

No. 1-17-0569

**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  
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
	)	Cook County
Respondent-Appellee,	)	
	)	
v.	)	No. 04 CR 11244
	)	
JOHNATHAN PENA,	)	
	)	Honorable
Petitioner-Appellant.	)	Domenica A. Stephenson,
	)	Judge Presiding.

PRESIDING JUSTICE REYES delivered the judgment of the court.  
Justices Hall and Rochford concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* Reversing the judgment of the circuit court of Cook County dismissing petitioner’s postconviction petition at the first-stage where petitioner met the low threshold standard of asserting a gist of a constitutional claim.
- ¶ 2 Petitioner Johnathan Pena<sup>1</sup> appeals the first-stage dismissal of his postconviction petition

<sup>1</sup> We observe that defendant’s name appears as both “Johnathan” and “Jonathan” in the record. As he was indicted under the name “Johnathan” and the notice of appeal refers to him as “Johnathan” we do the same here.

filed pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2016)). On appeal, Pena contends that (1) his petition presented an arguable claim (a) of ineffective assistance of trial and appellate counsel based on trial counsel's failure to preserve issues related to the improper introduction of evidence, (b) that new evidence supported Pena's assertion that his arrest and subsequent statement were the result of coercion, or in the alternative, that trial counsel was ineffective for failing to cross examine certain police officers regarding prior instances of police misconduct, and (2) the circuit court erred in summarily dismissing the petition based on the unconstitutionality of the mandatory sentencing scheme. The State concedes that Pena's postconviction petition asserts the gist of a constitutional claim regarding potential police officer misconduct. We agree with the State and accordingly reverse the determination of the circuit court and remand for second-stage proceedings.

¶ 3

#### BACKGROUND

¶ 4 Pena's conviction arose from the April 2004 shooting death of Kevin Murphy. Following Pena's arrest, he was charged with two counts of first degree murder, one count of attempted first degree murder of Sergeant William Grassi, two counts of aggravated discharge of a firearm in the direction of Sergeant Grassi, two counts of unlawful use of a weapon by a felon, and eight counts of aggravated unlawful use of a weapon. The facts of the trial, including the suppression hearing, are set forth as they appear in *People v. Pena*, 2013 IL App (1st) 110869-U (unpublished pursuant to Supreme Court Rule 23).

¶ 5

#### Motion to Suppress Statements

¶ 6 Prior to trial, Pena filed a motion to suppress statements he provided to law enforcement officials while at Mount Sinai Hospital. Pena alleged: (1) he was not informed of his constitutional rights; (2) any of his statements were not knowing or voluntary because he was

emerging from anesthesia; (3) the statements were obtained after Pena elected to remain silent and consult with an attorney; and (4) the statements were produced by physical and mental coercion.

¶ 7 During the hearing on Pena's motion, then-ASA David Williams (Williams) testified that on April 19, 2004, he was assigned to the investigation of the Murphy shooting. ASA Williams proceeded to the Area 5 police station, where he conducted a 20-30 minute interview commencing at approximately 10 a.m. with Pena's codefendant, Nikolas Santos (Santos), in the presence of Chicago police detective Tracy Fanning (Fanning) and Detective Day (Day)<sup>2</sup>, youth investigator Charity Musial (Musial), and Santos's mother. ASA Williams also spoke to Santos for "a couple of minutes" at approximately 12:30 p.m., in part to notify Santos he was about to interview Pena and inquire whether Santos had any additional information about the shooting.

¶ 8 ASA Williams then proceeded to Mount Sinai Hospital to interview Pena. ASA Williams again met with Detective Fanning at the hospital. He and Detective Fanning requested permission to speak to Pena. ASA Williams subsequently introduced himself to Pena, noting he was a prosecutor, not Pena's lawyer. ASA Williams testified he advised Pena of his constitutional rights and Pena responded he understood and wished to waive those rights. ASA Williams spoke to Pena for 15-20 minutes. ASA Williams also testified he had no difficulty speaking to Pena due to Pena's medication. ASA Williams did not memorialize Pena's oral statement from this interview.

