No. 124143

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. QUENTIN BATES, Defendant-Appellant.	Appeal from the Appellate Court of Illinois, Fourth District, No. 4-16-0255; There on Appeal from the Circuit Court of the Seventh Judicial Circuit, Sangamon County, Illinois, No. 11 CF 953; The Honorable John Schmidt, Judge Presiding.

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

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E-FILED
7/17/2019 2:14 PM
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ORAL ARGUMENT REQUESTED

POINTS AND AUTHORITIES

NATURE OF THE CASE

Defendant was convicted of home invasion and two counts of aggravated criminal sexual assault and sentenced to an aggregate prison term of seventy years. The appellate court affirmed the circuit court's judgment. This appeal concerns whether the trial court erred at defendant's posttrial hearing by failing to sua sponte investigate whether defense counsel provided ineffective assistance. No question is raised on the charging instrument.

ISSUE PRESENTED FOR REVIEW

Whether the trial court had no duty to inquire about trial counsel's performance because defendant retained private counsel, expressed no desire for appointment of a new attorney, and never claimed ineffective assistance of trial counsel.

JURISDICTION

Appellate jurisdiction lies under Supreme Court Rules 315 and 612(b). On January 31, 2019, this Court granted defendant's petition for leave to appeal. *People v. Bates*, 116 N.E.3d 958 (Ill. 2019) (Table).

STANDARD OF REVIEW

The scope of a trial court's duty to investigate trial counsel's performance is a legal question that this Court reviews de novo. *See People v. Jolly*, 2014 IL 117142, ¶ 28.

STATEMENT OF FACTS

A. Pretrial Proceedings

Defendant was charged in the Circuit Court of Sangamon County with sexually assaulting two women in a three-week period. The charges alleged that he invaded the home of A.P. on September 19, 2011, and forced her to submit to oral and vaginal penetration at knifepoint. C17-19 (filed in case no. 11 CF 953).[1] The charges further alleged that defendant invaded C.H.'s apartment and sexually assaulted her on October 6, 2011. C63 (filed in case no. 11 CF 888).

The cases were consolidated for pretrial proceedings. *See* Vol. V at R4. At defendant's arraignment in November 2011, the trial court appointed Assistant Public Defender Ryan Cadagin, *see* Vol. IV at R3-4, R19, who appeared in both the A.P. and C.H. cases, C7. At a preliminary hearing, Detective Michael Flynn testified that defendant had been linked to both sexual assaults through DNA evidence. Vol. V at R6-11.

The prosecutor elected to try defendant first for the crime against A.P. *Id.* at R29. The People moved in limine to introduce evidence at that trial concerning defendant's sexual assault of C.H. C62-64 (citing 725 ILCS 5/115-

[1] "C_" denotes the common law record; "Vol. [number] at R_" denotes the reports of proceedings, referring to both volume number and page number; "Def. Br." denotes defendant's appellant's brief; "A_" denotes defendant's appendix; and "SA_" denotes the People's supplemental appendix to this brief.

7.3). The trial court granted the People's motion, finding that the incidents were both proximate in time and factually similar. Vol. V at R37.

In December 2014, defendant moved to substitute a private attorney, Ronald Kesinger, as counsel in the A.P. prosecution. C97-98. Kesinger emphasized that he was appearing solely for purposes of the A.P. case, while Cadagin would continue to represent defendant in the C.H. prosecution. Vol. IX at R3-4, R8-9.

Kesinger moved to reconsider the trial court's earlier ruling permitting the People to introduce evidence concerning defendant's assault of C.H. *See* C185-86, Vol. VII at R106-08. The court denied the motion. Vol. VII at R108-09.

B. Jury Trial

Defendant's jury trial began in January 2016. A.P. testified that on September 19, 2011, she lived in a ground-floor apartment in Springfield with her infant son. Vol. XII at R54. She was sleeping with the baby in the living room when she heard a noise in the kitchen. *Id.* at R55-56. As she started to get up, a man put his hands around her neck and pushed her onto the couch. *Id.* at R56-57. He held a knife against her side and threatened to stab her if she continued to struggle. *Id.* at R57-58.

The man turned A.P. over onto her stomach and put his penis in her vagina. *Id.* at R58. When A.P.'s son started to stir, the man led A.P. to a bedroom, where A.P. saw that the window screen had been removed and

placed on the bed. *Id.* at R59. The man threw A.P. to the floor, shoved his penis in her mouth, and ordered her not to bite him. *Id.* The man then turned A.P. onto her stomach, inserted his penis in her vagina, but withdrew and ejaculated on her back. *Id.* at R60. The man told A.P. to count to one hundred, and she heard him leave the apartment through the front door. *Id.* at R60-61. A.P. did not see the man's face and was unable to identify him, but described him as a black male. *Id.* at R61-62, R64.

