2021 IL App (1st) 172105

No. 1-17-2105

Opinion filed September 30, 2021

Third Division

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 08 CR 9594
	)	
VENNIS McCALL,	)	Honorable
	)	Erica L. Reddick,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE BURKE delivered the judgment of the court, with opinion.
Justice McBride concurred with the judgment and opinion.
Justice McBride also specially concurred, with opinion.
Justice Ellis concurred in part and dissented in part, with opinion.

OPINION

¶ 1 Following a bench trial,[1] defendant Vennis McCall was convicted of three counts of first degree murder for the deaths of Allen McCullough Jr. (Allen Jr.), Danna McCowen-McCullough (Danna), and Allen McCullough III (Allen III). Prior to sentencing, defendant raised *pro se* claims of ineffective assistance of trial counsel, contending that his attorneys should have filed a motion

[1]Circuit Court Judge Rosemary Higgins presided over defendant's trial and the first preliminary *Krankel* hearing. On remand from this court, Judge Erica Reddick presided over defendant's second preliminary *Krankel* hearing.

to suppress his videotaped statement to police because it was obtained in violation of his *Miranda* rights and because the video recording had been tampered with. The trial court held a preliminary *Krankel* hearing on those claims and rejected them. See *People v. Krankel*, 102 Ill. 2d 181 (1984). On appeal, in an agreed summary order, we reversed and remanded, agreeing with the State's concession that the preliminary *Krankel* inquiry was an improperly adversarial proceeding given the State's participation. *People v. McCall*, 2015 IL App (1st) 133463-U (summary order).

¶ 2 On remand, the trial court conducted a second preliminary *Krankel* hearing and again rejected defendant's claims of ineffective assistance, declining to appoint defendant new counsel. Defendant now appeals, contending that the trial court erred in rejecting his claims of trial counsel's possible ineffectiveness. Defendant asserts that he adequately demonstrated that his trial counsel possibly neglected his case in failing to file motions to suppress evidence. Defendant specifically identifies two viable claims that counsel should have raised in a motion to suppress. First, defendant asserts that counsel should have filed a motion to suppress the evidence seized from the McCullough home, where the evidence was seized without a warrant, and police overstepped the plain-view exception to the fourth amendment. Second, defendant contends that his trial counsel should have filed a motion to suppress his custodial statement to police. where the detectives engaged in an improper "question first, warn later" style of questioning in violation of *Missouri v. Seibert*, 542 U.S. 600 (2004) (opinion of Souter, J., joined by Stevens, Ginsburg, and Breyer, JJ.). For the reasons that follow, we affirm the judgment of the circuit court.

¶ 3 I. BACKGROUND

¶ 4 A. Trial

¶ 5 1. *Trial Evidence*

¶ 6 The facts adduced at defendant's trial are largely uncontested. The record shows that in April 2008 defendant was a house guest at Danna and Allen Jr.'s home on South Hermitage Avenue in Chicago. Defendant had been staying at the McCullough home for about a month. On April 3, 2008, Allen III and his friend Eddie Connor visited Rikki Jones, defendant's sister and a family friend of the McCulloughs. Jones gave Allen III some money and asked him to buy her some cigarettes. Connor drove Allen III to the McCullough home at South Hermitage Avenue and waited in the car while Allen III went inside to retrieve his iPod. Connor fell asleep in the vehicle and awoke several minutes later to see defendant exiting the house. Connor asked defendant where Allen III went, and defendant responded that he was "gone." Connor did not note anything unusual about defendant's appearance.

¶ 7 After Allen III and Connor did not return to give Jones her cigarettes, she called Allen III on his cell phone, but he did not answer. She also called the McCullough house phone and Danna's cell phone, but no one answered any of her calls. After repeatedly calling the McCullough house phone, defendant eventually answered. Jones asked defendant about the money she gave to Allen III and whether he had picked up the cigarettes. Defendant responded that Allen III had left the money in the house and then left the house. Defendant told Jones that he would buy her the cigarettes. Jones waited for more than an hour for defendant to arrive, but when he did not, she called again and told him that she would come to the McCulloughs' house to retrieve the cigarettes. Before Jones could finish getting dressed, however, defendant arrived and gave her the cigarettes.

Jones did not observe anything unusual about defendant's appearance and did not notice any signs of an injury to his arm.

¶ 8 Both Jones and Connor attempted to contact the McCulloughs over the next several hours, but none of them answered their phone calls or responded when Jones knocked on the door of the house. Defendant was the only person who would answer the landline phone.

¶ 9 The next morning, April 4, 2008, Chicago police conducted a well-being check on the McCulloughs at the South Hermitage residence. Chicago police officer John O'Donnell knocked on the door and rang the doorbell but received no response. Officer O'Donnell attempted to gain entry to the residence but was unable to do so. A member of the fire department arrived and was able to open one of the windows. Officer O'Donnell pushed the drapes to the side and saw what appeared to be a body on the floor of the living room. Officer O'Donnell crawled inside the window and moved a chair that was being used to barricade the front door so that other officers could enter the home. The officers did not have a search warrant.

¶ 10 After gaining entry to the home, the officers discovered the bodies of Allen Jr., Danna, and Allen III. All three of the bodies had been covered by sheets. After discovering the bodies, the officers searched the rest of the house to see if anyone else was in the house. Officer O'Donnell testified that the officers made sure they did not touch anything because it was a crime scene. The officers called for evidence technicians to come process the scene. Chicago police evidence technician Michael Emmett processed the scene with a team of other officers. Officer Emmett and his team walked through the house and were "careful not to contaminate anything." They then recorded a video and took photographs of the exterior and interior of the house before marking the evidence while the scene was "still in pristine condition." The officers then marked each piece of evidence. The video tape, photographs, and pieces of evidence were then submitted into evidence.

¶ 11 The officers found the bodies of Allen Jr. and Allen III on the floor of the kitchen and Danna's body on the floor of the dining room. All three bodies were covered with sheets or tarps. There was blood on the floor of the living room, dining room, and kitchen. There was also blood in the bathroom, including in the sink and in the bathtub. The officers removed the "P-traps" from the bathroom and kitchen sinks and swabbed them for DNA, but neither trap contained blood. The officers also discovered cell phones and a hammer on the couch on the living room. DNA testing showed that blood on the hammer matched defendant. The officers also discovered various cleaning supplies, including bloody rags, paper towels, disinfectant wipes, and bottles of Windex. Allen III's blood was found on the Windex bottle and on a grate from the bathroom sink. Allen Jr.'s blood was found on a water bottle and a glove. Defendant's blood was found on duct tape, washcloths, and the bathroom sink grate, and defendant's fingerprint was on the Windex bottle.

¶ 12 The officers found cartridge cases in the dining room and a fired bullet in one of the bedrooms. Emmett testified that they found a 9-millimeter handgun, which was Allen Jr.'s "duty weapon" in an upstairs bedroom. The gun had been placed in its holster.

¶ 13 Autopsies revealed that Danna and Allen Jr. each sustained gunshot wounds to the head. Allen Jr. also sustained a blunt force injury to his head as the result of a hammer strike. The medical examiner testified that the injury was consistent with someone striking Allen Jr. with a hammer as though they were hammering a nail, rather than someone throwing the hammer at Allen Jr. Allen III had two gunshot wounds. One was in his upper lip that lacerated his brain, and one was to his left ear that fractured his cervical spine. The bullet that struck Allen III in the upper lip was fired from close range. Ballistics evidence showed that each of the bullets recovered from the scene, including those recovered from the victims' bodies, were fired from the 9-millimeter gun found in the upstairs bedroom of the home.

¶ 14 Defendant was not arrested until nearly three weeks later on April 22, 2008. A neighbor of the McCulloughs discovered defendant in his basement and called police. Officers arrived, but defendant had fled from the neighbor's basement. The responding officer noticed a broken window in the basement of the McCulloughs' home and entered the house through the window. Defendant, who had been hiding in the home, fled the house into the yard where he was tased and arrested.

¶ 15 Chicago police Detective Daniel Ludwig helped transport defendant to the police station. When they arrived at the police station, defendant asked Detective Ludwig how long the police had been looking for him. Detective Ludwig responded that they had been looking for him for "a couple of weeks." Defendant told Detective Ludwig that he was nervous about going back to jail. Detective Ludwig asked defendant why he would go back to jail. Defendant responded that "[y]ou go back to jail when you murder somebody."

¶ 16 2. *Defendant's Statement*

¶ 17 At the police station, defendant was placed in an interview room, where he was interrogated by Chicago police detectives Thomas Carr and Allen Szudarski. A video recording and transcript of the interrogation were moved into evidence. At the beginning of the recording, Detective Szudarski walks into the interrogation room and introduces himself. Detective Szudarski then says, "First of all, earlier you said that Mister McCullough shot you and whatever happened happened in self-defense." Defendant responded, "Yes." Detective Szudarski then informed defendant that the officers had to give defendant his "rights." Detective Carr then read defendant his *Miranda* rights. Defendant indicated that he understood his rights and indicated that he wanted to talk to the detectives.

¶ 18 Detective Szudarski asked defendant how his arm felt. Defendant had sustained a gunshot wound to his left arm. Defendant responded that it "throbb[ed]" and that he had not received

medical treatment for the wound. The detectives asked defendant if he wanted to speak with them first or whether he wanted to go to the hospital to have treatment for his arm first. Defendant responded that he wanted to go to the hospital for his arm, but he still wanted to speak with the detectives. Defendant was taken to the hospital and then returned to the same interrogation about two hours later.

¶ 19 When the questioning resumed, Detective Szudarski asked defendant if he remembered when Detective Carr read him his rights and asked defendant if he understood them. Defendant responded that he did. Detective Szudarski then asked defendant if he wanted to talk about what happened, and defendant responded that he did. Defendant told the detectives that on April 3, 2008, he was living with the McCulloughs. Defendant said that Allen Jr. had a "grudge" against him because defendant was making rap videos while Allen Jr. had to go to work every day. Defendant told the detectives that he was an "automobile designer" and "invented cars and stuff." Defendant also claimed that he invented "video games, Play Station 3, Duces, X-Box, all pro football," plus he was a rapper. Defendant said that he rapped with "Little Wayne, Cash Money Record, I'm Briscoe" and had a record label. Defendant said that he had accumulated a lot of money and had also won the lottery for "three hundred and fourteen million dollars," but he could not get his money. Defendant stated that he had accumulated "two billion dollars" since he had been released from the Illinois Department of Corrections (IDOC) in November 2005.

¶ 20 Defendant told the detectives that all of these circumstances had made Allen Jr. envious of him. Before leaving for work on April 3, Allen Jr. yelled at defendant and then took out his pistol and shot three times in defendant's direction. Defendant saw Danna, who was sitting in the kitchen nearby, "drop" and then felt something "burning." One of the bullets had struck Danna, killing her; one of the bullets had struck defendant in the arm; and one of the bullets went into the living

room wall. Defendant told the detectives two different versions of these events during the interview. In the first version, Allen Jr. accidentally shot Danna before shooting defendant in the dining room. In the second version, Allen Jr. shot defendant first and then accidentally shot Danna in the living room. After Allen Jr. shot defendant, defendant grabbed a nearby hammer and threw it at Allen Jr. The hammer hit Allen Jr. on the top of his head, and defendant was able to take the gun away from him and then fired it at Allen Jr. a "few" times, killing him. Defendant was "worried" because he had just "committed murder." Defendant was panicking, so he started cleaning up all of the blood with towels and left the gun on the floor near Allen Jr.'s body.

¶ 21 Allen III[2] then came home and saw Danna's body on the floor. Allen III picked up the gun, pointed it toward defendant, and then turned to pick up a "sharp object." Allen III tried to shoot defendant, but the gun jammed. Defendant hit Allen III's hand and knocked the gun away from him. Defendant then picked up the gun and shot Allen III in the head. After shooting Allen III, defendant sat on the couch, but Allen III "jumped right back up." Defendant got scared so he shot him again "in the front of his face." Defendant moved Allen III's body to the kitchen and put it beside Allen Jr.'s body. Defendant covered the bodies with sheets because he did not want to see the blood.

¶ 22 Defendant knew that he had committed a crime but asserted that he acted in self-defense. When the detectives confronted defendant with the fact that there were no bullets found in the walls where defendant indicated bullets would be found and that Danna's body was not found where defendant said she had been shot, defendant asserted that the police had tampered with the crime scene. The detectives also confronted defendant with the inconsistencies and contradictions

[2]Defendant refers to Allen Jr. as "Mister Allen McCullough" or "Allen McCullough Senior" and Allen III as "Allen Junior."

in his account of the murders, but defendant consistently insisted that he acted in self-defense. The police obtained a search warrant and searched the McCulloughs' house on April 23, 2008. They did not find any bullets in the walls of the living room or dining room.

¶ 23 3. *Verdict and Sentencing*

¶ 24 Defendant's primary defense at trial was self-defense. At the conclusion of the evidence, the court found defendant guilty of all charges. The court noted defendant gave "varied and conflicting" statements regarding the incident and found that there was no evidence in the record to support defendant's claim of self-defense. The court noted that defendant cleaned the crime scene, washed his clothes, and remained living in the McCulloughs' home for a period of time after the shootings. The court found that the evidence indicated that defendant personally killed each of the McCulloughs and did not accept the argument that Allen Jr. had accidentally shot Danna. The court also did not find credible defendant's contention that he had been shot in the arm by Allen Jr., based on the fact that neither Connor nor Jones noticed any injury to defendant's arm when they saw him after the shooting. The court found that "defendant inflicted those wounds himself in order to support his ongoing crime and prepare his defense in this case."

¶ 25 B. Initial *Krankel* Hearing

¶ 26 Prior to sentencing, defendant filed a *pro se* "motion for new trial" alleging that his trial counsels were ineffective. Defendant asserted that his counsels failed to file a motion to suppress his statement where the statement was obtained in violation of his *Miranda* rights. See *Miranda v. Arizon*a, 384 U.S. 436 (1966). Defendant maintained that he informed his attorneys that during his interrogation, the detectives did not inform him that he had the right to have counsel present and coerced him to confess to the murders by pointing their guns at his face. Defendant also asserted

that the video recording of the interrogation had been tampered with and that his counsel should have called a video technician expert to challenge the validity of the video.

¶ 27 When defendant presented his motion to the court, the court asked defense counsel, Assistant Public Defender (APD) Christina Yi, if she had reviewed all of the discovery with defendant. Yi responded that she had. The court asked Yi to respond to defendant's contention that his statement was obtained through a violation of *Miranda* because he was not given his *Miranda* warnings. Yi responded that she discussed that issue with defendant and that the interrogation recording "speaks for itself." Another APD clarified that defendant received his *Miranda* warnings on the recording itself. The court found that, based on the content of defendant's motion, the court was going to conduct a "*Krankel* hearing and to inquire into the factual basis." The court then continued the case for a hearing.

¶ 28 At the hearing, the assistant State's attorney and the court questioned Yi regarding the allegations in defendant's motion. At the conclusion of the hearing, the court found that defendant's contentions were meritless and declined to appoint defendant counsel to pursue an ineffective assistance of counsel claim. The court subsequently sentenced defendant to natural life in prison.

¶ 29 C. Initial Appeal

¶ 30 On appeal, defendant asserted that the trial court erred by allowing the State's adversarial participation in the preliminary *Krankel* hearing. The State conceded the error and this court remanded for a new preliminary *Krankel* hearing. *McCall*, 2015 IL App (1st) 133463-U.

¶ 31 D. Second *Krankel* Hearing

¶ 32 The trial court judge from the first *Krankel* hearing had retired, Therefore, on remand, the case was transferred to a different trial court judge, Judge Reddick. Initially, defendant was

appointed counsel to assist him; however, after determining that the court had not yet conducted a preliminary *Krankel* hearing, defendant proceeded *pro se*. Defendant filed several *pro se* pleadings. Defendant first filed a "Supplemental Motion for New Trial," in which he largely repeated his claims from the first *Krankel* hearing, including that the detectives violated his *Miranda* rights by disregarding his request to remain silent. Months later, defendant filed a "Motion to Amend the motion for new trial." In that motion, in addition to the claims defendant had previously asserted, defendant contended that his trial counsel was ineffective in failing to file a pretrial motion to suppress evidence. Defendant asserted that he asked his counsel to file a motion to suppress the evidence obtained from the initial search of the McCullough home because that evidence had been obtained in violation of the fourth amendment. Defendant contended that the police officers did not have probable cause to enter the home and did not have a warrant to seize evidence.

¶ 33 Defendant also asserted for the first time that he told his attorneys to file a motion to suppress his custodial statements because the detectives used an improper "question first, warn later" approach "and the interview was not electronically recorded." Defendant contended that when he arrived at the police station, he was placed in an interrogation room. One of the detectives told him that they would get him medical attention and that the police had been looking for him for a couple of weeks because the people in the neighborhood said he had killed his family. Defendant told the detectives that he had killed the McCullough's in self-defense and then explained his version of the events. The detectives told him to cooperate in the investigation and that he would receive medical attention. The detectives then left the room for a "short time" and advised defendant of his *Miranda* rights when they returned.

¶ 34 At the subsequent hearing, the court told defendant that it needed to hear all of the reasons he believed that his trial counsel was ineffective, regardless of whether he had included those allegations in his prior written motions. Defendant's first contention in support of his ineffective assistance claim was that he informed his attorneys that he believed the electronically recorded interview (ERI) video had been tampered with, but his attorneys refused to call a video technician expert to review the tape. Second, defendant asserted that the video showed that he invoked his right to remain silent, but the detectives did not honor his request and improperly obtained a statement from him. Defendant asserted that he sent a letter to Yi's supervisor requesting that his trial counsels raise this issue in a motion to suppress. Defendant received a response from an assistant public defender, indicating that she received his letter and had spoken to his attorneys regarding the issues he raised in the letter.[3] The letter further provided that defendant was being represented by three experienced attorneys who would raise all the issues relevant to his case.

¶ 35 Third, defendant asserted that the police used mental and physical coercion to force him to make an inculpatory statement. Defendant asserted that the detectives pointed guns in his face and grabbed his injured arm. Defendant reiterated that the police then edited the ERI video to remove these incidents. Defendant reviewed the ERI with his attorneys and pointed out certain portions of the video that he believed had been edited, but his attorneys did not raise this issue at trial. Defendant then made the same allegations he made in his written motion regarding the improper seizure of evidence from the McCullough home on April 4, 2008, and the prewarning statement he made to the police about him killing the McCulloughs in self-defense.[4] Defendant

[3]This letter from the office of the Cook County Public Defender does not appear in the record filed on appeal; however, defendant apparently submitted the letter to the trial court, which read its contents into the report of proceedings.

[4]Defendant also raised other allegations not relevant here.

asserted that when he brought these issues to the attention of Yi, she either told him that she would not file anything regarding those issues or she would not say anything and look at him "like in shock." Defendant asserted that his attorneys pressured him to take a plea deal.