¶ 9 ASA Williams further testified Pena never indicated he had been beaten on the head by the police. On cross-examination, ASA Williams acknowledged he knew Pena had sustained a head injury and observed Pena wearing a head bandage at the hospital. ASA Williams did not

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<sup>2</sup> The record does not include Detective Day's first name.

inquire of Pena or anyone else about his injuries, treatment or medication. ASA Williams did not recall noticing any injuries to Pena's face, even after being presented with photographs of Pena with injuries to his temple and chin. ASA Williams testified that when he interviewed Pena he only noticed the left side of Pena's face and the injuries appeared to be to the right side of Pena's face.

¶ 10 Detective Fanning testified he was assigned to investigate the Murphy shooting at approximately 12:45 a.m. on April 19, 2004. Detective Fanning learned Santos was in custody regarding the shooting, and was present for the interviews of Santos occurring at 2:30 a.m., 6:10 a.m., 10 a.m. and 12:30 p.m.

¶ 11 Detective Fanning then proceeded to Mount Sinai Hospital at approximately 2 p.m. to interview Pena. Detective Fanning testified ASA Williams secured permission from hospital personnel to interview Pena. Detective Fanning's testimony regarding the ensuing interview was substantially similar to the testimony of ASA Williams.

¶ 12 Pena was released from the hospital on April 20, 2004, and transported to the police station located at Grand and Central Avenues. Detective Fanning advised Pena of his constitutional rights. Pena stated he wanted to be represented by counsel and provided a lawyer's business card to Detective Fanning, whereupon the interview terminated.

¶ 13 Chicago police sergeant William Grassi testified that on April 18, 2004, at approximately 11:30 p.m., he was conducting a narcotics investigation in the back yard of a building located on the 1300 block of North Campbell Avenue. Sergeant Grassi observed Pena and Santos run southbound through an alley between Artesian Avenue and Campbell Avenue. Sergeant Grassi testified he proceeded to the alley, when he heard gunfire from the vicinity of Artesian and Potomac Avenues. He immediately placed a radio call regarding the incident.

¶ 14 Several seconds later, Sergeant Grassi observed Pena and Santos re-enter the alley. According to Sergeant Grassi, Pena and Santos were both carrying firearms. Sergeant Grassi identified himself and ordered Pena and Santos to drop their weapons, whereupon Santos discharged his weapon at Sergeant Grassi once, while Pena fired three times. Sergeant Grassi returned fire.

¶ 15 Sergeant Grassi further testified he pursued Pena and Santos on foot for several blocks. Sergeant Grassi continued to follow Pena when Santos split to run in another direction. During his pursuit, Sergeant Grassi observed Pena fall down, immediately strike the ground, “bounce” upright, resume running and later trip over a park bench. When Pena subsequently dove over a chain-link fence, Sergeant Grassi was able to grab Pena’s waist or legs. The barbed wire on the fence, however, dug into Sergeant Grassi's arms. Fearing he would drop his handgun, Sergeant Grassi released Pena, who fell head-first into a play lot. According to Sergeant Grassi, Pena “popped up” and resumed running. Sergeant Grassi testified he was too exhausted to continue the pursuit, but Chicago police officer Dennis Lopez, who had joined the pursuit, climbed over the fence and continued chasing Pena. Officer Lopez and his partner, Will Labern, eventually placed Pena into custody.

¶ 16 Officer Labern testified that on April 18, 2004, at approximately 11:42 p.m., he assisted in the arrest of Pena at 1333 North Rockwell Avenue. Officer Labern had been involved in a narcotics investigation when he heard gunfire and received Sergeant Grassi’s radio call that the sergeant was pursuing an offender. Officer Labern drove to the vicinity provided in the report and observed Sergeant Grassi pursuing defendant. When Officers Labern and Lopez exited their vehicles, Pena turned down a dark gangway, heading westbound.<sup>3</sup> According to Officer Labern,

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<sup>3</sup> Officer Labern did not give a street location of this gangway.

