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A Jurisdictional Skirmish in the Arkansas Appellate Courts: Rule 37 Post-Conviction Appeals and the Importance of Supreme Court Rule 1-2(H)

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A JURISDICTIONAL SKIRMISH IN THE ARKANSAS APPELLATE COURTS: RULE 37 POST-CONVICTION APPEALS AND THE IMPORTANCE OF SUPREME COURT RULE 1-2(H)

J. Thomas Sullivan*

“We assumed jurisdiction of this appeal pursuant to footnote 1 in Barnes v. State, 2017 Ark. 76, 511 S.W.3d 845 (per curiam).”


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* Distinguished Professor of Law, University of Arkansas at Little Rock. I want to express my appreciation to the UA Little Rock Bowen School of Law for its generous support in underwriting this article. Special thanks to Melissa Serfass, Bowen Professor of Law Librarianship, for her excellent research assistance in helping me locate orders issued by the Arkansas Supreme Court. I also want to thank Tim Bunch, a managing attorney in the Arkansas Public Defender Department, who has encouraged me over the years in my teaching and scholarship. Any errors in analysis in this article are mine alone.
I. INTRODUCTION: THE BARNES FOOTNOTE

Effective March 2, 2017, the Arkansas Court of Appeals will assume appellate jurisdiction of all appeals arising from a petitioner’s allegation that the petitioner was denied effective assistance of counsel at trial or on direct appeal from a judgment of conviction except in instances when the death penalty or life imprisonment has been imposed on the petitioner. The Arkansas Court of Appeals will also assume jurisdiction of petitions for post-conviction relief pursuant to Arkansas Rule of Criminal Procedure 37.1 in cases wherein the Rule required the petitioner in cases where the judgment was entered before July 1, 1989, to obtain permission from the appellate court before proceeding in the trial court with a petition under the Rule.¹

In an otherwise unremarkable published opinion, Barnes v. State,² the Arkansas Supreme Court summarily changed the appellate process in the state’s postconviction process that may afford relief in some criminal cases.³ It directed that appeals in actions involving postconviction attacks on convictions or sentences pursuant to Arkansas Rule Criminal Procedure 37.1⁴ based on claims of ineffective assistance rendered by defense counsel will be heard in the future by the Arkansas Court of Appeals,⁵ rather than the

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2. 2017 Ark. 76, 511 S.W.3d 845.
3. See In re Review of Habeas Corpus Proceedings, 313 Ark. 168, 852 S.W.2d 791 (1993), where the state supreme court clarified its position on review of habeas corpus actions, announcing that following its decision, review would be by appeal, rather than by petition for writ of certiorari, addressing conflicting decisions previously rendered by the court. Certain specific challenges, such as denial of reasonable bail, continue to be brought by certiorari. Thomas v. State, 260 Ark. 512, 542 S.W.2d 284 (1976).
4. An Arkansas defendant challenging the legality of the sentence imposed, or by implication, the underlying conviction, “may file a petition in the court that imposed the sentence, praying that the sentence be vacated or corrected.” Ark. R. CRIM. P. 37.1(a). Arkansas Rule of Criminal Procedure 37.1(a) provides:
   (a) A petitioner in custody under sentence of a circuit court claiming a right to be released, or to have a new trial, or to have the original sentence modified on the ground:
      (i) that the sentence was imposed in violation of the Constitution and laws of the United States or this state; or
      (ii) that the court imposing the sentence was without jurisdiction to do so; or
      (iii) that the sentence was in excess of the maximum sentence authorized by law; or
      (iv) that the sentence is otherwise subject to collateral attack; may file a petition in the court that imposed the sentence, praying that the sentence be vacated or corrected.
6. For a brief history of the Arkansas Court of Appeals, see Court of Appeals, ARK. JUDICIARY, https://www.arcourts.gov/courts/court-of-appeals (last visited Sept. 6, 2017); see also Josephine Linker Hart & Guilford M. Dudley, The Unpublished Rules of the Arkansas
state supreme court, except in cases in which a death sentence or sentence of life imprisonment was imposed at trial. In this single footnote, the state supreme court redirected substantial responsibility for appellate review of cases rooted in the criminal trial process and did so leaving the precise parameters of the realignment of appellate jurisdiction vague. The change in appellate jurisdiction has significant consequences for Arkansas litigants and implicates an unresolved constitutional issue regarding the independent authority of the states to tailor their discrete appellate systems within the federalized judicial system.

In *Barnes*, the trial court of conviction dismissed the action based on the petitioner’s failure to comply with the requirement for personal verification of the petition’s contents. The verification requirement, an express requirement under the rules, is explained as necessary to prevent falsification of claims by inmates filing pro se.

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6. *Barnes*, 2017 Ark. 76, at 1 n.1, 511 S.W.3d at 846. The reservation of initial appellate jurisdiction over Rule 37.1 appeals in which a sentence of life imprisonment was imposed at trial by the supreme court is consistent with its jurisdiction on the direct appeal. *See* ARK. SUP. CT. R. 1-2(a) (“All cases appealed shall be filed in the Court of Appeals except that the following cases shall be filed in the Supreme Court: . . . 2. Criminal appeals in which the death penalty or life imprisonment has been imposed.”). Because the supreme court has jurisdiction over cases in which a life sentence is imposed, it has jurisdiction over subsequent appeals in cases arising from the same prosecution under Rule 1-2(a).

7. In the context of the criminal process, the nation works under a federalized judicial system because both federal and state courts have jurisdiction over criminal matters as a result of the operation of federal and state criminal statutes, sometimes regulating the same conduct. *E.g.*, Bond v. United States, 572 U.S. 844, 857-60 (2014) (discussing propriety of apparent overlap of state offenses and federal criminal offenses grounded in regulation of interstate commerce). In the postconviction context, the federalized judicial system is reflected in the review afforded state court determinations on claimed violations of procedural rights protected under the federal constitution by the Supreme Court of the United States in the certiorari process, *e.g.*, Michigan v. Long, 463 U.S. 1032 (1983), and in the federal habeas corpus process, pursuant to 28 U.S.C. § 2254 (2018). In *Long*, the Court observed:

The state courts handle the vast bulk of all criminal litigation in this country. In 1982, more than twelve million criminal actions (excluding juvenile and traffic charges) were filed in the 50 state court systems and the District of Columbia. By comparison, approximately 32,700 criminal suits were filed in federal courts during that same year. *The state courts are required to apply federal constitutional standards*, and they necessarily create a considerable body of “federal law” in the process. *Long*, 463 U.S. at 1042 n.8 (emphasis added) (citations omitted).

8. The reference to “inmates” is intentional. An individual in custody as a consequence of a felony conviction has standing to bring an action for postconviction relief pursuant to Rule 37. But, postconviction relief under Rule 37 is not available to a convicted defendant
On appeal, the supreme court upheld the circuit court’s dismissal of the Rule 37.1 petition, dismissing Barnes’s appeal. The dismissal in the trial court resulted from the defendant’s attempt to withdraw his plea, by motion, following his conviction on a guilty plea to four felonies with his punishment set at 240 months imprisonment. The trial court construed the post-trial motion to “retract” the guilty plea as a Rule 37.1 petition, and the

unless the petitioner is actually in custody at the time of filing the petition. Scott v. State, No. CR 05-351, 2006 WL 302351, at *1 (Ark. Feb. 9, 2006); Bohannon v. State, 336 Ark. 367, 372, 985 S.W.2d 708, 710 (1999). The Arkansas Supreme Court has consistently held that in order to pursue relief pursuant to Rule 37.1 of the Arkansas Rules of Criminal Procedure—the primary route for collateral attack on a conviction under Arkansas law—the petitioner must be incarcerated at the time of filing the petition. Scott, 2006 WL 302351, at *2; Bohannon, 336 Ark. at 372, 985 S.W.2d at 710. The state court has expressly rejected reliance on the more expansive understanding and treatment of the “in custody” requirement applied by federal courts in postconviction proceedings. Bohannon, 336 Ark. at 372, 985 S.W.2d at 710 (parolee not “in custody” for purposes of postconviction litigation under Rule 37); Kemp v. State, 330 Ark. 757, 758, 956 S.W.2d 860, 861 (1997) (holding that a defendant sentenced only to pay fine is not eligible for postconviction relief).

9. E.g., Nelson v. State, 363 Ark. 306, 306, 213 S.W.3d 645, 646 (2005); Boyle v. State, 362 Ark. 248, 250–51, 208 S.W.3d 134, 136 (2005). The verification requirement has also been applied to dismiss petitions filed by counsel representing inmates on behalf of a petitioner. In Walker v. Norris, the Court of Appeals for the Eighth Circuit upheld the district court’s deference to state court dismissal of the petitioner’s unverified Rule 37 petition, despite evidence that it had applied this remedy inconsistently in appeals from Rule 37 dismissals. 436 F.3d 1026, 1031–33 (8th Cir. 2006). The petitioner’s attorney had signed the petition, rather than the petitioner personally executing a separate verification. Id. at 1032. The Eighth Circuit found that the state postconviction petition was not properly filed as a consequence and did not toll the time for filing the federal petition, and therefore the petition was dismissed as not timely filed. Id. at 1032–33. Thus, verification remains a critical technical requirement for the consideration of the petitioner’s postconviction claims for relief. In Wooten v. State, however, the court applied an exception to the mandatory requirement that the petitioner verify the petition personally in cases in which a death sentence had been imposed, permitting correction of the error without dismissal of the Rule 37.5 petition. 2010 Ark. 467, 370 S.W.3d 475.

10. Barnes, 2017 Ark. 76, at 2, 511 S.W.3d at 846. The court explained its rationale for dismissing the appeal from the circuit court’s dismissal of the pending postconviction action: We dismiss the appeal because it is evident from the record that Barnes could not succeed on appeal. This court will not permit an appeal from an order that denied a petition for postconviction relief to go forward where it is clear that the appellant could not prevail. The motions are rendered moot by the dismissal of the appeal. Id. at 2, 511 S.W.3d at 846 (citation omitted).

11. Id. at 1, 511 S.W.3d at 845. The defendant styled his motion as one to “retract” his guilty plea, perhaps attempting to circumvent Arkansas Rule of Criminal Procedure 26.1(a), which provides that once a judgment is entered on the record of the conviction, the trial court loses jurisdiction to entertain a motion to withdraw a guilty plea.

12. A defendant convicted upon a guilty plea may move to withdraw the plea under certain circumstances, including an allegation that counsel provided ineffective assistance if necessary to correct a “manifest injustice.” ARK. R. CRIM. P. 26.1(b)(1).

13. With respect to ineffective assistance claims challenging counsel’s representation in advising the defendant who pleads guilty, the Arkansas Supreme Court has held “[i]t must be
II. THE SKIRMISH

Quite apart from the per curiam disposition of the appeal in *Barnes*, the supreme court chose to announce the change in appellate jurisdiction in a footnote to the *Barnes* opinion. The court’s language could be misleading because the change in jurisdiction appears limited to appeals involving claims of ineffective assistance of counsel, rather than in referencing all appeals from Rule 37.1 actions. The respective jurisdictional limits of the state supreme court and court of appeals are set out in the Arkansas Rules of the Supreme Court and Court of Appeals Rule 1-2, as adopted by the Arkansas Supreme Court. With the creation of the Arkansas Court of Appeals by constitutional amendment in 1979, the supreme court was given authority to determine jurisdiction of the respective appellate courts:

The General Assembly is hereby empowered to create and establish a Court of Appeals and divisions thereof. The Court of Appeals shall have

remembered that on appeal from the denial of a Rule 37 petition following pleas of guilty there are only two issues for review—one, whether the plea of guilty was intelligently and voluntarily entered, two, were the pleas made on the advice of competent counsel.” *Branham v. State*, 292 Ark. 355, 357, 730 S.W.2d 226, 227 (1987); *see also* Bryant v. State, 323 Ark. 130, 131-32, 913 S.W.2d 257, 258 (1996).


15. ARK. R. CRIM. P. 37.1–37.4 (providing for the basic postconviction remedy in Arkansas criminal prosecutions).

16. Rule 1-2 of the rules regarding jurisdiction of the Arkansas appellate courts, adopted by the state supreme court provides:

(a) Supreme Court Jurisdiction. All cases appealed shall be filed in the Court of Appeals except that the following cases shall be filed in the Supreme Court:
1. All appeals involving the interpretation or construction of the Constitution of Arkansas;
2. Criminal appeals in which the death penalty or life imprisonment has been imposed;
3. Petitions for quo warranto, prohibition, injunction, or mandamus directed to the state, county, or municipal officials or to circuit courts;
4. Appeals pertaining to elections and election procedures;
5. Appeals involving the discipline of attorneys-at-law and or arising under the power of the Supreme Court to regulate the practice of law;
6. Appeals involving the discipline and disability of judges;
7. Second or subsequent appeals following an appeal which has been decided in the Supreme Court; and
8. Appeals required by law to be heard by the Supreme Court.

ARK. SUP. CT. R. 1-2.
such appellate jurisdiction as the Supreme Court shall by rule determine, and shall be subject to the general superintending control of the Supreme Court.17

Rule 1-2 has not expressly addressed initial jurisdiction over appeals in actions brought under Arkansas Rule of Criminal Procedure 37.1.18

Although Rule 1-2 has not explicitly provided that appeals from trial court determinations on the merits of claims brought pursuant to Rule 37.1 lie within the jurisdiction of the Arkansas Supreme Court, these appeals have traditionally been filed in that court.19 Rule 37.3 of the criminal procedure rules does expressly provide, however, that when counsel is appointed to represent a petitioner in a Rule 37.1 action, the appeal lies with the state supreme court.20 The Barnes footnote has effectively abrogated this provision in the rule.

The Arkansas Court of Appeals responded to the supreme court’s reassignment of jurisdiction in Barnes with its opinion in Bridgeman v. State,21 an appeal from denial of postconviction relief in a Rule 37.1 action. There, the court noted, “Before we can address the specific arguments that Bridgeman raises on appeal, we must first address how our court obtained jurisdiction over appeals such as this, which have historically been decided by our supreme court.”22

The court’s opinion, written by Judge Whiteaker,23 recalled the traditional history of jurisdiction over Rule 37 actions.24 He noted in this instruc-
tional discussion that the state supreme court had consistently held, prior to its decision in *Barnes*, that review of appeals from denial of postconviction were “required by law to be heard by the Supreme Court.” He referred to the supreme court’s 2014 decision, *Green v. State*, in which the court noted that the appellant brought an appeal from denial of postconviction relief to the supreme court based on Rule 37 and Arkansas Supreme Court Rule 1-2(a)(8), which merely provide that the court has jurisdiction over “[a]ppeals required by law to be heard by the Supreme Court.”

The *Bridgeman* court then observed:

On March 2, 2017, however, our supreme court, without effectuating a rule change and without any explication or further explanation as to why it was no longer required by law to hear such cases, summarily transferred a majority of its Rule 37 cases to this court by means of a footnote in an unsigned per curiam opinion. Thus, we exercise jurisdiction over this appeal pursuant to the authority apparently delegated to us by virtue of this simple footnote contained in *Barnes*.

The court then proceeded to address the question presented by the appeal on the merits, rejecting his claim that his guilty plea was not knowingly entered because trial counsel rendered ineffective assistance in failing to fully advise him of the sentencing consequences of the plea. This claim in the Rule 37 petition clearly fell within the supreme court’s footnote directive in *Barnes*, because it addressed trial counsel’s effectiveness in advising his client with respect to the guilty plea, as noted in the footnote reassigning appellate jurisdiction to the court of appeals.

However, Bridgeman asserted an alternative theory that was not specifically couched in terms of counsel’s performance. He argued that because the judgment initially entered in the case did not indicate that he was being sentenced as a habitual offender, the 15-year sentence imposed on his con-

25. *Id.*, 525 S.W.3d at 461 (emphasis added).
27. *Id.* at 1, 2014 WL 2814866, at *1.
29. *Bridgeman*, 2017 Ark. App. 321, at 3–4, 525 S.W.3d at 462 (emphasis added) (citing *Barnes v. State*, 2017 Ark. 76, at 1 n.1, 511 S.W.3d 845, 846 n.1). The *Bridgeman* court observed, “Prior to March 2, 2017, the Arkansas Supreme Court exerted jurisdiction over all postconviction matters, as it had previously and consistently held that such appeals are ‘required by law to be heard by the Supreme Court’ pursuant to Rule 1-2(a)(8).” *Id.* at 2, 525 S.W.3d at 462 (emphasis in original) (quoting Ark. Sup. Ct. R. 1-2 (a)(8)) (citing multiple decisions of Arkansas Supreme Court).
30. *Id.* at 5–7, 525 S.W.3d at 462–63.
viction—10 years imprisonment with an additional 5 years suspended—exceeded the trial court’s authority since he was convicted of a Class D felony offense, carrying a sentence range of 0-6 years, on a reduced charge of breaking and entering. The imposition of a sentence in excess of the trial court’s authority under the applicable sentencing statute constitutes jurisdictional error, which may be challenged initially on direct appeal or in postconviction without having been preserved by objection at trial.

The postconviction court ruled, however, that Bridgeman had made a knowing and voluntary plea of guilty pursuant to an agreement negotiated by trial counsel and represented his understanding of the plea agreement to the court during his guilty plea colloquy. The court of appeals rejected Bridgeman’s argument on appeal based on the trial court’s findings, including his admission that he was satisfied with counsel’s performance when he entered his guilty plea.

