No. 120649

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Appellate Court of
	)	Illinois, Fourth Judicial District
Plaintiff-Appellee,	)	No. 4-13-0888
	)	
v.	)	There on Appeal from the Circuit Court
	)	of the Fifth Judicial Circuit, Coles
	)	County, Illinois, No. 12 CF 479
	)	
BLACKIE VEACH,	)	The Honorable
	)	Mitchell K. Schick,
Defendant-Appellant.	)	Judge Presiding.

BRIEF AND SUPPLEMENTARY APPENDIX OF PLAINTIFF-APPELLEE PEOPLE OF THE STATE OF ILLINOIS

LISA MADIGAN
Attorney General of Illinois

DAVID L. FRANKLIN
Solicitor General

MICHAEL M. GLICK
DANIEL B. LEWIN
Assistant Attorneys General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601-3218
(312) 814-2391
dlewin@atg.state.il.us

Counsel for Plaintiff-Appellee
People of the State of Illinois

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ISSUES PRESENTED

1. Whether trial counsel's decision to stipulate to recorded statements of the People's witnesses was neither prejudicial nor constituted deficient performance.

2. In the alternative, whether the appellate court appropriately declined to address the ineffective assistance of counsel claim and encouraged defendant to raise it in a postconviction petition.

JURISDICTION

Jurisdiction lies under Supreme Court Rules 315 and 612(b). On September 28, 2016, this Court granted defendant's petition for leave to appeal. *People v. Veach*, 60 N.E.3d 881 (Ill. 2016) (Table).

STATEMENT OF FACTS

On December 12, 2012, defendant Blackie Veach slit the throats of Matthew Price and Renee Strohl. *See generally* People's Exh. 20, Track 1 (recording of Matthew and Renee's 911 call).[1] Both survived, and Matthew testified that he observed defendant commit both attacks. RXV 223-24. Matthew's cousin, Johnny Price, also witnessed the attacks and testified that defendant was the perpetrator. *Id.* at 62-64. Although she did not see the attacker, Renee substantially corroborated the testimony provided by Matthew and Johnny. RXVI 515-17.

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[1] Citations to the common law record appear as "C__." Citations to the reports of proceedings appear as "R[Vol] __." Citations to the evidence deposition of Kelly Biggs appear as "Ev. Dep. __." Citations to trial exhibits appear as "People's Exh. __" and "Def. Exh. __." People's Exhibits 20 (911 calls from Renee, Gayla Jenkins, and Randall Strohl) and 28 (police interviews of Matthew and Renee) both contain multiple audio tracks that are labeled in the reports of proceedings only as "a portion of Exhibit 20" or "a portion of Exhibit 28." Pinpoint citations to those exhibits reference specific tracks. Pinpoint citations to video recordings refer to the timestamp displayed at the bottom of the screen. Citations to defendant's brief and appendix appear as "Def. Br. __" and "A__," respectively. Citations to the supplemental appendix appear as "SA__."

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Johnny's Testimony

Johnny explained that on the day of the attacks, he, Matthew, Renee, and Matthew's friends had been hanging out at Matthew and Renee's residence in Charleston. RXV 40-41. The group drank alcohol and smoked marijuana and synthetic marijuana (K2) in the living room. *Id.* at 48-51. At some point, defendant joined the group. *Id.* at 45-46. In the evening, the friends left, leaving only Johnny, Matthew, Renee, and defendant in the house. *Id.* at 53.

Matthew and Renee left the living room for around half an hour. *Id.* at 60. They returned to the living room and sat on the loveseat together. *Id.* at 61. Johnny, seated on the couch facing the loveseat, observed defendant seated behind Matthew and Renee, *id.* at 61-62;[2] Johnny looked up and "saw Blackie cut [Matthew's] neck." *Id.* at 63. Johnny observed Matthew leap up and heard him tell defendant to back up. *Id.* at 63-64. Defendant then cut Renee. *Id.* at 64. Johnny saw Matthew push defendant onto a mattress and ran out of the house. *Id.* at 65-66. He called his grandmother and arrived at a Dairy Queen down the road, *id.* at 67, where an employee then called the police, RXIX 975.

Before Johnny testified, the People informed the court that the parties would stipulate to the introduction of Johnny's recorded statement to Detective Blagg of the Charleston Police Department. RXV 33. Defense counsel explained, "Technically we were going to open the door with impeachment . . . . If we go to impeach it, then the

[2] The layout of the room is best displayed in People's Exh. 11, a photograph of the room in which the couch (left) and a portion of the loveseat (bottom right) are visible. A copy of People's Exhibit 11 is attached as a supplemental appendix to this brief. SA1.

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whole video comes in[.]" *Id.* at 33-34. The parties ultimately agreed to introduce the video, in its entirety, on direct examination. *Id.* at 70-71.

In the video, Johnny explained that he was visiting his cousin Matthew. People's Exh. 24 at 10:24:40-25:04. When defendant arrived at the house, Johnny followed him around to talk to him. *Id.* at 10:25:30-40. Defendant told Johnny he didn't like being followed. *Id.* at 10:25:45-26:08. Johnny first said that defendant told him that he was a Vice Lord; on the next telling, he was a Latin King (both of which are street gangs). *Id.* at 10:26:03-07, 10:26:56-27:04. Asked to clarify, Johnny said that defendant had been making gang signs and asked Johnny to make them as well. *Id.* at 10:27:04-42. Johnny thought defendant was joking about his gang membership. *Id.* at 10:27:58-28:03.

Prior to the attacks, defendant was seated behind Matthew. *Id.* at 10:28:10-23. Johnny looked up to see that Matthew had been cut. *Id.* at 10:28:23-38. Matthew shouted, "Call 911!" *Id.* at 10:28:38-45. Renee pulled out her phone, then Johnny saw defendant push her down. *Id.* at 10:29:33-50. Johnny then pushed defendant off of Renee before escaping. *Id.* at 10:29:50-30:05. Defendant pursued him. *Id.* at 10:30:06-30. Johnny evaded defendant and called his grandmother. *Id.* at 10:30:30-50.

Detective Blagg asked Johnny to clarify his narrative of the events. On Johnny's second telling, defendant came over in the early afternoon, left, and then returned several hours later. *Id.* at 10:33:11-23. At some point, defendant encouraged Johnny to "take a hit" of synthetic marijuana, and when Johnny refused (because he was on probation), defendant was upset. *Id.* at 10:34:35-35:00. Johnny relented when defendant said he was a Latin King. *Id.* at 10:35:06-20. Matthew then said, "If you touch him, you have to go through me." *Id.* at 10:35:20-48. Johnny heard defendant say "I'm going to get him,"

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then Matthew said, "Go through me first." *Id.* at 10:35:54-36:09. Johnny was looking down at the time, then looked up and saw a knife going across Matthew's throat. *Id.* at 10:36:10-20; *id.* at 10:47:18-41. Matthew jumped up, held his throat, and said, "Call 911." *Id.* at 10:36:21-30. Johnny pushed defendant off of Renee. *Id.* at 10:41:45-42:00. Johnny did not see defendant attack Renee, though she had been cut by the time Johnny left. *Id.* at 10:42:47-43:30. Asked why defendant attacked Renee, Johnny surmised that he "wanted to kill all of us." *Id.* at 10:42:00-25. When Johnny ran out of the house, defendant chased him "all the way" to Dairy Queen. *Id.* at 10:43:30-37.