Officer Lopez and Sergeant Grassi slowed down. Officer Labern initially indicated he slowed down because the gangway was dark, but subsequently testified he had exited his police vehicle, proceeded into the gangway then returned to the vehicle. Officer Labern testified he observed Pena strike his head on a brick overhang, but then spring right back up and continue fleeing. He did not observe Pena fall from a fence.

¶ 17 Officer Labern further testified he was behind Officer Lopez and Sergeant Grassi when he returned to his vehicle and drove to the alley while the other officers continued to pursue Pena. Officer Labern temporarily lost sight of Pena and the police officers. When Officer Labern arrived at the alley, he observed Pena enter the back yard of the building located at the 1300 North block of Rockwell Avenue. Officers Labern and Lopez discovered Pena crouched in a stairwell under the front porch at this address. Officer Labern placed Pena, who was bloody and dazed, into handcuffs. Officer Labern escorted Pena to the alley, where Pena proceeded to vomit. Officer Labern summoned an ambulance. Officer Labern denied beating Pena.

¶ 18 Dr. Phillip Zaret, a trauma surgeon who treated Pena at Mount Sinai Hospital in the early morning hours of April 19, 2004, testified for the defense. Dr. Zaret testified Pena had multiple lacerations and contusions of the scalp. Pena had an altered mental state and was confused. Pena had to be sedated in order to intubate him and conduct a battery of medical tests, which revealed no internal injuries or acute bleeding. Among the sedatives administered to Pena was morphine; the first dose was administered at 12:56 a.m. and the final dose was provided at 2:45 a.m. According to Dr. Zaret, Pena was extubated at 10:30 a.m. and discharged the following day. Pena was fully fluent upon his discharge from the hospital. Dr. Zaret did not recall police requesting permission to interview Pena. Dr. Zaret did not have an opinion regarding the cause of Pena's head injuries, but agreed Pena could have fallen on his head.

¶ 19 Pena testified on his own behalf. According to Pena, on April 18, 2004, he was walking up an alley when an individual carrying a handgun approached him. Pena did not recognize the individual as a police officer. Pena fled, and the other individual pursued him. Pena additionally testified that when he approached a gate he was struck on the side of his head.<sup>4</sup> Pena could not tell who or what struck him, although the object felt like a flashlight or weapon. Pena further testified he fell to the ground, was struck again, and lost consciousness. Pena denied running through a gangway and did not recall any overhang in a gangway. Pena asserted he awakened in the hospital with staples in his head and observed his attorney by his side.

¶ 20 Moreover, Pena testified that on April 20, 2004, he did not recall speaking to ASA Williams or Detective Fanning while in the hospital. Pena also denied providing any statement to them.

¶ 21 Over defense objection, Pena was questioned about the contents of his purported statements to ASA Williams and Detective Fanning. Pena denied stating Santos wanted to join the Campbell Boys street gang. Pena also denied stating Santos wanted to act “like a gang banger.” Pena further denied stating he retrieved a “gang gun” from a “stash spot” in the vicinity of Division Street and Marshfield Avenue. Pena additionally denied stating he carried the handgun at first, but Santos convinced him to provide the weapon to Santos. Moreover, Pena denied stating he and Santos walked up to an individual sitting on a porch who said “Cobra folk,” to which Pena replied, “Yeah, folk,” whereupon Santos shot the individual on the porch. Pena denied being notified of his constitutional rights on or prior to April 2004, although he was previously arrested as a juvenile and as an adult.

¶ 22 Detective Fanning testified in rebuttal he was present when ASA Williams questioned

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<sup>4</sup> Pena did not testify on which side of his head he was struck, but subsequently identified photographs showing injuries to the right side of his face.

Pena at the hospital. According to Detective Fanning, Pena was notified of his constitutional rights and provided the statements which Pena denied providing during his testimony. Detective Fanning further testified Pena had referred to the “stash gun” as a silver 9 mm pistol. Detective Fanning additionally testified Pena was communicative and did not appear to be suffering any effects from the medication.