In light of the record, it is not at all remarkable that Bridgman’s postconviction challenges were rejected by both the trial and appellate courts. But, there is one additional point particularly relevant in light of the Arkansas Supreme Court’s reassignment of appellate jurisdiction for Rule 37 appeals. In the Barnes footnote, the court expressly held that the court of appeals would thereafter have jurisdiction over appeals of postconviction claims “arising from a petitioner’s allegation that the petitioner was denied effective assistance of counsel at trial or on direct appeal from a judgment of conviction.” The supreme court did not simply redirect all appeals from denial of Rule 37.1 relief to the court of appeals, although that is almost certainly the court’s intent. Rather, the express language in the Barnes footnote only redirects appeals based on ineffective assistance of counsel at trial or on direct appeal to the court of appeals.

38. Id. at 8, 525 S.W.3d at 464.
40. The court of appeals specifically noted that the supreme court had “summarily transferred a majority of its Rule 37 cases to this court by means of a footnote in an unsigned per curiam opinion.” Bridgeman, 2017 Ark. App. 321, at 3–4, 525 S.W.3d at 462. However, in a post-Barnes opinion, the court of appeals reversed the trial court in a Rule 37.1 appeal in Kaufeld v. State, to correct a clerical error in the judgment in considering the petitioner’s claimed violation of the protection afforded by double jeopardy. 2019 Ark. App. 29, at 4, 569 S.W.3d 348, 352.
Bridgeman did challenge trial counsel’s effectiveness, but his other point in challenging his sentence was directed at the trial court’s exercise of jurisdiction in imposing the sentence that had been agreed upon in the negotiated plea. Because the judgment entered by the court did not include the recitation, or checked box, indicating the he was being sentenced as a habitual offender, he argued that the 15-year sentence, with 5 years suspended, amounted to a sentence in violation of the trial court’s authority.

This claim did not constitute an attack on trial counsel’s performance, or effectiveness, at all. The court of appeals, however, had no difficulty in finding that the trial court’s correction of the clerical error in the omission of the reference to his punishment as a habitual offender by amending the judgment and commitment order nunc pro tunc was proper. The record of the plea colloquy effectively rebutted any claimed prejudice from the clerical error and reflected Bridgeman’s understanding of the plea agreement and his willingness to forego trial and plead guilty.

Ultimately, of course, the Arkansas Supreme Court would necessarily prevail in the skirmish over jurisdiction of Rule 37.1 appeals. As the Bridgeman court explained, the power to define appellate jurisdiction had consistently been vested in the Arkansas Supreme Court by the state constitution with approval for creation of the Arkansas Court of Appeals by amendment in 1978. Amendment 80 section 5 of the Arkansas Constitution, adopted pursuant to the 2000 General Election, affirmed the authority of the supreme court to define the jurisdiction of the court of appeals, expressly providing:

There shall be a Court of Appeals which may have divisions thereof as established by Supreme Court rule. The Court of Appeals shall have such appellate jurisdiction as the Supreme Court shall by rule determine and shall be subject to the general superintending control of the Supreme Court.

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42. Id. at 5, 525 S.W.3d at 462–63 (“On appeal, Bridgeman challenges the trial court’s factual findings, argues that his attorney was ineffective for not sufficiently informing him of the sentencing consequences of his suspended sentence, and asserts that he was convicted of a crime for which he was never charged.”).
43. Id. at 7, 525 S.W.3d at 463.
44. Id. at 6–7, 525 S.W.3d at 463–64.
45. Id. at 1–2 n.1, 525 S.W.3d at 460–61 n.1. In note 1, the court explained:
   Amendment 58, which was approved by voters on November 7, 1978, stated, in relevant part, “The General Assembly is hereby empowered to create and establish a Court of Appeals and divisions thereof. The Court of Appeals shall have such appellate jurisdiction as the Supreme Court shall by rule determine, and shall be subject to the general superintending control of the Supreme Court.”
Id., 525 S.W.3d at 460–61 n.1 (emphasis in original) (quoting ARK. CONST. amend. 58, repealed by ARK. CONST. amend. 80, § 22(D)).
Court. Judges of the Court of Appeals shall have the same qualifications as Justices of the Supreme Court.46

The recognition by the Bridgeman court of the change in appellate jurisdiction to redirect appeals in Rule 37 postconviction actions in which ineffective assistance of counsel is alleged, effectively would have ended the skirmish over the reassignment occasioned by the supreme court’s footnote in Barnes. However, just over one month later, perhaps stung by Judge Whiteaker’s criticism of the manner by which the supreme court had altered appellate jurisdiction over Rule 37.1 appeals, Associate Justice Womack issued a reply for the majority in an opinion on a wholly unrelated matter in Mason v. Mason.47

Mason involved the certification of an issue on appeal by the Arkansas Court of Appeals to the Arkansas Supreme Court.48 The issue concerned retroactive application of a statute requiring mandatory termination of alimony payments upon a showing that the alimony recipient is “living full time with another person in an intimate, cohabitating relationship.”49 The supreme court rejected retroactive application of this provision to an award of alimony included in a divorce decree issued in 2010,50 remanding the case for determination of other appellate issues not before the supreme court in the certified question.51

47. 2017 Ark. 225, 522 S.W.3d 123. The opinion was not unanimous as Chief Justice Kemp dissented. Id. at 5, 522 S.W.3d at 126.
48. Id. at 1, 522 S.W.3d at 124; see also Ark. Sup. Ct. R. 1-2(d). The rule provides for transfer of a pending case from the court of appeals to the supreme court, in pertinent part:
If the Court of Appeals seeks to transfer a case, the Court of Appeals shall find and certify that the case: (1) is excepted from its jurisdiction by Rule 1-2(a), or (2) otherwise involves an issue of significant public interest or a legal principle of major importance. The Supreme Court may accept for its docket cases so certified or may remand any of them to the Court of Appeals for decision.
50. Mason, 2017 Ark. 225, at 2, 522 S.W.3d at 124. Resolution of the retroactivity issue represented an important ruling under state law, both because it clarified the finality of alimony orders in divorce decrees entered prior to the effective date of the statute, and because it affords insight into the court’s current review of retroactive application of legislation with respect to civil law issues. Id. at 1, 522 S.W.3d at 124. Initially, the court explained that retroactive application of new legislation is subject to a clear expression of legislative intent. Id. at 4, 522 S.W.3d at 125. The majority found that because there was no evidence in the statutory language, neither party arguing to the contrary, there was no basis for concluding that the General Assembly intended retroactive application of the new provision mandating end of alimony in the event the recipient subsequently engages in an intimate, cohabitating relationship. Id. at 3–5, 522 S.W.3d at 125–26. The legislation incorrectly said “cohabitating,” rather than using the correct term, cohabiting. Ark. Code Ann. § 9-12-312(a)(2)(D).
Mason also includes another point, unrelated to disposition of the retroactivity issue. Again, in a footnote, the majority directly criticized the Arkansas Court of Appeals, complaining of the state of the record on appeal that the intermediate court forwarded with its certification request.\(^\text{52}\) The opinion, this time in a signed opinion, included the supreme court’s reference to the inadequate briefs submitted by counsel for the parties, including the brief submitted on behalf of the appellant, who nevertheless prevailed on the certified question.\(^\text{53}\) The supreme court criticized the briefs:

\begin{quote}
We note that the briefs the court of appeals certified to us are deficient. The appellee raised his statutory argument in a motion for summary judgment. Debra filed a response and Charles filed an additional reply. The circuit court held a hearing on May 5, 2014, and issued an order on June 17, 2014, denying the appellee’s motion for summary judgment. None of the mentioned pleadings, hearings, orders, or briefs and exhibits are included in the abstract or addendum.\(^\text{54}\)
\end{quote}

But the court’s opinion does not simply address the deficiencies in the briefs submitted by counsel for the respective parties. First, the court explained that it was able to resolve the retroactivity issue without resorting to the materials not included in the briefs as submitted.\(^\text{55}\) The supreme court went further in directing its criticism to the court of appeals:

\begin{quote}
We remand to the court of appeals to address the briefing deficiencies and the underlying merits of the case. It is unfortunate that this case was certified to our court in its current state. We note that with twelve judges, twenty-four law clerks, and four staff attorneys, the court of appeals has sufficient resources to spot such deficiencies. In the future, we expect the court of appeals to ensure that the briefs comply with our rules prior to certifying a case to this court.\(^\text{56}\)
\end{quote}

The court’s comment might not be interpreted as a response to the Bridge-man court’s observations on the reassignment of appellate jurisdiction in Rule 37.1 appeals to that court. But then again, it would not seem unlikely that the reader or court observer would characterize it as nothing less than a direct response reflecting a near-consensus that the intermediate court had improperly questioned the means by which the reassignment had been announced as well as the supreme court’s motive in redirecting Rule 37.1 ap-
peals or the wisdom of this administrative decision. Finally, the reference in Mason to the number of judges, law clerks, and attorneys staffing the court of appeals suggests only that the intermediate court could readily absorb the shifted caseload. This could simply provide a point of clarification, or it could reflect the supreme court’s view that the court of appeals should not be considered to be overworked in terms of its docket and available resources.

Regardless of whether the court of appeals was less than diplomatic in taking its argument over the reassignment of appellate jurisdiction in Rule 37.1 appeals public by addressing the situation in a published opinion, its criticism of the state supreme court clearly made its point. The inclusion of the decision to redirect those appeals raising claims of ineffective assistance of counsel to the intermediate court in a footnote to an unsigned opinion seems less formal than appropriate. The supreme court could have accomplished this change by amending Rule 1-2(a) of the rules it is authorized to promulgate.\(^57\) Or, it could have announced the change in an order published in the official reports now included on the Judiciary website, as it had done with its order clarifying that appeal, not certiorari, is the proper procedure for reviewing adverse trial court decisions in habeas corpus actions.\(^58\)

The supreme court did clearly address its own appellate jurisdiction in Rule 37 proceedings in the Barnes footnote, providing that appeals from denials of postconviction relief in cases in which a death sentence or sentence of life imprisonment has been imposed will continue to be heard by that court, rather than initially being directed to the court of appeals.\(^59\) A significant number of Rule 37 appeals are taken in cases in which the petitioner has been sentenced to life imprisonment, either after trial\(^60\) or upon a plea of guilty.\(^61\) The supreme court’s familiarity with those cases may well

59. Barnes v. State, 2017 Ark. 76, at 1 n.1, 511 S.W.3d 845, 846 n.1 (redirecting appellate review for Rule 37 appeals to the Arkansas Court of Appeals, “except in instances when the death penalty or life imprisonment has been imposed on the petitioner”).
60. E.g. Sykes v. State, 2011 Ark. 412, at 4–6, 2011 WL 4635021, at *2–3 (upholding trial court’s denial of postconviction relief on claim that trial counsel was ineffective on multiple grounds). The supreme court had previously upheld the conviction and life sentence for capital murder on direct appeal. Sykes v. State, 2009 Ark. 522, 357 S.W.3d 882.
61. In Sandoval-Vega v. State, the supreme court granted relief on the petitioner’s claim that the trial court had improperly accepted his plea of guilty to capital murder and imposed a sentence of life imprisonment before finding that he was competent to enter a plea to the charge, remanding the case for findings or evidentiary hearing on issue of defendant’s competence. 2011 Ark. 393, at 6–10, 384 S.W.3d 508, 513–15. In Marlin v. State, the defendant who was charged with capital murder but pleaded guilty to the lesser-included offense of first degree murder, attempted to attack his conviction in a Rule 37.1 action. No. CR 03-586, 2003 WL 22145827 (Ark. Sept. 18, 2003). Ultimately, the supreme court held that his postconvic-
facilitate the review of issues raised in Rule 37.1 appeals because cases involving life sentences are initially heard by that court on direct appeal.\(^{62}\)

Having already reviewed the facts and considered the issues raised in the direct appeal where counsel’s performance at trial would have been evident with respect to claims of defective performance in the record itself, the supreme court would seem well-positioned to assess the potential prejudice resulting from a claim of defective performance. Even if counsel’s claimed deficiency was not apparent in the appellate record but required development in a Rule 37.1 hearing to be fully explained—such as a claim that counsel failed to investigate the case properly with respect to matters not raised at trial and, thus, not included in the trial record—the supreme court would still be well-positioned to evaluate the potential prejudice from counsel’s failure, if any.

Thus, reservation of Rule 37.1 direct appeals in cases involving life sentences would present no additional burden for the Arkansas Court of Appeals, while potentially expediting review of postconviction claims by the supreme court due to its familiarity with the trial record in the case. In the same general vein, Supreme Court Rule 1-2(a)(7) provides that jurisdiction on direct appeal will lie in the Arkansas Supreme Court when it has previously heard the case.\(^{63}\)

Moreover, in reality, the number of pro se filings by inmates challenging their convictions or sentences pursuant to the Rule 37.1 remedy is sub-

\(^{62}\) Ark. Sup. Ct. R. 1-2(a)(2) (providing that the supreme court has jurisdiction over “[c]riminal appeals in which the death penalty or life imprisonment has been imposed”).

\(^{63}\) Ark. Sup. Ct. R. 1-2(a)(7) (providing that the supreme court has jurisdiction over “[s]econd or subsequent appeals following an appeal which has been decided in the Supreme Court”). For example, in *Buckley v. State*, the supreme court remanded for resentencing where the trial court had improperly admitted hearsay during punishment phase testimony at trial. 341 Ark. 864, 874–75, 20 S.W.3d 331, 338–39 (2000). The appeal was originally heard by the supreme court because Buckley’s jury had imposed life sentences on two delivery of cocaine counts involving less than one-quarter gram of cocaine on each occasion. *Id.* at 866, 20 S.W.3d at 333. On remand for re resentencing, the second jury imposed sentences of twenty-eight years for each count, and Buckley again appealed. *Buckley v. State*, 349 Ark. 53, 60, 76 S.W.3d 825, 829 (2002). This second appeal was also heard by the supreme court, which affirmed. *Id.* at 70 –71, 76 S.W.3d at 836. Thereafter, the supreme court heard Buckley’s appeal from denial of relief on his Rule 37.1 petition by the trial court, initially reversing and remanding for evidentiary hearing. Buckley v. State, No. CR 04-554, 2005 WL 1411654, at *3 (Ark. June 16, 2005). Following the hearing, the supreme court denied relief on Buckley’s appeal. Buckley v. State, No. CR 04-554, 2007 WL 1509323, at *2 (Ark. June 16, 2005). The supreme court heard the appeal from resentencing based upon Arkansas Supreme Court Rule 1-2(a)(7).
statical, many of which undoubtedly fail to comply with the strict formatting requirements for petitions and are consequently subject to dismissal for noncompliance. Disposition of pro se filings may not require the expenditure of resources equivalent to, or necessary for the disposition of, civil and criminal matters in which counsel are involved because of the pro se petitioner’s failure to comply with the requisite formatting requirements for the petition, failure to verify the petition; failure to support a claimed

64. For example, the court explained in its 1987 order referring to Rule 37:

*We are being inundated with petitions*, mostly from inmates of the Arkansas Department of Correction, seeking relief under Rule 37. Each petition must be reviewed and considered, however involved, and most are lengthy and detailed. We have a fulltime lawyer and secretary serving to handle such petitions and assist the court. We have had to add another part-time lawyer to the staff. All of this work is related to petitions filed by prisoners. In 1986, 189 such petitions were filed with written opinions issued in the majority of the cases, usually finding them meritless. They are invariably handwritten, lengthy (a recent one was 100 pages long), and generally attempt to retry the case or attempt to prove their lawyer incompetent. The three year time limitation in which petitions may be filed is ignored. Also, the rule that states only one petition may be filed is often ignored.


65. ARK. R. CRIM. P. 37.1(b) (including specific margin lengths, at least 1½ inches on the left and right sides of the page and at least 2 inches at the top and bottom of the page; number of lines per page, 30; and number of words per line, 15).

66. Id. Section (b) also provides: “The circuit court or appellate court may dismiss any petition that fails to comply with this subsection.” Id. The rule does not specify whether “appellate court” refers to either the supreme court or court of appeals, but until Barnes, the supreme court had consistently held that it had jurisdiction to review appeals from circuit court orders rendered in Rule 37 actions.

67. E.g., White v. State, No. CR 07-312, 2007 WL 2793286 (Ark. Sept. 27, 2007). The supreme court upheld the trial court’s dismissal of the pro se petition and appeal, finding: Specifically, the court found that appellant’s petition was fourteen pages in length, exceeded thirty lines per page and did not meet the requirements for left, right, upper, or lower margins. While the petition contained in the record was twelve-pages in length rather than fourteen, an examination of the petition contained in the record substantially supports the trial court’s findings.

Id. at *1. The court explained the rationale for enforcing strict compliance with the formatting requirements for post-conviction petitions:

> The restrictions in Rule 37.1 placed upon lines per page, words per line and margins require little more than an ability to count and measure with a ruler. The restrictions are neither burdensome, unduly time-consuming, nor unreasonable, and appellant has not demonstrated that the court erred in requiring him to comply with Rule 37.1(b).