¶ 36 The court then questioned Yi regarding defendant's allegations of ineffective assistance. With regard to defendant's claim that the ERI had been tampered with, Yi acknowledged that defendant raised that claim with her and she reviewed the video with defendant at the Cook County Jail. Yi did not believe the ERI showed any evidence of tampering. Yi also reviewed the video with defendant because he told her that he did not appear in the video, but it was instead an actor pretending to be him. Yi noted that the timestamp on the video continued to run and there was no evidence of tampering as defendant suggested.

¶ 37 With regard to defendant invoking his right to remain silent, Yi noted that the video shows that defendant was read his *Miranda* rights and he indicated that he understood his rights. Defendant then gave a "qualified waiver" of his rights, requesting that he receive medical attention before he answered any questions. Yi also noted that the video did not show any suggestion that the detectives physically coerced or threatened defendant.

¶ 38 The court next addressed defendant's claims regarding the police entering the McCullough home without a warrant and seizing evidence. Yi acknowledged that Chicago Police Department (CPD) officers did enter the house, but they did so as part of a wellbeing check on Allen Jr. Yi noted that after a preliminary investigation of the crime scene, police did subsequently obtain a search warrant. Yi could not recall whether defendant brought this issue to her attention prior to trial but did remember that the subsequent warrant was properly executed.

¶ 39 Finally, with regard to defendant's claim regarding the "question first, warn later" tactic used by the detectives, Yi could not recall defendant raising this claim with her. Yi noted only that

it was clear that after the ERI was activated, defendant made a qualified waiver of his *Miranda* rights and then made statements against his interest. Yi also stated that she would not have advised defendant to take a plea deal because, based on the charges, the only possible sentencing option for defendant was natural life, so "[t]here was nothing to be gain[ed] by going into any type of plea bargaining."

¶ 40 The court then asked Yi why she decided to not file a motion to quash arrest and suppress evidence or a motion to suppress statements. Yi asked whether she had permission to "divulge HIPAA protected information." Yi then gave a "limited answer" that, based on the investigation, such motions would have been "without merit" and "frivolous." Yi stated that based on defendant's own version of the events "we didn't have a sufficient basis to proceed on those motions."

¶ 41 In ruling on defendant's motion, the court stated that it was examining whether there was "ineffectiveness." The court examined whether there was "a supported factual basis that shows that the defendant received ineffective assistance of counsel." The court considered Yi's meetings with defendant and the discussions they had regarding his claims. The court concluded that defendant's claims "clearly lack merit." The court noted counsel plainly considered filing a motion to quash arrest and suppress evidence or a motion to suppress statements and ultimately determined to not file those motions. The court found that Yi adequately explained why she chose to not file those motions, "[n]ot the least of which would be that such motion would have been frivolous based on counsel's investigation and knowledge of the discovery, the charges and the claims at that time." Accordingly, the court found that it was not necessary to appoint counsel for defendant and that defendant had failed to show that he received ineffective assistance of counsel.

¶ 42 1. *Motion to Reconsider*

¶ 43 Defendant filed a *pro se* motion to reconsider, contending that he was not prepared to orally present his claims of ineffective assistance as the trial court requested. Defendant asserted that he had documents, including letters, showing that he requested that his trial counsels file motions to quash and suppress based on the claims he presented at the hearing. Defendant attached two letters to his motion. The first letter includes a notarized "affidavit of service" stating that defendant sent the letter to Yi and the office of the Cook County Public Defender on April 21, 2011. In the letter, defendant requested that Yi raise a number of issues, including filing motions to dismiss the indictment and requesting ballistics evidence. Defendant also requested that Yi file a motion to suppress his confession "on the ground if statement [*sic*] was given knowing[ly], voluntarily, and intelligently" and a motion to quash his arrest because the "arrest was legally for questioning" and the detectives used excessive force during the interrogation.

¶ 44 The second letter attached to defendant's motion is dated January 5, 2012, but it does not include a notarized affidavit of service. There is a "notice of filing," suggesting that the letter was filed with the court, but there is no date stamp indicating that it was filed with the court (aside from the April 20, 2017, date stamp, indicating the date defendant filed his motion to reconsider). In the January 5 letter, defendant did not request the filing of any specific motions, but merely wanted to "inform" Yi that the police did not have probable cause to search the McCullough residence on April 4, 2008, and that the evidence seized as a result of that search was obtained in violation of the fourth amendment. Defendant also stated that his statements to police should be suppressed because the detectives questioned him before giving him his *Miranda* rights.

¶ 45 Defendant also attached to his motion a police report, entitled "case supplementary report," which provided that as defendant was being placed in the interview room, he

> "spontaneously stated that he had killed the McCullough's' [*sic*] in self defense. He was told not to say anything further and he responded that he would tell the detectives everything, that he killed two people in self defense. He again was told to relax and the detectives would be right back to speak to him."

Defendant subsequently filed an amended motion to reconsider, which largely mirrored his initial motion.

¶ 46 In denying defendant's motion to reconsider, the court observed that, at the hearing, Yi did not state that she did not recall defendant asking her to file pretrial motions to quash and suppress, but rather stated that she discussed those issues with defendant and the defense team. The court noted that Yi ultimately determined that the motions would be frivolous. Accordingly, the court found that claim was meritless. With regard to the police officers' entry and search of the McCullough home, the court found that a CPD supplementary report showed that the officers lawfully entered the home as part of a well-being check and discovered the bodies shortly after gaining entry.

¶ 47 In addressing defendant's claim that the detectives obtained incriminating statements from him prior to issuing him his *Miranda* warnings, the court noted that although the transcript of the interview suggested that defendant had told the police that he acted in self-defense prior to the beginning of the recorded interview, this did not establish any police misconduct. The court stated that, "it is equally possible that the defendant simply blurted out that information prior to being questioned and detectives stopped him in order to begin recording the videotaped statement." Accordingly, the court found that defense counsel was not ineffective in failing to raise this claim. The court similarly dismissed the remaining claims in defendant's motion and, therefore, denied the motion to reconsider. This appeal follows.

¶ 48 II. ANALYSIS

¶ 49 On appeal, defendant, now represented by counsel, contends that the court erred in denying his posttrial motion and refusing to appoint him new counsel where he showed trial counsel's "possible neglect" of his case. Defendant asserts that he showed trial counsel's possible neglect where counsel failed to seek suppression of the statements stemming from the detective's improper "question first, warn later" interrogation tactic. Defendant also contends that he demonstrated trial counsel's possible neglect where trial counsel failed to seek suppression of the evidence seized in the warrantless search of the McCullough home. Defendant asserts that this court should remand for a full *Krankel* hearing on his claims of ineffective assistance of counsel.

¶ 50 A. *Krankel* Hearings

¶ 51 In *Krankel*, 102 Ill. 2d 181, the supreme court developed a common law procedure for addressing *pro se* posttrial motions alleging ineffective assistance of trial counsel. Under this procedure, a defendant brings his claims of ineffective assistance to the trial court's attention, whether in writing or orally, and the trial court examines the factual basis of the defendant's claim. *People v. Ayres*, 2017 IL 120071, ¶ 11; *People v. Moore*, 207 Ill. 2d 68, 77-78 (2003). The court is not required to automatically appoint counsel to assist defendant in the presentation of his claim, and if the court determines that defendant's claim lacks merit or pertains only to matters of trial strategy, the court may deny the *pro se* motion without appointing counsel. *People v. Roddis*, 2020 IL 124352, ¶ 35 (citing *Moore*, 207 Ill. 2d at 77-78). "However, if the allegations show possible neglect of the case, new counsel should be appointed." *Roddis*, 2020 IL 124352, ¶ 35 (citing *Moore*, 207 Ill. 2d at 78).

¶ 52 B. Standard of Review

¶ 53 At the outset, we note that the parties disagree as to the standard of review to be applied in this case. The State maintains that we should review the trial court's decision for manifest error. Defendant, however, contends we should not give deference to the trial court's ruling because the court applied the wrong standard at the preliminary hearing. Defendant points out that the court examined whether trial counsel was ineffective and did not mention the appropriate standard of "possible neglect." Defendant asserts that we should therefore review the trial court's ruling *de novo*.

¶ 54 The supreme court recently considered and rejected a similar argument in *People v. Jackson*, 2020 IL 124112. In *Jackson*, the court first explained that, in determining the applicable standard of review, the reviewing court first determines whether the trial court did or did not determine the merits of the defendant's *pro se* posttrial claims of ineffective assistance of counsel. *Id.* ¶ 98. If, as here, the trial court properly conducted a *Krankel* inquiry and reached a determination on the merits of the defendant's *Krankel* motion, we will reverse only if the trial court's ruling was manifestly erroneous. *Id.* A ruling is manifestly erroneous where the error is clearly evident, plain, and indisputable. *Id.*

¶ 55 The defendant in *Jackson*, as defendant here, contended that the trial court improperly considered whether trial counsel was ineffective, rather than applying the appropriate "possible neglect" standard. *Id.* ¶¶ 101, 104. The *Jackson* court found that this claim was "foreclosed" based on its recent decision in *Roddis*. *Id.* ¶ 105. In *Roddis*, the supreme court determined that the trial court could " 'base its evaluation of the defendant's *pro se* allegations of ineffective assistance on its knowledge of defense counsel's performance at trial and the insufficiency of the defendant's allegations on their face.' " *Roddis*, 2020 IL 124352, ¶ 56 (quoting *Moore*, 207 Ill. 2d at 79). The

court continued that "even in preliminary *Krankel* inquiries, a trial court must be able to consider the merits *in their entirety* when determining whether to appoint new counsel on a *pro se* posttrial claim of ineffective assistance of counsel." (Emphasis in original.) *Id.* ¶ 61.

¶ 56 Relying on this language, the *Jackson* court agreed with the trial court's finding that the defendant's allegations "fail[ed] *** to substantiate a claim of ineffective assistance of counsel." *Jackson*, 2020 IL 124112, ¶ 106. The court found that the defendant's allegations related to trial strategy, which cannot serve as the basis for a *Krankel* claim. *Id.* Accordingly, the court found that the trial court did not manifestly err when it denied the defendant's *pro se* posttrial motion alleging ineffective assistance. *Id.*

¶ 57 Applying the reasoning in *Jackson* and *Roddis* to the case at bar, it is clear, despite defendant's contentions to the contrary, that our review of the trial court's ruling is limited to a determination of whether the court manifestly erred. In this case, the trial court properly conducted a *Krankel* inquiry and reached a determination on the merits of the defendant's *Krankel* motion. *Id.* ¶ 98. Although the trial court denied defendant's motion on the basis that he failed to show ineffective assistance, rather than relying on the "possible neglect" standard, the rulings in *Roddis* and *Jackson* are clear that the trial court is able to consider the merits of defendant's claims in their entirety. *Roddis*, 2020 IL 124352, ¶ 61; *Jackson*, 2020 IL 124112, ¶ 106. As such, it was within the trial court's purview to consider whether defendant's allegations showed ineffective assistance, and its ruling in that regard does not alter our standard of review. Defendant maintains, however, that remand is warranted under either standard of review. As such, we will review defendant's claims for manifest error.

¶ 58 C. Search of McCullough Home

¶ 59 We first address defendant's contention that the court erred in denying his motion with respect to trial counsel's failure to file a motion to suppress the evidence seized from the McCullough home during the search on April 4, 2008. Defendant maintains that the officers' extensive processing of the scene went well be beyond the permitted protective sweep and seizure of contraband in plain view. Defendant asserts that after the emergency passed, the police were not permitted to enlist evidence technicians who were not part of the original well-being check to conduct a large-scale warrantless search of the home. Defendant contends that he demonstrated that trial counsel possibly neglected his case in failing to file a motion to suppress this evidence.

¶ 60 At the second preliminary *Krankel* hearing, Yi appeared to have trouble remembering the timeline of the events. Yi noted that CPD officers entered the McCullough house to perform a wellbeing check, but subsequently obtained a search warrant. Yi noted only that the search warrant was properly executed. At the time of the preliminary hearing, Yi did not seem recall the distinction between the initial, warrantless search on April 4, 2008, and the subsequent search on April 23, 2008, after a search warrant had been issued. Officer Emmett's testimony shows that the majority of the physical evidence introduced at trial was seized during the warrantless search on April 4, 2008.

¶ 61 Trial counsel's failure to specifically recall these details can be excused in light of the substantial amount of time that elapsed between the trial and the second preliminary *Krankel* hearing. The bench trial concluded in August 2013, the first preliminary *Krankel* hearing took place in October 2013,[5] and the second preliminary *Krankel* hearing occurred in April 2017.

[5]We note that defendant did not raise this issue at his first preliminary *Krankel* hearing.

Although trial counsel's response to the court's questioning could demonstrate possible neglect, the trial court's inquiry—and, by extension, our inquiry—is not limited to trial counsel's recollection of the facts and memory of the trial. Instead, even in a preliminary *Krankel* inquiry, a trial court considers "the merits *in their entirety*" in determining whether to appoint new counsel. (Emphasis in original.) *Roddis*, 2020 IL 124352, ¶ 61. "This serves both the ends of justice and judicial economy." *Id.* As such, we will examine the merits of a motion to suppress the evidence seized from the April 4, 2008, search of the McCullough home and whether trial counsel was ineffective in failing to file such a motion.

¶ 62 Defendant does not challenge the propriety of the police officers' initial, warrantless entry into the McCullough home to conduct the well-being check. The so-called "emergency aid exception" permits law enforcement to make a warrantless entry into a home in emergency situations. *People v. Ramsey*, 2017 IL App (1st) 160977, ¶ 24; see also *Mincey v. Arizona*, 437 U.S. 385, 392 (1978); *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006). Defendant asserts, however, that the officers far exceeded the protective sweep permitted under the emergency aid exception by conducting an extensive investigation of the scene, including processing by evidence technicians who were not part of the initial entry. He also asserts that the evidence seized was not in "plain view" and that the officers did not have probable cause to believe that some of the seized evidence was associated with criminal activity.

¶ 63 There is no question that the officers exhaustively searched and processed the scene after gaining entry to the McCullough home and discovering the three bodies during the protective sweep. Consistent with the Supreme Court's ruling in *Mincey*, the officers, in conducting their protective sweep, were permitted to seize any evidence in plain view. *Mincey*, 437 U.S. at 392-93. Evidence is in "plain view" if "(1) the officers are lawfully in a position from which they view the

object; (2) the incriminating character of the object is immediately apparent; and (3) the officers have a lawful right of access to the object." *People v. Jones*, 215 Ill. 2d 261, 271-72 (2005). Here, both Officer O'Donnell and Officer Emmett testified that they did not disturb the scene in any way prior to processing the scene and, importantly, before both photographing and videotaping the scene. As such, anything that appears in plain view in the video or photographs could reasonably be said to be in plain view during a protective sweep of the house.

¶ 64 Before examining the seized evidence, we first must address defendant's contention that, even if the evidence were in plain view, the seizure of that evidence was still unlawful because it was seized after any emergency had passed. Defendant points out that Officer O'Donnell, the first officer on the scene, did not testify to seeing any evidence in plain view. He merely testified that, after seeing the McCulloughs' bodies, the officers searched the house to see if anyone was in the house. It was not until Officer Emmett arrived, after any emergency was over, that evidence was documented and seized. Defendant asserts that Officer Emmett, and the other evidence technicians who processed the scene, were not part of the original well-being check and arrived only after any emergency had lapsed. Defendant maintains that the officers were therefore unlawfully in the McCullough house and were not lawfully in a position to view the evidence or access it.

¶ 65 This court considered and rejected a similar argument in *Ramsey*, 2017 IL App (1st) 160977. In *Ramsey*, police officers responded to 911 call following an altercation between the defendant and his girlfriend. *Id.* ¶¶ 2, 8-9. When the officers arrived, they spoke to the defendant at the front door of his apartment. *Id.* ¶ 9. The defendant was "nervous and sweaty" and had blood droplets on his T-shirt. *Id.* The defendant told the officers that he had been in a fight with his girlfriend. *Id.* Officers entered the defendant's apartment and found his girlfriend, crying, disheveled, and with scratches on her arms. *Id.* ¶ 10. The officers arrested the defendant, and his

girlfriend was taken to the hospital in an ambulance. *Id.* The officers then walked through the defendant's residence to determine if any other perpetrators or victims were present. *Id.* ¶ 11. The officers limited their search to "anywhere *** a person could be hiding." *Id.* The officers observed a knife and other potential pieces of evidence but did not collect any items. *Id.* About an hour later, an evidence technician entered the home and photographed and recovered pieces of evidence for about 20 minutes. *Id.*

¶ 66 The defendant filed a pretrial motion to suppress the items recovered from his home, as well as photographs taken inside his home after his arrest. *Id.* ¶ 2. The defendant asserted that there were no exigent circumstances permitting the officers to enter his home and the officers did not have a warrant to conduct the search. *Id.* The State responded that, following the 911 call, the officers had probable cause to enter the home to locate any other victims or offenders. *Id.* The State asserted that once they were inside the home, the officers were permitted to document and recover the evidence in plain view. *Id.* The trial court denied the motion to suppress. *Id.*

¶ 67 On appeal, the defendant contended that the court erred in denying his motion to suppress because the police did not have justification to enter his home after he was arrested and his girlfriend was put in an ambulance. *Id.* ¶ 20. The defendant further asserted that the second entry into his home by an evidence technician an hour after the initial entry, was further grounds for suppression. *Id.* In addressing the defendant's contentions, this court recognized the emergency aid exception to the warrant requirement. *Id.* ¶ 24. The court noted that officers operating under that exception may seize evidence without a warrant provided that evidence is in plain view. *Id.*

¶ 68 The court found that the emergency aid exception justified the officers' warrantless entry into the defendant's residence, the officer's search of the residence, and the ultimate seizure of the evidence in plain view. *Id.* ¶ 25. The court found that the evidence seized was reasonably

associated with the defendant's assault of his girlfriend, and given the circumstances of the 911 call and the defendant's statements to them about the fight, it was reasonable for the officers to search the residence to determine whether anyone else was present. *Id.* The court also rejected the defendant's assertion that the evidence technician was not permitted to seize the evidence because, by the time of his entry, any emergency had lapsed. *Id.* ¶ 28. The court found that because the officers who first made entry into the home would have been justified in seizing that evidence, "the fact that the ultimate recovery of the evidence is accomplished not by the officer who first saw the evidence, but by another member of law enforcement, does not invalidate the seizure." *Id.* (citing *People v. Drummond*, 103 Ill. App. 3d 621, 625 (1981)). As such, this court found that the trial court properly denied the defendant's motion to suppress. *Id.* at 30.

¶ 69 We find the same reasoning is applicable in this case. Here, there is no question—with one notable exception discussed below—that the evidence seized from the search of the McCullough home was in plain view. There is also no question that Officer O'Donnell and the other officers who conducted the well-being check were lawfully in the home and thus lawfully permitted to seize any evidence in plain view. Although the evidence was ultimately seized by evidence technicians who arrived on the scene later, this does not invalidate the seizure. *Id.* ¶ 28. Accordingly, any motion to suppress on this basis would have been meritless.

