

¶ 3

BACKGROUND

¶ 4 In 2008 the defendant and four others were arrested for the murder of Dorothy Dixon. The defendant was charged by indictment in nine counts. As part of a negotiated plea with the State, the defendant agreed to plead guilty to one count of first-degree murder and in exchange the State agreed to drop the remaining eight counts and to allow the defendant's daughter, who also was charged in the matter, to plead to second-degree murder.

¶ 5 At the plea hearing the State presented a factual basis which summarized the police investigation and interviews of the defendant and codefendants. Defense counsel stipulated to the State's factual basis for the plea. Pursuant to Supreme Court Rule 402(a) (eff. July 1, 1997), the circuit court admonished the defendant of her rights, accepted her plea, and ordered a presentence report. At the sentencing hearing, the circuit court sentenced the defendant to 45 years in the Illinois Department of Corrections.

¶ 6 Following sentencing, the defendant did not file a motion to withdraw her plea, nor did she file a direct appeal. On August 30, 2011, the defendant filed a *pro se* postconviction petition with a two-page handwritten addendum, along with motions to proceed *in forma pauperis* and for appointment of counsel. On November 3, 2011, the circuit court summarily dismissed the defendant's *pro se* petition as frivolous and patently without merit. The defendant now appeals the first-stage dismissal of her postconviction petition. For the following reasons, we reverse and remand for further proceedings.

¶ 7

ANALYSIS

¶ 8 The defendant made a number of allegations in her *pro se* postconviction petition including that she requested a lawyer during questioning by police officers, but they denied her request, and that her attorney was ineffective because he "did not raise issues regarding rights being violated." In addition, she also alleged that her attorney was ineffective because he failed to properly investigate her case.

¶ 9 On appeal, the defendant asserts that the circuit court erred in dismissing her *pro se* postconviction petition at the first stage of the proceeding. "A postconviction proceeding not involving the death penalty contains three distinct stages." *People v. Hodges*, 234 Ill. 2d 1, 10 (2009). At the first stage, the circuit court must independently review the petition, taking the allegations as true, and may summarily dismiss the petition upon a finding that it is frivolous or is patently without merit. *Id.*; 725 ILCS 5/122-2.1(a)(2) (West 2010). Review of a trial court's dismissal of a defendant's postconviction petition is *de novo*. *People v. Washington*, 348 Ill. App. 3d 231, 233 (2004).

¶ 10 Although the Act requires that the postconviction petition "clearly set forth the respects in which petitioner's constitutional rights were violated," a *pro se* defendant at the first stage is required only to make out a claim that is arguably constitutional for purposes of invoking the Act. *Hodges*, 234 Ill. 2d at 9; 725 ILCS 5/122-2 (West 2006). In *Hodges* the court recognized that because most postconviction petitions are drafted by defendants, the threshold for survival of a petitioner's claims is low and that only a gist of a constitutional claim is needed at the first stage. *Id.* To survive a first-stage dismissal, "a defendant need only present a limited amount of detail in the petition *** and need not make legal arguments or cite to legal authority." *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996). The petition can be summarily dismissed only if it has "no arguable basis either in law or in fact." *Hodges*, 234 Ill. 2d at 16.

¶ 11 Considering this lenient standard for pleading a *pro se* postconviction petition, we believe that the circuit court should not have summarily dismissed the defendant's petition at the first stage of the proceeding, but should have advanced the petition to the second stage of the postconviction proceeding.

¶ 12 The gist of the defendant's allegations in her petition is, in part, that her guilty plea was involuntary because her attorney did not raise issues concerning violations of her

Miranda rights before she pleaded guilty. Specifically, she alleged that police officers denied her request for an attorney during police interrogations and that her attorney was ineffective in failing to suppress her statements. The State argues that this issue was waived by the defendant when she abandoned her motion to suppress and pleaded guilty. Therefore, the State argues, the circuit court's first-stage dismissal was appropriate.

¶ 13 "Ordinarily, a defendant may not raise claims of the deprivation of constitutional rights that occurred prior to the entry of a guilty plea." *People v. Sharifpour*, 402 Ill. App. 3d 100, 115 (2010). "However, a defendant may attack the voluntary character of a plea by showing that it was based on ineffective assistance of counsel." *Id.* In other words, if an attorney's ineffectiveness influences the voluntary and intelligent character of the plea, a claim of ineffectiveness of counsel is not waived by the plea.

