



guilty at trial, the sentencing range was 20 to 60 years, to be served without any time credit, plus "three years of mandatory supervised release."

¶ 5 Defendant pled guilty. The trial court accepted his plea and agreed to the negotiated 20-year sentence. The trial court advised defendant that he had the right to appeal but would first need to file a motion to withdraw his guilty plea. The court concluded the sentencing hearing by addressing the defendant and advising him: [W]hen you get out you have three years mandatory supervised release, parole. Any questions about that?"

¶ 6 Defendant filed two motions to withdraw his guilty plea—on September 19, 2007, and on February 8, 2008. The trial court denied these motions on February 8, 2008, because neither motion was filed within 30 days of his guilty plea on June 13, 2007.

¶ 7 A notice of appeal was filed on February 29, 2008. We dismissed the appeal by an order dated May 6, 2008, because defendant had not timely filed a motion to withdraw his guilty plea in the trial court.

¶ 8 More than three years later, on June 3, 2011, defendant filed his postconviction petition alleging improper *Whitfield* admonishments. Defendant claims he was not properly informed that a 3-year MSR period was to be added to his 20-year sentence. He claims that if he had known that his sentence included the MSR term, he would not have agreed to the plea. Defendant requested a reduction of his sentence from 20 years to 17 years plus the 3-year period of MSR.

¶ 9 On August 17, 2011, the trial court entered its order dismissing defendant's petition, holding that allegations of the petition failed to support defendant's claim that he had been deprived of a constitutional right. The order specifically found that "[t]he record clearly shows the Petitioner was properly admonished." Defendant appeals from this order.

¶ 10 **LAW AND ANALYSIS**

¶ 11 The Post-Conviction Hearing Act (725 ILCS 5/122-1 to 122-7 (West 2010)) provides

a three-step process to resolve a defendant's claim that his conviction was the product of a substantial deprivation of rights protected under the state or federal constitution. *People v. Makiel*, 358 Ill. App. 3d 102, 104, 830 N.E.2d 731, 736 (2005). At the first stage of postconviction proceedings, the court independently reviews the petition without any input from the State or the defendant. If the court finds that the claims alleged in the petition are frivolous and patently without merit, the court may dismiss the petition. 725 ILCS 5/122-2.1(a)(2) (West 2010); *People v. Hernandez*, 283 Ill. App. 3d 312, 316, 669 N.E.2d 1326, 1329 (1996). A petition found to be frivolous or patently without merit is a petition that contains an "indisputably meritless legal theory or a fanciful factual allegation." *People v. Hodges*, 234 Ill. 2d 1, 16, 912 N.E.2d 1204, 1212 (2009). At the first stage, the court must construe all well-pleaded facts in the defendant's petition as true. *People v. Coleman*, 183 Ill. 2d 366, 380-81, 701 N.E.2d 1063, 1071-72 (1998). The trial court must not engage in any fact-finding at this first stage. *Id.* In order to survive a first-stage dismissal, a defendant must present only the "gist of a constitutional claim." (Internal quotation marks omitted.) *People v. Clark*, 386 Ill. App. 3d 673, 675, 899 N.E.2d 342, 345 (2008). Because most defendants are acting *pro se* at this stage, Illinois courts have held that the "gist of a constitutional claim" is a low threshold to establish. *People v. Ligon*, 239 Ill. 2d 94, 104, 940 N.E.2d 1067, 1073 (2010). Review of an order summarily dismissing a first-stage postconviction petition is *de novo*. *Coleman*, 183 Ill. 2d at 388-89, 701 N.E.2d at 1075; *Clark*, 386 Ill. App. 3d at 675, 899 N.E.2d at 345.

¶ 12 Before we address the merits of defendant's alleged constitutional violation, we first consider defendant's argument that the trial court's summary dismissal was flawed and rendered void. Defendant argues that the trial court used an improper standard by which to review his petition at the first stage of the postconviction process. The trial judge dismissed the petition, concluding that defendant did not assert a deprivation of a constitutional right.