¶ 70 Defendant asserts, however, that *Ramsey* was wrongly decided and that the circumstances in that case are distinguishable from the case at bar. First, defendant asserts that *Ramsey* is not applicable because it was decided on the merits whereas here our review here is limited to trial counsel's possible neglect. As discussed, however, our review is not so limited, and we, and the trial court, are permitted to consider the merits "*in their entirety*" even in a preliminary *Krankel* hearing. (Emphasis in original.) *Roddis*, 2020 IL 124352, ¶ 61. Defendant also asserts that *Ramsey*

improperly applied the "*de minimis* exception" to the warrant requirement, contrasting the brief search in *Ramsey* with the days-long search in *Mincey*. However, the *Ramsey* court did not base its ruling on this exception. Instead, the court distinguished *Mincey* and other precedent on the basis that it was reasonable for the police officers to walk through the home after their encounter with the defendant and his girlfriend and to seize any evidence in plain view. *Ramsey*, 2017 IL App (1st) 160977, ¶ 27. The court then determined that it was reasonable to extend that justification to officers who arrived at the scene later and permit them to collect that same evidence.

¶ 71 Defendant also attempts to distinguish *Ramsey* on the basis that the search in that case was only 20 minutes, in contrast to the lengthy search in this case. The *Ramsey* court was not concerned with the *length* of the search, however, but rather the *scope* of the search. *Ramsey*'s holding that the search and subsequent seizure was justified was based on the fact that the officers limited their search to areas that were in plain view or areas where a person could reasonably expect to be found. The officers did not, as in *Mincey*, search through drawers, cupboards, or clothing pockets (see *Mincey*, 437 U.S. at 393-94), but instead limited their search to areas and objects that they had the lawful right to access without a warrant based on their lawful presence in the house. It would of course take the officers in the case at bar significantly more time to document and process the scene at the McCullough house, given the tremendous amount of evidence readily visible and in plain view as compared to the limited evidence visible in *Ramsey*. As such, the concern is not with the length of time of the search, but whether the items seized were, in fact, in plain view and obviously incriminating. In this case, as in *Ramsey*, there is no suggestion that the officers seized items that were not in plain view and that were not obviously incriminating.[6]

[6]We discuss below defendant's contention that all of the items seized were not obviously incriminating or not in plain view.

¶ 72 We find defendant's reliance on *People v. Koniecki*, 135 Ill. App. 3d 394 (1985), and *People v. Faine*, 88 Ill. App. 3d 387 (1980) unpersuasive. In *Faine*, the contested items were unquestionably not found in plain view. The officers recovered a gun that had been hidden behind a stove, and they also opened drawers to find evidence. *Faine*, 88 Ill. App. 3d at 388-89. At the time of the search, there was no indication that the officers were looking for other victims or the killer when they searched the home because the defendant had already been taken into custody. *Id.* at 389. In this case, the evidence recovered from the McCullough home was found in plain view and the officers conducting the protective sweep were looking for other people who might be in the house. In *Koniecki*, the officer made a second, unauthorized entry into the house after conducting a sweep and exiting the house. *Koniecki*, 135 Ill. App. 3d at 397, 401. The court found that the officer, making this second entry, could not seize the items because he was not legally permitted to be on the premises after conducting the initial search and leaving the premises. *Id.* at 401. Defendant attempts to analogize Officer Emmett's subsequent entry and search of the premises to the second entry in *Koniecki*, but the comparison is unfounded. As this court recognized in *Ramsey*, if one officer is permitted to seize evidence under the plain view doctrine, it is immaterial if another officer ultimately recovers that evidence. *Ramsey*, 2017 IL App (1st) 160977, ¶ 28. The distinction in *Koniecki* was that because the officer did not recognize the evidence as obviously incriminating on his first search through the house, he was unjustified in investigating further on his second search. *Koniecki*, 135 Ill. App. 3d at 401. Thus, because Officer O'Donnell could have seized the evidence during his protective sweep, it is immaterial that the evidence technicians ultimately seized the evidence and there is no "second entry" impediment as in *Koniecki*.

¶ 73 We also find no merit to defendant's contention that the officers were not permitted to seize any evidence because Officer O'Donnell did not testify to seeing any of the seized evidence in plain view. As noted, we are not limited to Officer O'Donnell's description of the scene. The officers in this case took extensive photographs and videos that unequivocally demonstrated what evidence was in plain view without relying on the officers' testimony. Both Officer O'Donnell and Officer Emmett testified that they did not disturb the scene before processing the evidence and we have no reason to doubt that testimony. Because this was not a contested issue at trial and the State chose to enter the evidence through Officer Emmett's testimony, there was no reason for Officer O'Donnell to identify, specifically, what evidence he saw in plain view.

¶ 74 Turning to the physical evidence discovered in the McCullough home, the video, photographs, and police reports show that three bodies were found on the floor on the dining room and kitchen. The bodies were covered with sheets but were unmistakably dead bodies. There were two bottles of Windex, disinfectant wipes, and other cleaning solutions. There were also bloody rags, latex gloves, and duct tape. A photograph showed three cell phones lined up on the living room couch next to a hammer that appeared to have blood on it. A bullet casing was recovered from the dining room, and a bullet was recovered from the bedroom on the ground floor. Another bullet casing was found beneath a bloody paper towel. The floor and the walls in the kitchen, dining room, and bathroom also appeared to be spattered with blood. A bullet casing was found in the dining room and another was found next to Allen III's body. There was also a gun on top of a desk in the upstairs bedroom.

¶ 75 This evidence, in plain view in a location where the officers were lawfully permitted to be, and obviously incriminating, was lawfully seized. As defendant contends, some of the items—such as the Windex bottles, disinfecting wipes, gloves, duct tape, and rags—may not have been

incriminating on their face. However, it was readily apparent that these items had been used in an attempt to clean up the scene. Many of these items were covered in blood, and the crime scene had clear indications that someone had tried to clean the house. All of these items, therefore, could not have been the subject of a motion to suppress because they were lawfully seized as part of the protective search.

¶ 76 There is, however, one notable exception. Officer Emmett testified that the officers removed the "P-traps" from the bathroom and kitchen sinks and swabbed them for DNA. The P-traps themselves and the DNA, if any, inside were clearly not in plain view. As such, their seizure and subsequent swabbing were clearly outside the scope of the officers' lawfully permitted search. Defense counsel thus arguably could have sought to suppress the seizure of the P-traps. However, as we have previously discussed, our review is of the merits in their entirety. *Roddis*, 2020 IL 124352, ¶ 61. A motion to suppress the P-traps and the lack of evidence found inside of them resulting from the swab may have been successful, but it would not have any impact on the ultimate outcome of the case because no blood or DNA was found inside the P-traps. The motion to suppress thus would have concerned only the P-traps themselves, which had no significance to either the State's case or defendant's defense. Accordingly, because the officers were lawfully permitted to be in the McCullough home and seized only evidence that was in plain view and obviously incriminating, defendant would not be able to prevail on a claim of ineffective assistance based on trial counsel's failure to file a motion to suppress the evidence seized from the McCullough home.

¶ 77 D. Question First, Warn Later

¶ 78 We next address defendant's contention that trial counsel possibly neglected his case by failing to file a motion to suppress his statements to police. Defendant asserts that he informed his

trial counsels before trial that the detectives used an improper "question first, warn later" tactic to elicit his confession—in violation of the Supreme Court's ruling in *Seibert*, 542 U.S. 600, and our supreme court's ruling in *People v. Lopez*, 229 Ill. 2d 322 (2008)—but they refused to file a motion to suppress his statement.

¶ 79 In order to better understand the Supreme Court's ruling in *Seibert*, and our supreme court's ruling in *Lopez*, it is first necessary to examine the Supreme Court's ruling in *Oregon v. Elstad*, 470 U.S. 298 (1985). In *Elstad*, police officers arrived at the defendant's house with a warrant for his arrest. *Id.* at 300. One of the officers stayed with the defendant while the other officer spoke to defendant's mother in a separate room about the arrest. *Id.* at 300-01. The officer who stayed with the defendant testified that he asked defendant if he knew why the officers were there. *Id.* at 301. The defendant stated that he did not, and then the officer asked the defendant if he knew " 'a person by the name of Gross,' " who was the victim of the robbery the police were investigating. *Id.* The defendant responded that he did know Gross and added that heard there had been a robbery at the Gross house. *Id.* The officer told the defendant that he "felt" that the defendant was involved in the robbery. *Id.* The defendant acknowledged that he was at the robbery. *Id.* The officers then escorted the defendant to their patrol vehicle. *Id.*

¶ 80 The defendant was taken to the police station where he was for the first time given his *Miranda* warnings. *Id.* The defendant indicated that he understood his rights, waived them, and gave a written statement to police about the robbery. *Id.* at 301-02. At the defendant's trial, the prewarning statement the defendant made to the arresting officer was suppressed. *Id.* at 302. However, the defendant's postwarning, written confession was admitted into evidence. *Id.*

¶ 81 On appeal, the Supreme Court considered whether the suppression of the postwarning statement was warranted. *Id.* at 303. The court agreed that the first unwarned statement should

have been suppressed but found that the admissibility of the subsequent statement "should turn in these circumstances solely on whether it is knowingly and voluntarily made." *Id.* at 309. The court reasoned that

> "[t]here is a vast difference between the direct consequences flowing from coercion of a confession by physical violence or other deliberate means calculated to break the suspect's will and the uncertain consequences of disclosure of a 'guilty secret' freely given in response to an unwarned but noncoercive question, as in this case." *Id.* at 312.

The court concluded:

> "[A]bsent deliberately coercive or improper tactics in obtaining the initial statement, the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion. A subsequent administration of *Miranda* warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement. In such circumstances, the finder of fact may reasonably conclude that the suspect made a rational and intelligent choice whether to waive or invoke his rights." *Id.* at 314.

¶ 82 The Supreme Court revisited *Elstad* in *Seibert*. In *Seibert*, the police arrested the defendant and took her to an interrogation room at the police station. *Seibert*, 542 U.S. at 604 (opinion of Souter, J., joined by Stevens, Ginsburg, and Breyer, JJ.). The police then questioned her for "30 to 40 minutes" and squeezed her arm while attempting to coerce her to make incriminating statements. *Id.* at 604-05. After the defendant made an incriminating statement, the officer gave her a 20-minute break. *Id.* at 605. After the break, the officer returned, turned on a tape recorder, and gave the defendant her *Miranda* warnings, which she waived. *Id.* The officer then confronted

her with her prewarning statements, asking her to confirm everything she had already told the officers. *Id.*

¶ 83 At her trial, the defendant sought to suppress her statements. *Id.* The interrogating officer testified that "he made a 'conscious decision' to withhold *Miranda* warnings, thus resorting to an interrogation technique he had been taught: question first, then give warnings, and then repeat the question 'until I get the answer that she's already provided once.' " *Id.* at 605-06. The trial court suppressed the prewarning statements, but admitted the responses given after the *Miranda* warnings. *Id.* at 606.

¶ 84 In a plurality opinion, the Supreme Court distinguished *Elstad* finding that the prewarning statement elicited by the police in that case was obtained "in arguably innocent neglect of *Miranda*." *Id.* at 614-15. The Court found that conversation between the defendant and the arresting officer in *Elstad* was a "good-faith *Miranda* mistake," which was "open to correction by careful warnings before systematic questioning." *Id.* at 615. The Court observed that the contrast between the facts in *Elstad* and in *Seibert* revealed a series of factors for a court to consider in determining whether warnings delivered after questioning could be effective enough to protect the defendant's rights:

> "[T]he completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and the second, the continuity of police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first." *Id.*

¶ 85 The plurality found that the facts here demonstrated a police strategy designed to undermine *Miranda* warnings. *Id.* at 616. "The unwarned interrogation was conducted in the station house, and the questioning was systematic, exhaustive, and managed with psychological

skill. When the police were finished there was little, if anything, of incriminating potential left unsaid." *Id.* The plurality concluded that because the question-first, warn-later tactic threatened to thwart *Miranda*'s purpose, the defendant's postwarning statements were inadmissible. *Id.* at 617.

¶ 86 Justice Kennedy wrote a concurrence agreeing with plurality's conclusion but applying a somewhat narrower test. *Id.* at 618-22 (Kennedy, J., specially concurring). In *Lopez*, our supreme court found that Justice Kennedy's concurring opinion in *Seibert* resolved the case on the narrowest ground and therefore was the controlling authority. *Lopez*, 229 Ill. 2d at 360. In his concurring opinion, Justice Kennedy recognized that not every violation of *Miranda* requires suppression of the evidence obtained. *Seibert*, 542 U.S. at 618. "Evidence is admissible when the central concerns of *Miranda* are not likely to be implicated ***." *Id.* at 618-19. Justice Kennedy also discussed *Elstad* finding that it was "correct in its reasoning and its result," but, as the plurality, found that *Seibert* presented "different considerations." *Id.* at 620. Justice Kennedy found that the two-step questioning technique the officer employed was based on a deliberate violation of *Miranda*. *Id.* The officer then relied on the defendant's prewarning statements to obtain the postwarning statement used against her at trial. *Id.* at 621. Justice Kennedy noted that the postwarning interview resembled a "cross-examination" where the officer confronted the defendant with her inadmissible prewarning statements and pushed her to acknowledge them. *Id.*

¶ 87 Justice Kennedy found, however, that the test employed by the plurality was "too broad[ ]" because it envisioned an objective inquiry from the perspective of the suspect and applied in cases of both intentional and unintentional two-step interrogations. *Id.* at 621-22. Justice Kennedy stated that the admissibility of postwarning statements should continue to be governed by the principles of *Elstad* unless the police deliberately employed a two-step strategy. *Id.* at 622. If officers deliberately employ a two-step strategy, then the admissibility of the postwarning statements that

are related in substance to prewarning statements depends on whether the officers take curative measures before the postwarning statement is made. *Id.* "Curative measures should be designed to ensure that a reasonable person in the suspect's situation would understand the import and effect of the *Miranda* warning and of the *Miranda* waiver." *Id.* As an example, Justice Kennedy noted that a "substantial break in time" would suffice to distinguish the two contexts of the interrogation. *Id*.

¶ 88 Our supreme court first had an opportunity to examine *Seibert* in *Lopez*, 229 Ill. 2d 322. In *Lopez*, police responded to a burglary and found a dead body on the floor of an apartment. *Id.* at 324. The defendant gave both an oral and a written statement confessing to his part in the crime. *Id.* at 325. Prior to trial, the defendant filed motions to quash his arrest and suppress his oral and written statements. *Id.* At the hearing on his motion, the evidence showed that while investigating the victim's murder, the officers learned of defendant's name. *Id.* The officers went to defendant's apartment and took him into custody. *Id.* The officers did not tell defendant that they were investigating a homicide but told him that wanted to ask him questions about gangs. *Id.* at 325-26.

¶ 89 At the police station, the defendant was placed in an interrogation room, where the officers questioned him about the murder. *Id.* at 326. The defendant was questioned for 15 to 20 minutes without being given his *Miranda* warnings. *Id.* at 332. Nearly five hours later, detectives again interviewed the defendant at the police station, but still did not inform him of his *Miranda* rights. *Id.* at 333. In the intervening hours, defendant's co-offender had given a statement to police, implicating both himself and the defendant in the crime. *Id.* Confronted with this information, the defendant made an oral statement implicating himself in the crime. *Id.* at 334. After the defendant gave the inculpatory statement, the officers gave defendant his *Miranda* warnings for the first time and then terminated the interview. *Id.* The defendant later gave a handwritten statement of his

involvement in the murder. *Id.* at 341. The trial court granted the defendant's motion to suppress with regard to the oral statement he made before he was given his *Miranda* warnings but found that his handwritten statement was voluntarily given and sufficiently attenuated from the oral statement. *Id.* at 341-42.

¶ 90 On appeal, this court rejected the defendant's assertion that the police violated his fifth amendment rights when they engaged in an unlawful "question first, warn later" interrogation technique. *Id.* at 344. This court reasoned that there was no evidence that the detectives intentionally withheld *Miranda* warnings in order to secure a confession from the defendant. *Id.*

¶ 91 Before the supreme court, the defendant likewise asserted that his handwritten confession was involuntary and should have been suppressed under *Seibert. Id.* at 355. After reviewing the Supreme Court's rulings in *Elstad* and *Seibert*, the *Lopez* court found that the threshold question was whether the detectives deliberately engaged in a question first, warn later technique when interrogating the defendant. *Id.* at 360. If the court found deliberateness, it would then have to examine whether curative measures were taken. *Id.* at 360-61. The court recognized that officers will rarely admit on the record that they deliberately withheld *Miranda* warnings in order to obtain a confession and therefore looked to the Ninth Circuit's opinion in *United States v. Williams*, 435 F.3d 1148 (9th Cir. 2006) for guidance. *Lopez*, 229 Ill. 2d at 361. In *Williams*, the Ninth Circuit stated that, "in determining whether the interrogator deliberately withheld the *Miranda* warning, courts should consider whether objective evidence and any available subjective evidence such as an officer's testimony, support an inference that the two-step interrogation procedure was used to undermine the *Miranda* warning." *Williams*, 435 F.3d at 1158. In assessing objectivity, the *Williams* court identified the same factors as those identified by the Supreme Court in *Seibert*—

"the timing, setting and completeness of the prewarning interrogation, the continuity of police personnel and the overlapping content of the pre- and postwarning statements." *Id.* at 1159.

¶ 92 In examining the subjective and objective factors, the *Lopez* court noted that the defendant's co-offender was taken into custody after giving a statement implicating both himself and defendant in the crime. *Lopez*, 229 Ill. 2d at 363. The court found that the co-offender's statement was sufficient to elevate his status from that of witness to suspect, and thus, after the statement, the defendant must have also been a suspect. *Id.* The court noted that the detective testified that the defendant was not a suspect at that point, but the court found the detective's testimony contradictory. *Id.* The court noted that although the detective testified that the defendant was not a suspect after the police obtained the inculpatory statement from the co-offender, the detective also testified that the defendant was nevertheless not free to leave the police station at that point. *Id.* The court found that "[i]n light of these facts, we can think of no legitimate reason why the detectives failed to give defendant his *Miranda* warnings [after obtaining the co-offender's confession], other than a deliberate decision to circumvent *Miranda* in hopes of obtaining a confession, which would ultimately lead to a handwritten statement." *Id.* at 363-64. The court observed that this was not a case where the officers mistakenly withheld *Miranda* warnings because the detectives were clearly interrogating the defendant as they confronted him with his co-offender's statement and asked him if he was involved in the crime. *Id.* at 364. Accordingly, the court found that the record showed that the detectives deliberately withheld *Miranda* warnings from the defendant and that his postwarning statement should have been suppressed. *Id.*

¶ 93 With that precedent in mind, we now turn to defendant's contentions under *Seibert*. In his written *pro se* posttrial motion, defendant asserted that he told his trial counsels that when he arrived at the police station, he was placed in an interrogation room. Two detectives came into the

interrogation room and told defendant that the police had been looking for him for a couple of weeks because the people in the neighborhood said that defendant had killed his family. Defendant told the detectives that he killed the McCulloughs in self-defense. Defendant said that he had a "heated argument" with Allen Jr., and Allen Jr. killed Danna "by accident." Allen III then came home and saw Danna and Allen Jr. "on the floor bleeding." Allen III picked up the gun and tried to shoot defendant, but the gun jammed. Defendant knocked the gun out of Allen III's hand, and "killed him." According to defendant, the detectives told defendant to cooperate with their investigation and they would make sure that he got medical attention. The detectives then left the interview room "for a short time" and then returned and advised defendant of his *Miranda* rights.