¶ 23 The trial court denied Pena’s motion to suppress. The trial court stated the allegations of police brutality were serious and the credibility of the witnesses was very important in this case. Accepting the police testimony, the trial court found Pena did not suffer his injuries as a result of police brutality. The trial court also found Pena was properly notified of his constitutional rights and did not invoke his right to counsel until after he provided the statements to the police.

¶ 24 Trial

¶ 25 Pena and Santos were tried simultaneously by separate juries. Murphy’s mother, Sabina Smith (Smith), testified that on April 18, 2004, she observed Murphy at approximately 11:15 p.m. and he was alive and healthy. When Smith next observed Murphy, approximately 15 minutes later, Murphy had been shot. Murphy died from injuries sustained in the shooting.

¶ 26 Teresa Ward (Ward) testified that on the evening of the shooting, she was at her residence on the 1200 block of North Artesian Avenue in Chicago, Illinois. Ward had known Murphy for years. At approximately 11:30 p.m., she heard Murphy arguing with his girlfriend and went to her bedroom window to observe what was occurring outside. Ward noticed Santos and Pena approach Murphy after the girlfriend departed. Ward then moved to observe the scene from her daughter's bedroom window. Ward testified she had a clear view of all three individuals. Ward observed Pena produce a weapon and point it in the direction of Murphy. Santos then produced a silver handgun from his pocket and shot Murphy twice. After Murphy



collapsed to the ground, Santos and Pena ran from the scene into the alley. Ward telephoned the police, then ran downstairs to assist Murphy. Ward did not speak to police when they arrived, but she contacted the police the following day. Ward proceeded to the police station, where she identified Santos in a physical lineup and Pena from a photographic array.

¶ 27 Connie Cash (Cash), who lived on the 1300 block of North Maplewood Avenue on the night in question, testified she heard gunshots at approximately 11:35 p.m., and observed two men running, one of whom was carrying a handgun. Cash observed a third individual she assumed to be a police officer approach the other two from behind, shouting for them to “freeze.” Cash observed one of the first two individuals, wearing a white t-shirt, flee from the scene. Cash never identified the individuals she observed that evening.

¶ 28 Dr. Adrienne Segovia, a forensic pathologist, testified she performed Murphy’s autopsy. Dr. Segovia opined Murphy died as the result of multiple gunshot wounds and the manner of death was homicide.

¶ 29 Sergeant Grassi testified he had been assigned to Area 5 Gang Enforcement Unit 315 for the previous two years. Sergeant Grassi was previously a sergeant in the 14th District for a year, a sergeant in the 19th District for three years, and a patrolman/tactical officer in the 14th District for approximately five years. Based on this experience, Sergeant Grassi testified he was familiar with the gang activity and territory surrounding the 14th District.

¶ 30 Sergeant Grassi testified he was a tactical officer assigned to the 14th District on April 18, 2004. He and his partner were conducting a narcotics investigation, during which he concealed himself in a gangway at the 1300 block of North Campbell Avenue. At approximately 11:30 p.m., he observed Santos and Pena run southbound through the alley. Sergeant Grassi was curious because he was in Spanish Cobra gang territory, about one-half block from Maniac

Campbell Avenue Boys territory. Over defense objection Sergeant Grassi testified the rival gangs were at war at the time.

¶ 31 Santos and Pena had already exited the alley when Sergeant Grassi reached the alley. Sergeant Grassi continued in the same direction as Santos and Pena when he heard at least two gunshots coming from the direction of the corner of Artesian Avenue and Potomac Avenue. Sergeant Grassi was moving southward through the alley when Santos and Pena reentered the alley, running northward. According to Sergeant Grassi, Santos and Pena were carrying weapons. Sergeant Grassi announced he was a police officer and directed Santos and Pena to drop their weapons. Santos fired his handgun once at Sergeant Grassi; Pena fired at Sergeant Grassi three times. Sergeant Grassi returned fire, whereupon Santos and Pena turned around, and ran southward out of the alley, then turned westward on Potomac Avenue.