Detective Blagg asked for further clarification. Johnny said that defendant cut Matthew while seated behind the loveseat, but eventually defendant, Matthew, and Renee were all standing. *Id.* at 56:55-57:17. Renee tried to get to the bathroom or her bedroom to make a call, but defendant caught her outside the bathroom and pushed her to the floor. *Id.* at 10:58:00-59:11. Detective Blagg then tried to reconcile Johnny's various accounts of where and how defendant pushed Renee. *Id.* at 10:59:11-11:01:21. As the interview ended, Johnny expressed concern that he would be in trouble because he was on probation and asked Detective Blagg to vouch for him to his probation officer. *Id.* at 11:01:38-02:19.

Matthew's Testimony

Matthew testified that defendant came to the house in the evening. RXV 202. Another group of friends soon arrived. *Id.* at 203. Defendant picked up a knife from a nearby table before getting up to let the group into the house. *Id.* at 204. The new group soon left, but Matthew, Renee, Johnny, and defendant remained. *Id.* at 206, 211. Matthew and Renee had sex in the bathroom, and when they emerged, defendant stood at

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the door, saying that what they had just done was "bogus." *Id.* at 215-16. Defendant asked to speak with Matthew on the back porch. *Id.* at 217. Defendant told Matthew that he planned to retaliate against Renee for a recent altercation between Renee and Debbie Davis, a close acquaintance of defendant's. *Id.* at 217-18 (defendant explained to Matthew that "he had to put a hit out for Renee beating up his Aunt Debbie"); *see also* RXVI 395-97 (describing incident). Matthew urged defendant not to retaliate, and they returned to the living room. RXV 218.

Matthew sat on the loveseat with Renee. *Id.* Defendant sat on a black folding chair positioned behind the loveseat. *Id.* Johnny sat on the couch. *Id.* at 222. Defendant and Matthew conversed "about Latin Kings and Juggalos" (two gangs). *Id.* at 222-23. Then defendant said, "You're not my brother. You never have been." *Id.* at 223. Before Matthew could respond, he felt blood running down his neck, raised his hand, and realized he had been cut. *Id.* at 223-24. Defendant then cut Renee. *Id.* at 224. Matthew leapt over the couch, and defendant dropped the knife. *Id.* at 224-25. In the process, Matthew knocked defendant onto a nearby mattress. *Id.* at 226-27. As Matthew approached the mattress to hit defendant, Johnny ran past and defendant escaped. *Id.* at 227. Renee called 911, and an ambulance arrived soon after. *Id.* at 230.

The parties stipulated to the admission of Matthew's recorded statement to Detective West of the Charleston Police Department. *Id.* at 238. Matthew said that when defendant arrived on December 12, the group listened to music. People's Exh. 28, Track 1, at 1:20-28. Defendant drank alcohol but did not consume any drugs. *Id.* at 3:07-17, 15:10-43. At some point during the evening, Matthew had seen defendant play with a broken knife. *Id.* at 8:39-9:17.

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Just before the attacks, Matthew was seated on the loveseat to the right of Renee, and defendant was seated behind them in a black folding chair (though Matthew acknowledged that on the night of the incident, he had said that defendant was in a swivel chair). *Id.* at 3:40-3:56, 4:59-5:30. Defendant said, "You ain't gonna be there for me, are you?," or some version of "you're not gonna have my back." *Id.* at 1:40-2:01; 3:24-40, 5:31-37. Defendant put his hand on Matthew's forehead, then Matthew felt blood running down his shirt. *Id.* at 5:50-6:12, 6:56-7:06. Matthew grabbed his neck and jumped up, then saw defendant cut Renee. *Id.* at 2:01-08, 6:12-21, 7:12-18. Matthew urged Johnny to call 911, pushed defendant down onto the mattress, chased defendant out of the house, and then defendant in turn chased Johnny. *Id.* at 2:08-19, 6:15-21, 7:18-24, 7:48-8:15, 9:25-30.

Matthew repeatedly denied that defendant had shown any animosity prior to the attack. *Id.* at 00:41-51 (nothing defendant did earlier in the day made Matthew believe he was upset); *id.* at 2:28-33 ("It was out of the blue. He said, 'you're not gonna have my back,' and I didn't know what he was talking about."); *id.* at 14:05-11. Matthew offered that the only possible rationale was the fight between Renee and Debbie Davis. *Id.* at 2:43-3:02, 13:55-14:04. He denied witnessing any argument between defendant and Johnny. *Id.* at 14:12-52.

Renee's Testimony

Renee testified that defendant came to the house around 5:00 p.m. RXVI 490. She corroborated Matthew's account that defendant picked up a knife before letting a group of visitors into the house. *Id.* at 500. Eventually, that group left, and only Matthew, Renee, Johnny, and defendant remained in the house. *Id.* at 506. Matthew and

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Renee went to the bathroom to have sex, and as they exited the bathroom, defendant was waiting just outside and appeared to be upset with them. *Id.* at 512-13. They returned to the living room, where Johnny sat on the couch, Matthew and Renee on the loveseat, and defendant on a swivel chair. *Id.* at 513-14. Defendant then opened a folding chair and sat behind the loveseat. *Id.* at 515. The next thing Renee remembered "was something along the lines of brother, something to do with brother," which is what Matthew and defendant called each other. *Id.*; *cf.* RXV 193. Renee then felt a sharp pain. RXVI at 515. She opened her eyes, stood up, and saw defendant on the mattress behind her and Matthew standing over him. *Id.* at 516-17. Matthew told her to call 911; defendant urged her not to. *Id.* at 517. She saw Matthew strike defendant, then went to her bedroom to call 911. *Id.* at 518. Matthew came to her room shouting "he's gone!" *Id.* at 519. The next thing she remembered, she was on the porch and Matthew was walking toward the ambulance. *Id*. at 521.

Toward the end of Renee's direct examination, the parties stipulated to the admission of her recorded statement to Detective West. *Id.* at 530-31. In her statement, Renee explained that defendant came to the house around 6 or 6:30, appearing drunk and smelling like marijuana. People's Exh. 28, Track 2, at 1:00-07. She listened to music while defendant and Matthew drank. *Id.* at 1:48-55. Defendant's mother called and asked Renee when defendant would be home because he had court the following day. *Id.* at 2:05-2:21. This was the last thing she remembered until she "woke up on the couch and Matt was screaming 'call an ambulance,' . . . he cut you." *Id.* at 2:30-2:47.

