

**SUPREME COURT OF ARKANSAS**

No. CR 10-1288

MARCUS LEWIS  
Appellant

v.

STATE OF ARKANSAS  
Appellee

**Opinion Delivered** April 21, 2011

PRO SE MOTION TO FILE BELATED  
REPLY BRIEF [FAULKNER COUNTY  
CIRCUIT COURT, CR 97-304, HON.  
CHARLES E. CLAWSON, JUDGE]

APPEAL DISMISSED; MOTION  
MOOT.

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**PER CURIAM**

In 1997, appellant Marcus Lewis was found guilty by a jury in the Faulkner County Circuit Court of murder in the first degree and battery in the third degree. He was sentenced as a habitual offender to serve an aggregate term of 720 months' imprisonment. The Arkansas Court of Appeals affirmed. *Lewis v. State*, CACR 98-635 (Ark. App. Oct. 6, 1999) (unpublished).

In 2010, appellant filed in the trial court a pro se "Petition to Vacate, and/or-to Modify Plus Correct the Judgment Pursuant to Ark. Ct. Proc. Rule-60(I) & Fed. Rule-60 (B)(3)." The court denied the petition on the ground that it constituted an unauthorized second petition under our postconviction rule, Arkansas Rule of Criminal Procedure 37.1 (2010).

Appellant has lodged an appeal in this court from the denial of the petition. Before us now is his pro se motion to file a belated reply. We need not consider the merits of that

motion, however, because it is clear that appellant cannot prevail on appeal. *See Morgan v. State*, 2010 Ark. 540 (per curiam). An appeal from an order that denies a petition for postconviction relief will not be permitted to go forward where the appellant could not be successful on appeal. *Delamar v. State*, 2011 Ark. 87 (per curiam); *Wilmoth v. State*, 2010 Ark. 315 (per curiam); *Tillman v. State*, 2010 Ark. 103 (per curiam); *Pierce v. State*, 2009 Ark. 606 (per curiam); *see also Pardue v. State*, 338 Ark. 606, 999 S.W.2d 198 (1999) (per curiam); *Seaton v. State*, 324 Ark. 236, 920 S.W.2d 13 (1996) (per curiam).

Appellant relied upon Arkansas Rule of Civil Procedure 60 (2010) and a federal rule of procedure as the basis for his challenge to the judgment against him. The theory behind Rule 60 has been applied in criminal cases only where a court corrects a judgment nunc pro tunc. *Morgan*, 2010 Ark. 540. Appellant, however, did not seek to correct a clerical error, but rather he directly and collaterally challenged the judgment against him.

The trial court correctly treated the petition as a subsequent Rule 37.1 petition.<sup>1</sup> Regardless of the label placed on a pleading, a motion that seeks postconviction relief is governed by the provisions of our postconviction rule. *Musgrove v. State*, 2010 Ark. 458 (per curiam). This court has consistently held that Rule 60 does not provide an avenue for

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<sup>1</sup>The record lodged in this appeal contains a copy of a Rule 37.1 petition filed by appellant in the trial court in 1999. Following a hearing, the court denied the petition on February 1, 2002. No appeal from the order was perfected. Rule 37.2(b) provides that all grounds for relief available to a petitioner under the rule must be raised in his or her original petition unless the original petition was denied without prejudice to filing a second petition. The order that denied appellant's Rule 37.1 petition did not specify that he was entitled to file a subsequent petition.

Cite as 2011 Ark. 176

postconviction relief. *Morgan*, 2010 Ark. 540. Appellant also failed to demonstrate that the federal rule applied to his state postconviction claims. Because appellant's appeal cannot be successful, we dismiss the appeal. Consequently, appellant's motion to file a belated reply brief is moot.

Appeal dismissed; motion moot.