Defendant takes issue with this wording, contending that the applicable statute requires the court to determine if the petition was "frivolous" or "patently without merit." Defendant argues that the trial court's failure to use those precise words mandates that his petition advance to the second stage of postconviction proceedings. He cites to *People v. Porter*, 122 Ill. 2d 64, 84-85, 521 N.E.2d 1158, 1166 (1988), a case that held that the 30-day requirement<sup>1</sup> of section 122-2.1 of the Code of Criminal Procedure of 1963 (Ill. Rev. Stat., 1984 Supp., ch. 38, ¶ 122-2.1 was mandatory and the trial court's noncompliance with the 30-day time frame rendered the dismissal void. Defendant contends that the standard applied by the court—the failure to assert a constitutional deprivation—was a standard for evaluation of the claim at a later stage.

¶ 13 We disagree with defendant that a trial court's dismissal of a postconviction petition at the first stage must contain the precise words referenced in the statute. The statutory requirement is that "[i]f the petitioner is sentenced to imprisonment and the court determines the petition is frivolous or is patently without merit, it shall dismiss the petition in a written order." 725 ILCS 5/122-2.1(a)(2) (West 2010). Use of the precise wording is not mandatory. However, dismissal of the petition is mandatory if the content of the petition is found lacking in substance. The court is required to "examine the court file of the proceeding in which the petitioner was convicted, any action taken by an appellate court in such proceeding and any transcripts of such proceeding" which serve to aid the court in determining whether the record positively rebuts the allegations contained in the petition. 725 ILCS 5/122-2.1(c) (West 2010); *Coleman*, 183 Ill. 2d at 381-82, 701 N.E.2d at 1071-72. If the court record contains information that rebuts the allegations of the postconviction

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<sup>1</sup>The 30-day time limit was amended by the legislature to 90 days, effective January 1, 1993.

petition, then the petition is construed as frivolous or patently without merit. See *Coleman*, 183 Ill. 2d at 382, 701 N.E.2d at 1072. As stated earlier, nothing in the statute mandates that the court order describe the petition as "frivolous" or "patently without merit." The issue is not whether the court used specific words in its order dismissing the petition, but whether the court had good reason to find that the petition was deficient. If the record rebuts the allegations of the petition, then the statutory standard is met. The trial court must simply determine whether the allegations meet that standard.

¶ 14 In this case, while the trial court did not state that defendant's petition was frivolous and patently without merit, the court stated its reasoning for its conclusion that defendant did not allege a constitutional deprivation. Defendant's allegation was that he had been improperly admonished. After review of the record, and consideration of the defendant's allegations, the court concluded that defendant was properly admonished. Consequently, although the trial court's wording for the basis of its dismissal varied from the relevant statute, the trial court's order stated its basis along with the conclusion that defendant failed to state a constitutional violation. Therefore, we hold that the order is not void.

¶ 15 Defendant also contends that because the judgment entry listed his petition as "denied" rather than as "dismissed," the order is void. He cites no authority for this argument, and we find that the argument elevates form over substance. The proper verbiage for a first-stage order is dismissal rather than denial. However, the substance of the trial court's order ended the petition at the first stage regardless of the word utilized by the court. Use of the word "denied" did not void the order.

¶ 16 We next turn to the merits of the alleged constitutional violation. Defendant contends that the trial court did not properly admonish him at sentencing about the 3-year MSR period which was in addition to his 20-year sentence of imprisonment.

¶ 17 Supreme Court Rule 402(a) (eff. July 1, 1997) requires that in any hearing where a

defendant enters a plea of guilty, the court must substantially comply with certain admonitions to the defendant. Substantial compliance does not mean literal compliance. *People v. Dismore*, 33 Ill. App. 3d 495, 501-02, 342 N.E.2d 151, 156-57 (1975). Rule 402(a) requires the court to advise the defendant, as well as confirm the defendant's understanding, of "the minimum and maximum sentence prescribed by law, including, when applicable, the penalty to which the defendant may be subjected because of prior convictions or consecutive sentences." Ill. S. Ct. R. 402(a)(2) (eff. July 1, 1997). Substantial compliance is determined by the admonishments provided to the defendant at the hearing when the plea of guilty is received. *People v. Blankley*, 319 Ill. App. 3d 996, 1007, 747 N.E.2d 16, 25 (2001).

