

No. 1-11-3068

**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).

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	
	)	
LARRY MACK,	)	Honorable
	)	Lawrence E. Flood
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LAVIN delivered the judgment of the court.  
Justice Fitzgerald Smith concurred in the judgment.  
Justice Epstein dissented.

**ORDER**

- ¶ 1 *Held:* Defendant failed to demonstrate that his natural life sentence was void. In addition, the trial court did not err in characterizing defendant's "Motion for Leave to File Successive Petition For Post Conviction Relief" according to its title and contents.
- ¶ 2 This appeal arises from the denial of defendant Larry Mack's *pro se* "Motion for Leave to File Successive Petition For Post Conviction Relief" pursuant to section 122-1(f) of the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1(f) (West 2010)). On appeal, defendant asserts his natural life sentence is void and that the trial court erred in characterizing his pleading as a successive petition under the Act. We affirm.

¶ 3 I. BACKGROUND

- ¶ 4 We recite only those facts necessary to resolve the issues on appeal. Following a bench

trial before Judge John J. Crowley in 1981, defendant Larry Mack was found guilty of several counts for the first-degree murder of security guard Joseph Kolar. Pertinent to this appeal, one of those counts required the trial court to find beyond a reasonable doubt that defendant either "*intends* to kill or do great bodily harm to that individual or another, or *knows* that such acts will cause death to that individual or another." (Emphasis added.) Ill. Rev. Stat. 1979 ch. 38. Pars. 9-1(a)(1); *People v. Rodriguez*, 2012 IL App (1st) 072758-B, ¶ 42 (setting forth the beyond a reasonable doubt standard). Defendant was also convicted of two counts of armed robbery. Evidence adduced at trial generally showed that on November 23, 1979, defendant, then 24 years old, committed armed robbery of a bank with codefendants Alexander Peterson and Fletcher Turner.<sup>1</sup> During the armed robbery, defendant put his gun to Kolar's collar, Kolar raised his arm to push the gun away, and defendant shot him in the arm. Defendant then forced Kolar to the floor and fired the fatal shot into Kolar's chest.

¶ 5 Pursuant to a jury verdict following a bifurcated capital sentencing hearing, the trial court sentenced defendant to death for murder and imposed two concurrent 25-year prison terms for armed robbery. Following a direct appeal, only one count of murder remained for intentionally or knowingly killing Kolar (Ill. Rev. Stat. 1979 ch. 38. Pars. 9-1(a)(1)) and only one count of armed robbery remained. *People v. Mack*, 105 Ill. 2d 103 (1984) (*Mack I*). Numerous proceedings subsequently ensued in this case. *Mack v. Illinois*, 479 U.S. 1074 (1987); *People v. Mack*, 128 Ill. 2d 231 (1980), *cert. denied*, 493 U.S. 1093

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<sup>1</sup>Codefendants both entered open guilty pleas and received prison terms.

(1990) (*Mack II*); *People v. Mack*, 167 Ill. 2d 525 (1995) (*Mack III*); *People v. Mack*, 182 Ill. 2d 377 (1998) (*Mack IV*), *cert. denied*, 525 U.S. 1007 (1998).

¶ 6 Suffice it to say, defendant, through a postconviction petition filed under the Act, had his death sentence vacated and a new capital hearing commenced in October 2001. At this hearing before Judge James M. Schreier, defendant presented new evidence in an attempt to show the jury that he fired both shots accidentally and that only the first bullet actually struck Kolar. The jury's verdict stated that it could not unanimously find beyond a reasonable doubt that defendant was eligible for the death sentence. See Ill. Rev. Stat. 1979 ch. 38. Pars. 9-1(f) (requiring the State to prove an aggravating factor beyond a reasonable doubt in order for a death sentence to be imposed). Specifically, the jury could either not agree that "defendant was 18 years old or older at the time of the murder for which he was convicted in this case or we cannot find unanimously beyond a reasonable doubt that the statutory aggravating factor exists." As applied to this case, the relevant aggravating factor required a finding that defendant was the individual who actually killed the victim, that defendant had committed an armed robbery, and that "*the defendant killed the murdered individual intentionally or with the knowledge that the acts which caused the death created a strong probability of death or great bodily harm to the murdered individual or another.*" (Emphasis added.) Ill. Rev. Stat. 1979 ch. 38. Pars. 9-1(b)(6). After the jury was dismissed, it became the trial court's function to determine what sentence should be imposed pursuant to 1979 sentencing laws, which defendant had

