

by information on October 20, 2006, with aggravated battery of a correctional officer after he allegedly struck David R. Downs, a correctional officer at Centralia, more than four months earlier on June 6, 2006. Initially, the matter was handled internally at Centralia prior to charges being filed against defendant. A disciplinary committee revoked defendant's good-time credit, but the Department's Administrative Review Board reinstated the two months of good-conduct credit because it was not convinced defendant struck Downs.

¶ 5 Prior to trial, defendant requested the disciplinary record and copies of grievances filed against Downs. The State alleged that it would object on relevancy grounds. The trial court pointed out that there is a difference between discoverability and admissibility and ordered the Department to turn over its records for *in camera* review. The Department submitted two documents in response to the order. The first was a memo dated June 14, 2004, from an Internal Affairs investigator to the warden, detailing grievances filed against Downs by inmates McCrady, Johnson, and Wardle and mentioning complaints against Downs by inmates Brown and Hutson. The memo concluded that Internal Affairs found no evidence of wrongdoing by Downs. The second document was one of the three grievances listed in the memo.

¶ 6 Numerous motions *in limine* were filed prior to trial, including a motion *in limine* seeking to bar any and all findings of grievance procedures involving Downs or defendant. The State sought to exclude both evidence of the Department's investigation of the events which led to the charge against defendant and evidence of other inmates' grievances against Downs. The trial court ruled that defense witnesses could not testify about incidents they had only heard about from others and did not actually involve them personally, but reserved ruling on whether defense witnesses could testify that on previous occasions they were involved in altercations with Downs. The trial court also determined that the defense could not present the findings of the disciplinary committee that it was not convinced that

defendant struck Downs.

¶ 7 The State filed a subsequent motion *in limine* seeking to bar evidence that Downs had been removed, transferred, or prohibited from entering the wing in which defendant was housed at Centralia. The State filed this because defense witnesses reported they heard Downs was transferred because of previous grievances. The trial court explained that if this were in fact true, the defense would be able to prove it through the testimony of a Department official, not through inmate hearsay. Defense counsel responded: "I don't expect that I am going to be able to present any evidence from the official channels saying that Officer Downs was not permitted there or reassigned. I have not been able to come up with that." The trial court ruled that defense witnesses could not testify that Downs had been transferred unless they had personal knowledge of such.

¶ 8 The trial court ruled that the documents turned over by the Department for *in camera* review were subject to discovery, but reserved ruling on the documents' admissibility. At trial, defense counsel did not attempt to introduce the documents, and none of the five inmates named in the Internal Affairs memo was called to testify.

¶ 9 Downs testified that on the day of the alleged incident he entered a day room where defendant was sitting when he noticed what he believed was a weapon lying on the table. The item, introduced as "State's Exhibit 1," turned out to be a permanent marker with a pencil protruding from the end. Downs testified he picked up the marker and explained to defendant that he was not allowed to have it because inmates are prohibited from having permanent markers. According to Downs, defendant tried to grab the marker and stood up and struck him in the chest twice using an open palm. Defendant then tried to punch him, but Downs grabbed defendant's left arm and held him until other correctional officers arrived. Another correctional officer, Rick Taphorn, testified that inmates are not allowed to possess either a permanent marker or any other item that has been altered from its original

state.

¶ 10 Defendant testified he was drawing a picture of another inmate's daughter at the time of the alleged incident. With regard to State's Exhibit 1, defendant explained that on the other end of the marker, opposite of the pencil, there was a tissue. This device allowed him to draw and then soften the look with the tissue. Defendant used the marker as a holder for the pencil because it was easier to hold as he drew. According to defendant, he picked up the marker when a hand reached over his right shoulder and grabbed the marker out of his hand. Defendant stood up and turned around and saw Downs holding the marker. Downs told defendant the item was contraband. Defendant asked Downs if he could have the pencil inside the marker, explaining that he purchased the pencil from the commissary and it was his property. Downs placed the marker in his back pocket and then grabbed defendant's arm and held defendant until other officers arrived.