Id.

violation with sufficient legal authority\(^{69}\) or facts\(^{70}\) to warrant relief; or failure to include an abstract of the trial deemed necessary for resolution of the issues on appeal.\(^{71}\) Nevertheless, regardless of the fact that disposition of petitions failing for these reasons may appear routine, a panel of the court of appeals will presumably still be required to consider the appeal from denial of Rule 37 relief and make the decision to dismiss the petition as meritless or procedurally defaulted.\(^{72}\)

The conclusion of the “skirmish” over reassignment of appellate review of trial court rulings denying relief on Rule 37.1 petitions could hardly have been in doubt. Regardless of the abruptness of the supreme court’s announcement of the change in appellate, its order was basically final upon announcement in *Barnes*. The court of appeals has accepted its responsibility\(^{73}\) with little objection other than Judge Whiteaker’s comments in *Bridgeman*,\(^{74}\) hearing appeals and upholding trial court decisions denying relief.\(^{75}\)

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69. *E.g.*, Polivka v. State, 2010 Ark. 152, at 14–15, 362 S.W.3d 918, 928 (“Appellant fails to cite any authority or make a convincing argument that his trial attorney had a duty to object to the jury instructions made by the court. It is in fact not a violation of the doctrine of separation of powers for a court to instruct the jury on parole and transfer eligibility. We will not entertain arguments unsupported by any legal authority.”) (citations omitted).

70. *See, e.g.*, Weatherford v. State, 363 Ark. 579, 586, 215 S.W.3d 642, 648–49 (2005) (upholding the trial court’s denial of relief on ineffective assistance of counsel claim where Rule 37.1 did not provide sufficient factual evidence of witness’s proposed testimony and its claimed effect on trial despite postconviction counsel’s request to expand page limitations to permit development of argument which was denied by trial court).

71. The current rules provide that a deficient brief may be corrected at the direction of the clerk or court, Ark. Sup. Ct. R. 4-2(b)(3), but the supreme court has also simply dismissed appeals or affirmed cases based on deficiencies in the brief in the past. *See e.g.*, Hubbard v. State, 334 Ark. 321, 324, 973 S.W.2d 804, 806 (1998) (affirming denial of relief in a per curiam opinion for failure to include an abstract of the trial in the appellate brief). The rule continues to authorize disposition by dismissal or affirmance when a party fails to correct a deficient brief after having been afforded notice and an opportunity to comply with the applicable rule. Ark. Sup. Ct. R. 4-2.

72. There are apparently no published rules regarding criteria for the exercise of discretion in dismissing Rule 37.1 appeals for noncompliance with rules governing the formatting or the verification of pleadings or appellate briefs, nor is there any published rule requiring that the appeal be considered and ruled on by the reviewing court, or by a single justice or judge of the reviewing court.

73. *See, e.g.*, Slater v. State, 2017 Ark. App. 499, at 1, 583 S.W.3d 84, 86 (“We assumed jurisdiction of this appeal pursuant to footnote 1 in Barnes v. State, 2017 Ark. 76, 511 S.W.3d 845 (per curiam).”).

74. *See supra* notes 23–32 and accompanying text.

75. *E.g.*, Shadwick v. State, 2017 Ark. App. 243, at 12, 519 S.W.3d 722, 732 (upholding denial of relief on claim that trial counsel was ineffective for numerous reasons, including failure to object to State’s assertion of territorial jurisdiction where computer images of minor children claimed to have been sent from Arkansas to defendant and downloaded when he was living in Montana). The court of appeals issued its decision in *Shadwick* on April 19, 2017, shortly after the supreme court ordered the court of appeals to assume jurisdiction over Rule
III. POST-TRIAL REMEDIES UNDER ARKANSAS LAW

The conclusion of the direct appeal process in the criminal case does not preclude the convicted defendant from continuing to litigate issues that may have arisen in the case, including issues that may have only arisen after the trial or after the direct appeal. These remedies are often referred to as “collateral” because they afford means to attack a conviction or sentence outside the trial and appellate process. Commonly, they are referred to as “habeas corpus,” although habeas corpus under Arkansas law refers to specific challenges governed by statute. The basic postconviction remedy recognized in Arkansas is the Rule 37 procedure created by the Arkansas Supreme Court.

The Federal Constitution does not recognize the right of a criminal defendant to post-trial process for challenging the conviction or sentence, as the Arkansas Supreme Court noted in an order issued in 1987. The court described the situation it confronted at the time, after noting that there was no duty upon the states to provide postconviction remedies. The court complained:

Seldom is relief or a new trial granted under Rule 37. Yet, we are being inundated with petitions, mostly from inmates of the Arkansas Department of Correction, seeking relief under Rule 37. Each petition must be reviewed and considered, however involved, and most are lengthy and detailed. We have a fulltime lawyer and secretary serving to handle such petitions and assist the court. We have had to add another part-time lawyer to the staff. All of this work is related to petitions filed by prisoners. In 1986, 189 such petitions were filed with written opinions issued in the majority of the cases, usually finding them meritless. They are invariably handwritten, lengthy (a recent one was 100 pages long), and generally attempt to retry the case or attempt to prove their lawyer incompetent. The

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37.1 appeals alleging ineffective assistance of counsel on March 2, 2017. See id., 519 S.W.3d 722; see also Barnes v. State, 2017 Ark. 76, at 1 n.1, 511 S.W.3d 845, 846 n.1.
76. See, e.g., Wall v. Kholi, 562 U.S. 545, 552–53 (2011) (defining “collateral review” and related term “collateral attack” as “indirect” attack on a judgment, often referred to as “habeas corpus”).
77. ARK. CODE ANN. § 16-112-101 (West 2019).
78. ARK. R. CRIM. P. 37.1.
79. In re Rule 37, Rules of Criminal Procedure, 293 Ark. 609, 609, 732 S.W.2d 458, 458 (1987); see also Maulding v. State, 299 Ark. 570, 571, 776 S.W.2d 339, 340 (1989) (“States are not obligated to provide for post-conviction relief after the defendant has failed to secure relief through direct review of his conviction.” (citing Pennsylvania v. Finley, 481 U.S. 551, 557 (1987))).
80. In re Rule 37, 293 Ark. at 609, 732 S.W.2d at 458 (citing Finley, 481 U.S. at 556–57).
three year time limitation in which petitions may be filed is ignored. Also the rule that states only one petition may be filed is often ignored.  

Rather, the court recognized that “some relief should exist to set aside void convictions;” continuing, “however, the remaining grounds for relief should be reexamined.” It then concluded its order by referring the question of continuing postconviction remedies in the then-current form for review to the court’s advisory committee. The court’s observation that relief is seldom granted or that a new trial is rarely ordered under Rule 37 is confirmed by Justice Josephine Linker Hart’s comment in a recent concurring opinion:

In the nearly thirty years since this court created the rule, I am aware of only two cases in which a prisoner received a new trial pursuant to Rule 37: *Flores v. State*, 350 Ark. 198, 85 S.W.3d 896 (2002), and *Rackley v. State*, 2014 Ark. 39, 2014 WL 346713. Meanwhile, the procedural defaults that are distressingly common when an inmate attempts to invoke Rule 37 bars [sic] the inmate from pursuing habeas relief in federal court.

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81. *Id.*, 732 S.W.2d at 458.
82. *Id.* at 610, 732 S.W.2d at 458.
83. *Id.*, 732 S.W.2d at 458 (“We refer to the Supreme Court Committee on Rules of Pleading, Practice and Procedure in Criminal Cases for consideration of the question of whether and under what circumstances should we provide for and maintain a postconviction proceeding.”).

I believe that Rule 37 could have been an invaluable tool for this court to assess whether the State of Arkansas is providing competent counsel as the state and federal constitutions require. Effectiveness of counsel should be judged not merely on whether a case is won or lost but also on whether defense counsel was competent enough to help the finder of fact to decide the nature and level of culpability for a particular criminal act. Determining the proper level of culpability directly corresponds to the length of a prison sentence. Without a competent defense, a criminal defendant could easily receive a much greater sentence than the law contemplates. With Arkansas’s prison population exceeding 19,000, ineffective counsel is something that we simply cannot afford.

*Id.* at 7–8, 543 S.W.3d at 864.

With respect to Justice Hart’s reference to the two cases in which new trials had been granted in Rule 37 actions, it is worth noting that the supreme court ordered relief on appeal from a denial of relief on the Rule 37.1 petition in *Conley v. State*, 2014 Ark. 172, at 13, 433 S.W.3d 234, 243. There, the court ordered dismissal of convictions on two counts of the three-count information on which the petitioner had been convicted, while upholding his conviction on Count 1, which charged delivery of cocaine—a sale of $100 worth of cocaine base to undercover officers—that resulted in imposition of a sixty-year enhanced sentence. *Id.* at 12, 433 S.W.3d at 243. The thirty-year term on the two counts that were ordered dismissed for lack of sufficient evidence was vacated when the supreme court found that trial counsel was ineffective for failing to preserve his challenge of insufficient evidence on those counts at trial. *Id.*, 433 S.W.3d at 243.
A. Post-Trial Remedies Are Not Mandated by the Federal Constitution

The rights accorded by the Sixth Amendment expressly address the trial process, and the Federal Constitution is otherwise silent with respect to post-trial proceedings. There is no constitutional provision requiring a state to provide the criminal defendant with the option of filing a motion for new trial, although States may choose to afford litigants the right to move for new trial, as Arkansas does.

Similarly, the Federal Constitution does not expressly provide for appeal from a criminal conviction. The Supreme Court essentially grafted a right to direct appeal on state criminal process by relying on the Fourteenth Amendment’s Equal Protection Clause to hold that once a state has created a right of appeal that could be accessed by financially capable litigants, indigent defendants must be accorded similar access.

Thus, in Griffin v. Illinois, the Court required states to provide a free copy of the record of proceedings in the trial court, or its equivalent, to permit the indigent appellant

85. U.S. CONST. amend. VI. The precise language of the Sixth Amendment guarantees, “In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence.” The amendment does not refer to trial, appeal or post-conviction proceedings with respect to the scope of the guarantee, but the Supreme Court has consistently held that the right to assistance of counsel does not extend to post-conviction proceedings because the Constitutional does not expressly address the right to post-conviction process at all. There is no right to post-conviction review, as the Court explained in Pennsylvania v. Finley, 481 U.S. 551, 557 (1987) (“States have no obligation to provide this avenue of relief”) and, consequently, there is no right to assistance or effective assistance of counsel in post-conviction proceedings, even in capital cases in which a state court defendant has been sentenced to death. Murray v. Giarratano, 492 U.S. 1, 7-8 (1989).

86. For instance, there is no mention of a right to file a motion for new trial in the Constitution, as the Supreme Court of the United States explained in Herrera v. Collins, 506 U.S. 390, 400 (1993).

87. For a summary of the process used by the Court to impose a constitutional requirement for access to state appellate process for indigent criminal defendants, see Smith v. Robbins, 528 U.S. 259, 276–77 (2000).

88. Id. at 20. Subsequently, in Eskridge v. Washington State Board of Prison Terms and Paroles, 357 U.S. 214 (1958) and Draper v. Washington, 372 U.S. 487 (1963), the Court
comparable means to frame the argument on appeal with support from the record of the proceedings in the court below.\textsuperscript{93}

The appellate right was significantly extended in \textit{Douglas v. California},\textsuperscript{94} when the same equal protection analysis was applied to require assistance of counsel to indigent criminal appellants.\textsuperscript{95} However, the \textit{Douglas} addressed whether an alternative to the complete trial court record could suffice. The \textit{Draper} Court explained:

> In all cases the duty of the State is to provide the indigent as adequate and effective an appellate review as that given appellants with funds—the State must provide the indigent defendant with means of presenting his contention to the appellate court which are as good as those available to a nonindigent defendant with similar contentions.

372 U.S. at 496. As a practical matter, however, counsel appointed to represent the indigent defendant on appeal often cannot determine which issues should be raised on appeal in the exercise of their best professional judgment without having an opportunity to review the complete record of the proceedings in the trial court. Entsminger v. Iowa, 386 U.S. 748, 752 (1967) (appointed counsel’s failure to file record on appeal, without notice to client, resulted in ineffective assistance by denying client appeal on the record).

\textsuperscript{93} \textit{Griffin}, 351 U.S. at 18–19. The majority based its equal protection analysis on its recognition of the prevalence and significance of systems for appellate review in the states:

> All of the States now provide some method of appeal from criminal convictions, recognizing the importance of appellate review to a correct adjudication of guilt or innocence. Statistics show that a substantial proportion of criminal convictions are reversed by state appellate courts. Thus to deny adequate review to the poor means that many of them may lose their life, liberty or property because of unjust convictions which appellate courts would set aside.

\textit{Id.}; \textit{see also} Burns v. Ohio, 360 U.S. 252, 258 (1959) (state rule requiring all appellants to pay filing fee violated indigent’s right to review, precluding even defective appeal based on insufficient record, as addressed in \textit{Griffin}).


> Respondent must first show that his counsel was objectively unreasonable, see \textit{Strickland}, 466 U.S. at 687–691 [], in failing to find arguable issues to appeal—that is, that counsel unreasonably failed to discover nonfrivolous issues and to file a merits brief raising them. If Robbins succeeds in such a showing, he then has the burden of demonstrating prejudice. That is, he must show a reasonable probability that, but for his counsel’s unreasonable failure to file a merits brief, he would have prevailed on his appeal.

528 U.S. at 285; \textit{see also} Burnside v. State, 2017 Ark. App. 691, at 4, 537 S.W.3d 796, 803 (“Appellate counsel’s failure to raise a specific issue must have amounted to error of such magnitude that it rendered appellate counsel’s performance constitutionally deficient under the \textit{Strickland} criteria.”).
Court also limited the implied constitutional right to a direct appeal to a one-step process, therefore declining to extend the right to assistance of counsel to discretionary appeals in state courts or federal courts:

We are dealing only with the first appeal, granted as a matter of right to rich and poor alike from a criminal conviction. We need not now decide whether California would have to provide counsel for an indigent seeking a discretionary hearing from the California Supreme Court after the District Court of Appeal had sustained his conviction, or whether counsel must be appointed for an indigent seeking review of an appellate affirmance of his conviction in this Court by appeal as of right or by petition for a writ of certiorari which lies within the Court’s discretion.96

Similarly, there is no mention of postconviction or collateral process for collateral attack on a criminal conviction or sentence in the Sixth Amendment.97 The Court drew the constitutional line differentiating the right to the single-step appeal and discretionary review in Ross v. Moffitt.98 There, the Court held that the Constitution does not afford an indigent criminal appellant the right to assistance of counsel in petitioning the Supreme Court by writ of certiorari to review a state court rejection of his federal constitutional claim, nor the right to counsel in a state discretionary appeal, in contrast to the right to counsel in the first appeal noted by the Douglas Court.99 Because there is no express or inferred right to discretionary review in the language of the Federal Constitution, the Ross Court found that there was no right to assistance of counsel in prosecuting a discretionary petition: “We do not believe that the Due Process Clause requires North Carolina to provide respondent with counsel on his discretionary appeal to the State Supreme Court.”100

Nevertheless, states have created systems for postconviction or collateral review of criminal convictions.101 They vary in terms of procedure but,

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99. The Ross majority questioned the reasoning of Douglas: “The precise rationale for the Griffin and Douglas lines of cases has never been explicitly stated, some support being derived from the Equal Protection Clause of the Fourteenth Amendment, and some from the Due Process Clause of that Amendment.” Id. at 608–09.
100. Id. at 610. The Arkansas Supreme Court has similarly held that there is no right to assistance of counsel in Arkansas postconviction proceedings. Williams v. Porch, 2018 Ark. 1, at 3, 534 S.W.3d 152, 154 (“We have also made clear that the appointment of counsel in postconviction proceedings is discretionary and not mandated.” (citing Mancia v. State, 2015 Ark. 115, at 27, 459 S.W.3d 259, 276)).
101. The variation in postconviction process adopted by the states prompted the Commissioners on Uniform State Laws to propose a model statute designed to eliminate inconsist
generally, permit a convicted defendant an option for raising issues that undermine the integrity of the conviction or sentence. While the lack of any express requirement for provision for postconviction attack on the criminal conviction or sentence in the Federal Constitution has been noted by the Arkansas Supreme Court, it has also held that once the state has provided a postconviction process for state court defendants, the process must be fair. Fairness in operation of postconviction proceedings is a particularly elusive concept because the petitioning criminal defendant is not only not afforded a right to assistance of counsel in the postconviction litigation process, there is also no Sixth Amendment guarantee of effective representation. Even in capital cases in which the postconviction petitioner has been sentenced to death, ineffective representation in state or federal proceedings will not provide an avenue for relief from execution of the sentence. Thus, in *Coleman v. Thompson*, the Court held that state postconviction counsel’s failure to appeal from the trial court’s denial of relief, which resulted in a procedural default of Coleman’s claims, did not warrant federal habeas relief.

