

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Winnebago County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 10-CF-744
)	
LEON SMITH,)	Honorable
)	Joseph G. McGraw,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Presiding Justice Burke and Justice McLaren concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court erred in summarily dismissing defendant's postconviction petition, as defendant stated the gist of a claim that he was denied the benefit of the bargain under which he admitted a probation violation: whereas he bargained for statutory eligibility for impact incarceration, the Department of Corrections arguably concluded erroneously that he was statutorily ineligible in light of his sentence.

¶ 2 Defendant, Leon Smith, was charged with aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(1) (West 2010)) and aggravated unlawful use of weapons (720 ILCS 5/24-1.6(a)(1), (a)(3)(A) (West 2010)), and he agreed to plead guilty to aggravated discharge of a firearm in exchange for 36 months of probation. As a term of his probation, defendant was required to

meet with his probation officer. When defendant failed to do so, the State petitioned to revoke his probation. Defendant admitted to violating the terms of his probation, in exchange for a seven-year prison sentence. That sentence, among other factors, made defendant statutorily eligible for impact incarceration (see generally 730 ILCS 5/5-8-1.1 (West 2010)). However, when defendant arrived at a facility of the Department of Corrections (DOC), he was told that his sentence disqualified him for impact incarceration. Defendant petitioned for postconviction relief. He argued primarily that his admission had been induced by his counsel's ineffectiveness, but he additionally suggested, with a citation to *People v. Whitfield*, 217 Ill. 2d 177 (2005), that he had relied on an unfulfilled promise by the State. The trial court summarily dismissed the petition, and this timely appeal followed. For the reasons that follow, we reverse and remand.

¶ 3 At the hearing on the petition to revoke defendant's probation, defendant agreed to admit to violating the terms of his probation, in exchange for a seven-year prison sentence. Defense counsel advised the court that "[defendant] is going to execute a consent to participate in the impact incarceration [program]," that defendant "would ask the Court to enter that recommendation," and that "[defendant] does understand that the final determination [of admission to the program] rests with the [DOC]." The court agreed to enter a recommendation. However, before doing so, the court verified that no promises were made to defendant to get him to admit to violating the terms of his probation and that defendant knowingly, freely, and voluntarily was entering his admission. Moreover, in sentencing defendant, the court questioned defendant about impact incarceration. That exchange proceeded as follows:

"THE COURT: Do you understand that the final determination of whether or not you are acceptable [for impact incarceration] rests with the [DOC]?"

[DEFENDANT]: Yes.

THE COURT: In other words, I cannot guarantee and [your attorney] cannot guarantee it. By the time you get down there the legislature could say there is no money for the impact incarceration program, it's canceled. They can say that you are not physically able to do it. They could have any reason or no reason why they don't let you into the program, and you would end up doing your seven years in the general population.

Do you understand?

[DEFENDANT]: Yes.”

¶ 4 After defendant was transferred to the DOC, he inquired about impact incarceration. More specifically, he submitted an “Offender Request” wherein he asserted that he “took [b]oot camp with 7 years,” but, “when [he] got to State ville [*sic*][,] they said [he] wasn't eligible for [b]oot camp.” Defendant asked, “[C]an you tell me why I was denied[?]” In a written response, DOC personnel explained that defendant did “not qualify because sentence [*sic*].”

¶ 5 Thereafter, defendant petitioned *pro se* for postconviction relief, arguing that his admission was constitutionally invalid. The trial court summarily dismissed the petition, finding it frivolous and patently without merit. This timely appeal followed.

¶ 6 At issue in this appeal is whether the summary dismissal of defendant's postconviction petition was proper. The Post-Conviction Hearing Act (Act) provides a method by which a criminal defendant may assert that his or her conviction was the result of “a substantial denial of his or her rights under the Constitution of the United States or of the State of Illinois or both.” 725 ILCS 5/122-1(a)(1) (West 2010); see *People v. Tate*, 2012 IL 112214, ¶ 8. The Act establishes three stages to the proceedings. *Tate*, 2012 IL 112214, ¶ 9. This appeal concerns the dismissal of a petition at the first stage.

¶ 7 At the first stage, the trial court considers, without input from the State, whether the petition is “frivolous or is patently without merit.” 725 ILCS 5/122-2.1(a)(2) (West 2010). In doing so, the court assesses whether the allegations in the petition, viewed liberally and taken as true, set forth a constitutional claim for relief. *People v. Hommerson*, 2014 IL 115638, ¶ 7. To survive dismissal at the first stage, the petition must present only “the gist of a constitutional claim.” *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996). This “gist standard” presents “a low threshold.” *Id.* To assert the gist of a constitutional claim, the petition “need only present a limited amount of detail,” does not need to set forth the claim in its entirety, and does not need to include legal arguments or citations to legal authority. *Id.* On appeal, we consider whether the petition has “no arguable basis either in law or in fact, *i.e.*, whether it was based on an indisputably meritless legal theory or a fanciful factual allegation.” *People v. Hodges*, 234 Ill. 2d 1, 17 (2009). We review *de novo* the summary dismissal of a petition. *People v. Brown*, 236 Ill. 2d 175, 184 (2010).

