SECOND DIVISION
June 21, 2016

No. 1-14-0412

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 06 CR 12269
	)	
ANTHONY REYNOLDS,	)	Honorable
	)	Luciano Panici,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Presiding Justice Pierce and Justice Hyman concurred in the judgment.

O R D E R

¶ 1 *Held*: Dismissal of post-conviction petition affirmed. Defendant failed to state meritorious claim of ineffective assistance of trial counsel for not investigating or calling certain witnesses. Defendant failed to show that he had a leniency agreement with the State or that he was prejudiced by any promises of leniency made by persons associated with the State.

¶ 2 Following a jury trial, defendant Anthony Reynolds was convicted of first degree murder, committed while personally discharging a firearm, and sentenced to 60 years' imprisonment. We affirmed the judgment on direct appeal. *People v. Reynolds*, No. 1-09-2625 (2012)(unpublished order under Supreme Court Rule 23). Defendant now appeals from a 2014 circuit court order

granting the State's motion to dismiss his 2013 counsel-filed post-conviction petition as amended. On appeal, he contends that he has presented meritorious claims that (1) trial counsel rendered ineffective assistance by not investigating or presenting certain witnesses, and (2) the State violated a proffer agreement whereby defendant exchanged information for leniency. For the reasons stated below, we affirm.

¶ 3 This case arises from the fatal shooting of Martel Edwards (Martel) on April 28, 2006. It was undisputed at trial that, on that night, Martel was at a car wash near Harvey, Illinois, with various persons including David Dabbs, William Blasingame, Nathaniel Arnold, Stephen Henderson, and car wash manager Deon Maloney when defendant arrived in a blue Buick Park Avenue also containing Raymond Lipscomb and another man. Defendant walked up to Dabbs and shook hands with him, and some time later gunshots rang out. State witnesses and defendant agreed that Lipscomb fired multiple shots before defendant drew his gun. Martel and Dabbs fled from the shooting but Martel fell to the ground wounded. Defendant and Lipscomb left the scene together in the blue Buick. Eight .45 caliber shell casings fired from one gun and one .40 caliber casing were found at the scene, and a bullet from the scene and from Martel's body were both .45 caliber bullets.

¶ 4 David Dabbs testified that defendant walked up to him and asked "Where is Willie?" to which Dabbs replied "Willie ain't here." After defendant extended his hand and Dabbs shook it, Martel approached the men. Defendant shook Martel's hand and asked him the same question. Lipscomb approached a few seconds later and immediately began firing. Dabbs believed Lipscomb was shooting at him and Martel because he heard bullets pass right by him. He took

cover and did not see defendant holding or firing a gun nor did he see defendant or Lipscomb leave the scene.

¶ 5 William Blasingame testified that he saw defendant and Lipscomb arrive and then both walk up to Dabbs. As Lipscomb stood nearby, Martel approached defendant and Dabbs after their handshake and also shook defendant's hand. Lipscomb and defendant then both fired multiple shots in the direction of Martel and Dabbs before Blasingame saw defendant and Lipscomb leave the scene.

¶ 6 Nathaniel Arnold testified that he did not see defendant or Lipscomb arrive or approach Dabbs but saw Lipscomb standing near defendant as he spoke with Dabbs and then Martel, who arrived and shook defendant's hand. (On cross-examination, Arnold admitted to telling police that Lipscomb approached just before the shooting, and that he did not notice Lipscomb until shots were fired.) Less than a minute later, Lipscomb fired towards Martel and Dabbs, and Arnold believed that defendant fired only once in the direction of Martel and Dabbs. While Arnold believed Martel had a gun in his car, he did not see Martel, Dabbs, or anyone else but defendant and Lipscomb holding a gun. Arnold saw defendant and Lipscomb leave the scene.

¶ 7 Stephen Henderson testified to seeing Dabbs talking with defendant and Lipscomb when Martel walked towards them. (On cross-examination, Henderson testified that Lipscomb approached defendant and Dabbs after Martel did.) After they talked for a while, gunshots rang out, and Henderson saw Lipscomb and defendant shooting at Martel and Dabbs before leaving the scene.

