No. 124352

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	Appeal from the Appellate Court of Illinois, Fourth District
Plaintiff-Appellant,	No. 4-17-0605
v.	There on Appeal from the Circuit Court of the Sixth Judicial Circuit, Macon County, Illinois
	No. 12-CF-897
RYAN M. RODDIS,	The Honorable Thomas E. Griffith,
Defendant-Appellee.	Judge Presiding.

REPLY BRIEF OF PLAINTIFF-APPELLANT
PEOPLE OF THE STATE OF ILLINOIS

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ORAL ARGUMENT REQUESTED

ARGUMENT

I. The Appellate Court's Opinion Contradicts This Court's Precedent.

A. It is settled that trial courts may and should consider the merits of a defendant's claim at the preliminary *Krankel* inquiry.

The People's opening brief demonstrated that the appellate court's holding that, during a preliminary *Krankel* inquiry, a trial court may not "reach the merits" of a defendant's ineffective assistance claim, is contrary to more than twenty opinions of this Court. Peo. Br. 11-14 (collecting cases).[1] Defendant's argument — that the appellate court instead meant that courts "should not adjudicate the final legal merits" of a defendant's claim and may only consider the claim's "factual merit," Def. Br. 9 — fails for three independent reasons.

First, the appellate court's opinion draws no distinction between factual and legal merit. Rather, it flatly and repeatedly states that "the trial court does not — and cannot — reach the merits of an ineffective assistance claim" during the preliminary inquiry. *People v. Roddis*, 2018 IL App (4th) 170605, ¶¶ 47, 52; *see also id.* ¶81 ("We hold that a trial court commits reversible error" when it conducts a preliminary inquiry "and concludes — on the merits — that there was no ineffective assistance"). Indeed, defendant

[1] The People's and defendant's briefs are cited as "Peo. Br." and "Def. Br.," respectively.

cannot identify any part of the opinion distinguishing between factual and legal merit. *See* Def. Br. 8-10.

Second, and more importantly, defendant's new theory that a trial court may not decide a claim on the "legal merits" is contrary to this Court's longstanding precedent. *See* Peo. Br. 11-14 (collecting cases). In *People v. Chapman*, 194 Ill. 2d 186 (2000), for example, the defendant faulted his trial counsel for failing to investigate and introduce certain documents that could have supported an alibi, and the trial court declined to appoint new counsel because it "found that [Chapman] received the effective assistance of counsel" and the omitted evidence would not have changed the jury's verdict. *Id.* at 229. As in this case, Chapman argued on appeal that the trial court had erred by evaluating the merits of his claim. *Id.* This Court rejected that argument and affirmed the trial court's judgment, noting that new counsel should not be appointed if the defendant's claim "lacks merit." *Id.* at 230-31. This Court explained that "the record shows that [the omitted alibi evidence] would not have had any bearing on the case. This claim simply has no merit." *Id*. at 231. The conclusion the trial court reached here — that failing to introduce hard copies of the text messages did not affect the outcome of the case — is thus perfectly in line with this Court's precedent.

Notably, although the People's brief discussed *Chapman* at length, Peo. Br. 13-14, defendant makes no attempt to distinguish it, *see* Def. Br. 9-10. Defendant's conclusory assertion that no authority permits trial courts to

"adjudicate the final legal merits of a claim" is thus incorrect. *See, e.g., Chapman*, 194 Ill. 2d at 230-31; *see also People v. Crane*, 145 Ill. 2d 520, 533 (1991) (trial counsel's failure to investigate motion to suppress did not entitle defendant to appointment of new counsel because motion would have had no legal merit); *People v. Coleman*, 158 Ill. 2d 319, 350-51 (1994) (no new counsel where motions defendant faulted trial counsel for not filing were meritless). Accordingly, while trial courts should examine the factual basis for a defendant's claims during the preliminary inquiry, they are not limited to determining whether the claim is factually meritless.

Third, defendant's new theory would lead to absurd results. Under that theory, if a defendant alleged that his trial counsel erred by failing to raise per se legally meritless arguments — such as that the victim in a statutory rape case was dressed provocatively or that the First Amendment flatly prohibits any law criminalizing the creation of child pornography — the circuit court would nonetheless be required to appoint new counsel to pursue the claim, which would not be a just or efficient result. Claims that are "legally meritless" are often the easiest claims to resolve, and there is no reason to prohibit trial courts from doing so at the preliminary inquiry.