¶ 32 Sergeant Grassi testified he gave chase and radioed for police backup. According to Sergeant Grassi, Santos and Pena continued westward until they reached an alley between Campbell Avenue and Maplewood Avenue. Pena ran northward into the alley, while Santos continued westward on Potomac Avenue. Sergeant Grassi followed Pena and observed him throw a black object toward a garage at Maplewood Avenue and Potomac Avenue, but a police search conducted later failed to recover a weapon. Pena turned down a gangway at the 1300 block of Maplewood Avenue and ran northward on Maplewood Avenue, where Pena and Santos were reunited.

¶ 33 According to Sergeant Grassi, he was joined by two police officers on Maplewood Avenue, where Santos and Pena had crouched behind a parked, silver Pontiac Grand Am. Santos attempted to run eastward, but fell and was taken into custody. Pena then attempted to flee, again pointing a weapon at Sergeant Grassi. Pena ran into a dark, narrow gangway at the 1300

block of North Maplewood Avenue. As Sergeant Grassi was reaching for his flashlight, he observed Pena strike the ground, jump up and resume running. Sergeant Grassi testified he was required to duck under an approximately six-foot tall arch as he pursued Pena. Sergeant Grassi further recounted that as a result of Pena scaling the chain-link fence he was not able to capture Pena.

¶ 34 Officer Labern also testified to his participation in Pena's arrest, in a manner substantially similar to his pretrial testimony.

¶ 35 Robert Tovar (Tovar), a forensic investigator for the Chicago Police Department, recovered discharged 9mm and .45-caliber bullet cartridges from the route of the chase and recovered a 9 mm automatic pistol from under a gray Pontiac at the 1300 block of North Maplewood Avenue. In the alley between Maplewood and Rockwell Avenues, Tovar collected money, as well as a blood-stained t-shirt, pair of pants and shoes.

¶ 36 Illinois State Police forensic scientist Brian Mayland testified that the discharged 9mm cartridges, as well as a bullet taken from Murphy's body, were all fired by the automatic pistol recovered from under the gray Pontiac. The recovered .45-caliber cartridges were all fired by Sergeant Grassi's firearm.

¶ 37 Former Illinois State Police forensic scientist Anastasia Petruncio, who has examined thousands of latent fingerprints and testified as an expert on approximately 40 occasions, was qualified as an expert in fingerprint identification and analysis without objection. Petruncio explained fingerprints and latent fingerprints to the jury. According to Petruncio, she compares unknown fingerprints to a known fingerprint card by looking for points of identification, clarity and quality, and pattern type. Petruncio testified she examined the automatic pistol and magazine for fingerprints. Petruncio opined two latent fingerprints found on the surface of the

magazine matched the inked fingerprints of Pena, not Santos.

¶ 38 On cross-examination, Petruncio testified she believed fingerprint analysis is an exact science, although she also testified the answer depends on whom you ask. Petruncio also testified that if trained analysts employ the process of analysis, comparison, evaluation and verification, they will reach the same conclusion. Petruncio specified that verification is performed by an analyst of equal or greater training. Petruncio added this case was verified. Petruncio further testified there had never been a disagreement among analysts in her cases. The trial court sustained the State's objection to the question of whether analysts disagreed in other cases.

¶ 39 Petruncio acknowledged she looked for points of comparison as part of her analysis. Petruncio, however, indicated there was no set number of points of comparison when comparing an unknown impression to a known fingerprint card. Although Petruncio had found points of comparison in this case, she did not count them. The trial court sustained the State's objection to the question of whether there were more than 10 points of comparison in this case. Petruncio testified seven points of comparison were required to search an Illinois State Police database. The trial court sustained the State's objection to the question of whether there were more than seven points of comparison in this case.

¶ 40 The parties stipulated that if called as a witness, Abby Moeykens, an expert in the field of DNA analysis, would testify she received known blood standards from Murphy, Santos and Pena, as well as possible cellular material from a "doo rag," two stains from a tank top and a stain from a pair of shoes recovered by Officer Tovar. Moeykens would opine Pena's DNA was on the tank top and right shoe.