Renee's statement contained six passages to which defendant objects in this appeal: (1) that she had heard stories of defendant becoming violent when he consumes

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hard alcohol, *id.* at 1:11-28; (2) that defendant had to go to court the following day, *id.* at 2:03-15; (3) that defendant asked Renee to invite a woman named Lizzie so that defendant could have sex with her, *id.* at 9:53-10:50; (4) that defendant previously had sexual contact with Lizzie, *id.* at 14:00-35; (5) that defendant said he would kill Derrall Enlow if he came over, *id.* at 15:44-16:00; and (6) that Matthew suggested to her that defendant attacked them because of Renee's previous fight with Debbie Davis. *Id.* at 16:20-34.

Police Testimony and Forensic Evidence

Several officers testified about defendant's arrest. Sergeant Beadles of the Coles County Sheriff's Department had received a dispatch advising that the Charleston Police Department was looking for defendant. RXVI 536. He spotted defendant walking in Charleston, approached to within six feet of defendant, noticed blood on defendant's face, and arrested him. *Id.* at 539-40. Sergeant Beadles transferred custody of defendant to Charleston Police Officer Carder, who also noticed the blood on defendant's face and hands. RXVII at 675. Detective West, who observed defendant's interview, testified that he could see blood on defendant's face and hands. RXIX 848.

The People introduced a video recording of defendant's interview with Detective Stuart Myers. *Id.* at 928-29. When asked why he had blood all over him, defendant first insisted that he did not, then claimed that the blood came from being punched in the nose. People's Exh. 25 at 9:39:19-40; *id.* at 11:00:54-01:30. Asked to explain the events of that evening, defendant stated that the Joneses (Robert Jones and Derrall Enlow) came into the house and tried to attack him and his friends. *Id.* at 10:53:50-54:20; *id.* at 10:57:38-58:35.

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Forensic examiner Kelly Biggs testified (by evidence deposition) that the blood on defendant's left hand contained a minor DNA profile consistent with Matthew's. Ev. Dep. at 19-21. The blood on defendant's left cheek and on his shoe contained DNA that matched Matthew's. *Id.* at 25-26, 33. Renee's DNA matched the DNA in the blood on defendant's jeans. *Id.* at 29, 30. Some of the blood either did not match Matthew or Renee or was unsuitable for comparison. *Id.* at 21, 23, 25.

Defense Witnesses

Defendant testified that the attack transpired while he was in the bathroom for five to ten minutes. *Id.* at 1162-63. Though he did not hear anything while he was in the bathroom, he emerged to find that both Matthew and Renee had been cut. *Id.* at 1162-63, 1197. Matthew then pushed defendant onto the mattress. *Id.* at 1163. Defendant claimed that this aggravated a previous injury to his nose, causing it to bleed. *Id.* at 1166. Renee pushed Matthew off of defendant, allowing defendant to run out of the house. *Id.* at 1163. On cross-examination, defendant said that he chased two people out of the house (but not Johnny). He then said that he had not chased anyone. Finally, he claimed that he had chased only one person. *Id.* at 1182-83, 1196, 1198-99.

Defendant pursued three alternative theories throughout his case-in-chief: (1) Matthew attacked Renee, then slit his own throat; (2) Johnny committed the attacks; and (3) the Joneses committed the attacks. Counsel primarily emphasized the first theory in closing argument. RXX 1251-1268.

Defendant called several witnesses and introduced other evidence showing Matthew's violent character and specific instances in which Matthew threatened to commit violence with a knife or gun against Renee, himself, and others. RXVI at 560-

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67, 579-80; RXIX 988-90, 996, 1006-07; RXX 1149-52. Among this evidence was defendant's and Renee's testimony that Matthew had forced Renee at gunpoint to fight with Debbie Davis (the incident for which Matthew testified that defendant had put a "hit" on Renee). RXVI 562-64 (Renee); RXX 1151 (defendant). Defendant also introduced evidence that Renee's father believed that Matthew cut her, including live testimony and a recording of his 911 call to the same effect. RXX at 1048; People's Exh. 20, Track 4 (911 call of Randall Strohl).

Defendant also introduced evidence suggesting that Johnny committed the attacks. Alvina Wright testified that Matthew had told her in the days following the incident that Johnny did it. RXX 1098. Adrianna Pedigo stated that Matthew told her that Johnny committed the attack but cautioned her not to testify because "snitches get stitches." *Id.* at 1111, 1114. Tina Broom also testified that Matthew told her that both defendant and Johnny were behind him at the time of the attacks, but that he did not believe Johnny capable of attacking him. *Id.* at 1106-07. Defendant also introduced the 911 call from the Dairy Queen employee, who stated that Johnny did not want her to call 911 and was laughing when he arrived shortly after the incident. People's Exh. 20, Tracks 2, 3.

Finally, defendant suggested that the Joneses may have committed the attacks. Defendant testified that about a week and a half before the incident they had attacked Matthew and him at a bar. RXX 1129-33. Matthew corroborated this account on cross-examination. RXVI 423-28. Defendant testified that Robert Jones was across the street from Renee's residence on the afternoon of the incident. RXX 1133-34. Defendant

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admitted on cross-examination, however, that, contrary to his initial statement to Detective Myers, he did not see the Joneses that night. *Id.* at 1181-82, 1186-87.

Defendant and his parents testified that he had not used synthetic marijuana since he was hospitalized after using it years ago. *Id.* at 1081-82, 1086-87, 1156-57.

Conviction and Appeal

The jury found defendant guilty of two counts of attempted murder and two counts of aggravated battery. *Id.* at 1318. The circuit court found that the aggravated battery charges merged into the attempted murder charges and sentenced defendant to an aggregate term of thirty-two years of imprisonment. RXXI 141-42; C600.

Defendant appealed, arguing that trial counsel was ineffective for stipulating to admission of the recorded statements of Johnny, Matthew, and Renee, which he argued contained inadmissible prior consistent statements and bad-character evidence. *People v. Veach*, 2016 IL App (4th) 130888, ¶ 58. The appellate court affirmed, holding that under *People v. Kunze*, 193 Ill. App. 3d 708 (4th Dist. 1990), and its progeny, defendant's claim of ineffective assistance of counsel required consideration of matters outside the record and therefore should not be addressed on direct appeal. *Id.*, ¶¶ 66-98. Justice Appleton dissented, arguing that the record was sufficient to hold that trial counsel was ineffective. *Id.*, ¶¶ 99-153 (Appleton, J., dissenting).