Moreover, none of the cases defendant relies on supports his new theory. *See* Def. Br. 8-9 (citing *Moore*, *Ayres*, *Nitz*). In *Moore* and *Ayres*, no preliminary *Krankel* inquiry was held and, thus, the opinions addressed what is necessary to trigger a preliminary inquiry, and not what conclusions may

be made at the inquiry; in any event, both *Moore* and *Ayres* state that during the preliminary inquiry, the court may deny a claim if it "lacks merit" and do not distinguish between claims that are factually and legally meritless. *People v. Moore*, 207 Ill. 2d 68, 77-78 (2003); *People v. Ayres*, 2017 IL 120071, ¶¶ 9, 11. *Nitz* likewise makes no such distinction — it holds that the trial court's error in allowing trial counsel to cross-examine witnesses at a preliminary *Krankel* hearing was harmless because the defendant's claims were meritless. *People v. Nitz*, 143 Ill. 2d 82, 134-35 (1991). It is telling that although *Krankel*'s rule has existed for four decades, defendant has cited no case recognizing a distinction between legally and factually meritless claims in *Krankel* proceedings.

Defendant's reliance on the standard applicable at the first stage of proceedings under the Post-Conviction Hearing Act (the Act) fares no better. Def. Br. 10-11. Indeed, contrary to defendant's new theory, this Court has consistently held that courts must consider the "legal basis" of a claim at the first stage of postconviction proceedings and should summarily dismiss claims that are based on a "meritless legal theory." *E.g., People v. Petrenko*, 237 Ill. 2d 490, 499 (2010) (citations omitted). In *Petrenko*, for example, this Court affirmed the first-stage dismissal of a postconviction claim alleging that trial counsel erred by failing to contest the validity of a search warrant because it concluded that police had sufficient evidence "to establish probable

cause," and the arguments the petitioner faulted counsel for not raising "would not have succeeded." *Id*. at 499-502.

Moreover, to the extent that defendant believes that postconviction petitioners have an easier burden at the first stage than do defendants in preliminary *Krankel* inquiries, he also fails to consider that a petition under the Act must be summarily dismissed if it does not attach affidavits, records, or other documentary evidence that sufficiently support the petitioner's claims. *See* 725 ILCS 5/122-2; *People v. Delton*, 227 Ill. 2d 247, 255-58 (2008) (affirming first-stage dismissal because the documents petitioner attached to his petition were insufficient to support his claim that counsel erred). Thus, the postconviction standard is more challenging than defendant contends.

Lastly, even if defendants did face a lesser burden at the first stage of postconviction proceedings than at the preliminary *Krankel* inquiry, that difference would be unsurprising, given the significant differences between the two proceedings. A judge conducting a preliminary *Krankel* inquiry will typically be much more familiar with the proceedings (and counsel's performance) than a judge considering a postconviction petition at the first stage. That is so because a *Krankel* motion must be filed shortly after trial is complete, in the same proceeding, and (typically) before the same judge who presided over the defendant's trial. *See Ayres*, 2017 IL 120071, ¶ 22 ("*Krankel* is limited to posttrial motions"). It is thus understandable that this Court has long held that at the preliminary *Krankel* inquiry the trial court

may deny a *Krankel* motion on the merits "based on its knowledge of defense counsel's performance at trial." *E.g., id.* ¶ 12 (collecting cases). By contrast, a postconviction judge will almost always have less knowledge (or memory) of a defendant's trial and claims because postconviction petitions are typically filed long after trial (usually after direct appeal is complete), are sometimes filed before a judge who did not preside over the trial, and generally concern extra-record matters. Therefore, it would not be surprising if postconviction judges have less discretion to dismiss a postconviction petition in the first instance, because they have less familiarity with the defendant's claims and may more often need to appoint counsel to efficiently and accurately resolve them.

B. The appellate court's framework is unnecessary, confusing, and internally inconsistent.

The People's opening brief also demonstrated that the appellate court's proposed framework (identifying four categories of claims that may be denied at the preliminary *Krankel* inquiry) is unnecessary, confusing, and internally inconsistent. Peo. Br. 15-17. Defendant's brief fails to respond to most of those arguments, and what little it does say only generates further confusion.