¶ 94 During the preliminary hearing, Yi stated that she did not recall defendant raising this issue with her pretrial.[7] She noted only that the ERI explicitly showed defendant being read his *Miranda* rights, waiving those rights, and then making statements against his interest. Again, however, we note that our review is not limited to trial counsel's recollection of the facts. Nevertheless, we observe that trial counsel stated that she reviewed the entire ERI video with defendant on more than one occasion. She listened to all his concerns about the video, including that the video had been tampered with and that the detectives had used physical force to obtain his confession. Presumably, defendant would have also told her about the perceived *Miranda* violation. Yi ultimately decided, however, along with the other murder task force assistant public defenders assigned to defendant's case, to not file a motion to suppress and instead to proceed with a defense of self-defense. With that background, it is clear why trial counsel would not seek to suppress either defendant's prewarning statement or postwarning statements. In both statements, defendant

[7]We note that defendant also did not raise this issue in the first preliminary *Krankel* hearing.

professed that he acted in self-defense. Yi's strategy at trial was to present a claim of self-defense. These statements were thus a boon to her defense, and it would be illogical for her to seek to suppress them. Matters of trial strategy are generally immune from posttrial claims of ineffective assistance. *Moore*, 207 Ill. 2d at 77-78.

¶ 95 This strategy appears even more sound when we consider what would occur at a hearing on a motion to suppress defendant's statement. The State has the burden at a suppression hearing of proving, by a preponderance of the evidence, that defendant voluntarily made the statements in question. *People v. Reid*, 136 Ill. 2d 27, 51 (1990). Once the State establishes its *prima facie* case, the burden shifts to defendant to show that the statements were made in violation of his *Miranda* rights. *Id.* In meeting its burden in this case, the State would have to call as witnesses the detectives who took the statement from defendant. The detectives would testify that defendant did make an unwarned statement that he killed the McCulloughs in self-defense, but, as the case supplementary report provides, that defendant made these statements "spontaneously."

¶ 96 The burden then would shift to defendant to show that he made these statements in violation of his *Miranda* rights. Although there is a second unwarned statement on the ERI video, this would not, in and of itself, rebut the detective's testimony. Defendant would therefore have to testify that he did not make the unwarned statement spontaneously as the detectives testified, but that it was made in response to clear interrogation designed to undermine his *Miranda* rights. At that point, the State would be able to question defendant about not only the contradictory and inconsistent statement, but also his more outlandish claims, such as that he is a billionaire rapper and inventor. Such questioning would eviscerate devastate defendant's credibility and undermine any viable defenses that trial counsel could attempt to establish in lieu of a claim of self-defense. It would also lock defendant into his version of events if he chose to testify at trial. Accordingly, we find

that it would be sound trial strategy for trial counsel to decide to not proceed with a motion to suppress. See *Moore*, 207 Ill. 2d at 77-78.

¶ 97 Nonetheless, based on our discussion of *Elstad*, *Seibert*, and *Lopez* above, it is clear that a motion to suppress defendant's statement would have been meritless. First, we must examine the circumstances under which defendant made the prewarning statement. According to defendant, after placing him in the interrogation room, the detectives told defendant that the police had been looking for him for a couple of weeks because the people in the neighborhood said that defendant had killed his family. After defendant briefly explained his version of the events, the detectives told defendant to cooperate in the investigation and that they would get him medical attention. The detectives then turned on the video recording, returned to the room, and one of them elicited a second prewarning statement from defendant. Notably, this second prewarning statement references the first prewarning statement:

> "Q. First of all, earlier you said that Mister McCullough[8] shot you and whatever happened happened in self-defense.
>
> A. Yes.
>
> Q. Okay. Uh—But just so you know we have to give you your rights, you understand that, okay?
>
> A. No problem, sir."

One of the detectives then read defendant his *Miranda* rights. Defendant indicated that he understood his rights. The detective asked defendant, "You want to talk to us?" Defendant responded that he did. Rather than asking defendant questions about the incident, however, the

[8]"Mister McCullough" in this case refers to Allen Jr.

detective asked defendant about his arm. The detective asked defendant, "do you want to talk first or do you want to go get your arm fixed?" Defendant responded that he wanted to get his arm fixed first, but still wanted to talk to the detectives. Defendant was then taken to the hospital and returned to the interrogation room nearly two hours later. When he returned, the detectives reminded defendant about receiving his *Miranda* rights and asked him if he still wanted to talk. Defendant responded that he did. The detective then opened up the conversation with the open-ended question of: "What happened?"

¶ 98 This series of events does not resemble the clearly improper police tactics employed in *Seibert* and *Lopez*, but more closely mirrors the innocent prewarning conversation that took place in *Elstad*. First, in *Seibert*, the detectives questioned the defendant for "30 to 40 minutes" and physically coerced her before reading her *Miranda* rights. *Seibert*, 542 U.S. at 604-05 (opinion of Souter, J., joined by Stevens, Ginsburg, and Breyer, JJ.). The detective at the defendant's suppression hearing acknowledged that he intentionally withheld *Miranda* rights in order to get the answers he wanted postwarning. *Id.* at 605-06. *Seibert* thus represents an extreme and obviously improper example. However, the guidelines set by the plurality and Justice Kennedy are relevant here. In the case at bar, there was no specific strategy designed to undermine *Miranda* warnings. See *id.* at 615. The unwarned "interrogation" in this case was a single statement by a detective that the police had been looking for defendant and then a follow-up question later referencing defendant's response. It was a far cry from questioning that was "systematic, exhaustive, and managed with psychological skill," leaving "little, if anything, of incriminating potential left unsaid." *Id.* at 616.

¶ 99 The postwarning interview also did not resemble a "cross-examination," where the detectives confronted defendant with his prewarning statements and pushed him to acknowledge

them. *Id.* at 621 (Kennedy, J., specially concurring). A review of the ERI showed that the detectives asked defendant open-ended questions and followed up on his responses. During the first several minutes of the interview, the majority of the questions the detectives asked in this case were in the vein of: "What happened?" "When was this" "About what time was this?" "Who's he?" "Okay. And then what happened?" And this becomes even more clear when considered in conjunction with the content of defendant's prewarning statement. Defendant asserted that he acted in self-defense. If the detectives were to employ the kind of improper questioning found prohibited by *Seibert*, the detectives would have questioned defendant until he acknowledged that he did *not* act in self-defense. The conclusion of defendant's ERI establishes that the detectives believed from the very beginning that defendant did not act in self-defense. After defendant repeated his account of the murders several times, detectives confronted defendant with inconsistencies in his version of the events and told him what the evidence recovered from the scene suggested. Rather than attempting to elicit incriminating statements from defendant before giving him his *Miranda* warnings, however, the detectives first read defendant his full *Miranda* warnings, established that he understood and waived them, and allowed him to repeat his version of the events more than once. Only then did the detectives attempt to elicit an incriminating statement.

¶ 100 *Lopez* is similarly distinguishable. In that case, the defendant was questioned for 15 to 20 minutes and then questioned a second time without being given his *Miranda* warnings. *Lopez*, 229 Ill. 2d at 332-34. The court, relying on *Williams*, 435 F.3d 1148, found that the detectives deliberately withheld *Miranda* warnings in order to obtain a prewarning confession from the defendant when they confronted him with his co-offenders' inculpatory statement. *Lopez*, 229 Ill. 2d at 363-64. The court found that the detectives were clearly interrogating the defendant and should have read him his *Miranda* warnings before confronting him with the statement. *Id.* at 364.

¶ 101 Here, again, there was no concerted effort by the detectives to elicit a prewarning confession. There was no such clear prewarning interrogation lasting 15 to 20 minutes. Defendant complained merely of a single statement made by one of the detectives. It is not even clear that this statement was intended to elicit a response. As Justice Kennedy noted in *Seibert*, "it would be extravagant to treat the presence of one statement that cannot be admitted under *Miranda* as sufficient reason to prohibit subsequent statements preceded by a proper warning." *Seibert*, 542 U.S. at 620 (Kennedy, J., concurring in the judgment).

¶ 102 We do not mean to suggest that the circumstances in *Lopez* or *Seibert* are the only circumstances in which we would find that the police utilized an improper "question first, warn later" technique such that suppression is warranted. We simply find that the circumstances in this case are too far removed for the reasoning in those cases to apply here. There was simply not the deliberateness that was employed in both *Lopez* and *Seibert*. As there was no deliberateness, it was not necessary for the officers to take curative measures. *Id*. at 622; see also *Lopez*, 229 Ill. 2d at 359. Nonetheless, we observe that both *Seibert* and *Lopez* noted that a substantial break in time between the prewarning statement and the *Miranda* warning may suffice as a curative measure in most circumstances. *Seibert*, 542 U.S. at 622 (Kennedy, J., concurring in the judgment); see also *Lopez*, 229 Ill. 2d at 359. Here, the substantial break in time actually came after the issuance of the *Miranda* warnings, but, importantly, the break came before any meaningful postwarning interrogation. We also find it notable that the break was suggested by the detectives, not defendant. The detectives gave defendant the option of going to hospital to have his injured arm looked at before answering questions, and the detectives did not attempt to dissuade defendant when he requested to go to the hospital before answering questions. Although the officers did not re-*Mirandize* defendant when he returned from the hospital, they did remind him that they read him

his rights and confirmed that he understood his rights and that he still wished to waive his rights and speak with the detectives. Only then did the detectives ask defendant about the murders. Thus, even if we found the requisite deliberateness, we would nonetheless find that this substantial break in time served as a proper curative measure because it allowed defendant "to distinguish the two contexts and appreciate that the interrogation has taken a new turn." *Seibert*, 542 U.S. at 622 (Kennedy, J., concurring in the judgment).

¶ 103 As noted, we believe that *Elstad* is the proper guide here. As Justice Kennedy stated in *Seibert* that *Elstad* was "correct in its reasoning and its result." *Id.* Like in *Elstad*, the detectives here did not employ "physical violence or other deliberate means calculated to break" defendant's will. *Elstad*, 470 U.S. at 312. The mere fact that defendant made an unwarned statement does not warrant a presumption of compulsion and does not invalidate subsequent administration of *Miranda* warnings followed by a knowing and voluntarily waiver of those rights. *Id.* at 314. The *Seibert* plurality described the circumstances in *Elstad* as a "good-faith *Miranda* mistake" that was "open to correction by careful warnings before systematic questioning" and posed "no threat to warn-first practice generally." *Seibert*, 542 U.S. at 615 (opinion of Souter, J., joined by Stevens, Ginsburg, and Breyer, JJ.).

¶ 104 The detective's conduct in this case could likewise be described as a "good-faith *Miranda* mistake." The detective's comment to defendant that the police had been looking for him for weeks did not seem to be part of a concerted effort to obtain a prewarning confession from defendant. Defendant's statement could thus be described as "disclosure of a 'guilty secret' freely given in response to an unwarned but noncoercive question." *Elstad*, 470 U.S. at 312.

¶ 105 Importantly, after defendant explained his account of the murders in response to the detective's comment, the detective did not follow up and attempt to elicit even more statements.

This suggests that the detectives did not plan to conduct a prewarning interrogation of defendant. *Seibert*, 542 U.S. at 620 (Kennedy, J., concurring in the judgment) (explaining that there is no basis to suppress a postwarning statement, despite the presence of a prewarning statement where the evidence shows that the officer was not planning to question the suspect or was waiting for a more appropriate time).

¶ 106 Thus, because we find that there was no basis for trial counsel to seek suppression of the postwarning statement, it likewise would have been baseless for trial counsel to seek suppression of the prewarning statement. Defendant's prewarning statement that he acted in self-defense was essentially the same as what he told the detectives after returning from the hospital. Thus, that evidence would have been admitted in any case. In addition, as noted, the fact that defendant stuck to his self-defense account actually bolstered Yi's chosen defense in this case. It would have hurt her case to seek suppression of defendant's prewarning statement.

¶ 107 Finally, because *Roddis* instructs that the trial court may consider the merits in their entirety (*Roddis*, 2020 IL 124352, ¶ 61) in determining whether to appoint new counsel, we may consider if defendant could succeed on his claim of ineffective assistance by making the requisite showing of prejudice. Defendant could succeed on a claim for ineffective assistance only if he could show that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. *People v. Hale*, 2013 IL 113140, ¶ 18. That is, defendant could succeed in his claim if he could show that there is a reasonable probability that the outcome of his trial would have been different if, as he suggests, (1) the trial counsel would have filed a motion to suppress his statement and (2) such a motion would have been successful. As such, we will examine defendant's contention in the context of his entire trial and what bearing, if any, a motion to suppress would have had on the court's guilty verdict.

¶ 108 Assuming defendant sought to suppress his statement, that would likely mean that he would not be pursuing a defense of self-defense. As noted, the best evidence of defendant's self-defense claim is his own repeated statements to police that he acted in self-defense.[9] If that statement were suppressed, defendant would likely have to pursue another defense. At oral arguments before this court, defendant's counsel suggested that a reasonable doubt defense would have been viable in lieu of the self-defense claim. We disagree.

¶ 109 In this case, there was copious physical evidence tying defendant to the murders. Defendant's blood and fingerprints placed defendant at the scene. Connors and Jones' testimony also placed defendant at the scene. It was well known around the neighborhood that defendant had been living with the McCulloughs. The evidence further showed that defendant clearly attempted to clean the crime scene, washed his clothes, and that he continued to live in the home for a period of time until he was arrested. Defendant made a spontaneous statement after his arrest that he was nervous about going back to jail because "[y]ou go back to jail when you murder somebody." Defendant never contested that he made this statement. Accordingly, there would be no reasonable basis for defendant to argue that he was not at the scene of the murders.

¶ 110 If his trial counsel elected to not pursue a claim of self-defense and sought to suppress his statement where he proclaimed that he acted in self-defense, it is difficult to imagine how another viable defense could have been presented. Defendant would thus be in the precarious position of having indisputable evidence demonstrating that he was present either during or immediately after the commission of the murders, but having to assert a defense that he was either not involved in

[9]We note that defendant still could have proceeded with a self-defense defense even in the absence of the statement, but considering that the trial court rejected defendant's claim of self-defense even with the inclusion of the statement, it seems reasonable that such a defense would have also failed if pursued in the absence of the statement.

the murders or there was another basis to excuse his guilt.[10] There is simply no basis in the record to find that such a claim would be viable. Accordingly, because a motion to suppress defendant's statement would be without merit or would otherwise run contrary to trial counsel's trial strategy, defendant would not be able to prevail on a claim of ineffective assistance based on trial counsel's failure to file a motion to suppress his statement.

¶ 111 E. Mittimus

¶ 112 Finally, in our previous summary order in this case, we agreed with the parties that the mittimus should be corrected to reflect three, rather than six, convictions for first degree murder. *McCall*, 2015 IL App (1st) 133463-U. We ordered the clerk of the circuit court of Cook County to correct defendant's mittimus by vacating counts I, II, and III, by indicating on the mittimus defendant's convictions on counts XV, XVI, and XVII, and by indicating on the mittimus sentences of natural life with a 25-year enhancement for each count. *McCall*, 2015 IL App (1st) 133463-U, ¶ 3. These corrections have not been made. As we may correct the mittimus at any time (*People v. Miles*, 117 Ill. App. 3d 257, 260 (1983)), we direct the clerk of the circuit court to make these corrections (*People v. McCray*, 273 Ill. App. 3d 396, 403 (1995) ("Remandment is unnecessary since this court has the authority to directly order the clerk of the circuit court to make the necessary corrections.").

¶ 113 III. CONCLUSION

¶ 114 For the reasons stated, we affirm the judgment of the circuit court of Cook County.

¶ 115 Affirmed; mittimus corrected.

[10]We observe that the record does contain a behavioral clinical examination from Forensic Clinical Services. The report found that defendant was fit to stand trial, sane at the time of the offenses, and had the ability to understand *Miranda*. This suggests that trial counsel did pursue other defenses, but ultimately found them frivolous.

¶ 116 JUSTICE McBRIDE, specially concurring.

¶ 117 I agree with the analysis in the majority decision but write separately to add a few points and to respond to some of the claims of the special concurrence and dissent (dissent). First, the record shows that the trial court not only conducted an adequate inquiry into defendant's claims of ineffective assistance of counsel but went above and beyond that requirement. Second, the trial court did not manifestly err in denying appointment of counsel for a further *Krankel* hearing because defendant's claims pertained only to matters of trial strategy and lacked merit. Third, even if the trial court erred in denying the appointment of new counsel, any error was harmless. I will address each of these points in turn.

¶ 118 In cases where a defendant presents a *Krankel* motion alleging ineffective assistance of trial counsel, the reviewing court first asks "whether the trial court conducted an adequate inquiry" into the allegations. *People v. Moore*, 207 Ill. 2d 68, 78 (2003). Whether a trial court has conducted an adequate inquiry is a legal issue subject to *de novo* review. *Roddis*, 2020 IL 124352, ¶ 33; *Jackson*, 2020 IL 124112, ¶ 98.