ARGUMENT

The People agree that defendant's ineffective assistance of counsel claim can be resolved on direct appeal, because the record is sufficient to show that he did not suffer prejudice. Because this Court can reject an ineffective-assistance claim on the prejudice prong alone, *see People v. Hale*, 2013 IL 113140, ¶ 17, it can affirm defendant's

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conviction without further record development. The recordings now challenged as prior consistent statements were actually prior inconsistent statements and favorable to the defense. Most portions of the statements characterized as "other acts" evidence were not so, and regardless were not prejudicial. And whatever the nature of the evidence in the recordings, the live testimony — two eyewitnesses directly inculpating defendant, a third corroborating them, police and forensic testimony showing defendant speckled with the victims' blood after the attacks, and defendant's feigned ignorance and false statements in his police interview — was so overwhelming that defendant did not suffer prejudice. Therefore, this Court should affirm because defendant cannot prove prejudice.

The recorded statements were also important to counsel's strategy. Because this Court must presume counsel's competence, and the stipulations can be construed as part of a reasonable trial strategy, this Court should affirm defendant's conviction because he cannot show deficient performance. *See People v. Evans*, 209 Ill. 2d 194, 221 (2004) (counsel did not perform unreasonably by failing to object to other-acts evidence); *People v. Graham*, 206 Ill. 2d 465, 478-79 (2003) (counsel did not perform unreasonably by failing to object to prior consistent statements).

In the alternative, this Court can affirm based on the reasoning of the appellate court. In *People v. Bew*, 228 Ill. 2d 122 (2008), this Court explained that reviewing courts may, in appropriate circumstances, decline to rule on an ineffective assistance of counsel claim and encourage a defendant to bring the claim under the Post-Conviction Hearing Act. *Id.* at 134-35 (citing 725 ILCS 5/122-1, *et seq.*). Although the record is sufficient to reject defendant's ineffective-assistance claim, this Court may affirm the

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conviction and permit defendant to raise the claim with an expanded record in a postconviction proceeding.

I. Defendant Received Effective Assistance of Counsel.

Defendant identifies a handful of excerpts of the recorded statements to which he argues counsel should have objected. Def. Br. 25-29. These fall into two categories: (1) accounts of the events of December 12, which defendant characterizes as prior consistent statements; and (2) "unfairly prejudicial" references to other instances of defendant's bad acts or character. *Id.* Defendant cannot show that counsel's strategic decision not to object to portions of these statements on either basis prejudiced him or constituted deficient performance.

A. Standard of review

Strickland v. Washington, 466 U.S. 668 (1984), governs claims of ineffective assistance of counsel. *People v. Domagala*, 2013 IL 113688, ¶ 36 (citing *People v. Albanese*, 104 Ill. 2d 504 (1984) (adopting *Strickland*)). "To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was deficient and that the deficient performance prejudiced the defendant." *Domagala*, 2013 IL 113688, ¶ 36.

A court "may dispose of an ineffective assistance of counsel claim by proceeding directly to the prejudice prong without addressing counsel's performance." *Hale*, 2013 IL 113140, ¶ 17 (citation omitted). A defendant must "affirmatively prove prejudice" by "show[ing] that [particular errors] actually had an adverse effect on the defense." *Strickland*, 466 U.S. at 693. "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.* Rather, a defendant

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"must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. Thus, defendant must "show[] . . . actual prejudice, not simply speculation that defendant may have been prejudiced." *People v. Patterson*, 2014 IL 115102, ¶ 81.

B. Counsel's stipulation to the recorded statements did not prejudice defendant.

1. The recorded statements were inconsistent in critical respects with the inculpatory live testimony and employed by defendant to positive effect in his case.

Defendant argues that counsel should have objected to Johnny's and Matthew's recordings because they contained prior consistent statements. Prior consistent statements are not admissible to bolster the credibility of a witness. *People v. Cuadrado*, 214 Ill. 2d 79, 90 (2005). But a witness's prior statement is admissible as substantive evidence if (1) it is inconsistent with the witness's trial testimony; (2) the witness had personal knowledge of the event or condition described; and (3) the statement was accurately recorded. Ill. R. Evid. 801(d)(1)(A)(2). This Court has recognized that "[a] witness['s] prior testimony . . . does not have to directly contradict testimony given at trial to be considered inconsistent within the meaning of that term set out in [the statutory predecessor to Rule 801(d)(1)]." *People v. Flores*, 128 Ill. 2d 66, 87 (1989). Defendant contends that Matthew's and Johnny's recordings included inadmissible prior consistent statements because they "repeated details" of relevant events. Def. Br. 25, 27. This obscures the details themselves, which were inconsistent with the live testimony and thus furthered defendant's theory of the case; therefore, admission of the statements cannot have been prejudicial.

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The clearest evidence that these statements were not inadmissible prior consistent statements comes from the parties' closing arguments. The People did not cite the recorded statements even once. RXX 1227-51, 1272-81. Defense counsel, on the other hand, cited them repeatedly to highlight their inconsistencies. *See id.* at 1252 (Matthew's recorded statement that "Johnny Price is fully snoring"); *id.* at 1253 ("Remember how [Johnny] said in the statement the music kind of paused or stopped."); *id.* at 1263 ("Johnny changed his story two or three times in that video tape about what he saw."). Counsel emphasized that Matthew's live testimony about defendant's motive was suspect because he had impeached Matthew by omission with the recorded statement. *People v. Owens*, 65 Ill. 2d 83, 91-92 (1976) (discussing impeachment by omission); RXX at 1265 ("[N]o motive for months until an epiphany, I'm in prison, oh, yeah, this hit, it was a hit about Debbie Davis."). Because, as defense counsel recognized, Johnny's and Matthew's prior accounts were on balance favorable to defendant, he was not prejudiced by their admission at trial.

Indeed, throughout the trial, counsel used the recorded statements to defendant's advantage. Before Johnny's statement was introduced, counsel noted on the record that he wanted to use portions for impeachment. RXV 33-34 ("Technically we were going to open the door with impeachment . . . . If we go to impeach it, then the whole video comes in[.]"). On cross-examination, counsel tried to secure an admission that Johnny's memory of the events was fresher in the video than at trial, *id.* at 78, in an effort to show that the recorded account — which was more favorable to defendant than Johnny's live testimony — was more reliable than Johnny's trial testimony. For instance, Johnny testified that he looked up and saw defendant cut Matthew's and Renee's throats. *Id.* at

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63-64. Counsel impeached Johnny with the recorded statement in which Johnny said that he looked up only *after* Matthew was cut or after the cutting had begun, and in which he denied seeing defendant cut Renee. *Id.* at 127; *cf.* People's Exh. 24 at 10:28:23-38; *id.* at 10:36:10-18; *id.* at 10:43:03-08. Likewise, Johnny admitted on cross-examination that in the video, he told Detective Blagg that he saw defendant playing with a bat earlier in the night, rather than a knife, as he said at trial. RXV 110. Counsel also used the recorded statement to impeach Johnny about whether he or Matthew pushed defendant after the attacks, *id.* at 80, 86; whether defendant forced him to do drugs, *id.* at 87; whether Matthew, rather than defendant, had been flashing gang signs, *id.* at 89-92, 99; and whether he had met defendant before the night of the incident, *id.* at 103.