As noted, although defendant attempts to refashion the appellate court's opinion as prohibiting only the denial of claims on the "legal merits," Def. Br. 8-10, to the contrary, the appellate opinion states that trial courts should assess the legal merit of a claim in some instances, including by denying claims at the preliminary inquiry stage where the defendant faults

trial counsel for not raising legally incorrect arguments or failing to call witnesses whose testimony would not have changed the outcome of the case. *Roddis*, 2018 IL App (4th) 170605, ¶¶ 71, 73. Indeed, as defendant himself points out, the opinion also states that in some cases the trial court "must determine" whether counsel's actions could be said to be "objectively unreasonable," which plainly involves a legal determination. *Id.* ¶ 77; *see also* Def. Br. 13-14. Thus, whether the appellate court's opinion is understood by its express terms ("[w]e hold that a trial court commits reversible error" when it makes a decision "on the merits") or viewed under the defendant's interpretation (attempting to distinguish between legal and factual merit), the opinion is confusing and internally inconsistent.

Defendant's remaining arguments fail as well. Although defendant contends that the appellate opinion's first category (permitting denial of conclusory claims) is not confusing, *see* Def. Br. 13, the opinion itself acknowledged that "it is unclear" when a claim would be so conclusory that it would not warrant relief, *Roddis*, 2018 IL App (4th) 170605, ¶ 67. That the opinion attempted to define "conclusory" does not clarify the issue, but rather invites future disputes about that category's scope. Moreover, as defendant recognizes, Def. Br. 13-14, the opinion is also inconsistent regarding whether the strategic decision not to introduce certain evidence may serve as a basis for a *Krankel* claim, at times stating that trial courts "should decline to appoint new counsel" when a claim involves "matters of trial strategy (for

example, when to introduce a particular piece of evidence or testimony)" and at other times suggesting that courts should examine whether the strategic decision was reasonable. *Roddis*, 2018 IL App (4th) 170605, ¶¶ 75-77, 100.

Defendant is also incorrect to suggest that the appellate court was simply compiling categories of claims in conformity with this Court's precedent. Def. Br. 11-12. As noted, the opinion states that trial courts may not consider the merits of a defendant's claim (contrary to this Court's authority), then lists four categories of claims that may be denied (though this Court has never been so restrictive). And some of those categories are inconsistent with this Court's precedent. For example, the opinion suggests at some points that counsel's strategic decision not to call a particular witness to testify entitles a defendant to new counsel if the decision was "objectively unreasonable." *Roddis*, 2018 IL App (4th) 170605, ¶¶ 76-77. But this Court has repeatedly held that new counsel should not be appointed when a defendant's *Krankel* claim "pertains only to matters of trial strategy" without consideration of the soundness of counsel's strategy. *Ayres*, 2017 IL 120071, ¶ 11 (collecting cases); *see also, e.g., People v. Banks*, 237 Ill. 2d 154, 215-16 (2010) (complaint about failure to call certain witness "fell under the parameters of trial strategy and therefore the trial court did not err in choosing not to appoint counsel"); *Chapman*, 194 Ill. 2d at 231 (defendant's allegation "did not require the trial court to appoint new counsel" because "[w]hether to call certain witnesses is a matter of trial strategy").

Lastly, defendant's assertion that there are other types of claims (which defendant does not attempt to describe) that do not fit into the four categories identified by the appellate court, but which may nevertheless be denied at the preliminary inquiry, Def. Br. 11-12, further supports the People's argument that the appellate court's framework is unnecessary and will lead to disputes about whether a particular claim falls into one of the four identified categories of claims or whether a new category needs to be created. Indeed, as defendant's brief makes clear, the line dividing the determinations the appellate opinion deems permissible and those that are not is impossible to identify, let alone apply in practice.

In sum, this Court has never distinguished between factual and legal merit, but instead has consistently instructed trial courts to deny claims at the preliminary inquiry stage if they are meritless. Neither the appellate court's opinion nor defendant's brief provides a basis to believe that this Court's precedent has proved unworkable or detrimental to the public interest. *See People v. Williams*, 235 Ill. 2d 286, 294 (2009) (requirements for departing from stare decisis). Simply put, the best rule is the one this Court has followed for decades: trial courts can be trusted to distinguish at the preliminary inquiry stage claims that are meritless (legally or factually) from those claims that may potentially be viable if new counsel is appointed to pursue them.

