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*sponte* dismissal of his section 2-1401 petition was premature, and requests that this court vacate the dismissal and remand for further proceedings, or, alternatively, modify the judgment to reflect a dismissal "without prejudice." For the following reasons, we vacate the judgment of the circuit court of Cook County, and remand the matter for further proceedings.

¶ 3

### BACKGROUND

¶ 4 The relevant underlying facts pertaining to the defendant's conviction and sentence are reproduced as follows from this court's September 4, 2009 decision on direct appeal. See *People v. Matthews*, No. 1-07-2407 (2009) (unpublished order under Supreme Court Rule 23). In 2004, the defendant was charged with multiple counts of first-degree murder, attempted first-degree murder, aggravated discharge of a firearm, and unlawful use of a weapon by a felon in connection with the September 16, 2004 shooting death of Dushawn Shelby. Codefendant Dushawn Bradley (codefendant Bradley) was also charged with the victim's murder, attempted first-degree murder, and aggravated discharge of a weapon.

¶ 5 At the April 16, 2007 bench trial, Derrell Wilson (Derrell), who was also known as "Tony Wilson," testified that in September 2004, he routinely sold cocaine at the intersection of 87th and Sangamon Streets, and the defendant and codefendant Bradley sold cocaine nearby. Derrell's cousin, the victim, did not sell drugs, but would sometimes accompany Derrell while he did. A few days before the shooting, the defendant confronted Derrell and the victim, and warned them not to sell drugs at that location again. At about 5 p.m. on September 16, 2004, Derrell was selling drugs at the corner of 87th and Sangamon Streets while the victim was at a nearby candy store with an individual named Lornzo Dixon (Dixon). Derrell saw codefendant Bradley and someone he knew as "Nine-O" wearing gloves and carrying a bag, and assumed they were carrying guns. Derrell then went to the candy store, got the victim and Dixon, and

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walked to 87th and Morgan Streets, where they encountered codefendant Bradley and "Nine-O." Codefendant Bradley pulled a gun out of his pocket, after which the victim said that he had a gun, and Derrell fled while the victim ran behind him. As Derrell and the victim entered an alley, the defendant pulled up in a red two-door car, pointed a gun at them, and fired five or six shots. Derrell then ran into a nearby yard, noticed that the victim was no longer behind him, and returned to the alley where he saw the victim lying on the ground. He also noticed that the defendant was still in the same location as when he shot at them. On July 1, 2005, Derrell signed a letter in the presence of defense counsel, stating that he did not see the shooter's face or a red car. Derrell explained at trial that the facts contained in the letter were untrue, and that he signed it because "Nine-O" visited his house a number of times and offered him \$5,000.

¶ 6 Dixon testified that a few days before September 16, 2004, he witnessed the end of a fight which took place near the intersection of 87th and Morgan Streets. The fight involved the defendant, codefendant Bradley, the victim, and the victim's brother. Dixon observed the victim knock the defendant to the ground. Dixon further testified that at about 5 p.m. on September 16, 2004, he was at a candy store with the victim at 87th and Morgan Streets. After leaving the candy store, Dixon and the victim encountered Derrell, who informed them that he had just seen the defendant and codefendant Bradley carrying a black bag. Dixon then saw codefendant Bradley and "Nine-O" standing at a nearby street corner with gloves on and their hands in their back pockets. Dixon, the victim, and Derrell approached codefendant Bradley and "Nine-O," and Dixon saw codefendant Bradley put his hand on a gun that was in his pocket. The victim and Derrell then fled, while Dixon stayed behind. "Nine-O" then told codefendant Bradley to "call folks," and codefendant Bradley called someone on his cellular telephone and entered a car that was driven by the defendant. After the car left, Dixon heard eight or nine gunshots from the

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direction in which the victim and Derrell had fled, and observed codefendant Bradley running from that direction while holding his back pocket. Dixon then went to the area where he heard the gunshots and saw the victim lying on the ground.