chosen to govern resentencing.<sup>2</sup>

- ¶ 7 Meanwhile, the United States Supreme Court held as a matter of due process and a defendant's right to a trial by jury, that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” *Apprendi v. New Jersey*, 530 U.S. 466, 469, 490 (2000). In resentencing defendant, the trial court considered, among other things the evidence adduced both at trial and at the second capital hearing. The court assumed that *Apprendi* did not apply and imposed a natural life sentence, finding by a preponderance of the evidence that defendant killed Kolar with knowledge that his actions created a strong probability of death and that the murder was also accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty.
- ¶ 8 The appellate court subsequently found that an *Apprendi* violation occurred when the trial court found the crime was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty but that the error was harmless because evidence of this factor was overwhelming. The appellate court did not, however, consider Judge Schreier's finding that a life sentence was warranted because defendant killed Kolar knowing his actions created a strong probability of death. In addition, the appellate court did not consider Judge Crowley's original finding beyond a reasonable doubt that defendant intended to kill Kolar. *People v. Mack*, No. 1-02-0961 (2004) (unpublished

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<sup>2</sup>The standard sentencing range in 1979 was 20 to 40 years in prison (Ill. Rev. Stat. 1979, ch. 38, ¶ 1005-8-1(a)(1)), whereas the sentencing range in 2002 was 20 to 60 years in prison (730 ILCS 5/5-8-1(a)(1)(a) (West 2002)).

order under Supreme Court Rule 23) (*Mack V*).

- ¶ 9 Pursuant to defendant's petition for a writ of *habeas corpus*, the Seventh Circuit ultimately found that *Apprendi* was not violated because the finding that defendant intentionally and knowingly killed Kolar, which led to defendant's life sentence, did not require additional fact findings beyond the trial court's findings during the guilt phase in 1981 that defendant intentionally or knowingly killed Kolar. *Mack v. McCann*, 530 F.3d 523 (7th Cir. 2008) (*Mack VIII*); see also *Mack v. Battaglia*, 441 F. Supp. 2d 928 (N.D. Ill. 2006) (*Mack VII*); *Mack v. Battaglia*, 385 F. Supp. 2d 751 (N.D. Ill. 2005) (*Mack VI*).
- ¶ 10 Defendant then unsuccessfully moved to revive claims raised, but not ruled on, in his initial petition filed under the Act. The appellate court found the trial court improperly recharacterized the motion as a new petition under the Act but nonetheless found the claims raised therein had been abandoned. *People v. Mack*, No. 1-09-1369 (July 23, 2010) (unpublished order under Supreme Court Rule 23) (*Mack IX*).
- ¶ 11 Finally, defendant filed the instant *pro se* "Motion for Leave to File Successive Petition For Post Conviction Relief" pursuant to section 122-1(f) of the Act (725 ILCS 5/122-1(f) (West 2010)) on May 12, 2011. After reciting the procedural history of his case, defendant asserted claims of actual innocence and ineffective assistance of counsel. In September 2011, the trial court entered a written order denying "Petitioner Leave To File Successive Petition For Post-Conviction Relief." The court found that this was defendant's second petition for relief under the Act. Moreover, the court found that the petition failed to demonstrate cause and prejudice with respect to defendant's ineffective

assistance of counsel claim, as required to file a successive petition, and that defendant's actual innocence claim was frivolous and patently without merit.

¶ 12

## II. ANALYSIS

¶ 13 On appeal, defendant first asserts his life sentence is void because the trial court "ignored the jury's rejection of an aggravating factor and imposed a life sentence based on its own finding made by the preponderance of the evidence." The motion appealed from did not challenge defendant's sentence as void. See 725 ILCS 5/122-3 (West 2010) ("Any claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived"). In addition, the State contends that in light of defendant's prior *Apprendi* claims, defendant's assertion is barred by *res judicata*. Defendant contends, however, that his voidness claim, raised for the first time, overcomes any procedural hurdles. *People v. Rockman*, 2012 IL App (1st) 102729, ¶ 8 (a void judgment can be attacked at anytime). Notwithstanding defendant's contention, he has failed to demonstrate that the error alleged rendered his sentence void.