¶ 11 Defendant denied striking Downs. Six other inmates who witnessed the incident corroborated defendant's version of events. All six maintained that defendant did not strike or swing at Downs.

¶ 12 A jury found defendant guilty, after which the trial court sentenced defendant to eight years in the Department of Corrections. Defendant filed a posttrial motion and a motion to reconsider sentence, both of which were denied by the trial court. Defendant's posttrial motion alleged that the Department's discovery disclosure was incomplete.

¶ 13 At a hearing on the posttrial motion, defendant testified that he believed the Department failed to disclose all of Downs's disciplinary and grievance records and that Downs had been transferred away from his wing. The State objected, pointing out there was no evidence in the record to confirm that Downs had been transferred. The State also asserted that after speaking with Lieutenant Taphorn at Centralia, it learned that the Department "does not file inmate grievances or keep records of them as they relate to the

individual officer who the inmate complains against." Defense counsel responded: "I will corroborate that, Your Honor. I did speak to Officer Taphorn and he did inform me of the same incident. They don't have any way of cross-referencing those right now with their bookkeeping." Ultimately, the trial court ruled that there was no evidence presented that the State failed to disclose disciplinary or corrective actions and denied defendant's posttrial motion.

¶ 14 Defendant filed a timely notice of appeal. The State Appellate Defender was appointed to represent defendant. However, pursuant to *Anders v. California*, 386 U.S. 738 (1967), the State Appellate Defender filed a motion requesting leave to withdraw on the basis that there was no merit to the appeal. Ultimately, this court granted the Appellate Defender's motion to withdraw as counsel on appeal and affirmed the judgment of the circuit court. *People v. Morris*, No. 5-07-0488 (2008) (unpublished order under Supreme Court Rule 23).

¶ 15 On June 16, 2009, defendant filed a *pro se* petition for relief under the Act in which defendant alleged that unnamed constitutional violations occurred at trial, along with a motion to proceed *in forma pauperis* and to appoint counsel. The trial court found the petition timely, but lacking a constitutional claim, and gave defendant 60 days to file an amended petition.

¶ 16 In the amended postconviction petition, defendant first alleged that the State took part in a vindictive prosecution of him after defendant grieved the good-time credit the disciplinary committee revoked, and the Department's Administrative Review Board reinstated the two months of good-conduct credit. Only thereafter did the State's Attorney charge defendant with aggravated battery of a correctional officer.

¶ 17 Second, defendant alleged that the State withheld information from him during prosecution, including three eyewitnesses to the incident who were not disclosed, Department regulations regarding the seizure of contraband and the use of force, and Officer Downs's

personnel files. Defendant further alleged that he was not allowed to present testimony and statements that Downs had a history of abusing his authority and bad behavior, even though the State was allowed to inquire about the prior convictions of defense witnesses and the State was allowed to see defense witnesses' files. Defendant insisted that if Downs's files had been produced and fully examined, then exculpatory evidence, namely complaints, grievances, infractions, and disciplinary actions against Downs, would have produced a different result at trial. Defendant alleged this nondisclosure denied him the most critical aspect of his defense and not only violated his due process rights but also denied him a fair trial.

¶ 18 Third, defendant alleged a violation of *Batson v. Kentucky*, 476 U.S. 79 (1986), because his jury was comprised totally of Caucasians. He also alleged that his trial counsel was ineffective for neither reading nor objecting to the State's out-of-date census data regarding the racial composition of Clinton County which was used by the State during arguments surrounding defendant's posttrial motion.

¶ 19 The original *pro se* petition and the amended petition contained several attachments, including defendant's signed affidavit in which he swore that all the facts presented in the petition were true and to the best of his recollection and the Adjustment Committee Final Summary Report. The report summarized the statements of three witnesses who testified before the committee, all of whom denied seeing defendant strike Downs in any manner.

¶ 20 On November 3, 2009, the circuit court summarily dismissed defendant's *pro se* petition as "patently frivolous and without merit." Defendant now appeals.