A.P. went to the hospital, where a rape kit was prepared. *Id.* at R63. Per protocol, a nurse took swabs of A.P.'s mouth, vaginal area, and outer anal area. *Id.* at R71. The nurse testified that the anal swab captures biological evidence that pools when a victim sits. *Id.* at R73-74.

C.H. testified on October 6, 2011, she was sleeping with her week-old infant and her five-year-old son in their Springfield apartment. *Id.* at R102-04. C.H. awoke to find a man holding a knife against her throat. *Id.* at R105. He had cut the screen and entered through the window of her eleven-year-old daughter's bedroom. *Id.* at R103-05. The man ordered C.H. into a bedroom, where he licked C.H.'s breasts and vagina. *Id.* at R106-07. After taking $50 from C.H.'s purse, he told her to stay in the bathroom and count. *Id.* at R108-09. When C.H. heard him leave through the front door, she ran to her sister's house down the street. *Id.* at R109-10.

Detective Flynn testified that he took C.H. to a hospital, where a rape kit was prepared. *Id.* at R88. Flynn requested an expedited analysis of

C.H.'s kit due to multiple recent assaults in the area. *Id.* at R92-93. Forensic analyst Dana Pitchford contacted Flynn the following week to tell him that the evidence from C.H.'s rape kit had been linked to defendant. *Id.* at R93-94. Defendant was arrested the next day. *Id.* at R95. Flynn placed defendant in a lineup, and although C.H. tentatively identified defendant, she told Flynn that she was not sure about the identification. *Id.* at R96-98.

Forensic scientist Cory Formea testified that he tested evidence from A.P.'s rape kit, and that his DNA analysis focused on sixteen locations, or "loci," on the DNA strand. Vol. XIII at R28, R30. He detected sperm cells in the anal swab from A.P.'s kit. *Id.* at R37-39. Analysis of the DNA extracted from the sample revealed two profiles: A.P.'s own profile, and another profile consistent with defendant's DNA profile at the fifteen loci detected. *Id.* at R43-44. The sixteenth locus could not be detected. *Id.* at R44. Defendant could not be excluded as a possible contributor, and one "would expect [that] approximately one in 2.3 quadrillion whites, one in 840 trillion blacks, and one in 3.0 quadrillion southwest Hispanics could not be excluded from that profile." *Id.* at R47.

Pitchford testified that she tested evidence from C.H.'s rape kit, *id.* at R69-70, and found a male DNA profile in a swab of C.H's chest, where C.H. claimed that her assailant had licked her, *id.* at R76. The DNA profile matched defendant's at all sixteen loci; the same "profile would be expected to occur in approximately one in 2.8 quintillion black," "[o]ne in 53 quintillion

white," or "one in 270 quintillion Southwest Hispanic unrelated individuals." *Id.* at R80.

In closing argument, defense counsel urged jurors to disregard the testimony about the attack on C.H. because it was not fair to consider it:

> [W]e've got a case within a case, the second case with [C.H.]. The State's attorney put on witnesses including that victim to, of course, imply that there was some connection between that one and the [A.P.] one. As I told you in my opening statement, I'm not his attorney in that case. There's been no review by any DNA experts and I think it is — would be improper to put much weight on that because . . . he's alleged to have committed a crime, it's an information, it's just a way of charging him. So the fact that he's charged with this crime against this lady by the name of [C.H.] should not be held against him.
>
> And then the fact that there's presumption of innocence all throughout, he has not gone to trial. There's a presumption of innocence that follows him in that case. It hasn't even gone to trial. So I really would respectfully hope you will not — you would not place any great degree of trust in what was said about that case. It's — it was a technique to make him look bad and it did, but it's not evidence, he hasn't been convicted. He hasn't even had a trial in that case.

Id. at R167-68.

The jury convicted defendant of all charges. C480-82; Vol. XIII at R191.

C. Posttrial Hearing

Defendant moved for a new trial, claiming, in pertinent part, that the trial court erred in admitting evidence about C.H.'s sexual assault. SA1-2.

At the posttrial hearing, defense counsel remarked that it "bother[ed]" him that he did not represent defendant in the C.H. case and opined that he "couldn't possibly do as good a job defending [defendant]" as he would have, had he represented defendant in that separate matter. SA6. Counsel asserted that he "was taken by surprise at the depth of the evidence and testimony" and stated that he "would have asked for review by our own experts" of the forensic evidence in the C.H. matter. SA6-7. Counsel suggested that, in light of those circumstances, it was unfair for the trial court to have admitted the testimony. *See* SA6. The court denied the motion for new trial. SA11; C517.

Following a hearing, the court sentenced defendant to an aggregate prison term of seventy years. C517.

D. Appeal

On appeal, defendant argued that the trial court erred by failing to investigate counsel's suggestion at the posttrial hearing that he was unprepared to rebut the evidence concerning C.H.'s assault. Defendant contended that counsel's remarks triggered a duty to investigate counsel's performance, as it would if defendant had raised a pro se allegation of ineffective assistance pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984).