¶ 14 We consider *de novo* whether an order is void. *People v. Hubbard*, 2012 IL App (2d) 120060 ¶ 16. An order should be characterized as void only where there is no other possible alternative, as the consequences of collaterally attacking an order are disastrous. *J.S.A. v. M.H.*, 224 Ill. 2d 182, 211 (2007). In addition, a judgment is void only where the court entering the judgment lacked jurisdiction or exceeded its statutory authority. *People v. Holmes*, 405 Ill. App. 3d 179, 184 (2010). Moreover, constitutional errors do not render a judgment void. *People v. Gray*, 2013 IL App (1st) 112572, ¶ 10 (citing

*People v. Morfin*, 2012 IL App (1st) 103568, ¶ 31). Defendant apparently recognizes the latter principle, stating that "the issue is whether the circuit court acted beyond its statutory authority in sentencing Mack to life imprisonment, not whether the sentence violates the federal constitution under *Apprendi*." Notwithstanding this concession, defendant muddies the waters by arguing that his sentence violated *Apprendi* and by citing case law pertaining solely to constitutional issues rather than matters of voidness. See, e.g., *Alleyne v. United States*, 133 S. Ct. 2151, 2155 (2013) (finding that the sixth amendment requires a jury to determine beyond a reasonable doubt whether facts exist which increase a defendant's minimum sentence). Despite defendant's antithetical contentions, we decline to consider constitutional issues which have no bearing on defendant's contention that a lack of statutory authority rendered his natural life sentence *void*, rather than merely voidable.

¶ 15 Section 5-8-1(a)(1) of the Criminal Code of 1961 (the Code) governs a trial court's authority to enter a natural life sentence:

"[F]or murder a term shall be not less than 20 years and not more than 40 years, or, *if the court finds* that the murder was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty or that any of the aggravating factors listed in subsection (b) of Section 9-1 of the Criminal Code of 1961 are present, the court may sentence the defendant to a term of natural life imprisonment." (Emphasis added.)

Ill. Rev. Stat. 1979, ch. 38, ¶ 1005-8-1(a)(1). Although section 9-1(b) was incorporated into

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section 5-8-1(a)(i), that section generally governs the court's authority to sentence a defendant to death. In this case, the trial court found that the aggravating factor listed in section 9-1(b)(6) was present:

"A defendant who at the time of the commission of the offense has attained the age of 18 or more and who has been found guilty of murder may be sentenced to death if:

6. the murdered individual was killed in the course of another felony [and] if:

(a) the murdered individual was actually killed by the defendant and not by another party to the crime; and

(b) the defendant killed the murdered individual intentionally or with the knowledge that the acts which caused the death created a strong probability of death or great bodily harm to the murdered individual or another; and

(C) the other felony was one of the following: \*\*\* armed robbery."

Ill. Rev. Stat. 1979, ch. 38, ¶¶ 9-1(b)(6)(a),(b),(c).

¶ 16 Defendant challenges only the trial court's compliance with subsection (b)'s requirement that the defendant intended to kill the victim or knew that his actions created a strong probability of death or great bodily harm to the victim. The trial court, however, made findings satisfying subsection (b) both at the bench trial on defendant's guilt and at resentencing.

¶ 17 Following the bench trial, the court found beyond a reasonable doubt that defendant

intentionally or knowingly killed Kolar. Defendant's briefs completely disregard this finding, a finding which defeats many of the arguments raised on appeal. He appears to operate under the unsupported misapprehension that new evidence produced at the capital hearing retroactively nullified factual findings made at his bench trial. *Cf. People v. Bailey*, 2013 IL 113690, ¶ 64 (in determining the remedy for the trial court's failure to tender separate verdict forms as to guilt, the supreme court found that when a jury's verdict of acquits the defendant of intentional and knowing murder, the trial court is foreclosed from making its own determination of the defendant's mental state with respect to his eligibility for a death sentence).