¶ 14 For example, in *People v. Mengedoht*, 91 Ill. App. 3d 239, 241 (1980), the defendant maintained that a confession and a guilty plea were involuntary and that his confession would have been suppressed but for the ineffective assistance of his attorney. Specifically, the defendant argued as follows: "that his attorney failed to disclose the fact that he (defendant) was twice denied an opportunity to phone his father during the course of interrogation and that this fact, had it been made known, would have justified suppression of the confession." *Id.* In addressing the issue of whether the defendant waived his claim of ineffectiveness of his counsel by pleading guilty, the court stated as follows: "Nor are we prepared to say that this issue has been waived by defendant's plea of guilty when there is an allegation that the denial of the motion to suppress influenced the voluntary and intelligent character of the plea." *Id.*

¶ 15 In the present case, the defendant's counsel filed a motion to suppress her statements that she made during police interrogations. The defendant alleged in her postconviction petition that her attorney was ineffective because he did not present the motion to suppress

before she pleaded guilty. As noted above, we must evaluate the defendant's postconviction petition under very lenient standards. It appears to us that the "gist" of the defendant's allegations, at least in part, includes an allegation that her attorney's failure to argue the motion to suppress was constitutionally ineffective and influenced the voluntary and intelligent character of her plea. The allegations in her postconviction petition that she requested an attorney and that the interrogating officers denied that request are facts outside the record. See *Mengedoht*, 91 Ill. App. 3d at 241 ("We agree with defendant that *res judicata* does not bar consideration of this issue as the facts upon which the claim is based were outside the record on direct appeal.").

¶ 16 "At the first stage of postconviction proceedings under the Act, a petition alleging ineffective assistance may not be summarily dismissed if (i) it is *arguable* that counsel's performance fell below an objective standard of reasonableness and (ii) it is *arguable* that the defendant was prejudiced." (Emphases added.) *Hodges*, 234 Ill. 2d at 17.

¶ 17 We cannot say that the defendant's *pro se* petition did not *arguably* allege that she was denied her fifth amendment right to counsel. *Miranda v. Arizona*, 384 U.S. 436, 444-45 (1966) ("If [the defendant] indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning."). We cannot say that the defendant's *pro se* motion did not *arguably* allege that her attorney's failure to present the motion to suppress based on her denial of her fifth amendment right to counsel affected the "voluntary and intelligent character of the plea." *Mengedoht*, 91 Ill. App. 3d at 241.

¶ 18 At the first stage of a postconviction proceeding it is not necessary that the defendant make a substantial showing of a constitutional violation as that is a second-stage inquiry. *People v. Edwards*, 197 Ill. 2d 239, 246-47 (2001). It is enough that a *pro se* defendant set forth a gist of a constitutional claim. *Hodges*, 234 Ill. 2d at 9. In the present case, we offer

no opinion on the merits of the defendant's claim under the fifth amendment's right to counsel, the allegations of ineffective assistance of counsel, or the voluntariness of her guilty plea. We hold only that, under the low threshold requirement in the first-stage evaluation of a *pro se* defendant's postconviction petition, the defendant in the present case adequately alleged the *gist* of a constitutional claim.

¶ 19 The State argues, alternatively, that the circuit court properly dismissed the defendant's postconviction petition because she failed to attach affidavits to the petition in support of her allegations. Section 122-2 of the Act requires that a postconviction petition have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached. 725 ILCS 5/122-2 (West 2010). The State relies on *People v. Collins*, 202 Ill. 2d 59, 66 (2002), for its contention that the defendant's failure to provide a section 122-2 affidavit is fatal and thus justifies the petition's summary dismissal.

¶ 20 In *Collins*, the only attachment to the defendant's *pro se* postconviction petition was a sworn verification stating he had read and understood the petition and that all of the facts presented therein were true and correct to the best of his recollection. *Collins*, 202 Ill. 2d at 62. The *Collins* court rejected the defendant's contention that his sworn verification could serve as a substitute for the section 122-2 requirements since the Act clearly distinguished between the sworn verification as required by section 122-1 and the necessity of attaching "affidavits, records, or other evidence" as required by section 122-2. *Collins*, 202 Ill. 2d at 66.

¶ 21 Here, in addition to the verification at issue in *Collins*, the defendant's petition also was accompanied by her two-page handwritten addendum to the petition and a certification under section 1-109 of the Code of Civil Procedure (735 ILCS 5/1-109 (West 2000)). In *People v. Rivera*, 342 Ill. App. 3d 547 (2003), the defendant, as in the instant case, filed a petition for postconviction relief along with a certification referencing section 1-109 of the

Code of Civil Procedure. The court in *Rivera* noted that section 1-109 provides, in pertinent part, that "[a]ny pleading, affidavit or other document certified in accordance with this Section may be used in the same manner and *with the same force and effect as though subscribed and sworn to under oath*" (emphasis added) (735 ILCS 5/1-109 (West 2000)). In distinguishing *Collins*, the *Rivera* court concluded that the section 1-109 "certification is at least the equivalent of an affidavit, unlike the verification contained in *Collins*." *Rivera*, 342 Ill. App. 3d at 550. We find the *Rivera* court's reasoning compelling and conclude that the defendant's two-page handwritten addendum, together with the signed section 1-109 certification, satisfies the section 122-2 affidavit requirement.

¶ 22

CONCLUSION

¶ 23 For the foregoing reasons, we reverse the circuit court's dismissal of the postconviction petition and remand to the circuit court for further proceedings under the Post-Conviction Hearing Act.

¶ 24 Reversed and remanded.