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.

BRIEF AND ARGUMENT FOR DEFENDANT-APPELLANT

JAMES E. CHADD
State Appellate Defender

THOMAS A. KARALIS
Deputy Defender

BRYON KOHUT
Supervisor
Office of the State Appellate Defender
Third Judicial District
770 E. Etna Road
Ottawa, IL 61350
(815) 434-5531
3rddistrict.eserve@osad.state.il.us

COUNSEL FOR DEFENDANT-APPELLANT

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SUPREME COURT CLERK

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NATURE OF THE CASE

Antwoine Teddy Eubanks, hereinafter "defendant", appeals from a judgment denying his petition for post-conviction relief after an evidentiary hearing. No issue is raised on the pleadings.

ISSUE PRESENTED FOR REVIEW

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

RULES INVOLVED

> "Plea Discussions, Plea Agreements, Pleas of Guilty Inadmissible Under Certain Circumstances. If a plea discussion does not result in a plea of guilty, or if a plea of guilty is not accepted or is withdrawn, or if judgment on a plea of guilty is reversed on direct or collateral review, neither the plea discussion nor any resulting agreement, plea, or judgment shall be admissible against the defendant in any criminal proceeding."

Ill. S. Ct. Rule 402(f) (2010).

> "Except as otherwise provided in this rule, evidence of the following is not admissible in any criminal proceeding against the defendant who made the plea or was a participant in the plea discussions:
>
> (1) a plea of guilty which was later withdrawn;
> (2) a plea of *nolo contendere*;
> (3) any statement made in the course of any proceedings under Illinois Supreme Court Rule 402 regarding either of the foregoing pleas; or
> (4) any statement made in the course of plea discussions which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.
>
> However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant

under oath, on the record and in the presence of counsel."

Ill. R. Evid. 410 (eff. Jan. 1, 2011).[1]

[1] Rule 410 was amended effective October 15, 2015. The amendment has no impact on the instant issue.

STATEMENT OF FACTS

Defendant was arrested on April 14, 2010, and charged with one count of first degree murder for killing Samuel Rush and one count of aggravated battery with a firearm for shooting Erick Childs (C24-26, 28-30). *People v. Eubanks*, 2020 IL App (3d) 180117, ¶ 3.[2] Defendant initially denied any involvement in the offenses (People's Ex. No. 5).[3] *Eubanks*, 2020 IL App (3d) 180117, ¶ 3.

On April 19, 2011, defendant participated in a videotaped interview with two Rock Island detectives, Gene Karzin and Tina Noe, along with his attorney, Daniel Dalton (C320; People's Ex. No. 6).[4] *Id.*, ¶ 4. Assistant State's Attorney (ASA), Norma Kauzlerich, was outside the room watching the interview and texting questions to Karzin (EX 2, audio disc file 2 at 39:30-39:50, 47:40). Defendant confessed that he and two others, Pashanet Reed and Stephan Phelps, lured the victims to a specific location, where

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[2] The statement of facts is largely copied from the facts set forth in the appellate court's opinion, and defendant dually cites herein to the opinion and the record.

[3] People's Ex. No. 5 is a DVD recording of defendant's interview on April 14, 2010. It stops a third of the way through the interview, at approximately the 52-minute mark. After contacting the circuit court clerk, the State's Attorney's Office, defense counsel, and the Rock Island Police Department, undersigned counsel has been unable to obtain a recording of the rest of the interview.

[4] The record contains a DVD recording of defendant's interview on April 19, 2011 (People's Ex. No. 6). However, the DVD stops at 14 minutes 30 seconds, a third of the way through the interview. Undersigned counsel obtained an audio recording from trial counsel and supplemented the record in defendant's direct appeal (*People v. Eubanks*, 2014 IL App (3d) 130021-U), with the recording. The recording is included in the record before this Court in the manilla envelope marked "3-18-0117 EX 2". The audio recording is separated into two files; "file 1" is 1 and a half minutes long, and "file 2" is 54 and a half minutes long. File 1 was recorded after file 2 and contains follow-up questions. Defendant cites to the audio recording as "EX 2, audio disc file_" followed by the file number and the time indicated on Windows Media Player.

defendant shot them (EX 2, audio disc file 2 at 39:30). After the defendant made his statement, Dalton left the room, presumably to speak with ASA Kauzlerich, to "make sure we're good" (EX 2, audio disc file 1 at 1:30; audio disc file 2 at 54:30). *Id.*, ¶ 4.

On May 11, 2011, defendant appeared in court to enter a guilty plea (C132, 150, 320; R241-48). *Id.*, ¶ 5. The State indicated that the parties had reached a "negotiated disposition" pursuant to which the State recommended that defendant be sentenced to 35 years in prison for first degree murder and dismiss the aggravated battery with a firearm charge, provided that defendant "continues to truthfully cooperate and, if necessary, truthfully testify" (C150; R241). The trial court entered judgment for first degree murder and it dismissed the aggravated battery charge (C156; R247). The matter was continued for sentencing "pending the defendant's cooperation with the co-defendants' cases" (C156; R247). *Id.*, ¶ 5.

Defendant filed motions to withdraw his guilty plea on November 10, 2011, February 14, 2012, and March 27, 2012 (C140-41, 160-64, 170-73). *Id.*, ¶ 6. On March 28, 2012, the trial court held a hearing on the motions (C287-96). The court allowed defendant to withdraw his guilty plea (C293). *Id.*, ¶ 6.

On May 15, 2012, defendant filed a motion to suppress his videotaped statement, alleging that it was "obtained in violation of [his] rights as guaranteed by the Fifth and Fourteenth Amendments to the federal Constitution" (C301-05). *Id.*, ¶ 7. According to the motion, "the plea agreement reached by defendant and the State required defendant to plead guilty to the . . . First Degree Murder charge, provide a true statement as to his involvement in the murder, and testify if necessary, against the other co-defendants" (C301). In exchange, the State would recommend that defendant receive a 35-year prison sentence for first degree murder, and it would dismiss the aggravated battery with a

firearm charge (C301-02). The motion further stated that "pursuant to his obligation under the bargain reached with the State, [defendant] provided a videotaped statement to law enforcement officials and attorneys from the Rock Island County State's Attorney[']s office" (C302).[5] The trial court denied defendant's motion to suppress (C309-10). *Id.*, ¶ 7.

Defendant's case proceeded to a stipulated bench trial (C310-21, 323-34; R85-111). *Id.*, ¶ 8. The stipulations established that, on March 30, 2010, Rush and Childs were found shot inside a vehicle (C323). Reed and Phelps were found fleeing from the scene in a dark green Lincoln (C323, 327-33). *Id.*, ¶ 8.

Phelps told police that he was with defendant on March 30, 2010, and traded a gun with defendant that day (C330-33). *Id.*, ¶ 9. Phelps gave police the gun and ammunition defendant had given him (C324). Reed told the police that defendant shot Rush and Childs (C329). *Id.*, ¶ 9.

Officers located a cell phone at the scene of the shooting (C325). *Id.*, ¶ 10. Defendant drove to a store after the murder to obtain a new "SIM card" with the same cell phone number as the phone located at the scene (C325, 334). *Id.*, ¶ 10.

Reed and Phelps would have testified that they drove around in a green Lincoln drinking alcohol and smoking cannabis with defendant on March 30, 2010 (C327-33). *Id.*, ¶ 11. They went to defendant's brother's house, where defendant picked up a rental car. Phelps called Rush to set up a cannabis transaction. Upon meeting up, Rush exited his vehicle and walked toward the green Lincoln. Defendant then ran from the side of a house and started shooting into Rush's car. Rush ran toward his car, and defendant ran around the back of the car and shot Rush (C327-33). *Id.*, ¶ 11.

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[5] The motion incorrectly asserted that defendant provided his statement after the guilty plea.

The State presented defendant's videotaped interview (C333-34; People's Ex. No. 6). *Id.*, ¶ 12. ASA Kauzlerich stated that Noe and Karzin interviewed the defendant pursuant to a "proffer agreement" (R108). In the interview, defendant told detectives that he, Reed, and Phelps drove around on March 30, 2010, smoking cannabis and drinking alcohol (C333-34; People's Ex. No. 6). He, Reed, and Phelps traveled to Rock Island, where Phelps was supposed to meet Rush. Defendant parked his rental car in an alley. He exited his vehicle and ran between houses toward Rush's vehicle, and he shot Childs three times. When he saw Rush run back toward the car, he ran around the back of the car and shot Rush three times. Defendant, Reed, and Phelps fled the scene. Reed and Phelps were in a Lincoln, and defendant was in a rental car. Defendant discovered that he lost his phone during the shooting, so he drove to an I-Wireless store in Davenport (C333-34). *Id.*, ¶ 12.

The trial court found defendant guilty of first degree murder and sentenced him to 50 years in prison (C344-46; R128-29, 170). *Id.*, ¶ 13. Defendant appealed, arguing that his videotaped statement to police was inadmissible at trial. He also raised a claim of ineffective assistance of counsel. The appellate court affirmed defendant's conviction and sentence, finding that it could not determine if defendant's videotaped statement was made pursuant to plea negotiations (C365-79). *Id.*, ¶ 13 (citing *People v. Eubanks*, 2014 IL App (3d) 130021-U, ¶ 37). The appellate court recommended that defendant raise the issue in a post-conviction petition. *Id.*, ¶ 13 (citing *Eubanks*, 2014 IL App (3d) 130021-U, ¶ 37).

Thereafter, defendant filed a post-conviction petition, alleging that his trial counsel was ineffective for failing to move to suppress his videotaped statement pursuant to Illinois Supreme Court Rule 402(f) (C382-422). *Id.* ¶ 14. Defendant later filed an amended

petition, and the State filed a motion to dismiss the amended petition (C425-37, 439-41). The court denied the State's motion, finding that the amended petition sufficiently presented a claim of deficient representation that was not harmless (C443-44). The petition proceeded to a third-stage evidentiary hearing (R195-232). *Id.*, ¶ 14.

At the third-stage hearing, Dalton testified that the State approached him about defendant providing evidence against Reed and Phelps (R201). *Id.*, ¶ 15. According to Dalton, the State agreed to provide defendant with a 35-year prison sentence in exchange for a statement from defendant and defendant's "further cooperation" (R203). Dalton arranged for defendant to give a videotaped statement to Karzin and Noe on April 19, 2011 (R201-02). Dalton stated that defendant's videotaped statement "never would have been made but for that plea agreement." (R203). He was asked, "Would it be fair to characterize that statement as part of the plea discussion?", and he answered, "Of course" (R203). Dalton said he would not have allowed defendant to give a statement without a plea deal in place (R209). *Id.*, ¶ 15.

Defendant agreed with Dalton's testimony regarding the events surrounding the plea negotiations (R212-21). *Id.*, ¶ 16. Defendant testified that Dalton told him "the State was willing to give me a deal." (R213). According to defendant, "in order for me to get the deal, I would have to give a statement, a truthful statement, of my involvement in the case." (R214). The plea deal also required defendant to testify against his co-defendants "if need be" (R215). Dalton told defendant that the State was offering him a sentence of 35 years before defendant made his statement and that he would not have received the deal if he would not have made the statement (R216, 220). *Id.*, ¶ 16.

At the hearing, the circuit court judge found that it was clear "there was an agreement reached by the parties that [defendant] -- so long as he, one, gave a videotaped

statement truthfully stating his participation in the alleged crime; and, two, coop – continued cooperation against the two co-defendants up to and including possible testimony, the State would agree to a 35-year sentence." (R225). The court further stated, "Well, the deal is [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). It subsequently issued an order finding that defendant's April 19, 2011, statement "was not part of the plea discussion, but rather the result of the plea agreement, and thus Supreme Court Rule 402[(f)] was not violated" (C460-61). *Id.*, ¶ 17. The court denied defendant's post-conviction petition (C460-61). *Id.*, ¶ 17.

