plea discussion." In this appeal, defendant makes two arguments. First, he contends that the lower courts misinterpreted Rule 402(f) in holding that it does not apply to statements made after the end of plea negotiations. And second, he challenges the trial court's factual determination that the parties had finished negotiating before defendant made his April 2011 videorecorded statement. Both arguments are meritless.

1. The plain language of Rule 402(f) applies only to plea negotiations.

This Court applies the same principles of construction to Supreme Court Rules that it applies when construing statutes. *People v. Salem*, 2016 IL 118693, ¶ 11. To best "ascertain and give effect to the drafters' intentions," the Court looks first to "the plain and ordinary meaning" of the rule, which is "the most reliable indicator of intent." *Id.*

Ill. R. Evid. 410. But defendant has forfeited any suppression argument based on Rule 410 by neglecting to present it to the trial court below. *See People v. Hughes*, 2015 IL 117242, ¶¶ 37-46 (court will not consider a suppression argument that lower court did not address). Both defendant's pro se and counseled petitions relied solely on Rule 402(f). *See* C382-98 (pro se petition); C425-37 (amended counseled petition). Nor did defendant cite Rule 410 during the evidentiary hearing. As a result, the trial court rejected defendant's postconviction petition under Rule 402(f). C460-61. This Court should do the same. Because defendant failed to preserve a Rule 410 argument, the People's brief discusses only Rule 402(f). But in any event, as defendant acknowledges, Def. Br. 12-13, Illinois courts have interpreted the two rules consistently, *see People v. Neese*, 2015 IL App (2d) 140368, ¶ 11, n.1. So all of the People's arguments addressing Rule 402(f) would apply with equal force to Rule 410.

Rule 402(f) provides that, where "a plea of guilty [ ] is withdrawn," both the fact of the plea and "the plea discussion" are inadmissible "against the defendant in any criminal proceeding." Ill. S. Ct. R. 402(f). In interpreting Rule 402, this Court has consistently defined "plea discussion," in accordance with its plain meaning, as synonymous with plea negotiation or plea bargaining. In *People v. Friedman*, 79 Ill. 2d 341 (1980), for example, this Court explained that discussions between a suspect and the police are "plea-related" only if they "contain the rudiments of the negotiation process, i.e., a willingness by defendant to enter a plea of guilty in return for concessions by the State." *Id.* at 353; *accord People v. Rivera*, 2013 IL 112467, ¶ 19; *People v. Hart*, 214 Ill. 2d 490, 502-04 (2005).

Given this plain meaning, the appellate court correctly held that statements made pursuant to a plea agreement, *after* the parties have finished negotiating, are not a "plea discussion" and thus are unaffected by Rule 402(f). A19-22. Other appellate decisions that have addressed this question have reached the same conclusion. *People v. Connery*, 296 Ill. App. 3d 384, 388 (3d Dist. 1998) ("Since the plea bargain process is completed when the plea is entered, statements made after an agreement has been reached and the plea has been entered are not covered by Rule 402(f)."); *People v. Bennett*, 222 Ill. App. 3d 188, 198 (2d Dist. 1991) (rejecting argument that Rule 402(f) should apply to any statements made at "a point subsequent to the plea negotiation and entry stage"); *People v. Saunders*, 135

Ill. App. 3d 594, 606 (2d Dist. 1985) (Rule 402(f) does not apply because "defendant's testimony, although made after and pursuant to the agreement, was not made while he was negotiating over the disposition of his case").

The decision below is also supported by federal cases interpreting Federal Rule of Evidence 410 and Federal Rule of Criminal Procedure 11(e)(6), which this Court has held are relevant to interpreting Rule 402(f) and which similarly bar admission of certain statements made during "plea discussions." *Friedman*, 79 Ill. 2d at 351; *Hart*, 214 Ill. 2d at 502-04. In interpreting these rules, federal courts, like Illinois courts, have uniformly held that any statements made by a defendant *after* reaching a plea agreement are not plea discussions and are thus generally admissible. *See United States v. Watkins*, 85 F.3d 498, 500 (10th Cir. 1996) (statements made "pursuant to, but subsequent to the finalization of, a plea agreement" are not plea discussions); *United States v. Hare*, 49 F.3d 447, 450 (8th Cir. 1995) ("Statements voluntarily offered . . . after a plea agreement has been reached cannot be considered statements made 'in the course of plea discussions' within the meaning of the exclusionary rules."); *United States v. Lloyd*, 43 F.3d 1183, 1186 (8th Cir. 1994) (same); *United States v. Knight*, 867 F.2d 1285, 1288 (11th Cir. 1989) (same).