The appellate court rejected the claim for two reasons. A37-40. First, it reasoned that a *Krankel* inquiry is triggered only by pro se allegations of ineffective assistance and not claims of ineffective assistance raised by

counsel. A38. Second, the appellate court held that "counsel's dialogue at the [posttrial] hearing . . . did not constitute a clear claim of ineffective assistance of counsel" that would suffice to trigger *Krankel*. A39.

This Court granted defendant's petition for leave to appeal the appellate court's denial of his *Krankel* claim.

ARGUMENT

I. No *Krankel* Inquiry Was Warranted Because Defendant Retained Private Counsel, Did Not Request Appointment of New Counsel, and Never Claimed that Counsel Was Ineffective.

Krankel and its progeny set forth a procedure for evaluating whether an indigent defendant's pro se, posttrial allegations of ineffective assistance of trial counsel merit appointment of new counsel to investigate and present an ineffective assistance claim. *See People v. Moore*, 207 Ill. 2d 68, 77-78 (2003); *Krankel*, 102 Ill. 2d at 187-89.

When a court's duty under *Krankel* is triggered, it must investigate "the factual basis of the defendant's claim." *Moore*, 207 Ill. 2d at 77-78. If the court determines that "the claim lacks merit or pertains only to matters of trial strategy, then the court need not appoint counsel and may deny the *pro se* motion," but "if the allegations show possible neglect of the case, new counsel should be appointed." *Id.* at 78. The new attorney "can independently evaluate the defendant's claim and . . . avoid the conflict of interest that trial counsel would experience if trial counsel had to justify his or her actions contrary to defendant's position." *Id.*

The court's duty to investigate possible ineffective assistance was not triggered here because defendant retained private counsel, did not request that the trial court appoint a new attorney, and raised no claim of ineffective assistance of counsel.

A. Because Defendant Retained Private Counsel and Did Not Request Appointment of a New Attorney, No *Krankel* Inquiry Was Necessary or Appropriate.

Because the *Krankel* inquiry governs whether a trial court should appoint new counsel to litigate a defendant's posttrial motion, it applies to indigent defendants represented by court-appointed counsel. But the procedure does not apply automatically to defendants with private counsel, who presumably can hire new attorneys to argue posttrial motions claiming ineffective assistance. To trigger *Krankel*, such a defendant must alert the court that he seeks new counsel to pursue a claim of ineffective assistance and cannot afford to hire one. Because defendant did not do so, a *Krankel* inquiry would have been improper.[2]

This Court distinguished between defendants with private and appointed counsel in the *Krankel* context in *People v. Pecoraro*, 144 Ill. 2d 1 (1991). Pecoraro had retained private trial counsel and moved for a new trial on the ground that counsel was ineffective. On appeal, he argued that the

[2] Although the appellate court did not rely on Kesinger's status as private counsel to hold that the trial court had no duty to conduct a *Krankel* inquiry, this Court "may affirm on any basis supported by the record." *People v. Durr*, 215 Ill. 2d 283, 296 (2005).

trial court erred by failing to appoint a new attorney to investigate and present his ineffective assistance claim. This Court disagreed, emphasizing that "Pecoraro retained private counsel to represent him," whereas Krankel "was represented by an appointed public defender at both trial and post-trial motions." 144 Ill. 2d at 15. The Court reasoned that "[i]t was not within the trial court's rubric of authority to advise or exercise any influence or control over the selection of counsel by defendant"; instead, "[d]efendant and his counsel were the only parties who could have altered their attorney-client relationship." *Id.*

The Illinois Appellate Court has recognized that the presumptive remedy for a defendant dissatisfied with privately retained counsel is to discharge that counsel and retain a new attorney. *See People v. Shaw*, 351 Ill. App. 3d 1087, 1092 (4th Dist. 2004) ("Here, as in *Pecoraro*, defendant retained private counsel of his own choosing. Defendant could have ended that attorney-client relationship and obtained new counsel to represent him in postplea proceedings if he so chose."); *People v. McGee*, 345 Ill. App. 3d 693, 699 (1st Dist. 2003) ("In this case, the defendant retained private counsel of his own choosing. Defendant was free to retain different counsel to represent him prior to the hearing on his *pro se* motion.").[3]

[3] To be sure, defendants with private counsel may raise claims alleging that retained counsel was ineffective, *Cuyler v. Sullivan*, 446 U.S. 335, 344-45 (1980), and *Pecoraro* did not hold otherwise. *Pecoraro* simply limits the circumstances under which a trial court must investigate whether to provide a new attorney to litigate such a claim.

To invoke *Krankel*, a defendant represented by private counsel must communicate that he seeks appointment of a new attorney to litigate a claim of ineffective assistance and cannot afford to hire one. *See People v. Mourning*, 2016 IL App (4th) 140270, ¶ 20 ("[W]e hold that *Krankel* applies when a defendant represented by private counsel makes a *pro se* posttrial claim of ineffective assistance of counsel and informs the court that he both (1) desires new counsel and (2) cannot afford new private counsel."); *see also Shaw*, 351 Ill. App. 3d at 1092 ("[I]f it were true that defendant could no longer afford to hire another private counsel, he could have told the court that he wished to fire his then-counsel and asked the trial court to again appoint counsel to represent him.").