¶ 18 Furthermore, at resentencing, the trial court found beyond a preponderance of the evidence that defendant knew a strong probability existed that his actions would cause Kolar's death. Defendant acknowledges this but argues that the court's findings were precluded in this instance because the jury's verdict in defendant's capital hearing stated that the jury could not unanimously find beyond a reasonable doubt that defendant was eligible for the death penalty. Even assuming, as defendant does, that the jury's verdict at the capital hearing was tantamount to a unanimous jury finding that defendant neither intended to kill Kolar nor acted with the knowledge that his acts created a strong probability of death or great bodily harm, defendant has not shown that this had any effect on the trial court's statutory authority to enter a life sentence under section 5-8-1. While the jury in this case would have been required to make the requisite finding in order to impose a death sentence, it does not follow that the jury's verdict in a capital case

removes the trial court's statutory authority to make findings and enter a life sentence under section 5-8-1. On the contrary, the statute expressly and unambiguously states that a natural sentence may be imposed "if the court finds," not if a jury finds, that certain facts are present. Moreover, we reiterate that even if the trial court had not made the requisite finding at the resentencing hearing, the trial court found at trial that defendant intentionally or knowingly killed Kolar. Accordingly, defendant's natural life sentence was authorized by statute in this instance and was not void.

- ¶ 19 The supreme court's recent decision in *Bailey* does not change the result. In *Bailey*, the supreme court found that "if a jury in a capital case has rendered a verdict *in the guilt phase* that contradicts a fact necessary for a finding of eligibility at the sentencing phase, a contradictory finding cannot be made (emphasis added)." *Bailey*, 2013 IL 113690, ¶ 55. More specifically, the supreme court stated that when the jury's verdict on guilt acquits the defendant of intentional and knowing murder, the trial court is foreclosed from making its own determination of the defendant's mental state with respect to his eligibility for a death sentence. *Id.* ¶ 64. The court further stated that "because defendant was not properly found eligible for the death penalty, he was not eligible for a sentence of natural life without parole under section 5-8-1(b)\*\*\*, which may be imposed when the court elects not to impose the death penalty on a death-eligible defendant." *Id.* ¶ 65.
- ¶ 20 Nowhere in *Bailey* did the supreme court state that the jury's acquittal of the defendant for intentional and knowing murder at the defendant's trial on guilt impacted the trial court's statutory authority to enter a life sentence, impacted the court's jurisdiction, or rendered

the judgment void. In addition, unlike *Bailey*, here, the guilt phase resulted in a finding of guilt for intentional and knowing murder. Accordingly, *Bailey* provides defendant no relief under these circumstances.

- ¶ 21 We are also unpersuaded by defendant's reliance on *People v. Swift*, 202 Ill. 2d 378 (2002). There, the supreme court observed that the standard sentencing range for first-degree murder that was in place at the time of the defendant's offense was 20 to 60 years in prison. *Id.* at 392. The court concluded for *Apprendi* purposes that "[a]lthough there is statutory authorization for higher sentences to be imposed for this crime, any sentence longer than 60 years requires additional factual findings." *Id.* As a result, *Apprendi* requires that any factual finding which places a sentence above the standard sentencing range must be proven to a jury beyond a reasonable doubt. *Id.*
- ¶ 22 Defendant contends that the holding in *Swift* was a matter of statutory construction and thus, his life sentence, which exceeds the standard sentencing range of 20 to 40 years under 1979 sentencing laws (Ill. Rev. Stat. 1979, ch. 38, ¶ 1005-8-1(a)(1)) or 20 to 60 years under 2002 laws (730 ILCS 5/5-8-1(a)(1)(a) (West 2002)), is void. In *Swift*, however, the supreme court recognized that a higher sentence was statutorily authorized. *Swift*, 202 Ill. 2d at 392. In addition, this court has previously rejected the assertion that *Swift* interpreted the sentencing statute for first-degree murder as incorporating the requirements of *Apprendi*. *People v. Smith*, 395 Ill. App. 3d 496, 499 (2009). More importantly, this court has rejected the assertion that *Swift* held the extended-term sentence there was void as a matter of statutory construction. *Rockman*, 2012 IL App

(1st) 102729, ¶¶ 30-31. We adhere to this well-reasoned precedent.