Matthew's recorded statement similarly diverged from his trial testimony in key respects, and counsel made use of those inconsistencies as well. Matthew testified that defendant pulled him aside shortly before the attacks and said he had a "hit" on Renee (i.e., he intended to harm Renee); his recorded statement includes no mention of the "hit." RXV 217-18. Defendant argues that Matthew's statement was actually consistent on this point because Matthew mentioned the Debbie Davis incident — the reason defendant put a "hit" on Renee — in the recording. Def. Br. 27.[3] But as defense counsel discussed at length in Matthew's cross-examination and in closing argument, there is a great difference between the recording, which showed that Matthew could think of no motive except possibly the Debbie Davis incident, and Matthew's live testimony, in which he

[3] While defendant identifies three such instances, there are only two, as the second pinpoint citation does not reference such a statement. Def. Br. 27 (citing People's Exh. 28, Track 2, at 05:50-59); *cf.* People's Exh. 28, Track 1, at 05:50-59 (Matthew) ("A. I do got your back my bro. Q. Were you looking at him at that point? A. No. And as I was saying this, there's a hand on my — a hand goes on my forehead.").

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claimed that defendant confided, moments before the attack, that he planned to attack Renee. *Compare* People's Exh. 28, Track 1, at 2:28-33 ("It was out of the blue. He said, 'you're not gonna have my back,' and I didn't know what he was talking about.") *with* RXV 217-18 ("He told me that he had to put a hit out for Renee beating up his Aunt Debbie[.]"). Counsel thus used Matthew's recorded statement as impeachment by omission. *See* RXV 251 ("[Y]ou would agree with me prior to today you never said anything about someone having a hit, had to have a hit against . . . Renee for beating up Debbie?"); *id.* ("[E]very[ ]day that . . . you were living in Charleston, you don't walk to the Charleston Police Department and say, hey, [Detective West], I just remembered something, it's very, very important, he told me that night he had to take a hit out on Renee for beating Debbie Davis up[.]"); RXX 1265 (remarking in closing argument: "[N]o motive for months until an epiphany, I'm in prison, oh, yeah, this hit, it was a hit about Debbie Davis."). Indeed, Matthew's "hit" testimony was so different from the recording that counsel argued that it constituted "trial by ambush" and moved for a mistrial. RXV 219, 254-84.

Defense counsel highlighted several other details that differed from Matthew's recorded statement: for instance, Matthew stated on the recording that Johnny was "fully snoring" at the time of the incident, impeaching both Matthew's and Johnny's testimony on that point. *See* RXV 246, 248-49; People's Exh. 28, Track 1, at 14:54-15:05 ("He was . . . on the bigger couch on the far end . . . by the door . . . fully snoring on the couch."). Counsel highlighted differences between Matthew's recording and his testimony about how he knew the shape of Renee's laceration. RXVI 404-05; RXX 1270 (referencing this in closing argument). The recording also differed from Matthew's testimony with

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respect to Matthew's reaction to being attacked. *Compare* RXV 224 (ducked and spun to see Renee being cut) *with* People's Exh. 28, Track 1, at 2:02-04 ("jumped up") *and id.* at 6:12-13 (same).

Because the recorded statements were inconsistent with the trial testimony in many respects, they were not prejudicial to the defense even to the extent that they also contained consistent statements. To begin, "the defendant must show that [particular errors] actually had an adverse effect on the defense. It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Strickland*, 466 U.S. at 693. Moreover, "[t]he prejudicial nature of evidence of prior consistent statements is judged on a case-by-case-basis." *People v. Caffey*, 205 Ill. 2d 52, 110 (2001). As discussed, the statements were, on balance, favorable to the defense and therefore not prejudicial. Indeed, defendant's opening brief before this Court cites the inconsistencies among the recorded statements and between the recorded statements and the live testimony. *See* Def. Br. 36-37 (citing the conflict between Johnny's recorded statement and Matthew's and Renee's recorded statements as evidence that Johnny was biased and may have been the perpetrator); Def. Br. 40-41 (citing Matthew's and Renee's recorded statements as evidence that Matthew had motive to lie). Defendant therefore was not prejudiced by counsel's decision not to object to Matthew's and Johnny's recorded statements, even if they were in some other respects consistent with their testimony.

2. The recorded statements did not contain "other-acts" evidence.

Defendant also claims that the statements of Johnny, Matthew, and Renee contained inadmissible other-acts evidence. Illinois Rule of Evidence 404 prohibits the

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use of a defendant's bad character, or acts tending to show bad character, to prove that defendant has a propensity to commit crime. Ill. R. Evid. 404(a) & (b); *People v. Pikes*, 2013 IL 115171, ¶ 11 (citations omitted). Defendant claims that several statements within the recordings were inadmissible under Rule 404, though it is unclear whether he argues that they were improper propensity evidence, more prejudicial than probative, or both. Def. Br. 25-29. Regardless of how these statements are characterized, defendant was not prejudiced by counsel's decision not to object to them.

Defendant first argues that counsel should have objected to references in Matthew's and Renee's statements to defendant's drinking. *Id.* at 27, 28. Matthew's statement that defendant "was a real big alcoholic, and that's all he does now is drink" was made in response to Detective West's question whether defendant consumed narcotics, and in context meant that "defendant does not do drugs," and not that "defendant's only leisure activity is drinking alcohol."[4] People's Exh. 28, Track 1, at 15:22-44. Although an objection to Renee's remark that defendant became violent when he drank hard alcohol may have been sustained, there is no reasonable probability that but for the error the outcome would have been different. As discussed *infra*, Section I.B.3, two eyewitnesses watched defendant commit the attacks, a third placed him in a position to commit the attacks, defendant had the victims' blood on his face and clothes, and he vacillated between feigning ignorance and concocting a fictitious narrative in his police interview. *Cf. Harris*, 182 Ill. 2d at 137 (no prejudice from introduction of other-crimes evidence where two eyewitnesses testified that defendant committed crime and defendant confessed). Renee's remark, on the other hand, was isolated and cryptic — she

[4] This is a good example of the virtues of the completeness doctrine. *See infra*, Section I.C.

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provided no specific examples and the statement was not referenced again. *Evans*, 209 Ill. 2d at 221 (counsel not ineffective for not making meritorious objection to isolated, nonspecific other-acts evidence). Its impact was lessened by the fact that immediately afterwards she remarked that in her numerous interactions with defendant she had never personally seen him become violent. People's Exh. 28, Track 2, at 1:18-23. Defendant therefore cannot show prejudice from this single remark.