Moreover, claims of ineffectiveness of counsel in state and federal postconviction proceedings do not generally afford the postconviction petitioner claims for relief from adverse decisions in those proceedings in the federal habeas corpus process, as provided by the controlling statute.
B. Suspension, Then Reinstatement, of Rule 37 in 1989

Interestingly, for a brief period of time, the defendant convicted in an Arkansas circuit court did not have a specific postconviction remedy at all. The Arkansas Supreme Court abolished its earlier version of Rule 37 by order entered on May 30, 1989, and for some period of time, a defendant’s postconviction remedy under state law was limited to proceeding under Rule 36.4, which permitted the defendant to allege ineffective assistance by his trial counsel by motion for new trial filed within thirty days of judgment. The claim of ineffectiveness raised in this procedure would then be merged with the claims raised on direct appeal from the trial and conviction to consolidate the appellate process into a single action. The court reinstated Rule 37, which was facially less limited than the Rule 36.4 procedure, some fifteen months later. In an effort to expedite the postconviction process, the court reduced the time for filing for relief under Rule 37 from three years—under the previous rule—to sixty days when the defendant has appealed from a conviction by trial or ninety days when the defendant’s conviction results from a guilty plea. The newly modified and readopted Rule 37 became effective on January 1, 1991. An example of the

In *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013), this Court announced a narrow exception to Coleman’s general rule. That exception treats ineffective assistance by a prisoner’s state postconviction counsel as cause to overcome the default of a single claim—ineffective assistance of trial counsel—in a single context—where the State effectively requires a defendant to bring that claim in state postconviction proceedings rather than on direct appeal. The question in this case is whether we should extend that exception to allow federal courts to consider a different kind of defaulted claim—ineffective assistance of appellate counsel. We decline to do so.
implications of this change in Arkansas postconviction process was explained in *Hubbard v. State*.

At the time of Hubbard’s conviction, Arkansas Criminal Procedure Rule 37 had been abolished and was replaced with Rule 36.4. Under Rule 36.4, a defendant who wished to raise a claim of ineffective assistance of counsel had to do so in a motion for a new trial within thirty days of the date of the judgment. Although it is unclear whether Hubbard filed such a motion, he subsequently pursued habeas corpus relief pursuant to 28 U.S.C. § 2254 in federal court. On November 5, 1995, the United States District Court for the Eastern District of Arkansas ordered that a writ of habeas corpus would issue “unless, within ninety (90) days, petitioner is allowed to prosecute with the benefit of counsel, Rule 36.4 proceedings in Monroe County Circuit Court and an appeal if desired.”

Following reinstatement by the supreme court, Rule 37 has remained the primary vehicle for postconviction, or collateral, attacks on convictions under Arkansas law. However, the overall scheme of remedies is rather Byzantine, including both legislative and judicially created remedies principally defined by specific subject matter.

There are, in fact, a number of postconviction remedies that may be available to Arkansas litigants to challenge unfavorable trial court dispositions and with which counsel should be familiar. The supreme court’s order in *Barnes*, however, appears to affect only appeals from Rule 37 actions brought in circuit courts. This is because the other remedies do not


115. *Hubbard*, 334 Ark. at 322, 973 S.W.2d at 805.

116. In *Spears v. State*, the court of appeals explained that the reinstatement of Rule 37 resulted in deletion of the previous requirement that the defendant petition the appellate court for leave to file the postconviction petition. No. CR 83-20, 1997 WL 618681, at *1 n.1 (Ark. App. Oct. 2, 1997); see also *Moss v. State*, 3010 Ark. 284, at 1 n.1, 2010 WL 2210933, at *1 n.1. (explaining that under prior rule, Rule 37 petitioner convicted on his plea of guilty was required to obtain leave from Arkansas Supreme Court to petition for relief, requiring showing that the conviction was a nullity, such as trial court’s lack of jurisdiction or violation of double jeopardy). Rule 37.2(c)(i) no longer imposes the requirement that the petitioner first obtain leave from the supreme court or, after *Barnes*, to file the Rule 37 petition. Instead, a petitioner seeking relief from a conviction obtained on a plea of guilty may now file the petition without first obtaining leave to file “within ninety (90) days of the date of entry of judgment” if no appeal was taken from the conviction. ARK. R. CRIM. P. 37.2(c)(i).

In its footnote, the court cited *In re Reinstatement of Rule 37 of Ark. Rules of Criminal Procedure*, 303 Ark. 746, 979 S.W.2d 458, but erroneously cited the Southwestern Reporter citation as volume “979” when the citation to the supreme court’s order issued October 29, 1990, actually appears at “797 S.W.2d 458,” while Westlaw responds with no citation requested for “303 Ark. 746.” *Spears*, 1997 WL 618681, at *1 n.1.

117. See infra Section III.D.
afford relief for claims brought as challenges to counsel’s performance as defective under the Sixth Amendment, compromised by actual conflict of interest impairing or distorting counsel’s performance, or in the rare case, by rules or state action compromising counsel’s ability to perform effectively.

C. Rule 37 Practice

The appeal in *Barnes* was characterized by the Arkansas Supreme Court as arising from a denial of postconviction relief in an action brought under Rule 37.1 of the criminal procedure rules, although the pro se litigant styled his motion in the trial court as a “belated motion to retract” his guilty plea. In his pleading Barnes argued that his guilty plea was tainted by trial counsel’s ineffective assistance. On appeal, the supreme court held that claims attacking counsel’s effectiveness must be prosecuted under Rule 37.1. The precise issues raised on the appeal involved Barnes’s request for appointment of counsel, a copy of the record, and an extension of time to file the appellate brief, but the court interpreted the thrust of his claim to be ineffective assistance of counsel, cognizable only pursuant Rule 37.1 regardless of the title of the pleading.

Rule 37.1 provides a remedy for inmates challenging their convictions or sentences in the state’s circuit courts that must be filed in the court

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118. ARK. R. CRIM. P. 37.1. The rule provides, in pertinent part:
   (a) A petitioner in custody under sentence of a circuit court claiming a right to be released, or to have a new trial, or to have the original sentence modified on the ground:
   (i) that the sentence was imposed in violation of the Constitution and laws of the United States or this state; or
   (ii) that the court imposing the sentence was without jurisdiction to do so; or
   (iii) that the sentence was in excess of the maximum sentence authorized by law; or
   (iv) that the sentence is otherwise subject to collateral attack; may file a verified petition in the court which imposed the sentence, praying that the sentence be vacated or corrected.
   
120. Id., 511 S.W.3d at 845.
121. Id. at 1–2, 511 S.W.3d at 845 (“A petition for postconviction relief mounting a collateral attack on a judgment, regardless of the label placed on it by the petitioner, is considered pursuant to our postconviction rule.”).
122. Id. at 2, 511 S.W.3d at 846.
123. The court explained that Barnes apparently sought to avoid dismissal based on his failure to file a verified petition, as required by Rule 37.1(c) of the Arkansas Rules of Criminal Procedure, by styling his petition as a “belated motion to retract” his guilty plea. Id. at 2–3, 511 S.W.3d at 846–47.
124. The Arkansas Supreme Court has limited the right to petition for postconviction relief to the remedy provided by Rule 37.1(a) to convicted defendants “in custody.” See supra
of conviction within sixty days after the conclusion of the direct appeal, if the case is appealed, or within ninety days of entry of the judgment and sentence on a plea of guilty when there is no appeal taken in the case.\textsuperscript{125}

In considering the petition on its merits, the trial court of conviction\textsuperscript{126} may order an evidentiary hearing on contested issues of fact or law,\textsuperscript{127} or dispose of the petition without hearing but with findings that may then be addressed on appeal from its denial of relief.\textsuperscript{128} The standard for review of the circuit court’s determination that relief is not warranted is high, requiring a finding that the trial court’s decision is clearly erroneous; the court explained in \textit{Wood v. State}:\textsuperscript{129}

Our standard of review in Rule 37.1 petitions is that, “on appeal from a circuit court’s ruling on a petitioner’s request for Rule 37 relief, this

\textsuperscript{125} Ark. R. CRIM. P. 37.2(c)(i)–(ii); see Wicks v. State, 2010 Ark. App. 499, at 9, 375 S.W.3d 769, 774 (“Appellant was required to pursue postconviction relief under Rule 37.1 within ninety days of the date of the entry of judgment. The time limitations in Rule 37.2(c) are jurisdictional in nature, and, where they are not met, a trial court lacks jurisdiction to grant postconviction relief.” (citing Carter v. State, 2010 Ark. 231, 364 S.W.3d 46)); accord Harris v. State, 2017 Ark. App. 381, at 8–9, 526 S.W.3d 43, 49.

\textsuperscript{126} Rule 37 does not directly refer to a requirement that the petition for postconviction relief must be filed in the circuit court in which the conviction was obtained. However, in Rule 37.2, there are references to the “appropriate circuit court.” Ark. R. CRIM. P. 37.2(c)(i), (iii)–(iv). In subsection (a) the rule explains that if there is an appeal pending from the conviction in the “original case,” when a Rule 37 petition is filed, “no proceedings under this rule shall be entertained by the circuit court while the appeal is pending.” Ark. R. CRIM. P. 37.2(a).

\textsuperscript{127} Ark. R. CRIM. P. 37.3(c).

\textsuperscript{128} Ark. R. CRIM. P. 37.3(a) (“If the petition and the files and records of the case conclusively show that the petitioner is entitled to no relief, the trial court shall make written findings to that effect, specifying any parts of the files, or records that are relied upon to sustain the court’s findings.”); see, e.g., Henington v. State, 2012 Ark. 181, at 5–6, 403 S.W.3d 55, 59–60 (affirming denial of relief on written findings of trial court, cautioning that trial court should hold evidentiary hearing “unless the files and record of the case conclusively show that the prisoner is entitled to no relief”); accord England v. State, 2018 Ark. App. 137, at 11–15, 543 S.W.3d 553, 562–64 (holding that trial counsel’s failure to move to sever counts involving two victims of incestuous sexual assault did not constitute defective performance where petitioner could not show severance motion would have been meritorious, and holding that lack of merit because offenses against victims intertwined, as both were present at the same time during some assaults and would be available to testify against defendant in joint trial).

\textsuperscript{129} 2015 Ark. 477, 478 S.W.3d 194.
court will not reverse the circuit court’s decision granting or denying post-conviction relief unless it is clearly erroneous. A finding is clearly erroneous when, although there is evidence to support it, the appellate court, after reviewing the entire evidence is left with the definite and firm conviction that a mistake has been committed.130

If the petition is meritorious, the circuit court may order relief from the conviction or sentence imposed.131

Despite the apparently broad grant of jurisdiction provided, the relief available in an action brought pursuant to Rule 37 is actually quite limited by case law, whether under Rule 37.1, which generally governs the authority of the trial court, or Rule 37.5, which specifically addresses the postconviction action brought by a defendant sentenced to death.132

1. Limiting the Scope of Review in Rule 37 Postconviction Actions

While the language of Rule 37.1 is very broad in authorizing attacks on sentences—and, by implication, convictions—the petitioner’s ability to do so is extremely limited by case law. First, the court has consistently viewed postconviction proceedings as a procedural vehicle for addressing claims that could not have been addressed in the trial and direct appeal process. For


131. Ark. R. Crim. P. 37.4 (“If the circuit court finds that for any reason the petitioner is entitled to relief, then the circuit court may set aside the original judgment, discharge the petitioner, resentence him or her, grant a new trial, or otherwise correct the sentence, as may appear appropriate in the proceedings.”); see, e.g., Conley v. State, 2014 Ark. 172, at 12, 433 S.W.3d 234, 243 (granting relief based on trial counsel’s failure to make adequate motion for directed verdict where evidence at trial was insufficient to support convictions on two counts charged in the information); State v. Harrison, 2012 Ark. 198, at 2–3, 404 S.W.3d 830, 833 (granting relief on Rule 37 petition where trial counsel failed to investigate witness’s prior juvenile conviction for capital murder and impeach witness at trial).

132. If the petitioning defendant has been sentenced to death, the postconviction remedy is governed by the provisions of Rule 37.5. See Ark. R. Crim. P. 37.5. Rule 37.5 provides procedural framework for litigation of claims brought by death-sentenced inmates designed to comply with federal law, expediting the execution of death sentences imposed in state capital prosecutions. Id. With respect to the limitation on claims cognizable in Arkansas postconviction proceedings, the range of claims which may be brought in capital challenges parallels those generally cognizable in cases in which defendants have not been sentenced to death, including those who may have been charged with capital offenses but were sentenced to life imprisonment or lesser sentences. See Ark. R. Crim. P. 37.5(a) (“Purpose and Scope. This rule shall apply only to persons under a sentence of death. Except as otherwise provided in this rule, the provisions of Rules 37.1, 37.2, 37.3 and 37.4 shall apply to a petition for postconviction relief filed by a person under sentence of death. The intent of this rule is to comply with the provisions of 28 U.S.C. § 2261 et seq.”). Ark. R. Crim. P. 37.5; see supra note 4 for text of Arkansas Rule of Criminal Procedure 37.1(a).
instance, in Sasser v. State, a death penalty case, the court offered its standard explanation with respect to the scope of appeal:

We have previously held that even constitutional issues must be raised in the trial court and on direct appeal, rather than in Rule 37 proceedings. Finley v. State, 295 Ark. 357, 748 S.W.2d 643 (1988). Rule 37 is a postconviction remedy, and as such, does not provide a method for the review of mere error in the conduct of the trial or to serve as a substitute for appeal.

The issue Sasser advanced involved an arguably flawed jury instruction on a lesser offense on which his capital felony murder charge rested, but which had not been challenged by trial counsel. The court’s rejection of the postconviction challenge reflects the general rule that Rule 37 may not be used to assert claims that should have been brought on direct appeal based on error preserved by proper objection at trial. The notion of procedural default relied upon by the Arkansas appellate courts to avoid review of those claims on the merits on direct appeal thus extends to prevent litigation of defaulted claims in the postconviction process. The Sasser court further explained that the exception to this general rule of procedural default would apply to claims of “fundamental” or “structural error,” but this proposition may not actually be consistently applied by the court:

We have made an exception, however, for errors that are so fundamental as to render the judgment of conviction void and subject to collateral attack. In Collins, for example, we held that the right to trial by a twelve-member jury is a fundamental right that fell within the exception. When we review a “fundamental” or “structural” error either on direct appeal or through the exception just explained, the fundamental nature of the error precludes application of the “harmless-error” analysis.

As explained in Wicks v. State, the court’s consistent rejection of “plain error” review suggests that its purported willingness to review claims of “fundamental” error in Sasser is quite restricted.

133. 338 Ark. 375, 993 S.W.2d 901 (1999).
134. Id. at 383, 993 S.W.2d at 906 (citation omitted).
135. Id. at 385, 993 S.W.2d at 907.
136. Id. at 383, 993 S.W.2d at 906.
137. Id. at 383–84, 993 S.W.2d at 906 (citing Collins v. State, 324 Ark. 322, 920 S.W.2d 846 (1996)).
139. “Plain error” review is arguably available for matters involving error in admission or exclusion of evidence pursuant to Arkansas Rules of Evidence 103(d), which provides, “Nothing in this rule precludes taking notice of errors affecting substantial rights although they were not brought to the attention of the court.” However, in Wicks the court expressly rejected “plain error” review in Arkansas law. 270 Ark. at 785, 606 S.W.2d at 369 (“Some
For instance, in *Kennedy v. State*, the court found that the trial court’s failure to instruct the jury on a lesser-included offense, a right recognized under state law, did not constitute a claim that could be raised in Rule 37 as a matter of fundamental or plain error:

Kennedy further argues that our cases have recognized the importance of lesser included offense instructions because we have previously held that the jury must be so instructed even when there is the “slightest evidence” to support a finding of a lesser included offense. We conclude that the right to have the jury instructed on all lesser included offenses supported by the evidence is not a fundamental right that warrants review of the omission of such instructions for the first time in a Rule 37 proceeding.

Thus, claims that could have been raised in the trial and direct appeal process, but were procedurally defaulted, cannot be revived in the postconviction process under Rule 37, as the State argued in *Kennedy*.

Nor can a petitioner use Rule 37 to reargue claims that were raised on direct appeal and rejected on their merits, except in the rare situation in which a change in the controlling law would have required the appellate court to rule differently in the appeal. Thus, in *Fudge v. State*, the court rejected a claim raised in postconviction that had been rejected in the supreme court’s disposition under Rule 4-3(h) and (i) in reviewing trial objections not argued on the direct appeal. It concluded that the issue had been decided against the petitioner on appeal as a result of the summary findings in its opinion: “Because this issue was settled in Fudge’s direct appeal, it is now the law of the case and cannot be reargued here.”

And in *Howard v. State*, the court rejected a claim raised in postconviction that was not asserted in a petition for writ of certiorari, although it could have been presented to the Supreme Court of the United States based on federal courts, especially the federal courts, have a “plain error” rule, under which plain errors affecting substantial rights may be noticed although they were not brought to the attention of the trial court. Federal Rules of Criminal Procedure, Rule 52(b); State v. Meiers, 412 S.W.2d 478 (Mo. 1967). In Arkansas, however, we do not have such a rule.”). And, with respect to Arkansas Rules of Evidence 103(d), the *Wicks* court explained that the rule was permissive, not mandatory, and thus, did not require the court to consider unpreserved error. *Id.* at 787, 606 S.W.2d at 370 (“If there is any other exception to our general rule that an objection must be made in the trial court, we have not found it in our review of our case law.”).