¶ 23 Similarly, defendant asserts his life sentence was unauthorized under 2002 sentencing laws, notwithstanding his election to be resentenced under the laws in effect in 1979. Pursuant to Public Act 91-953 (eff. Feb. 23, 2001), section 5-8-1 was amended to state that "*if a trier of fact finds beyond a reasonable doubt that the murder was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty or \*\*\* that any of the aggravating factors listed in subsection (b) of Section 9-1 of the Criminal Code of 1961 are present, the court may sentence the defendant to a term of natural life imprisonment.*" (Emphasis added.) 730 ILCS 5/5-8-1(a)(1)(b) (West 2002). Defendant contends that because that statute required a trier of fact to find the aggravating factor beyond a reasonable doubt, the trial court's finding under the preponderance of the evidence standard at resentencing rendered his life sentence unauthorized. We remind defendant, however, that even though the trial court specified the preponderance of the evidence standard at that time, neither that finding nor the jury's finding at the capital hearing invalidated the trial court's prior determination at defendant's bench trial that defendant, beyond a reasonable doubt, intended to kill Kolar. Accordingly, defendant has failed to demonstrate that the judgment was void.

¶ 24 Next, defendant asserts the trial court erred in characterizing his "Motion for Leave to File Successive Petition For Post Conviction Relief" according to its label because this

was the first petition filed by defendant following resentencing.<sup>3</sup> The State responds that defendant's pleading was nonetheless a successive petition because it was not directed solely at his new sentence, but, rather, the petition attacked the finding of guilt in his case. Regardless of whether the petition is successive or not, defendant is not entitled to relief.

¶ 25 We first find that any error was invited. A defendant may not request to proceed in one manner but subsequently assert on appeal that the course of action was improper. *People v. Harding*, 2012 IL App (2d) 101011, ¶ 17. To permit a defendant to use the exact action procured in the trial court as a vehicle for reversal would offend notions of fair play. *People v. Harvey*, 211 Ill. 2d 368, 385 (2004).

¶ 26 Here, as defendant acknowledges, he labeled the motion as one seeking leave to file a successive petition. Defendant also cited section 122-1(f) of the Act, which specifically applies to successive petitions. 725 ILCS 5/122-1(f) (West 2010) ("Only one petition may be filed \*\*\* without leave of the court."). In addition, defendant's pleading cited the cause and prejudice test that applies to successive petitions. *People v. LaPointe*, 227 Ill. 2d 39, 44 (2007); 725 ILCS 5/122-1(f) (West 2010). Furthermore, his pleading recited the rule that where a defendant sets forth an actual innocence claim in a successive postconviction petition, he will be excused from showing cause and prejudice (*People v. Ortiz*, 235 Ill. 2d 319, 330 (2009)) and proceeded to allege an actual innocence claim. Accordingly, the contents of defendant's pleading were entirely consistent with his

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<sup>3</sup> We note that defendant has developed no argument that leave to file a successive postconviction petition should have been granted should this court find that the trial court properly characterized defendant's pleading.

request to file a successive petition. Defendant nonetheless contends the trial court should have determined from the procedural history included in the pleading that it was required to be treated as an initial postconviction petition. Thus, defendant suggests the trial court was required to determine that defendant erred with regard to the pleading's label, citation to law, arguments and prayer for relief, but was entirely correct with regard to the case's procedural history. We are unpersuaded. In light of the aforementioned invitations from defendant and the complex history of this case, we find any error was invited and therefore, forfeited.