Here, defendant did not discharge Kesinger or ask the trial court to appoint new counsel. Indeed, defendant did not even claim that Kesinger erred. Defendant easily could have asked that Assistant Public Defender Caragin, who spent years as defendant's counsel in the A.P. matter before defendant retained Kesinger, be re-appointed to litigate the posttrial motion, but he did not do so.

Under such circumstances, a *Krankel* inquiry was not merely unnecessary: it would have been improper. The trial court lacks the authority to direct a defendant to fire his chosen attorney and accept a court-ordered replacement. *See Pecoraro*, 144 Ill. 2d at 15. Nor should a trial court sua sponte raise questions that might undermine retained defense counsel's

considered strategy. *See People v. Medina*, 221 Ill. 2d 394, 409 (2006) (trial court should avoid "improperly intruding on the attorney-client relation and interfering with the defense strategy counsel has pursued" by raising questions about lesser-included offense jury instructions); *People v. Gillespie*, 276 Ill. App. 3d 495, 502 (1st Dist. 1995) ("Ordinarily, a trial court should not be placed in a position of having to 'second-guess' defense counsel strategy. This is especially true when counsel is privately retained.").

Thus, the trial court, correctly, did not invade defendant's relationship with Kesinger to investigate a potential allegation of ineffective assistance that defendant had not even raised to determine whether to appoint new counsel that defendant had not requested. Thus, this Court should affirm the appellate court's judgment finding no error under *Krankel*.

B. The Trial Court Had No Duty to Investigate Counsel's Performance under *Krankel* Because Defendant Did Not Raise a Claim of Ineffective Assistance.

Even setting aside Kesinger's status as private counsel, the trial court had no duty to investigate his performance under *Krankel* because defendant did not claim that he was ineffective.

This Court's precedent requires a defendant to clearly raise a claim of ineffective assistance to trigger a court's duty to investigate. *See People v. Ayres*, 2017 IL 120071, ¶ 18 (*Krankel* duty is triggered "when a defendant brings a clear claim asserting ineffective assistance of counsel, either orally or in writing"); *People v. Taylor*, 237 Ill. 2d 68, 77 (2010) (statements that did

not "specifically inform[ ] the court that defendant [was] complaining about his attorney's performance" did not trigger *Krankel*). Defendant did not clearly raise an ineffective assistance claim — pro se or through counsel. *See infra* Section I.B.i. Further, this Court should reaffirm that trial courts have no duty to sua sponte investigate possible deficient performance in the absence of an express ineffective assistance claim. *See infra* Section I.B.ii.

i. Defendant did not raise an ineffective assistance claim, pro se or through counsel.

As the appellate court held, defendant never asserted ineffective assistance of counsel as "an independent reason for a new trial," and any "vague statements regarding counsel's performance did not constitute a clear claim of ineffective assistance of counsel warranting a *Krankel* inquiry." A39 (citing *Taylor*, 237 Ill. 2d at 77).

Defendant's posttrial motion claimed instead that the trial court erred in admitting the evidence of defendant's assault against C.H. In arguing that distinct issue, defense counsel remarked that he could not rebut the C.H. evidence as effectively as he would have, had he also represented defendant on the C.H. matter. Counsel did not purport by that statement to amend the posttrial motion to add a new claim of ineffective assistance. And such an ambiguous remark would not amount to a clear allegation of ineffective assistance even if it were voiced by a pro se defendant.

The appellate court further reasoned that *Krankel* did not apply because any suggestion of ineffective assistance came from counsel, and "a

Krankel hearing is required [only] when the *defendant* who has been convicted brings a claim *pro se*." A38-39 (emphasis in original); *see also People v. McGath*, 2017 IL App (4th) 150608, ¶ 49. It noted, correctly, that this Court "has never held that a *Krankel* hearing may be triggered by a defense counsel's representations in the absence of a defendant's *pro se* motion," A38, but has consistently articulated the *Krankel* rule as applying to pro se allegations, *see, e.g.*, *Ayres*, 2017 IL 120071, ¶ 11 ("The common-law procedure, which has evolved from our decision in *Krankel*, is triggered when a defendant raises a *pro se* posttrial claim of ineffective assistance of trial counsel."); *Jolly*, 2014 IL 117142, ¶ 29 ("The common law procedure developed from our decision in *Krankel* is triggered when a defendant raises a *pro se* posttrial claim of ineffective assistance of trial counsel."); *People v. Patrick*, 2011 IL 111666, ¶ 30 ("A *pro se* posttrial motion alleging ineffective assistance of counsel is . . . part of a separate common law procedure developed in a line of cases beginning with *Krankel*.").