¶ 18 The court's failure to substantially comply with the required admonishments denies the defendant of his due process rights. *People v. Whitfield*, 217 Ill. 2d 177, 195, 840 N.E.2d 658, 669 (2005). The supreme court held in *Whitfield* that substantial compliance with the admonition requirements did not occur when the trial court failed to explain, prior to acceptance of the plea, that a term of MSR would be tacked onto the sentence of imprisonment he would receive. *Id.* at 189-91, 840 N.E.2d at 666-67. The supreme court explained that the court's failure to advise the defendant of the MSR period constituted "an unfair breach of the plea agreement." *Id.* at 195, 840 N.E.2d at 669.

¶ 19 A recent Illinois Supreme Court case determined that the rule set forth in *Whitfield* is applicable only to cases in which the sentencing occurred after the date of the *Whitfield* case—December 20, 2005. *People v. Morris*, 236 Ill. 2d 345, 363-64, 925 N.E.2d 1069, 1080 (2010). The *Morris* court first determined that the holding in *Whitfield* established a new rule, as prior to *Whitfield*, even with a faulty MSR admonishment, a defendant's due process rights remained intact so long as the plea of guilt was deemed intelligent and voluntary. *Id.* at 360, 925 N.E.2d at 1078. As defendant was sentenced in 2007, the *Whitfield* rule is applicable.

¶ 20 At the beginning of the plea hearing, the prosecutor representing the State of Illinois stated:

"It is my understanding the defendant is going to enter a plea of guilty to the one-count Indictment charging him with first degree murder. The parties respectfully ask the Court to sentence him to twenty years in the Illinois Department of Corrections. He is to be given time spent in the County Jail awaiting this disposition.

Truth-in-Sentencing does apply. We'd ask the Court to admonish the defendant that his sentence would be a hundred percent plus his mandatory supervised release upon release[ ].

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Of three years, I believe

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And court costs and DNA."

In response to this offering, defendant's attorney noted, "That is correct, Your Honor." The trial judge advised defendant that if he had opted to take his case to trial and been found guilty that the court had the option to sentence him to prison for a period of time between 20 and 60 years, and that the time would have to be served at 100%. The trial judge further advised the defendant that he "would have whatever the sentence was" and "have to do three years of mandatory supervised release." The judge asked defendant if he had any questions about the range of sentence that would have applied but for his attorney's negotiations with the State. Defendant said that he had no questions. In agreeing to the State's recommended sentence, the court stated:

"I will concur in the negotiations, enter judgment on your plea, sentence you to twenty years in the Illinois Department of Corrections, assess court costs, require a DNA sample and assessment, give you credit for the time served in the St. Clair County

Jail, both against your costs and against the sentence.

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And, finally, Mr. Wilborn, when you get out, you have three years of mandatory supervised release, parole."

The court then asked the defendant if he had any questions about the MSR, and defendant answered in the negative. The written judgment order entered on June 13, 2007, clearly indicates that the sentence is 20 years plus 3 years of MSR.

¶ 21 Defendant argues that this admonishment was improper and misleading. He cites to three cases which we find distinguishable. In *People v. Company*, this court held that the trial court's admonishments were misleading and that the defendant's constitutional rights were violated. *People v. Company*, 376 Ill. App. 3d 846, 852-53, 876 N.E.2d 1055, 1060-61 (2007). In *Company*, before accepting the defendant's plea, the court neglected to inform the defendant that an MSR term would be added to his sentence. The judge informed the defendant that an MSR term would be added to his sentence if he were found guilty by a jury or the court. However, he did not inform the defendant that an MSR term would be added to his negotiated sentence. *Id.* In accepting his plea of guilty and in sentencing the defendant to the agreed-to sentence, the judge also made no reference to the MSR term. *Id.* at 850-51, 876 N.E.2d at 1059. Additionally, the court neglected to include the MSR term in the written judgment. *Id.* at 851, 876 N.E.2d at 1059. In *People v. Smith*, as in *People v. Company*, the court referenced MSR in the possible range of sentences if the defendant did not plead guilty, but failed to reference MSR in accepting the defendant's plea and sentencing defendant to the agreed-upon terms, and also failed to include the MSR term in the written judgment. *People v. Smith*, 386 Ill. App. 3d 473, 474-75, 898 N.E.2d 119, 122-23 (2008). During the plea hearing, neither the State nor the defense attorney made any reference to a term of MSR. *Id.* at 474, 898 N.E.2d at 122. This court concluded that the admonishments given to the

defendant were insufficient to inform him that he would be subject to an MSR term in addition to his 22-year prison sentence. *Id.* at 479, 898 N.E.2d at 126. Finally, defendant claims that *People v. Morris* is supportive in establishing that his admonishments were deficient. In *Morris*, the supreme court, noticing difficulties the appellate court had interpreting *Whitfield*, offered clarification on the necessary admonitions. The court stated:

