



sentence. In response, the State moved to dismiss the motion on the basis of timeliness (see Ill. S. Ct. R. 604(d) (eff. Nov. 1, 2000)). In March 2005, following a hearing on the matter, the circuit court granted the State's motion to dismiss the defendant's motion to withdraw his guilty plea. In June 2005, the defendant's direct appeal from the circuit court's judgment was dismissed for a lack of jurisdiction.

In April 2006, the defendant filed a postconviction petition alleging, *inter alia*, that he had been coerced into pleading guilty. The circuit court subsequently dismissed the petition as frivolous and patently without merit, and the court's judgment was affirmed on appeal. *People v. Beck*, No. 5-06-0503 (2007) (unpublished order under Supreme Court Rule 23 (eff. July 1, 1994)).

On April 20, 2009, the defendant filed a *pro se* petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2008)). The petition alleged that the defendant's guilty plea had been involuntarily entered because he had not been admonished that his negotiated sentence included a three-year period of mandatory supervised release (see *People v. Whitfield*, 217 Ill. 2d 177 (2005)). On April 21, 2009, referring to the defendant's section 2-1401 petition as a petition for postconviction relief, the circuit court subsequently entered a written order summarily dismissing the petition. Noting that the record belied the defendant's claim that he had not been admonished that his negotiated sentence included a three-year period of mandatory supervised release, the circuit court determined that the petition was patently without merit. Before treating and dismissing the defendant's section 2-1401 petition as a postconviction petition, the circuit court did not admonish the defendant pursuant to *People v. Shellstrom*, 216 Ill. 2d 45 (2005), and *People v. Pearson*, 216 Ill. 2d 58 (2005). The present appeal followed.

#### ANALYSIS

At the outset, we note that the defendant does not contest the State's assessment that

his petition's underlying claim is wholly without merit. As the circuit court noted below, the record belies the defendant's contention that he was not admonished that his negotiated sentence included a three-year period of mandatory supervised release. Before accepting the defendant's plea of guilty, the circuit court thrice stated that the defendant's negotiated sentence would be followed by a three-year period of mandatory supervised release, and the defendant indicated that he understood that such was the case. Furthermore, even if the defendant had not been so advised, he would still be unable to seek relief from the judgment. The supreme court has held that "the new rule announced in *Whitfield* should only be applied prospectively to cases where the conviction was not finalized prior to December 20, 2005, the date *Whitfield* was announced" (*People v. Morris*, 236 Ill. 2d 345, 366 (2010)), and, here, the defendant's conviction was finalized in June 2005, seven months prior (see *People v. Santana*, 401 Ill. App. 3d 663, 667 (2010)). In any event, whether the defendant's claim is meritorious is not the central issue on appeal.

Maintaining that the error cannot be deemed harmless, the defendant argues that because the circuit court failed to admonish him pursuant to *Shellstrom* and *Pearson* prior to treating his section 2-1401 petition as a postconviction petition, the court's dismissal of his petition must be vacated and his cause remanded for further proceedings. The State counters, "Although the court used an incorrect procedure, the court's error was harmless because the result was correct, and the defendant suffered no prejudice." While we agree with the State's reasoning, we must nevertheless vacate the court's judgment and remand for further proceedings.

The Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2008)) sets forth a procedural mechanism through which a defendant can claim that "in the proceedings which resulted in his or her conviction there was 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 2008). The Act provides a three-stage process for the adjudication of postconviction petitions in noncapital cases. *People v. Boclair*, 202 Ill. 2d 89, 99 (2002). At the first stage, the circuit court independently assesses the defendant's petition, and if the court determines that the petition is "frivolous" or "patently without merit" the court can summarily dismiss it. 725 ILCS 5/122-2.1(a)(2) (West 2008). If a petition is not dismissed at the first stage, it advances to the second stage, where counsel can be appointed to represent the defendant, and the State can move to dismiss the defendant's petition. 725 ILCS 5/122-2.1(b), 122-4, 122-5 (West 2008). At the second stage, the circuit court determines whether the defendant has made a substantial showing of a constitutional violation, and if a substantial showing is made, the petition proceeds to the third stage for an evidentiary hearing; if no substantial showing is made, the petition is dismissed. *People v. Edwards*, 197 Ill. 2d 239, 245 (2001). Because the Act only contemplates the filing of one postconviction petition "without leave of the court," when filing a successive postconviction petition, a defendant must satisfy the Act's cause-and-prejudice test, *i.e.*, he or she must demonstrate "cause for his or her failure to bring the claim in his or her initial post[.]conviction proceedings" and resulting prejudice. 725 ILCS 5/122-1(f) (West 2008). "We review *de novo* the trial court's summary dismissal of a defendant's postconviction petition." *People v. Townsend*, 333 Ill. App. 3d 375, 376 (2002).

"Section 2-1401 establishes a comprehensive, statutory procedure that allows for the *vacatur* of a final judgment older than 30 days." *People v. Vincent*, 226 Ill. 2d 1, 7 (2007). "A section 2-1401 petition filed more than two years after the challenged judgment cannot be considered absent a clear showing that the person seeking relief was under a legal disability or duress or the grounds for relief were fraudulently concealed," but "[i]f the party opposing the section 2-1401 petition does not raise the limitations period as a defense, it may be waived." *People v. Pinkonsly*, 207 Ill. 2d 555, 562 (2003). "Although a section 2-1401

petition is usually characterized as a civil remedy, its remedial powers extend to criminal cases." *In re Detention of Morris*, 362 Ill. App. 3d 321, 323 (2005). "A section 2-1401 petition is the procedure in a criminal case by which to correct all errors of fact occurring in the prosecution of a cause, unknown to the petitioner and court at the time judgment was entered, which, if then known, would have prevented its rendition." *People v. Addison*, 371 Ill. App. 3d 941, 945 (2007). "To obtain relief under section 2-1401, the defendant 'must affirmatively set forth specific factual allegations supporting each of the following elements: (1) the existence of a meritorious defense or claim; (2) due diligence in presenting this defense or claim to the circuit court in the original action; and (3) due diligence in filing the section 2-1401 petition for relief.'" *Pinkonsly*, 207 Ill. 2d at 565 (quoting *Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 220-21 (1986)). "We review the dismissal of a section 2-1401 petition *de novo*." *People v. Laugharn*, 233 Ill. 2d 318, 322 (2009).

Although not obligated to do so, a circuit court can, in its discretion, recharacterize a *pro se* section 2-1401 petition for relief from judgment as a petition for postconviction relief. *People v. Stoffel*, 239 Ill. 2d 314, 324 (2010); *Shellstrom*, 216 Ill. 2d at 53 n.1; *Pearson*, 216 Ill. 2d at 66-67. Because the Act contemplates the filing of only one postconviction petition, however, and because the cause-and-prejudice test can be difficult to overcome, in *Shellstrom*, the supreme court announced the following:

"Pursuant to our supervisory authority, we hold that, in the future, when a circuit court is recharacterizing as a first postconviction petition a pleading that a *pro se* litigant has labeled as a different action cognizable under Illinois law, the circuit court must (1) notify the *pro se* litigant that the court intends to recharacterize the pleading, (2) warn the litigant that this recharacterization means that any subsequent postconviction petition will be subject to the restrictions on successive postconviction petitions, and (3) provide the litigant an opportunity to withdraw the pleading or to

amend it so that it contains all the claims appropriate to a postconviction petition that the litigant believes he or she has. If the court fails to do so, the pleading cannot be considered to have become a postconviction petition for purposes of applying to later pleadings the Act's restrictions on successive postconviction petitions." *Shellstrom*, 216 Ill. 2d at 55, 57.