This Court has not addressed whether a claim of ineffective assistance raised by counsel triggers a *Krankel*-like duty of a trial court to consider appointing new counsel.[4] And, to be sure, trial counsel may have a disabling

[4] Defendant claims that *People v. Sims*, 167 Ill. 2d 483 (1995), constitutes "precedent of this Court analyzing claims of ineffectiveness raised by trial counsel under the *Krankel* procedure." Def. Br. 22. *Sims* held that defendant had not stated a valid claim under *Krankel* and did not consider whether *Krankel* should apply to an ineffective assistance claim raised by counsel. *See* 167 Ill. 2d at 518-20.

conflict when litigating a claim that his own performance was deficient. *See People v. Garcia*, 2018 IL App (5th) 150363, ¶¶ 39, 48-49 (finding posttrial counsel ineffective due to conflict posed by arguing his own ineffectiveness and remanding for appointment of new counsel and further posttrial proceedings); *People v. Brown*, 2017 IL App (3d) 140921, ¶¶ 32-34 (same); *People v. Willis*, 2013 IL App (1st) 110233, ¶¶ 71-74 (holding trial court erred in permitting counsel to withdraw posttrial claim alleging his own ineffectiveness without conducting further investigating its basis).

Defendant argues, at length, that *Krankel* should be extended to cases in which defense counsel, rather than a pro se defendant, raises a claim of ineffective assistance. *See* Def. Br. 9-10, 15-23. But because his own trial counsel never raised a claim of ineffective assistance, holding that a claim of ineffective assistance raised by counsel triggers a duty to investigate would not assist defendant. "As a general rule, courts of review in Illinois do not . . . render advisory opinions, or consider issues where the result will not be affected regardless of how those issues are decided." *Commonwealth Edison Co. v. Ill. Commerce Comm'n*, 2016 IL 118129, ¶ 10 (internal quotation marks omitted). Because the issue is not presented here, this Court should decline to address it.

In short, even assuming that *Krankel* applies where trial counsel alleges his own ineffectiveness, counsel would also — like a pro se defendant — need to raise an express claim of ineffective assistance to trigger a court's

duty to investigate. Because counsel did not do so here, the trial court was not required to conduct a *Krankel* inquiry.

ii. This Court should reaffirm that, absent a defendant's express claim of ineffective assistance, trial courts have no duty to second-guess counsel's performance.

Assuming for argument's sake that *Krankel* applies where defense counsel alleges his own ineffectiveness, this Court should reaffirm that trial courts have no duty to conduct a *Krankel* inquiry absent an *express* claim of ineffective assistance (whether made by defendant pro se or through counsel).

As discussed, this Court's precedents require a clear and express claim of ineffective assistance to trigger *Krankel*. *See Ayres*, 2017 IL 120071, ¶ 18; *Taylor*, 237 Ill. 2d at 77. In almost all cases, the Illinois Appellate Court has hewed to this doctrine. *See, e.g., People v. Villanueva*, 2017 IL App (3d) 150036, ¶ 50 ("Though the circuit court has a duty to follow the *Krankel* procedure to consider posttrial claims of ineffective assistance of counsel, it is only required to do so when defendant raises the claim."); *People v. Cunningham*, 376 Ill. App. 3d 298, 304 (1st Dist. 2007) ("To invoke the rule announced in *Krankel* and its progeny . . . , a defendant must at least make *some* allegation of ineffective assistance of counsel[.]"); *Gillespie*, 276 Ill. App. 3d at 502 ("Nothing in *Krankel* suggests that if the issue is not raised before the trial court a duty should be placed on the trial court to raise the issue of ineffectiveness of counsel *sua sponte*.").

One First District case held otherwise. In *People v. Williams*, 224 Ill. App. 3d 517, 524 (1st Dist. 1992), defense counsel moved for a new trial based on newly discovered evidence, presenting three witnesses "who would have provided critical support to defendant's alibi defense."[5] The trial court denied the motion but expressed concern that counsel had not been diligent in securing the witnesses' testimony for trial. *Id.* The First District held that the circuit court should have conducted a *Krankel* inquiry and possibly appointed new counsel, holding that *Krankel* applies if "there is a clear basis for an allegation of ineffectiveness of counsel." *Id.*

The Fourth District rejected the "loose and broad reading of *Krankel*" set forth in *Williams* and limited *Krankel*'s purview to cases in which a defendant expressly raises a posttrial claim of ineffective assistance. *McGath*, 2017 IL App (4th) 150608, ¶¶ 50-51. This Court should similarly reaffirm, contrary to *Williams*, that a trial court need not investigate counsel's performance unless a defendant (or his counsel) clearly articulates a claim of ineffective assistance.

This case demonstrates the difficulty of defining the circumstances in which a trial court must sua sponte raise the issue of ineffective assistance.