Nor did certain statements concerning defendant's gang affiliation prejudice him. Defendant argues that counsel should have moved to redact Johnny's statements that defendant flashed gang signs and claimed to be a Latin King. Def. Br. 25-26. But Johnny stated that defendant attacked Matthew because Matthew interposed himself when Johnny resisted defendant's demands to make gang signs or smoke synthetic marijuana, making this admissible motive evidence, not inadmissible propensity evidence. *See Pikes*, 2013 IL 115171, ¶ 11. Second, the portion of Johnny's statement that referenced gangs had little impact on the trial: he was inconsistent about it (he changed defendant's alleged gang affiliation midstream, *see* People's Exh. 24 at 10:26:03-07, 10:26:56-27:06); neither Matthew nor Renee mentioned defendant making gang signs; and Johnny did not mention it at trial, either. For these reasons, there is no reasonable probability of a different outcome had counsel objected to this evidence.

Moreover, at multiple points, counsel emphasized Johnny's statements about defendant's "gang affiliations" because he believed that they showed that Johnny was misattributing Matthew's actions to defendant. *See* RXV 94. On cross-examination, counsel elicited from both Johnny and Matthew that Matthew flashed the gang sign Johnny saw that night. *Id.* at 99; RXVI 382-83. Counsel introduced two exhibits

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showing Matthew making the same hand gesture that Johnny made in the video. Def. Exh. 1 & 2. Counsel even highlighted that portion of Johnny's statement in closing argument: "You [saw] Johnny Price's video when he flashes a gang symbol. It's identical to what Matthew Price . . . admits is him, so again I think that's Johnny's confusion, can't believe his cousin would do this. It had to be this evil Blackie Veach[.]" RXX 1260. The People, on the other hand, never again referenced the gang-related evidence; it was not part of their theory of the case and was not introduced to show defendant's bad character.[5] Defendant was therefore not prejudiced by its introduction.

Counsel's decision not to make the remainder of the objections proposed by defendant was not prejudicial. Johnny's statements about defendant's motive, for instance, were not other-acts evidence (they did not describe any bad acts); even if they were other-acts evidence, they were used to show motive, not propensity. *See* Def. Br. 26 (counsel should have objected to two statements about defendant's motive); Ill. R. Evid. 404(b) ("[Other-acts evidence] may be admissible for other purposes, such as proof of motive[.]"). Renee's discussion of defendant's sexual encounters with "Lizzie G" plainly was not prejudicial, as even the dissent below agreed. *Veach*, 2016 IL App (4th) 130888, ¶ 139 (Appleton, J., dissenting). Defendant's relationship with Lizzie G bore no connection to the crimes and it was never suggested, even tangentially, that he attacked Matthew and Renee because of any propensity for licentiousness. Likewise, Renee's statement that defendant's mother told her to make sure defendant was home early

[5] This point, it bears noting, resonated with the trial judge, who explained in a posttrial matter that "the gang testimony in this case dealt with more [*sic*] Mr. Price than Mr. Veach. . . . I think it could reasonably be assumed that if there is any concern or link . . . to a gang, . . . the jury more probably would have linked them to Mr. Price than Mr. Veach." RXXI 24-25.

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because he had court the next day was not prejudicial. The statement did not reference why he was going to court, and it played no role in the People's theory of the case. *See id.* Similarly, Renee's statement that defendant told her that he would kill Derrall Enlow (one of the Joneses) was not other-acts evidence. *Id.*, ¶ 135 (statement explained why defendant picked up knife before answering door). Because these statements were admissible, counsel's decision not to object to them did not prejudice defendant.

Finally, defendant argues that counsel should have at least requested a limiting instruction with respect to the "other acts" evidence. Def. Br. 29-30. But if there is no reasonable probability of a different result had the jury not heard the evidence at all, then *a fortiori* there is no reasonable probability of a different result if the jury had heard the evidence with a limiting instruction.

3. The recorded statements did not prejudice defendant because the remaining evidence was overwhelming.

Whatever counsel's motivation for proceeding as he did, the indisputably admissible testimony was so compelling that defendant cannot show a reasonable probability of a different outcome even had defense counsel tried to exclude portions of the recorded statements. Both Johnny and Matthew testified that defendant slit Matthew's and Renee's throats. RXV 63-64, 223-24. Johnny said he looked up from the couch and saw defendant commit both attacks. *Id.* at 63-64. Matthew said that defendant was the only person behind him when he felt blood come down his neck and that he observed defendant cutting Renee. *Id.* at 223-24. Renee, though either asleep or incapacitated during the attack, substantially corroborated Johnny's and Matthew's accounts: she explained that defendant moved to a folding chair behind the loveseat just before the attacks and stated that defendant urged her not to call 911 afterward. RXVI

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515, 517. Matthew testified that, shortly before the attacks, defendant explained that he had a "hit" on Renee as retaliation for an earlier fight between Renee and Debbie Davis. RXV 217-18. Matthew also told the emergency dispatcher that defendant committed the attacks. People's Exh. 20, Track 1, at 1:22-26; *see also* RXVI 524 (Matthew's statement to dispatcher admitted substantively). Three police officers testified that when they encountered defendant after the attacks, he was covered in blood, some of which forensic testing confirmed belonged to Matthew and Renee. *Id.* at 539-40; RXVII 675; RXIX 848; Ev. Dep. at 19-21, 26, 29, 30.

Defendant's alternative theories suffered from significant defects unrelated to the evidence he argues his counsel should have challenged. Notably, in his interview, defendant feigned ignorance of the attacks (and the blood on his face, hands, and clothes), then concocted a story about the Joneses breaking in with guns, which he admitted on the stand was a lie. People's Exh. 25 at 10:53:50-54:20; RXX 1181. That interview belied his account at trial that he innocently emerged from the bathroom to find Matthew and Renee already cut. In the bathroom, defendant would have been only ten feet away from the attacks, yet he claimed to hear nothing, despite consistent testimony that Matthew and Renee screamed and physical evidence that the loveseat was moved in the course of the attacks. RXX 1191, 1197.

No evidence supported defendant's theory that the Joneses committed the attacks. As for Johnny, although defendant adduced evidence that Matthew once thought that Johnny was the perpetrator, the jury was not required to find that testimony credible. The jury had good reason to reject this theory: unlike defendant, no one testified that Johnny had Matthew's and Renee's blood on him, and none is apparent in his video interview,

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see generally People's Exh. 24. And, unlike defendant, Johnny did not steadfastly refuse to acknowledge that Matthew and Renee were attacked or fabricate a story about the Joneses during his police interview.

Defendant introduced substantial evidence of Matthew's violent character, but that evidence could not overcome countervailing evidence, especially the wound to Matthew's hand, which corroborated Matthew's explanation that he reached up as he was being attacked, RXV 223-24, 233-34, the undisputed fact that Matthew and Renee were getting along that night (indeed, they had intercourse minutes before the attacks), *e.g.*, *id.* at 215, the fact that no one present claimed that Matthew committed the attacks, and the inherent incredibility of the theory that Matthew slit his own throat. Defendant therefore cannot show that counsel's decision not to object to certain portions of the recorded statements prejudiced him.