On appeal, defendant argued that his statement was inadmissible under Supreme Court Rule 402(f) and Illinois Rule of Evidence 410 if the statement was given in performance of the plea agreement, or, in the alternative, the requirement that he give a truthful statement amounted to a condition precedent to the agreement because the deal was not finalized until the statement was complete. *Id.*, ¶ 19. The Appellate Court, Third Judicial District, affirmed, finding that defendant's statement was admissible because it was given after the plea agreement had been reached. *Id.*, ¶¶ 30-33. It further found that providing a truthful statement was not a condition precedent to the agreement, but part of the deal. *Id.*, ¶ 32.

In dissent, Justice McDade determined that the statement was not an independent admission, but was offered pursuant to plea negotiations and therefore inadmissible. *Id.*, ¶¶ 37-47 (McDade, J., dissenting). The dissent further found that the majority's holding frustrated the purpose of the Rules and discouraged criminal defendants from entering plea deals where a potential admission was required. *Id.*, ¶¶ 42, 46 (McDade,

J., dissenting). The dissent also observed that admitting a statement; a confession in this case, made pursuant to a plea agreement, but before the plea had been judicially approved, placed a defendant in considerable peril without any guarantee that the State would not breach the deal. *Id.*, ¶ 44 (McDade, J., dissenting).

On November 18, 2020, this Court allowed defendant's petition for leave to appeal.

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 a post-conviction petition, defendant asserted that trial counsel was ineffective for failing to bar the admission of his statement because it was made during plea discussions (C382-98). Following an evidentiary hearing, the trial court denied the petition, and the appellate court affirmed (C460-61). *People v. Eubanks*, 2020 IL App (3d) 180117, ¶¶ 17, 30-33. Before this Court, defendant maintains that his statement was inadmissible.

Illinois Supreme Court Rule 402(f) and Illinois Rule of Evidence 410 are sufficiently broad to include pre-plea statements that are made in exchange for promised sentencing concessions. The rationale underlying Rules 402(f) and 410 is to promote unrestrained candor in the plea-negotiation process, and allowing the State to admit such a statement at trial if negotiations fail hinders the flexibility necessary to plea agreements and stifles the plea-negotiating process.

In any event, the record shows that the State demanded a truthful statement before it would agree to a deal. Therefore, defendant's confession was made during plea discussions and in anticipation of an agreement. Accordingly, this Court should determine that defendant's statement was inadmissible; trial counsel was ineffective for failing to properly object to the admission of defendant's statement; the trial court erred in denying defendant's post-conviction petition; the appellate court erroneously affirmed its decision; and defendant's conviction should be reversed, and the case should be remanded for further proceedings.

Defendant's post-conviction petition was dismissed after a third-stage evidentiary hearing. The Post-Conviction Hearing Act provides a means by which a defendant may

challenge his conviction or sentence for violations of federal or state constitutional rights. *People v. Pendleton*, 223 Ill. 2d 458, 471 (2006). The Act provides a three-stage process for adjudicating post-conviction petitions. *People v. English*, 2013 IL 112890, ¶ 23. After a third-stage hearing, where the trial court made factual and credibility determinations, the trial court's decision will not be reversed unless it is manifestly erroneous. *English*, 2013 IL 112890, ¶ 23. However, if no new evidence is presented at the third-stage hearing, and the issue involves a pure question of law, *de novo* review applies. *Id.* Here, where testimony was presented at the third-stage hearing, this Court, as did the appellate court, should review the trial court's fact-finding and credibility determinations for manifest error, but review the trial court's ultimate legal conclusion as to whether defendant's statement was inadmissible under Rules 402(f) and 410 *de novo*. *People v. Eubanks*, 2020 IL App (3d) 180117, ¶ 21 (citing *People v. Tyler*, 2015 IL App (1st) 123470, ¶ 195).

In his petition, defendant claimed that trial counsel was ineffective. To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). A defendant must also establish that defense counsel's deficient performance resulted in prejudice such that the result of the proceeding would have been different had counsel not performed deficiently. *Strickland*, 466 U.S. at 687.

In this case, 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). Therefore, the question is whether counsel performed deficiently by failing to move to suppress defendant's confession under Supreme Court Rule 402(f) and Illinois Rule of Evidence 410. Ultimately then, the issue before this

Court is whether defendant's statement was admissible under Rules 402(f) and 410.

Supreme Court Rule 402(f) provides:

> "If a plea discussion does not result in a plea of guilty, or if a plea of guilty is not accepted or is withdrawn, or if judgment on a plea of guilty is reversed on direct or collateral review, neither the plea discussion nor any resulting agreement, plea, or judgment shall be admissible against the defendant in any criminal proceeding."

Ill. S. Ct. R. 402(f) (2010).

At the time of defendant's statement, his plea, and his trial, Rule 410 of the Illinois Rules of Evidence provided, in pertinent part,

> "Except as otherwise provided in this rule, evidence of the following is not admissible in any criminal proceeding against the defendant who made the plea or was a participant in the plea discussions:
>
> (1) a plea of guilty which was later withdrawn;
>
> (2) a plea of *nolo contendere*;
>
> (3) any statement made in the course of any proceedings under Illinois Supreme Court Rule 402 regarding either of the foregoing pleas; or
>
> (4) any statement made in the course of plea discussions which do not result in a plea of guilty or which result in a plea of guilty later withdrawn."

Ill. R. Evid. 410 (eff. Jan. 1, 2011). Supreme Court Rule 402(f) and evidentiary Rule

410 should be interpreted consistently. *People v. Neese*, 2015 IL App (2d) 140368, ¶ 11, n.1.

This Court has adopted a two-part test for determining whether a particular statement is plea related, with both a subjective and an objective component. *People v. Rivera*, 2013 IL 112467, ¶ 18. It considers, "[F]irst, whether the accused exhibited a subjective expectation to negotiate a plea, and, second, whether this expectation was reasonable under the totality of the objective circumstances." *Rivera*, 2013 IL 112467, ¶ 18 (quoting *People v. Friedman*, 79 Ill. 2d 341, 351 (1980)). The determination is not a bright-line rule and turns on the factual circumstances of each case. *Friedman*, 79 Ill. 2d at 352.

The typical scenario in which the *Friedman* test has been applied is in the preliminary stages of the potential negotiation process. In this case, at the time defendant made the statement, the record shows that he, through counsel, had negotiated an anticipated agreement whereby defendant would plead guilty to the offense of first degree murder, provide a truthful statement about his participation in the offense, and truthfully cooperate against his co-defendants, all in exchange for a 35-year prison term (C399, 405-06, 401-03; R209-10, 214-15, 225, 241-43). Whether defendant was objectively reasonable in his subjective expectation that he had entered plea negotiations is not at issue; the record clearly shows that the parties had been involved in structured plea discussions.

The question here necessarily focuses on the opposite end of the deal-making process: the conclusion of discussions. The uncontested facts show that the State approached defendant's counsel, Daniel Dalton, about defendant providing evidence against his co-defendants Pashanet Reed and Stephan Phelps (R201). The State had

agreed to a 35-year prison term in exchange for a statement from defendant and defendant's further cooperation (R203). Defendant said, "the State was willing to give me a deal", and "in order for me to get the deal, I would have to give a statement, a truthful statement, of my involvement in the case" (R213-14). He would also have to testify against his co-defendants, "if need be" (R215). Defendant would not have received the deal if he would not have made the statement (R216).

Dalton arranged for defendant to give a videotaped statement to Detectives Gene Karzin and Tina Noe on April 19, 2011 (R201-02; People's Ex. No. 6). Assistant State's Attorney (ASA) Norma Kauzlerich was outside the room observing defendant's statement and texting questions to the detectives (EX 2, audio disc file 2 at 39:30-39:50, 47:40). When the interview was finished, Dalton left the room, to talk to "these guys" to "make sure we're good" (EX 2, audio disc file 1 at 1:30; audio disc file 2 at 54:30). Dalton and defendant both said that defendant never would have given the statement absent the proposed deal, and, when Dalton was asked, "Would it be fair to characterize that statement as part of the plea discussion?", he answered, "Of course" (R203, 209, 216).

These facts show that defendant's statement was either given before the State would agree to a plea deal or in performance of a negotiated agreement. If the statement was given in performance of the plea agreement, this Court should construe Rules 402(f) and 410 to include such pre-plea statements.[6] Rule 402(f) and Rule 410 contain broad language. Rule 402(f) bars the use of "a plea discussion" and Rule 410 states that "any statement made in the course of plea discussions" is inadmissible. Ill. Sup. Ct. R. 402(f)

[6] Defendant notes that other statements, such as those given at a co-defendant's trial, may warrant a different analysis. The question in this portion of the issue solely involves statements given to a prosecutor, as part of a plea agreement, before the entry of a guilty plea.

(2010); Ill. R. Evid. 410 (2011). Given the broad language, Rules 402(f) and 410 should be read to bar statements made in exchange for a plea deal.

The rationale underlying Rules 402(f) and 410 supports barring such statements. As recently as 10 years ago, pleas accounted for nearly 95% of all criminal convictions. *Padilla v. Kentucky*, 559 U.S. 356, 372 (2010). Accordingly, the plea-bargaining process and negotiated plea agreements are vital to, and highly desirable for, our criminal justice system. *People v. Evans*, 174 Ill. 2d 320, 325 (1996). Plea bargaining leads to the prompt disposition of cases, preserves finite judicial and financial resources, and allows the State to focus its prosecutorial efforts where they are most needed. *People v. Boyt*, 109 Ill. 2d 403, 416 (1985). When properly administered, plea bargaining is to be encouraged. *Evans*, 174 Ill. 2d at 325; *People v. Donelson*, 2013 IL 113603, ¶ 18; see also *Blackledge v. Allison*, 431 U.S. 63, 71 (1977) ("Whatever might be the situation in an ideal world, the fact is that the guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system. Properly administered, they can benefit all concerned"); *Santobello v. New York*, 404 U.S. 257, 261 (1971) ("Disposition of charges after plea discussions is not only an essential part of the process but a highly desirable part for many reasons").

The purpose of Rules 402(f) and 410 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 Rules derive from "the inescapable truth that for plea bargaining to work effectively and fairly, a defendant must be free to negotiate without fear that his statements will later be used against him." *United States v. Herman*, 544 F.2d 791, 796 (5th Cir. 1977). The Rules allow plea discussions to be conducted in an atmosphere of candor (*People v. Hill*, 78 Ill. 2d 465, 472 (1980)), and, absent

such a shield provided under the Rules, "the possibility of self-incrimination would discourage defendants from being completely candid and open during plea negotiations". *United States v. Davis*, 617 F.2d 677, 683 (D.C. Cir. 1979) (internal quotation marks and citation omitted). Thus, the rule of inadmissibility both encourages and protects a free plea dialogue between the accused and the government. *United States v. Robertson*, 582 F.2d 1356, 1366 (5th Cir. 1978).

Allowing the use of a defendant's statement given to a prosecutor in performance of a plea deal would have a chilling effect on plea discussions, contrary to their benefit to the criminal justice system. Prosecutors will increasingly demand recorded admissions as part of plea deals because such statements would be admissible at a later trial. Given the potential costs of having such confessions admitted at a subsequent trial, criminal defendants will be wary about making such statements in case a plea deal, for whatever reason, falls through. Thus, no properly advised defendant would give a statement in exchange for sentencing concessions if such statements could be used against him or her if the deal fell through. See *People v. Morris*, 79 Ill. App. 3d 318, 332 (1st Dist. 1979) (stating, "no properly advised defendant will fully and candidly participate in such negotiations if statements made during the negotiations may be used against the defendant when negotiations fail."). Thus, allowing the use of statements that are given in performance of a plea deal would inhibit plea discussions and reduce the number of guilty pleas, ultimately straining overtaxed judicial resources. See *United States v. Mezzanatto*, 513 U.S. 196, 211 (1995) (Ginsburg, J., concurring) (finding that, even a voluntary waiver allowing the use of statements made during plea negotiations would "severely undermine a defendant's incentive to negotiate, and thereby inhibit plea bargaining").