¶ 21

ANALYSIS

¶ 22 The issue raised in this appeal is whether the circuit court erred in summarily dismissing defendant's *pro se* petition for postconviction relief. According to defendant, his conviction hinged solely on the credibility of the witnesses, and he was prejudiced by the

State's failure to disclose Downs's disciplinary record and inmate grievances. Defendant insists his petition states the gist of a constitutional claim, and his claim must advance to the second stage. The State replies that defendant's claims are forfeited because they could have been raised on direct appeal, the petition does not contain new claims, the claims are frivolous and patently without merit, and the petition is not supported with sufficient affidavits or documentation. After careful consideration, we agree with defendant.

¶ 23 The Act provides a tool for those under criminal sentence to assert that their convictions were the result of a substantial denial of their rights under the United States Constitution or the Illinois Constitution or both. 725 ILCS 5/122-1(a) (West 2008); *People v. Coleman*, 183 Ill. 2d 366, 378-79, 701 N.E.2d 1063, 1070-71 (1998). The purpose of a postconviction proceeding is to allow inquiry into constitutional issues relating to the conviction or sentence that were not and could not have been determined on direct appeal. *People v. Barrow*, 195 Ill. 2d 506, 519, 749 N.E.2d 892, 901 (2001). Therefore, *res judicata* bars consideration of issues that were raised and decided on direct appeal, as well as issues that could have been presented on direct appeal, but were not. *Barrow*, 195 Ill. 2d at 519, 749 N.E.2d at 901.

¶ 24 At the first stage, the circuit court must independently review the petition within 90 days of its filing to determine whether "the petition is frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2008). A petition is frivolous or patently without merit only if it has no arguable basis in law or fact. *People v. Hodges*, 234 Ill. 2d 1, 16, 912 N.E.2d 1204, 1209 (2009). A petition lacks an arguable basis in law or fact if it is "based on an indisputably meritless legal theory," which is "completely contradicted by the record" or "a fanciful factual allegation," including "those which are fantastic or delusional." *Hodges*, 234 Ill. 2d at 16-17, 912 N.E.2d at 1212. At the first stage, the circuit court is not permitted to engage in any fact-finding or credibility determinations. Instead, all well-pleaded facts that

are not positively rebutted by the original trial record are taken as true. *Coleman*, 183 Ill. 2d at 385, 701 N.E.2d at 1071.

¶ 25 The "gist" standard is low. *People v. Edwards*, 197 Ill. 2d 239, 244, 757 N.E.2d 442, 445 (2001). To set forth the "gist" of a constitutional claim, the postconviction petition need only present a limited amount of detail and need not include any legal arguments or citations to legal authority. *Edwards*, 197 Ill. 2d at 244, 757 N.E.2d at 445. The reason the threshold is low is because most petitions drafted at this stage are done so by defendants with little knowledge or training. *People v. Delton*, 227 Ill. 2d 247, 254, 882 N.E.2d 516, 519 (2008). However, even though a *pro se* petition is not expected to set forth a complete and detailed factual recitation, it must set forth some facts which can be corroborated and are objective in nature or contain an explanation as to why those facts are absent. *Delton*, 227 Ill. 2d at 254,-55, 882 N.E.2d at 520. If the petition is not frivolous or patently without merit, then the petition advances to the second stage where counsel may be appointed to an indigent defendant (725 ILCS 5/122-4 (West 2008)) and where the State is allowed to file a motion to dismiss or an answer to the petition. 725 ILCS 5/122-5 (West 2008).

¶ 26 We agree with defendant's assertion that the State's alleged failure to disclose Downs's disciplinary record and inmate grievances filed against him presents precisely the type of claim that postconviction petitions are designed to address. We also agree with defendant that the issue was not waived. While the State asserts that defense counsel waived the issue by backing away from his demand for full disclosure and agreeing with the State that there was not a system in place to cross-reference complaints, the record indicates that defendant has properly raised an ineffective assistance of counsel claim against not only trial counsel but also appellate counsel.