¶ 41 ASA Williams testified regarding his questioning of Pena at the hospital. ASA Williams

introduced himself and advised Pena of his constitutional rights, which Pena acknowledged and stated he understood.

¶ 42 ASA Williams also testified he inquired of Pena regarding the events of the evening of April 18, 2004. According to ASA Williams, Pena stated he was upset following a fight with his girlfriend. Pena proceeded to Campbell Avenue, where he met Santos. Pena was a member of the Campbell Street Boys street gang; Santos was younger and wanted to join the gang.

¶ 43 According to ASA Williams, Pena stated he and Santos decided to shoot a Cobra, referring to a member of a rival gang. They proceeded to a house at Division Street and Marshfield Avenue, where they obtained a loaded, silver 9 mm semiautomatic handgun. Pena and Santos then walked through alleys to the vicinity of Artesian and Potomac Avenues, “where there is a Cobra hangout.”

¶ 44 Pena stated to ASA Williams that after a few minutes, he and Santos observed an individual sitting on a porch, whom they believed to be a Cobra. Santos convinced Pena to provide him with the handgun. Pena and Santos approached the individual on the porch, who looked up and stated, “Cobra folk.” Pena replied, “Yeah, folk,” Santos then shot the individual “a couple of times.”

¶ 45 According to ASA Williams, Pena stated he and Santos then ran through an alley off Potomac Avenue. As they ran, they observed a police officer, who directed them to stop. Santos fired the weapon at the police officer, who returned fire. Pena and Santos then ran from the officer. As they ran Santos provided the handgun for Pena to conceal. ASA Williams further testified that Pena stated he was running away from the first police officer when he observed a second officer. This was the last thing Pena recalled about the incident. ASA Williams described Pena as “clear and conversant” during the 20-30 minute interview.

¶ 46 The State rested its case. Pena moved for a directed verdict. The trial judge denied the motion.

¶ 47 Dr. Zaret testified for the defense in a manner substantially similar to his testimony at the hearing on the motion to suppress. Dr. Zaret added it was possible Pena was coherent 12 hours after his final dose of morphine, but how meaningful the conversation might be varied from individual to individual.

¶ 48 Pena then rested and again moved for a directed verdict. The trial court again denied the motion.

¶ 49 Following closing arguments and jury instructions, the jury deliberated and found Pena guilty of first degree murder. Pena filed a posttrial motion for a new trial. The trial court denied the motion and proceeded to a sentencing hearing. Following a hearing of factors in aggravation and mitigation of the offense, the trial court sentenced Pena to 40 years imprisonment.

¶ 50 Pena appealed, claiming the trial court erred when it: (1) admitted and considered the substance of his statements to the ASA and detective during the hearing on his motion to suppress his statements; (2) improperly instructed the jury regarding his statements; (3) excluded testimony from a witness who purportedly overheard Pena make a statement; (4) admitted testimony regarding Pena's gang affiliation without the proper foundation; (5) admitted the testimony of a fingerprint expert without proper foundation and limited the cross-examination of that expert; and (6) allowed improper rebuttal argument from the State. We affirmed Pena's conviction in *Pena*, 2013 IL App (1st) 110869-U (unpublished pursuant to Supreme Court Rule 23) (leave to appeal denied Mar. 26, 2014).

¶ 51 Subsequently, on November 4, 2016, Pena, through counsel, filed a postconviction petition alleging (1) trial and appellate counsel were ineffective for failing to properly preserve

issues related to the improper introduction of the substance of his statement during the suppression hearing and whether the State provided a proper foundation for the admission of the fingerprint expert's testimony, (2) new evidence supported his claim that his statement was the result of police coercion and trial counsel was ineffective for failing to adequately investigate these allegations of police misconduct in preparing for the suppression hearing, and (3) the mandatory sentencing scheme in this case was unconstitutional as applied to him because he was only 18 years old at the time of the offense and will "be nearly 60 years old when he is finally released." Pena attached to his petition civil complaints from four cases wherein it was alleged that Officer Grassi engaged in excessive force and one case which alleged that Detective Fanning engaged in coercive behavior while questioning a defendant at the hospital. Pena maintained that, had these cases been available at the hearing on the motion to suppress, they could have been used to impeach Sergeant Grassi and Detective Fanning's testimony.