Furthermore, if a statement given as part of a negotiated deal was deemed admissible, such statement would be admissible regardless of who breached the agreement. If the defendant breached the agreement, the statement would be admissible. Yet, in promulgating the Rules, this Court did not place any sort of liquidated damages provision against criminal defendants, and none should be read into the Rules. A criminal defendant's penalty for breaching a plea deal is the loss of the deal itself, and allowing the State to use a defendant's statement that was given as part of a plea agreement unfairly penalizes him or her. Likewise, if the State breached the agreement or if a term of the deal was void, the statement would still be admissible.

The inequity in allowing a defendant's negotiated statement to be admitted if either party breached the agreement is particularly apparent in the instant context. Defendant pled guilty in exchange for a 35-year sentence (C150; R241). ASA Kauzlerich presented the factual basis (R246-47). She stated 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. Thus, the minimum available sentence for defendant's offense was 45 years' imprisonment. 720 ILCS 5/5-4.5-20(a) (2010); 720 ILCS 5/5-4.5-20(a) (2010). His 35-year sentence was not statutorily authorized, and, at the time it was imposed, it was void. *White*, 2011 IL 109616, ¶ 21; *People v. Arna*, 168 Ill. 2d 107, 113 (1995) (abrogated by *People v. Castleberry*, 2015 IL 116916).

The court and the State posited that the charge could have been amended to eliminate the firearm language (C289-90). This same position was rejected in *White*, 2011 IL 109616, ¶ 25. There, this Court found, "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. *Id.* ¶ 27.

Arguably then, the State breached the agreement when it presented a factual basis that included language showing that defendant used a firearm in the offense. Construing Rules 402(f) and 410 to allow a statement to a prosecutor as part of a plea deal to be used in a subsequent trial would permit the State to breach an agreement and then use the statement. But, the Rules are applicable regardless of which party breached the deal.

Additionally, the admission of statements made in exchange for sentencing concessions would be unfair to a criminal defendant. Fundamental fairness requires protections for a criminal defendant providing a statement in performance of his plea obligations if that statement is admissible against him. See *Hutto v. Ross*, 429 U.S. 28, 30 (1978) (quoting *Bram v. United States*, 168 U.S. 532, 542-43 (1897)) (the test for voluntariness includes a determination of whether the confession was "obtained by any direct or implied promises, however slight"); *People v. Martin*, 102 Ill. 2d 412, 430 (1984) (confessions "acquired by trick, promises, or threats" are inadmissible); *People v. Navarroli*, 121 Ill. 2d 516, 523 (1988) (due process principles govern the enforceability of plea agreements); *People v. Stapinski*, 2015 IL 118278, ¶ 51 (the essence of due process is fundamental fairness).

In this case, defendant obtained the assistance of counsel (C11, 35; R4). He denied any involvement in the offense at his first interview (C325; People's Ex. No. 5). Prior to giving the statement at issue, he was not advised that he was waiving his right against self-incrimination, nor was he informed that the statement would, or could be used against

him (People's Ex. No. 6; EX 2, audio disc 2). Had it been contemplated that defendant's statement could be used against him if he breached the deal, such a term should have been part of the agreement. See *United States v. Bowler*, 585 F.2d 851, 854 (7th Cir.1978) (stating that, in the context of a criminal proceeding, the language of any agreement should be construed most strongly against the State). Defendant's statement should not have been admissible in his subsequent trial where his confession was not an independent admission and he was not warned that it could be used against him.

Defendant acknowledges that, when the court allowed him to withdraw his plea, the State said that it could use his statement at a later trial (C290-91). Nevertheless, any admonition at the hearing on defendant's motion to withdraw his plea came way too late to warn defendant that his statement, given nearly a year earlier, could be used at a subsequent trial. For all of these reasons, statements made to a prosecutor in performance of a plea deal should not be admissible at a subsequent trial when the deal falls through.

Even if this Court should find that a statement given in performance of a plea deal is admissible, the statement at issue here was given before the agreement had been reached, during plea discussions, and was therefore inadmissible under Rules 402(f) and 410. The record shows that defendant was required to provide a "truthful" statement (C399, 405-06, 401-02; R214, 225, 227). ASA Kauzlerich was present in order to direct the conversation and to ensure that defendant's statement was adequate (EX 2, audio disc 2 at 39:30-39:50, 47:40). Upon completion of the interview, Dalton confirmed that the ASA was sufficiently satisfied with defendant's statement and that she agreed to accept it (EX2, audio disc file 1 at 1:30; audio disc file 2 at 54:30). Thus, a critical condition of the proposed agreement, termed a "proffer" by Kauzlerich (R109), was

that defendant give a "truthful" statement. Indeed, the circuit court found that defendant was required to give a truthful confession to the State as part of any potential agreement, and, if defendant had not given a truthful statement, "the deal would have been off" (R225, 227). Because it was up to the State to determine whether defendant's statement was sufficient to satisfy the terms of the deal, no deal was in place until the statement was accepted. Simply put, had defendant not given a sufficiently adequate statement, ASA Kauzlerich would have rejected it, and any anticipated agreement would have foundered.

Dalton's statement at the end of the video shows that discussions were ongoing until the State accepted defendant's statement as adequate. Illinois' courts do not require a preamble explicitly demarcating the beginning of plea discussions. *Friedman*, 79 Ill. 2d at 352. But, where a preamble is delivered, it cannot be ignored. *Id.* at 352. Similarly, reviewing courts should not require a specific statement exhibiting the culmination of discussions and formation of an agreement. However, Dalton's statement at the end of the confession, where he said he was going to talk to "these guys" to "make sure we're good", showed that plea discussions would not culminate in a plea deal until the State accepted the statement. Therefore, no deal was in place until the confession was complete and deemed adequate, and defendant's statement was given before the termination of plea discussions.

The State's purpose in obtaining the "truthful" statement further supports defendant's interpretation. There was no written agreement. However, it is apparent that the State wanted to use defendant's confession against the co-defendants who had previously denied any involvement in the offenses (C324-25). *People v. Eubanks*, 2014 IL App (3d) 130021-U, ¶¶ 15-16. In order for defendant's cooperation to be of any

utility, his potential testimony would have to be beneficial to the State. If defendant did not have any useful information, the State could not use defendant as leverage against the co-defendants or use his testimony in trial proceedings against them. It was therefore critical for the State to first find out what defendant had to say before it would agree to any sentencing concessions. Consequently, defendant's "truthful" statement constituted a condition that defendant had to fulfill before the State would agree to a 35-year sentence, showing that discussions were ongoing until the State agreed that the statement was adequate.

The State's use of the term "proffer" to describe the agreement is particularly noteworthy. At the stipulated bench trial, ASA Kauzlerich said that detectives Noe and Karzin "interviewed the defendant pursuant to a proffer agreement" (C325; R108). "Proffer" means "to offer or tender for immediate acceptance". Black's Law Dictionary, p.1226 (7th Ed. 1999). See *People v. Weinke*, 2016 IL App (1st) 141196, ¶41 (describing an evidence "proffer" as showing "what the offered evidence is or what the expected testimony will be, by whom it will be presented and its purpose."); *United States v. Goodapple*, 958 F.2d 1402, 1409 (7th Cir. 1992) (describing the defendant's "proffers" as statements given to the prosecutor in furtherance of a possible plea).

In the instant context, the "proffer" was defendant's statement detailing the evidence that he would provide to the State. The "proffer agreement" was the preliminary agreement between the State and defendant; defendant would provide evidence of what he knew, and the State would agree to accept his statement if it was adequate. Thus, the "proffer agreement" amounted to an agreement to reach an agreement predicated on a condition; that defendant's statement was true, or, at least, sufficiently useful to the State. Consequently, in using the term "proffer", the State implicitly acknowledged that it

was necessary for the State to establish the utility of defendant's statement before any deal would be concluded. See *United States v. Farmer*, 543 F.3d 363, 374 (7th Cir. 2008) (stating, "We hold the government to 'the literal terms' of the agreement, as well as the 'most meticulous standards of both promise and performance' to insure the integrity of the bargaining process involved in proffers"). Thus, the statement came during the negotiation process, not after it. See *United States v. Dortch*, 5 F.3d 1056, 1068 (7th Cir. 1993) (stating, "absent a waiver, proffer statements are generally not admissible against a defendant").

In *People v. Mack*, 105 Ill. 2d 103 (1984), *vacated on other grounds by Mack v. Illinois*, 479 U.S. 1074 (1987), this Court discussed the effect of a similar condition on an agreement. There, the defendant alleged that the prosecutor had entered into an agreement whereby the defendant would plead guilty in exchange for a natural-life sentence. *Mack*, 105 Ill. 2d at 116. In discussing the nature of the negotiations, defense counsel said that the State had accepted the proposed deal, subject only to the approval of the victim's family. *Id.* The family did not approve, and the defendant was tried under death-penalty provisions. *Id.* at 117.

The circuit court found that the family's willingness to go along with any deal "was made very definitely a condition precedent to any kind of an agreement by the State." *Id.* at 117. It said, "I do not think, considering all the attendant circumstances, that there was at any time an unconditional acceptance of the offer to plead by the State's Attorney's office." *Id.*

On review, this Court determined, "The trial court's holdings both in ruling on the motion to enforce the alleged plea bargain prior to trial, and on the defendant's motion for a new trial, were that the State's Attorney's office had never accepted the defendant's

offer to plead guilty." *Id.* This Court agreed with the trial court and affirmed. *Id.* Thus, the family's acceptance of the deal amounted to a condition that had to be met before the agreement could be reached. The condition was not satisfied, and there was no agreement.

Similarly, here, the State sought defendant's truthful statement. The State had to accept defendant's statement before any deal was reached. If defendant had refused to give any statement, there would have been no agreement. If defendant had stopped talking halfway through the interview, there would not have been a deal. And, if defendant had not given the State what it wanted, the State could have simply declared "no deal" and walked away from the negotiations process. Thus, there was no agreement until the statement was finished and the State agreed that the statement was adequate. Therefore, defendant's statement was given before a plea agreement had been reached; during the course of plea discussions, and it was inadmissible under Rules 402(f) and 410.

In rejecting defendant's argument that his statement was given during the course of plea discussions, the appellate court relied on *People v. Saunders*, 135 Ill. App. 3d 594 (2d Dist. 1985). *Eubanks*, 2020 IL App (3d) 180117, ¶¶ 25-26. There, a murder case, the parties entered into a negotiated agreement prior to any statements by the defendant. *Saunders*, 135 Ill. App. 3d at 596. According to the terms of the deal, Saunders agreed to give a full and complete statement as to his knowledge of the murder and to testify against any co-defendant who was arrested as a result of his statement. *Id.* at 597.

In exchange for defendant's cooperation, the prosecutors agreed to charge defendant with concealment of a homicide if, based upon his statement, Saunders could not be charged as a principal in the murder. *Id.* The prosecutor further agreed to recommend

that defendant be sentenced to probation if, based on Saunders' statement, he had not physically contributed to the death of the victim. However, if defendant did physically contribute to such death, "but said contribution did not rise to the level of a principal in the offense," the prosecutor would recommend a sentence of two years' imprisonment. The agreement also provided that the deal would no longer be valid if Saunders withheld information from the police. *Id.*

After the negotiated agreement was reached, Saunders gave several statements about his knowledge of the murder. *Id.* at 597. But, at his co-defendant's trial, it was revealed that Saunders had placed a syringe of air into the victim's arm, a fact Saunders had not disclosed in his prior statements. *Id.* at 598.