"An admonition that uses the term 'MSR' without putting it in some relevant context cannot serve to advise the defendant of the consequences of his guilty plea and cannot aid the defendant in making an informed decision about his case. We recognize that there is no precise formula in admonishing a defendant of his MSR obligation, and we are mindful that '[a]n admonition of the court must be read in a practical and realistic sense. The admonition is sufficient if an ordinary person in the circumstances of the accused would understand it to convey the required warning.' [Citation.] The trial court's MSR admonishments need not be perfect, but they must substantially comply with the requirements of Rule 402 and the precedent of this court. [Citation.] *Whitfield* requires that defendants be advised that a term of MSR will be added to the actual sentence agreed upon in exchange for a guilty plea to the offense charged.

Ideally, a trial court's admonishment would explicitly link MSR to the sentence to which defendant agreed in exchange for his guilty plea, would be given at the time the trial court reviewed the provisions of the plea agreement, and would be reiterated both at sentencing and in the written judgment." *Morris*, 236 Ill. 2d at 366-67, 925 N.E.2d at 1082.

¶ 22 A case decided in this court is analogous to the facts of this case. In *People v. Thomas*, we determined that *Whitfield* did not apply, but analyzed the facts as if *Whitfield* were applicable. *People v. Thomas*, 402 Ill. App. 3d 1129, 1133, 932 N.E.2d 658, 662

(2010). When the trial judge informed the defendant of the applicable range of penalties without a negotiated guilty plea, that admonishment included the MSR term. *Id.* Defendant contended that because the MSR admonishment was only given with reference to possible penalties, a reasonable person would have concluded that MSR was not part of a negotiated plea. *Id.* In support, the defendant cited *People v. Company*. *Id.* at 1133-34, 932 N.E.2d at 662. We distinguished *Company*, finding that this defendant was told with each count that MSR attached to any penalty he could receive within that range of penalties, and stated that:

"The defendant knew, as he stood before the court to enter his plea, that he was about to receive a sentence of imprisonment, and in fact he did receive a sentence of imprisonment. Under those circumstances, any misunderstanding about the applicability of mandatory supervised release, although perhaps unfortunate, cannot be deemed objectively reasonable." *Id.* at 1134, 932 N.E.2d at 662-63.

Furthermore, we distinguished *Thomas* from *Whitfield*, finding that in *Whitfield* there was no mention of MSR, whereas this defendant was informed about MSR attaching to any sentence on each count. *Id.* at 1134-35, 932 N.E.2d at 663.

¶ 23 We have thoroughly reviewed the admonishments defendant received, and we conclude that defendant's constitutional rights were not violated. Defendant was informed of the attachment of an MSR term by the State, who asked the court to admonish him on this topic. His attorney concurred that this information was accurate. The trial court clearly indicated that a term of MSR would attach to any penalty within the range of penalties applicable to the murder charge. Defendant acknowledged his understanding of these sentencing possibilities. In imposing sentence, the trial judge specifically stated that when defendant was released from his 20-year imprisonment, he would "have three years of mandatory supervised release, parole." Defendant acknowledged that he understood the MSR term. The written judgment also included the MSR term. Given these admonishments,

and the fact that defendant was aware that he was in court to plead guilty to a crime and be sentenced for that crime, we conclude that defendant was sufficiently informed about the MSR term and that he has not been denied his constitutional rights. Defendant failed to meet his burden of objectively establishing that the admonishments provided left him with the mistaken impression that his sentence did not include a term of MSR. *Company*, 376 Ill. App. 3d at 851, 876 N.E.2d at 1059.

¶ 24 Accordingly, defendant fails to satisfy the requirement that his postconviction petition allege the gist of a constitutional violation. Therefore, the trial court's dismissal of his postconviction petition at the first stage was correct.

¶ 25 CONCLUSION

¶ 26 For the foregoing reasons, the judgment of the circuit court of St. Clair County is hereby affirmed.

¶ 27 Affirmed.