¶ 119 What amounts to an adequate preliminary inquiry was considered, in depth, in *People v. Moore*. In *Moore*, the trial court failed to conduct any inquiry at all into defendant's *pro se* posttrial claim of ineffectiveness. *Moore*, 207 Ill. 2d at 79. The supreme court explained that under *Krankel* "some interchange between the trial court and trial counsel regarding the facts and circumstances surrounding the allegedly ineffective representation is permissible and usually necessary in assessing what further action, if any, is warranted on a defendant's claim." *Id.* at 78. Trial counsel "may simply answer questions and explain the facts and circumstances surrounding the allegations," and "[a] brief discussion between the trial court and the defendant may be sufficient." *Id.* Lastly, the court noted that a trial court can "base its evaluation of the defendant's *pro se*

allegations of ineffective assistance on its knowledge of defense counsel's performance at trial and the insufficiency of the defendant's allegations on their face." *Id.* Finding the trial court's failure to conduct any inquiry at all to be error, and that the complete lack of an inquiry was not harmless, the supreme court remanded the matter to the trial court to conduct an adequate inquiry. *Id.*

¶ 120 In so holding, the supreme court cited with approval several cases where the trial court's inquiry was adequate and proper. For example, in *People v. Chapman*, 194 Ill. 2d 186, 230 (2000), the record revealed that the trial court made a significant effort to explore the matters the defendant raised in his *pro se* motion. Similarly, in *People v. Bull*, 185 Ill. 2d 179, 210 (1998), the trial court found defendant's allegations to be spurious, but only after hearing from defendant and his trial counsel. In *People v. Towns*, 174 Ill. 2d 453, 465 (1996), the trial court not only considered and denied defendant's *pro se* motion, but also allowed defendant to file an amended motion, which the court considered and denied. The court also referred to *People v. Munson*, 171 Ill. 2d 158, 201 (1996), where the trial court "made every effort to ascertain the nature and substance of defendant's ineffectiveness claim." The court continued its cataloging of other cases, such as *People v. Byron*, 164 Ill. 2d 279, 304-05 (1995), noting that the trial court heard defendant describe in detail the factual basis of the claim, and only then concluded that defendant's claim was without merit; *People v. Johnson*, 159 Ill. 2d 97, 125 (1994), where the trial court made a significant effort to explore the matters raised in defendant's motion; and *People v. Williams*, 147 Ill. 2d 173, 252-53 (1991), in which the trial court conducted a proper examination of the factual bases for the defendant's claims and found them to be meritless.

¶ 121 Unlike the court's failure to conduct any inquiry at all in *Moore*, the trial court here conducted an exemplary hearing, which is set out below, carefully and extensively examining the numerous claims raised by defendant in his posttrial motion. If there is a "gold standard" on how

to conduct a preliminary *Krankel* hearing, this model of excellence was demonstrated by the trial court here. As a review of the proceedings makes clear, there is absolutely no reason for the dissent to chastise the trial judge. The judge listened to each claim defendant outlined in open court, heard at length from defendant's attorney in response, inquired further with her own questions, and set forth her detailed findings on the record.

¶ 122 The hearing began with the judge advising the defendant that the purpose of the proceedings was to learn

> "all the reasons you believe you did not receive the effective assistance of counsel. *** I want to hear all the reasons you believe you didn't receive appropriate representation. And I need to hear it from you.
>
> So if you need some additional time to write it all down, if that helps you, that's fine, or if you want to tell me now that you're here in court all the reasons, then I can do it in that way as well."

¶ 123 Defendant then began explaining in open court all the reasons he believed his three attorneys were ineffective. His first claim was that portions of his recorded statement were "tampered with," and that he requested counsel obtain a "video technician expert" to examine the recording, but counsel refused.

¶ 124 Next, defendant stated that the video showed that he invoked his right to remain silent and the police did not honor his request. Defendant claimed that he discussed this with his lawyer, but she "did nothing" in response to his request. Defendant further explained that he then raised the issue in a letter to his attorney's supervisor. Defendant presented the letter that he received in response, which indicated that the author had discussed the issues raised by defendant with the

attorneys representing him, that those attorneys were experienced, and that they would raise all issues relevant to defendant's case.

¶ 125 The defendant next asserted that the police used mental and physical coercion to coerce him to make a statement by pointing a gun at him, grabbing his gunshot wound, and demanding that defendant tell the officers what happened because they knew he killed his family. Defendant stated that when he complained to his attorney about this, she "just looked at" him and did not say anything. Defendant also said that she told him she would not raise the issue and he would have to file such a motion himself.

¶ 126 The court then asked defendant for his next claim, and defendant responded, "That's it." The court asked again to confirm that those were the only claims he was raising, and he responded that those were the claims made in his petition. The court then said: "But I'm asking you now, are there any other reasons that you can think of that you believe support why you received ineffective assistance of counsel?"

¶ 127 Given this opportunity, defendant then described several more allegations. Defendant stated that the police lacked probable cause to enter the crime scene, where he said he lived and had a "private section" of the residence. Defendant further stated that he told his attorney that the police reports did not indicate that the police had probable cause to enter the home without a warrant. He contended that a search warrant executed later included material the police listed as seized during the execution of the warrant when, in fact, the items had been improperly seized earlier. Defendant said he asked his attorney to file a motion to suppress the evidence because it was obtained in "violation of the Fourth Amendment," but she "just looked at" defendant, "shocked," and said nothing in response.

¶ 128 Defendant next contended that his initial arrest for criminal trespass was unlawful because the police "did not have probable cause to arrest [defendant] for the homicide incident." Again, defendant stated that he provided this information to his attorney, who acted "shocked," looked at him, and did not say anything. He asked his attorney to obtain 911 records and police records regarding the criminal trespass charge, but his attorney did not do so. Defendant felt his attorney was ineffective for not obtaining those records and believed that, had she obtained the records, a motion to quash his arrest and suppress evidence would have been successful.

¶ 129 Defendant was once again asked by the trial judge if he had additional claims. Defendant responded that he told his attorney in 2012, by phone and in a letter, that the police put him in an interview room and questioned him, despite his complaints about his gunshot wound. Defendant said that the detective told him "Hey, we been looking for you, because we heard you killed your family." Defendant said he told his attorney about this conversation.

> "I told her that I told the police, hey look, you know it was a situation that occurred. I got shot. I killed somebody in self-defense. My Auntie Dana got shot by accident.
>
> *** I told [the attorney] *** my cousin came home and seen his momma and daddy on the floor. He started crying. He grabbed the gun. And it went from there. We had a wrestle and I managed to get out. And I might have shot and killed him.
>
> That's what I told the attorney. That's what I told the detectives. And during that time, I also let her know that the ERI video recording wasn't even activated."

¶ 130 Defendant stated that he asked his attorney to file a motion to suppress his statements because the police "questioned [defendant] again and advised [him] of [his] *Miranda* rights after

[defendant] *** made incriminating statements." He showed his attorney that, on the video, police mentioned that defendant said he killed the family in self-defense "earlier." Defendant asked his attorney to prepare a motion to have his statements suppressed. Once again, defendant said that his attorney just "looked at him" and told him that she was working on other motions, specifically, to get DNA evidence. The judge then asked defendant if he complained to his attorney's supervisor regarding this allegation, and defendant said that he did, "through U.S. Mail" and "on [the] telephone." Defendant said that he was told that he "did this case" and that he should "take the rap" and "cop out and take natural life." The judge asked defendant who made those statements, and defendant told him it was his attorney and "the other man."

¶ 131 Defendant generally contended that his attorneys were "incompetent," that they did not act in his "best interests," and that they were not "trying to represent" him at all. Defendant also said that if they had filed the motions he requested, those motions would have been granted because the police "illegally obtained" a confession from him.

¶ 132 The court asked if those complaints "covered all the reasons that [he] believe[d] [he] did not receive the effective assistance of counsel," and defendant agreed that they did.

¶ 133 The judge then advised defendant that she would now question his lawyer about defendant's claims and "and then I'll make the decision whether there is a showing that warrants the appointment of counsel and further proceedings based on your claims that you didn't receive effective assistance of counsel."

¶ 134 Counsel Christina Yi was asked to step forward. As to the first claim, that the ERI video was tampered with and that defendant requested to have an expert review it, Yi explained that defendant had, indeed, complained to her about this. Yi "follow[ed] up," and viewed the video with defendant at the Cook County Jail. Yi found no evidence of tampering, time skips, or lapses.

Yi told defendant that she did not see what he saw. She further explained that the program that was used to watch the video occasionally would "buffer," and perhaps defendant thought this to be evidence of tampering, but in her opinion, it was not. Yi also explained that defendant complained that the person who appeared on the video was not defendant, but another person "acting as" defendant. Based on her review of the evidence and defendant's allegations, Yi and her colleagues "did not pursue" hiring an expert to review the video. In response to the court's questioning, Yi further stated that she reviewed the timestamp on the video, and there was "no issue with the timestamp." It "continued to run [and] there was no gap in the recording." Yi further stated that the team of attorneys viewed the video "multiple times," but defendant "was insistent." On one occasion, defendant "didn't see" the evidence of tampering that he had previously described and insisted that Yi brought the wrong video and that the "wrong" video had been tampered with as well.

¶ 135 The court then asked Yi about defendant's next claim—that he invoked his right to remain silent, that the police violated that right, and that counsel "did nothing." In response, Yi said that the ERI in fact depicts the *Miranda* warnings being given, defendant acknowledging he understood them, and defendant's qualified waiver. Yi said,

> "And that Mr. McCall, this is to the best of my knowledge, it's been quite a while. Mr. McCall had requested medical attention before he answers or talks about the incident any further. He did indicate that he wanted to talk to the police about the shooting, but he wanted medical attention for his gunshot wound first."

¶ 136 When asked if defendant received medical attention before they continued the interrogation, Yi said:

> "Yes. He was taken to *** a hospital to receive medical attention. We did have medical records with similar timeframes as depicted on the ERI. He was treated for his gunshot wound and returned to the same interview room and the ERI was continued. *** Mr. McCall is in fact shown *** in the same interview room after he received the medical attention. And you can see the evidence of the medical attention with the fresh bandaging and so forth on his forearm gunshot wound."

¶ 137 The court moved on to the third claim, that the police used mental and physical force, including pointing a gun at his face and squeezing his wound, to procure his statement and that counsel did not address this allegation. Yi agreed that this claim was brought to her attention, and that it was "part of his allegation that the video had been tampered with." Yi noted that the video did not depict the physical or psychological coercion of which defendant complained. Defendant insisted that the videotape was "doctored," that it was not an actual recording of the events, and that the tape portrayed an actor wearing a mask. However, there was no evidence of a gun being pointed at defendant's face, nor any evidence of his wound being manipulated.

¶ 138 The court then asked Yi about defendant's claim that a motion to quash arrest should have been filed based on the lack of probable cause to enter the premises. Yi responded that she could not recall specific dates of the events, but she did have conversations with defendant about these allegations. It was correct that the police first searched the crime scene without a warrant. However, the police entry was to do a well-being check after several family members had grown concerned after being unable to contact the McCullough family at their home. Yi agreed that, when no one answered the door, there was a forced entry, but that entry was not for the investigation of a crime, but a well-being check.

¶ 139 The court then asked Yi about defendant's claim that certain materials were listed as being obtained pursuant to the search warrant when the evidence was actually obtained earlier. Again, Yi did not recall the exact dates of the first entry and the subsequent search pursuant to a warrant, but she remembered that a search warrant issued. Yi explained that after the initial entry, police discovered that it was a crime scene, secured the area, and did some preliminary investigation. Yi recalled having conversations with defendant about the discrepancy in dates but noted that the warrant was clearly executed after the warrant had been issued.

¶ 140 Concerning the claim that the criminal trespass arrest was pretextual to apprehend the defendant so he could be questioned about the homicides, Yi recalled discussing the issue with defendant. Yi remembered that there had been several complaints to police about defendant by neighbors, who knew that he was missing following the homicides, and complaints about possible trespasses to the crime scene or surrounding area. For one of those calls, defendant was able to flee from the area before his arrest. Yi explained that defendant had been seeking shelter at multiple homes in the area, including the crime scene, until he was eventually arrested for criminal trespass to a neighbor's home.

¶ 141 Then, the court questioned Yi about defendant's claim that he made statements to the police before being given *Miranda* warnings, that these statements were used to incriminate him, and that he requested she file a motion to suppress. Yi responded,

> "To be honest with you, I don't recall any prior allegations by Mr. McCall that there were any statements that he made to the police prior to the ERI being activated. What is clear in the ERI is even after the ERI was activated, Mr. McCall did not make any statements, even though he acknowledged *Miranda* and waived *Miranda*, it was a qualified waiver in that he wanted medical attention and food first, and

> that's what he received. And then Mr. McCall made statements against his interests."

¶ 142 Yi further explained that she did not file a motion to suppress his statements, or to quash his arrest and suppress evidence. She explained that the police had probable cause to arrest defendant "for, if nothing else, his trespass onto" the crime scene and other properties. Defendant had been seen by "numerous neighbors" and acknowledged "trespassing on other people's homes and land for shelter."

¶ 143 The court specifically asked about defendant's claim that Yi told him to "cop out" and take the plea. She responded:

> "As the court is aware, there was the death penalty when Mr. McCall was initially charged, the death penalty was in fact what the State is seeking. When the case was ultimately going to trial, obviously the death penalty was no longer a possible sentencing option for the State against Mr. McCall.
>
> There was no cop out deal to be had. There was no plea bargain to be had. The only possible sentence available to the Court upon a finding of three murders would be mandatory natural life, even with two murders it would be mandatory natural life. The State was not making any offers beyond natural life.
>
> There was nothing to gain by going into any type of plea bargaining. And there was absolutely no reason to insist that Mr. McCall plea to a maximum sentence on the case."

¶ 144 The judge asked Yi how long she had been on the case, and Yi indicated that she had been representing defendant throughout most of the proceedings, at least since his arraignment through disposition.

¶ 145 After reviewing the history of the case, the court questioned Yi about a time when defendant had been considering to proceed *pro se*. Yi explained that defendant at times would indicate that he would hire a private attorney. Yi indicated that she informed defendant that, because she was representing him and because she was not willing to file a motion to suppress his statement, the only way that it could come before the court was if he decided to proceed *pro se*, which he had a constitutional right to do. She also advised him against proceeding *pro se* and, ultimately, he did not proceed *pro se*.

¶ 146 The court then asked Yi why it was her decision that the motions to quash arrest and suppress evidence, as well as a motion to suppress defendant's statement, were not appropriate. Before answering this, Yi asked if she had the Court's or defendant's permission to divulge HIPAA protected information. When the court inquired whether it was necessary to divulge HIPAA information to answer the question, Yi indicated that she could give a limited answer. Yi stated:

> "Based on the evidence that we had received and based on the investigation that we had conducted in the matter, it was not just my decision, but the defense team's decision, except for Mr. McCall who disagreed with the rest of the defense team, that those motions were without merit and would be frivolous. And as such we made the decision not to proceed with those motions. In addition, along with the evidence and the investigation we had completed, based on Mr. McCall's own version of the events, we didn't have a sufficient basis to proceed on those motions."

¶ 147 The trial judge then recessed the matter for a period of time to give the matters "additional consideration" and to "go over" Yi's responses.

¶ 148 Later that day, the trial judge announced her findings. With all parties present the trial judge stated as follows:

> "The case is before the Court for ruling on the defendant's claim, preliminary claim that he received ineffective assistance of counsel.
>
> *** [W]hen I make an inquiry, when I'm conducting a preliminary *Krankel* determination, this is essentially a nonadversarial process which is why the State is not involved. I mean, certainly they have a right to be present, but they are not involved in this determination by the Court. And really the appointment of counsel is not necessary at this stage until the Court makes a determination that there has been an appropriate showing.
>
> So the Court considers when determining whether a *pro se* claim of ineffective assistance of counsel warrants the appointing of counsel to further pursue those claims, the Court does consider each of the grounds upon which the claim is made. The Court considers statements of the petitioner, the defendant/petitioner, in making the claim as well as the responses of counsel as to each of the claims.
>
> And I'm not going to go and restate each of the six claims but know that I have heard exhaustively both from Mr. McCall as the petitioner as well as counsel in her response as to the basis or the just clear responses to the claims as to how Mr. McCall was deprived of the effective assistance of counsel.
>
> Now, when I examine whether there is ineffectiveness, of course, the Court looks at really is there a factual claim, a supported factual basis that shows that the defendant received ineffectiveness assistance of counsel.

The Court considers whether any issues are raised from which prejudice doesn't even need to be shown, whether as a basis for why the defendant claims that he received ineffectiveness, that whether it is true or not. But the claim itself, that there is prejudice shown based on an issue that warrants the appointing of counsel so that further investigation can be had for the claims to be further investigated.

And the Court again having inquired of both the defendant and counsel looks to the law. And the law requires that defendant receive the effective assistance of counsel. It does not require perfect representation, but it does require effective assistance.

The Court has considered each of the six claims, many of them do revolve around pretrial motions that could or should have been brought based upon defendant's assessment of the facts.

The Court again considering counsel's claims with respect to her meeting with Mr. McCall and Mr. McCall does agree that meetings were had, discussions were held as to each of the claims, although on a few of them he claims that counsel really just looked at him in response as opposed to working actively to address some of them. But the Court has considered each of the claims and the responses thereto.

And it is the finding of this Court that the claims clearly lack merit. The decision not to file the motion to quash arrest and suppress evidence for the claimed reasons, the *** decision to not file a motion to suppress statements, clearly the claims were heard by counsel, considered by counsel and, in the opinion of this Court, based on the response and the Court's review of the charges, the history of

the case, counsel has clearly stated reasons for not filing the same. Not the least of which would be that such motions would have been frivolous based upon counsel's investigation and knowledge of the discovery, the charges and the claims at that time.

I find no *bona fide* claim of ineffective assistance of counsel based on my interview of Mr. McCall and my interview of Counsel Yi. And that's as to each of the six claims.

And as a consequence, I find that there is no need for the appointment of counsel. There is not a showing of ineffective assistance of counsel.

So the preliminary *Krankel* hearing has been conducted. There is no need for the appointment of counsel to pursue any *pro se* claims of ineffective assistance of counsel.

So that concludes the proceedings on this case before this Court."

¶ 149 Following the proceedings above, defendant filed a motion to reconsider and then an amended motion to reconsider, which the court denied in a written order. Specifically, regarding defendant's claim of being questioned first and given *Miranda* warning later, the court observed:

"Although the transcript does suggest that defendant told police that he acted in self-defense prior to the beginning of the recorded statement, this does not establish any misconduct. Instead, it is equally possible that defendant blurted out that information prior to be questioned and detectives stopped him in order to begin recording the videotaped statement. Accordingly, counsel was not ineffective for failing to raise this issue."

¶ 150 Based on a review of the above, it is abundantly clear that the trial court not only conducted an adequate inquiry into the defendant's claims but did much more than is required. There is simply no authority to support the suggestion in the dissent that the inquiry was inadequate. One cannot imagine what more the judge could or should have done. To chastise the trial judge in these circumstances is unfair to this judge and to all the other trial judges who take the time, effort, and care to conduct a preliminary *Krankel* hearing like the one so meticulously conducted here. Because the trial court scrupulously inquired into all defendant's claims, including defendant's *Seibert* claim, the hearing it conducted was more than adequate and entirely proper.

¶ 151 Second, the trial court did not manifestly err in denying appointment of counsel for a further *Krankel* hearing. Defendant's ineffectiveness claims fail where they involve matters of trial strategy, and where defendant has not shown that a motion to suppress would have actually succeeded or that the result of the proceedings would have been different had the motion been granted.

