

girlfriend, Gina Giberson. According to Giberson's trial testimony, she did not remember the actual assault, but she remembered waking from a coma in the hospital with breathing and feeding tubes. The emergency-room physician testified defendant told him he assaulted Giberson with a baseball bat. However, defendant denied telling the doctor this. Nevertheless, the jury found defendant guilty and the trial court sentenced defendant to 20 years in prison. Defendant appealed, raising only an issue regarding the admission of certain other-crimes evidence. This court affirmed. *People v. Abernathy*, 402 Ill. App. 3d 736, 755-56 (2010).

¶ 5 On June 3, 2011, defendant filed a *pro se* postconviction petition, alleging (1) his appellate counsel was ineffective for failing to raise more significant issues on appeal, such as (a) the trial court's error in denying defendant's motion for a change of venue due to pretrial publicity; (b) the court's demonstrated bias toward defendant and sympathy for the victim; (2) the State failed to prove him guilty beyond a reasonable doubt of aggravated domestic battery; (3) the court failed to properly instruct the jurors by failing to ask if they understood and accepted the given principles of law; (4) the court imposed an excessive sentence in violation of defendant's due-process rights; and (5) his trial counsel was ineffective for failing to (a) conduct proper cross-examination to impeach the State's witnesses based on their prior inconsistent statements, (b) file a more specific posttrial motion, and (c) advise defendant he would be entitled to day-for-day good-conduct credit, rather than be required to serve 85% of his sentence. Defendant claims he rejected a plea offer of 15 years due to counsel's erroneous advice. Defendant's petition was supported by his own affidavit, third-party affidavits, and accompanying documents, including, but not limited to, copies of e-mail communications with his appellate counsel and several newspaper articles related to the case published before trial.

¶ 6 On July 19, 2011, the circuit court entered a written order of dismissal, which included specific findings regarding each allegation. Overall, the court found the "allegations fail to set forth a substantial denial of defendant's rights under the Constitution of the United States or of the State of Illinois" and the "petition is frivolous and patently without merit." This appeal followed.

¶ 7 II. ANALYSIS

¶ 8 Defendant appeals, claiming the circuit court erred in summarily dismissing his *pro se* postconviction petition as frivolous and patently without merit because he alleged the gist of a constitutional claim of (1) ineffective assistance of trial counsel and (2) judicial bias. The Act provides defendants with a means of challenging their convictions or sentences for violations of their constitutional rights that could not have been raised on direct appeal. 725 ILCS 5/122-1 to 122-7 (West 2010).

¶ 9 The Act establishes a three-stage process for adjudication of a postconviction petition. At the first stage, the circuit court determines whether the defendant's allegations sufficiently demonstrate a constitutional violation that would necessitate relief, and it may summarily dismiss the petition upon finding that it is frivolous and patently without merit. *People v. Coleman*, 183 Ill. 2d 366, 380 (1998); 725 ILCS 5/122-2.1(a)(2) (West 2010). All well-pled allegations are to be taken as true and liberally construed, unless contradicted by the record. *Coleman*, 183 Ill. 2d at 380-81. A petition is considered frivolous and patently without merit where its allegations fail to present the gist of a meritorious constitutional claim (*People v. Edwards*, 197 Ill. 2d 239, 244 (2001)), or if it has "no arguable basis either in law or in fact." (*People v. Hodges*, 234 Ill. 2d 1, 11-12 (2009)). This court reviews the summary dismissal of a petition for postconviction relief *de novo*. *Coleman*, 183

Ill. 2d at 388-89.

¶ 10 First, defendant claims his allegation of ineffective assistance of trial counsel was sufficient when he alleged counsel erroneously advised him he was required to serve 85% of his sentence when actually defendant would be eligible for good-conduct credit. According to defendant, the State had offered defendant a sentence of 15 years in prison, but he rejected it based on counsel's erroneous advice. The circuit court found this allegation to be frivolous, noting defendant did not "establish that he would have accepted the State's plea offer had he been informed by trial counsel that he would likely serve only 50% of the sentence, assuming entitlement to all of his good[-]conduct credit."

¶ 11 A first-stage petition claiming ineffective assistance of counsel must show it is arguable that counsel's performance fell below an objective standard of reasonableness, and that it is arguable that the defendant was prejudiced by counsel's performance. *Hodges*, 234 Ill. 2d at 17. The Illinois Supreme Court has found that "[a] criminal defendant has the constitutional right to be reasonably informed with respect to the direct consequences of accepting or rejecting a plea offer." *People v. Curry*, 178 Ill. 2d 509, 528 (1997). Thus, for example, our supreme court in *Curry* found ineffective assistance of counsel where defense counsel incorrectly informed the defendant during plea negotiations about mandatory consecutive sentencing and the minimum sentence possible at trial. *Curry*, 178 Ill. 2d at 529. As a result of the defense attorney's misleading information, the defendant's conviction and sentence were reversed and the defendant was given a new trial. *Curry*, 178 Ill. 2d at 536-37.