¶ 8 Deon Maloney testified that he saw a blue Park Avenue pass the car wash and then, as he was preparing to leave the car wash, saw Dabbs talking to defendant and Lipscomb while Martel

approached them. Defendant and Lipscomb then fired several shots in the direction of Martel and Dabbs before leaving the scene in the blue Buick.

¶ 9 Defendant testified that, on the night in question, he was with his cousin Kendall Edwards (Kendall) and Lipscomb in Kendall's blue Buick Park Avenue when they passed the car wash and defendant noticed Dabbs and Blasingame. After stopping at a store a few blocks away, they went to the car wash because defendant wanted to talk to Dabbs. Defendant explained that there had been an altercation and tension between the east side of Harvey where Dabbs and Blasingame lived and the west side where defendant lived, and defendant wanted to see if he and Dabbs could squelch that animosity. Defendant walked up to Dabbs while (as far as he knew) Kendall and Lipscomb stayed in the car. Defendant and Dabbs shook hands, which defendant considered a good sign. When defendant told Dabbs that he wanted to squash the hostility, Dabbs agreed that he was tired of the conflict. Dabbs then shouted "Hey, check it out" and defendant saw a man approaching quickly with his hand on a gun on his hip. Defendant believed the man, who he then realized was Martel, was going to shoot him. However, defendant could not draw his gun, a .40 caliber pistol, because he and Dabbs were still locked in a handshake; he believed that Dabbs did this to keep him from drawing his gun. Defendant then heard gunshots very nearby. (Defendant did not know at the time that Lipscomb was firing the shots.) Defendant pulled his hand away from Dabbs and began to flee, drawing and then firing his gun once, in an unknown direction, to discourage his attackers from firing more shots. Defendant took cover at the car wash then ran back to the Buick and jumped in. Lipscomb then joined him in the car – he was surprised, as he did not know Lipscomb had left the car – and they fled the scene.

¶ 10 Defendant admitted that, as of trial, he was in prison for armed habitual criminal and unlawful use of a weapon. He also admitted that he wanted revenge on Willie Matthews for shooting at defendant and killing his friend in 2005. However, he denied being angry at Martel, Dabbs, Blasingame, Arnold or Henderson and maintained that he went to the car wash to make peace and did not ask Dabbs or Martel where Willie was. After his arrest, defendant told the police that an unknown black male behind defendant pulled out two guns and began shooting at Martel and Dabbs. He told police in a later interview that the second shooter was "Little Mo" but did not give Lipscomb's name because he believed Lipscomb had just saved his life.

¶ 11 The jury was instructed on two kinds of first degree murder – intentional or strong probability, and felony based upon aggravated discharge of a firearm – and on second degree murder but not the justifications of defense of self or others. Following deliberations, the jury found defendant guilty of both kinds of first degree murder and found that he personally discharged a firearm but did not find that he personally discharge a firearm proximately causing death. The court sentenced defendant to 60 years' imprisonment.

¶ 12 On direct appeal, defendant raised various contentions regarding jury instructions given (on felony murder) and denied (on the justifications of defense of self and others), allegedly improper closing arguments by the State, and his impeachment with prior convictions. In denying the jury instructions claim, we found that instructions must be based on evidence but there was no evidence that anyone but defendant and Lipscomb fired a gun that night and the State introduced evidence that neither Martel nor Dabbs was armed. We also found that defendant's desired instruction on self-defense was potentially confusing and would have applied to the felony murder charge despite self-defense being inapplicable to felony murder. In denying

the closing-arguments claim, we found in part that prosecutorial remarks were not a material factor in defendant's conviction.

> "The State's evidence consisted of Dabbs' testimony that defendant asked 'Where is Willie?' As stated previously, the State also presented Arnold's testimony who stated that he did not see a weapon in either [Martel's] or Dabbs' hands. Also, no evidence exists in the record that they, or other fraction members, fired a single bullet from a weapon." *Reynolds*, No. 1-09-2625, ¶ 53.