¶ 152 As the supreme court has clearly stated, "If the trial court determines the claim lacks merit or pertains only to matters of trial strategy, then the court need not appoint new counsel and may deny the *pro se* motion." *Roddis*, 2020 IL 124352, ¶ 35 (citing *Moore*, 207 Ill. 2d at 77-78). We review the trial court's decision not to appoint new counsel under the manifestly erroneous standard. *Jackson*, 2020 IL 124112, ¶ 98 ("if the trial court has properly conducted a *Krankel* inquiry and has reached a determination on the merits of the defendant's *Krankel* motion, we will reverse only if the trial court's action was manifestly erroneous"). Manifest error arises only where the opposite conclusion is clearly evident, plain and indisputable. *Id.*

¶ 153 The supreme court in *Jackson* recently reaffirmed that *Krankel* does not require the appointment of independent counsel when the ineffectiveness claims raised are matters of

traditional trial strategy. The defendant in *Jackson* raised multiple claims of ineffective assistance at his preliminary *Krankel* hearing, specifically that counsel was deficient for failing to call certain witnesses, for failing to make certain objections, and for failing to present certain evidence. *Id.* ¶ 103. The defendant argued that he triggered the appointment of new counsel for a hearing on his *pro se* ineffectiveness claims by showing "possible neglect" by defense counsel. The supreme court rejected that claim, holding that all his claims were foreclosed because they were based on counsel's strategic decisions. The supreme court noted that the claims—specifically, whether to call certain witnesses and what objections to make—were matters of trial strategy generally reserved to the discretion of trial counsel. *Id.* ¶ 106. Because the defendant's allegations related to trial strategy, the supreme court concluded that they could not serve as the basis of a *Krankel* claim and the trial court did not manifestly err when it denied defendant's *pro se* posttrial motion without appointing counsel. *Id.* ("Because each of these allegations relates to trial strategy, it cannot serve as the basis of a *Krankel* claim." (citing *Chapman*, 194 Ill. 2d 186, *People v. Kidd*, 175 Ill. 2d 1, 44-45 (1996), and *People v. Strickland*, 154 Ill. 2d 489, 526-30 (1992)).

¶ 154 Similar to the claims in *Jackson*, the ineffectiveness claims raised by defendant here are clearly matters of trial strategy and cannot serve as the basis of a *Krankel* claim. A reviewing court will not extend its inquiry into areas involving the exercise of judgment, discretion, trial facts, or strategy. *Jackson*, 2020 IL 124112, ¶ 106. An attorney's decision whether to file a motion to suppress is generally a matter of trial strategy and entitled to great deference. *People v. White*, 221 Ill. 2d 1, 21 (2006); see also *People v. Kornegay*, 2014 IL App (1st) 122573, ¶ 20 ("Whether or not a motion to quash a search warrant and suppress evidence should be filed in a criminal case is a matter of trial tactics and has little bearing on competency of counsel.").

¶ 155 That is not to say that defense counsel's failure to file a motion to suppress can never amount to ineffective assistance. In *Henderson*, the supreme court held that to establish the prejudice prong of an ineffective assistance claim based upon an attorney's failure to file a motion to suppress, the showing required is not that there is a reasonable probability that a motion would have been successful. Rather, a defendant must show that the motion to suppress, if pursued, would have *actually succeeded*. *People v. Henderson*, 2013 IL 114040, ¶¶ 12, 15. In addition to showing that the unargued motion is meritorious, a defendant must also show a reasonable probability that the outcome of the trial would have been different as a result. *Id.*; see also *People v. Gayden*, 2020 IL 123505, ¶ 28. Defendant has shown neither. Even the dissent concedes that a *Seibert* motion may or may not have been successful. This alone, demonstrates that the trial court did not manifestly err.

¶ 156 The dissent contends that *Henderson*, 2013 IL 114040, does not apply at the preliminary stage. However, it cites no authority for why *Henderson* is inapplicable. Instead, as our supreme court has repeatedly explained, reviewing the underlying legal merits of a claim is entirely proper for the trial judge, even during preliminary postconviction proceedings. *Roddis*, 2020 IL 124352, ¶ 56. The dissent also misunderstands what *Henderson* is being cited for, claiming that it turns the preliminary *Krankel* hearing into the "forum for [a] final showdown" of the merits, and requires a defendant to "prove his case outright." *Infra* ¶¶ 248, 250. The dissent is incorrect; requiring that a claim be nonfrivolous is not the same as requiring a defendant prove "certain victory." A defendant need not definitively prove his claim at a preliminary *Krankel* hearing; however, if a defendant could *never* establish his claim because that claim is nonmeritorious, the court need not waste precious judicial resources by advancing the postconviction petition to subsequent stages and ignoring the claim's ultimate and inevitable failure. *Roddis*, 2020 IL 124352, ¶ 61 ("[A] trial court

must be able to consider the merits *in their entirety* when determining whether to appoint new counsel on a *pro se* posttrial claim of ineffective assistance of counsel. This serves both the ends of justice and judicial economy." (Emphasis in original.)).

¶ 157 Defendant here has presented no facts that would indicate that a *Seibert* motion, or a motion to suppress, would have actually succeeded. Defendant's own statements in his written motions and in court that he was interrogated first and given *Miranda* warnings later and that the police took incriminating statements from him are, at best, conclusory allegations that were properly rejected by the trial judge. *Id*. ¶ 56 ("The trial court, most familiar with the proceedings at issue, remains best situated to serve the interests of judicial economy by extinguishing conclusory claims. We decline to unduly limit the most effective arbiter between patently frivolous claims and those showing possible neglect.").

¶ 158 Although the video indicates that defendant made a statement to police before the ERI was activated, that does not mean that defendant was not advised of his rights before he made the earlier statements about self-defense. And, even if he was not advised of his rights, that does not mean he was subjected to a custodial interrogation. Defendant has not shown that he did not spontaneously make the statements. As the trial court noted, in her denial of the defendant's motions to reconsider, the fact that defendant agreed that he made a statement before the ERI device began recording does not mean he did not simply "blurt[ ] out" the statements earlier.

¶ 159 The police reports, which were attached to defendant's motion, demonstrate that it was defendant who wanted to speak to the detectives and explain the shootings. One of the reports indicates that after defendant was apprehended and handcuffed, defendant told the police to be careful because he had a gunshot wound on his left arm. When asked how he sustained the wound, he replied that he would only speak to the detectives. When police transported defendant to the

station, defendant told the officers he was going to jail for a long time because when you murder someone you go to jail. As he was being placed into an interview room, defendant spontaneously stated that he had killed the McCulloughs in self-defense. He was told not to say anything further, and he responded that he would tell the detectives everything, that he killed two people in self-defense. He was again told to relax, and the detectives would be right back to speak to him.

¶ 160 With a consent form completed, the ERI was initiated, defendant was given his *Miranda* warnings from a preprinted form, and defendant replied that he understood those rights and wanted to speak to the detectives. The detectives asked defendant if he had received treatment for his arm, and he responded that he had not. They then asked if he wished to receive medical treatment, and defendant responded affirmatively. The interview was stopped, and he was transported to the hospital. The reports further indicate that the case was not discussed with defendant on the way to the hospital, in the hospital, or on the return trip, although defendant attempted to speak to the transporting officers on three occasions and was told repeatedly that the officers would not speak to him until he was treated and returned to the police station. When defendant returned to the station, he acknowledged that he had been advised of his *Miranda* rights earlier, stated that he understood those rights, and told the detectives that he wanted to talk to them about what happened. He then gave a detailed account of the murders.

¶ 161 The dissent ignores the facts in this record and completely exaggerates counsel's statements in court, which she clarified were based upon her best recollection of proceedings years earlier. It claims that the "broad outlines" of a *Seibert* motion were there for anyone to see and that the attorney omitted the critical detail that the *Miranda* warnings came after defendant incriminated himself under custodial interrogation at least once and maybe twice. However, there is no evidence that a custodial interrogation took place before defendant claimed self-defense.

Instead, the record shows that before the ERI was ever activated, it was defendant himself who actively and spontaneously volunteered his self-serving self-defense claims to the police. It was defendant who first asked the police how long they had been looking for him. It was defendant who said to one of the arresting officers that he was going back to jail because that's what happens "when you murder somebody." It was defendant who complained about the need for medical attention, which was promptly provided to him.

¶ 162 The dissent claims there was at least one, maybe two custodial interrogations that occurred without any *Miranda* warnings being given before the ERI was ever activated. This was, according to the dissent, plain, unmistakable, and visible on the ERI for anyone to see. This conclusion is based upon two things: (1) defendant's statement that the police detective said there was a rumor in the neighborhood that defendant killed his family and (2) defendant's response of "Yes" when asked if he had earlier told police that Mr. McCullough shot him and that everything that happened, happened in self-defense. From this brief scenario, the dissent concludes a custodial interrogation took place without any warnings and that a *Seibert* violation occurred.

¶ 163 What the video actually shows is the following. The ERI begins, the detectives are identified by name, and defendant is asked how he is doing. One of the detectives then says, "First of all, earlier you said that Mister McCullough shot you and whatever happened happened in self-defense." Defendant responds, "Yes." The detective says, "Okay. Uh- - But just so you know we have to give you your rights, you understand that, okay?" Defendant answers, "No problem sir."

¶ 164 According to the dissent, this limited colloquy, along with defendant's claim that the officer stated that there was a rumor in the neighborhood that defendant killed his family, demonstrates the "broad outlines" of a *Seibert* claim. The dissent suggests that three seasoned defense attorneys, who spent years preparing for this triple murder trial, completely neglected and missed this obvious

Seibert motion that anyone else, knowledgeable in the law, would see and recognize. To suggest that the team of three experienced attorneys from the Public Defender's Murder Task Force were neglectful is deeply flawed.

¶ 165 It is even more concerning that the dissent accuses counsel of inaccurately describing the facts as they must have occurred and, worse yet, "misrepresent[ing]" the ERI to the trial court. Yi did not misrepresent anything. She made clear on several occasions that her responses about the ERI were to the best of her recollection. She did not specifically recall that defendant claimed he was interrogated first and only thereafter given his *Miranda* warnings. Defense counsel's best recollection of the ERI was that defendant did not make any statements before the *Miranda* warnings were given. She said he gave a qualified waiver and wanted to talk to the police after his wound was treated. This was not a misrepresentation.

¶ 166 The ERI shows that defendant did not specifically start making a statement at that time, though he did say "Yes" when the detective asked if earlier he said "Mr. McCullough shot [him] and whatever happened happened in self-defense." But defense counsel also said, as described above, that defendant gave a qualified waiver, and "requested medical attention before he answer[ed] or talk[ed] about the incident any further." This response indicates counsel's understanding that defendant had already given some type of statement and that he did not want to speak "any further" until he received medical attention. This colloquy demonstrates the attorney was not misrepresenting anything to the trial judge; she was aware of the facts and described them accurately to the best of her recollection.

¶ 167 The dissent, however, insists that, had the video been played in court at the hearing, the trial court would "have hit the brakes," recognized trial counsel's faulty memory of the video, and seen that the outlines of a *Seibert* violation were present. The court could have continued the matter

so the defense attorney could have more accurately recalled the years-old case; better still, the trial judge could have appointed new counsel and advanced everything to a full blown *Krankel* hearing to get to the "bottom of what happened." However, as explained above, defendant needed to show, not only that a *Seibert* motion was viable, but that it would have *actually succeeded* to warrant appointment of counsel and a full *Krankel* hearing. *Henderson*, 2013 IL 114040, ¶ 15. There is no meaningful support for the dissent's conclusion that the ERI indicates that custodial interrogations occurred without *Miranda* warnings. As the trial court concluded, defendant's agreement to having made a statement earlier on the ERI did not show any misconduct on the part of the police. A spontaneous or volunteered statement made by a person in custody is not *per se* a *Seibert* or *Miranda* violation. *People v. Peo*, 391 Ill. App. 3d 815, 821 (2009) (reversing the suppression of a defendant's statement under *Miranda*, where the officer's "question was a natural, neutral response that logically followed from defendant's volunteered statement, and it did not create the type of coercive situation that *Miranda* is designed to guard against"); *People v. Lowenstein*, 378 Ill. App. 3d 984 (2008) (under *Miranda*, volunteered statements of any kind are not barred by the fifth amendment (U.S. Const., amend. V), therefore, they do not require *Miranda* because the fundamental import of the privilege while an individual is in custody).

¶ 168 The above testimony, all the police reports, voluminous discovery, the ERI, and the many conversations between defense counsel and defendant easily account for the decision not to file a motion to suppress defendant's statements under *Seibert*.

¶ 169 Moreover, our supreme court has repeatedly confirmed that a trial court must be able to consider the merits of those ineffectiveness claims in their entirety, both factually and legally when a trial court conducts a preliminary *Krankel* hearing.

¶ 170 The defendant in *Roddis* was charged with aggravated domestic battery against a roommate. *Roddis*, 2020 IL 124352, ¶ 8. A bench trial was conducted, with conflicting testimony from the defendant, the victim, and the responding police officer. Specifically, the victim's testimony at trial changed from her original account of the incident to police. She testified that the incident was an accident, admitted communicating with the defendant multiple times since the charges were filed, and admitted that she had a pending charge for filing a false report in an unrelated case. *Id.* ¶ 11. The defendant was ultimately found guilty of the lesser aggravated battery charge and sentenced to six years in the penitentiary. After a first appeal, the matter was remanded for the trial court to conduct a *Krankel* hearing to address defendant's posttrial claims that his lawyer was ineffective for failing to impeach the victim with text messages in which she said that the incident was an accident and offered to testify in a certain manner for $1000. *Id.* ¶ 23. The defendant also alleged that his attorney misled him into taking a bench trial because the attorney said he knew the judge, which would result in lower criminal charges. *Id.* ¶ 25. Both the defendant and attorney testified at a subsequent hearing. The trial judge found that defense counsel was not ineffective and denied appointing new independent counsel. Although defendant's conviction was affirmed, the appellate court concluded that trial court had improperly conducted the hearing by going beyond the factual merits of defendant's posttrial claims. It remanded the matter for a second preliminary *Krankel* hearing. *Id.* ¶ 29.

¶ 171 The supreme court granted the State leave to appeal and concluded that the appellate court erred in determining that trial courts should only consider the factual merits of a defendant's *pro se* allegations of ineffectiveness. The supreme court explained that a trial court has the clear authority to determine both the factual and legal merits of an ineffective assistance of counsel claim at a preliminary *Krankel* hearing and that deciding otherwise would erroneously require appointment

of new counsel anytime a defendant asked defense counsel to pursue a claim that counsel disagreed with, including even obviously spurious claims. *Id.* ¶¶ 48-56. The court relied primarily on its prior decision in *People v. Chapman*, 194 Ill. 2d 186 (2000), to render its decision. *Roddis*, 2020 IL 124352, ¶¶ 40-47.

¶ 172 The *Roddis* court set out the facts of *Chapman*, in which the defendant was convicted of the murders of his paramour and their infant son. After his conviction, the defendant in *Chapman* filed a *pro se* posttrial motion alleging ineffective assistance of trial counsel. Defendant contended that his lawyer should have checked his phone and bank records from the day of the murders, arguing that if his lawyer had established at trial that he was at "a cash station or the house instead of traveling throughout the whole state searching for someone and preconceiving a crime to the victim" those facts would have negated his guilt. The trial judge rejected defendant's ineffectiveness claims, finding that the proffered evidence would not have altered the guilty verdicts in the case because the evidence of defendant's guilt was overwhelming.

¶ 173 On appeal, the defendant in *Chapman* argued that the trial court erred in evaluating the merits of his allegations rather than first determining whether to appoint new counsel to argue his ineffective assistance claims. The supreme court, however, rejected the defendant's claims as conclusory and noted that the trial court had "thoroughly explored" the matters raised by the defendant. The supreme court further concluded the fact defendant withdrew money on the day the victims disappeared would not have any bearing on the case, and the claim had no merit.

¶ 174 In examining *Chapman*, the supreme court in *Roddis* explained that the trial court's statements that the evidence against the defendant was overwhelming was "akin to a conclusion that the merits of the State's case were so firmly founded and sufficient that, even if the factual bases for the defendant's claim were true, they would not have altered the resulting conviction."

Id. ¶ 47. The supreme court further noted that, "[i]n *** finding the *Chapman* trial court's proceedings proper, this court arrived at the same conclusion." *Id.*

¶ 175 In reviewing the record of the defendant's trial in *Roddis*, the supreme court found that the trial court's inquiry was adequate, that defendant received effective assistance of counsel, and that he was not prejudiced by his attorney's performance. *Id.* ¶¶ 66-68. The trial court's denial of the appointment of new counsel was therefore affirmed. *Id.* ¶ 70.

¶ 176 As in *Roddis*, the trial court considered defendant's claims in this case, including his *Seibert* claim, and found that those claims had no legal merit and did not warrant the appointment of counsel and a further hearing. That conclusion was not manifestly erroneous.

¶ 177 To state a claim for ineffective assistance, a defendant must show (1) that counsel's performance was deficient and (2) that the deficient performance prejudiced him or her. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Here, defendant cannot show deficient performance by counsel for the reasons described above, and he cannot show prejudice from counsel's alleged failure where he has not shown that a motion to suppress would have actually succeeded, or, if it had, that the result of the proceedings would have been different.

¶ 178 Even if we assumed that defendant could show that a motion to suppress would have actually succeeded, he would still be unable to show prejudice from counsel's alleged failure. There is no reasonable probability that the outcome of his trial would have been different had the motions that he claims counsel should have prepared, been granted. Because the evidence presented against defendant was overwhelming and established defendant's guilt of the three murder charges, the result of defendant's trial would not have been different absent the use of the complained of statements.

¶ 179 At defendant's trial, the State introduced the testimony of two civilian eyewitnesses, who placed defendant in the McCullough home at the time of the murders. The physical evidence—including DNA evidence, blood, fingerprints, and the murder weapons—were recovered at the scene. This evidence established beyond any doubt that defendant was present at the time of the murders, that the three victims were killed by the defendant, and that they were not accidental deaths. The pathologist testimony established how the victims were shot, that the deaths were homicides, and that Allen McCullough was both shot and struck on the top of his head with the hammer. There was also evidence that defendant tried to hide evidence of his guilt by attempting to clean up the crime scene, by moving and covering the bodies, and by washing his blood-stained clothing. Defendant also demonstrated consciousness of guilt by his efforts to elude police for weeks and his final attempt to escape capture before he was arrested for criminal trespass. Finally and importantly, defendant's statements immediately after his capture, which have never been questioned as anything but spontaneous and volunteered, were admissions that he had murdered the victims and that he would be returning to jail for his crimes.

¶ 180 Given this overwhelming evidence of defendant's guilt for the three murders, there is no possibility that the result of trial would have been different, even if defendant's statements had been suppressed. Recognizing defendant's inability to establish the prejudice prong of an ineffective assistance claim, the dissent never addresses that prong or the compelling evidence of defendant's guilt. The failure to address either of these issues is most telling. Because defendant could never establish either prong of an ineffective assistance claim, the trial court's determination that defendant's claims had no legal merit and did not warrant the appointment of counsel and a further hearing was not manifestly erroneous.