Saunders moved to suppress his statements under Rule 402(f). *Id.* At the hearing on the motion, the prosecutor admitted the existence of the agreement and the substance of its terms, but asserted that defendant had not given a full and complete statement prior to the trial of his co-defendant because the defendant had not disclosed his full participation in the murder. *Id.* at 597-98. The trial court allowed the State to admit the statement made to the prosecutor and the testimony from the co-defendant's trial at Saunders' trial. *Id.* at 598. The reviewing court determined that Saunders' statements were admissible because 1) the statements were made after the agreement had been reached, and 2) it was defendant who breached the agreement. *Id.* at 606.

In doing so, the *Saunders* Court first determined that there were no Illinois cases "dealing with statements made after a negotiated agreement has been reached." *Id.* at 604. Therefore, it relied on a line of federal cases that can be traced back to the Second Circuit's decision in *United States v. Stirling*, 571 F.2d 708 (2d Cir. 1978). *Saunders*, 135 Ill. App. 3d at 605-06. In *Stirling*, 571 F.2d at 730, the pertinent defendant, Shulz,

entered into a written plea agreement. The agreement provided that Schulz' statements could be used against him if he breached the agreement. *Id.* at 732. The next day, he testified before a grand jury, providing incriminating information. *Id.* at 730. Schulz subsequently withdrew from the plea agreement, pleaded not guilty, and went to trial. *Id.*

Schulz' testimony before the grand jury was admitted as evidence against him, and he was found guilty. *Id.* The reviewing court found that Schulz' testimony was admissible in his subsequent trial, notwithstanding Rule 402(f)'s federal counterparts: Rule 11 of the Federal Code of Criminal Procedure and Federal Rule of Evidence 410. *Id.* at 731 (citing Fed. R. Crim. P. 11(e)(6) (1978), and Fed. R. Evid. 410 (1978)).[7]

The line of cases beginning with *Stirling* and including *Saunders* is readily distinguishable. Initially, Schulz made his statement to the grand jury. His statement was not made to the prosecutor or to the police, and the grand jury simply had no involvement in "plea discussions". *Stirling*, 571 F.2d at 731.[8]

Here, by contrast, defendant made his statement to the police detectives who were investigating the offenses, with the prosecuting attorney right outside the room

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[7] The Federal Rules were subsequently amended in 1980 so as to require that the statement be made "in the course of plea discussions with an attorney for the prosecuting authority." *People v. Hart*, 214 Ill. 2d 490, 502 (2005). Illinois Supreme Court Rule 402(f) was enacted in 1970 and has remained unchanged since at least 1972. See *People v. Steptore*, 51 Ill. 2d 208, 217 (1972) (quoting Rule 402(f)).

[8] *Saunders* also relied on *Davis*, 617 F.2d 677. *Davis* presented the same factual scenario as *Stirling*; in exchange for a plea deal, the defendant gave an admission to the grand jury, and his statement was subsequently admitted at his trial. *Davis*, 617 F.2d at 681. The *Davis* court adopted the holding in *Stirling* but not the entirety of its rationale, stating, "For now, we conclude . . . statements made by a defendant in testimony before a grand jury pursuant to a plea agreement are not 'statements made in connection with, and relevant to' plea negotiations, offers of pleas, or pleas entered and later withdrawn." *Id.* at 686.

watching the interview and texting questions to one of the detectives (R201-02, 212-21; People's Ex. No. 6). This Court has previously addressed the importance of the prosecutor during plea negotiations. In *People v. Hart*, 214 Ill. 2d 490 (2005), the defendant asked a police officer what the officer could do for him if he cooperated. *Hart*, 214 Ill. 2d at 495. The officer told the defendant that he could not make any promises, but would inform the prosecutor of any cooperation. *Id.* This Court found that offers to cooperate, without more, do not constitute plea negotiations or offers to enter into plea negotiations. *Id.* at 507. It further noted that the defendant had not asked what concessions the *prosecutor* might offer him, and failed to initiate contact with the State's Attorney's office or convey his terms to the prosecutor. *Id.* at 511 (emphasis in original). Cases addressing statements made to some individual or entity other than the prosecutor are not on point.

Additionally, in *Stirling*, Schulz had agreed that his statement could be used against him if his plea fell through. His deal provided,

> "(S)hould it be judged by [the prosecutor's] office that Mr. Schulz has . . . violated any provision of this agreement, this agreement shall be null and void and Mr. Schulz shall thereafter be subject to prosecution for any federal criminal violation . . . Any such prosecutions may be premised upon any information provided by Mr. Schulz, and such information may be used against him."

Stirling, 571 F.2d at 732. Thus, Schulz' negotiated deal allowed for the use of his statement if his agreement was not realized. Likewise, in *Saunders*, the defendant agreed that the deal would no longer be valid if he withheld information from the police, he withheld information from the police, and his deal was no longer valid. *Id.* at 597-98. See also,

United States v. Jones, 469 F.3d 563, 567 (6th Cir. 2006) (holding that Jones' statement was admissible where the agreement allowed the government to use the statement if he violated its terms, and Jones' withdrawal of his plea violated its terms). In the instant matter, there was no similar term.

The *Stirling* court also found that Schultz should not benefit from the Federal Rules because it was he who breached the agreement. *Id.* at 736. Similarly, in *Saunders*, 135 Ill. App. 3d at 606, the court focused on who breached the agreement.

This Court, like other jurisdictions, should reject the *Saunders-Stirling* rationale on this point. If the defendant is the breaching party, his penalty for breaching a plea deal is the loss of the deal itself. *Eubanks*, 2020 IL App (3d) 180117, ¶ 44 (McDade, J., dissenting); *State v. Hanson*, 382 S.E.2d 547, 556 (W. Va. 1989) (distinguishing *Saunders* and holding that statements obtained after the parties entered into a cooperation agreement could not be used against a defendant in a subsequent trial even if the defendant breached the agreement); see also, *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"). Additional penalties for a breach of an agreement are not contemplated by the Rules. Aptly stated, "If statements made by an accused person during plea bargain negotiations are admissible if that person decides to change the plea after the plea bargain is struck, then [the federal counterparts to Rules 402(f) and 410] would be so circumscribed in their applicable scope that the rules would be rendered effectively meaningless." *United States v. Grant*, 622 F.2d 308, 315 (8th Cir. 1980). It was the State who approached defendant with a proposed deal (R201). If the State wanted to use defendant's statement

against him in a subsequent trial in case of a breach, the State should have included such a provision in the agreement.

Furthermore, a defendant does not have the absolute right to withdraw a guilty plea. *People v. Hughes*, 2012 IL 112817, ¶ 32. Rather, he must show a manifest injustice under the facts involved. *Hughes*, 2012 IL 112817, ¶ 32. Withdrawal is only appropriate where the plea was entered through a misapprehension of the facts or of the law or where there is doubt as to the guilt of the accused and justice would be better served through a trial. *Id.*, ¶ 32. When the circuit court allows a defendant to withdraw his guilty plea, it has good reason for doing so. "Refusing to admit statements made in conjunction with a plea rejected or withdrawn, by returning the defendant to where he would have been had he not offered or entered the plea, effectuates the court's decision that rejection or withdrawal is proper." *Davis*, 617 F.2d at 686. Thus, allowing statements to be admitted for a decision the circuit court has determined to be appropriate unfairly punishes a defendant.

Critically, it is clear that the agreements in *Saunders* and *Stirling* had been finalized before any statements were made. In *Saunders*, the defendant's motion to suppress stated that the parties had entered into a negotiated agreement before Saunders gave any statement. *Saunders*, 135 Ill. App. 3d at 596. The court framed the issue as one "dealing with statements made after a negotiated agreement has been reached." *Id.* at 604. And, the agreement called for differing consideration dependant upon the defendant's stated involvement in the offense. *Id.* at 597.

In *Stirling*, the decision shows that there had been a written agreement before Schultz gave his testimony to the grand jury. *Stirling*, 571 F.2d at 732; see also, *Davis*, 617 F.2d at 681, 684 (finding that the agreement had been formalized before the statement

at issue had been made). This fact determined the case; the court easily found that any negotiations had been concluded by the time Schulz went before the grand jury. *Id.* at 731-32.

Here, the record shows that defendant was required to give a "truthful" statement (C399, 405-06, 401-03; R209-10, 214-15, 225, 241-43). It was up to ASA Kauzlerich whether or not to accept defendant's statement after it was given. Thus, without the finalization of the agreement at the time of the statement, this Court should find that defendant's confession was made in the course of plea discussions.

Analogous caselaw provides persuasive support for defendant's position. In *Grant*, 622 F.2d at 310, Grant received a phone call from a Federal Bureau of Investigations (FBI) agent and was asked to appear for an interview. The FBI agent informed the defendant of an investigation regarding his alleged involvement in a kickback scheme with vendors who sold merchandise to the county where Grant was a judge. *Id.* at 310. The prosecutor agreed to allow Grant to plead to a one-count indictment in exchange for his cooperation, and Grant gave an incriminatory statement. *Id.* Grant indicated that he wanted to see the prosecutor to further explore the suggested plea bargain. *Id.* at 311.

The following day, Grant made two further incriminating statements to FBI agents. *Id.* He then met with the prosecutor and was told that he did not have to say anything, but expressed a willingness to cooperate. The prosecutor told him that he was the subject of an investigation and that his case was going to be presented to the next grand jury. The prosecutor also told Grant that if he continued to cooperate, he would be charged in a one-count indictment and that both the court and the probation office would be informed of his assistance. Grant made another incriminatory statement, and he was

indicted on one count of engaging in racketeering. Two days later, Grant appeared at an FBI office, expressed a fear of incarceration, and stated that he would be willing to pay a substantial fine in lieu of a prison sentence. The district court ruled that all of the statements were inadmissible. *Id.* The government appealed.

The reviewing court initially held that the statements made to the FBI agent on the first day amounted to plea discussions. *Id.* at 314. Regarding the statements made the second day, the court held, "It seems clear that [Grant] was seeking to pursue the offer made to him on the preceding day. The admissions he made before meeting with [the prosecutor] were produced, in our view, as a part of the plea bargain negotiation process as he understood it. And, *a fortiori*, the statements [Grant] made to [the prosecutor] are inadmissible." *Id.* at 315.

The court went on to reject the government's position that the defendant's statements should be admissible because it was he who subsequently breached the plea agreement. *Id.* It found that allowing the use of plea discussions made by a defendant simply because the defendant withdraws his plea would render the Federal rules barring the admission of plea discussions meaningless. *Id.* However, the court held that the final statement, made at the FBI office, was made after the deal had been reached. *Id.* at 315. Notably, the court found that the deal was that Grant would cooperate in exchange for an opportunity to plead to a one-count bill of indictment, Grant had cooperated, the one-count indictment had come down, and the deal was final. *Id.* at 316.

In *United States v. Watkins*, 85 F.3d 498, 499 (10th Cir. 1996), the defendant entered into plea negotiations with the prosecutor. During a meeting held on May 19 attended by Watkins, his attorney, the prosecutor and law enforcement personnel, Watkins gave a proffer of the information that he could provide the government, which included

his participation in drug offenses and the name of his supplier. *Watkins*, 85 F.3d at 499. After evaluating the proffer information, the prosecutor agreed to a plea agreement with Watkins. *Id.* On June 7, after the parties entered into a written plea agreement, Watkins was debriefed by DEA agents, and he provided the same information that he had given on May 19. The agreement provided that, if Watkins breached the deal, information he provided to the government could be used against him. The next day, Watkins breached the agreement by escaping from a halfway house. *Id.* At his subsequent trial, the district court barred the May 19 statement but allowed the June 7 statement to be introduced as evidence. *Id.* at 499.