¶ 7 Antonio Shelby (Antonio), the victim's brother, testified that a couple of days before the shooting, he was walking to the corner of 87th and Morgan Streets to meet his close friend, Dennis Durley (Durley), when the defendant and codefendant Bradley approached Durley. Codefendant Bradley began choking Durley, while the defendant rummaged through Durley's pockets and asked, "where's our [expletive] at?" Antonio believed that the defendant was accusing Durley of stealing some of his drugs. Durley then grabbed the defendant and a fight ensued. During the fight, the victim arrived and punched the defendant, who fell to the ground.

¶ 8 Desiree Shelby (Desiree), the victim's aunt, testified that at about 5 p.m. on September 16, 2004, she was at a store at 87th and Sangamon Streets when she saw the victim and Derrell run by the store. Shortly thereafter, she saw the defendant drive by in a reddish-colored car.

¶ 9 Chicago police detective Dan Stover (Detective Stover) testified that, during the course of police investigations, he obtained the cellular telephone records of the defendant and codefendant Bradley, which showed that the defendant had called codefendant Bradley about five minutes before and 40 minutes after the shooting. Detective Stover further testified that at about 1:05 a.m. on December 17, 2004, he and several officers arrived at a residence at 14522 South Lowe Avenue in Riverdale, Illinois. When they arrived at the location, the defendant was walking down the front steps with a number of people, including Latoya White (White). When the police officers attempted to apprehend the defendant, he ran back inside the house and hid in a basement utility closet. On cross-examination, Detective Stover stated that he interviewed Desiree multiple times after the shooting, and that her recollection of the events often changed in

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those interviews. He further stated that when he spoke with Desiree shortly after the shooting, she appeared to be under the influence of alcohol.

¶ 10 Bruce Thomas (Thomas) testified for the defense that he was not present at the shooting, and that he had never been associated with the nickname "Nine-O." White and Ladonna Duncan (Duncan) testified that at about 4:30 p.m. or 5 p.m. on September 16, 2004, the defendant drove to White's house in a gray car and played video games with White's boyfriend until they left at about 6 p.m. They further testified that the defendant received a number of calls on his cellular telephone during that time, but did not make any outgoing calls.

¶ 11 In rebuttal, the parties stipulated that, if recalled, Detective Stover would testify that on October 11, 2004, Thomas acknowledged that he had been known in the past as "Nine-O."

¶ 12 Following closing arguments, the court found the defendant guilty of first-degree murder and subsequently sentenced him to 50 years of imprisonment.

¶ 13 On direct appeal, the defendant argued that the trial court denied him a fair trial by improperly admitting other-crimes evidence of his involvement in drug activity. On September 4, 2009, this court affirmed the defendant's conviction and sentence on direct appeal. See *People v. Matthews*, No. 1-07-2407 (2009) (unpublished order under Supreme Court Rule 23). On November 25, 2009, a petition for leave to appeal was denied by our supreme court.

¶ 14 On April 23, 2010, the defendant filed a *pro se* postconviction petition under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2010)), alleging ineffective assistance of trial and appellate defense counsel, as well as insufficiency of the evidence in convicting him. On June 14, 2010, the circuit court summarily dismissed the *pro se* postconviction petition, finding the issues raised by the defendant to be frivolous and patently without merit. On June

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12, 2012, this court affirmed the circuit court's summary dismissal of the defendant's *pro se* postconviction petition. See *People v. Matthews*, 2012 IL App (1st) 102191-U.

