

STATE OF ARKANSAS,)
) **SCT.**
SUPREME COURT)

Tracy Tector

BY: _____

HON. JOHN HOMER WRIGHT, CIRCUIT JUDGE (W/COPY OF OPINIONS)

SUPREME COURT OF ARKANSAS

No. CV-18-569

ERIC C. BURGIE

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered March 14, 2019

PRO SE APPEAL FROM THE PULASKI
COUNTY CIRCUIT COURT, FIFTH
DIVISION

[NO. 60CV-18-2076]

HONORABLE WENDELL GRIFFEN,
JUDGE

AFFIRMED.

ROBIN F. WYNNE, Associate Justice

Appellant Eric C. Burgie sought to proceed as a pauper in the circuit court with a petition for declaratory judgment. Burgie appeals the order denying his petition for leave to proceed in forma pauperis, and he asserts error in the circuit court's finding that his declaratory-judgment petition failed to demonstrate a colorable cause of action. Because the circuit court did not abuse its discretion in finding that Burgie should not be permitted to proceed as a pauper, we affirm.

Our standard of review of a decision to grant or deny a petition to proceed in forma pauperis is abuse of discretion, and the circuit court's factual findings in support of its exercise of discretion will not be reversed unless clearly erroneous. *Whitney v. Guterres*, 2018 Ark. 133, *cert. denied*, 139 S. Ct. 482 (2018). An abuse of discretion occurs when the court acts arbitrarily or groundlessly. *Whitney v. State*, 2018 Ark. 138.

Arkansas Rule of Civil Procedure 72 (2017) conditions the right to proceed in forma pauperis in civil matters on indigency and the circuit court's satisfaction that the alleged facts indicate "a colorable cause of action." Ark. R. Civ. P. 72(c). A colorable cause of action is a claim that is legitimate and may reasonably be asserted given the facts presented and the current law or a reasonable and logical extension or modification of it. *Penn v. Gallagher*, 2017 Ark. 283.

In this case, the circuit court failed to make findings on Burgie's indigency. While this was error, when there are obvious defects in the underlying petition, this court may nevertheless dispose of an appeal from the denial of in forma pauperis proceedings. *Wood v. State*, 2017 Ark. 290. If the underlying petition clearly fails to state a colorable cause of action, there has been no abuse of discretion, and this court may summarily affirm the denial of in forma pauperis status. *Gardner v. Kelley*, 2018 Ark. 300; *see also Ashby v. State*, 2017 Ark. 233.

Burgie sought a declaratory judgment that our procedural rules governing postconviction relief for those persons not under a sentence of death, Arkansas Rule of Criminal Procedure 37.1–37.4 (2017), are unconstitutional. He alleged that these procedural rules are unconstitutional as applied to him because he was denied assistance of counsel in raising his claims of ineffective assistance under Rule 37 and that this constituted a denial of due process because Arkansas is a state in which collateral-review proceedings are the first time when a prisoner may practically assert this type of challenge to his conviction. He contends that because he is indigent and confined, he was unable, without appointment of counsel, to develop the evidentiary basis for a claim of ineffective assistance

of counsel. He also contends that the failure to have counsel in the proceedings was an impediment to seeking federal habeas relief. He would have the court declare that, as a result of the alleged defects in the procedural rules, the rules must be modified to require appointment of counsel and he should be permitted to file a new petition under the modified rules.

Declaratory relief may be granted if the petitioner establishes (1) a justiciable controversy; (2) that the controversy is between persons whose interests are adverse; (3) that the party seeking relief has a legal interest in the controversy; and (4) that the issue involved in the controversy is ripe for judicial determination. *Rogers v. Knight*, 2017 Ark. 267, 527 S.W.3d 719. A controversy is justiciable when a claim of right is asserted against one who has an interest in contesting it. *Id.* Declaratory relief is intended to supplement rather than supersede ordinary causes of action. *Martin v. Equitable Life Assur. Soc^{ty} of the U.S.*, 344 Ark. 177, 40 S.W.3d 733 (2001). It is not a substitute for an ordinary cause of action, nor is it a proper means of trying a case. *City of Fort Smith v. Didicom Towers, Inc.*, 362 Ark. 469, 209 S.W.3d 344 (2005).

Burgie challenged our rules for postconviction relief only on the basis that those rules fail to require appointment of counsel to assist a prisoner in applying for that postconviction relief. The right he asserts is one to have counsel appointed for Rule 37 proceedings. He admits that he previously filed a Rule 37.1 petition without success, and this is the type of

issue he could have raised and addressed in those proceedings. Declaratory relief may not be used in substitution for the ordinary cause of action.¹

Moreover, the argument that Burgie relies on is not a viable one, given the facts presented and the current law or a reasonable and logical extension or modification of it. The same claim that Burgie makes in his declaratory-judgment petition has in fact been raised in Rule 37 proceedings and reviewed and rejected by this court on a number of occasions. *E.g.*, *Mancia v. State*, 2015 Ark. 115, 459 S.W.3d 259 (noting that *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013), do not dictate appointment of counsel in postconviction proceedings). Because the underlying petition clearly failed to state a colorable cause of action, the circuit court did not abuse its discretion, and the decision denying in forma pauperis status is affirmed.