140. 338 Ark. 125, 991 S.W.2d 606 (1999).
141. *Id.* at 129, 991 S.W.2d at 609.
142. *Id.* at 128–29, 991 S.W.2d at 608.
144. *Id.* at 428–30, 206 S.W.3d 862–64.
on its recent decisions. This suggests that the Arkansas position is that even newly announced decisions of the Supreme Court of the United States may not afford a basis for arguing claims not litigated on direct appeal. The Howard court explained:

In his second point on appeal, Howard argues that, under *Ring v. Arizona*, 536 U.S. 584 (2002), the information charging him with capital murder was defective because it failed to enumerate any of the four aggravating circumstances upon which the State relied to obtain the death penalty. The two counts of information charging Howard with capital murder, filed in Little River County Circuit Court on December 19, 1997, stated only that Howard was charged with committing capital murder “with the premeditated and deliberated purpose of causing the death of another person.” The information did not enumerate the statutory aggravating factors that the State subsequently submitted to the jury.

As with Howard’s first argument, this is a claim that should have been presented on direct appeal. As the State points out, even though *Ring* was decided mere days before this court denied Howard’s petition for rehearing, the direct-review process encompasses certiorari proceedings. See *Casper v. Bohlen*, 510 U.S. 383 (1994). Thus, Howard could have presented his *Ring* and *Allen*-based argument in his petition for writ of certiorari to the United States Supreme Court, but he did not. Accordingly, he is barred from raising it for the first time during the course of his postconviction proceedings. See *Williams v. State*, 346 Ark. 54, 56 S.W.3d 360 (2001) (even constitutional issues must be raised on direct appeal, rather than in Rule 37 proceedings).

In short, the general rule is that “Rule 37 does not provide an opportunity for an appellant to reargue points that were settled on direct appeal. . . Therefore, there is no merit to Howard’s arguments on this issue.”

Howard and other decisions confirm the position taken by the Arkansas Supreme Court in its view of the limitation on presentation of issues in the Rule 37 process:

Generally, Rule 37 does not provide a remedy when an issue could have been raised in the trial or argued on appeal. See *Camargo v. State*, 346 Ark. 118, 55 S.W.3d 255 (2001). Stated another way, it is not appropriate to raise trial errors, including constitutional errors, for the first time in a Rule 37 proceeding. See *Rowbottom v. State*, 341 Ark. 33, 13

147. *Id.* at 27–28, 238 S.W.3d at 32–33.
148. *Id.*, 238 S.W.3d at 32–33.
149. *Id.* at 42, 238 S.W.3d at 43 (citing *Kemp v. State*, 348 Ark. 750, 74 S.W.3d 224 (2002); *Coulter v. State*, 342 Ark. 22, 81 S.W.3d 826 (2002)).
Thus, Rule 37.1 does not provide for raising issues for the first time that could have been litigated in the direct appeal, nor does it afford the petitioner an opportunity to relitigate issues that were addressed in the direct appeal and decided adversely to him.\(^\text{151}\)

2. **Litigating Ineffective Assistance Claims in Rule 37.1**

The practical effect of the limitations on claims cognizable in Rule 37 proceedings imposed by the Arkansas Supreme Court is that the majority of claims that might result in relief arise in the context of ineffective assistance of counsel claims.\(^\text{152}\) These claims rest primarily on the guarantee of assistance of counsel in the Sixth Amendment\(^\text{153}\) and the application of the federal protection as the controlling definition of the right for Arkansas litigants.\(^\text{154}\)

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150. *Id.* at 26, 238 S.W.3d at 32.

151. However, in *State v. Harrison*, the State argued, unsuccessfully, that an issue raised in a Rule 37 petition had been considered on direct appeal and decided adversely to the petitioner was barred from reconsideration in postconviction litigation, relying on the “law of the case” doctrine. 2012 Ark. 198, at 7–8, 404 S.W.3d 830, 835–36. The supreme court disagreed. *Id.* at 8, 404 S.W.3d at 836. On direct appeal, Harrison argued that the prosecution violated its obligation to disclose favorable evidence to the defense, the juvenile adjudication for capital murder of its witness. *Id.* at 6, 404 S.W.3d at 835; *see also* Harrison v. State, 371 Ark. 652, 269 S.W.3d 321 (2007). In the postconviction action, in contrast, he argued that trial counsel had rendered ineffective assistance in failing to discover the prior adjudication, which had been the subject of a published decision issued by the court of appeals. *Harrison*, 2012 Ark. 198, at 7, 404 S.W.3d at 835. In rejecting the State’s argument, the supreme court explained:

> In short, the issue that was adjudicated on direct appeal was the prosecutor’s conduct in failing to disclose, and the issue at the Rule 37 proceeding was the defense counsel’s conduct in failing to investigate and then develop a defense. *These are two distinct issues.* The latter of these issues, trial counsel’s effectiveness in investigating and developing a defense implicating Ingram was not adjudicated on direct appeal, and resolution of that issue is therefore not barred by law of the case. Accordingly, we find no merit to the State’s argument that the circuit court’s findings on the ineffectiveness of trial counsel are barred by law of the case.

*Id.* at 8, 404 S.W.3d at 836 (emphasis added).

152. *See, e.g.*, Howard v. State, 367 Ark. 18, 51, 238 S.W.3d 24, 49 (Hannah, C.J., dissenting) (“Rule 37 petitions most often concern issues of alleged ineffective assistance of counsel.”).

153. U.S. CONST. amend. VI. The Sixth Amendment guarantee that “the accused shall enjoy the right . . . to have the assistance of counsel for his defence,” has been held to include the right to *effective* assistance of counsel. McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970).

Strickland v. Washington\(^{155}\) is the controlling United States Supreme Court decision defining the scope of the Sixth Amendment guarantee. It establishes a two-prong test for counsel’s constitutional effectiveness, requiring first, proof that counsel rendered defective performance not reflecting an objectively reasonable strategic decision, and second, reasonable probability that but for counsel’s errors, the outcome of the case would have been different.\(^{156}\)

Other Sixth Amendment bases for violation of the guarantee to assistance of counsel arise in context of conflicts of interest compromising counsel’s performance, generally requiring a showing that counsel’s conflict actually compromised the client’s case under Cuyler v. Sullivan,\(^{157}\) and rare situations in which a rule or trial court ruling deprived the defendant of counsel’s effective assistance, such as the trial court’s ruling denying defense counsel the right to make a closing statement in a bench trial.\(^{158}\)

In Conley v. State,\(^{159}\) the Arkansas Supreme Court discussed the burden convicted defendants must satisfy in order to establish a claim based on ineffective assistance of counsel based on the Sixth Amendment test set by the Court in Strickland.\(^{160}\) The court explained:

In asserting ineffective assistance of counsel under Strickland, the petitioner first must demonstrate that counsel’s performance was deficient. Williams v. State, 2011 Ark. 489, 385 S.W.3d 228. This requires a showing that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed the petitioner by the Sixth Amendment. Adams v. State, 2013 Ark. 174, 427 S.W.3d 63. The reviewing court must indulge in a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance. Scott v. State, 2012 Ark. 199, 406 S.W.3d 1. The defendant claiming ineffective assistance of counsel has the burden of overcoming that presumption by identifying the acts and omissions of counsel which, when viewed from counsel’s perspective at the time of trial, could not have been the result of reasona-

\(^{156}\) Id. at 694. In Sparkman v. State, the court reversed the circuit court’s denial of post-conviction relief based on trial counsel’s failure to object to admission of the accused’s uncounseled confession, given under questioning by detective without notice to counsel already appointed to represent accused, constituted defective performance and noting that accused’s confession is “probably the most probative and damaging evidence that can be admitted against him.” 373 Ark. 35, 50–52, 281 S.W.3d 277, 281–83 (2008) (citing Arizona v. Fulminante, 499 U.S. 279, 296 (1991)). The court concluded that Sparkman had satisfied both the defective performance and probable prejudice prongs of the Strickland test for ineffective assistance and reversed and remanded for new trial. Id. at 52, 281 S.W.3d at 283.
\(^{157}\) 446 U.S. 335, 349–50 (1980).
\(^{159}\) 2014 Ark. 172, 433 S.W.3d 234.
\(^{160}\) Id. at 4–5, 433 S.W.3d at 239 (citing Strickland, 466 U.S. 668).

Second, the petitioner must show that the deficient performance prejudiced the defense, which requires a demonstration that counsel’s errors were so serious as to deprive the petitioner of a fair trial.161

The state supreme court has also explained that “in making a determination on a claim of ineffective assistance of counsel, [it] considers the totality of the evidence.”162 This language would suggest that when counsel’s representation includes more than one instance of defective performance, the *totality* of the evidence would require the reviewing court to assess the cumulative effect of counsel’s errors in arriving at the determination of whether the defendant was afforded effective assistance. This view apparently agrees with the majority of jurisdictions that have held that cumulative error analysis does apply to claims resting on multiple instances of counsel’s deficient performance.163

However, the Arkansas Supreme Court has rejected application of cumulative error in the review of ineffective assistance claims,164 a position also taken by the Eighth Circuit Court of Appeals165 and other jurisdictions.166 This approach fails to recognize the repeated reference to counsel’s

161. *Id.*, 433 S.W.3d at 239.
163. *See, e.g.*, James v. Warden, No. CV104003622, 2014 WL 1646974, at *28 (Conn. Super. Ct. Jan. 31, 2014) (noting majority of courts have applied cumulative error doctrine in assessing effectiveness of counsel’s assistance (citing Hooks v. Workman, 689 F.3d 1148, 1188 (10th Cir. 2012); Richards v. Quarterman, 566 F.3d 553, 564 (5th Cir. 2007); Dugas v. Coplan, 428 F.3d 317, 335 (1st Cir. 2005); Lindstadt v. Keane, 239 F.3d 191, 199 (2d Cir. 2001); Harris By & Through Ramseyer v. Wood, 64 F.3d 1432, 1438 (9th Cir. 1995); Kubat v. Thieret, 867 F.2d 351, 370 (7th Cir. 1989); Suggs v. State, 923 So.2d 419, 441 (Fla. 2005); Schofield v. Holsley, 642 S.E.2d 56, 60 n.1 (Ga. 2007); State v. Clay, 824 N.W.2d 488, 500 (Iowa 2012); Evans v. State, 28 P.3d 498, 524 (Nev. 2001); Commonwealth v. Koehler, 36 A.3d 121, 161 (Pa. 2012); State v. Thiel, 665 N.W.2d 305, 321 (Wis. 2003)).
165. Middleton v. Roper, 455 F.3d 838, 851 (8th Cir. 2006) (holding that defendant may not build constitutional claim on series of counsel’s errors).
166. *See Fisher v. Angelone*, 163 F.3d 835, 852 (4th Cir.1998) (“To the extent this [c]ourt has not specifically stated that ineffective assistance of counsel claims, like claims of trial court error, must be reviewed individually, rather than collectively, we do so now.”). The *Fisher* court reviewed the positions taken by other circuits:

*For example, in Wainwright v. Lockhart, 80 F.3d 1226 (8th Cir.), cert. denied, 519 U.S. 968 [] (1996), the Eighth Circuit expressly held that an attorney’s acts or omissions “that are not unconstitutional individually cannot be added together to create a constitutional violation.” *Id.* at 1233; *see also Jones v. Stotts*, 59 F.3d 143, 147 (10th Cir. 1995) (noting that cumulative-error analysis evaluates only effect of matters determined to be error, not cumulative effect of non-errors); United States v. Stewart, 20 F.3d 911, 917–18 (8th Cir. 1994) (same); United States v. Gutierrez, 955 F.2d 169, 173 (9th Cir. 1993) (same). But see Williams v.
“errors” in the opinion in *Strickland*.\textsuperscript{167} Arguably, then, Arkansas fails to apply the proper standard for review of ineffective assistance claims.

A significant part of the problem for petitioners asserting ineffective assistance claims is the clear tendency of the state supreme court to defer to counsel’s exercise of judgment in resolving claims of defective performance.\textsuperscript{168} For instance, even in a capital case in which the death sentence had been imposed,\textsuperscript{169} *Wertz v. State*,\textsuperscript{170} the court explained: “[W]ith respect to an ineffective-assistance-of-counsel claim regarding the decision of trial counsel to call a witness, *such matters are generally trial strategy and outside the purview of Rule 37.1*.\textsuperscript{171}


\textsuperscript{169} In capital cases in which the petitioner has been sentenced to death, the postconviction petition proceeds pursuant to Rule 37.5, not 37.1. ARK. R. CRIM. P. 37.5. Because a death sentence has been imposed, the appeal from denial of relief proceeds directly to the state supreme court. McGehee v. State, 344 Ark. 602, 604, 43 S.W.3d 125, 126 (2001) (explaining that supreme court jurisdiction for defendant sentenced to death is pursuant to Rule 37 of the Arkansas Rules of Criminal Procedure and Arkansas Supreme Court Rule 1-2(a)(8)).

\textsuperscript{170} 2014 Ark. 240, 434 S.W.3d 895.

\textsuperscript{171} Id. at 4, 434 S.W.3d at 900 (emphasis added). Note that the court referenced “Rule 37.1,” in explaining its position on trial counsel’s exercise of discretion, rather than “Rule 37.5.” Id., 434 S.W.3d at 900. Rule 37.5(a), however, explains: “This rule shall apply only to persons under a sentence of death. Except as otherwise provided in this rule, the provisions of Rules 37.1, 37.2, 37.3 and 37.4 shall apply to a petition for post-conviction relief filed by a person under sentence of death.” ARK. R. CRIM. P. 37.5(a). Section (a), thus, provides that only the specific procedural requirements of Rule 37.5 for death penalty cases are unique to capital prosecutions, such that principles of law apply in capital cases in which defendants have been sentenced to death and those in which death was not imposed and non-capital cases with equal force. Id. However, Criminal Appellate Rule 10 expressly provides for different standards for appellate review in cases in which a sentence of death has been imposed but applies to review on direct appeal. ARK. R. APP. P.—CRIM. 10. For instance, two provisions appear to require the review of error regardless of preservation by trial objection:

(b) Mandatory Review. Whenever a sentence of death is imposed, the Supreme Court shall review the following issues in addition to other issues, if any, that a defendant may enumerate on appeal. Counsel shall be responsible for abstracting the record and briefing the issues required to be reviewed by this rule and shall consolidate the abstract and brief for such issues and any other issues enumerated on appeal. The Court shall consider and determine:

(iv) whether the trial court failed in its obligation to intervene without objection to correct a serious error by admonition or declaring a mistrial;
With respect to the specific reassignment of appellate jurisdiction in *Barnes*, however, one obvious problem is that while the court redirected cases to the court of appeals in which claims of ineffective assistance have been asserted, Arkansas cases demonstrate that claims other than those alleging ineffective assistance remain cognizable under Rule 37. For example, in *Pardue v. State*, the court noted:

At the postconviction-relief hearing, appellant Pardue waived the arguments in his pro se petition asserting ineffective assistance of counsel. Counsel’s arguments presented at the hearing asserted appellant lacked the capacity to intelligently and voluntarily enter a guilty plea, or that the pleading procedure was defective. Appellant raises four points for reversal: (1) use of prescription medications rendered his plea invalid; (2) his plea was not knowing and voluntary because the conditions were not clearly stated and assented to on the record; (3) his plea was void because he was not asked and did not assent to the factual basis; (4) sentencing as a habitual offender should be void because the state failed to charge appellant as a habitual offender or because the trial court failed to fully advise appellant or require a factual basis.

This recitation of claims brought in a Rule 37 petition show that the remedy is not limited to arguments that counsel failed to provide effective assistance but may include other grounds for attacking the conviction or sentence imposed by the trial court.

Under the limited directive in the *Barnes* footnote, it could be argued that the claim should be properly presented to the Arkansas Supreme Court because it is not restricted to ineffective assistance allegations. However, the supreme court’s decision to simply change appellate jurisdiction for these claims by footnote, rather than by published order, leaves unexplained the full extent of appellate jurisdiction redirected to the court of appeals in the *Barnes* footnote. Still, that this might remain an unresolved issue is suggested by Judge Whiteaker’s opinion for the court in which he referred to the

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(v) whether the trial court erred in failing to take notice of an evidentiary error that affected a substantial right of the defendant;

*Id.*

The requirements imposed upon review of capital cases in which a death sentence has been imposed by the Arkansas Supreme Court itself in its adoption of Criminal Appellate Rule 10(b)(iv) and (v) suggest nothing less than recognition of a rule of plain or fundamental error in those cases, contrary to the general approach taken by the court in *Wicks v. State*, 270 Ark. 781, 785, 606 S.W.2d 366, 369 (1980). But the decisions in *Sasser v. State*, 338 Ark. 375, 993 S.W.2d 901 (1999) and *Howard v. State*, 367 Ark. 18, 238 S.W.3d 24 (2006), do not support any conclusion that Rule 10 requires the court to overrule its previous position generally rejecting review of unpreserved error.