In denying the impeachment claim, we found in part that the evidence of defendant's guilt was overwhelming:

> "The State presented Dabbs' testimony that defendant asked him 'Where is Willie?' Five of the State's witnesses testified that Lipscomb discharged his weapon. The State's witnesses also testified that Lipscomb was standing near defendant, and that he left the scene in the same vehicle as defendant. The evidence further established that neither Dabbs, [Martel] or other members of the rival faction discharged a weapon." *Id.*, ¶ 69.

¶ 13 Defendant, through counsel, filed the instant petition in March 2013 and amended it that month. Defendant alleged that trial counsel rendered ineffective assistance by not investigating or presenting witnesses – Kendall, Jonathan Phillips, and Patrick Taylor – who "would have completely discredited the [S]tate's witnesses who claimed [defendant] was the provocateur." Defendant alleged that "client communication and discovery alerted trial counsel to [Kendall's] existence," that Kendall would testify consistent with his attached affidavit, and that Phillips and Taylor would corroborate Kendall and thus defendant. Defendant also alleged that the State violated his right to due process by breaching a proffer agreement, exchanging defendant's

information regarding criminal activities in Harvey for leniency, by not extending leniency to defendant. The petition as amended was supported by defendant's verifying affidavit and post-conviction counsel's certification pursuant to Supreme Court Rule 604(d)(eff. Dec. 3, 2015). Attached to the petition as amended were the 2013 notarized statements of Kendall and Taylor, and of investigator William Pedersen to his 2013 telephone interview of Phillips.

¶ 14 Kendall averred that he was in the car driven by defendant on the night of the shooting. Defendant went to the car wash to discuss with Dabbs "the recent violence in the area between their rival groups," and defendant approached Dabbs while Lipscomb stayed near the car and Kendall stayed inside it. After defendant and Dabbs shook hands, two men with guns in their hands came from behind a nearby parked car and approached defendant and Dabbs, and Kendall heard gunshots from behind him where Lipscomb had been. Defendant took cover, drew a gun, and fired a single shot behind him, then he and Lipscomb returned to the car and they left the scene. Kendall averred that he was not interviewed by anyone, and admitted that he was defendant's cousin and was in prison as of the affidavit.

¶ 15 Taylor averred that he was at the car wash on the night in question when a car containing defendant and two other men arrived. Defendant and one of the men exited, but the other man stayed near the car. Defendant shook hands with Dabbs and spoke with him. Dabbs called out to Martel, and Martel and another man carrying guns exited a nearby car and approached Dabbs and defendant. The man by defendant's car then began shooting, and defendant fled while firing one or two shots behind him. Martel was shot, and defendant and the other man returned to their car and left. Taylor averred that he spoke with a police detective a few days later; the detective said that someone would "get back" to Taylor but he heard nothing further. Taylor also averred

that he gave his account to defendant's father, who told Taylor that defense counsel would contact him, but no attorney contacted him.

¶ 16 Phillips, who was in prison, told investigator Pedersen that he was aware in April 2006 of the "feud" between defendant and Dabbs and was at the car wash when he saw defendant arrive in a car with two other men; defendant and one of the men exited the car, and defendant approached Dabbs. After Dabbs made some remark in the direction of another car parked nearby, two men exited that car with guns and "[s]hots began being fired." Defendant took cover, crawled back to his car and left, and Phillips did not see him firing a gun.

¶ 17 Also attached to the petition were three pages from[1] a handwritten but unsigned statement by defendant. He asserted that a named officer of the State Police approached him in jail in the summer of 2006 and told him "that if I told him everything about the Harvey Police and Mayor about the gun incident that he could make the murder go away because they wanted my codefendant [Lipscomb] for it but I would have to do some time for the gun but not a lot." The officer would arrange a proffer meeting with the State's Attorney's Office [Office]. After discussing this with counsel, defendant agreed to the meeting. In the meeting, defendant "was given a paper to sign that said no promises" and was reluctant to sign it. Counsel told defendant that the Assistant State's Attorney [ASA] would help defendant if he helped the Office and "would not take what I said and not help me." Defendant gave information on the instant case, albeit without naming Lipscomb, and on "several unsolved murders." A few months later, defendant named Lipscomb, who was linked to the instant case by ballistic evidence and placed

[1] The statement has no caption or heading of any kind on its first page, and its third page ends in the middle of a sentence and has no signature or other indication of the ending of a document.