The question before the reviewing court was whether "statements made by a criminal defendant pursuant to, but subsequent to the finalization of, a plea agreement [were] entitled to protection" under the Federal Rules. *Id.* at 500. The reviewing court, relying on *Stirling* and *Davis*, answered the question in the negative. *Id.* Watkins further argued that his June 7 statement should be excluded because it was essentially the same as the statement made on May 19. The court dismissed the argument, but in doing so, it acknowledged that the May 19 statement was made during the negotiation process. *Id.*

In *United States v. Serna*, 799 F.2d 842, 848-49 (2d Cir. 1986), one defendant, Cinnante, argued that the statement of his co-defendant, Serna, should have been admissible at Cinnante's trial. Serna and his attorney had met with Drug Enforcement Agency (DEA) agents and the prosecutor to discuss the possibility of Serna's cooperation. *Serna*, 799 F.2d at 848. The prosecutor told Serna that statements would not be used against him but that his cooperation had to be total. To determine Serna's sincerity, a DEA agent questioned him. *Id.* Serna was less than forthcoming, the agent determined

that Serna's cooperation was a sham and ended the interview, and no further discussions took place. *Id.* at 848-49. The reviewing court found that Serna's preliminary discussion was part of the overall plea bargaining process, "[i]n light of the initial meeting with the prosecutor". *Id.* at 849. Serna's statement was therefore deemed inadmissible at Cinnante's trial because it was made during plea discussions. *Id.* at 848.

In *People v. Ragusa*, 346 Ill. App. 3d 176, 181, 187 (2d Dist. 2004), the defendant was taken into police custody after the execution of a warrant and the recovery of drugs. The police allowed the defendant to speak with his uncle who was a police officer for a neighboring jurisdiction. *Ragusa*, 346 Ill. App. 3d at 187. The defendant and his uncle spoke about cooperating and working out a deal to get the defendant's charges reduced. *Id.* The defendant attempted to purchase drugs from his suppliers, but was unsuccessful. *Id.* at 179, 187. The reviewing court determined that the statements to the uncle and to the police about cooperating, and the attempts to implicate others in performance of the cooperation agreement were inadmissible under Rule 402(f). *Id.* at 186-87.

In *State v. Campoy*, 207 P.3d 792, 795 (Ariz. Ct. App. 2009), the State provided a letter to the defendant, Crockwell, stating that, if he was interested in obtaining a non-trial resolution of the charges and was willing to assist law enforcement, he would be required to participate in "a debriefing" or "free talk." The letter further provided that, once the State had the opportunity to evaluate the information Crockwell provided, it would decide whether to make an offer. *Campoy*, 207 P.3d at 795-96. Crockwell met with police officers and admitted to his participation in the offense. *Id.* at 796. The defendant and the prosecutor entered into a plea agreement whereby Crockwell would testify truthfully against his co-conspirators. The agreement further provided that, if

the prosecutor believed Crockwell was being untruthful, it could declare the agreement "null and void". *Id.*

Crockwell thereafter made two additional statements, the second of which was inconsistent with his first statement. *Id.* The court allowed the State to withdraw from the agreement. The trial court later allowed Crockwell's motion to bar the admission of all of the statements, and the government appealed. *Id.* at 796-97.

Relying on *Davis* and *Stirling*, the reviewing court found that the statements made after the plea deal had been reached were admissible. *Id.* at 801. But, the court found that the first statement, made during the "debriefing" or "free talk", was protected by Arizona's version of Illinois Rules 402(f) and 410. *Id.* at 802. The court nevertheless held that the statement was admissible based on language in the defendant's agreement allowing the State to admit the statements if the defendant was not truthful. *Id.* at 801-04.

In *State v. Myrick*, 848 N.W.2d 743, 746 (Wis. 2014), Myrick and his co-defendant, Winston, were involved in a murder. Myrick claimed that he shot at the victim but missed and that Winston was the person who riddled the victim with bullets. *Myrick*, 848 N.W.2d at 746. The State made a written offer to Myrick; Myrick would cooperate in the case against Winston in exchange for an amended charge and a sentencing recommendation. *Id.* at 746-47. The letter further stated that, "as part of this negotiation", Myrick agreed to testify truthfully against Winston, and, that if he did so, the State "would" amend the charge, and "would" recommend a specific range of sentence. *State v. Myrick*, 839 N.W.2d 129, 130-31 (Wis. App. 2013). The letter went on to say that "it w[ould] be at the discretion of [the] district attorney's office . . . as to whether the above negotiation will be conveyed to [Myrick] to settle the . . . case short of trial." *Myrick*, 848 N.W.2d at 747. Myrick was "debriefed" by the police and testified against Winston at Winston's

preliminary hearing. *Id.* at 747. Myrick refused to cooperate further, and the statements he made at the preliminary hearing were admitted at trial. *Id.*[9]

The Wisconsin Supreme Court first found that the State was prepared to offer Myrick concessions if he complied with the State's requirements and that Myrick had testified at the preliminary hearing in connection with his offer to plead guilty, which the State had not yet accepted. *Id.* at 752. The court distinguished prior precedent, which relied on *Stirling* and *Davis*, finding that Myrick's plea-bargaining with the State was ongoing and still in flux when he testified at Winston's hearing. *Id.* at 753. It found that the State's discretionary consideration subjectively depended on the value of Myrick's testimony to the State's case. *Id.* The court further held that Myrick's breach of the deal did not make his testimony admissible; rather, his breach merely allowed the State to amend the charges and make different sentencing recommendations. *Id.*

In *State v. Jollo*, 685 P.2d 669, 670-71 (Wash. Ct. App. 1984), as a condition to entering plea negotiations, the State requested Jollo be evaluated concerning his amenability to treatment. The defendant agreed, was examined and, during the exam, made several incriminating statements. *Jollo*, 685 P.2d at 670. The plea deal fell through, and statements to the therapist were admitted at Jollo's subsequent trial. *Id.* at 670-71.

On appeal, the defendant argued that his statements were inadmissible under Washington Rule of Evidence 410, the functional equivalent of Illinois' Rules 402(f) and 410. *Id.* at 671. Citing *Stirling*, the reviewing court observed, "In some cases, suppressing statements made after a plea agreement will not serve [Rule 410's] purpose of fostering plea negotiations." *Id.* But, the court held that the defendant's statements

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[9] Myrick's statement made during the de-briefing (also termed a "proffer" by the State, *(Myrick*, 839 N.W.2d at 131)), was not admitted at his trial.

to the therapist amounted to "statements made in connection with an offer to plead guilty" and were therefore inadmissible under its rules barring plea discussions. *Id.* It also rejected the State's argument that the statements should be admitted because it was the defendant who breached the plea deal, finding that its rules applied regardless of who breached the agreement. *Id.* at 671-72.

Entirely contrary to the circumstances in the instant case, in *United States v. Knight*, 867 F.2d 1285, 1287 (11th Cir. 1989), the pertinent defendant, Garrison, was offered a plea agreement by a DEA agent acting on behalf of the prosecutor. Garrison admitted that she accepted the offer. *Knight*, 867 F.2d at 1287-88. After the deal was reached, she started answering questions posed by the agent. *Id.* at 1287. The agent did not believe Garrison was being candid and terminated the interview. Garrison testified at her trial, and her statements to the agent were admitted as impeachment evidence. *Id.* The reviewing court held that Garrison's statements were not made during the negotiation process; rather, they were given after the plea contract had been formed. *Id.* at 1288. Relying on *Stirling* and *Davis*, the court held that the statements were admissible. *Id.*

In *United States v. Lloyd*, 43 F.3d 1183, 1185 (8th Cir. 1994), Lloyd signed a written plea agreement stating that he would divulge information about his case and assist the government with investigations into drug trafficking. The agreement provided that any statement Lloyd made pursuant to its terms could be used at a subsequent trial if he breached the deal. *Lloyd*, 43 F.3d at 1185. Lloyd withdrew from the agreement and his statements were admitted at his trial. *Id.*

Citing *Grant*, *Knight*, and *Davis*, the reviewing court found that Lloyd's statements were admissible because they were made after Lloyd had entered into the written

agreement and pursuant to its terms. *Id.* at 1186. It specifically found that, once Lloyd signed the agreement, negotiations terminated. It further noted that the agreement specified that the statements would be admissible if Lloyd breached the deal. *Id.*

In *Meece v. Commonwealth.*, 348 S.W.3d 627, 646 (Ky. 2011), Meece argued that videotaped statements he made "subsequent to his entering into and executing a plea agreement" should have been suppressed. Under the terms of the agreement, the Commonwealth would recommend a specific sentence in exchange for Meece's truthful statements regarding his involvement in the murders at issue and to testify against his co-defendant. *Meece*, 348 S.W.3d at 646. Immediately following the execution of the plea agreement, Meece gave his first recorded statement detailing his involvement in the murders. Subsequently, Meece pled guilty. *Id.* The trial court later allowed Meece to withdraw his guilty plea.[10] *Id.* at 647.

On appeal, Meece argued that his post-agreement statements should have been inadmissible because they were given during plea negotiations. *Id.* at 647-48. The Kentucky Supreme Court, relying on cases that can be traced back to *Stirling* and *Davis*, held that the parties "discussed, negotiated, and executed a formal plea agreement *prior* to [Meece's] statements." *Id.* at 649 (emphasis in original). In fact, the court found, Meece had stipulated that "[n]o additional plea discussions or negotiations regarding any term of the plea agreement were had after the written plea offer and motion to enter a plea of guilty were executed by the parties." *Id.* The court held, "Once a cooperation plea agreement is negotiated, a defendant's cooperation thereafter is not solicitation, discussion or negotiation of a plea, but rather, compliance." *Id.* at 650.

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[10] The decision does not articulate the trial court's basis for allowing Meece to withdraw his plea.

A review of the authority discussed above provides the framework for determining the admissibility of a statement made in conjunction with a plea deal. Where the statements were given after the agreement had been finalized, the statements were not made during plea discussions and were admissible. *Saunders*, 135 Ill. App. 3d at 604, 606; *Stirling*, 571 F.2d at 732; *Davis*, 617 F.2d at 681, 684; *Knight*, 867 F.2d at 1287; *Lloyd*, 43 F.3d at 1186; *Grant*, 622 F.2d at 315-16, *Watkins*, 85 F.3d at 500; *Campoy*, 207 P.3d at 796; *Meece*, 348 S.W.3d at 649-50. In most of these cases, the agreement was in writing (*Stirling*, 571 F.2d at 732; *Davis*, 617 F.2d at 681; *Lloyd*, 43 F.3d at 1186; *Watkins*, 85 F.3d at 499; *Campoy*, 207 P.3d at 796; *Meece*, 348 S.W.3d at 646, 649), or the defendant admitted or argued that an agreement had been reached before the statement was given (*Saunders*, 135 Ill. App. 3d at 596; *Knight*, 867 F.2d at 1287). Of further import, in several of these cases, the defendant had agreed that his or her statement would be admissible if he or she breached the deal. See *Stirling*, 571 F.2d at 732; *Davis*, 617 F.2d 677; *Watkins*, 85 F.3d at 499, *Lloyd*, 43 F.3d at 1185; *Campoy*, 207 P.3d at 801-04.

On the other hand, where the statements were given *before* the agreement was finalized, the statements were deemed inadmissible. *Grant*, 622 F.2d at 314-15, *Watkins*, 85 F.3d at 500; *Serna*, 799 F.2d at 849; *Campoy*, 207 P.3d at 802; *Myrick*, 848 N.W.2d 743 at 752-53; *Jollo*, 685 P.2d at 671.

Here, the statements were given before the agreement was finalized, and the instant case falls within the latter line of cases. Initially, there was no written agreement. But, both Dalton and defendant testified that defendant would have to give a truthful statement in order to obtain the deal (R203, 213-14, 216). This testimony went unrebutted.