In *Pearson*, the supreme court held that the "rationale in *Shellstrom*" was applicable where the circuit court recharacterized the defendant's section 2-1401 petition as a successive postconviction petition and "subjected the [recharacterized] petition to the rigorous standards of a successive postconviction petition without giving defendant notice and an opportunity to either withdraw the pleading or amend it to comply with the restrictions on a successive petition." *Pearson*, 216 Ill. 2d at 68. Accordingly, the supreme court remanded the cause with directions that the circuit court warn the defendant that "the recharacterization [of his section 2-1401 petition as a postconviction petition] means that the petition will be subject to the restrictions on successive postconviction petition" and provide him an opportunity to withdraw or amend the pleading accordingly. *Id.* at 69.

Here, the defendant suggests that *Pearson* is controlling. Citing *People v. Escobedo*, 377 Ill. App. 3d 82 (2007), wherein the appellate court held that a circuit court's failure to admonish a defendant that it was recharacterizing a *pro se* pleading as an initial postconviction petition is not subject to harmless error analysis (*id.* at 88; see also *People v. Hood*, 395 Ill. App. 3d 584, 585-88 (2009) (same); *People v. Caliendo*, 391 Ill. App. 3d 847, 849-53 (2009) (same)), the defendant further argues that his cause must be remanded so that he may be properly admonished and allowed to withdraw or amend his *pro se* pleading. Acknowledging that a defendant cannot file a successive postconviction petition without leave of court, the State concedes that where the *Shellstrom* admonishments have not been given, a circuit court's recharacterization of a *pro se* pleading as an initial postconviction

petition can never be harmless error. The State maintains that *Escobedo*, *Hood*, and *Caliendo* are distinguishable from the present case, however, because here, the defendant filed an initial postconviction petition in April 2006, so his present petition, if recharacterized as a postconviction petition, is a successive petition. The State further maintains that *Pearson* is also distinguishable from the present case because, here, the circuit court did not subject the defendant's recharacterized petition to the restrictions applicable to successive postconviction petitions before addressing the petition's merits. Accordingly, the State argues that the circuit court's failure to admonish him pursuant to *Shellstrom* and *Pearson* was harmless error under the circumstances. In support of its argument, the State cites the supreme court's decision in *People v. Stoffel*, 239 Ill. 2d 314 (2010), wherein it was held that the circuit court's failure to give the *Shellstrom* admonitions was inconsequential where the court did not summarily dismiss the defendant's petition and appointed counsel to represent him. *Id.* at 327-28. While we tend to agree with the State's reasoning, we cannot adopt it without ignoring the supreme court's opinion in *People v. Swamynathan*, 236 Ill. 2d 103 (2010).

In *Swamynathan*, the defendant filed an untimely motion to withdraw his guilty plea and vacate his sentence. *Id.* at 107-08. Thereafter, the circuit court indicated that it intended to recharacterize the defendant's motion as a postconviction petition, but the court did not admonish the defendant pursuant to *Shellstrom* until months after stating that it was going to recharacterize the motion. *Id.* at 108-10. When the defendant later argued that the circuit court had failed to summarily dismiss his petition within the 90-day time frame set forth in the Act, the supreme court held that a circuit court's stated intentions notwithstanding, "a pleading does not become a postconviction petition until the defendant is given the *Shellstrom* admonishments." *Id.* at 113. "It would follow, then, that the Act's 90-day rule could not apply to a recharacterized petition until the defendant was fully admonished under *Shellstrom* and recharacterization was fully completed." *Id.* The *Swamynathan* court

indicated that its holding was consistent with the rule that if a circuit court fails to admonish a defendant pursuant to *Shellstrom* and *Pearson*, a defendant's recharacterized *pro se* pleading " 'cannot be considered to have become a postconviction petition for purposes of applying to later pleadings the Act's restrictions on successive postconviction petitions.' " *Id.* at 112 (quoting *Shellstrom*, 216 Ill. 2d at 57). We note that in *Stoffel*, the supreme court seemingly recognized an exception to *Swamynathan*'s rule that a defendant's *pro se* pleading does not become a postconviction petition until the defendant has been properly admonished, but as previously indicated, that exception was recognized where the "defendant's *pro se* petition [was] not summarily dismissed but [was] instead advanced for further review, and counsel [was] appointed to represent the defendant." *Stoffel*, 239 Ill. 2d at 328. The *Stoffel* court held that under those circumstances, "*Shellstrom* admonitions are unnecessary," and a valid recharacterization thus occurs despite their absence. *Id.*