II. The Trial Court Properly Denied Defendant's *Krankel* Motion.

A. The correct standard of review is "manifestly erroneous."

A reviewing court will reverse a trial court's denial of a *Krankel* motion at the preliminary inquiry stage only if the ruling was manifestly erroneous, *i.e.*, only if it is an error that is clearly evident, plain, and indisputable. *See* Peo. Br. 10. Defendant appears to contend that because the trial court erred (in his view) by considering the merits of his claim, its ruling should not be reviewed under the manifestly erroneous standard. Def. Br. 16-18. However, defendant does not articulate what standard of review should apply.

The two appellate cases that defendant cites undermine his substantive arguments and do not clarify his position regarding the standard of review. Def. Br. 17 (citing *Fields* and *Cabrales*). *Fields* and *Cabrales* hold that trial courts should decline to appoint new counsel if the defendant's claims "lack merit" or are not "valid." *People v. Fields*, 2013 IL App (2d) 120945, ¶ 38; *People v. Cabrales*, 325 Ill. App. 3d 1, 5-6 (2d Dist. 2001). Neither case discusses whether a trial court's decision should be reviewed under the manifestly erroneous standard. Rather, *Cabrales* holds that the trial court's failure to conduct a preliminary inquiry could not be deemed harmless in that case because the record was incomplete and precluded review of the defendant's claims. 325 Ill. App. 3d at 5-6. And *Fields* holds that the prosecutor's substantial adversarial participation in the preliminary *Krankel* inquiry could not be deemed harmless because the prosecutor distorted the record, and the judge had no prior familiarity with the trial

proceedings. 2013 IL App (2d) 120945, ¶¶ 40-42, n.4. Here, unlike in *Fields* and *Cabrales*, there is no allegation that the record was distorted or undeveloped, nor could there be; thus, any suggestion that it is impossible to review whether defendant is entitled to new counsel would fail.

Moreover, defendant's argument against applying the manifestly erroneous standard is based on his belief that the trial court could not consider the merits of his claim during the preliminary inquiry. Def. Br. 16-18. But, as discussed, it is proper to consider the merits of a claim during the preliminary inquiry. Peo Br. 11-14. And because, as defendant's cases show, a court's ruling at the preliminary inquiry requires an "inquiry" into the "factual basis" for the claims, *e.g., Ayres*, 2017 IL 1250071, ¶¶ 11-12, and defendant's claim concerns credibility determinations and the effect of omitting certain evidence on the outcome of his trial, the trial court's decision is necessarily fact-bound and should be reviewed under the manifestly erroneous standard, *see, e.g., People v. Willis*, 2016 IL App (1st) 142346, ¶ 18 (applying manifestly erroneous standard to denial of *Krankel* motion).

In any event, regardless of the proper standard of review, this Court should affirm the trial court's judgment because, as shown below, it was plainly correct.

B. The appellate court's ruling misinterprets the record.

The People's opening brief demonstrated that the appellate court misinterpreted the record by finding that the trial court had appointed new

counsel before conducting the preliminary *Krankel* inquiry and, thus, that there was no need for initial *Krankel* proceedings. Peo. Br. 17-19.

Defendant's brief does not dispute the three most important facts: (1) the trial court appointed new counsel only because it wanted help "getting organized" — not because the court believed defendant was entitled to new counsel under *Krankel*; (2) appointed counsel was involved for a short period of time and withdrew before the preliminary *Krankel* inquiry because it was understood that defendant was not (yet) entitled to counsel; and (3) the court and parties understood that the purpose of the preliminary inquiry was to determine whether defendant was entitled to the appointment of counsel.

Indeed, as the record shows, after this case was remanded following defendant's first appeal, the trial court appointed counsel (Rodney Forbes) to help "get me organized." R227. Soon thereafter, however, the court and Forbes agreed that Forbes should withdraw "until such time as a pre-*Krankel* hearing could be held and it was determined that [defendant] was entitled" to appointed counsel. R317-19. The court explained that it would "first proceed with a pre-inquiry *Krankel* hearing which would not necessitate the defendant being represented by [counsel]." R319. Later, at the preliminary inquiry, the court told defendant that "if I find that the allegations are founded, I'll have to appoint" counsel to pursue defendant's claims. R245.