¶ 15 On April 23, 2012, while the defendant's appeal from the circuit court's summary dismissal of his *pro se* postconviction petition was still pending, the defendant filed the instant section 2-1401 petition, alleging that he was denied a fair trial, where "Tony Wilson," who was also known as State witness Derrell, perjured himself at trial. Specifically, the section 2-1401 petition alleged that "Tony Wilson" could not have seen the defendant shoot the victim because he was at the scene of another shooting shortly thereafter. The section 2-1401 petition further alleged that the defendant was denied his right to confront his accuser, where the trial court prevented defense counsel from questioning "Tony Wilson" about his involvement in the subsequent shooting. Attached to the section 2-1401 petition was a document entitled "proof/certificate of service," stating that, on March 25, 2012, the defendant had placed copies of his section 2-1401 petition "with proper first-class postage attached thereto" in the prison mail system at Menard Correctional Center, to be mailed to the clerk of the circuit court of Cook County and the Cook County State's Attorney's Office "through the United States Postal Service." The copy of the section 2-1401 petition that was mailed to the clerk of the circuit court of Cook County bears a date stamp of "received April 11, 2012," and "filed April 23, 2012." Thereafter, the defendant's section 2-1401 petition was docketed.

¶ 16 On April 30, 2012, the defendant's case first appeared on the circuit court's call. On that day, April 30, 2012, the circuit court acknowledged the filing of the defendant's section 2-1401 petition and continued the case until May 21, 2012. The front page of the transcript of the April 30, 2012 proceedings indicates the presence of "Hon. Anita M. Alvarez, State's Attorney of Cook County" at the proceedings, without specifying the name of the assistant State's Attorney acting

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on behalf of State's Attorney Alvarez. On May 21, 2012, the circuit court noted that it was still in the process of reviewing the section 2-1401 petition, and continued the case to May 24, 2012.

¶ 17 On May 24, 2012, the circuit court, in the presence of assistant State's Attorney Kimellen Chamberlain (ASA Chamberlain),<sup>1</sup> dismissed the defendant's section 2-1401 petition. In its May 24, 2012 written order, the circuit court found that the section 2-1401 petition was untimely because it was filed more than two years after the statute of limitations period allowed by the Code, and that the delay was not excused by any legal grounds. The circuit court also found that, regardless of the untimeliness of the petition, the defendant failed to advance a meritorious claim which would entitle him to relief under section 2-1401 of the Code. Specifically, the court noted that the perjury claim alleged in the petition was a mere attempt by the defendant to "re-litigate the facts of his case." In dismissing the defendant's section 2-1401 petition, the circuit court also noted that the defendant failed "to bring any new evidence to light that was not known at the time of trial," and that his allegations "are merely bald and conclusionary [*sic*] statements that do not warrant relief under the [Code]."

¶ 18 On June 19, 2012, the defendant filed a timely notice of appeal.

¶ 19 ANALYSIS

¶ 20 The sole inquiry before us on appeal is whether the circuit court's *sua sponte* dismissal of the defendant's section 2-1401 petition was premature, which we review *de novo*. See *People v. Laugharn*, 233 Ill. 2d 318, 322 (2009).

¶ 21 The defendant argues that the circuit court's *sua sponte* dismissal of his section 2-1401 petition was premature, where the State was never properly served by him because service cannot be effectuated by "regular mail" under Illinois Supreme Court Rule 105. He contends

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<sup>1</sup> The defendant was not in court on this day.

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that, because the State was not properly served with notice of his section 2-1401 petition, and therefore the State's 30-day period to respond had not yet commenced, this court should remand the cause for further proceedings. He requests, in the alternative, that the circuit court's judgment be modified to reflect a dismissal "without prejudice" so that he may refile a section 2-1401 petition, should he choose to do so.

¶ 22 The State counters that the circuit court's *sua sponte* dismissal of the section 2-1401 petition was proper. Specifically, the State argues that because an assistant State's Attorney was present in court when the case was first called and thus had an opportunity to object to the improper service, the assistant State's Attorney's choice not to do so amounted to a waiver of any objection to the improper service. The State further contends that the section 2-1401 petition was properly dismissed because it was untimely filed more than two years after the defendant's conviction and sentence in 2007, none of the statutory exceptions applied to toll the time limitations period, and the petition's claims were insufficient to warrant relief as a matter of law. The State also asserts that the circuit court's dismissal was not premature, arguing that it could be presumed that the State received notice of the defendant's section 2-1401 petition around the same time the clerk of the circuit court of Cook County received notice, and thus, the 30-day period in which the State could have filed a response to the petition had already elapsed.