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173. *Id.* at 569–70, 215 S.W.3d at 653.
Arkansas Supreme Court’s transfer of a majority of its Rule 37 appellate jurisdiction to the Arkansas Court of Appeals.\textsuperscript{174}

D. Other Postconviction Remedies Under Arkansas Law

There are at least four other procedural vehicles for convicted criminal defendants seeking relief from their convictions or sentences, each based on discrete theories of violations compromising their substantial rights. Ironically, perhaps in light of the position taken in the footnote to the Court’s order in \textit{Barnes}, the appeal in each of these procedural remedies lies in the Arkansas Supreme Court.\textsuperscript{175} This may be consistent with the underlying thinking in Rule 1-2(a), which provides that the supreme court has appellate jurisdiction in actions involving extraordinary relief, “quo warranto, prohibition, injunction, or mandamus directed to the state, county, or municipal officials or to circuit courts.”\textsuperscript{176} The remedies involved in collateral attacks on criminal judgments are not included in this list but are, in a real sense, extraordinary because they operate outside the regular course of civil and criminal litigation.

The four alternative remedies are briefly summarized below.\textsuperscript{177}

1. \textit{Statutory Attack on an Illegal Sentence}

Section 16-90-111 of the Arkansas Code Annotated provides a remedy for imposition of an \textit{illegal} sentence, rather than a sentence illegally imposed, brought in the trial court of conviction.\textsuperscript{178} This remedy overlaps the provisions in Rule 37.1(a)(ii) and (a)(iii).\textsuperscript{179} While the state supreme court has held that a challenge to illegal imposition of sentence is only cognizable in a Rule 37.1 action, it continues to recognize that facially illegal sentences may still be brought pursuant to section 16-90-111.\textsuperscript{180} Rule 37.1 would also


\textsuperscript{175} \textit{E.g.}, Flowers v. Norris, 347 Ark. 760, 762, 68 S.W.3d 289, 290 (2002) (“An appeal is the proper procedure for the review of a circuit court’s denial of a petition for a writ of habeas corpus.”).

\textsuperscript{176} \textsuperscript{ARK} \textsuperscript{S}UP. \textsuperscript{C}T. \textsuperscript{R}. 1-2(a)(3).

\textsuperscript{177} \textit{See infra} Sections III.D.1–4.

\textsuperscript{178} \textsuperscript{ARK} \textsuperscript{C}ODE \textsuperscript{A}NN. § 16-90-111 (West 2019).

\textsuperscript{179} Arkansas Rule of Criminal Procedure 37.1(a) provides, in pertinent parts:

(a) A petitioner in custody under sentence of a circuit court claiming a right to be released, or to have a new trial, or to have the original sentence modified on the ground:

(ii) that the court imposing the sentence was without jurisdiction to do so; or

(iii) that the sentence was in excess of the maximum sentence authorized by law;

afford the petitioner the option of raising a challenge to the legality of the sentence imposed by postconviction petition within the time limits imposed by the rule, according to the text of subsections (b) and (c). In contrast, there is no time limit for filing the claim under section 16-90-111.\footnote{Green v. State, 2017 Ark. 361, at 2 n.1, 533 S.W.3d 81, 82 n.1; Gardner v. State, 2017 Ark. 230, at 2, 2017 WL 3300528, at *2.} The petition to correct an illegal sentence must be filed in the circuit court of conviction, as the court explained in Wesley v. Kelley:\footnote{2017 Ark. 194, 519 S.W.3d 693.}

A petition under section 16-90-111 is a request for postconviction relief from a judgment of conviction; as such, it is properly filed in the trial court where the judgment was entered under the docket number for the criminal judgment being challenged.\footnote{Id. at 2 n.2, 519 S.W.3d at 695 n.1.}

The court also explained that the petition should name the State as the defendant, rather than the Director of the Arkansas Department of Correction.\footnote{Id. at 2, 519 S.W.3d at 695. The more recent decision in Board of Trustees of the University of Arkansas v. Andrews, 2018 Ark. 12, 585 S.W.3d 616, may ultimately bear on reliance on section 16-90-111 as a procedural vehicle for challenging illegal sentences. The court held that the Arkansas constitutional doctrine of sovereign immunity precludes actions against the State in state courts except in limited circumstances. Id. at 3–6, 585 S.W.3d at 619–20. Justice Baker, joined by Justice Hart, dissenting, suggests that “postconviction cases” could fall within the ambit of the constitutional prohibition of actions against the State as a party. Id. at 18–19, 585 S.W.3d at 627. Andrews would appear to reject the court’s decision in Lenard v. Kelley, 2017 Ark. 186, at 6, 519 S.W.3d 682, 688, in which the court described those circumstances in which an action against the State, or naming the State as a defendant, is not precluded by the doctrine of sovereign immunity. However, the court rendered a decision in Lukach v. State, 2018 Ark. 208, 548 S.W.3d 810, issued on June 7, 2018, six months after the decision in Andrews, which was issued on January 18, 2018. Lukach was an action brought under section 16-90-111, suggesting that the concern originally expressed by Justice Baker in Andrews, has implicitly been addressed by the supreme court in ruling on the merits in this action naming the State as party defendant. Id. at 4, 548 S.W.3d at 812.}

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Second, where a trial court acts outside or in excess of its jurisdiction, the defendant may, alternatively, challenge the action by petitioning for habeas corpus relief, pursuant to section 16-112-101.\footnote{ARK. CODE ANN. § 16-112-101 (West 2019). The writ of habeas corpus is designed to protect the individual from illegal confinement as a result of action taken by public officials or actors. Meny v. Norris, 340 Ark. 418, 422–23, 13 S.W.3d 143, 146. The state constitution expressly provides that the writ shall not be suspended. ARK. CONST. art. II, § 11.} The most common claim that warrants relief is based on imposition of a conviction or sentence by the circuit court not authorized by statute, most typically a sentence im-
posed beyond the trial court’s statutory authority.\textsuperscript{186} This claim is similar to that available under section 16-90-111, but the petition is filed in the circuit having physical jurisdiction over the petitioner because of his place of confinement,\textsuperscript{187} rather than in the trial court of conviction.\textsuperscript{188}

The habeas court’s jurisdiction is not limited to claims based on facially-defective judgments, those in which the sentence reflected in the judgment and commitment order is outside the trial court’s jurisdiction. In \textit{Gardner v. Hobbs},\textsuperscript{189} the court held that the burden is on the petitioner contesting: “A writ of habeas corpus is proper only when a judgment of conviction is invalid on its face or \textit{when a trial court lacked jurisdiction over the cause}.”\textsuperscript{190}

Even though the circuit court may be within its discretion in imposing punishment in accordance with the controlling statute, subsequent action may serve to require relief from a sentence lawful at the time it was imposed, as the Arkansas Supreme Court’s disposition in \textit{Jackson v. Norris},\textsuperscript{191}

\begin{quote}
186. For instance, in \textit{Flowers v. Norris}, the court held that an illegal sentence claim implicates jurisdictional error which cannot be waived and can be asserted on direct appeal or in a petition for habeas corpus without having been preserved by timely objection in the trial court. 347 Ark. 760, 763–64, 68 S.W.3d 289, 291–92 (2002). While the court denied relief on the claim asserted, it did modify the sentence imposed in the case where the trial court improperly imposed a concurrent sentence of forty years on a Class A felony on one of the charges on which Flowers had been convicted on his plea of guilty, reducing that sentence to the thirty year maximum punishment for attempted capital murder. \textit{Id.} at 767, 68 S.W.3d at 293

187. \textit{ARK. CODE ANN.} § 16-112-105(b)(1) (West 2019). As with Rule 37.1 claims, the circuit court only has jurisdiction if the petitioner is actually confined pursuant to the illegal sentence. In \textit{State v. Wilmoth}, for example, the Court noted that Wilmoth had been released from custody two years before he filed for relief. 369 Ark. 346, 351, 255 S.W.3d 419, 422 (2007). Similarly, in \textit{Pardue v. State}, the petitioner was confined on a federal conviction, rather than on the basis of a state conviction, at the time he filed his habeas petition, having already discharged the state sentence. 363 Ark. 567, 215 S.W.3d 650 (2005). And in \textit{Bradford v. State}, the Court explained that because the conviction the petitioner challenged as illegally resulting in his confinement had been reversed on appeal and dismissed, he could not support a valid habeas corpus claim. 2011 Ark. 494, at 5, 2011 WL 5588934, at *3. His claim that he was illegally confined was rejected because Arkansas Department of Corrections records showed that he was actually serving three other sentences, including a life sentence, on other offenses on which he had been convicted. \textit{Id.} at 1–2, 2011 WL 5588934, at *1.

188. \textit{E.g., Wesley v. Hobbs}, 2014 Ark. 260, at 2, 2014 WL 2465503, at *1 (“Appellant’s petition to correct the sentence that was imposed in Nevada County was filed in the wrong court because the circuit court in Lee County had no jurisdiction to consider the petition to correct a judgment of conviction that had not been entered in Lee County. While the statute refers to ‘any circuit court,’ it is the court where the judgment was entered that has authority to act under Arkansas Code Annotated section 16-90-111.” (quoting \textit{ARK. CODE ANN.} § 16-90-111 (West 2019))).

189. 2014 Ark. 346, 469 S.W.3d 663.

190. \textit{Id.} at 2, 469 S.W.3d at 669 (emphasis added).

191. 2013 Ark. 175, 426 S.W.3d 906.
demonstrates. There, the life sentence without parole mandatorily imposed under Arkansas law was invalidated for the juvenile offender by the Supreme Court of the United States in *Miller v. Alabama*, and the companion case of *Jackson v. Hobbs*, which originated in the Arkansas courts. On remand from the Court’s decision, the state court reversed the denial of habeas corpus relief, applying the decision in *Miller/Jackson* retroactively, and by implication, finding that the circuit court’s imposition of the mandatory life sentence without possibility of parole was beyond the scope of its lawful authority.

Finally, although the state habeas corpus statute provides that the petitioner has the option of filing the petition directly in the state supreme court, Amendment 80 to the state constitution subsequently limited the court’s original jurisdiction to specific actions that do not include habeas corpus actions.

3. Statutory Habeas Corpus Claims of Actual Innocence

Third, a defendant claiming actual innocence may seek testing for exculpatory DNA or other scientific evidence by writ of habeas corpus under a separate statutory provision. The statutory process for raising an actual innocence claim is complicated, requiring the defendant to demonstrate that the scientific evidence, upon which the claim is based, is either newly discovered or newly available scientific evidence that would be sufficiently exculpatory “to establish by clear and convincing evidence that no reasonable fact-finder would find the petitioner guilty of the underlying offense.” Critical to the defendant’s right to testing under the statutory scheme is a showing that the scientific evidence would address an issue at trial, such as

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194. *Jackson*, 2013 Ark. 175, at 2, 426 S.W.3d at 907.
195. *Id.* at 6, 426 S.W.3d at 909–11.
196. *Id.* at 2, 426 S.W.3d at 907.
197. *Ark. Code Ann.* § 16-112-102(a)(1) (West 2019) (“The writ of habeas corpus shall be issued upon proper application by a Justice of the Supreme Court or a judge of the circuit court. The power of the Supreme Court and circuit court to issue writs of habeas corpus shall be coextensive with the state.”).
200. *Id.* § 16-112-201(a)(1) (referring to scientific evidence not available at the time of trial).
201. The statutory test for obtaining relief requires that the scientific evidence was not available at the time of trial and “if proven and viewed in light of the evidence as a whole,” the evidence would be sufficient to meet the clear and convincing evidence test. *Id.* § 16-112-201 (a)(2).
the perpetrator’s identity, upon which a doubt as to guilt could logically rest.  

4. *Writ of Error Coram Nobis*

Finally, the writ of error coram nobis permits a defendant to petition for leave to raise claims outside the trial record. In *Mason v. State*, the Arkansas Supreme Court explained:

The function of the writ is to secure relief from a judgment rendered while there existed some fact that would have prevented its rendition if it had been known to the trial court and which, through no negligence or fault of the defendant, was not brought forward before rendition of judgment.

Moreover, relief by writ of error coram nobis is available for only certain specified claims of such significance that relief is required to prevent injustice, as the court explained in *Penn v. State*:

The writ is granted only when there is an error of fact extrinsic to the record such as insanity at the time of trial, a coerced plea of guilty, or material evidence withheld by the prosecutor. It must be a fact which might have resulted in a different verdict. In simple terms, this writ is a legal procedure to fill a gap in the legal system—to provide relief that was not available at trial because a fact exists which was not known at that time and relief is not available on appeal because it is not in the record.

Importantly, coram nobis affords the convicted defendant the procedural option of presenting a claim that the conviction was tainted when the prosecutor failed to disclose exculpatory evidence, as required by the Supreme Court of the United States in *Brady v. Maryland* and subsequent decisions.

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202. Wells v. State, 2017 Ark. 88, at 6, 513 S.W.3d 834, 837. At trial the defendant argued that the evidence failed to show he intended to kill, and thus, that the evidence was insufficient to support a conviction for attempted murder because he did not know the victim and only fired randomly. *Id.*, 513 S.W.3d at 837. Because he had not claimed that he was not the individual who fired, his identity was not in issue and the court rejected his claim that the trial court abused its discretion in refusing to order DNA testing. *Id.*, 513 S.W.3d at 837. The supreme court concluded: “A request for DNA testing raised now to assert a claim of actual innocence would not produce new material evidence that would support Wells’s theory of defense presented at trial, nor would it raise a reasonable probability that he did not commit the offense, particularly in light of his confession to the contrary.” *Id.*, 513 S.W.3d at 837.

203. *Id.* at 2, 436 S.W.3d at 469.

204. *Id.* at 2, 436 S.W.3d at 471.


206. *Id.* at 573–74, 670 S.W.2d at 428.

Brady decisions, when the defendant was insane at the time of trial, when his guilty plea was coerced, or when a third party confesses to the crime while the defendant’s conviction is pending on appeal.

A showing that evidence favorable to the defense was suppressed, or not disclosed while in the possession or under control of the prosecutor or members of the prosecution team, may be the subject of extraordinary relief by writ of error coram nobis only if the Arkansas Supreme Court orders jurisdiction reinvested in the trial court to consider the claim on its merits if the case has been appealed. If the defendant has been convicted on a plea of guilty, however, the writ may be filed directly in the trial court because that court never lost jurisdiction since there was no appeal. Coram nobis is

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208. E.g., Strickler v. Greene, 527 U.S. 263, 285 n.27 (1999) (where prosecutor relies on open file policy arguably disclosing all evidence known to State is available to the defense, the defendant is not charged with duty to make an additional search for undisclosed evidence favorable to defense); Kyles v. Whitley, 514 U.S. 419, 436–37 (1995) (undisclosed favorable evidence must be considered cumulatively in determining whether there was a reasonable probability of a different outcome had all favorable evidence been disclosed to defense); United States v. Bagley, 473 U.S. 667, 668 (1985) (material impeachment evidence must be disclosed to defense); United States v. Agurs, 427 U.S. 97, 106 (1976) (no duty for defense counsel to make request for specific evidence not known to defendant because of the disclosure duty imposed upon prosecutor).

209. See Hydrick v. State, 104 Ark. 43, 45, 148 S.W. 541, 541–42 (1912) (citing Johnson v. State, 97 Ark. 131, 133 S.W. 596 (1911)). More recently, in Graham v. State, the court held that an allegation that the petitioner was incompetent at the time he entered his plea of guilty is cognizable in coram nobis, but may not be raised under the habeas corpus remedy for newly discovered scientific evidence supporting a claim of actual innocence under Arkansas Code Annotated sections 16-112-201 to -203. 358 Ark. 296, 298, 188 S.W.3d 893, 895 (2004).

210. The Arkansas Supreme Court has distinguished between a claim based on coercion of a defendant’s guilty plea, cognizable in coram nobis, and a challenge to the conviction on a guilty plea based upon counsel’s ineffectiveness in failing to properly advise the pleading defendant with respect to the consequences of pleading guilty. The former situation may warrant relief if the defendant was actually threatened harm into pleading guilty or his guilty plea was entered under fear or duress, according to White v. State, 2015 Ark. 151, at 5, 460 S.W.3d 285, 288. But where the allegation rests on a claim that counsel failed to advise the defendant pleading guilty correctly, the claim is actually a postconviction attack on the conviction that must be brought in Rule 37. Id., 460 S.W.3d at 288–89. In Thacker v. State, the court also explained, “Claims of coercion cognizable in error coram nobis proceedings include pleas that are the result of fear, duress, or threats of mob violence.” 2016 Ark. 315, at 6, 500 S.W.3d 736, 740.


212. Newman v. State, 2009 Ark. 539, at 5, 364 S.W.3d 61, 65. The court specifically applied the test for establishing a Brady violation in the context of a petition to reinvest the trial court with jurisdiction to consider Newman’s petition for writ of error coram nobis. Id. at 18–19, 364 S.W.3d at 71.

a judicial remedy, recently expanded by decisions in *Strawhacker v. State* and *Pitts v. State*, in which the supreme court held that disclosure by the FBI that criminalists testifying as experts had testified falsely in some trials, warranted review by the trial courts in those cases to determine whether false expert testimony compromised in the integrity of the convictions.

These decisions expand the underlying premise for the remedy because they recognize that the remedy may lead to evidence demonstrating a constitutional non-disclosure violation, even though the petitioner remains unable to present evidence establishing the suppression or non-disclosure of evidence that would have been favorable to the defense. Even if the petitioner is able to demonstrate the undisclosed evidence would have been favorable to the petitioner in developing or supporting a defense at trial, the petitioner may not be entitled to relief from the conviction. The required showing for relief mirrors that for *Brady* violations as a matter of federal constitutional law. Relief from the conviction depends upon a showing that there would have been a reasonable probability of a different outcome had the undisclosed or suppressed evidence been available to the defendant at trial.