C. Counsel performed adequately because the stipulation was strategic.

Defense counsel provided reasonable professional assistance. When reviewing an ineffective-assistance claim, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. This means that "a reviewing court will be highly deferential to trial counsel on matters of trial strategy, making every effort to evaluate counsel's performance from his perspective at the time, rather than through the lens of hindsight." *People v. Perry*, 224 Ill. 2d 312, 344 (2007) (citations omitted). It is therefore the defendant's burden to "overcome the strong presumption that the challenged action or inaction may have been the product of sound trial strategy," because "[m]atters of trial strategy are generally immune from claims of ineffective assistance of counsel." *People*

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v. Manning, 241 Ill. 2d 319, 327 (2011) (citations omitted). "As a general rule, trial strategy encompasses decisions such as what matters to object to and when to object." *People v. Pecoraro*, 144 Ill. 2d 1, 13 (1991) (citations omitted). Indeed, even a failure to lodge a meritorious objection "may be a matter of strategy and does not necessarily establish substandard performance," *Graham*, 206 Ill. 2d at 478-79, including where, as here, counsel has not objected to prior consistent statements or other-acts evidence. *Id.* (not deficient performance not to object to prior consistent statements).

In *Graham*, the prosecution's star witness (named Johnny) testified that he saw the defendant shoot repeatedly into the bedrooms where the three victims were found. *Id.* at 467-68. An Assistant State's Attorney (ASA) later testified for the prosecution that Johnny had reported "that he had seen the defendant 'shooting people, or shooting in the house.'" *Id.* at 477. Defense counsel did not object. *Id.* at 478. Indeed, counsel even had the ASA repeat on cross-examination that "[h]e told me that he saw the defendant shoot into the room[.]" *Id.* at 477. This Court held that defendant could not demonstrate deficient performance based on counsel's failure to object to this testimony. *Id.* at 479. Rather, counsel's "decision not to object to [the ASA's] testimony was a strategic choice. Johnny's testimony . . . and [the ASA's] testimony corroborating Johnny's testimony comported with the defense theory that Johnny did not see the defendant actually shooting the victims." *Id.* at 479; *see also Perry*, 224 Ill. 2d at 344 (reading *Graham* to stand for proposition that "counsel's decision not to object [to a witness's prior consistent statement] was a 'strategic choice' that did not fall below an objective standard of reasonableness"); *People v. Evans*, 209 Ill. 2d 194, 220-21 (2004) (counsel may have had strategic reasons for not objecting to "other acts" testimony).

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Here too, counsel's stipulation was strategic. As discussed above, because the recorded statements were in large part inconsistent with the trial testimony and favorable to the defense, *see supra*, Section I.B.1, counsel did not object, *see* RXV 33-34. Indeed, counsel went so far as to emphasize that Johnny's memory was fresher in his recorded statement than on the stand, revealing counsel's strategy to urge the trier of fact to credit the recorded statements over the live testimony. *Id.* at 78.

Even what defendant characterizes as other-acts evidence had strategic value. Defendant's primary theory was that Matthew attacked Renee and then cut himself. Integral to that theory was the notion that Johnny incorrectly implicated defendant out of the mistaken belief that Matthew could not have committed the crime. *See, e.g.*, RXX 1260 ("I think that's Johnny's confusion, can't believe his cousin would do this. It had to be this evil Blackie Veach[.]"). Counsel explained that the critical evidence supporting this theory was Johnny's false attribution of some of Matthew's actions to defendant. *Id.*; RXV 94. Hence, counsel talked extensively about Johnny's references to defendant flashing gang signs, then produced documentary evidence that Matthew was known to make those signs as well. Def. Exhs. 1 & 2. Likewise with forcing Johnny to smoke synthetic marijuana: defendant, his mother, and his stepfather testified that synthetic marijuana had nearly killed him, so he never touched it, implying that Matthew — not defendant — had forced Johnny to smoke. RXX 1076-85, 1156-57. The recorded statements were integral to this false-attribution theory.

Defendant argues that counsel failed to object because he was ignorant of the law. Def. Br. 30. In particular, defendant contends that trial counsel was wrong to think that the completeness doctrine would have rendered the complete recordings admissible. But

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counsel was right. "When a . . . recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." Ill. R. Evid. 106. Rule 106 incorporates most of the common-law doctrine of completeness, under which a party's use of a portion of a statement allows the adverse party to introduce other portions of the statement that give context and ensure that the jury is not misled. *See People v. Craigen*, 2013 IL App (2d) 111300, ¶ 45; *see also People v. Patterson*, 154 Ill. 2d 414, 453 (1992) (completeness doctrine allows party to introduce "the remainder of an utterance or writing, so much as is required to shed light on the meaning of the evidence already received").

The record suggests that counsel wanted to use significant portions of the recordings for impeachment, or to further claims of bias or mistake. *See supra*, Section I.B.1. Counsel thus reasonably concluded that the completeness doctrine rendered the remainder of the recordings admissible. *See People v. Harris*, 123 Ill. 2d 113, 142-43 (1988) (completeness analysis depends on which portion of statements opponent introduces). And defense counsel's silence about any other reason for stipulating to Matthew's and Renee's statements cannot be interpreted as legal ignorance. RXV 238; RXVI 530-31; *Massaro v. United States*, 538 U.S. 500, 505 (2003) (counsel's ignorance not presumed from silence).

II. In the Alternative, This Court Can Affirm the Appellate Court's Judgment if It Finds that the Ineffective-Assistance Claim Is Better Suited to Postconviction Review.

The record is sufficient to show that defendant's *Strickland* claim lacks merit, and although this was not the basis for the appellate court's judgment, this Court may affirm

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on any basis in the record. *People v. Thomas*, 164 Ill. 2d 410, 419 (1995). In the alternative, however, this Court can affirm defendant's conviction and the judgment of the appellate court if it finds that defendant's claim is more appropriate for postconviction review, as the appellate court concluded. *Veach*, 2016 IL App (4th) 130888, ¶¶ 91-95.

The United States Supreme Court has recognized that ineffective assistance of counsel claims may require consideration of information outside the record. In *Massaro v. United States*, 538 U.S. 500 (2003), the Court held that ineffective-assistance claims could be brought in collateral proceedings whether or not they could have been raised on direct appeal from a federal-court conviction. *Id.* at 504. The Court explained that the trial record "in many cases will not disclose the facts necessary to decide either prong of the *Strickland* analysis." *Id.* at 505. "If the alleged error is one of commission, the record may reflect the action taken by counsel but not the reasons for it. . . . The trial record may contain no evidence of alleged errors of omission, much less the reasons underlying them." *Id.* The Court therefore concluded that ineffective-assistance claims arising out of federal-court trials were better suited to collateral proceedings and held that the ordinary federal rule that claims that could have been raised on direct review are waived on collateral review did not apply to ineffective-assistance claims. *Id.* at 504.