¶ 52 Thereafter, the circuit court issued a written order dismissing the petition as being frivolous or patently without merit at the first stage of the postconviction proceedings. Relevant to this appeal, the circuit court found that Pena's claim of newly discovered evidence was meritless. The circuit court explained that three of the four complaints against Sergeant Grassi were not "newly discovered" as they could have been discovered by counsel earlier through due diligence. The circuit court further explained that even if these cases could be considered newly discovered evidence, that such evidence is typically not of such a conclusive character as to justify postconviction relief. The circuit court also noted that these cases included unsubstantiated allegations that had not been proven in a court of law and, in some instances, were dismissed or otherwise resolved out of court. Finally, the circuit court observed that Pena failed to properly allege a police coercion claim under the factors set forth in *People v.*

*Patterson*, 192 Ill. 2d 93, 145 (2000)). This appeal followed.

¶ 53

ANALYSIS

¶ 54 The Act (725 ILCS 5/122-1 *et seq.* (West 2016)) provides that a petitioner may challenge his or her conviction or sentence for violations of federal or state constitutional rights. *People v. Pendleton*, 223 Ill. 2d 458, 471 (2006) (citing *People v. Whitfield*, 217 Ill. 2d 177, 183 (2005)).

To be entitled to postconviction relief, a petitioner bears the burden of establishing that a substantial deprivation of his constitutional rights occurred at his original trial. *People v. Waldrop*, 353 Ill. App. 3d 244, 249 (2004); 725 ILCS 5/122-1(a) (West 2016).

¶ 55 In noncapital cases, the Act provides for three stages. *Pendleton*, 223 Ill. 2d at 471-72. At the first stage, the trial court has 90 days to review a petition and may summarily dismiss it, if the trial court finds that the petition is frivolous and patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2016); *Pendleton*, 223 Ill. 2d at 472. If the petition survives initial review, the process moves to the second stage, where the trial court appoints counsel for the petitioner when a petitioner cannot afford counsel. 725 ILCS 5/122-4 (West 2016). Appointed counsel may make any amendments that are “necessary” to the petition previously filed by the *pro se* petitioner. *People v. Perkins*, 229 Ill. 2d 34, 42 (2007). After defense counsel has amended the petition, the State may file a motion to dismiss or an answer. 725 ILCS 5/122-5 (West 2016); *Pendleton*, 223 Ill. 2d at 472. If the State moves to dismiss, the trial court may hold a dismissal hearing, which is still part of the second-stage. *People v. Coleman*, 183 Ill. 2d 366, 380-81 (1998). If the petition makes a substantial showing of a claim, the matter proceeds to a third-stage evidentiary hearing. *People v. Edwards*, 197 Ill. 2d 239, 246 (2001).

¶ 56 On appeal, Pena maintains that the circuit court erred when it summarily dismissed his postconviction petition at the first stage of the proceedings and that the decision should be



reversed and the cause remanded for second-stage proceedings. Specifically, Pena asserts that (1) his petition presented an arguable claim (a) of ineffective assistance of trial and appellate counsel based on trial counsel's failure to preserve issues related to the improper introduction of evidence, (b) that new evidence supported Pena's assertion that his arrest and subsequent statement were the result of coercion, or in the alternative, that trial counsel was ineffective for failing to cross examine certain police officers regarding prior instances of police misconduct, and (2) the circuit court erred in summarily dismissing the petition based on the unconstitutionality of the mandatory sentencing scheme. For the reasons that follow, we conclude, and the State concedes, that Pena's claims relating to the newly discovered evidence of police coercion meets the low threshold required to survive the first-stage of the postconviction proceedings.