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[5] The appellate court below addressed whether it should adopt the rule set forth in *Willis*, 2013 IL App (1st) 110233, and did not mention *Williams*. *See* A37-40. *Willis*, however, involved an express claim of ineffective assistance raised by counsel, *see* 2013 IL App (1st) 110233, ¶ 62, and *Williams* is the only case to hold that a circuit court must conduct *Krankel* inquiry even in the absence of an express claim.

Defendant characterizes trial counsel's remark at the posttrial hearing as an "admission that he went to trial unprepared," Def. Br. 9, but trial counsel merely suggested that he would have been better equipped to rebut the C.H. testimony had he also represented defendant on that separate matter, SA6. And, contradicting defendant's assertion that counsel "admit[ted] to not having reviewed all of the State's discovery materials prior to trial," Def. Br. 26, counsel conceded that he was "generally aware" of the State's evidence in the C.H. case, SA6. Counsel did not suggest at the hearing that he was deficient for proceeding in that fashion, nor did defendant claim that trial counsel had erred. Defendant claimed that the error instead lay with the trial court's evidentiary ruling. The trial court had no basis to perceive a potential ineffective assistance claim where none had been raised.

Moreover, the *Williams* rule violates the principle that a trial court should not be required to second-guess defense counsel's performance. *See Gillespie*, 276 Ill. App. 3d at 502. A defendant may have consented to a strategy that the trial court deems questionable; and, if so, any claim of ineffective assistance would be barred. *See People v. Wilborn*, 2011 IL App (1st) 092802, ¶ 82 (trial counsel not ineffective for pursuing not only "a sound trial strategy" but also "a strategy that the defendant agreed with"); *People v. Anderson*, 272 Ill. App. 3d 566, 571 (1st Dist. 1995) ("[w]here a defendant knowingly and intelligently consents to defense counsel's strategy, he

normally cannot claim ineffective assistance of counsel for the actions of defense counsel in furtherance of that strategy").

That appears to have been the case here. Defense counsel entered an appearance limited to the A.P. prosecution and generally declined to cross-examine witnesses on the C.H. assault at trial (a tactic that defendant now criticizes, Def. Br. 24). Trial counsel then argued to the jury that it was unfair to consider the C.H. assault at all, because it was only an "alleg[ation]" and had not been the subject of a trial. Vol. XIII at R167-68. Defendant gave no sign that he disagreed with trial counsel's strategy of declining to participate in the "mini trial" concerning the C.H. assault in the hopes that the jury would be inclined to give it less weight. Assuming that defendant approved counsel's strategy (and there is no sign that he did not), any claim of ineffective assistance must fail.

Finally, defendants have other, adequate remedies for pursuing ineffective assistance claims. If the record provides a "clear basis" for finding ineffective assistance, as the appellate court claimed was the case in *Williams*, 224 Ill. App. 3d at 524, there is an appellate remedy. Defendants need not raise a claim of ineffective assistance in the trial court to preserve it for appeal. *See People v. Lawton*, 212 Ill. 2d 285, 296 (2004) ("trial counsel's failure to assert his own ineffective representation in a posttrial motion does not waive the issue on appeal" because "[a]n attorney cannot be expected to argue his own ineffectiveness"). And if the record requires further

development, the Post-Conviction Hearing Act provides the appropriate forum. *See People v. Cherry*, 2016 IL 118728, ¶ 33 (declining to find posttrial counsel ineffective and noting that postconviction proceeding provides appropriate means of addressing the "altogether common occurrence [where] the viability of a *Strickland* claim will turn on matters outside the record"); *see also People v. Tate*, 2012 IL 112214, ¶¶ 13-15 (holding that failure to raise claim of ineffective assistance in posttrial motion does not bar collateral review).

The burden properly falls on a defendant to raise a claim of ineffective assistance, whether in a posttrial motion, on appeal, or in a collateral proceeding. This Court should not impose a duty on trial courts to police possible suggestions of ineffective assistance of counsel where neither defendant nor counsel has raised such a claim. And because defendant here did not raise an ineffective assistance claim, either pro se or through counsel, the trial court was not required to conduct a *Krankel* inquiry.

CONCLUSION

This Court should affirm the appellate court's judgment.

July 17, 2019

Respectfully submitted,

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RULE 341(c) CERTIFICATE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is twenty-one pages.

/s Erin M. O'Connell
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SUPPLEMENTAL APPENDIX

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IN THE CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT OF ILLINOIS
SANGAMON COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff,
vs.
QUENTON T. BATES,
Defendant.

NO. 11-CF-953

MOTION FOR A NEW TRIAL

NOW COMES the Defendant, QUENTON T. BATES, by his attorney G. RONALD KESINGER, and moves this Honorable Court to grant him a new trial, and in support thereof Defendant states as follows:

1. That on January 13, 2016, after a trial by jury, the Defendant was found guilty of the offense of two counts aggravated criminal sexual assault.

2. That the Court erred in denying Defendant's Motion in Limine, wherein the Defendant moved the Court to prohibit any testimony or evidence to be offered by the People concerning an investigation of an alleged occurrence on October 6, 2011, involving an alleged victim, C.H., in pending Sangamon County Case No. 2011-CF-888, wherein the Defendant is represented by other counsel, namely Ryan Cadagin.

