

to a 30-year term of imprisonment. Notably, the defendant did not pursue a direct appeal from that judgment.

¶ 5 In April 2007, 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 2006)). In response, the State filed a motion to dismiss the defendant's petition as untimely filed and improperly served. In August 2007, the defendant conceded the State's arguments and withdrew his 2-1401 petition. Advancing numerous ineffective-assistance-of-counsel claims, he also filed a *pro se* petition for postconviction relief pursuant to the Act. In his postconviction petition, the defendant asserted, *inter alia*, that although he had failed to file the petition within the Act's applicable time frame, he was not culpably negligent for its untimely filing. The defendant subsequently filed a motion for leave to supplement and file his late petition for postconviction relief, again asserting that he was not culpably negligent for its untimely filing.

¶ 6 In October 2007, the trial court entered a written order indicating that it was unable to determine whether the constitutional claims set forth in the defendant's postconviction petition were frivolous or patently without merit. The court therefore appointed counsel to represent the defendant and ordered the State to either answer the petition or move to dismiss it.

¶ 7 In November 2007, the State filed a motion to dismiss the defendant's postconviction petition as untimely filed. The State's motion referenced the defendant's concessions that his petition was not timely filed and argued that the defendant was culpably negligent for the delay. Appointed counsel subsequently filed a motion in response to the State's motion to dismiss, countering that for various reasons, the defendant was not culpably negligent for the late filing of his petition for postconviction relief.

¶ 8 In April 2008, the trial court held a hearing on the State's motion to dismiss the

defendant's postconviction petition as untimely filed. At the hearing, appointed counsel acknowledged that "in his own petition and as per his request," the defendant conceded that his postconviction petition was filed late. Counsel maintained that the defendant had alleged sufficient grounds to excuse his delay, however, and that under the circumstances, the State should "waive that procedural defect." In response, reiterating its position that the defendant had been culpably negligent with respect to the delayed filing of his petition, the State advised that it would not be waiving the Act's timeliness requirement.

¶ 9 In May 2008, the trial court entered a written order dismissing the defendant's postconviction petition as untimely filed and denying the defendant's request for leave to file the petition late. Stating, "The State's objection is well taken," the court noted that the defendant had failed to comply with the Act's requirement that his petition be filed within three years of "judgment." Rejecting the defendant's assertions that the delayed filing of his postconviction petition was not due to his own culpable negligence, the court further noted that months before seeking relief under the Act, the defendant "had the ability, and did, in fact" file a 2-1401 petition for relief from judgment. The Office of the State Appellate Defender was subsequently appointed as the defendant's counsel on appeal.

¶ 10 In February 2010, we affirmed the trial court's judgment dismissing the defendant's postconviction petition as untimely filed. *People v. Hedger*, No. 5-08-0262 (2010) (unpublished order under Supreme Court Rule 23). Noting, *inter alia*, that when he was resentenced in July 2004, the defendant had been correctly advised that he had three years to file a petition for postconviction relief pursuant to the Act, we concluded that he had failed to demonstrate that the delay in filing his petition was not the product of his culpable negligence. *Id.*

¶ 11 In April 2010, the defendant filed various *pro se* pleadings, including a successive petition for postconviction relief pursuant to the Act and a motion for leave to file the

petition. In his successive petition, the defendant did not challenge the trial court's finding that his initial petition had not been filed within the Act's limitations period, but he argued, *inter alia*, that appointed counsel had provided ineffective assistance for failing to amend the petition in a way that "would have allowed the State to consider forfeiting the procedural bar of untimeliness." As the defendant notes on appeal, the successive petition also raised "the same claims that were contained in the initial petition." Notably, the successive petition did not advance a claim of actual innocence.

¶ 12 In June 2010, the trial court entered a written order denying the defendant's request for leave to file his successive petition for postconviction relief. Referencing its previous order dismissing the defendant's initial petition as untimely filed, the court stated that the defendant's "own culpable negligence was the sole factor impeding his ability to previously raise the claims of error cited in his [successive petition]." Noting that appointed counsel had tried to "induce the State to waive any objection to the procedural defects of [the defendant's] first post[]conviction petition," the court further indicated that the outcome of the proceedings on the first petition was inevitable given the State's position on the timeliness issue. The court thus concluded that the defendant had failed to satisfy the Act's cause-and-prejudice test. In November 2010, after filing various *pro se* pleadings that the trial court struck or denied, the defendant filed a motion for leave to file a late appeal, which we subsequently granted.

¶ 13

DISCUSSION

¶ 14 Faulting his previous court-appointed attorneys for "erroneously" conceding the point, the defendant argues that the trial court erred in denying him leave to file his successive postconviction petition because its judgment was based on the erroneous belief that his initial petition was untimely filed. In response, the State maintains that the defendant's claim of error should not be considered because he raises it for the first time on appeal. The State

further maintains that the defendant's assertion that his initial petition was not untimely filed is contrary to well-established case law. We agree with the State.

¶ 15 The Act sets forth a procedural mechanism through which a defendant can assert 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 2010). 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 trial court independently assesses a 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 2010); *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). If a postconviction petition is not dismissed at the first stage, it advances to the second stage, where an indigent defendant can obtain appointed counsel and the State can move to dismiss the petition. 725 ILCS 5/122-2.1(b), 122-4, 122-5 (West 2010). If a petition is not dismissed at the second stage, it proceeds to the third stage for an evidentiary hearing. *Edwards*, 197 Ill. 2d at 245.