¶ 12 The importance of defense counsel's effective representation in the context of plea negotiations was recently reinforced by the United States Supreme Court. See *Lafler v. Cooper*, ____

U.S. ___, 132 S. Ct. 1376 (2012) (holding that a defendant can succeed on an ineffective-assistance-of-counsel claim where that defendant rejects a plea offer based on counsel's erroneous advice and can show that, but for the erroneous advice, he would have accepted the plea offer and the ultimate outcome of the plea process would have been different). The Court held the two-part *Strickland* test (*Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984)) applies to challenges to guilty pleas based on ineffective assistance of counsel. *Lafler*, 132 S. Ct. at 1384. Thus, to demonstrate counsel's ineffectiveness

"a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (*i.e.*, that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed." *Lafler*, 132 S. Ct. at 1385.

¶ 13 In the case at bar, the circuit court rejected defendant's allegation in his *pro se* petition as frivolous and without merit because defendant failed to allege he would have accepted the State's plea had he been informed he would likely only serve 50% of his sentence. The State relies on this basis (as well as claiming defendant failed to sufficiently allege pertinent facts surrounding the plea negotiations) in supporting the court's dismissal as frivolous and patently without merit. Indeed, defendant does *not* make the specific claim he would have accepted the offer had he been properly advised. Defendant alleged as follows:

"Prior to trial, the State made a 15 year offer if petitioner pled guilty. Petitioner rejected the offer because trial counsels mistakenly advised him of the above. Petitioner received ineffective assistance of counsel during these negotiations. Petitioner maintains that, but for trial counsel's ineffective assistance during plea negotiations with the State the outcome would have been different."

¶ 14 When addressing the remedy for an ineffective-assistance-of-counsel claim in relation to rejecting a plea offer, the *Lafler* court noted that if a defendant claims he would have received a lesser sentence by pleading guilty to the same charges the defendant was convicted of after trial, the court should conduct an evidentiary hearing to determine whether the defendant has shown a reasonable probability that but for counsel's errors he would have accepted the plea. *Lafler*, 132 S. Ct. at 1389. Though we need not determine the remedy at this stage, or the precise contents of the offer, we must determine whether defendant's failure to specifically allege he would have accepted the plea is fatal to his claim.

¶ 15 A petitioner need present only a limited amount of detail and is not required to include legal argument or citation to legal authority. *Edwards*, 197 Ill. 2d at 244-45. However, a *pro se* petitioner is not excused from providing factual detail. *People v. Delton*, 227 Ill. 2d 247, 254 (2008). As stated above, the allegations of the petition, taken as true and liberally construed, need only present the gist of a constitutional claim. *People v. Harris*, 224 Ill. 2d 115, 126 (2007). This standard presents a "low threshold" (*People v. Jones*, 211 Ill. 2d 140, 144 (2004)), requiring only that the petitioner plead sufficient facts to assert an arguably constitutional claim (*Hodges*, 234 Ill. 2d at 9).

¶ 16 "A petition lacking an arguable basis in law or fact is one 'based on an indisputably meritless legal theory or a fanciful factual allegation.'" *People v. Brown*, 236 Ill. 2d 175, 185 (2010) (quoting *Hodges*, 234 Ill. 2d at 16). "Fanciful factual allegations include those that are fantastic or delusional." *Brown*, 236 Ill. 2d at 185. Defendant's allegation cannot be described as either "fantastic or delusional." Rather, defendant set forth sufficient facts to assert a claim that is arguably constitutional. His allegations indicate he believed he would have been required to serve at least 12 3/4 years when he rejected the offer of 15 years. He chose to proceed to trial, arguably taking a chance he would be found not guilty or that he would receive a sentence less than 12 3/4 years. Whether defendant can sufficiently demonstrate a claim of ineffective assistance of counsel, including prejudice, on these facts should be determined in later proceedings. See *People v. Correa*, 108 Ill. 2d 541, 548-49 (1985) ("A defendant may enter a plea of guilty because of some erroneous advice by his counsel; however, this fact alone does not destroy the voluntary nature of the plea.") At this stage, we conclude only that the petition cannot be deemed frivolous or patently without merit for lack of an arguable factual basis. Defendant has alleged enough to proceed and survive summary dismissal.

¶ 17 Based on our decision regarding the sufficiency of defendant's allegation of ineffective assistance of counsel, we need not discuss his remaining claim regarding his allegation of judicial bias. The individual claims within a postconviction petition are not severable at the first stage of the proceedings. That is, the Act mandates if any individual allegation within the petition is not deemed frivolous or patently without merit, the entire petition proceeds to the second stage. *People v. Rivera*, 198 Ill. 2d 364, 371 (2001). Accordingly, we reverse and remand with directions to docket defendant's petition for second-stage proceedings.

¶ 18

III. CONCLUSION

¶ 19 For the foregoing reasons, we reverse the circuit court's order dismissing defendant's postconviction petition as frivolous and patently without merit and remand for further proceedings.

¶ 20 Reversed and remanded with directions.