in a lineup. A month later, defendant's counsel relayed a request from a named ASA for information on the killing of a police officer in Harvey; "if I could help them find who did that, it would be my golden key out." Defendant did so and provided four names to his counsel; two of the named persons were later arrested but "I was never given anything." Counsel later advised defendant not to provide information to the Office "because I wasn't getting anything, but by then it was too late" as he had given significant information about "murders and dealing with the police as well as the Harvey Mayor." Defendant was questioned extensively in February 2007 about several murders. He also spoke extensively with a named official of "Internal Affairs" (of what organization, defendant did not specify) who told defendant "that he would speak to the [Office] because I helped a lot."

¶ 18 The State filed a motion to dismiss the petition in August 2013. The State argued that defendant's ineffective assistance claims were meritless because calling witnesses is a matter of trial strategy and the new witnesses' accounts corroborate the State's case. In particular, they all place defendant at the scene and two of the three corroborate that defendant fired a gun. The State also argued that the investigator's interview of Phillips is hearsay and nothing verifies that the man the investigator spoke with by telephone was Phillips. The State argued that the proffer agreement did not include a promise of leniency and defendant failed to show a plea agreement for the State to violate. In particular, the State noted that the proffer agreement, contained in the record and signed by defendant, included a disclaimer that "[n]o other promise or agreement exists between your client and the [State's Attorney's] Office regarding the interview." The motion did not challenge defendant's unsigned statement as not constituting an affidavit, though

the State argued generally that "[t]here is no support in this petition to show that there was a plea agreement which was based on any proffer entered into by the petitioner."

¶ 19 Attached to the State's response was the proffer agreement, a single-page document on Office letterhead, bearing a September 2007 date and signed by three ASAs on behalf of the Office and by defendant and his counsel. In the agreement, the Office agreed to interview defendant and that anything said in that interview by defendant or his counsel would not be used against defendant in the State's case-in-chief at trial or in aggravation at sentencing. However, if defendant testified or made oral or written statements inconsistent with the interview, the State could use the contents of the interview in impeachment or rebuttal at trial, as aggravation in sentencing, or to bring charges of perjury or obstruction of justice. The agreement also provided that the Office could "pursue any and all investigative leads derived in any way from anything" provided in the interview. The agreement provided that it "shall not be construed as a grant of statutory immunity" nor as plea discussions under Supreme Court Rule 402(f) (eff. July 1, 2012). It concluded that the "letter embodies the entirety of the agreement. No other promise or agreement exists between [defendant] and this Office regarding the interview."

¶ 20 Defendant responded to the motion to dismiss, arguing that his suggested witnesses would have supported his case; he did not deny firing a gun on the night in question but maintained that he did so in self-defense, and his witnesses would have established that it was not defendant but those around Martel who fired first. As to the proffer, defendant argued that his affidavit regarding the circumstances of the proffer challenges the written proffer agreement, thus creating a factual issue that can be resolved only in an evidentiary hearing.

¶ 21 On January 10, 2014, the circuit court heard the State's motion to dismiss. The State noted that none of the State's trial witnesses testified that defendant was the aggressor that night and thus argued that the new witnesses – except for Phillips, who was contradicting defendant's admission that he fired his gun – were merely cumulative of the trial evidence. The State also argued that there was no support for the proposition that trial counsel was aware of these witnesses. Defendant argued that he was denied a jury instruction on self-defense because his exculpatory account – that he fired but was not the aggressor – was uncorroborated, but it would have been corroborated by Kendall and arguably the other new witnesses. As to the proffer, the State argued that nothing in the proffer agreement established a plea agreement with defendant, while defendant argued that plea negotiations can affect due process and thus be a proper subject for a post-conviction claim. The court found that the evidence from the new witnesses was not new but had been "brought out during the trial *** and the jury refused to accept [defendant's] version that this was self-defense." As to the proffer, the court noted that the proffer agreement was to the effect that anything said by defendant during the interview would not be used against him in the State's case-in-chief or in aggravation at sentencing but could be used in an investigation to find other evidence. The court also noted that the agreement stated that it was not a grant of statutory immunity nor a plea discussion. The court granted the motion to dismiss.