The video shows that Dalton left the room after defendant had completed the statement to converse with ASA Kauzlerich to "make sure we're good" (EX 2, audio file 1 at 1:30; audio file 2 at 54:30). Kauzlerich referred to the statement as a "proffer", meaning that she understood that defendant was giving the statement in an attempt to reach a deal (C325; R108). As found by the trial court, if defendant's statement did not comport to the State's version of what it believed to be true, there would have been no agreement (R225, 227). Thus, the record shows that it was up to the State to determine whether it would accept defendant's offered statement before there was an agreement. Consequently, there was no plea agreement until the State accepted defendant's statement as truthful, the statement was given during plea discussions, and it was inadmissible under Rules 402(f) and 410.

Finally, *People v. Connery*, 296 Ill. App. 3d 384 (3d Dist. 1998), which the appellate court also relied on, is wholly inapplicable. There, the defendant and James Rogers were charged in the stabbing death of Melissa Osman. *Connery*, 296 Ill. App. 3d at 386. The defendant confessed to the police in a video-taped statement. *Id.* He later entered into an agreement with the State whereby he would plead guilty and testify truthfully against Rogers in exchange for a 55-year sentence. At his guilty plea hearing, the State examined the defendant, eliciting testimony that his confession was truthful and voluntary. *Id.*

The State never called defendant to testify against Rogers. *Id.* Nonetheless, the defendant requested that the 55-year sentence be imposed. The State objected, asserting that it was not bound by the agreement because the defendant never testified against Rogers. The circuit court agreed with the State, but it allowed the defendant to withdraw his guilty plea. *Id.* At his trial, the defendant claimed his confession was coerced, and

the State impeached him with his testimony at the guilty plea proceeding wherein he stated that his confession was true and voluntary. *Id.* at 387.

On appeal, the defendant asserted that his testimony should not have been admitted under Rule 402(f). *Id.* at 387-88. The State argued that the statement was not protected because it was given after the defendant pled guilty. *Id.* at 388. The Appellate Court, Third Judicial District, agreed with the State. Specifically, the court stated,

> "Here, the record indicates that the statements made by the defendant were made after his plea had been fully negotiated and the plea had been entered and accepted by the trial court. Under these circumstances, we find that no reversible error occurred in defendant's admission of the veracity of his confession. We note, however, that had the statements been made prior to entry of the plea and its acceptance by the trial court, our analysis may have been different."

Id. at 388. See also, *McGowan v. State*, 706 So.2d 231, 233 (Miss. 1997) (holding that a defendant's statements to an investigator made after the defendant pled guilty were admissible).

In the instant matter, the statement was given well before the plea had been entered. Therefore, the appellate court was wrong in according weight to *Connery*.

In sum, defendant's statement was given to the prosecutor before plea discussions had terminated and was inadmissible. Even if the statement was given after discussions had completed, policy favors barring its admission. Accordingly, under the provisions in Illinois Supreme Court Rule 402(f) and Illinois Rules of Evidence 410, defendant's statement was inadmissible, 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 petition.

CONCLUSION

For the foregoing reasons, defendant 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,

THOMAS A. KARALIS
Deputy Defender

BRYON KOHUT
Supervisor
Office of the State Appellate Defender
Third Judicial District
770 E. Etna Road
Ottawa, IL 61350
(815) 434-5531
3rddistrict.eserve@osad.state.il.us

COUNSEL FOR DEFENDANT-APPELLANT

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342, is 40 pages.

/s/Bryon Kohut
BRYON KOHUT
Supervisor

APPENDIX TO THE BRIEF

Antwoine Teddy Eubanks No. 126271

APPEAL TO THE APPELLATE COURT OF ILLINOIS
THIRD JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE FOURTEENTH JUDICIAL CIRCUIT
ROCK ISLAND COUNTY, ILLINOIS

PEOPLE	)	
Plaintiff/Petitioner	)	Reviewing Court No: 3-18-0117
	)	Circuit Court No: 2010CF298
	)	Trial Judge: Frank R Fuhr
v	)	
	)	
	)	
EUBANKS, ANTWOINE TEDDY	)	
Defendant/Respondent	)	

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People v. Antwoine Teddy Eubanks
2010 - CF- 298 3-18-0117

ERecord

2020 IL App (3d) 180117

Opinion filed July 14, 2020

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2020

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 14th Judicial Circuit,
Plaintiff-Appellee,	)	Rock Island County, Illinois.
	)	
	)	Appeal No. 3-18-0117
v.	)	Circuit No. 10-CF-298
	)	
	)	
ANTWOINE TEDDY EUBANKS,	)	The Honorable
	)	Frank R. Fuhr,
Defendant-Appellant.	)	Judge, Presiding.

PRESIDING JUSTICE LYTTON delivered the judgment of the court, with opinion.
Justice Carter concurred in the judgment and opinion.
Justice McDade dissented, with opinion.

OPINION

¶ 1 Defendant was charged with first degree murder (720 ILCS 5/9-1(a) (2) (West 2010)) and aggravated battery with a firearm (720 ILCS 5/12-4.2(a)(1) (West 2010)). Approximately one year later, defendant provided a videotaped statement to detectives. Soon thereafter, he pled guilty to first degree murder. Defendant later filed several motions to withdraw his guilty plea, which the trial court granted. Defendant's case proceeded to a stipulated bench trial, where defendant's statement was admitted into evidence. Defendant was found guilty of first degree murder and sentenced to 50 years in prison. Defendant filed a postconviction petition, alleging that his trial

counsel was ineffective for failing to suppress his videotaped statement pursuant to Illinois Supreme Court Rule 402(f) (eff. July 1, 2012). The petition proceeded to a third-stage evidentiary hearing, where the trial court denied it. Defendant appeals, arguing that the trial court erred in denying his postconviction petition because his videotaped statement was inadmissible at trial. We affirm.

¶ 2 BACKGROUND

¶ 3 Defendant was arrested on April 14, 2010, and charged with one count of first degree murder for killing Samuel Rush and one count of aggravated battery with a firearm for shooting Erik Childs. Defendant initially denied any involvement in the crimes.

¶ 4 On April 19, 2011, defendant participated in a videotaped interview with two Rock Island detectives, Gene Karzin and Tina Noe, along with his attorney, Daniel Dalton. Assistant State's Attorney Norma Kauzlerich was outside the room watching the interview and texting questions to Karzin. Defendant confessed that he and two other men, Pashanet Reed and Stephan Phelps, lured the victims to a specific location, where defendant shot them. After the defendant made his statement, Dalton left the room, presumably to speak with Kauzlerich, to "make sure we're good."

¶ 5 On May 11, 2011, defendant appeared in court to enter a guilty plea. The State indicated that the parties had reached a "negotiated disposition" pursuant to which the State recommended that defendant be sentenced to 35 years in prison for first degree murder and dismiss the aggravated battery with a firearm charge, provided that defendant "continues to truthfully cooperate and, if necessary, truthfully testify." The trial court entered judgment for first degree murder and dismissed the aggravated battery charge against defendant. The matter was continued for sentencing "pending the defendant's cooperation with the co-defendants' cases."

¶ 6 Defendant filed motions to withdraw his guilty plea on November 10, 2011, February 14, 2012, and March 27, 2012. On March 28, 2012, the trial court held a hearing on the motions. At the hearing, the State indicated that it would stand by its offer in exchange for defendant's cooperation. The trial court allowed defendant to withdraw his guilty plea.

¶ 7 On May 15, 2012, defendant filed a motion to suppress his videotaped statement, alleging that it was "obtained in violation of [his] rights as guaranteed by the Fifth and Fourteenth Amendments to the federal Constitution." According to the motion, "the plea agreement reached by defendant and the State required defendant to plead guilty to the *** First Degree Murder charge, provide a true statement as to his involvement in the murder, and testify if necessary, against the other co-defendants." In exchange, the State would recommend that defendant receive a 35-year prison sentence for first degree murder and dismiss the aggravated battery with a firearm charge. The motion further stated that "pursuant to his obligation under the bargain reached with the State, [defendant] provided a videotaped statement to law enforcement officials and attorneys from the Rock Island County State's Attorney[']s office." The trial court denied defendant's motion to suppress.

¶ 8 Defendant's case proceeded to a stipulated bench trial. The stipulations established that on March 30, 2010, Rush and Childs were found shot inside a vehicle. Reed and Phelps were found fleeing from the scene in a dark green Lincoln.

¶ 9 Phelps told police that he was with defendant on March 30, 2010, and traded a gun with defendant that day. Phelps gave police the gun and ammunition defendant gave him. Reed told police that defendant shot Rush and Childs.

¶ 10 Officers located a cell phone at the scene of the shooting. Defendant drove to a store after the murder to obtain a new "SIM card" with the same cell phone number as the phone located at the scene.

¶ 11 Reed and Phelps would have testified that they drove around in a green Lincoln drinking alcohol and smoking cannabis with defendant on March 30, 2010. They went to defendant's brother's house, where defendant picked up a rental car. Phelps called Rush to set up a cannabis transaction. Upon meeting up, Rush exited his vehicle and walked toward the green Lincoln. Defendant then ran from the side of a house and started shooting into Rush's car. Rush ran toward his car, and defendant ran around the back of the car and shot Rush.

¶ 12 The State presented defendant's videotaped interview. The prosecutor stated that Noe and Karzin "interviewed the defendant pursuant to a proffer agreement." In the interview, Rush told detectives that he, Reed, and Phelps drove around on March 30, 2010, smoking cannabis and drinking. He, Reed and Phelps traveled to Rock Island, where Phelps was supposed to meet Rush. He parked his rental car in an alley. He exited his vehicle and ran between houses toward Rush's vehicle. He shot Childs three times. When he saw Rush run back toward the car, he ran around the back of the car and shot Rush three times. He, Reed, and Phelps fled the scene. Reed and Phelps were in the Lincoln, and he was in the rental car. He discovered that he lost his phone during the shooting, so he drove to an I-Wireless store in Davenport.

¶ 13 The trial court found defendant guilty of first degree murder and sentenced him to 50 years in prison. Defendant appealed, arguing that his videotaped statement to police was inadmissible at trial. He also raised a claim of ineffective assistance of counsel. We affirmed defendant's conviction and sentence, finding that we could not determine if defendant's videotaped statement

was made pursuant to plea negotiations. People v. Eubanks, 2014 IL App (3d) 130021-U, ¶ 37. We recommended that defendant raise the issue in a postconviction petition. Id.

¶ 14 Thereafter, defendant filed a postconviction petition, alleging that his trial counsel was ineffective for failing to move to suppress his videotaped statement pursuant to Rule 402(f). Defendant later filed an amended petition. The State filed a motion to dismiss the amended petition. The court denied the State's motion, finding that the amended petition potentially alleged a claim of deficient representation that was not harmless. The petition proceeded to a third-stage evidentiary hearing.

¶ 15 At the third-stage hearing, Dalton testified that the State approached him about defendant providing evidence against Reed and Phelps. According to Dalton, the State agreed to provide defendant with a 35-year prison sentence in exchange for a statement from defendant and defendant's "further cooperation." Dalton arranged for defendant to give a videotaped statement to Karzin and Noe on April 19, 2011. Dalton stated that defendant's videotaped statement "never would have been made but for that plea agreement." Dalton said he would not have allowed defendant to give a statement without a plea deal in place.

¶ 16 Defendant agreed with Dalton's testimony regarding the events surrounding the plea deal. Defendant testified that Dalton told him "the State was willing to give me a deal." According to defendant, "in order for me to get the deal, I would have to give a statement, a truthful statement, of my involvement in the case." The plea deal also required defendant to testify against his codefendants "if need be." Dalton told defendant that the State was offering him a sentence of 35 years before defendant made his statement. Defendant said he would not have made the videotaped statement if it had not been required by the plea deal.