¶ 57 In the case at bar, Pena's petition was dismissed at the first stage as frivolous and patently without merit. Because this was a first-stage dismissal, the question before us is not whether Pena's petition made a substantial showing of a constitutional violation. "[T]hat is a second-stage inquiry." *Edwards*, 197 Ill. 2d at 246. Rather, the question we must address is whether Pena's petition was frivolous or patently without merit, *i.e.*, whether he presented the gist of a constitutional claim. *Id.* at 247. A petition may be dismissed as frivolous or patently without merit "only if the petition has no arguable basis either in law or in fact." *People v. Hodges*, 234 Ill. 2d 1, 16 (2009). A petition has no arguable basis in law when it is founded in "an indisputably meritless legal theory," for example, a legal theory that is completely belied by the record. *Id.* A petition has no arguable basis in fact when it is based on a "fanciful factual allegation," which includes allegations that are "fantastic or delusional" or contradicted by the record. *Id.* at 16-17; *People v. Morris*, 236 Ill. 2d 345, 354 (2010). At the first stage of the

process the allegations asserted in the petition are taken as true. *Hodges*, 234 Ill. 2d at 10. Our review of the circuit court's dismissal of Pena's postconviction petition is *de novo*. *Edwards*, 197 Ill. 2d at 247.

¶ 58 Here, Pena filed a motion to suppress the statements he made to ASA Williams and Detective Fanning, asserting those statements were involuntary. According to Pena in his motion to suppress, these statements were made as he emerged from anesthesia after being treated for being "beaten upon the head by members of the Chicago Police Department." During the suppression hearing, Pena testified that on April 18, 2004, he was walking up an alley when an individual carrying a handgun approached him. Pena did not recognize the individual as a police officer. Pena fled, and the other individual pursued him. Pena additionally testified that when he approached a gate he was struck on the side of his head. Pena could not observe who or what struck him, although the object felt like a flashlight or weapon. Pena further testified he fell to the ground, was struck again, and lost consciousness. Pena denied running through a gangway and did not recall any overhang in a gangway. Pena asserted he awakened in the hospital with staples in his head and observed his attorney by his side. He did not recall speaking to ASA Williams or Detective Fanning while in the hospital and denied providing any statement to them.

¶ 59 The record here reflects that Pena received medical attention immediately following his arrest for injuries he sustained directly prior or during his arrest. Pena asserted in his petition that these injuries were the result of police misconduct and resulted in his involuntary confession. The complaints attached to Pena's petition allege similar fact scenarios involving the same officer and detective who were involved in Pena's case, Sergeant Grassi and Detective Fanning. While the circuit court correctly observed that three of the four complaints against

Sergeant Grassi could have been discovered by trial counsel through due diligence, it does not follow that this petition warranted a first-stage dismissal.

¶ 60 Interpreting Pena's allegations liberally, as we must, we conclude that Pena's testimony at the suppression hearing along with his head injury and the evidence attached to the petition that others had complained of similar coercion from Sergeant Grassi and Detective Fanning (which support his contention that his statement was coerced), sufficiently raise a claim of newly discovered evidence to survive first-stage proceedings. See *People v. Reyes*, 369 Ill. App. 3d 1, 14 (2006).

¶ 61 Although Pena raises additional claims on appeal, the State does not address those claims in its brief. The parties, however, agree that because the petition sets forth a single claim which survives summary dismissal, the entire petition must be remanded for further proceedings. See *People v. Tate*, 2012 IL 112214, ¶ 10; *People v. Rivera*, 198 Ill. 2d 364, 374 (2001) (under the Act, partial summary dismissals are not permitted at the first-stage of postconviction proceedings). Accordingly, we decline to address Pena's remaining allegations.

¶ 62 CONCLUSION

¶ 63 For the reasons stated, we reverse the judgment of the circuit court of Cook County and remand the matter for second-stage proceedings.

¶ 64 Reversed and remanded.