¶ 22 On appeal, defendant contends that his petition as amended was erroneously dismissed because it presented meritorious claims that (1) trial counsel rendered ineffective assistance by not investigating or presenting Kendall, Phillips, and Taylor as witnesses, and (2) the State violated a proffer agreement whereby defendant exchanged information for leniency.

¶ 23 A post-conviction petition may be dismissed upon the State's motion if, taking as true all well-pled facts not positively rebutted by the record, the petition and supporting documentation do not make a substantial showing of a constitutional violation. *People v. Minniefield*, 2014 IL App (1st) 130535, ¶¶ 54-58. Because all well-pled and unrebutted factual allegations are accepted as true at this stage, the circuit court does not engage in fact-finding nor make credibility determinations in ruling on a dismissal motion, and we review its ruling on such a motion *de novo*. *Id.*, ¶ 58.

¶ 24 To prevail on a claim of ineffective assistance, a defendant must show that counsel's performance was both deficient and prejudicial to defendant. *Id.*, ¶ 70. Performance is deficient when it is objectively unreasonable under prevailing professional norms, and prejudice is a reasonable probability that the result of the proceeding would have been different absent the deficiency. *Id.*, ¶ 71. Counsel's reasonable decision on strategy does not fall below prevailing norms merely because the strategy did not succeed. *Id.*, ¶ 89.

¶ 25 The Post-Conviction Hearing Act (Act) requires that a petition be accompanied by affidavits. 725 ILCS 5/122-2 (West 2014). A defendant's verifying affidavit (725 ILCS 5/122-1(b) (West 2014)) is a different instrument, serving a different purpose, than an evidentiary affidavit. *People v. Allen*, 2015 IL 113135, ¶ 26, citing *People v. Collins*, 202 Ill. 2d 59, 67-69 (2002). While a petition cannot be summarily dismissed for lacking either a verifying or evidentiary affidavit, it can be dismissed upon State motion on such grounds. *Allen*, ¶¶ 27, 35. However, the State forfeits a challenge to a non-jurisdictional procedural defect, such as a statement not constituting an affidavit for lack of notarization, by not raising the challenge in its motion to dismiss to the petition. *Id.*, ¶¶ 33, 35.

¶ 26 Defendant's first post-conviction claim is ineffective assistance of trial counsel for not investigating or calling witnesses.

¶ 27 Trial counsel has a duty to investigate the legal and factual issues in a case; whether a failure to investigate constitutes ineffectiveness is determined by the closeness of the evidence presented at trial and the value of the evidence not presented at trial. *People v. Harmon*, 2013 IL App (2d) 120439, ¶ 26. Counsel has the discretion to decide which witnesses to call at trial, and we exercise a strong presumption that counsel's decision was the product of sound trial strategy. *Id*. That said, trial counsel may be deemed ineffective for failing to present exculpatory evidence such as failing to call witnesses who support an otherwise uncorroborated defense theory. *Id*.

¶ 28 As a threshold matter, we disregard the affidavit of investigator Pedersen to his telephone interview of Phillips. It is rank hearsay to which the State has consistently objected below and here, and " '[a]ffidavits containing hearsay are insufficient to support a claim under the Act.' " *People v. Walker*, 2015 IL App (1st) 130530, ¶ 25, quoting *People v. Brown*, 2014 IL App (1st) 122549, ¶ 58. Also, Phillips's relayed statement is positively rebutted by the record in that it contradicts defendant's own version of events (*Minniefield*, ¶ 98): defendant admitted at trial to firing a gun, but Phillips said that he did not see defendant fire a gun despite seeing defendant take cover following gunshots and then leave the scene. However, we disregard the State's argument that the notarized statements of Kendall and Taylor are not affidavits because it did not so argue in its motion to dismiss. *Allen*, ¶¶ 33, 35.