¶ 27 Claims of ineffective assistance of counsel are resolved under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). The *Strickland* test also applies to claims

of ineffective assistance of appellate counsel. *People v. Rogers*, 197 Ill. 2d 216, 223, 756 N.E.2d 831, 835 (2001). In *Strickland*, the Supreme Court of the United States set forth a two-part test for evaluating whether a defendant has been denied the effective assistance of counsel in violation of the sixth amendment. Under *Strickland*, a defendant must demonstrate that counsel's performance was deficient and that such deficient performance substantially prejudiced defendant. *Strickland*, 466 U.S. at 687. In order to demonstrate that counsel's performance was deficient, a defendant must establish counsel's performance fell below an objective standard of reasonableness. *Edwards*, 195 Ill. 2d 142, 163, 745 N.E.2d 1212, 1223 (2001). In evaluating sufficient prejudice, the defendant must show that but for counsel's unprofessional errors, there is a reasonable probability that the result would have been different. *Strickland*, 466 U.S. at 693.

¶ 28 While the State maintains that Downs's disciplinary records simply do not exist, the record fails to support that assertion. The trial court ruled such records were discoverable, but withheld ruling on their admissibility. No such records were presented at trial. During the hearing on defendant's posttrial motion during which defendant asserted that he believed the Department failed to disclose all of Downs's disciplinary and grievance records, the State never asserted that the records did not exist—the prosecutor merely set forth that they could not find them. The State explained that it talked to Lieutenant Taphorn at Centralia and learned that the Department does not cross-reference or file inmate grievances in such a way that it would allow a list to be produced of such. Defense counsel corroborated that assertion. Our review of the record shows that it is void of any direct statement that disciplinary records or inmate grievances against Downs fail to exist. We also point out that defendant requested not only individual grievance records against Downs but also Downs's disciplinary records. The fact that the Department does not cross-reference grievances filed by inmates does not address the issue of whether any disciplinary records exist.

¶ 29 Moreover, while defendant was not allowed to present evidence that Downs had a history of abusing his authority, the State was allowed to delve into the prior convictions of the six inmates who testified for the defense, as well as examine their prison files. Defendant is adamant that Downs has a history of abusing his authority and engaging in bad behavior and that other inmates have reported such incidents. Defendant makes a plausible first-stage argument that the State's failure to produce such records violated his due process rights. Under these circumstances, we find that defendant's petition raises the gist of a constitutional claim of error.

¶ 30 Nevertheless, the State asserts that defendant cannot show prejudice because the jury was exposed to defendant's theory that Downs has a history of abusing his authority and engaging in bad behavior and rejected it. We disagree. Defendant was the only witness to discuss past incidents with Downs. Similar complaints by other inmates would certainly have bolstered the defense. The record here indicates that this was in no way a slam-dunk case for the prosecution. During deliberations, the jury sent a note requesting to see Downs's testimony and a videotape of the incident. After approximately 3½ hours of deliberations, the jury reported it was at an impasse. A verdict was not reached until after the jury received a *Prim* instruction and deliberations continued. See *People v. Prim*, 53 Ill. 2d 62, 289 N.E.2d 601 (1972).

¶ 31 Finally, as this court pointed out on direct review, "The outcome of the present case turned entirely on the credibility of the witnesses." *Morris*, No. 5-07-0488, order at 4. Under these circumstances, defendant was undoubtedly prejudiced if the allegations in his petition concerning the State's failure to fully disclose and his attorney's failure to demand Downs's disciplinary records and inmates' grievance records prove to be true. Not only would trial counsel be ineffective, but appellate counsel would also be ineffective for failing to raise the issue on appeal and instead asking to withdraw on the basis that there was no merit to an

appeal.

¶ 32 Accordingly, we reverse the order of the circuit court summarily dismissing defendant's petition for postconviction relief as frivolous and patently without merit and remand the cause to the circuit court with directions that defendant's request for the appointment of counsel be granted and the matter be advanced to the second stage of postconviction proceedings.

¶ 33 For the foregoing reasons, the order of the circuit court of Clinton County summarily dismissing defendant's petition for postconviction relief is reversed and the cause remanded for further proceedings consistent with this order.

¶ 34 Reversed and remanded with directions.