Defendant's contention that "[t]he State agreed that it was 'a good idea' for counsel to be appointed to represent [defendant] during *Krankel*

proceedings" is incorrect. Def. Br. 21. At the initial status hearing, the judge stated that he "didn't realize" the case had been remanded until that morning and that, he was "not sure counsel is necessary" but that counsel could help to "get me organized." R226-27. It was in response to those points that the prosecutor agreed (without referring to *Krankel*) that it would be a "good idea." R227.[2] Defendant's assertion that Forbes "asked the court for an opportunity to file an amended document" is also inaccurate, Def. Br. 21; rather, the judge said that he needed to schedule a "pre-inquiry *Krankel* hearing," but he was unclear which pro se pleading was controlling and offered defendant a chance to file a new one "because I want to be certain that I'm considering the correct document." R234. Defendant also notes that at one status hearing another public defender standing in for Forbes mentioned preparations for a *Krankel* hearing, Def. Br. 20; but the record shows that what was being discussed was the "need to have a pre-inquiry *Krankel* hearing," R239-40. Thus, even if there were initial confusion about the purpose and scope of the remand order, once the judge, prosecutors, and Forbes familiarized themselves with the status of the case, they all agreed that defendant was not yet entitled to counsel because no preliminary *Krankel* hearing had been held.

[2] The court apparently wanted help "getting organized" because, in addition to the *Krankel* claims, the court believed that a pending motion to reduce sentence required resolution. *See, e.g.*, R299.

Two additional points bear mention. First, defendant did not argue below that *Krankel* proceedings were unnecessary because he had already been appointed new counsel; that defendant only now attempts to defend the appellate court's conclusion to that effect is further evidence of the appellate court's misunderstanding of the record. Second, if the appellate court were correct that no preliminary *Krankel* inquiry was necessary, then the remainder of its opinion should be vacated as an impermissible advisory opinion. *See, e.g., People v. Hampton*, 225 Ill. 2d 238, 245 (2007) (vacating portions of appellate court's opinion as advisory).

C. The trial court properly denied defendant's *Krankel* motion at the preliminary inquiry stage.

As noted, it has long been established that courts should deny a *Krankel* motion and decline to appoint new counsel if the defendant's claim "lacks merit or pertains only to matters of trial strategy." *Ayres*, 2017 IL 120071, ¶ 11 (collecting cases). The People's opening brief established that the trial court properly declined to appoint new counsel for two independent reasons: defendant's claim (1) concerns trial strategy and (2) is meritless. Peo. Br. 19-24. Defendant's response is contrary to this Court's precedent.

First, it is settled that issues regarding what evidence to present, how to conduct cross-examination, and whether to impeach a witness are "matters of trial strategy." *E.g.*, *People v. West*, 187 Ill. 2d 418, 432 (1999); *People v. Franklin*, 167 Ill. 2d 1, 22 (1995). Therefore, defendant's claim — that his trial attorney should have introduced hard copies of the text messages into

evidence while cross-examining the victim (Meghan Collins) about the substance of those messages — concerns a matter of trial strategy that cannot be challenged in *Krankel* proceedings. *See, e.g., Ayres*, 2017 IL 120071, ¶ 11 (collecting cases that hold that *Krankel* claim should be denied at preliminary inquiry if it "pertains" to "matters of trial strategy"). Defendant does not directly address this argument, though he suggests elsewhere in his brief that the trial court must determine whether counsel's strategic decision was "objectively unreasonable." Def. Br. 14. But that is incorrect — the plain reading of this Court's repeated holding that a *Krankel* claim should be denied if it "lacks merit *or* pertains only to legal strategy" directs that trial courts need not consider the reasonableness of counsel's strategic decisions. *See, e.g., Banks*, 237 Ill. 2d at 215-16 ("Here, both of defendant's complaints fell under the parameters of trial strategy and therefore the trial court did not err in choosing not to appoint counsel[.]"); *Chapman*, 194 Ill. 2d at 230-31 (defendant's allegation "did not require the trial court to appoint new counsel because "whether to call certain witnesses is a matter of trial strategy"). Thus, defendant's sole complaint — about counsel's strategic decision to question Collins about certain text messages without also introducing the messages themselves into evidence — is not a colorable *Krankel* claim.