Here, although the circuit court intended to recharacterize the defendant's section 2-1401 petition as a postconviction petition, the court never admonished the defendant pursuant to *Shellstrom* and *Pearson*, nor did it advance the petition for further review or appoint counsel to represent the defendant. As a result, a recharacterization never technically occurred, and the defendant's petition did not become a cognizable postconviction petition. See *Swamynathan*, 236 Ill. 2d at 113; *cf. Stoffel*, 239 Ill. 2d at 328. The issue that remains, then, is whether the circuit court erred in dismissing the defendant's section 2-1401 petition.

In *Vincent*, the supreme court held that a circuit court may *sua sponte* dismiss a defendant's section 2-1401 petition where the underlying complaint, like here, has no chance of success, *i.e.*, where the complaint is "meritless" and "cannot be salvaged by amendment." *Vincent*, 226 Ill. 2d at 7. Because "proceedings under section 2-1401 are subject to the usual rules of civil practice" (*id.* at 8), however, the circuit court must adhere to those rules before its *sua sponte* dismissal can be deemed valid (*Laugharn*, 233 Ill. 2d at 323).

In *Laugharn*, the defendant filed a *pro se* section 2-1401 petition that "[s]even court days later," the circuit court *sua sponte* dismissed as untimely. *Laugharn*, 233 Ill. 2d at 323. On appeal to the supreme court, the defendant argued that the circuit court's dismissal of her petition on timeliness grounds was improper. *Id.* at 321. Without reaching the merits of her claim, the supreme court held as follows:

"The circuit court's *sua sponte* dismissal of defendant's petition before the conclusion of the usual 30-day period to answer or otherwise plead was premature and requires *vacatur* of the dismissal order. While *Vincent* allows for *sua sponte* dismissals of section 2-1401 petitions, it did not authorize such action prior to the expiration of the 30-day period. [Citation.] In *Vincent*, the State's failure to answer the petition within the time for doing so resulted in 'an admission of all well-pleaded facts,' which rendered the petition 'ripe for adjudication.' [Citation.]

Laugharn's petition, in contrast, was not 'ripe for adjudication.' Only seven days had passed since its filing." *Id.* at 323.

The supreme court therefore remanded the defendant's cause for further proceedings. *Id.* at 324.

Here, the circuit court *sua sponte* dismissed the defendant's section 2-1401 petition the day after it was filed. The petition was not yet "ripe for adjudication," however, and because the court "short-circuited the proceedings and deprived the State of the time it was entitled to answer or otherwise plead," we must vacate the court's judgment and remand the instant cause for further proceedings. *Laugharn*, 233 Ill. 2d at 323-24. We emphasize that the circuit court is in no way obligated to recharacterize the defendant's section 2-1401 petition as a postconviction petition, but if it does, the court must admonish the defendant pursuant to *Shellstrom* before recharacterization is complete. *Swamynathan*, 236 Ill. 2d at 113. We further note that if the defendant's petition is not recharacterized and the State does

not file a response to the petition within 30 days, "the trial court may decide the case on the pleadings, affidavits, exhibits and supporting material before it, including the record of the prior proceedings." *Vincent*, 226 Ill. 2d at 9.

#### CONCLUSION

For the foregoing reasons, we hereby vacate the circuit court's dismissal of the defendant's section 2-1401 petition and remand for further proceedings.

Vacated; cause remanded.