Procedurally, the most significant aspect of the coram nobis process is that once the trial court has lost jurisdiction over the case after the time for motion for new trial or notice of appeal—thirty days—has expired, the petitioner seeking review of claims cognizable in coram nobis must petition the Arkansas Supreme Court for leave to reinvest jurisdiction in the circuit.

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218. For example, in *Buckley v. State*, the petitioner learned that state law enforcement officers had videotaped an interview with the confidential informant prior to trial. No. CR 01-644, 2007 WL 2955980, at *4 (Ark. Oct. 11, 2007). The videotape had never been disclosed because the drug agents themselves concluded that the videotape contained no exculpatory evidence requiring disclosure. *Id.* Buckley petitioned for coram nobis, but because the videotape had not been disclosed, he was unable to show that it did contain evidence warranting relief. *Id.* (“Although petitioner’s attempts to obtain the tape demonstrate diligence in pursuing this issue, he does not present a claim that is meritorious.”).

If the supreme court grants the petitioner’s motion, the petition for coram nobis relief can be presented to the trial court. If the trial court orders relief, the State may appeal; if relief is denied on the petition, the petitioner can appeal to the supreme court.

IV. PROCEDURAL CONSEQUENCES OF THE SHIFT IN RULE 37.1 APPELLATE JURISDICTION

The shift in appellate jurisdiction in Rule 37.1 appeals, ordered in the Barnes footnote, redirecting review of the trial court’s denial of relief from the Arkansas Supreme Court to the Arkansas Court of Appeals, results in a significant additional option, and burden, for state inmates challenging their convictions. The general framework for appellate review in Rule 37.1 actions imposes a duty on postconviction litigants to petition the Arkansas Supreme Court to review cases in which the court of appeals has ruled adversely on the claims.

A. The Additional Step in the Appellate Process: The Petition for Review

Pursuant to the rules governing the direct appeal process under Arkansas law, a petitioner, losing in the court of appeals, has the options of petitioning for rehearing in that court or petitioning for review of the case in

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221. On March 14, 2019, the Arkansas Supreme Court adopted new rules that alter the process for filing the petition for review in the state supreme court to review a decision rendered by the Arkansas Court of Appeals. In re Electronic Filing of Petitions for Rehearing & Petitions for Review, 2019 Ark. 79, ___ S.W.3d ___. Either party losing in the intermediate court may petition the supreme court for reconsideration the issues urged by the losing party. Id., ___ S.W.3d ___. If the petition for review filed pursuant to Supreme Court Rule 2-4 is granted, the court traditionally reviews the issue on which review has been granted de novo, rather than reviewing the decision of the court of appeals for error. The revised rule permits a losing party to file the petition for review within ten days of the denial of a petition for rehearing when the party has petitioned the court of appeals for rehearing. Id., ___ S.W.3d ___. Alternatively, in the event the losing party does not petition for rehearing in the court of appeals, the additional ten-day filing period commences when the time for filing the petition for rehearing has run, eighteen days from the issuance of the decision by the court of appeals. See id., ___ S.W.3d ___.
222. ARK. SUP. CT. R. 2-3. Under Rule 2-3(a), the losing litigant in the court of appeals has eighteen calendar days from the date of decision to file a petition for rehearing. ARK. SUP. CT. R. 2-3(a). Under subsection (g), the “petition for rehearing should be used to call attention to specific errors of law or fact which the opinion is thought to contain.” ARK. SUP. CT. R. 2-3(g). The rehearing process is not designed to simply reassert the argument on appeal, although it may certainly point to the court’s failure to properly consider precedent. See White v. State, No. CR 07-312, 2007 WL 4261535, at *1 (Ark. Dec. 6, 2007) (“A petition for rehearing should be used to call attention to specific errors of law or fact which the opinion is
the state supreme court. This means that the redirection of the appeal from denial of relief in a Rule 37 postconviction action transforms the process from a one-step appeal to a two-step appeal, with the latter being a discretionary step in which the supreme court will exercise its discretion in deciding whether to review the case.\(^{224}\)

thought to contain and not to repeat arguments already considered and rejected by this court. Ark. Sup.Ct. R. 2-3(g). Counsel may not use the petition to assert new claims or issues not presented to the court in the opening appellate brief, e.g., Pannell v. State, 320 Ark. 390, 897 S.W.2d 552 (1995), but counsel arguably could assert the impact of an intervening decision or rule issued by a higher court that should serve to change the disposition on appeal by rehearing.

\(^{223}\) A party losing in the court of appeals may petition for review in the state supreme court either with filing for rehearing or without petitioning for rehearing in the court of appeals. Id. Under the revised rule, the losing party may file the petition for review simultaneously with the petition for rehearing or within ten days after the court of appeals rules on the rehearing petition or the date on which the petition for rehearing was due to be filed in the court of appeals. In re Electronic Filing of Petitions for Rehearing & Petitions for Review, 2019 Ark. 79, ___ S.W.3d ___. The petition for review must be based on one of the following grounds set forth in Rule 2-4(c):

A petition for review must allege one of the following: (i) the case was decided in the Court of Appeals by a tie vote, (ii) the Court of Appeals rendered a decision which is in conflict with a prior holding of a published opinion of either the Supreme Court or the Court of Appeals, or (iii) the Court of Appeals otherwise erred with respect to one of the grounds listed in Rule 1-2(b).

\(^{224}\) Unlike the process used in other jurisdictions, once the supreme court elects to take a case for review on appeal, it approaches the issues raised de novo, rather than engaging in a review of the decision rendered by the court of appeals for error. Castaneda v. Progressive Classic Ins. Co., 357 Ark. 345, 350, 166 S.W.3d 556, 560 (2004) (“When this court grants a petition for review of a decision by the court of appeals, we review the appeal as if it had been originally filed in this court.”). However, in Scissom v. State, the court cited Castaneda for the usual proposition, but did so in language suggesting that it actually was reviewing the decision of the intermediate court:

Appellee, the State of Arkansas, petitions for review from a court of appeals’ decision to reverse and remand the Pope County Circuit Court’s order that extended appellant’s probation by ordering him to serve twelve months in the Regional
For the pro se petitioner, this second layer of review means that a second pleading must be prepared and filed in the state supreme court within an eighteen-day period, or within ten days following time for filing a petition for rehearing or disposition on a petition for review by the Arkansas court of appeals,\(^225\) in order to completely exhaust the process of appellate review in the Arkansas system.\(^226\) This time frame may prove particularly troubling because the petitioner will be incarcerated in the Department of Correction, perhaps resulting in limited access to the library resources, which may be necessary in order to frame the grounds urged in the petition for review and administrative delays in use of the postal system.

There is an additional consideration for pro se petitioners, as well as those represented by counsel. Under Rule 2-4(a), the petition for review “may be typewritten and shall not exceed three 8 ½” x 11”, double-spaced pages in length.”\(^227\) This extreme limitation on the length of the petition imposes a significant burden of framing the issues in terms of the brevity demanded by the supreme court, particularly if multiple colorable issues have been urged in the direct appeal and rejected by the court of appeals. The burden is eased, to some extent, by the express provision in Rule 2-4(b), which permits the party petitioning for review to attach a copy of a petition for rehearing by the court of appeals to the three-page petition for review.\(^228\) The petition for rehearing is limited by Rule 2-3(e)\(^229\) to ten pages, “including the style of the case and certificate of counsel.”\(^230\) Consequently, a litigant filing a petition for review may expand upon the three page limitation

Punishment Facility as an additional condition of probation, with credit to be given for time already served. See Scissom v. State, 94 Ark. App. 452, 232 S.W.3d 502 (2006). We granted the State’s petition for review pursuant to Ark. Sup. Ct. R. 2-4(e) and (f)(2006). We affirm the court of appeals’ decision for resentencing, and we reverse and remand to the circuit court for sentencing under the proper statutes. 367 Ark. 368, 368, 240 S.W.3d 100, 101 (2006) (emphasis added).

\(^{225}\) For discussion of new rule regarding time for filing petition for review, see supra note 223.

\(^{226}\) The rule governing the issuance of the court’s mandate following the conclusion of an appeal likely must be amended to reflect the reassignment of appellate jurisdiction in Rule 37.1 actions to the court of appeals. See Ark. Sup. Ct. R. 1-2(h), Reporter’s Notes (2001) (referring to the exhaustion of state remedies in the context of subsequent federal habeas corpus petitions and stating that “the exhaustion doctrine, in other words, turns on an inquiry into what procedures are ‘available’ under state law”).

\(^{227}\) Ark. Sup. Ct. R. 2-4(a). However, any party may request leave of the supreme court to file a supplemental brief pursuant to Rule 2-4(f) once the court grants a petition to review the case. Ark. Sup. Ct. R. 2-4(f).

\(^{228}\) Ark. Sup. Ct. R. 2-4(b).

\(^{229}\) Ark. Sup. Ct. R. 2-3(e).

\(^{230}\) The “certificate of counsel” refers to the statement that the petition for rehearing is not filed for purposes of delay. Ark. Sup. Ct. R. 2-3(a). Presumably, a pro se filing must include a similar certificate.
for the petition for review by simultaneously filing, within the applicable time period for filing either pleading, by attaching a copy of the petition for rehearing to the petition for review. For the pro se litigant, however, this process may not only be confusing, but also involve some considerable difficulty because it entails the filing of both the rehearing and review petitions.

B. Appointment of Counsel in the Postconviction Process

For those inmates represented by counsel, who may, in fact, be appointed by the circuit court to represent an indigent petitioner,231 a different question raised by the change in appellate jurisdiction remains to be resolved. Counsel appointed to represent a Rule 37.1 petitioner are obligated to continue their representation throughout the appeal from the circuit court’s order disposing of the issues raised and litigated in that court.232 Rule 37.3 provides:

(b) If the original petition, or a motion for appointment of counsel should allege that the petitioner is unable to pay the cost of the proceedings and to employ counsel, and if the court is satisfied that the allegation is true, the court may at its discretion appoint counsel for the petitioner for any hearing held in the circuit court. If a petition on which the petitioner was represented by counsel is denied, counsel shall continue to represent the petitioner for an appeal to the Supreme Court, unless relieved as counsel by the circuit court or the Supreme Court. If no hearing was held or the petitioner proceeded pro se at the hearing, the circuit court may at its discretion appoint counsel for an appeal upon proper motion by the petitioner.233

Thus, counsel proceeding by appointment of a circuit court in a Rule 37.1 action may find themselves ethically obligated to not only represent the indigent petitioner in the trial court for purposes of conducting the evidentiary hearing, but through the entire appellate process, as well.234

231. ARK. R. CRIM. P. 37.3(b).
232. Id.
233. Id. (emphasis added).
234. In Morgan v. State, the defendant argued in his pro se filing, that he had been denied credit for jail time served prior to revocation of his probated sentence, filed when trial counsel moved to withdraw from further representation under Anders v. California, 386 U.S. 738 (1967) and then-Arkansas Supreme Court Rule 4-3(j) (now, Rule 4-3(k)) based on counsel’s contention that the appeal from revocation of probation would be meritless. 73 Ark. App. 107, 108, 42 S.W.3d 569, 570 (2001). The appellate court found that the denial of credit for defendant’s prior confinement on two occasions while the probation remained in effect could be corrected through a Rule 37 action. Id. at 110, 42 S.W.3d at 572. The court agreed with counsel that the direct appeal was “without merit,” but declined to relieve counsel, explaining: “[B]ecause further relief regarding Mr. Morgan’s sentencing may be obtained from the
The duty imposed by the ethical rules regarding termination of representation will require that counsel continue representation throughout the appellate process following the circuit court’s ruling on the grounds asserted in the petition, unless counsel is relieved of further obligation. Rule 16 of the appellate rules in criminal cases specifically requires counsel representing the defendant on appeal to continue representation through the appellate process “unless permitted by the trial court or the appellate court to withdraw in the interest of justice or for other sufficient cause.” The application of this approach to the filing of the petition for review in Rule 37.1 cases is not clear. Subsections (b) and (c) directly refer to the situation involving withdrawal of counsel in Rule 37.5 postconviction petitions, but these are actions that are limited to capital prosecutions in which the death penalty has been imposed. Otherwise, there is no general rule governing counsel’s representation in Rule 37.1 litigation. Subsection (a), for instance, references counsel’s duty when a “notice of appeal of a judgment of conviction has

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been filed with the trial court,” which deals with the direct appeal from a conviction at trial, not a postconviction action.

Moreover, counsel appointed to undertake or continue representation may be unfairly burdened because the circuit court appointing counsel under Rule 37.3(b) has no authority to order compensation for counsel’s services. In Arkansas Public Defender Commission v. Greene County Circuit Court, the supreme court held that the circuit court’s order that the Public Defender Commission reimburse trial counsel for representation in a Rule 37.1 proceeding was invalid. Relying on case law holding that postconviction proceedings are civil in nature, rather than criminal matters, and that the Commission is not statutorily liable for compensation for representation in civil proceedings, the court rejected the trial court’s authority to order compensation for postconviction counsel.

In contrast, the circuit court appointing an indigent capital defendant in a Rule 37.5 postconviction action in a case in which a death sentence has been imposed does have the authority to order compensation of appointed counsel in “such rates or amounts as the courts determine to be reasonable.” The authority for payment of compensation for counsel’s representation does not rest on any inherent authority of the circuit courts that might be predicated on the fact that the death sentence had been imposed in the

241. Id. at 55–56, 32 S.W.3d at 474–75.
242. Id. at 52, 54–55, 32 S.W.3d at 474 (citing Ark. Pub. Def. Comm’n v. Burnett, 340 Ark. 233, 238, 12 S.W.3d 191, 194 (2000)). The court also rejected trial counsel’s argument that the trial court’s appointment ultimately required him to provide uncompensated representation constituted a violation of his right to due process. Id. at 57–58, 32 S.W.3d at 476. But it did not actually address counsel’s due process claim on the merits; rather, the court simply ruled that because counsel had offered no convincing authority in support of his claim, it would not address its merits, consistent with the court’s traditional view. Id., 32 S.W.3d at 476.
243. Id. at 57, 32 S.W.3d at 475–76.
244. Ark. R. Crim. P. 37.5.
petitioner’s case, but rather, on statutory authority expressly authorizing compensation of capital counsel.\textsuperscript{246}

The limitation upon the circuit court’s authority to order payment of compensation for counsel appointed to represent petitioners pursuing Rule 37.1 relief reflects the difficult predicament for indigent criminal defendants typically forced to proceed pro se, without professional assistance, in challenging their convictions or sentences on the basis of ineffective representation on the part of trial counsel. This situation may readily compromise the Arkansas defendant seeking to challenge representation by trial or appellate counsel as a matter of the federal constitutional guarantee of effective assistance of counsel promised by the Sixth Amendment.\textsuperscript{247}

However, the problem posed by lack of representation for indigent defendants has been addressed by the Supreme Court of the United States in \textit{Martinez v. Ryan}\textsuperscript{248} and \textit{Trevino v. Thaler}.\textsuperscript{249} The Court recognized the difficulty faced by indigent postconviction litigants challenging representation provided by counsel at trial and in the initial step in the direct appeal process as ineffective.\textsuperscript{250} Generally, defendants are advised that the ineffective assistance challenge almost always should be raised in the postconviction process.\textsuperscript{251} The limited exception to the rule arises when the issue has been raised and fully litigated by motion for new trial, permitting the development of the necessary record for full review of counsel’s representation, including counsel’s disclosure of strategic considerations for decisions made in the conduct of the case.\textsuperscript{252}

In \textit{Martinez}, the Court held procedural default of the ineffective assistance claim could be excused by the federal habeas court when it resulted from the petitioner’s failure to assert counsel’s ineffectiveness in the first step in postconviction process where Arizona law \textit{mandated} that the claim be raised at that point or lost.\textsuperscript{253} Subsequently, in \textit{Trevino}, the Court extend-
ed the excuse for procedural default to those ineffective assistance claims litigated in state postconvictions without benefit of effective assistance of counsel in that process, regardless of whether the state required the claim to be raised in the postconviction process.\textsuperscript{254} With respect to a claim based on asserted failure of trial or direct appeal counsel to perform effectively, these cases support a requirement for effective assistance for the postconviction litigant whose Sixth Amendment claim would otherwise be defaulted because it could not, or should not, have been brought in the direct appeal. This development is significant for state court defendants petitioning for federal habeas relief who have been forced to proceed without benefit of counsel or face procedural default of their claims.

V. EXHAUSTION OF STATE COURT REMEDIES AND REVIEW OF FEDERAL CONSTITUTIONAL CLAIMS

The significance of the change in appellate jurisdiction is particularly apparent in the obligation for litigants raising claims regarding federal constitutional violations to exhaust available state remedies prior to seeking relief from adverse decisions in federal actions. The state court defendant whose federal constitutional claims have been rejected by state courts has two options for seeking relief in the federal system for violations. The defendant may petition the Supreme Court of the United States for a writ of certiorari to review the state court disposition in the direct appeal process\textsuperscript{255} or from a decision on a federal claim initially litigated in state postconviction process.\textsuperscript{256} The \textit{Barnes} footnote clearly addressed appellate review of

\textsuperscript{254} 569 U.S. at 423.