Affirmed.

BAKER, GOODSON, and HART, JJ., dissent.

¹The circuit court based its finding that Burgie failed to state a colorable cause of action on the conclusion that the issue should have been raised on direct appeal. Even if that conclusion was in error, the court's ultimate finding was correct. This court can always affirm when the circuit court reaches the right result, albeit for the wrong reason. *Jarrett v. State*, 371 Ark. 100, 263 S.W.3d 538 (2007).

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APPEAL FROM THE PULASKI
COUNTY CIRCUIT COURT,
FIFTH DIVISION
[NO. 60CV-18-2076]

HONORABLE WENDELL
GRIFFEN, JUDGE

DISSENTING OPINION.

COURTNEY HUDSON GOODSON, Associate Justice

Pursuant to Rule 72(c) of the Arkansas Rules of Civil Procedure, “[t]he court shall make a finding regarding indigency based on the affidavit.” The majority correctly observes that the circuit court did not make the indigency finding mandated by our rule. As we explained in *Whitney v. Kelley*, 2018 Ark. 384, at 2, 562 S.W.3d 208, 209, “Rule 72 mandates that the circuit court make a specific finding of indigency based on the petitioner’s affidavit.” Therefore, I would reverse and remand for an indigency finding as Rule 72(c) requires.

Accordingly, I dissent.

BAKER and HART, JJ., join in this dissent.

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS

FIFTH DIVISION

ERIC BURGIE

PETITIONER

v.

60CV-18-2076

STATE OF ARKANSAS

RESPONDENT

ORDER DENYING LEAVE TO PROCEED IN FORMA PAUPERIS

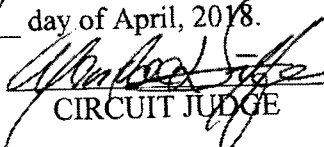
Eric Burgie petitions the Court for leave to proceed in forma pauperis in a suit against the State of Arkansas. Ark. R. Civ. P. 72 conditions the right to proceed in forma pauperis on the Court's satisfaction that the alleged facts indicate a colorable cause of action. *Boles v Huckabee*, 340 Ark. 410, 12 S.W.3d 201 (2000). A colorable cause of action is a claim that is legitimate, and may reasonably be asserted given the facts presented and the current law or a reasonable and logical extension or modification of it. *Id.*

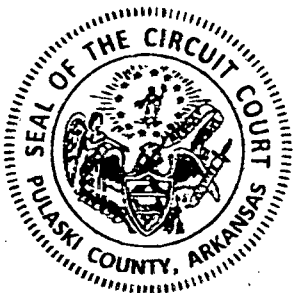
Rules governing post conviction proceedings does not provide an opportunity for a petitioner to reargue points that were settled on direct appeal. *Ark. R. Crim. P. 37.1*. Petitioner may not challenge the weight and sufficiency of the evidence by framing attack as an allegation of ineffective assistance of counsel. *Guy v. State*, 282 Ark. 424, 668 S.W.2d 952 (1984). Issues which were not raised on appeal in accordance with controlling rules of procedure must be considered waived. *Hill v State*, 278 Ark. 194, 644 S.W.2d 282 (1983). Even questions of constitutional dimension are waived if not raised in accordance with the controlling rules of procedure. *McCroskey v. State*, 278 Ark. 156, 644 S.W.2d 271 (1983).

Burgie seeks the Court to declare Arkansas Rules of Criminal Procedure 37.1, 37.2, 37.3, and 37.4 unconstitutional but did not raise the issues on direct appeal. The Court finds that

Petitioner has failed to demonstrate a colorable cause of action. Therefore, Petition to proceed in forma pauperis is hereby DENIED.

IT IS SO ORDERED, this 10 day of April, 2018.


CIRCUIT JUDGE



A TRUE COPY CERTIFIED THIS

7-10-19

**TERRI HOLLINGSWORTH
CIRCUIT COUNTY CLERK**

BY: 
DEPUTY CLERK

STATE OF ARKANSAS,)
) **SCT.**
SUPREME COURT)

CC: ERIC C. BURGIE
CHRISTIAN HARRIS, ASSISTANT ATTORNEY GENERAL
HON. WENDELL GRIFFEN, CIRCUIT JUDGE

**Additional material
from this filing is
available in the
Clerk's Office.**