This construction is consistent not only with the plain language but also with the purpose of Rule 402(f), which "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. The rule's purpose is accomplished by excluding statements made during the negotiation process. Once negotiations are complete and the parties have reached an agreement, however, there is nothing more for the rule to "encourage." At that point, the case is likely to be resolved according to the parties' agreed disposition. *See also Saunders*, 135 Ill. App. 3d at 606 (purpose of Rule 402(f), which is to encourage negotiation, "would not be served" by excluding statements "made after and pursuant to the agreement").

Contrary to its plain language and purpose, defendant asks the Court to "construe Rule 402(f)" to include statements "given in performance of [a] plea agreement." Def. Br. 14-15. But this argument ignores the text of Rule 402(f), and defendant suggests no basis for reading the term "plea discussions" to encompass something more than negotiations. And although defendant's brief discusses cases applying Rule 402(f) or its federal and state counterparts, Def. Br. 23-39, he fails to identify a single case that supports his proposed interpretation. Indeed, as he appears to concede, all of these cases instead support the People's interpretation of Rule 402(f). As defendant accurately summarizes, these cases collectively hold that statements given after a plea agreement is finalized are admissible. Def. Br. 37.

Thus, defendant is left with only his policy argument that a broader rule is preferable. But policy arguments cannot overcome the plain language

of a rule. *Corbett v. County of Lake*, 2017 IL 121536, ¶ 37. And defendant's policy arguments are unpersuasive in any event. Defendant posits that admitting statements "given to a prosecutor in performance of a plea deal would have a chilling effect on plea discussions" because "[p]rosecutors will increasingly demand recorded admissions as part of plea deals." Def. Br. 16. But 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. And, in any event, defendant's preferred construction would not bar the admission of such statements because prosecutors could insist, as part of the plea agreement, that the defendant waive application of Rule 402(f). *Cf. United States v. Mezzanatto*, 513 U.S. 196, 210 (1995) (defendant may agree to waive federal equivalent of Rule 402(f)).

Defendant further argues that "fundamental fairness" requires that statements made in exchange for sentencing considerations be excluded. Def. Br. 18. But this argument overlooks that such voluntary statements are "not an evil but an unmitigated good . . . essential to society's compelling interest in finding, convicting, and punishing those who violate the law." *McNeil v. Wisconsin*, 501 U.S. 171, 181 (1991). There is no reason that a defendant cannot knowingly and intelligently agree to provide truthful cooperation in exchange for concessions from a prosecutor. Indeed, the law should encourage such truthful cooperation.

The record does not support defendant's related suggestion that he was not advised of his rights against self-incrimination or that he felt compelled to confess. Def. Br. 18-19. It is true that the recording of defendant's statement does not show the detectives explaining defendant's rights. But defendant was represented by counsel who was present for the interview. There is no evidence in the record that counsel failed to explain defendant's rights. And absent such evidence, counsel is presumed to have provided competent assistance. *Strickland*, 466 U.S. at 689. And even if defendant's statement had been obtained through coercion, he would not need the protection of Rule 402(f), because due process bars the admission of involuntary confessions. *People v. Chapman*, 194 Ill. 2d 186, 208 (2000). Notably, defendant makes no such argument here.

Defendant supposes that without a broad interpretation of Rule 402(f), prosecutors may seek cooperation in exchange for a plea agreement, breach the agreement, and then use a defendant's cooperation against him. *See* Def. Br. 17 (arguing that "such statement[s] would be admissible regardless of who breached the agreement"). But this fear is misplaced because constitutional safeguards would prevent such a maneuver: a defendant who pleads guilty in reliance on a promise from a prosecutor has a constitutional right to have "such promise [ ] fulfilled." *Santobello v. New York*, 404 U.S.

257, 262 (1971).[5] In any event, here it was not the prosecutor but defendant who breached the plea agreement, by withdrawing his plea and refusing further cooperation. C310.