¶ 23 On May 24, 2012, the circuit court *sua sponte* dismissed the defendant's section 2-1401 petition, finding that it was untimely because it was filed more than two years after the statute of limitations period allowed by the Code, and further that the delay was not legally justified. The circuit court also found that, regardless of the untimeliness of the petition, the defendant failed to advance a meritorious claim which would entitle him to relief under section 2-1401 of the Code.

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¶ 24 Section 2-1401 of the Code sets forth a statutory procedure that allows relief from final judgments more than 30 days after their entry. 735 ILCS 5/2-1401 (West 2012). A section 2-1401 petition must be filed "in the same proceeding in which the order or judgment was entered but is not a continuation thereof," and must be "supported by affidavit or other appropriate showing as to matters not of record." 735 ILCS 5/2-1401(b) (West 2012). Further, the statute provides that section 2-1401 petitions must be filed "not later than 2 years after the entry of the order of judgment," unless the time limitation is tolled on the bases of legal disability, duress, or fraudulent concealment. 735 ILCS 5/2-1401(c) (West 2012). 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.'" *People v. Pinkonsly*, 207 Ill. 2d 555, 565 (2003) (quoting *Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 220-21 (1986)). "A meritorious defense under section 2-1401 involves errors of fact, not law." *Pinkonsly*, 207 Ill. 2d at 565. A section 2-1401 petition differs from a postconviction petition under the Post-Conviction Hearing Act. See 725 ILCS 5/122-2 *et seq.* (West 2012). While a postconviction petition "requires the court to decide whether the defendant's constitutional rights were violated at trial, a section 2-1401 petition, on the other hand, requires the court to determine whether facts exist that were unknown to the court at the time of trial and would have prevented entry of the judgment." *Pinkonsly*, 207 Ill. 2d at 566.

¶ 25 Supreme Court Rule 106 provides that notice for the filing of section 2-1401 petitions is governed by Supreme Court Rule 105. See Ill. S. Ct. R. 106 (eff. Aug. 1, 1985); R. 105 (eff. Jan. 1, 1989). Rule 105 states that notice may be served by either summons, certified or registered

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mail, or by publication. Ill. S. Ct. R. 105 (eff. Jan. 1, 1989). Once notice has been served, the responding party has 30 days to file an answer or otherwise appear. Ill. S. Ct. R. 105(a) (eff. Jan. 1, 1989). "The notice requirements of Rule 105 are designed to prevent a litigant from obtaining new or additional relief without first giving the defaulted party a renewed opportunity to appear and defend." *Albany Bank & Trust Co. v. Albany Bank & Trust Co.*, 142 Ill. App. 3d 390, 393 (1986). "The object of process is to notify a party of pending litigation in order to secure his appearance." *Professional Therapy Services, Inc. v. Signature Corp.*, 223 Ill. App. 3d 902, 910 (1992); see also *Public Taxi Service, Inc. v. Ayrton*, 15 Ill. App. 3d 706, 712 (1973). "In construing sufficiency of the notice, courts focus not on whether the notice is formally and technically correct, but whether the object and intent of the law were substantially attained thereby." (Internal quotation marks omitted.) *Professional Therapy Services, Inc.*, 223 Ill. App. 3d at 910-11.

¶ 26 Here, the "proof/certificate of service" attached to the section 2-1401 petition states that on March 25, 2012, the defendant placed copies of the petition "with proper first-class postage attached thereto" in the prison mail system, to be mailed to the clerk of the circuit court of Cook County and the Cook County State's Attorney's Office "through the United States Postal Service." The record shows that the copy of the section 2-1401 petition that was mailed to the clerk of the circuit court of Cook County bears a date stamp of "received April 11, 2012," and "filed April 23, 2012." However, the record is silent as to what date the State received a copy of the section 2-1401 petition that was sent by the defendant. We find that the defendant did not properly serve the State with notice of his section 2-1401 petition because he sent it by regular first-class mail, rather than by certified or registered mail, as required under the plain language of Rule 105. See *People v. Roberts*, 214 Ill. 2d 106, 116 (2005) (the rules of statutory construction

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also apply to interpretation of our supreme court rules); Ill. S. Ct. R. 105 (eff. Jan. 1, 1989). However, notwithstanding the defendant's improper service, we find that the State received *actual* notice of the defendant's filing of the section 2-1401 petition and forfeited any objections to improper service. We find this court's recent decision, *People v. Ocon*, 2014 IL App (1st) 120912, to be helpful.