3. That in Sangamon County No. 2011-CF-888, the alleged offense of aggravated sexual assault occurred on October 6, 2011, which is a date after the alleged offense occurred on September 19, 2011, in the case Sangamon County No. 2011-CF-953.

4. That the testimony of the alleged victim C.H. in said Sangamon County Case No. 2011-CF-888, and the testimony of the Forensic Scientist that matter from the victim's body contained matter which matched Defendant's DNA, was highly prejudicial to Defendant's defense

in that Defendant had not been tried or convicted of a crime against C.H., nor did he have the opportunity to have an independent Forensic Scientist review the DNA test results.

5. That the Defendant has not been convicted of any offense, sexual in nature, prior to his arrest for aggravated criminal sexual assault in the instant case No. 2011-CF-888.

6. That the People could not present any evidence tending to show a common scheme or design, also known as "modus operandi", based on the conduct of the Defendant prior to September 19, 2011.

7. That the Court erred in allowing the People's Motion in Limine to exclude evidence of victim's past sexual conduct, when DNA evidence by the People's expert witness showed that an unknown male's DNA was found on a vaginal swab by the victim, who testified that she had been sexually penetrated and assaulted vaginally by an unknown male person on September 19, 2011, the date of the sexual assault, which did not constitute prior sexual conduct by the victim.

8. That there was no DNA evidence by the People's expert witness stating Defendant's DNA was found from the vaginal swab of victim's vagina.

9. That there was no evidence showing that the victim has been sexually penetrated in her vagina other than on the date of the assault on September 19, 2011, and that such evidence would have allowed the jury to reasonably conclude that the victim was penetrated vaginally by a male person other than the Defendant, since the People's expert witness would have testified that the vaginal swab contained DNA of an unknown male.

10. That the Court improperly and without any evidence concluded that the DNA of an unknown male found on the vaginal swab was the result of a prior sexual encounter, which is contrary to the evidence.

WHEREFORE, Defendant prays for the Court to set aside the verdict of guilty and to grant a new trial.

QUENTON T. BATES, Defendant

By: _____

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PROOF OF SERVICE

I, the undersigned, hereby certify that on 3/4/16, I caused to be served the foregoing document by fax transmission, e-mail and/or mail delivery, a copy to each person to whom it is directed herein, and enclosing the same in a plainly addressed envelope, postage fully prepaid, in the United States Mail at Jacksonville, Illinois, and that the original was mailed to or filed with the Clerk of the Court in which said cause is pending.

_____

Mr. John Millhiser
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Mr. Quenton T. Bates, 93451
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IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT

SANGAMON COUNTY, ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff,	)	
vs.	)	Case No. 11-CF-953
QUENTIN BATES, Defendant.	)	

REPORT OF PROCEEDINGS of the hearing held on the 1st day of April, 2016, before the Honorable JOHN SCHMIDT, Judge of said court.

APPEARANCES:

MR. JOHN MILHISER
Sangamon County State's Attorney
MS. MARY BETH RODGERS
Assistant State's Attorney
on behalf of the Plaintiff;

MR. G. RONALD KESINGER
Attorney at Law
on behalf of the Defendant.

REPORTED BY:

CHRISTINA HOECKER, CSR #84-004006
Official Court Reporter
200 So. 9th St., Room 524
Springfield, IL 62701
217-753-6745

(The following proceedings were duly had.)

THE COURT: This is 11-CF-953, People of the State of Illinois versus Quentin Bates. Mr. Bates is present here in the custody of the Sangamon County Sheriff with his attorney Mr. Kesinger. The People are present by the Sangamon County State's Attorney John Milhiser and Assistant State's Attorney Rodgers.

Matter is set for -- I have it set today for a motion for new trial. And depending on the outcome of that motion, a sentencing hearing.

I have received, filed by Mr. Kesinger, his motion for a new trial. Mr. Milhiser and Ms. Rodgers, have you received a copy of that?

MR. MILHISER: Yes, Judge, the State has.

THE COURT: Very good. Mr. Kesinger, you can be heard on that.

MR. KESINGER: One preliminary matter, the defendant has asked that the cuffs be removed, if you would so allow.

THE COURT: Nope.

MR. KESINGER: Thank you, Your Honor. May I sit or stand?

THE COURT: Whatever you would like.

MR. KESINGER: Thank you, Your Honor.

Your Honor. There's basically three contentions, reasons for this motion for a new trial. I think the first, which is -- just called for a new trial all over the place is the fact that we had a trial within a trial when you allowed testimony in another case which occurred after this one, which actually occurred on October 6th, 2011, when the event for which he was being tried occurred September 19th, 2011. The thing that really bothers me, and I think could bother the Appellate Court if it went that way is that Mr. Bates had another attorney Ryan Cadagin, I was not that attorney. So all the testimony about the hearing that -- the event that occurred afterwards, I was generally aware, of course, but I couldn't possibly do as good a job in defending my client since it wasn't my case. So I think that perhaps we all should have thought of that, State's Attorney as well. But I think that is first and foremost a reason for a new trial.