¶ 16 The Act generally limits a defendant to one postconviction petition. *People v. Holman*, 191 Ill. 2d 204, 210 (2000). "Successive postconviction petitions are disfavored under the Act and a defendant attempting to institute a successive postconviction proceeding, through the filing of a second or subsequent postconviction petition, must first obtain leave of court." *People v. Gillespie*, 407 Ill. App. 3d 113, 123 (2010). Moreover, "until such time as leave is granted, a successive petition, though received or accepted by the circuit clerk, will not be considered 'filed' for purposes of further proceedings under the Act." *People v. Tidwell*, 236 Ill. 2d 150, 158 (2010).

¶ 17 To obtain leave of court to file a successive petition for postconviction relief, a petitioner must either demonstrate "actual innocence" or satisfy the cause-and-prejudice test

codified in section 122-1(f) of the Act. *People v. Edwards*, 2012 IL 111711, ¶¶ 22-24. For purposes of the cause-and-prejudice test, "a prisoner shows cause by identifying an objective factor that impeded his or her ability to raise a specific claim during his or her initial post[] conviction proceedings," and "a prisoner shows prejudice by demonstrating that the claim not raised during his or her initial post[] conviction proceedings so infected the trial that the resulting conviction or sentence violated due process." 725 ILCS 5/122-1(f) (West 2010). The denial of leave to file a successive postconviction petition is reviewed *de novo*. *People v. McDonald*, 405 Ill. App. 3d 131, 135 (2010).

¶ 18 The parties essentially agree that the only question we must decide on appeal is whether the defendant's initial petition for postconviction relief was timely filed. As previously indicated, in addition to addressing the merits of the issue, the State also argues waiver, noting that the defendant raises his present claims for the first time on appeal.

¶ 19 "[A]s a general rule[,] arguments raised for the first time on appeal are deemed waived." *People v. Williams*, 267 Ill. App. 3d 82, 91 (1994). Under general principles of procedural default, a defendant also forfeits appellate review of any issue not raised in his petition for postconviction relief. *People v. Pendleton*, 223 Ill. 2d 458, 475 (2006). Additionally, "[a] party is estopped from taking a position on appeal that is inconsistent with a position the party took in the trial court" (*People v. Major-Flisk*, 398 Ill. App. 3d 491, 500 (2010)), and through appointed counsel and in his own pleadings, the defendant consistently conceded below that his initial postconviction petition was untimely filed. Given our previous determination that when the defendant was resentenced in July 2004, he had been correctly advised that he had three years to file a timely postconviction petition (*People v. Hedger*, No. 5-08-0262 (2010) (unpublished order under Supreme Court Rule 23)), the "law of the case" doctrine would seemingly apply to the defendant's argument as well. See *People v. Douglas*, 2011 IL App (1st) 093188, ¶ 33. In any event, these considerations aside, we

agree with the State that the defendant's argument is without merit.

¶ 20 "The Act's time limits are not a jurisdictional bar, but rather act as a statute of limitations that can be raised, waived, or forfeited by the State." *People v. Wallace*, 406 Ill. App. 3d 172, 174 (2010). "The applicable time limits for a postconviction petition are the ones that were in effect when the defendant filed the petition." *Id.*

¶ 21 Here, when the defendant filed his initial petition for postconviction relief in August 2007, the Act provided in pertinent part as follows:

"If a defendant does not file a direct appeal, the post[]conviction petition shall be filed no later than 3 years from the date of conviction, unless the petitioner alleges facts showing that the delay was not due to his or her culpable negligence." 725 ILCS 5/122-1(c) (West 2006).

The "date of conviction" in the context of the Act is the date that the final judgment, including sentence, was entered. *People v. Hager*, 202 Ill. 2d 143, 149 (2002).

¶ 22 Here, the defendant was resentenced on July 30, 2004, and at that time, his attorney "correctly informed him *** that he had until July 30, 2007, to file a petition under the Act." *People v. Hedger*, No. 5-08-0262, order at 6 (2010) (unpublished order under Supreme Court Rule 23). The defendant's initial postconviction petition was not mailed and deemed filed until August 8, 2007 (see *People v. Saunders*, 261 Ill. App. 3d 700, 703-04 (1994)), however, after the July 30, 2007, deadline. The defendant's initial petition was thus untimely filed under the Act and was properly dismissed as such. See 725 ILCS 5/122-1(c) (West 2006); *Hager*, 202 Ill. 2d at 149.

¶ 23 On appeal, noting that the trial court did not formally enter a written resentencing order until August 11, 2004, the defendant argues that he had three years from that date to timely file his initial petition for postconviction relief. It is well-established, however, that "[i]n a criminal case[,] the pronouncement of the sentence is the judicial act which comprises

the judgment of the court," and "[t]he entry of the judgment order is a ministerial act and is merely evidence of the sentence." *People v. Allen*, 71 Ill. 2d 378, 381 (1978); see also *People v. Williams*, 97 Ill. 2d 252, 310 (1983); *People v. Toolen*, 116 Ill. App. 3d 632, 643 (1983); *People v. Ervin*, 103 Ill. App. 3d 465, 469 (1982). We reject the defendant's invitation to revisit or modify this long-standing rule of criminal procedure, bearing in mind that the doctrine of *stare decisis* precludes us from disturbing well-settled points of law. *People v. Clemons*, 2012 IL 107821, ¶ 9.

¶ 24

CONCLUSION

¶ 25 For the foregoing reasons, we hereby affirm the trial court's judgment denying the defendant leave to file a successive petition for postconviction relief.

¶ 26 Affirmed.