¶ 27 In *Ocon*, in December 2011, the defendant filed a *pro se* section 2-1401 petition alleging that his sentences were unconstitutional. *Id.* ¶ 15. The defendant's proof of service to the petition stated that it was placed in the prison mail system on December 7, 2011, to the clerk of the circuit court of Cook County and the Cook County State's Attorney. *Id.* On January 10, 2012, the circuit court stated on the record that the defendant had filed a section 2-1401 petition, and continued the case until February 14, 2012. *Id.* ¶ 16. The January 10, 2012 report of proceedings indicates that an assistant State's Attorney was present in the courtroom at the time of those proceeding. *Id.* On February 14, 2012, the circuit court *sua sponte* dismissed the petition in a written order, finding that the section 2-1401 petition was not the proper vehicle to raise a constitutional challenge. *Id.* On appeal, the defendant argued that the circuit court's dismissal of his section 2-1401 was premature because he failed to properly serve the State with the petition where it was sent through regular mail. *Id.* In rejecting the defendant's arguments, the reviewing court found that, although it was unclear whether the defendant properly served the State with his section 2-1401 petition, the State had actual notice of the filing of the petition because an assistant State's Attorney was present for the defendant's case when the circuit court docketed the petition on January 10, 2012. *Id.* ¶ 31. Because the State received actual notice of the filing of the petition through the court appearance of an assistant State's Attorney on January 10, 2012, the purpose of service was achieved. *Id.* ¶ 35. The *Ocon* court further found that,

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because the State was present at the January 10, 2012 proceedings, but remained silent during those proceedings, any objection to the lack of proper service had been waived. *Id.* ¶ 31; but *cf.* *People v. Carter*, 2014 IL App (1st) 122613 (distinguishing *Ocon* and finding that, where there was no indication that anyone other than the judge and the court reporter was present in court when the section 2-1401 petition was docketed on June 5, 2012, there was nothing to indicate that the prosecutor had any knowledge of, and could thus knowingly waive, service of the petition).

¶ 28 Like *Ocon*, in the case at bar, the defendant's section 2-1401 petition was docketed in April 2012 and the case first appeared on the court's calendar on April 30, 2012. The front page of the transcript of the April 30, 2012 proceedings indicates the presence of "Hon. Anita M. Alvarez, State's Attorney of Cook County, Assistant State's Attorney, on behalf of the People." Although the name of the assistant State's Attorney acting on behalf of State's Attorney Alvarez was not specified on the cover page of the April 30, 2012 transcripts, such an omission does not detract from the fact that the State was listed as being present in the courtroom during the proceedings. Similar to *Ocon*, the State received actual notice of the filing of the section 2-1401 petition through the court appearance of an assistant State's Attorney on April 30, 2012; thus, the purpose of Rule 106 was satisfied and the object of the notice requirements was achieved. Also, like *Ocon*, because the assistant State's Attorney was present but raised no objections to improper service during the April 30, 2012 proceedings, any objections have been forfeited. Accordingly, we find that, because the State received actual notice of the filing of the section 2-1401 petition and forfeited any objections to improper service by the defendant, the defendant's argument that the circuit court's *sua sponte* dismissal was premature could not be sustained on this basis.