I was taken by surprise at the depth of the evidence and testimony brought by the State's

attorney, meaning, brought the victim -- alleged victim, forensic scientists, I had no chance to review that. As you know, had I been thinking about that case, I would have asked for review by our own experts. So that alone, I think, is reason for a new trial.

Secondly, I remind you that the People asked permission to bring in evidence of other sexual offenses, which was the matter occurring on October 6th, 2011. I opposed that and I think I even brought a motion to reconsider that and the primary reason that I believe that is inappropriate is because it is an event that occurred after this one. All of my research and common sense says that to bring in evidence of other sex crimes, it would be a prior conviction of a sex crime. And my research as to the -- when the law originated, when it was brought as Senate Bill No. 5, it was part of an Attorney General's package on getting tough on crime, there's a discussion of it and it's all about previous convictions, nothing about any event afterwards.

As the Court knows, we talked about modus operandi, as the evidence would show -- tends to

show a common scheme or design. That's something that happened in the past but not something that might happen in the future. If, I guess, the defendant had been convicted of the event occurring afterwards, that might make some difference. But he wasn't, it was just an allegation of a crime. So that evidence was just terribly prejudicial to my client.

And for what it's worth, I did speak to one of the jurors after the trial --

THE COURT: I'm not going to listen to what one of the jurors after a trial said. That is wholly improper, Mr. Kesinger.

MR. KESINGER: Okay. Thank you.

My knowledge of the case, of course, is that -- and your knowledge of the case that in the second case involving the victim known as CH, the DNA evidence showed that it was a match, not a high degree of probability, but a match and that evidence is what really, I think, sealed the vote for a conviction by the jury.

Lastly, Your Honor, there was a motion to exclude evidence of the victim's past sexual conduct, which of course I disagreed with. I

don't agree in principle with it, I mean, if she had intercourse with other people at other times, makes no difference. But the problem is that the victim herself testified that there was vaginal penetration by her assailant. And I think there was testimony, also, that she hadn't had any sex with anybody else in the 72 hours, certainly there was a report of that.

So the evidence and it was -- it was the most important part of my case and my expert was and both experts found DNA in her vagina of somebody unknown male. It wasn't her consensual partners, it wasn't my client. So how can that -- when the client says -- when the victim says she was assaulted, how can you say that's prior sexual conduct. And that's the way you ruled because I couldn't get that in and that I couldn't get my expert to say that. So I was really enthusiastic and so was my expert that we've got at least a point to show reasonable doubt and you didn't allow that.

So those are the three areas, Your Honor, and I think any one of them is enough to establish a reason for a new trial. But especially, I

think, the lack of the defendant having his counsel Ryan Cadagin cries out for a new trial.

THE COURT: Mr. Milhiser, Ms. Rodgers.

MR. MILHISER: Thank you, Judge.

Your Honor, the Court properly ruled on the other crimes evidence. And contrary to Mr. Kesinger's position it has to be a conviction or has to happen prior in time, case law does not support that. The State has previously submitted a memorandum of law in support of our motion to allow this evidence in, which I know the Court has read. The Supreme Court case People versus Donoho refers to other crimes, not just previous crimes and not just convictions. In People versus Stephens, which is a First District case, the Court allowed evidence of another sexual assault that happened six years afterwards. So it is -- there is no requirement that it happen prior in time and there's no requirement that it be a conviction. Also in People versus Perez which allows evidence much the -- very similar to this other crimes evidence, and it does not have to be a conviction. So the Court properly allowed that evidence in.

With regard to no chance to review, Mr. Kesinger had all the DNA evidence from both cases. So he had that evidence and he had a chance to review it, so that is without any merit.

And without -- with regard to the Rape Shield Law and the rulings of the Court, the Court properly ruled on that evidence and excluded that. And that is supported by -- by case law in this case. Thank you.

THE COURT: Thank you. I've had an opportunity to review the motion for a new trial. I've had an opportunity to review my notes during the trial and the testimony and I remember it very well. And my rulings, the Court believes it was correct in each and every one of its rulings for the reasons I stated at the time I made them, there's no need for me to rehash them, they're already on the record. The motion for a new trial is denied.

Now, we're ready to proceed to sentencing. Mr. Milhiser, have you had the presentence investigation for the requisite period of time?

MR. MILHISER: Your Honor, I have.

THE COURT: Any additions, corrections or

CERTIFICATE OF FILING AND SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On July 17, 2019, the foregoing **Brief and Supplemental Appendix of Plaintiff-Appellee People of the State of Illinois** was filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, which served notice on the following e-mail address:

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

/s/ Erin M. O'Connell
ERIN M. O'CONNELL
Assistant Attorney General