¶ 181 Additionally, as a reviewing court, we may consider the entire record of proceedings and may affirm on any basis appearing in the record. *People v. Johnson*, 208 Ill. 2d 118, 129 (2003). Years earlier, at the first *Krankel* hearing, Yi, sworn and under oath, was specifically asked about defendant's then claim that he was not given his *Miranda* warnings and that he was never told he had a right to have an attorney present for advice during his interrogation. After reviewing all the discovery—including the police reports, the electronically-recorded interrogation of defendant, and all of the records she had available to her—Yi testified that she "learned that Mr. McCall was given his *Miranda* warnings prior to the ERI as well as once the ERI was activated and he indicated he understood those *Miranda* warnings and he waived them." Yi was specifically asked if she believed that defendant was advised of his *Miranda* rights, before he gave any statements and Yi stated that he was.

¶ 182 Accordingly, the record indicates that defendant was advised of the *Miranda* warnings before ever walking into the ERI. This evidence is memorialized in a transcript from years earlier, shortly after the trial, when everything was relatively fresh and when Yi was not testifying to her "best recollection." This fact has not been denied by the defendant at any time, even though defendant made many of the same claims in both 2013 and 2017. It also is clear from the first *Krankel* proceeding that defendant never claimed that he was questioned first and given his *Miranda* warnings later. However, this does not show that the attorneys were neglectful toward their client; instead, along with all the other evidence in the record, it demonstrates that the claim is newly conceived by defendant.

¶ 183 The record also suggests that defendant first presented the *Seibert* claim in 2017, despite attempting to manufacture the claim by filing a purported letter to counsel, backdated to January 2012, without any mailing certification or notarization that it actually existed at the time it was

allegedly written. The first *Krankel* hearing took place after the purported January 2012 letter to counsel was allegedly composed, but the *Seibert* claim was never mentioned or presented by defendant at that 2013 *Krankel* hearing. This also suggests that the defendant's claim was meritless and manufactured by him in 2017.

¶ 184 Finally, the trial court's judgment should be affirmed because, even if the trial court erred in failing to appoint counsel, which the record does not show, the erroneous failure to appoint new counsel following a preliminary *Krankel* inquiry is subject to harmless error analysis. *Jackson*, 2020 IL 124112, ¶ 113 (finding the trial court's error in not appointing independent counsel harmless where the result of the defendant's trial would have been the same, absent the error). To establish that an error is harmless, the State must prove beyond a reasonable doubt that the result of the proceedings would have been the same absent the error or the erroneously admitted evidence. *Id.* ¶ 127.

¶ 185 As explained above, the evidence against defendant was overwhelming, and the result of defendant's trial would have been the same, even without the use of defendant's challenged statements. *Id.* ¶ 113. Accordingly, any error in the failure of the trial court to appoint new counsel to consider defendant's ineffective assistance claims was harmless.

¶ 186 For all of the above reasons I specially concur.

¶ 187 JUSTICE ELLIS, concurring in part and dissenting in part.

¶ 188 I respectfully disagree with the majority's treatment of the second *Krankel* issue. The preliminary *Krankel* hearing, insofar as it concerned counsel's failure to move to suppress defendant's custodial statement under *Missouri v. Seibert*, 542 U.S. 600 (2004) (opinion of Souter, J., joined by Stevens, Ginsburg, and Breyer, JJ.), was nowhere close to adequate. Trial counsel's memory of the ERI video that captured the possible *Seibert* violation, and of the events that

preceded it, was inaccurate in several critical respects but, as told to the court, could only have led the trial court to one conclusion—that a proposed *Seibert* motion had no basis in law or fact, so it was sound trial strategy not to file that motion. But just the first 30 seconds of the ERI video reveals that the outlines of a *Seibert* violation are there, for all to see, and flatly contradict trial counsel's description of the video to the court.

¶ 189 The judge at the remanded preliminary *Krankel* hearing was not the judge who tried the case years earlier, and trial counsel was summoning memories of that ERI video and related events from several years ago. Her account was surely unintentionally mistaken, but inaccurate all the same. It is clear from the ERI video that a *Seibert* motion was viable—maybe a winner, maybe not, but unquestionably viable. Yet the claim of ineffectiveness failed to pass the preliminary *Krankel* screen—it was deemed frivolous—and the majority now validates that conclusion, not based on the reasons that trial counsel gave for not pursuing a *Seibert* motion, which are unsupportable, but based on its *own* estimation of what counsel's trial strategy could have been, instead.

¶ 190 *Seibert*, as the majority notes, prohibits a police tactic sometimes employed to undermine *Miranda* warnings. It works as follows: police detectives (1) conduct a custodial interrogation that elicits an incriminating statement (a *Miranda* violation), then (2) read the suspect *Miranda* warnings, then (3) with that pre-warning admission in hand and the suspect hard-pressed to deny it, resume the custodial interrogation, lead the suspect over the same ground, and obtain the incriminating statement again, this time post-warning.

¶ 191 When asked why she did not file a motion to suppress based on *Seibert* or even *Miranda*, trial counsel told the trial court three things about the ERI video that were wrong but, if true, would have led anyone to agree that a *Seibert* motion had no chance of success. When asked about

whether defendant's *Miranda* rights were violated, she told the court that the ERI video "depicts the *Miranda* warnings being administered to" defendant. But she omitted the critical detail that the *Miranda* warnings came *after* defendant incriminated himself under custodial interrogation at least once and maybe twice. That answer was clearly insufficient.

¶ 192 As for *Seibert*, counsel said she did not recall defendant making any statements before the ERI video was turned on, though it is undisputed that he did. She then said: "What is clear in the ERI is even after the ERI was activated, Mr. McCall did not make any statements," instead insisting on medical attention first. In other words, counsel told the court that defendant did not make any pre-warning incriminating statements whatsoever—when, of course, the ERI video shows that he made *two* such statements, one before the video was activated (which was discussed on-camera) and one after the camera was on, both before receiving *Miranda* warnings, and then he was later re-questioned extensively.

¶ 193 Counsel's statements to the court were critically inaccurate and flatly contradicted by the ERI video. The broad outlines of the "question first, warn later" tactic prohibited by *Seibert* were right there on the ERI video, plain as day. But any judge hearing and accepting counsel's misrepresentations would believe that no sane lawyer would give a second thought to a *Seibert* or *Miranda* motion to suppress—counsel's strategy in not pursuing them was not just sound but the only plausible trial strategy. In fact, however, counsel's asserted strategy was based on a version of the ERI video that did not exist, that the video flatly contradicts.

¶ 194 That should be all we need to know to recognize that something went awry at that preliminary *Krankel* hearing. Counsel could not remember the ERI video accurately and passed on her inaccurate memory to the trial court. Her asserted trial strategy—that the video contradicted defendant's claim of a *Seibert* violation—was simply wrong.

¶ 195 Had the ERI video been turned on at the preliminary *Krankel* hearing, both counsel and the trial court, within the first 30 seconds of the video, would have immediately recognized that counsel's memory of the video was significantly inaccurate. The off-camera admission defendant claimed he made, that counsel said he did not, was specifically referenced immediately by the detective when the camera was activated. And that on-camera discussion, itself, was a custodial interrogation without *Miranda* warnings that yielded a second admission. That would make two incriminating admissions—one (on-camera) a clear *Miranda* violation, the other (off-camera) a debatable one—before *Miranda* warnings were read, followed later by additional custodial interrogation that yielded more admissions.

¶ 196 Surely, had the video been played at that time, the trial court would have hit the brakes, recognizing that trial counsel's memory of the video was faulty, and that the broad outlines of a *Seibert* violation were obviously present. The court could have continued the matter to allow counsel to regroup with her former co-counsel, review notes—whatever was necessary for her to more accurately recall the years-old case. Or the court could have simply advanced the matter to a full *Krankel* hearing and given all sides time to refresh, prepare, and get to the bottom of what happened with sworn testimony subject to cross-examination.

¶ 197 What should not happen is for this court to uphold the trial court's finding as if no error occurred at all. But that is what the majority does. It does not embrace counsel's misrepresentations but comes up with a trial strategy of its own, one counsel never articulated, though given the chance. The majority then proceeds to make conclusive factual findings of its own, for the first time in the appellate court, about the state of mind of the police detectives to assure us that, if a violation of *Seibert* did occur, it was just a "good-faith mistake," not deliberate, and thus not actionable.

¶ 198 By substituting its own notion of trial strategy for that articulated by trial counsel, and in making conclusive factual findings of its own without the benefit of an evidentiary foundation below, the majority opinion undercuts the spirit and purpose of a preliminary *Krankel* hearing.

¶ 199 I

¶ 200 The genius of *Krankel* and its progeny was that it helped solve an intractable problem in Illinois (and in all state and federal courts alike)—the difficulty of asserting ineffective-assistance claims on direct appeal. They are notoriously difficult to assert for obvious reasons.

¶ 201 A defendant's claim that his trial lawyer made significant mistakes—especially the failure to do something, like move to suppress or call an alibi witness—usually requires an explanation of the *reasons* why trial counsel did or did not take certain actions. And the record at trial, concerned as it is with guilt or innocence and not the thoughts and strategies of trial counsel, rarely will supply that answer. See *Massaro v. United States*, 538 U.S. 500, 504-05 (2003) ("When an ineffective-assistance claim is brought on direct appeal, appellate counsel and the court must proceed on a trial record not developed precisely for the object of litigating or preserving the claim and thus often incomplete or inadequate for this purpose."); *People v. Moore*, 207 Ill. 2d 68, 81 (2003); *Guinan v. United States*, 6 F.3d 468, 474 (7th Cir. 1993) (Easterbrook, J. concurring) ("For ineffective assistance, the court of appeals on direct appeal is the wrong tribunal at the wrong time.").

¶ 202 These claims are so hard, so often, to assert on direct appeal that the United States Supreme Court has held that federal defendants will not be procedurally barred if they assert them for the first time in a collateral post-trial motion. *Massaro*, 538 U.S. at 504 (holding otherwise would "create[e] the risk that defendants would feel compelled to raise the issue before there has been an opportunity fully to develop the factual predicate for the claim," and "the issue would be raised

for the first time in a forum [the appellate court] not best suited to assess those facts"). Our supreme court permits ineffectiveness claims for the first time on collateral review if the claim relies on information outside the trial record. *People v. Veach*, 2017 IL 120649, ¶ 47.

¶ 203 Sometimes, when we get *Strickland* claims on direct appeal without a hearing below, we punt them, given that the record lacks the information we need, and the issue is better raised in a postconviction proceeding. See, *e.g.*, *People v. Zambrano*, 2016 IL App (3d) 140178, ¶ 30 ("whether defense counsel was ineffective for failing to raise [witness's] use immunity is an issue better determined on postconviction review").

¶ 204 Other times, though lacking a hearing below, we decide that the record is sufficiently complete and adequate to resolve the claim. In doing so, however, we often make judgments on counsel's reasons for taking or not taking a particular action during trial without hearing from trial counsel personally, based on what trial counsel "could reasonably have" done or "could have calculated" (*People v. Massey*, 2019 IL App (1st) 162407, ¶¶ 29-30) or "may have believed." *People v. Fields*, 2017 IL App (1st) 110311-B, ¶ 28.

¶ 205 But neither of those scenarios is ideal. If we defer ruling on direct appeal, the defendant must undertake the often-lengthy process of postconviction review. And if we proceed to rule on the question on direct appeal, though lacking a hearing below, we often find ourselves making informed guesses about why trial counsel may or may not have decided to take a certain action. I doubt that any appellate judge would prefer an estimate or guess over actually hearing the reasons from the mouth of trial counsel, in testimony before a judge.

¶ 206 In the best-case scenario, a defendant who can afford private counsel will hire a new lawyer to litigate a post-trial motion based on ineffective assistance. In that case, the court conducts a full hearing, including testimony from trial counsel, explaining the bases for their decisions. See, *e.g.*,

People v. Bell, 2021 IL App (1st) 190366, ¶¶ 35-45, 62-86; *People v. Gavin*, 2021 IL App (1st) 182085, ¶¶ 19-22. That is the gold standard; all claims of ineffective assistance are hashed out at the earliest possible juncture, before the trial judge who presided, with sworn testimony by trial counsel subject to cross-examination, and while everyone's memory is fresh. And we review the matter with a thorough, complete record on direct appeal.

¶ 207 Unfortunately, that is the rare case. Most defendants can't afford private counsel. For those defendants, the best approach is to create something akin to a postconviction hearing or a post-trial motion with new counsel, immediately after trial, while memories are fresh in the minds of all participants—prosecutors, lawyers, the defendant, and the judge—that allows for a full trial record on an ineffectiveness claim before direct appellate review.

¶ 208 And that, of course, is where *Krankel* comes in. *Krankel* and its progeny created a rule: if a defendant indicates in any way to the trial judge that he was dissatisfied with his trial counsel's performance, the trial judge stops everything and conducts a preliminary hearing, while memories are still fresh, and while the chance to make a trial record still exists.

¶ 209 That preliminary hearing is not a full-fledged one, and not an adversarial one in the sense that the State hardly participates, if at all. The judge hears from the *pro se* defendant and then asks his trial counsel for a response. The preliminary hearing is a screen, an opportunity for the trial judge, the one "most familiar with the proceedings at issue," to serve as the "arbiter between patently frivolous claims and those showing possible neglect." *People v. Roddis*, 2020 IL 124352, ¶ 56. The court will decline to appoint new counsel for the defendant "[i]f the court determines that the claim of ineffectiveness is spurious or pertains only to trial strategy." *Moore*, 207 Ill. 2d at 81.

¶ 210 If the claims are not meritless, patently frivolous, or spurious—if they have some merit—and they do not pertain to trial strategy, the claim proceeds to a full hearing. Defendant is appointed new counsel, who "can independently evaluate the defendant's claim." *Id.* at 78. The State weighs in fully, as well. Typically, that means the defendant's trial counsel will testify, explaining the reasons for his or her actions or inactions. And then the case comes up on appeal with a fully developed record, ready for meaningful appellate review.

¶ 211 *Krankel* was a watershed holding that provided the opportunity for prompt resolution of *Strickland* claims, promising the most accurate information (given the freshness of memories and the participation of all parties involved in the trial itself) and transforming what would otherwise be piecemeal litigation in postconviction proceedings into a direct appeal of the claim with a fully developed record. *People v. Jolly*, 2014 IL 117142, ¶ 38. It promotes fairness and efficiency. And it potentially "limits" or "narrows" the issues on appeal, avoiding conjecture and educated guesswork and replacing it with factual findings and stated reasons for trial strategy. *People v. Patrick*, 2011 IL 111666, ¶ 41; *People v. Jocko*, 239 Ill. 2d 87, 91 (2010).

¶ 212 But if *Krankel* is going to mean anything, we must ensure that trial courts, in their initial, preliminary screen, perform that screen properly, demanding an adequate record of trial counsel's reasons for certain actions and denying only those claims that have no merit, that are patently frivolous, that are spurious.

¶ 213 And just as importantly, on review of a preliminary *Krankel* ruling, the appellate court should no longer assume things or speculate about the record. Why *assume* things when we had the chance to nip things in the bud and develop a record below? Why guess what trial counsel "may" or "could" have been thinking in making this decision or that one, when trial counsel *tells*

us at the trial level why she did or did not take a certain action? We should review trial counsel's *stated* reasons and judge them accordingly.

¶ 214 The trial court here conducted a preliminary *Krankel* hearing covering a number of issues, including whether trial counsel should have moved to suppress defendant's custodial statements under *Siebert*. The preliminary *Krankel* inquiry thus afforded counsel an opportunity to explain on the record why she decided against pursuing a *Seibert* motion.

¶ 215 And what did counsel say? As noted, she explained to the court that the ERI video didn't support any basis for a *Seibert* or even a *Miranda* claim. There was no *Miranda* violation, she explained, because defendant was read his rights on the ERI video. (And there is no *Seibert* violation without a *Miranda* violation first; it's the "question-first" part of a *Seibert* claim.) Counsel also told the court that defendant *didn't even make a pre-warning statement*. The first 30 seconds of the ERI video proves that representation demonstrably false—he made two pre-warning statements, one off-camera and one with the camera on.

¶ 216 But if the trial court accepted counsel's faulty memory of that ERI video, as the court appeared to do, then *of course* it would have deemed the ineffectiveness claim based on *Seibert* to be frivolous. How can you have a *Miranda*, much less a *Seibert* violation, if no pre-warning statements were made?

¶ 217 So that's *two* unwarned incriminating admissions, one absolutely violating *Miranda* (the one on-camera) and the other (off-camera) a debatable *Miranda* violation. Then defendant is *Mirandized*, then he is later re-questioned. Patently frivolous, this claim that trial counsel should have pursued a *Seibert* motion to suppress? Hardly. Trial strategy? The only one counsel articulated is that a *Seibert* claim was contradicted by the ERI video, which is demonstrably not true.

¶ 218 The majority makes no attempt to defend counsel's stated trial strategy. The majority comes up with one of its own. It says it would have been reasonable trial strategy for counsel to determine that self-defense was the only viable trial theory, and thus defendant's statements did not hurt the defense. The fact that trial counsel had the chance to say that, and did not, does not seem to enter into the equation. But it should. A reviewing court should not supplant the actual record made by counsel at a preliminary *Krankel* inquiry with its own assessment of the trial strategies that counsel *could have* reasonably pursued. In effect, it treats the preliminary *Krankel* hearing as if it never happened, transforming this appeal into a typical direct-appeal consideration of *Strickland* claims that lack a hearing below, requiring us to make judgments on what we think counsel "may have" been thinking or "reasonably could have" decided. *Krankel* was designed to avoid that very thing.

¶ 219 II

¶ 220 Unfortunately, the majority does not stop there in reaching conclusions about the record without an evidentiary hearing. The majority not only embraces a trial strategy that counsel herself did not assert; to distinguish the police practices here from those in *Seibert*, the majority conclusively decides a number of purely factual issues (in favor of the State each time) from the ERI video alone, with no evidentiary findings below.

¶ 221 The majority determines that the police detectives did not deliberately violate *Miranda*, that "there was no concerted effort by the detectives to elicit a prewarning confession" (*supra* ¶ 101), and that the detectives, in eliciting an incriminating admission (at least once, if not twice) and *then* giving defendant *Miranda* warnings, merely committed a "good-faith *Miranda* mistake." *Supra* ¶ 84. The majority hypothesizes about what a suppression hearing would have looked like and decides that it would not have gone well for defendant, because of many outlandish things he

has said as a result of his mental illness, opening his credibility up to several avenues of impeachment.

¶ 222 It is premature and inappropriate to be reaching those factual determinations for the first time on appellate review. In essence, the majority holds the hypothetical suppression hearing itself, based on the ERI video alone, makes factual findings about the detectives' state of mind, and denies the motion.

¶ 223 As noted, *Seibert* is an off-shoot of *Miranda*, a rule of law aimed at stopping the police from a tactic they employ to circumvent *Miranda* protections. Again, the "question-first, warn-later" tactic prohibited by *Seibert* works like this: The police elicit an incriminating statement during a custodial interrogation, but before the suspect has received *Miranda* warnings. With that statement in hand, and the suspect hard-pressed to deny or disavow it, the police *Mirandize* the suspect, lead him over the same ground, and elicit the incriminating statement again.