There is no merit to defendant's suggestion that the People "arguably" breached the agreement because the 35-year sentence the parties agreed to was "void" or "not statutorily authorized." Def. Br. 17-18. The trial court correctly rejected this argument when denying defendant's pre-trial suppression motion. C309-10. As the court explained, had defendant performed his cooperation obligations under the plea agreement, he would have been permitted to withdraw his plea and enter a new plea to charges that did not include the firearm enhancement. *Id.* Contrary to defendant's argument, Def. Br. 17-18, this Court's decision in *People v. White*, 2011 IL 109616, left the door open for precisely this type of agreement. *See id.* ¶¶ 37-41 (Theis, J., specially concurring) (noting with approval that majority opinion "implicit[ly]" allows prosecutors to "negotiate around the mandatory [firearm] sentencing enhancement" by "amending the indictment and presenting a factual basis that referred to a dangerous weapon, rather than a firearm"). In any event, defendant is precluded from arguing that the plea

[5] Even before a formal plea is entered, there may be valid due process objections if a prosecutor were to breach a plea agreement and then attempt to use a defendant's cooperation against him. *Cf. People v. Pierson*, 230 Ill. App. 3d 186, 191 (5th Dist. 1992) (enforcing promise of immunity given in exchange for defendant's relinquishment of Fifth Amendment right against self-incrimination).

agreement was "void" because this was decided against him in the original criminal proceeding, and he never appealed that issue. *See People v. Page*, 155 Ill. 2d 232, 248-50 (1993) (defendant collaterally estopped from raising suppression argument that was rejected prior to initial trial and never appealed).

Defendant also argues that he should not be subject to a "penalty" for breaching the plea agreement or withdrawing his plea. Def. Br. 27-28. But the admission of defendant's voluntary statement is not a penalty. The question is whether the April 2011 statement constituted a "plea discussion" within the meaning of Rule 402(f). That determination has nothing to do with whether defendant subsequently decided to withdraw his plea or renege on his agreement.

In sum, defendant's unpersuasive policy arguments do not override the plain meaning and purpose of Rule 402(f), or any of the numerous cases that, he concedes, hold that the rule applies only to plea negotiations.

2. The trial court's factual determination — that defendant's videorecorded statement was not part of any negotiation — was not against the manifest weight of the evidence.

Under Rule 402(f)'s plain and ordinary meaning, defendant's videorecorded statement was properly admitted. The trial court made a factual finding that defense counsel and the prosecutors had finished negotiating the plea agreement *before* defendant gave his statement. C461. Thus, the videorecorded statement was "not part of the plea discussions." *Id.*

Because the trial court denied defendant's claim following a third-stage evidentiary hearing, its fact-finding may be disturbed only if it was "manifestly erroneous," that is, only if the court committed an error that is "clearly evident, plain, and indisputable." *People v. Morgan*, 212 Ill. 2d 148, 155 (2004). And here, the trial court's finding is amply supported by the record. Attorney Dalton testified without contradiction that plea negotiations concluded before defendant gave his videorecorded statement. R208. Dalton "never would have allowed" defendant to give the statement if the prosecutor had not already agreed to the 35-year sentence in exchange for defendant's cooperation. *Id.*[6] Defendant testified at the evidentiary hearing and agreed with Dalton's testimony; he further testified that, prior to giving the April 2011 statement, he understood that the People had agreed to a 35-year sentence in exchange for his plea and cooperation. R214-15.

---

[6] Defendant selectively quotes a portion of Dalton's testimony to suggest that he agreed the videorecorded statement was part of plea discussions. Def. Br. 14. But the full exchange belies such an interpretation:

> Q. Would it be fair to characterize that statement as part of the plea discussion?
>
> A. Well, of course. I mean, it – that that – that statement given by [defendant] wasn't made but for the plea agreement that we had. It never would have been made but for that plea agreement.

R203. Thus, although Dalton appeared to initially agree with the premise of the question that the statement was "part of the plea discussion," he quickly corrected himself to make clear that the statement was made only after an agreement had been reached.

Despite this testimony, defendant now contends that his videorecorded statement was merely a "proffer" that the prosecutor could accept or reject, and that only after the prosecutor found the statement acceptable did the parties reach a "finalized" agreement. Def. Br. 37-38. To support this theory, defendant points to fact that Assistant State's Attorney (ASA) Kauzlarich was listening to the detectives interview defendant and suggesting questions. The ASA also referred to the plea deal as a "proffer agreement" on one occasion during the stipulated bench trial — although the parties never used that term at any other point in the proceedings. But all of these facts were before the trial court, which reasonably found, in light of Dalton's testimony, "[t]hat [the plea] agreement was reached *before* th[e videorecorded] statement was given." C461 (emphasis added).