¶ 29 As another threshold matter, we note that defendant does not allege in his petition nor aver in any supporting attachment that he or his father informed trial counsel of Taylor as a potential witness. (The State does not challenge that trial counsel was aware of Kendall "as he

was in the car with defendant and was mentioned throughout the trial and in discovery, being listed as a witness on the People's Answer to Discovery.") This is not a procedural defect subject to forfeiture but is elemental to an ineffective assistance claim: a defendant who fails to show that trial counsel had any reason to be aware of a particular witness fails to show that counsel was ineffective for not interviewing or presenting him. *People v. Wilson*, 191 Ill. 2d 363, 377-78 (2000). Defendant has failed to show that trial counsel had any reason to be aware of Taylor: Taylor was not mentioned in discovery, and while Taylor avers that he gave his account to defendant's father, defendant did not present the affidavit of himself or his father averring that he relayed this account – or even mentioned Taylor – to trial counsel.

¶ 30 Turning to the merits of the claim on the only evidence we can properly consider, Kendall's affidavit, we must compare that potential evidence to the evidence at trial in light of the law including our order on direct appeal. Firstly, Kendall avers that two men approached defendant and Dabbs with guns in hand before Lipscomb began shooting from behind Kendall. While this corroborates defendant's testimony that he saw a gun in Martel's hand, it does not change one of the matters we considered overwhelming on direct appeal: there was no evidence that Martel or anyone with him fired a gun before Lipscomb and defendant did. Similarly, Kendall avers that defendant went to the car wash to negotiate peace between rival groups in Harvey. While this corroborates defendant's explanation of the meeting, which he offered to refute Dabbs's testimony that defendant asked him where Willie was, it does not directly contradict Dabbs's testimony. Lastly, Kendall avers that Lipscomb stood by his car, which tends to contradict the testimony by Blasingame, Arnold, Henderson, and Maloney that Lipscomb accompanied defendant as he walked up to Dabbs. However, the State witnesses were already

inconsistent on this point: Dabbs, and Arnold and Henderson on cross-examination, gave an alternative account that Lipscomb did not approach defendant and Dabbs until after Martel had approached. We conclude that Kendall's evidence[2] does not create a reasonable probability of a different outcome at trial, especially in light of the fact that the jury here was instructed on second degree murder but found defendant guilty of first degree murder.

¶ 31 Defendant also contends that he stated a meritorious claim that the State violated a proffer agreement to extend him leniency in exchange for information. The State responds that it and defendant entered into a written proffer agreement whereby information he provided would not be used against him while making no promise of leniency and indeed expressly disclaiming the existence of any other promises or agreements. Defendant contends that his petition shows that promises of leniency were made by agents of the State outside of the written proffer agreement. For the reasons stated below, we agree with the State that it had no leniency agreement with defendant, and we find that defendant has failed to show any enforceable promise of leniency.

¶ 32 As a threshold matter, we agree with the State that defendant's unsigned and un-notarized handwritten statement fails to comply with the Act's requirement of supporting affidavits. However, the State's motion to dismiss did not attack defendant's statement for not being an affidavit but rested on the proffer agreement, with its express disclaimer of the existence of any other promises or agreements, as rebutting or belying defendant's allegations. The State has therefore forfeited a challenge to the statement not constituting an affidavit. *Allen*, ¶¶ 33, 35.

[2] We note that defendant's petition offers Taylor as corroboration of Kendall. However, were we to consider Taylor's affidavit on that basis, our analysis of Kendall's potential evidence would not change.

¶ 33 Examining defendant's statement, we note that he does not rely upon conclusory allegations but names persons who allegedly offered him leniency. At this stage, we accept *arguendo* that the described statements by such persons were made and defendant provided the information described. However, remarks that "if I could help them find who did [a certain murder], it would be my golden key out" and that someone would "speak to the [Office] because I helped a lot" are vague and unenforceable. Defendant also describes a named State Police officer's statement "that if I told him everything about the Harvey Police and Mayor about the gun incident that he could make the murder go away because they wanted my codefendant [Lipscomb] for it but I would have to do some time for the gun but not a lot." The officer's statement is not a vague promise of unspecified leniency but a relatively concrete promise: that murder charges would be withdrawn or dismissed, with only gun charges remaining, if certain information was provided. Defendant states that he provided information "on murders and dealings with the police as well as the Harvey Mayor."