¶ 29 While the circuit court's dismissal of the section 2-1401 petition could not be considered premature on the basis of the defendant's improper service, we find, however, that the dismissal was premature on the ground that the 30-day period allotted for a response by the State had not yet passed at the time of the dismissal. Under Rule 105, once notice has been served, the responding party has 30 days to file a response. Ill. S. Ct. R. 105(a) (eff. Jan. 1, 1989). Unlike *Ocon*, in which the circuit court *sua sponte* dismissed the defendant's section 2-1401 petition on February 14, 2012, *after* the 30-day period allotted for a response had elapsed since the State received actual notice on January 10, 2012, we find that, in the instant case, the circuit court's *sua sponte* dismissal of the defendant's section 2-1401 petition occurred on May 24, 2012—only 24 days after the State had received actual notice of the filing of the section 2-1401 petition on April 30, 2012.

¶ 30 In *Laugharn*, the defendant filed a *pro se* section 2-1401 petition on August 24, 2004, alleging that certain evidence was withheld from the trial at which she was convicted of first-degree murder of her husband. *Laugharn*, 233 Ill. 2d at 320. On September 2, 2004, the circuit court *sua sponte* dismissed the petition as untimely because it was filed beyond the two-year limitation as required by statute. *Id.* at 321. The appellate court affirmed the dismissal. *Id.* On appeal, our supreme court vacated the judgments of the circuit and appellate courts, finding that the defendant's section 2-1401 petition was not "ripe for adjudication," where it was dismissed only seven court days after the filing of the petition and where the dismissal "short-circuited the proceedings and deprived the State of the time it was entitled to answer or otherwise plead." *Id.* at 323. The *Laugharn* court specifically noted that the circuit court's dismissal of the petition before the conclusion of the 30-day period to answer or otherwise plead was premature and required vacatur of the dismissal order. *Id.*

¶ 31 Likewise, in *People v. Gray*, 2011 IL App (1st) 091689, the defendant filed a section 2-1401 petition on February 6, 2009, alleging that his indictment and conviction were void because he had not been indicted within 30 days of his arrest as required by statute. *Gray*, 2011 IL App (1st) 091689, ¶ 8. On February 20, 2009, the circuit court dismissed the section 2-1401 petition, finding that the defendant failed to show that the judgment was void and should be vacated. *Id.* The transcript of the dismissal proceedings showed that an assistant State's Attorney was present, but did not speak, file a motion to dismiss, or raise any affirmative defenses to the defendant's petition. *Id.* On appeal, the reviewing court, citing *People v. Clemons*, 2011 IL App (1st) 102329, vacated the circuit court's dismissal order and found that the State was deprived of the time during which it was entitled to answer or otherwise plead and, thus, the section 2-1401 petition was not ripe for adjudication. *Id.* ¶¶ 21-22. The *Gray* court further noted that, while the State was present at the dismissal proceedings, its silence at the proceedings did not render the section 2-1401 petition ripe for adjudication and the subsequent *sua sponte* dismissal by the circuit court was premature. *Id.* The *Gray* court further noted that *Laugharn* and *Clemons* would not apply in a case where the State is present at the dismissal hearing and "expressly represents to the court its waiver of the 30-day time period and consents to a *sua sponte* decision on the merits." *Id.* ¶ 22.

¶ 32 Applying the principles of *Laugharn*, *Gray*, and *Clemons*, we find that the defendant's section 2-1401 petition in the case at bar was not ripe for adjudication, and the circuit court's *sua sponte* dismissal was premature. The record is clear that the defendant attempted to serve the State's Attorney with a copy of the section 2-1401 by depositing it in the prison mail system, along with a copy of the same to be mailed by regular first-class mail to the clerk of the circuit court of Cook County. As discussed, however, the defendant did not properly serve the State