Second, and independently, defendant's claim lacks merit. This Court has long recognized that, under *Strickland*, nearly all ineffective of assistance

claims that relate to strategy are meritless because "counsel's strategic decisions are virtually unchallengeable." *E.g., People v. Palmer*, 162 Ill. 2d 465, 476 (1994). That is true even if the strategic decision is "clearly wrong in retrospect." *Id*. at 479-80. The "only exception" is when counsel "entirely fails to conduct any meaningful adversarial testing of the State's case." *E.g., People v. Perry*, 224 Ill. 2d 312, 355-56 (2007); *West*, 187 Ill. 2d at 432-33.

The People's opening brief demonstrated that defense counsel aggressively tested the prosecution's case, including by:

- Eliciting from Collins that she had sent text messages to defendant saying that she believed he did not intend to (1) hit her head against the door or (2) cause her any injury. R94-95, 102.
- Eliciting that Collins's statement to police that defendant hit her multiple times was untrue, and she had a pending charge for filing a false report in an unrelated case. R93-94, 96.
- Eliciting testimony from a police officer that defendant waited for police to arrive and cooperated with them. R109-110.
- Calling defendant to testify that the injury was an accident, caused by Collins inadvertently moving into the path of a cushion he threw out the door. R122-27.
- Eliciting from defendant that after the incident, Collins contacted him "all the time" by text messages in which she said that (1) the incident was an accident and (2) she would testify against him unless he gave her money. R126-27.
- Asserting in closing argument that (1) the People failed to prove that defendant knowingly caused great bodily harm because Collins admitted that her injury was an accident, which was consistent with defendant's account; (2) unlike Collins, defendant's account had never changed; (3) defendant conducted himself like an innocent man, such as by waiting for police and cooperating with them; and (4) Collins testified that she maintained contact with defendant and "admits letting him know that he didn't mean for this to happen." R142-47.

Defendant's brief conspicuously fails to respond to this argument, let alone dispute that his counsel aggressively tested the prosecution's case. Instead, he appears to argue that trial counsel's strategic decision not to introduce hard copies of the text messages was a poor one; he cites a single appellate court opinion for the proposition that an "unreasonable" strategic decision can support an ineffective assistance claim. Def. Br. 14, 23-26 (citing *People v. Peacock*, 359 Ill. App. 3d 326 (3d Dist. 2005)). But this Court has squarely rejected the argument that courts should consider whether counsel's strategy was flawed. *E.g., Palmer*, 162 Ill. 2d at 479-80. Contrary to defendant's theory, this Court has expressly held that "trial performance is not to be judged in hindsight" and that "errors in judgment or trial strategy do not establish incompetence even if clearly wrong in retrospect." *Id.* (internal citations omitted). Instead, when counsel decides not to introduce certain evidence, the only question is whether counsel could be said to have "entirely failed" to conduct "any meaningful adversarial testing" of the prosecution's case. *E.g., West*, 187 Ill. 2d at 432-33; *Perry*, 224 Ill. 2d at 355-56. Defendant's claim is meritless because he does not (and cannot) argue that his counsel failed to test the People's case.

In sum, defendant was not entitled to new counsel for two independent reasons: his claim (1) relates to legal strategy and (2) is plainly meritless.

D. Defendant's remaining arguments are incorrect and irrelevant.

Defendant's remaining arguments — generally alleging that introducing hard copies of the text messages would have changed the judge's verdict — are irrelevant because they do not alter the fact that his claim concerns legal strategy (and thus cannot be raised in *Krankel* proceedings) or that his counsel aggressively tested the People's case (and thus his claim is meritless). Defendant's arguments are also incorrect.

Defendant's argument that introducing hard copies of the text messages "could have led to an acquittal," Def. Br. 25, is wrong, as the trial court made clear. As discussed in the People's opening brief, when announcing its verdict following the bench trial, the court emphasized that the determinative fact was "the severity of the cut" on Collins's head. R153. According to the court, the severity of the injury — a gaping wound that required multiple staples to close — proved that defendant's version of events "simply doesn't make any sense." R151. As the court explained, it "[did] not believe that one could possibly receive that degree of injury by simply throwing a pillow out the door and somebody wandering in the path." R151-52. Defendant's brief fails to acknowledge these points, or respond to the People's observation that nothing in the text messages lessens the severity of Collins's injury or makes defendant's story any more credible. And, perhaps more importantly, defendant's brief fails to acknowledge the trial court's statement, made after reviewing the text messages during the preliminary

Krankel inquiry, that the text messages would "not be sufficient to sway the Court's decision" that defendant was guilty. R263.