¶ 17 The trial court issued an order finding that defendant's April 19, 2011, statement "was not part of the plea discussion, but rather the result of the plea agreement, and thus Supreme Court Rule 402[(f)] was not violated." The court denied defendant's postconviction petition.

¶ 18 ANALYSIS

¶ 19 Defendant argues that the trial court erred in denying his postconviction petition following the third-stage hearing because his videotaped statement was made during plea discussions and, therefore, was inadmissible at trial under Rule 402(f). He contends that the statement was a condition precedent to his plea agreement.

¶ 20 The Post-Conviction Hearing Act (Act) provides a method for a criminal defendant to assert that "in the proceedings which resulted in his or her conviction there was a substantial denial of his or her rights under the Constitution of the United States or of the State of Illinois or both." 725 ILCS 5/122-1(a)(1) (West 2018). "A proceeding under the Act is a collateral attack on the judgment of conviction." People v. Wrice, 2012 IL 111860, ¶ 47.

¶ 21 The Act provides a three-stage process for adjudicating postconviction petitions. People v. English, 2013 IL 112890, ¶ 23. After a third-stage hearing, where the trial court made factual and credibility determinations, the trial court's decision will not be reversed unless it is manifestly erroneous. Id. However, if no new evidence is presented at the third-stage hearing, and the issue involves a pure question of law, de novo review applies. Id. Here, where testimony was presented at the third-stage hearing, we review the trial court's fact-finding and credibility determinations for manifest error and review de novo the trial court's ultimate legal conclusion that defendant's statement was admissible under Rule 402(f). See People v. Tyler, 2015 IL App (1st) 123470, ¶ 195 (factual and credibility decisions reviewed for manifest error; issues of law reviewed de novo).

¶ 22 Rule 402(f) provides:

> "If a plea discussion does not result in a plea of guilty, or if a plea of guilty is not accepted or is withdrawn, or if judgment on a plea of guilty is reversed on direct or collateral review, neither the plea discussion nor any resulting agreement, plea, or judgment shall be admissible against the defendant in any criminal proceeding." Ill. S. Ct. R. 402(f) (eff. July 1, 2012).

Statements by a defendant that are part of "plea discussions," within the meaning of Rule 402(f), cannot be admitted into evidence at the defendant's trial. People v. Rivera, 2013 IL 112467, ¶ 17.

¶ 23 "The purpose of Rule 402(f) is 'to encourage the negotiated disposition of criminal cases through elimination of the risk that the accused enter plea discussion at his peril.' " Id. ¶ 18 (quoting People v. Friedman, 79 Ill. 2d 341, 351 (1980)). The rule "was enacted to protect communications made by the defendant in the bargaining process from being turned into a weapon of the State at a later trial." People v. Morris, 79 Ill. App. 3d 318, 332 (1979). "[T]he central policy behind Rule 402(f) is to prevent a jury from hearing of any statements made by a defendant during the process of attempting to reach a plea agreement or the fact that a defendant had reached an agreement to plead guilty." People v. Connery, 296 Ill. App. 3d 384, 388 (1998).

¶ 24 Rule 402(f) is similar to Rule 410 of the Federal Rules of Evidence. See People v. Victory, 94 Ill. App. 3d 719, 722 (1981). Rule 410 provides that "statements made in the course of plea discussions between a criminal defendant and a prosecutor are inadmissible against the defendant." United States v. Mezzanatto, 513 U.S. 196, 197 (1995). The purpose of the rule is "encouraging plea bargaining." Id. at 207. Suppressing evidence of plea negotiations "serves the policy of insuring a free dialogue only when the accused and the government actually engage in plea negotiations." United States v. Robertson, 582 F.2d 1356, 1365 (5th Cir. 1978). By its terms, the rule excludes only those statements made "during plea discussions." Fed. R. Evid. 410(a)(4).

¶ 25 Federal courts have consistently held that statements made by a defendant after a plea agreement has been reached but before the defendant has pled guilty are admissible. See United States v. Watkins, 85 F.3d 498, 500 (10th Cir. 1996); United States v. Hare, 49 F.3d 447, 450 (8th Cir. 1995); United States v. Lloyd, 43 F.3d 1183, 1186 (8th Cir. 1994); United States v. Knight, 867 F.2d 1285, 1288 (11th Cir. 1989); United States v. Davis, 617 F.2d 677, 682-86 (D.C. Cir. 1979); United States v. Stirling, 571 F.2d 708, 731 (2d Cir. 1978). The rationale for these holdings is that, once a plea agreement is entered, plea negotiations terminate and the policy behind the rule is no longer applicable. Knight, 867 F.2d at 1288. Excluding statements made after and pursuant to a plea agreement "would not serve the purpose of encouraging compromise." Davis, 617 F.2d at 685. Rather, "such a rule would permit a defendant to breach his bargain with impunity." Id.

¶ 26 The Second District adopted the rationale of above-cited federal cases and held that Rule 402(f) does not apply to a defendant's statements made after a plea agreement has been reached. See People v. Saunders, 135 Ill. App. 3d 594, 606 (1985). The court found that the defendant's testimony made after and pursuant to a plea agreement "was not made while he was negotiating over the disposition of his case." Id. "Thus, the purpose of the rule, i.e., to 'encourage the negotiated disposition of criminal cases,' would not be served by rendering the statements inadmissible." Id. (quoting Friedman, 79 Ill. 2d at 351). "In fact, *** such a holding would permit the defendant to 'breach his bargain with impunity.' " Id. (quoting Davis, 617 F.2d at 685).

¶ 27 This court similarly held that statements made by a defendant after he enters a guilty plea are admissible because they do not constitute "plea discussions" under Rule 402(f). See Connery, 296 Ill. App. 3d at 388. "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)." Id.

¶ 28 "Plea agreements are essentially contractual in nature and *** are controlled largely by contract law." People v. Caban, 318 Ill. App. 3d 1082, 1089 (2001); see also People v. Donelson, 2013 IL 113603, ¶ 18 (contract law principles have been applied to plea agreements). "A condition precedent is an act or event, other than a lapse of time, which must exist or occur before a duty of immediate performance of a promise arises." (Internal quotation marks omitted.) Wasserman v. Autohaus on Edens, Inc., 202 Ill. App. 3d 229, 236 (1990). "[W]here a contract contains a condition precedent, the contract does not become enforceable or effective until the condition is performed or the contingency occurs." Dodson v. Nink, 72 Ill. App. 3d 59, 64 (1979). "[W]here a condition goes solely to the obligation of the parties to perform, existence of such a condition does not prevent the formation of a valid contract." McAnelly v. Graves, 126 Ill. App. 3d 528, 532 (1984). "[C]onditions precedent are not generally favored." A.A. Conte, Inc. v. Campbell-Lowrie-Lautermilch Corp., 132 Ill. App. 3d 325, 329 (1985).

¶ 29 Plea agreements may contain conditions precedent, such as the trial court's acceptance of the agreement. See Marlow v. Marlow, 563 S.W.3d 876, 884 (Tenn. Ct. App. 2018). If the condition is not met, there is no enforceable agreement. See id. at 885. If a plea agreement is "contingent upon" a condition being met, the agreement should make that clear. See United States v. Saunders, 226 F. Supp. 2d 796, 802 (E.D. Va. 2002). Otherwise, obligations set forth in the plea agreement will be construed to be part of the finalized plea agreement. See State v. Moore, 240 S.W.3d 248, 253 (Tex. Crim. App. 2007).

¶ 30 Here, the testimony at the third-stage evidentiary hearing established that a plea deal had been reached before defendant provided his videotaped statement. Dalton testified that the State agreed to a 35-year prison sentence in exchange for defendant providing a truthful statement and testifying against his codefendants, if necessary. Dalton told defendant about the agreement before

defendant provided his videotaped statement. Dalton stated that he would not have allowed defendant to make a statement without a plea deal in place. Defendant agreed with Dalton's testimony, stating that he would not have made the statement if it was not part of the plea deal.

¶ 31 The testimony was consistent with the assertions contained in defendant's May 15, 2012, motion to suppress, wherein defendant stated that "the plea agreement reached by defendant and the State required [him] to plead guilty to the *** first degree murder charge, provide a true statement as to his involvement in the murder, and testify if necessary against the other co-defendants" in exchange for the State recommending that he receive a 35-year prison sentence and dismissing the other charge against him. Further, according to the motion, defendant provided his videotaped statement "pursuant to his obligation under the bargain reached with the State."

¶ 32 Based on the record, defendant provided his videotaped statement after the plea agreement was reached but before he entered his guilty plea. As a result, the statement was not made during "plea discussion[s]" and was admissible at defendant's trial. See Saunders, 135 Ill. App. 3d at 606; Hare, 49 F.3d at 451; Watkins, 85 F.3d at 500. We reject defendant's contention that his statement was a condition precedent to the plea agreement. As set forth above, the testimony provided at the third-stage hearing, as well as assertions contained in defendant's motion to suppress, establish that the plea deal was in place when defendant made his statement. Providing a truthful statement was not a condition precedent of the deal but, rather, was a term of the deal. See Moore, 240 S.W.3d at 253. If defendant had not provided a truthful statement, he would have been in breach of the plea deal.

¶ 33 Defendant's statement, which was made pursuant to his obligations under the plea agreement, was admissible. See United States v. Jones, 469 F.3d 563, 567 (6th Cir. 2006) (statements made to authorities pursuant to plea agreements are "not made in the course of plea

discussions" and, therefore, admissible (internal quotation marks omitted)). The trial court properly denied defendant's postconviction petition.

¶ 34 CONCLUSION

¶ 35 The judgment of the circuit court of Rock Island County is affirmed.

¶ 36 Affirmed.

¶ 37 JUSTICE McDADE, dissenting:

¶ 38 The issue before us in this case is whether a self-incriminating statement provided pursuant to a guilty plea agreement between a criminal defendant and the State is inadmissible under Illinois Supreme Court Rule 402(f) (eff. July 1, 2012). The majority rules that where the statement is made after the agreement is reached but before the guilty plea is entered, the statement is not protected under the rule. Relying almost entirely on federal decisions construing the essentially identical Rule 410 of the Federal Rules of Evidence (Fed. R. Evid. 410), the majority holds that defendant Antwoine Eubanks' recorded statement was not protected under Rule 402(f) because the statement was not made during plea discussions but was a term of the deal. Supra ¶ 32. I respectfully disagree. Nothing in the language of Rule 402(f) nor in its accepted purpose distinguishes between a statement made during plea negotiations and a statement offered pursuant to said negotiations.

¶ 39 The majority's use of the cited federal decisions is misguided. Rule 410 is a federal rule subject to interpretation by federal courts applying federal law, whereas Rule 402(f) is an Illinois Supreme Court rule subject to interpretation under Illinois law. "Interpretation of the Illinois Supreme Court rules is governed by the same principles as statutory interpretation." McCarthy v. Taylor, 2019 IL 123622, ¶ 17. "Our goal is to ascertain and give effect to the drafters' intention." Id. "The purpose of Rule 402(f) is 'to encourage the negotiated disposition of criminal cases through elimination of the risk that the accused enter plea discussion at his peril.' " People v.