¶ 34 On its face, this promise falls into the category of cooperation agreements as recently discussed by our supreme court in *People v. Stapinski*, 2015 IL 118278. "Cooperation agreements are neither plea agreements nor a grant of immunity. [Citation.] They arise when the State agrees to limit a prosecution in some manner in consideration for the defendant's cooperation." *Id.*, ¶ 46. "Such agreements are construed strictly against the government and courts should not hesitate to scrutinize the government's conduct to ensure it comports with the highest standard of fairness." *Id.*, ¶ 47. The *Stapinski* court also said:

> " 'Persons who enter into cooperation agreements with the government in criminal cases do so because they are in serious legal difficulties and are seeking to avoid or ameliorate

> their problems by furnishing information in pending investigations. The bargaining positions are not equal. The government has the upper hand. For this reason, extensive state and federal legal authority requires that governmental agencies deal fairly with a defendant in offers of immunity *** to obtain a waiver of constitutional rights in exchange for information exposing him to additional criminal liability.' " *Id.*, ¶ 45, quoting *People v. Dasaky*, 303 Ill. App. 3d 986, 996 (1999)(McNulty, J., dissenting).

Similarly, " 'where the government has entered into an agreement with a prospective defendant and the defendant has acted to his detriment or prejudice in reliance upon the agreement, as a matter of fair conduct, the government ought to be required to honor such an agreement.' " *Id.*, ¶ 48, quoting *State v. Wacker*, 688 N.W.2d 357, 362 (Neb. 2004).

¶ 35 Our supreme court in *Stapinski* affirmed the circuit court's dismissal of charges where the circuit court:

> "determined that [a police officer] entered into a cooperation agreement with defendant in which she promised not to charge defendant with possession of ketamine if he assisted in the apprehension of [two named persons]. The court further found that defendant fulfilled his obligations under the agreement and that his due process rights were violated when, over a year after defendant was detained by police in this matter, he was charged with possession of ketamine. Under these circumstances, we cannot say that the trial court abused its discretion by granting defendant's motion to dismiss the charge. Whether or not the cooperation agreement was 'valid' in the sense that it was approved by the State's Attorney, is not important. An unauthorized promise may be enforced on due process grounds if a defendant's reliance on the promise has constitutional consequences.

> [Citation.] In this case, the trial court found that defendant relied upon the nonprosecution agreement he made with police and incriminated himself in the process of fulfilling his obligations under the agreement. Thus, defendant suffered a prejudicial violation of his due process rights. The governmental conduct here 'shocks the conscience' and violates the 'decencies of civilized conduct.' " *Id.*, ¶ 55, quoting *Rochin v. California*, 342 U.S. 165, 172, 173 (1952).

Our supreme court rejected the State's argument that suppression of evidence would be the appropriate remedy, holding that the trial court had discretion to craft the appropriate remedy for breach of the cooperation agreement including dismissal of charges. *Id.*, ¶¶ 50-54.

¶ 36 However, we consider this case fundamentally distinguishable from *Stapinski*. The defendant in *Stapinski* incriminated himself while complying with his duties under his agreement and thus suffered a prejudicial violation of his due process rights. According to defendant's own account, following the State Police officer's remark but before defendant provided the State any information, the parties including the Office agreed to the written proffer agreement. Under that agreement, defendant was *not* incriminating himself or exposing himself to additional criminal liability by providing information. The State and defendant's trial counsel were therefore proactive in protecting defendant's due process rights, unlike the State in *Stapinski* which left it to the trial court to provide some remedy after the fact for a breach of that defendant's rights. Stated another way, the *Stapinski* court did not hold that a police officer can bind the State to an agreement with a defendant but that an officer's promise reasonably relied upon by a defendant to his prejudice is enforceable. Here, defendant provided information in reliance on the officer's promise but the proffer agreement eliminated prejudice from that reliance. The only agreement

reached by the State and defendant, through the Office and trial counsel, was the proffer agreement expressly disclaiming the existence of any other promise or agreement. We conclude that defendant has failed to state a claim of an agreement or enforceable promise of leniency.

¶ 37 Accordingly, the judgment of the circuit court is affirmed.

¶ 38 Affirmed.