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with notice of his section 2-1401 petition because he sent it by regular first-class mail, rather than by certified or registered mail, as required by Rule 105. Also, as discussed, the State forfeited any objections to improper service because it had received *actual notice* of the defendant's filing of the section 2-1401 petition through the court appearance of an assistant State's Attorney at the first court hearing on April 30, 2012, and the assistant State's Attorney did not raise any objections to the improper service during that hearing. We find that the circuit court's *sua sponte* dismissal of the defendant's section 2-1401 petition on May 24, 2012—only 24 days after the State had received actual notice on April 30, 2012—was premature. Like *Laugharn* and *Gray*, the circuit court's *sua sponte* dismissal of the petition before the expiration of the 30-day period in which the State may file a response, "short-circuited the proceedings" and deprived the State of its opportunity to answer or otherwise plead. Even assuming, *arguendo*, that the defendant had properly served the State by certified or registered mail, we cannot presume, without any evidence, what date the State had received notice of his section 2-1401 petition so as to trigger the 30-day period to commence prior to April 30, 2012. See Ill. S. Ct. R. 105(b) (eff. Jan. 1, 1989) (service by certified or registered mail "is not complete until the notice is *received* by the defendant"); see generally *Carter*, 2014 IL App (1st) 122613, ¶ 12 (a court may only properly *sua sponte* dismiss a section 2-1401 petition 30 days from the *date of service*). Further, the transcript of the May 24, 2012 dismissal proceedings show that ASA Chamberlain was present in the courtroom on behalf of the State, but raised no objection and remained silent other than to state her name on the record, we find that, under *Gray*, her silence did not render the defendant's section 2-1401 petition "ripe for adjudication." Certainly, there is no indication in the transcript of the May 24, 2012 dismissal proceedings that the State expressly waived the 30-day time period and consented to a *sua sponte* decision on the merits. See *Gray*, 2011 IL App

(1st) 091689, ¶ 22 (*Laugharn* and *Clemons* would not apply in a case where the State is present at the dismissal hearing and "expressly represents to the court its waiver of the 30-day time period and consents to a *sua sponte* decision on the merits"). Thus, we find that the defendant's section 2-1401 petition was not "ripe for adjudication."

¶ 33 Nonetheless, the State, citing certain case law, makes various arguments that the defendant's section 2-1401 petition was properly dismissed because it was untimely filed and its claims were meritless and insufficient to warrant relief as a matter of law. However, as our supreme court in *Laugharn* has explicitly stated, while a circuit court may *sua sponte* dismiss a section 2-1401 petition, such action was not authorized prior to the expiration of the 30-day period allotted for a response. *Laugharn*, 233 Ill. 2d at 323 (clarifying its holding in *People v. Vincent*, 226 Ill. 2d 1, 5 (2007) that a court's *sua sponte* dismissal of section 2-1401 petitions may not occur prior to the conclusion of the 30-day period allotted for a response, but that a petition is "ripe for adjudication" after the 30-day period has elapsed); see also *Ocon*, 2014 IL App (1st) 120912, ¶ 26 (reiterating the *Laugharn* court's clarification of its holding in *Vincent*). Therefore, because the 30-day period had not yet expired, and the State did not expressly waive the 30-day time period and consent to a *sua sponte* decision on the merits at the time the court dismissed the section 2-1401 petition, we find that the petition was not ripe for adjudication. Accordingly, we hold that the circuit court's May 24, 2012 *sua sponte* dismissal of the defendant's section 2-1401 petition was premature.

¶ 34 The State further argues, citing *People v. Nitz*, 2012 IL App (2d) 091165, that, should this court find the circuit court's dismissal order to be premature, this court should modify the circuit court's order to reflect a dismissal "without prejudice." The State contends that vacatur and remandment would unnecessarily consume judicial time and energy. We disagree. Modifying

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the circuit court's order to reflect a dismissal "without prejudice" would allow the defendant to refile a new section 2-1401 petition, which would necessarily restart the process for service and notice and thereby expending a fresh round of resources. Rather, we choose to vacate the circuit court's dismissal order and remand for further proceedings, so that the State may have the opportunity to respond to the section 2-1401 petition, the 30-day period may lapse without any response from the State, or the State may expressly waive the 30-day time period and consent to a *sua sponte* decision on the merits prior to the expiration of the 30-day period.

¶ 35 For the foregoing reasons, we vacate the judgment of the circuit court of Cook County, and remand the matter for further proceedings.

¶ 36 Vacated and remanded.