Rivera, 2013 IL 112467, ¶ 18 (quoting *People v. Friedman*, 79 Ill. 2d 341, 351 (1980)). The rule implicitly recognizes "the significance of the negotiation process to the administration of justice" and appreciates "the devastating effect of the introduction of plea-related statements in the trial of [an] accused." *Friedman*, 79 Ill. 2d at 351. Rule 402(f) therefore does not distinguish between "an offer to enter negotiation[s]" and "a statement made at an advanced stage of the negotiation process in terms of [their] impact upon a jury." *Friedman*, 79 Ill. 2d at 352. Nor does it "require a preamble explicitly demarcating the beginning of plea discussions." (Internal quotation marks omitted.) *Id.*

¶ 40 Considering these policy objectives, our supreme court noted that the key question is whether the "statement [was] made in the furtherance of a plea discussion [or was] an *otherwise independent admission* which is not excluded by [the] rule." (Emphasis added.) *Id.* at 353. This "determination is not a bright-line rule and turns on the factual circumstances of each case." *Rivera*, 2013 IL 112467, ¶ 19. Relevant factors to consider include "the nature of the statements, to whom [the] defendant made the statements, and what the parties to the conversation said." *Id.*

¶ 41 The majority however reasons that Eubanks' statement was a term of the plea deal and thus excluding it "would permit a defendant to breach his [plea] bargain with impunity." (Internal quotation marks omitted.) *Supra* ¶ 25. That is clearly not the case; a defendant who breaches his bargain denies himself any concession the State made to secure the bargain. He returns to the starting line of the criminal prosecution facing any charges and penalties that were removed by the plea deal. The State in turn cannot benefit from the concessions because they are no longer offered to the defendant. Any breach—by the defendant or the State—equalizes the parties by removing the deal's early stages, deliberative discussions, and terms both from the table and from the jury's consideration. If, as our supreme court stated in *Friedman*, the rule does not distinguish between an offer to negotiate and advance stages of the negotiation, then it should not draw a distinction

for a statement made pursuant to a specific term in an aborted plea agreement. Offers to negotiate, actual negotiations, and statements required in negotiated plea deals are all made in furtherance of the plea process.

¶ 42 The bright-line rule the majority endorses today—admitting as evidence at trial a potentially inculpatory statement that is a term of the plea deal and therefore not "an otherwise independent admission"—only serves to frustrate the purpose of Rule 402(f). After today's decision, a defendant would be discouraged from entering any plea deal where he must provide any statement, whether it be to locate the object of the crime or to describe the events at issue. That is unless he is sophisticated enough to work out a deal where his statement is a condition precedent. This outcome should be a difficult hurdle for the majority to overcome. Here it has been easily surmounted; the majority simply ignores it.

¶ 43 Instead, the majority cites People v. Connery, 296 Ill. App. 3d 384 (1998). Connery was decided by this court 22 years ago, and the majority suggests that it is applicable precedent for the rule it endorses today. However, not only is Connery factually distinguishable from the instant case, the Connery panel specifically noted it would be inapplicable in our current circumstances. Id. at 388. In his appeal, Connery challenged a sworn statement made at a court hearing in the presence of the trial court after the court accepted his guilty plea and entered judgment on it. Id. at 386. But Eubanks made his statement before the trial court accepted the agreement and certainly before the trial court entered judgment on the plea. Eubanks's statement was not sworn, and it was not made in the presence of the trial court.

¶ 44 The Connery majority noted "that had the statements been made prior to entry of the plea and its acceptance by the trial court, our analysis may have been different." (Emphasis in original.) Id. at 388 (emphasis in original). I agree; the defendant in Connery could not reasonably expect a

sworn statement made in the presence of the trial court after it entered judgment on his plea to have had the same level of confidentiality accorded to plea discussions under Rule 402(f). In significant contrast, a self-incriminating statement made pursuant to a plea agreement but before the plea is judicially approved places the defendant in considerable legal peril without any guarantee that the State would honor its agreement and would not withdraw the plea.

¶ 45 The special concurrence in Connery hammered this point home, voicing the very same concerns I now raise with the decision in this case, stating:

> "The majority holds that defendant's testimony after the acceptance of his guilty plea was admissible at his subsequent trial. While I concur based on the record in this case, this decision should be narrowly construed.
>
> Thus, if the plea agreement had been contingent on defendant giving self-incriminating testimony immediately after the acceptance of the plea, fundamental fairness would require this testimony to be excluded from his later trial. Otherwise, because of the timing of the sworn testimony, the State could time the defendant's admissions so that they could later be used against the defendant if the plea were vacated. Such a procedure could lead to radical changes in the strategies of defense attorneys, which would significantly reduce the number of these plea agreements and limit the evidence obtained by prosecutors.
>
> For the reasons stated, I specially concur in the majority's reasoning only as it applies to the specific facts of this case." Id. at 392 (Lytton, J., specially concurring).

¶ 46 The majority's decision today encourages the State to time a defendant's confession after he has agreed to a plea deal but before the trial court accepts the deal or enters a judgment on it. As I previously noted, this bright-line rule and the strategic gamesmanship it encourages would only serve to frustrate the purpose of Rule 402(f).

¶ 47 For the reasons stated, I respectfully dissent.

No. 3-18-0117

Cite as:	People v. Eubanks, 2020 IL App (3d) 180117
Decision Under Review:	Appeal from the Circuit Court of Rock Island County, No. 10-CF-298; the Hon. Frank R. Fuhr, Judge, presiding.
Attorneys for Appellant:	James E. Chadd, Peter A. Carusona, and Bryon Kohut, of State Appellate Defender's Office, of Ottawa, for appellant.
Attorneys for Appellee:	Dora Villarreal, State's Attorney, of Rock Island (Patrick Delfino, Thomas D. Arado, and Mark A. Austill, of State's Attorneys Appellate Prosecutor's Office, of counsel), for the People.

IN THE CIRCUIT COURT OF THE FOURTEENTH JUDICIAL CIRCUIT
ROCK ISLAND COUNTY, ILLINOIS

People of the State of Illinois
Plaintiff-Appellee

FILED in the CIRCUIT COURT of ROCK ISLAND COUNTY GENERAL DIVISION

FEB 22 2018

Tammy Reinhart
Clerk of the Circuit Court

VS.

CASE #: 10CF298

Antwoine Teddy Eubanks
Defendant – Appellant

NOTICE OF APPEAL

An appeal is taken from the Order or Judgment described below.

1. Court to which appeal is taken: **Third Judicial District, 1004 Columbus Street, Ottawa, Il 61350**
2. Name of appellant and address to which notice shall be sent.
   NAME **Antwoine Teddy Eubanks #M32508**
   ADDRESS: **711 Kaskaskia Street PO Box 711 Menard, IL 62259**
3. Name and address of Appellant's Attorney on appeal.
   NAME: **Peter A Carusona**
   ADDRESS: **770 E. Etna Road, Ottawa, IL 61350**
   TELEPHONE: **815-434-5531**
   If appellant is indigent and has no Attorney, does he want one appointed? **yes**
4. Date of order or judgment: **1/8/18 and 2/22/18**
5. Offense of which convicted: **First Degree Murder**
6. Sentence: **50 years IL DOC**
7. If appeal is not from a conviction, nature of order appealed from: **post conviction**

SIGNED: Tammy Reinhart

C 462

IN THE CIRCUIT COURT OF FOURTEENTH JUDICIAL CIRCUIT

CRIMINAL DIVISION

PEOPLE OF THE STATE OF ILLINOIS, Respondent,	)	3-18-0117
-vs-	)	No. 10 CF 298
ANTWOINE TEDDY EUBANKS, Petitioner.	)	E-FILED Transaction ID: 3-18-0117 File Date: 9/12/2018 1:51 PM Barbara Trumbo, Clerk of the Court APPELLATE COURT 3RD DISTRICT

AMENDED NOTICE OF APPEAL

(1) Court to which appeal is taken:

Appellate Court of Illinois, Third Judicial District

(2) Name of appellant and address to which notices shall be sent:

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

(3) Name and address of appellant's attorney on appeal:

Name: Peter A. Carusona
Address: Office of the State Appellate Defender
Third Judicial District
770 E. Etna Road
Ottawa, IL 61350
(815) 434-5531

(4) Date of judgment or order: February 16, 2018

(5) Offense of which convicted: first degree murder

(6) Sentence: 50 years in the Illinois Department of Corrections

(7) Nature of Order Appealed From: dismissal of post-conviction petition

/s/ Peter A. Carusona
PETER A. CARUSONA
Deputy Defender

IN THE CIRCUIT COURT OF THE FOURTEENTH JUDICIAL CIRCUIT
ROCK ISLAND COUNTY, ILLINOIS
CRIMINAL DIVISION

STATE OF ILLINOIS,	)	
Plaintiff,	)	Case No. 2010 CF 298
v.	)	
ANTWOINE T. EUBANKS,	)	
Defendant.	)	

ORDER

This cause came on for a hearing on January 8, 2018 for a third-stage hearing on Defendant's petition for post-conviction relief. The Defendant was present in person, in custody, with his attorney, Mr. Hany Khoury. The State was represented by Asst. State's Attorney John McCooley. The Court has considered the evidence, arguments and briefs of the parties.

The Defendant alleges that the use of his recorded statement as part of the factual basis at his stipulated bench trial violated Illinois Supreme Court Rule 402f. The Defendant further alleges that because his attorney at the time of the stipulated bench trial did not object to the use of that statement on the grounds that it violated Illinois Supreme Court Rule 402f, he was ineffective and the error was prejudicial, and requires that he be granted a new trial.

402f states:

> "If a plea discussion does not result in a plea of guilty, or if a plea of guilty is not accepted or is withdrawn, or if the judgment on a plea of guilty is reversed on direct or collateral review, neither the plea discussion nor any resulting agreement, plea, or judgment shall be admissible against the Defendant in any criminal proceeding."

In this case the Defendant, through his attorney, entered into plea discussions with the State's Attorney's Office in Rock Island County. As a result of those discussions an agreement was reached, pursuant to which the Defendant was to give a recorded statement as to his participation in the crime, and cooperate with the authorities by testifying against his two co-defendants. The agreement further provided

provided that upon his compliance with the agreement the State would allow him to withdraw his guilty plea to murder with aggravating circumstances, and re-enter a plea of guilty to murder without aggravating circumstances, and receive a 35-year sentence. That agreement was reached before this statement was given. The plea discussions and the resulting agreement and initial guilty plea of this Defendant were not used against him at the stipulated bench trial. The recorded statement that was introduced as evidence against him was a result of those plea discussions, not part of the plea discussions. The purpose of Rule 402f is:

> "To encourage the negotiated disposition of criminal cases through elimination of the risk of the accused to enter plea discussions at his peril." *People v Friedman,* 79 Ill. 2d 341, 351, 38 Ill.Dec. 141, 403.

None of the plea discussions, nor the resulting plea, were used against this Defendant. This Defendant chose to withdraw that initial plea, and he did so at his own peril, after being advised by the State and the Court that his statement could and would be used against him at a later trial.

This Court FINDS that the statement provided by the Defendant and used against him was not part of the plea discussion, but rather the result of a plea agreement, and thus Supreme Court Rule 402f was not violated in the Defendant's post-conviction petitions.

ENTERED this 16 day of February, 2018.

Frank R. Fuhr
Circuit Judge

FRF/sll

Copies to:
- Attorney Hany Khoury
  4500 Kennedy Drive
  East Moline, IL 61244
- Asst. State's Attorney John McCooley
  210 15th Street, 4th Floor
  Rock Island, IL 61201

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

Mr. Kwame Raoul, Attorney General, 100 W. Randolph St., 12th Floor, Chicago, IL 60601, eserve.criminalappeals@atg.state.il.us;

Mr. Thomas D. Arado, Deputy Director, State's Attorneys Appellate Prosecutor, 628 Columbus, Suite 300, Ottawa, IL 61350, 3rddistrict@ilsaap.org;

Dora Villarreal, Rock Island County State's Attorney, 210 15th St., 4th Floor, Rock Island, IL 61201, StatesAttorneysOffice@co.rock-island.il.us;

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 January 25, 2021, the Brief and Argument was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the defendant-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 Brief and Argument to the Clerk of the above Court.

/s/Nicole Weems
LEGAL SECRETARY
Office of the State Appellate Defender
770 E. Etna Road
Ottawa, IL 61350
(815) 434-5531
Service via email will be accepted at
3rddistrict.eserve@osad.state.il.us