



¶ 5 On June 20, 2011, the defendant filed *pro se* a petition for postconviction relief pursuant to section 122-1 of the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 (West 2010)). In his petition, the defendant alleged that his appellate counsel on direct appeal was ineffective for failing to raise the issue of the circuit court's denial of the defendant's motion *in limine*. The motion *in limine* asked that the circuit court prohibit the State from introducing into evidence any information related to the defendant's prior conviction for aggravated robbery. Defense counsel argued that introducing evidence of the defendant's prior aggravated robbery conviction would be highly prejudicial because aggravated robbery and home invasion were similar crimes and a jury would likely find that if the defendant committed aggravated robbery, he would likely commit home invasion. The circuit court denied the motion, finding that home invasion was not sufficiently similar to aggravated robbery to rise to the level of unfair prejudice.

¶ 6 At trial, the defendant testified on his own behalf. The State then introduced evidence of the defendant's prior conviction for impeachment purposes. The jury was told that the introduction of such evidence should only be considered for the purposes of believability of the witness. Thereafter, the jury found the defendant guilty of home invasion. Defense counsel filed a posttrial motion arguing that the circuit court erred when it allowed evidence of the defendant's prior conviction to be admitted at trial. The circuit court denied the motion. On direct appeal, the issue of the circuit court allowing the introduction of the defendant's prior conviction was not addressed by the defendant's appellate counsel.

¶ 7 ANALYSIS

¶ 8 The Act provides a mechanism by which defendants may challenge their conviction or sentence for violation of the state or federal constitution. *People v. Barrow*, 195 Ill. 2d 506, 518-19 (2001). Postconviction proceedings may consist of as many as three stages.

*People v. Pendleton*, 223 Ill. 2d 458, 471-72 (2006). At the first stage, the circuit court has 90 days to examine the petition and to determine, without input from the State, whether it is frivolous and patently without merit. *People v. Gulley*, 383 Ill. App. 3d 727, 731 (2008) If the court finds that it is frivolous and patently without merit, it may summarily dismiss it. *Id.* To survive a first-stage dismissal, the defendant need only present the gist of a constitutional claim, which is a low threshold. *Id.* The circuit court must determine if the petition alleges a constitutional violation that is unrebutted by the record. *People v. Turner*, 2012 IL App (2d) 100819, ¶ 18. A meritless legal theory is one that is completely contradicted by the record. *People v. Hodges*, 234 Ill. 2d 1, 16 (2009). We review the summary dismissal at the first stage *de novo*. *People v. Little*, 335 Ill. App. 3d 1046, 1050 (2003).

¶ 9 The defendant claims that his appellate counsel was ineffective for failing to include the issue of his prior conviction in his direct appeal. To succeed on a claim of ineffective assistance, a defendant must show that his counsel's performance fell below an objective standard of reasonableness and that such performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 688 (1984); *People v. Albanese*, 104 Ill. 2d 504, 525 (1984). In a first-stage postconviction petition, a defendant need only show that it is *arguable* that his counsel's performance fell below an objective standard of reasonableness and that it is *arguable* that the defendant was prejudiced as a result. *Hodges*, 234 Ill. 2d at 17.

¶ 10 Here, we find that the defendant's ineffective assistance of appellate counsel claim is at least supported by the record and that it is arguable that his appellate counsel's failure to raise the issue was below an objective standard of reasonableness. Procedurally, the issue was preserved for appellate counsel to raise on appeal. The record shows that the defendant's trial counsel objected to the admission of the prior conviction at the time of trial and also raised the objection in a posttrial motion. Substantively, a prior conviction is not

admissible to impeach a defendant if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. *People v. Montgomery*, 47 Ill. 2d 510 (1971). In his petition, the defendant argued the principles found in *Montgomery*. Thus, an argument based on the circuit court allowing the defendant's prior conviction to be introduced has at least some legal basis, and it cannot be considered a meritless legal claim. We find that the defendant made the gist of a constitutional claim and should be afforded the opportunity to move forward to the second stage of the postconviction proceedings.

¶ 11

#### CONCLUSION

¶ 12 For the foregoing reasons, the judgment of the circuit court of Marion County is reversed and remanded.

¶ 13 Reversed and remanded.