This is not the case in Illinois. Claims apparent on the record must be raised on direct appeal, including ineffectiveness claims. *People v. Kokoraleis*, 159 Ill. 2d 325, 328 (1994). However, this Court has held that on direct review, a court may, as a prudential matter, decline to address an ineffective-assistance claim where further record development is needed. *People v. Bew*, 228 Ill. 2d 122, 135 (2008). In *Bew*, the

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defendant claimed that counsel was ineffective for failing to move to suppress evidence on certain Fourth Amendment grounds. *Id.* at 133. This Court acknowledged *Massaro* and concluded that the best approach in the case before it was not to address the claim of ineffective assistance premised on an incomplete record but instead to allow defendant to bring the claim on postconviction review. *Id.* at 135.[6]

The People reiterate that this case can and should be resolved on direct appeal, making it distinguishable from *Bew*. First, unlike in *Bew*, defendant has declined an invitation to expand the record: he asks this Court to resolve the claim on direct appeal after the appellate court offered him the opportunity to pursue the claim in a postconviction petition. Second, as discussed above in Section I, there is record evidence to resolve defendant's claim here, unlike in *Bew*, in which the record contained no evidence from which a court could resolve the Fourth Amendment issue presented. *Id.* at 134.

Although defendant and the dissent below agree that this claim should be resolved on direct appeal, their reasons are unsound. First, defendant argues that because counsel failed to object to unfavorable evidence, he automatically rendered substandard performance. Def. Br. 31. This misstates Illinois law: the decision not to make even a meritorious objection can be a matter of sound trial strategy. *See Graham*, 206 Ill. 2d at 478. Defendant cites two cases from the appellate court for the proposition that failure to lodge a meritorious objection to prejudicial evidence cannot be presumed strategic. Neither case supports that proposition, as both turned on fact-specific determinations that counsel allowed an extraordinary amount of inadmissible, inculpatory facts into evidence.

[6] The majority below relied on *People v. Kunze*, 193 Ill. App. 3d 708 (4th Dist. 1990). The procedure in *Kunze* is identical to *Bew*'s. *Id.* at 725-26.

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See People v. Fletcher, 335 Ill. App. 3d 447, 450-52 (5th Dist. 2002) (counsel introduced evidence of myriad other convictions); *People v. Moore*, 279 Ill. App. 3d 152, 155 (5th Dist. 1996) (counsel failed to lodge meritorious objections to majority of People's case). As demonstrated above, this did not happen here; the record shows that counsel's decision not to object to the stipulation was strategic, and that there was no prejudice.

Second, defendant argues that the trial record already proves that counsel acted out of ignorance, not strategy. Def. Br. 32. On the contrary, as discussed above, *supra* Section I.C, the record supports the presumption that counsel knew the law and followed a reasonable strategy when he chose not to object.

Third, defendant argues that bringing the claim in a postconviction petition delays justice, deprives him of a direct appeal, and unfairly forces him to navigate the arcana of postconviction procedure without counsel. Def. Br. 34-35. This Court explicitly rejected such concerns as unfounded in *People v. Ligon*, 239 Ill. 2d 94 (2010). In *Ligon*, the appellate court on direct appeal followed *Bew* and declined to address two claims of ineffective assistance of counsel. *Id.* at 104-05. Defendant re-raised his *Strickland* claims in a postconviction petition and argued that he was denied his constitutional right to appointed counsel by being forced to litigate his claim in a pro se postconviction petition rather than in a counseled direct appeal. *Id.* at 105. This Court rejected his claim, noting that he had no constitutional right to postconviction counsel, even if it was his first opportunity to raise any particular claim. *Id.* at 113. This Court also noted that defendant was well situated to prepare a postconviction petition because he already had counseled briefs on the issue. *Id.* at 116-17. In short, this case may be resolved now

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because the record is adequate, not because it would be unfair to require defendant to bring the claim later.

Finally, the dissent reasoned that *Bew* does not apply because it involved an alleged error of omission (failure to move to suppress), whereas this case involved an alleged error of commission (stipulation). *Veach*, 2016 IL App (4th) 130888, ¶ 105-07 (Appleton, J., dissenting). The Supreme Court rejected the omission/commission distinction in *Massaro*, finding that both types of alleged errors may require consideration of matters outside the record. 538 U.S. at 505 ("If the alleged error is one of commission, the record may reflect the action taken . . . but not the reasons for it. The appellate court may have no way of knowing whether . . . counsel had a sound strategic motive or was taken because the . . . alternatives were even worse."). Moreover, the distinction does not matter in this case because both counsel's strategy and the lack of prejudice can be seen in the record. The record on direct appeal is thus sufficient to resolve the claim regardless of the nature of the claimed error.

Neither party urges a departure from *Bew*; both simply agree that this case is distinguishable. However, as a prudential doctrine, *Bew* authorizes courts to decline to review claims that they believe would benefit from further record development. If this Court concludes that defendant's claims fall into that category, it can affirm under the *Bew* framework, decline to address defendant's ineffective assistance of counsel claim, and note that he may raise it on postconviction review.

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CONCLUSION

For the foregoing reasons, the People of the State of Illinois respectfully request that this Court affirm the judgment of the Illinois Appellate Court, Fourth District.

February 1, 2017

LISA MADIGAN
Attorney General of Illinois

DAVID L. FRANKLIN
Solicitor General

MICHAEL M. GLICK

/s/ Daniel B. Lewin
DANIEL B. LEWIN
Assistant Attorneys General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601-3218
(312) 814-2391
dlewin@atg.state.il.us

Counsel for Plaintiff-Appellee
People of the State of Illinois

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) 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(a), is thirty-two pages.

/s/ Daniel B. Lewin
DANIEL B. LEWIN
Assistant Attorney General

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RULE 342(a) SUPPLEMENTARY APPENDIX

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SA1

PROOF OF FILING AND SERVICE

The undersigned deposes and states that on February 1, 2017, a copy of the foregoing **Brief and Supplementary Appendix of Plaintiff-Appellee People of the State of Illinois** was filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, and pursuant to Illinois Supreme Court Rule 11(b)(6), one copy was served by email upon the following:

Jack Hildebrand, Assistant Appellate Defender
Office of the State Appellate Defender
Second Judicial District
One Douglas Avenue, Second Floor
Elgin, Illinois 60120
2nddistrict.eserve@osad.state.il.us

David J. Robinson, Deputy Director
State's Attorneys Appellate Prosecutor
725 South Second Street
Springfield, Illinois 62704
4thdistrict@ilsaap.org

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

/s/ Daniel B. Lewin
DANIEL B. LEWIN
Assistant Attorney General

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