As Dalton confirmed, by the time defendant gave the videorecorded statement, there was nothing left to negotiate. The prosecutor knew how the shooting occurred; she had already obtained statements from Phelps and Reed. All that remained was the execution of the plea agreement: defendant was to perform his part of the bargain by cooperating and pleading guilty, and the People were to perform their part by dismissing the aggravated battery charge, amending the indictment to remove the firearm enhancement, and recommending a 35-year sentence. It is reasonable to infer that ASA Kauzlarich was present during the videorecorded statement to ensure that the detectives asked appropriate questions so the statement

could later be used against Phelps and Reed. There is no record evidence to support defendant's speculation that Dalton and Kauzlarich engaged in any further negotiation about the terms of defendant's plea deal.

Thus, because Rule 402(f) did not apply to the videorecorded statement, defendant suffered no prejudice from his attorney's failure to seek suppression of his statement on that ground.

B. Even Without the Videorecorded Statement, There Is No Reasonable Probability that Defendant Would Have Prevailed at Trial.

Even assuming that the videorecorded statement should have been suppressed, defendant still cannot show prejudice. Under *Strickland*, "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694. In other words, defendant bears the burden of showing something more than a "conceivable effect on the outcome of the proceeding," *id.* at 693, by coming forward with "proof" beyond "mere conjecture or speculation," *Palmer*, 162 Ill. 2d at 481.

On this record, defendant had no reasonable probability of an acquittal. Because defendant proceeded by stipulated bench trial, he never subjected any of the People's evidence to cross-examination nor introduced any evidence in his defense. The appellate court, in denying defendant's direct appeal, put him on notice that "[a] determination of prejudice is not possible based on this record." *Eubanks*, 2014 IL App (3d) 130021-U, ¶ 37. And although he could have called witnesses and presented evidence at the

postconviction hearing related to the likelihood of acquittal, he declined to do so. He is thus left to rely only on conjecture and speculation to challenge the People's strong evidence of his guilt.

That evidence includes defendant's stipulation that Phelps and Reed were available and prepared to testify that defendant shot Childs and Rush according to a premeditated plan. R128; C327-33. They lured the victims to a specific location in Rock Island where defendant lay in wait, armed with Phelps's gun. Reed alerted defendant to the victims' arrival, and both Phelps and Reed then observed defendant emerge from the alley, take aim, and fire at Childs and Rush.

Although a fact finder may often treat accomplice testimony with skepticism, there is no evidence that Phelps or Reed had a motive to falsely implicate defendant. Their stipulated testimony was largely consistent with their videorecorded statements, some of which were given close in time to the shooting. And their account was corroborated by other evidence. Police recovered defendant's phone from the scene. And defendant's flight to Decatur demonstrated his consciousness of guilt. Further, upon his arrest in April 2010, defendant admitted that he was with Phelps and Reed on the day of the murder and made an incriminating statement to the effect that Reed "set it up." R11.

In short, without an alternate theory of the crime or any impeachment of the People's evidence, there was no reasonable probability of an acquittal,

even absent the videorecorded statement. Accordingly, this Court should affirm the appellate court's judgment because defendant failed to establish either deficient performance or prejudice.

CONCLUSION

This Court should affirm the appellate court's judgment.

June 15, 2021

Respectfully submitted,

Kwame Raoul
Attorney General of Illinois

Jane Elinor Notz
Solicitor General

Michael M. Glick
Criminal Appeals Division Chief

Jason F. Krigel
Assistant Attorney General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601-3218
(312) 814-2197
eserve.criminalappeals@atg.state.il.us

Counsel for Plaintiff-Appellee
People of the State of Illinois

RULE 341(c) CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service is 30 pages.

/s/ Jason F. Krigel
Jason F. Krigel
Assistant Attorney General

PROOF OF FILING AND SERVICE

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 June 15, 2021, the foregoing **Brief of Respondent-Appellee People of the State of Illinois** was (1) filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, and (2) served by transmitting a copy from my email address to the email addresses below:

James E. Chadd
Thomas A. Karalis
Bryon Kohut
Office of the State Appellate Defender
Third Judicial District
3rddistrict.eserve@osad.state.il.us
bryon.kohut@osad.state.il.us

Thomas D. Arado
State's Attorneys Appellate Prosecutor, Third District
3rddistrict@ilsaap.org

Dora Villareal
State's Attorney Rock Island County
StatesAttorneysOffice@co.rock-island.il.us

Additionally, upon its acceptance by the court's electronic filing system, the undersigned will mail thirteen copies of the brief to the Clerk of the Supreme Court of Illinois, 200 East Capitol Avenue, Springfield, Illinois 62701.

/s/ Jason F. Krigel
Jason F. Krigel
eserve.criminalappeals@atg.state.il.us