Indeed, defendant's contention that he is innocent and was being extorted by Collins is absurd, as it would require a factfinder to believe that (1) defendant decided to throw a couch outside; (2) as a first step in that process, he threw a cushion out the door; (3) coincidentally, Collins was standing in the doorway at that time; (4) the cushion hit Collins and drove her head into the door frame with sufficient force to create a "gaping" wound that required multiple staples to close; (5) Collins immediately decided to call police and provide a false story about how she was injured; (6) Collins maintained that false story throughout trial, even though it would mean years of imprisonment for the father of her child, who was also responsible for paying child support; (7) defendant's text messages to Collins — in which he offered to pay Collins to change her account and threatened to stab her — and the video of defendant threatening to kill Collins, are not indicative of guilt; and (8) defendant's account should be credited despite his long history of violent felonies.

Defendant also speculates that, had trial counsel "opened the door" by introducing the supposedly "helpful" text messages, the prosecution might not have responded by introducing the text messages that were damaging to his case. Def. Br. 25. But such speculation cannot support an ineffective assistance claim. *See, e.g., Palmer*, 162 Ill. 2d at 481 (explaining that

speculation about how prosecutors might have acted cannot support an ineffective assistance claim, and collecting cases). Moreover, it is notable that when the damaging text messages became relevant (i.e., at sentencing), the prosecution introduced them. R169-71.

The rest of defendant's arguments misstate the record. Defendant incorrectly contends that his counsel "failed to use these text messages while cross-examining [Collins]," and missed an opportunity to elicit that Collins told defendant she knew her injury was an accident. Def. Br. 14, 23. To the contrary, the record shows that defense counsel asked Collins about her text messages, and she admitted that she wrote in the texts that she believed that defendant "didn't plan to hit [her head] against the door" and "did not mean" for her to "get injured." R95. Defendant also incorrectly states that counsel failed to argue that Collin's testimony was purportedly "for sale." Def. Br. 24. Instead, the record demonstrates that counsel elicited from defendant that Collins supposedly had sent him text messages "telling me that if I don't give her money or something she's going to testify against me." R126. Indeed, that testimony was more beneficial to defendant than introducing hard copies of the text messages would have been because (1) no such text message appears to exist; (2) in the text message defendant now points to, Collins merely says that she willing to talk to *defense counsel* in exchange for money, C116; and (3) the prosecution then could have introduced all of defendant's damaging text messages, including messages in which he threatened Collins

and offered to pay her to change her account, R169-71. The other text message defendant relies on — in which Collins says that she "said it to get wat I wanted and get money" — is taken out of context. Def. Br. 24. Read in its proper context, the message is about the end of their relationship and the "it" refers not to her statement to police, but to her prior declarations of love: "you put me through too much these past 5 years i just want my life back the life i had b4 i met you and im finally getting it. Sorry but I have no love for you and havent for a lil while now i just said it to get wat I wanted and get money." C120.

In any event, even if defendant were correct that, in hindsight it may have been a better strategy to introduce hard copies of the text messages, he still would not be entitled to new counsel because, as explained, (1) a complaint about strategy is not a colorable *Krankel* claim; and (2) counsel subjected the state's case to adversarial testing and, thus, defendant's claim is meritless.

CONCLUSION

For these reasons and those in the People's opening brief, this Court should reverse the appellate court's judgment.

October 24, 2019

Respectfully submitted,

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RULE 341(c) CERTIFICATE

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(c) certificate of compliance and the certificate of service is 5,366 words.

/s/ Michael L. Cebula
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PROOF OF FILING AND SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On October 24, 2019, the foregoing **Reply Brief of Plaintiff-Appellant People of the State of Illinois** was (1) filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, and (2) served by transmitting a copy from my email address to the email addresses below:

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

/s/ Michael L. Cebula

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