¶ 224 Now consider the sequence of events in this case, from the ERI video and defendant's post-trial claims:

> (1) Off-camera, upon first arriving at the police station with a gunshot wound, defendant is placed in a room and tells the detectives that he killed the three victims but did so in self-defense. Defendant claims that his admission was prompted by the detective's statement that the police had "been looking for you [defendant] for a couple of weeks. Because the people in the neighborhood said you killed your family."
>
> (2) The camera for the ERI video is turned on.
>
> (3) After re-entering the room and re-introducing himself, one of the detectives immediately asks defendant to confirm what he had just told them: "First of all,

earlier you said that [Allen Jr.] shot you and whatever happened happened in self-defense." Defendant responds, "Yes."

(4) The detective then says, "Okay. Uh—But just so you know we have to give you your rights, you understand that, okay?" Defendant says, "No problem, sir." And the other detective reads defendant his *Miranda* warnings.

(5) The detectives take defendant to the hospital to treat his gunshot wound.

(6) Upon return from the hospital, detectives interrogate defendant, and he incriminates himself again, stating that he killed the victims but acted in self-defense.

¶ 225 Presumably we can all agree that #4 was supposed to come before #3, and maybe before # 1, too. The on-camera question in #3 above was obviously a custodial interrogation. Defendant was in custody and was asked to re-confirm his off-camera admission—obviously a statement that was reasonably likely to elicit an incriminating response (and it did). That question was off-limits without *Miranda* warnings. But the warnings came after, not before, that question-and-answer.

¶ 226 As for #1, the off-camera admission by defendant, we couldn't possibly know at this juncture whether a *Miranda* violation occurred, because there was no full *Krankel* hearing, so we never heard the police's version. Defendant says his off-camera admission was prompted by the detective telling him that they'd been looking for him for a long time, because people in the neighborhood were saying that he was the one who killed his family. The only thing we know from the police's side is a police report calling that admission "spontaneous." The trial court summarized it correctly: "[I]t is equally possible that defendant blurted out that information prior to being questioned." Sure, that's possible. But a 50/50 chance, or anything close to that, means his claim is *not* "patently frivolous" or "meritless" or "spurious." That doesn't warrant a denial at a preliminary *Krankel* hearing; it warrants advancement of the cause to a full *Krankel* hearing.

¶ 227 And we know this much, or at least we should: the detective's off-camera statement, if indeed made, was an interrogation—a statement that is reasonably likely to elicit an incriminating response. The detective was (allegedly) telling him that people had identified him as the perpetrator of the crimes. Confronting defendant with other witnesses' allegations of his guilt is *at least* reasonably likely, if not highly likely, to elicit an incriminating response. See *People v. Olivera*, 164 Ill. 2d 382, 387, 392 (1995) (detective telling suspect he was " 'positively identified' " in line-up as shooter was statement that "would be reasonably likely to elicit an incriminating response," and thus interrogation); *People v. Lopez*, 229 Ill. 2d 322, 364 (2008) (interrogation found where officers confront suspect with another's statement implicating him in crime and ask him if he was involved).

¶ 228 That makes one clear and obvious *Miranda* violation caught on video (#3) and one debatable one off-camera (#1) before defendant was read his *Miranda* warnings. He was improperly locked into his statement at least once, if not twice, *then* given *Miranda* warnings, then re-questioned. Yet the majority says that any claim that a *Seibert* violation occurred has no merit whatsoever. It is patently frivolous, spurious.

¶ 229 Why? Principally because the majority decides the detectives' state of mind, based on nothing remotely contained in the record, other than the ERI video. It's not clear how we can determine the detective's mental state from the video, but the majority says it can. The detective did not deliberately violate *Miranda*, it says. It was a "good-faith *Miranda* mistake." The detective "seemed to realize his mistake" in not *Mirandizing* defendant before asking him to re-confirm his off-camera admission. There was no "concerted effort," says the majority, "to obtain a prewarning confession from defendant." *Supra* ¶ 101.

¶ 230 All of that is appellate factfinding, conclusively deciding facts based *not* on a hearing below but on nothing more than an ERI video subject to competing inferences, and landing on the side of the State at every turn. There is no way any of this can be said with certainty.

¶ 231 How can we say the detective didn't deliberately violate *Miranda* when he talked to defendant off-camera and elicited his off-camera admission? We can't. We don't even know what was said for certain—there are only allegations at this point. So how could we possibly know if what was said, was said intentionally?

¶ 232 The majority writes that the detective's alleged statement to defendant—that people from the neighborhood said he killed his family—"did not seem to be part of a concerted effort to obtain a prewarning confession from defendant." But what about the fact that the very next thing the detective does, after defendant's off-camera admission, is turn on the camera and conduct a brief custodial interrogation, eliciting an on-camera confirmation of his off-camera incriminating statement? That didn't look like a slip of the tongue to me. It looked like the detective walked in with a purpose. And if he merely forgot about *Miranda*, he didn't for long; not five seconds later, he was telling his partner to *Mirandize* defendant.

¶ 233 Am I sure that the detective's actions were deliberate? No, of course not, not at this stage. But how can the majority say that there is no proof of a "concerted effort to obtain a prewarning confession from defendant" when the very first thing we see on the ERI video is the detective obtaining a prewarning confession from defendant?

¶ 234 The proof that the first, off-camera unwarned statement was not a deliberate violation of *Miranda*, writes the majority, is that "after defendant explained his account of the murders in response to the detective's comment, the detective did not follow up and attempt to elicit even more statements." *Supra* ¶ 105. But again, that's *exactly* what he did. After the off-camera,

unwarned admission, the very next substantive statement the detective made to defendant (this time with the camera on) was asking him to re-confirm his admission of guilt he'd made off-camera. If anything, the stronger inference here is a deliberate violation of *Miranda*—not a conclusive appellate determination of non-intent. But again, I would make no conclusive finding of fact at this juncture.

¶ 235 And that is to say nothing of the fact that defendant was *suffering from a gunshot wound* during all of this. Why would the detective turn on the camera; ask defendant to re-confirm, on-camera, his off-camera admission; *then* read him his *Miranda* warnings; and *then* ask him if he'd rather talk more or go to the hospital? Is there no plausible, non-frivolous inference to be drawn here that the only reason for the quick Q-and-A on camera, before defendant's health took precedence, was because the detective wanted to lock him down on his admission before he had the chance to go to the hospital and have a change of scenery (and possibly a change of heart)? No possibility whatsoever that this might imply that the detective's actions were deliberate?

¶ 236 Of course, that possibility exists. There is a non-frivolous argument that detectives withheld *Miranda* warnings and forestalled defendant's requests for medical treatment just long enough to goad him into making an incriminating statement and then *acknowledging* that statement in a video recording. And that tactic would, no doubt, make it all but impossible for defendant to deny his unwarned admissions when the detectives later questioned him in more detail, post-warnings. As the record stands, it is not frivolous to argue that the detectives deliberately used defendant's unwarned statements to obtain his post-warning statement—a violation of *Seibert*.

¶ 237 All the majority's conclusions about the detective's state of mind are inappropriate, embracing all possible inferences in favor of the State and ignoring any favoring defendant—and all based on an independent assessment by appellate judges without an evidentiary foundation

created by the trial court. We have strayed far, far away from a review of a preliminary *Krankel* inquiry, designed merely to weed out patently frivolous claims.

¶ 238 I also disagree with the majority's conclusive—again, *conclusive* appellate findings that sufficient "curative measures" took place to remove the taint of the *Seibert* violation. I would note that one of the curative measures Justice Kennedy particularly singled out was an additional warning given to the suspect, explaining the likely *inadmissibility* of the previous unwarned statement(s) before questioning resumes, so the suspect understands that he isn't locked into his previous admissions. *Seibert*, 542 U.S. at 622 (Kennedy, J., concurring in the judgment).

¶ 239 Nothing like that occurred here. Nobody told defendant that his admission, captured on camera in blatant violation of *Miranda*, could not be used against him or that his off-camera one couldn't, either. Beyond that, I would only add that we have no detailed insight into what happened at the hospital, or what was said in transport—no sworn testimony to help a factfinder know the fine-grained details of what was and was not said to defendant during that window of time. It is far too premature to conclusively pronounce the "curative measures" adequate—so much so that a *Seibert* motion would have been patently frivolous.

¶ 240 The same goes for the hypothetical suppression hearing the majority imagines. Maybe the majority is right and defendant, who has suffered from mental illness since childhood and said some outlandish things, would open himself to devastating, wide-ranging attacks on his credibility. Maybe a judge, hearing a narrow fifth amendment question, would allow that. But much of the *Seibert* violation was caught on the ERI video itself. And everyone agrees he made an off-camera incriminating statement, as defendant himself claims.

¶ 241 As for his claim that the detectives said they would give him medical treatment if he cooperated with them, is that so hard to believe that we can disregard it as frivolous? Not in my

opinion. After all, the ERI video shows that the detectives' concern for defendant's gunshot wound came only after they got him to re-confirm his admission on camera. And the statement defendant claims the detective made to him off-camera—that people in the neighborhood were saying that defendant killed his family—is by no means such a fantastical claim that we could disregard it as frivolous. Sure, maybe the detectives told the truth when they wrote in their report that defendant's admission was "spontaneous." But maybe not. Who are we to say, absent a hearing below? And before we sanctify that police report to biblical proportions, we should note that, while the report indicates defendant was read his *Miranda* warnings, it failed to mention that *before* they were read, the detectives interrogated him on-camera and obtained an incriminating admission. We are far from conclusive findings on any of this. And far afield of a proper review of a preliminary *Krankel* hearing.

¶ 242 The majority distinguishes *Seibert* and our supreme court's *Lopez* decision, in both of which detectives interrogated suspects at a police station (as here) and conducted the "question-first, warn later" tactic (as here), and claims that this case is much more like the patrol officer talking to a suspect in his house in *Elstad*. The majority says the "series of events" in this case "does not resemble the clearly improper police tactics employed in *Seibert* and *Lopez*." *Supra* ¶ 98.

¶ 243 I would simply note that all three of those cases bear at least one significant distinction with our case—all of those cases involved suppression hearings, at which all of the necessary facts were hashed out and factual findings made by the trial court for appellate review. Here, not only was there no suppression hearing; there was not even a full *Krankel* hearing—we are just at the preliminary stage, the initial screen, at which the trial court's job is merely to serve as the "arbiter between patently frivolous claims and those showing possible neglect." *Roddis,* 2020 IL 124352, ¶ 56. The fact that we are even talking in detail about the differences between the facts in those

cases (found by trial courts) and the facts of this case (found by a majority of the appellate court with no evidentiary hearing below) should signal that we have gone way off the tracks.

¶ 244 III

¶ 245 The special concurrence elaborates at length on what occurred at the preliminary *Krankel* hearing, including all the other issues the trial court considered, and concludes that the trial court "did much more than is required" for an adequate *Krankel* hearing. *Supra* ¶ 150. No question, the trial court was dealing with a mentally ill, *pro se* defendant who sometimes rambled and who raised many bombastic claims along with the viable *Seibert* claim. The trial judge treated defendant with patience and respect. And the court made sure that defendant had raised every issue he wanted to raise (as the court was supposed to do; that is, after all, the very point of a preliminary *Krankel* hearing—to get as many ineffectiveness claims dealt with immediately as possible).

¶ 246 But none of that changes the fact that the trial court erred in its handling of the *Seibert* claim. This appeal is not an overall referendum on the trial court's conduct. It is not a score card of how many things it did right versus how many it did wrong. Defendant has raised the handling of the *Seibert* claim as a point of error on appeal, and it is our job to determine if he is correct—notwithstanding how well the rest of the hearing was conducted. If opining that the trial court erred in its handling of the *Seibert* claim is, as the special concurrence claims, "chastising" the trial judge and "unfair to this judge and to all the other trial judges" who handle *Krankel* hearings, then we must disagree on the purpose of appellate review.

¶ 247 The special concurrence says the analysis of an ineffectiveness claim, at this preliminary stage, is governed by *People v. Henderson*, 2013 IL 114040. Under that standard, a defendant must show that the motion to suppress would have actually succeeded. *Id.* ¶¶ 12, 15. The special

concurrence repeats this standard no less than six times—that defendant must but cannot show at this preliminary *Krankel* stage that his motion to suppress "would have actually succeeded."

¶ 248 But that cannot be the standard at a preliminary *Krankel* hearing—a full *Krankel* hearing, yes, but not a *preliminary* one. The preliminary *Krankel* hearing features a *pro se* defendant, unschooled in the law, doing his best to articulate what his trial counsel did wrong. The law recognizes that we can expect only so much from a *pro se* litigant by requiring *not* that the defendant prove his case outright at the preliminary hearing, but rather that he show *some* merit to his claim, that his claim is not frivolous. *Roddis*, 2020 IL 124352, ¶ 56. If there is some merit, the *pro se* defendant is given a new lawyer to prosecute this non-frivolous claim.

¶ 249 Requiring a *pro se* defendant to absolutely prove his claim at the preliminary stage would be terribly unfair and illogical. Unfair, because how is a *pro se* litigant expected to definitively prove he would have won his suppression hearing without calling witnesses, and without a lawyer to assist in his presentation of case law? He could not possibly accomplish that task.

¶ 250 And illogical for two reasons. First, even if a *pro se* defendant could somehow pull off that herculean feat, what would be the point of the *full* hearing under *Krankel*? There would be nothing left to litigate; the defendant already established that he would have won the suppression hearing outright. And second, where would the State come in? The law is clear that preliminary *Krankel* hearings are intended to be non-adversarial, preferably with no involvement of the State or, if necessary, minimal participation. But if the special concurrence is correct that the preliminary hearing is the forum for the final showdown of whether the suppression motion would or would not actually succeed, one would think the State would be allowed a word or two, as opposed to standing mute as a bystander.

¶ 251 The special concurrence has no answer for any of these concerns. Ironically, the concurrence faults this dissent for not citing any authority. But it is the special concurrence that cites no authority for the remarkable claim that a defendant, without counsel or the right to call witnesses, and with the State unable to respond, is somehow required to create a record showing he would certainly win a suppression motion at the preliminary *Krankel* stage. It is the special concurrence that claims that *Henderson*, which involved the consideration of a *Strickland* argument on direct appeal, should somehow apply in an entirely different context—a preliminary *Krankel* proceeding—without giving the slightest hint as to why that should be. It is the special concurrence that claims, without citing any authority, that a limited, non-adversarial preliminary hearing, designed only to weed out frivolous claims and trigger the appointment of new counsel for any claim with some merit, has suddenly morphed into a forum where the unrepresented defendant must now do far more than show some merit—he must show certain victory.

¶ 252 The special concurrence is correct that, as *Roddis* holds, the trial court can consider the legal merits of a *pro se* defendant's claim at a preliminary *Krankel* hearing, but that is hardly the point. The point is the *burden* the unrepresented defendant faces at that non-adversarial preliminary hearing. That burden has traditionally been showing some merit to a claim, that a claim is non-frivolous. For the reasons given above, there is no reason to carve out an exception, as the special concurrence would, when the ineffectiveness argument concerns the failure to file a suppression motion.

¶ 253 Indeed, if the special concurrence is right, why would a defendant have any incentive to even raise counsel's ineffectiveness for failure to file a suppression motion right after the trial? The point of *Krankel* is to get the *Strickland* issues on the table at the earliest juncture, while memories are fresh, and to avoid piecemeal litigation down the road. But if, as the concurrence

claims, the preliminary *Krankel* hearing requires the *pro se* defendant to show certain victory in his suppression claim, a defendant would be far better off skipping *Krankel* and just raising this ineffectiveness argument in a postconviction proceeding, when his burden at the preliminary stage, before he has a lawyer, is merely to show an *arguable* claim of deficient performance and an *arguable* claim of prejudice. *People v. Tate*, 2012 IL 112214, ¶ 22. That sounds a lot easier than what the special concurrence would impose on unrepresented defendants at preliminary *Krankel* hearings. The special concurrence's view of preliminary *Krankel* hearings would defeat their very purpose and *encourage* piecemeal litigation.

¶ 254 *Henderson* cannot be the standard at the preliminary stage. Imposing that high a burden at that early a stage would eviscerate the point of *Krankel*.

¶ 255 IV

¶ 256 The record shows that defendant here has suffered from significant mental-health issues since childhood and, by all accounts, continues to do so today. He said a lot of outlandish things about his lawyers and his case. He said he was a billionaire rapper. He said the police doctored the ERI video and tortured him. He said many things that the ERI video directly contradicted and some that were implausible on their face.

¶ 257 But his *Seibert* claim should not get lost in that wilderness of frivolous claims. We know that defendant made an unwarned, off-camera admission; we just don't know what the detective did, if anything, to elicit it. And that ERI video does not lie. It shows one *Miranda* violation caught on camera, followed by *Miranda* warnings and re-questioning. If the facts here do not show the broad outline of a *Seibert* violation, then I don't know what does. To call his claim patently frivolous is not even close to fair or correct. To engage in appellate factfinding to determine the state of mind of the detectives is inappropriate. To conclusively determine that sufficient "curative

measures" existed, absent a hearing below, is likewise improper. The trial court is the forum for factfinding.

¶ 258 Had counsel articulated a trial strategy such as the one the majority does for her, presumably we would have adopted it as sound, and the inquiry would end. But counsel's stated reason was that the ERI video did not support a *Seibert* motion, and that reason is anything but sound—it is undeniably incorrect. Probably the product of trial counsel struggling to remember something so long ago, but no less incorrect. No less unacceptable.

¶ 259 Nor is it acceptable for the majority to put a new trial strategy into counsel's mouth. What was the point of the preliminary *Krankel* hearing, if we hear from the trial lawyer but then erase every reason she gave and substitute one of our own? Again, this was just the preliminary hearing, the screen to weed out patently frivolous claims. With the clear outlines of a *Seibert* violation apparent from the ERI video and no sound trial strategy articulated by trial counsel, we should not allow this claim to be deemed frivolous.

¶ 260 We should have no confidence whatsoever that the purpose of the preliminary *Krankel* hearing was served here. And this is not how a preliminary *Krankel* hearing should be reviewed.

No. 1-17-2105

Cite as:	*People v. McCall*, 2021 IL App (1st) 172105
Decision Under Review:	Appeal from the Circuit Court of Cook County, No. 08-CR-9594; the Hon. Erica L. Reddick, Judge, presiding.
Attorneys for Appellant:	James E. Chadd, Douglas R. Hoff, and Jonathan Krieger, of State Appellate Defender's Office, of Chicago, for appellant.
Attorneys for Appellee:	Kimberly M. Foxx, State's Attorney, of Chicago (Alan J. Spellberg, Assistant State's Attorney, of counsel), for the People.