¶ 8 In his initial brief, defendant argued that his petition stated the gist of a claim that his admission was induced by his counsel’s ineffectiveness. However, we ordered the parties to submit supplemental briefs on the issue of whether the petition stated the gist of a claim that the admission was invalid because defendant did not receive the “benefit of the bargain he made with the State” (*Whitfield*, 217 Ill. 2d at 183). In his supplemental brief, defendant argues that his petition did state the gist of that claim. The State has filed a supplemental response brief, and defendant has replied.¹ We agree with defendant’s supplemental argument. We thus do not address his initial contention.

¹ We hereby deny the State’s motion to file a surreply.

¶ 9 In general, the rules for admissions to probation violations are the same as those for guilty pleas. *People v. Harris*, 392 Ill. App. 3d 503, 507-08 (2009). As the *Whitfield* court recognized, a defendant may constitutionally challenge his guilty plea by asserting that he did not receive the benefit of his plea bargain. *Whitfield*, 217 Ill. 2d at 183. In that case, the defendant pleaded guilty in exchange for a sentence of 25 years' imprisonment. After he entered the DOC, however, the defendant learned that, by operation of law, his sentence would also include three years of mandatory supervised release (MSR). The supreme court held that, in his postconviction petition, the defendant thus asserted a valid benefit-of-the-bargain claim: "Under these circumstances, we conclude that adding the statutorily required three-year MSR term to defendant's negotiated 25-year sentence amounts to a unilateral modification and breach of the plea agreement by the State, inconsistent with constitutional concerns of fundamental fairness." *Id.* at 190.

¶ 10 Here, defendant has alleged a similar breach. Defendant entered his admission in exchange for a sentence that would, along with other factors, make him statutorily eligible for impact incarceration. Indeed, the record demonstrates that defendant's statutory eligibility for impact incarceration was the precise benefit for which he bargained. However, though the DOC's response to his inquiry is not exactly a model of clarity, the DOC, at least arguably, concluded erroneously that his sentence made him statutorily *ineligible* for impact incarceration. See 730 ILCS 5/5-8-1.1(b)(4) (2010) (defendant can be statutorily eligible as long as he "has been sentenced to a term of imprisonment of 8 years or less"). Thus, at least arguably, defendant was denied the benefit of his bargain.

¶ 11 The State argues that, whereas in *Whitfield* the trial court did not advise the defendant of the MSR term, here the trial court advised defendant "that the final arbiter of his eligibility was

the Department of Corrections.” However, as defendant points out, the State conflates eligibility and acceptance. The legislature, not the DOC, was the arbiter of defendant’s eligibility; defendant had to meet certain statutory requirements “[i]n order to be eligible to participate in the impact incarceration program” (see 730 ILCS 5/5-8-1.1(b) (West 2010)), and defendant, by virtue of his bargain, met them all. The DOC, by contrast, was the arbiter only of his “acceptance in the program” (730 ILCS 5/5-8-1.1(a) (West 2010)). As the trial court advised him, the DOC could deem him not “acceptable” for various reasons. See 730 ILCS 5/5-8-1(b) (West 2010) (“The Department may also consider, among other matters, whether the committed person has any outstanding detainers or warrants, whether the committed person has a history of escaping or absconding, whether participating in the impact incarceration program may pose a risk to the safety or security of any person and whether space is available.”). However, the DOC could not deem him statutorily ineligible. As the State concedes, any such conclusion would be “incorrect.” But more importantly for our purposes here, it would deny him the “benefit of the bargain he made with the State” (*Whitfield*, 217 Ill. 2d at 183).

¶ 12 We hasten to add, however, that the record does not establish that the DOC *necessarily* deemed him statutorily ineligible. Indeed, the DOC’s response is cryptic and far from clear. Thus, we decline defendant’s request that we immediately give him “the opportunity to withdraw his admission, if he so desires.” *Cf. id.* at 202 (awarding the defendant relief where he had “established that his constitutional rights were substantially violated”). Instead, we simply reverse the first-stage dismissal of defendant’s petition and remand the cause for further proceedings under the Act. Those proceedings should determine whether the DOC indeed concluded that defendant was statutorily ineligible, and, if it did, the trial court should allow defendant to withdraw his admission to the petition to revoke probation.

¶ 13 The judgment of the circuit court of Winnebago County is reversed, and this cause is remanded for further proceedings.

¶ 14 Reversed and remanded.