- ¶ 27 Even assuming the error were not forfeited, defendant must demonstrate that the trial court had a duty to recharacterize defendant's self-proclaimed motion for leave to file a successive petition as an initial petition filed under the Act. *People v. Stoffel*, 239 Ill. 2d 314, 324 (2010) ("It cannot be error for a trial court to fail to do something it is not required to do.") Defendant, however, has cited no cases setting forth such a duty. See ILCS S. Ct. 341(h)(7) (eff. Feb. 6, 2013). Instead, defendant suggests the trial court should have overlooked his mischaracterization of his pleading due to his status as a *pro se* litigant. We find the supreme court's decision in *People v. Shellstrom*, 216 Ill. 2d 45 (2005), to be instructive.
- ¶ 28 In *Shellstrom*, the supreme court stated that "trial courts need not recharacterize a *pro se* pleading as a post-conviction petition," relying in part on section 122-1(d) of the Act (725 ILCS 5/122-1(d) (West 2002)). *Shellstrom*, 216 Ill. 2d at 53 fn. 1, 57. That section similarly states that the trial court is not required consider whether a petition states

grounds for relief under the Act unless the pleading specifies that it is being filed under section 122-1. 725 ILCS 5/122-1(d) (West 2010). In addition, the supreme court made the aforementioned finding despite its recognition that "recharacterization avoids the possible harshness of holding a *pro se* litigant to the letter of whatever label he happens to affix to his pleading, even when his claims are such that they could more appropriately be dealt with under a different heading." *Shellstrom*, 216 Ill. 2d at 52. Although section 122-1(d) does not apply here because the trial court clearly recognized defendant's pleading as having been filed under the Act, *Shellstrom* demonstrates that a defendant's *pro se* status does not itself impose any duty on the trial court to recharacterize a defendant's petition. See also *People v. Stevenson*, 2011 IL App (1st) 093413, ¶ 39 ("A *pro se* defendant must comply with the rules of procedure required of those represented by counsel, and a court should not apply more lenient standards to a *pro se* defendant."). As a result, the trial court did not err by failing to recharacterize a motion that the court had no duty to recharacterize.

¶ 29

### III. CONCLUSION

¶ 30 For the foregoing reasons, defendant failed to demonstrate that his natural life sentence was void. In addition, defendant failed to demonstrate that the trial court was obligated to recharacterize his motion for leave to file a successive postconviction. Accordingly, we affirm the trial court's judgment.

¶ 31 Affirmed.

¶ 32 Justice Epstein dissenting.

- ¶ 33 I agree with the majority that the circuit court properly sentenced defendant to natural life imprisonment. However, I believe that the court failed to rule on defendant's initial post-conviction petition within 90 days. I would therefore reverse the circuit court's judgment and remand this cause for second-stage proceedings.
- ¶ 34 Defendant argues that the circuit court failed to dismiss his mislabeled *pro se* post-conviction petition within 90 days. This issue turns on whether his pleading was an initial or successive petition. In this case, the Illinois Supreme Court vacated defendant's death sentence and remanded for a new sentencing hearing. See *People v. Mack*, 167 Ill. 2d 525 (1995). Defendant was resentenced in October of 2001 and, on May 12, 2011, he filed a motion requesting leave to file a successive petition, which the circuit court denied on September 1, 2011.
- ¶ 35 Defendant's May 12, 2011, petition was an initial post-conviction petition. Where a criminal defendant's case is remanded for resentencing, the Act's limitations periods do not run until after the defendant is resentenced. *People v. Hager*, 202 Ill. 2d 143, 149-50 (2002). Because this was the first post-conviction petition defendant had filed since his resentencing, it was an initial petition, and leave of court was not required prior to filing. See *People v. Inman*, 407 Ill. App. 3d 1156, 1162 (2011) (leave to file not required, where petition was the first filed since defendant's resentencing). Accordingly, the circuit court erred in denying leave to file and in failing to rule on his petition within 90 days. See *People v. Carter*, 383 Ill. App. 3d 795, 797-99 (2008) (remanding for second-stage proceedings, where circuit court erred in applying successive post-conviction standards to

an initial petition); *People v. Little*, 2012 IL App (5th) 100547, ¶¶ 21-25 (same).

¶ 36 Nor do I believe that the pleading's title—"Motion for Leave to File Successive Petition For Post Conviction Relief"—or its citation to section 122-1(f) of the Act rendered it a successive petition. A petition is either the first filed, or it is not. See *People v. Tidwell*, 236 Ill. 2d 150, 153 (2010) (petition successive, because it was the second filed); *People v. Spears*, 371 Ill. App. 3d 1000 (2007) (petition successive even though not labeled as such). Defendant's petition was the first filed since his resentencing. Neither defendant nor the court had the power to transform his pleading into a successive petition.