\textsuperscript{255} 28 U.S.C. § 1257(a) (2018). The petition for writ of certiorari seeking review of a state court decision rendered by the highest court of a State is characterized by the Court as the final step in the direct appeal process, with the ruling on the certiorari petition serving to finalize, or conclude, the direct appeal process. Griffith v. Kentucky, 479 U.S. 314, 321 n.6 (1987) (“By ‘final,’ we mean a case in which a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied.”).

\textsuperscript{256} Griffith, 479 U.S. at 328. Section 1257(a) authorizes review of a decision of the “highest court of a State in which a decision could be had,” which includes a decision rendered in an action for postconviction litigated in the state court process. \textit{See}, e.g., Hinton v. Alabama, 571 U.S. 263 (2014). The Court reviewed an ineffective assistance claim initially raised in state postconviction proceedings in which the evidence at the hearing showed that trial counsel had refused the trial court’s offer to provide additional funding for the defense to obtain the assistance of a qualified expert on ballistics. \textit{Id.} at 270. Three highly qualified experts testified that the unqualified “expert” called at trial failed to properly contest the prosecution’s theory of defendant’s involvement in the capital murder, supporting the Court’s
Rule 37.1 challenges that include claimed violations of federal constitutionally-protected rights, expressly the Sixth Amendment right to effective assistance of counsel. Rejection of a Rule 37.1 petitioner’s ineffective assistance of counsel claims in the state postconviction process may be addressed in a petition for writ of certiorari in the Supreme Court of the United States seeking review of the ruling of the Arkansas Supreme Court upholding denial of relief by the trial court.\textsuperscript{257}

The state court defendant may also seek relief on a claimed violation of a federal constitutional right in the federal habeas corpus process, pursuant to the federal habeas corpus statute.\textsuperscript{258} This remedy is significantly restricted, but may essentially be used by a state court defendant to assert a violation of federal constitutional protections in state court proceedings preserved in the state appeal or postconviction process.\textsuperscript{259} While direct review in the Supreme Court of the United States is not limited by the same restrictions as federal habeas actions, review is discretionary and the chances that the Court will grant review in any particular case are extremely remote.\textsuperscript{260} The Court itself provides the relevant data on its website: “The Court receives approximately 7,000-8,000 petitions for a writ of certiorari each Term. The Court grants and hears oral argument in about 80 cases.”\textsuperscript{261}

conclusion that trial counsel’s decision not to accept the offered funding resulted in effective assistance. \textit{Id.}


\textsuperscript{259} A claim that has not been preserved for review on the merits in state court proceedings, whether in the state direct appeal or state postconviction process, will likely be barred from review on the merits in the federal habeas process. \textit{See} Lee v. Kemna, 534 U.S. 362 (2002) (application of state procedural default rule to bar review on the merits, if routinely and fairly applied, will serve as adequate and independent determination on claim barring federal habeas review on the merits); Coleman v. Thompson, 501 U.S. 722, 752–53 (1991) (procedural default of federal constitutional claim bars review on the merits in federal habeas litigation).

\textsuperscript{260} There is no requirement that the state court defendant petition the Supreme Court of the United States to issue the writ of certiorari on a federal constitutional claim prior to petitioning for federal habeas corpus relief, nor does the Court’s denial of a petition for writ of certiorari serve as a decision on the merits that would bar relief on a federal constitutional claim asserted in a habeas action. Brown v. Allen, 344 U.S. 443, 456 (1953); Smith v. Baldi, 344 U.S. 561, 565 (1953).

A. State Court Dispositions as a Prerequisite for Federal Review

Federal review typically rests on a threshold disposition of the federal constitutional claim in state proceedings. Consequently, the redirection of Rule 37.1 appellate review to the Arkansas Court of Appeals not only alters the framework for available state court remedies for those federal constitutional claims, it also imposes an additional obligation upon state court litigants to file for review in the state supreme court when the intermediate court rejects the defendant’s arguments. The Rule 37.1 applicant must petition for review to fully exhaust state remedies, at least in theory. Section 2254 expressly commands:

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

Subsection (c) is unequivocal in its directive, meaning that the Arkansas Rule 37.1 petitioner will be required to petition the state supreme court for review of any decision rendered by the court of appeals rejecting the claim for relief for violation of a federally-protected procedural right.

Failure to petition for review in the Arkansas Supreme Court would mean that the Rule 37 petitioner had simply failed to raise his federal constitutional claim of ineffective assistance, much as if the petitioner had not sought review by Rule 37 at all in challenging counsel’s effectiveness.

Similarly, a federal petition including a claim of a Brady-disclosure violation would have to be exhausted by the litigant by moving for leave in the

262. The State might affirmatively waive the requirement that the federal constitutional claim first be litigated fully in state proceedings in a federal habeas corpus action as a matter of strategy in order to avoid delay in reaching the decision on the merits of the claim in the federal action. See 28 U.S.C. § 2254(b)(3) (“A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.”).

263. Id. § 2254(c) (emphasis added).

264. With respect to ineffective assistance claims, the Court’s decisions in Trevino and Martinez allow the indigent litigant unable to afford representation in the postconviction process an excuse for procedural default in failing to pursue available remedies in state court for challenging counsel’s effectiveness in representation. Trevino v. Thaler, 569 U.S. 413 (2013); Martinez v. Ryan, 566 U.S. 1 (2012). The unanswered question would be whether an Arkansas petitioner failing to petition for review from the adverse decision by the court of appeals on appeal from denial of Rule 37.1 relief would be extended the benefit of Martinez and Trevino in excusing the failure to fully exhaust that remedy available under the Arkansas rules.
Arkansas Supreme Court to reinvest the trial court of conviction with jurisdiction to consider the litigant’s petition for writ of error coram nobis.\textsuperscript{265}

Moreover, the requirement for exhaustion of state court remedies requires that the petitioner not combine exhausted and unexhausted claims of constitutional violations in the petition for federal habeas relief. In \textit{Rose v. Lundy},\textsuperscript{266} the Court issued a critical decision requiring federal habeas courts to dismiss petitions including claims not previously litigated in appropriate state process, whether on appeal or in state postconviction proceedings.\textsuperscript{267} The Court’s reasoning rested on the value for federal courts to respect state court determinations of federal constitutional issues raised in state prosecutions, recognizing that state courts are obligated to enforce federal constitutional protections.\textsuperscript{268} The Court explained:

Because “it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation,” federal courts apply the doctrine of comity, which “teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter.”\textsuperscript{269}

Thus, the exhaustion requirement, according to \textit{Rose}, reflects the comity principle by reducing “friction between our federal and state systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners’ federal rights.”\textsuperscript{270} In order to avoid dismissal of the unexhausted claims or the mixed petition containing exhausted and unexhausted claims, the petitioner may move to have the federal case held in abeyance, permitting litigation of the claims in any state process which re-

\textsuperscript{265} For discussion regarding the coram nobis process under Arkansas law, see \textit{supra} Section III.D.4. However, a claim of newly-discovered scientific evidence establishing the defendant’s innocence, a proper subject for litigation pursuant to Arkansas Code Annotated sections 16-112-201 to -203, is not cognizable in federal habeas corpus and, thus, the exhaustion question is essentially irrelevant with respect to the merits of such claims. See \textit{Herrera v. Collins}, 506 U.S. 390, 400 (1993); Townsend v. Sain, 372 U.S. 293, 317 (1963). On the other hand, the exhaustion of a remedy of this kind would appear to toll the time for filing the federal petition. See \textit{Polson v. Bowersox}, 595 F.3d 873, 875 (8th Cir. 2010) (holding habeas corpus proceeding authorized by rule was a form of collateral review qualifying for tolling of federal habeas filing period under 28 U.S.C. § 2244(c)). For discussion of the Arkansas statutory provision for relief based on newly discovered evidence, see \textit{supra} Section III.D.3.

\textsuperscript{266} 455 U.S. 509 (1982).

\textsuperscript{267} \textit{Id.} at 522 ("[B]ecause a total exhaustion rule promotes comity and does not unreasonably impair the prisoner’s right to relief, we hold that a district court must dismiss habeas petitions containing both unexhausted and exhausted claims.").

\textsuperscript{268} \textit{Id.} at 522 (citing \textit{Ex parte Royall}, 117 U.S. 241, 251 (1886)).

\textsuperscript{269} \textit{Id.} at 518 (quoting \textit{Darr v. Burford}, 339 U.S. 200, 204 (1950)).

\textsuperscript{270} \textit{Duckworth v. Serrano}, 454 U.S. 1, 3 (1981).
main available to the petitioner for consideration on the merits by state courts.\textsuperscript{271} Pursuant to the Court’s decision in \textit{Rhines v. Weber},\textsuperscript{272} the habeas court may stay the federal proceedings while the petitioner attempts to exhaust state court remedies.\textsuperscript{273} Otherwise, a subsequent federal petition, raising issues litigated in state proceedings after the initial petition containing only exhausted claims, would be barred under § 2254(b)(1), and would have to be dismissed as an unauthorized successive petition,\textsuperscript{274} unless expressly permitted by the court of appeals under extremely rare circumstances.\textsuperscript{275} The circumstances either relate to a United States Supreme Court decision announcing a new rule held to apply retroactively to cases that have been finalized,\textsuperscript{276} or to the development of new facts that would warrant a conclusion that no reasonable fact-finder would have found the defendant guilty of the underlying offense.\textsuperscript{277}

The operation of the statute effectively prevents an Arkansas postconviction petitioner from raising claims of constitutional violations, including ineffective assistance of counsel, in successive federal habeas corpus petitions. The petitioner cannot, for instance, claim a violation of a procedural protection and then later claim that counsel was ineffective if the federal habeas court finds that the claim was procedurally defaulted. Prior to pursuing federal relief, however, an Arkansas defendant might assert a defaulted claim on direct appeal from the conviction, and once the appellate court declines to review it on the merits based on counsel’s failure to preserve error, the defendant may present an ineffective assistance claim in a Rule 37.1 petition following affirmance of the conviction on appeal.\textsuperscript{278}

\textsuperscript{271} 28 U.S.C. § 2254(c) (2018) (“An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.”).
\textsuperscript{272} 544 U.S. 269 (2005).
\textsuperscript{273} Id. at 278.
\textsuperscript{274} 28 U.S.C. § 2244(b)(3)(A) (2018) (“Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.”).
\textsuperscript{275} Id. § 2244(b)(3)(A)–(E), (b)(4).
\textsuperscript{276} Id. § 2244(b)(2)(A).
\textsuperscript{277} Id. § 2244(b)(2)(B).
\textsuperscript{278} The Arkansas Supreme Court expressed its hostility to this process in its seminal opinion, \textit{Wicks v. State}, rejecting reliance on plain or fundamental error theories for review of defaulted claims on the merits in the direct appeal process:

In closing, we mention a position sometimes taken in appellate briefs in criminal cases, that a possible error should be argued by counsel even in the absence of an objection below, because the matter might be raised in a petition for postconviction relief. The short answer to that suggestion is that if the supposed error actually calls for postconviction relief, the defect is not cured by the presentation of an argument that is certain to be rejected by this court for want of an objection at the trial. Nevertheless, if counsel \textit{insist} upon consuming their time and that of the
B. The Boerckel Rule: The Requirement for Full Exhaustion of State Remedies

In O’Sullivan v. Boerckel,\(^{279}\) the Supreme Court of the United States held that complete or full exhaustion of state court remedies was required before state court defendants could assert claims arising from the protections afforded by the Constitution in federal proceedings.\(^{280}\) The holding specifically addressed the requirement in the federal habeas corpus statute,\(^{281}\) that “[a]n applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.”\(^{282}\) Because the option of petitioning a state supreme court for discretionary review of a decision rejecting a federal constitutional claim by an intermediate appellate court constitutes an “available procedure,” the decision requires the federal habeas petitioner to have petitioned for review in the state discretionary review process in order to meet the exhaustion requirement of § 2254(c).\(^{283}\)

Prior to the Court’s decision in Boerckel, several federal courts had declined to hold that the exhaustion requirement includes the filing of a petition for discretionary review in a state supreme court for purposes of federal habeas jurisdiction.\(^{284}\) The Court’s holding in Boerckel resolved the conflict

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\(^{280}\) Id. at 842.


\(^{282}\) Id. § 2254(c).

\(^{283}\) Boerckel, 526 U.S. at 848–49.

\(^{284}\) See Boerckel v. O’Sullivan, 135 F.3d 1194, 1199–1200 n. 2 (7th Cir. 1998); Dolny v. Erickson, 32 F.3d 381, 384 (8th Cir. 1994) (discretionary review in Minnesota Supreme Court not necessary for exhaustion of claim); Buck v. Green, 743 F.2d 1567, 1569 (11th Cir. 1984) (Georgia Supreme Court’s limited jurisdiction in discretionary appeals does not obligate state inmate to present claim in discretionary petition in order to assert claim in federal habeas). The Seventh Circuit had noted that other circuits had held to the contrary with respect to this exhaustion issue. Boerckel, 135 F.3d at 1199 n.2. (citing Jennison v. Goldsmith, 940 F.2d 1308, 1310 (9th Cir. 1991) (per curiam) (exhaustion of claim for Arizona inmate requires presentation of claim in petition for discretionary review); Grey v. Hoke, 933 F.2d 117, 119 (2d Cir. 1991) (exhaustion requires petition for discretionary review of claims subsequently asserted in federal habeas petition); Richardson v. Procunier, 762 F.2d 429, 431–32
in requiring full exhaustion of available state remedies, including the petition for discretionary review in a state’s supreme court, when this level of review is provided for by state postconviction procedure. At the same time, it left undisturbed the possibility that such a level of discretionary review might not be available in some states. It did not ultimately resolve the question of whether state courts could excuse exhaustion of state remedies on federal constitutional claims as matters of state court policy.285

Boerckel argued that the Illinois Supreme Court’s language in Rule 315(a) expressly discouraged the filing of petitions for discretionary review in the supreme court when the issues to be raised would be routine in nature.286 Rule 315(a) provides, in pertinent part:

Whether such a petition will be granted is a matter of sound judicial discretion. The following, while neither controlling nor fully measuring the court’s discretion, indicate the character of reasons which will be considered: the general importance of the question presented; the existence of a conflict between the decision sought to be reviewed and a decision of the Supreme Court, or of another division of the Appellate Court; the need for the exercise of the Supreme Court’s supervisory authority; and the final or interlocutory character of the judgment sought to be reviewed.287

Since the court had discouraged the filing of discretionary review petitions to exhaust state remedies prior to filing for federal review in “routine” cases, Boerckel argued that he should not be required to file what the state court had suggested would amount to a futile filing. Based on Rule 315(a)’s limiting language, the discretionary review process, in this sense, would be “unavailable” to a petitioner who could not show that his claim qualified for review under the terms of the Rule.288

The Supreme Court of the United States, however, read the language of § 2254(c) strictly, as requiring exhaustion of any process made available under state law, regardless of whether the exhaustion might be futile in terms of seeking to overturn state court precedent on a federal constitutional

(5th Cir. 1985) (petition for discretionary review by Texas Court of Criminal Appeals requisite for exhaustion of federal habeas claims)).

285. Boerckel, 526 U.S. at 847–48. The Court observed: The exhaustion doctrine, in other words, turns on an inquiry into what procedures are “available” under state law. In sum, there is nothing in the exhaustion doctrine requiring federal courts to ignore a state law or rule providing that a given procedure is not available. Id. The unresolved issue lies in determining when a state, by rule or law, has declared that a petition for discretionary review is “not available.”

286. Id. at 846–47.

287. ILCS S. Ct. R. 315 (addressing discretionary review, noting that review may be available as a “matter of right” in certain circumstances).

When confronted by this concern based on increased state court filings, the Court seemingly dismissed the issue as insignificant:

> We acknowledge that the rule we announce today—requiring state prisoners to file petitions for discretionary review when that review is part of the ordinary appellate review procedure in the State—has the potential to increase the number of filings in state supreme courts. We also recognize that this increased burden may be unwelcome in some state courts because the courts do not wish to have the opportunity to review constitutional claims before those claims are presented to a federal habeas court.\(^{290}\)

The Court’s willingness to force state litigants to exhaust seemingly futile state court remedies and the concomitant burden imposed on state courts of last resort, stems from the Court’s overriding concern with comity. It explained: “By requiring state prisoners to give the Illinois Supreme Court the opportunity to resolve constitutional errors in the first instance, the rule we announce today serves the comity interests that drive the exhaustion doctrine.”\(^{291}\)

The Court’s position in Boerckel has an important consequence for Arkansas postconviction litigants proceeding without assistance of counsel. The requirement for complete exhaustion imposed by the Supreme Court of the United States means that the Arkansas petitioner proceeding without counsel in the required petition for review of a federal constitutional claim, most commonly based on ineffective assistance of counsel, must completely exhaust state remedies by filing the petition for review in the state supreme court in order to fully exhaust a claim rejected by the Arkansas Court of Appeals on appeal from denial of Rule 37.1 relief. Even when the Arkansas petitioner preserves an ineffective assistance claim in the Rule 37.1 petition filed in the trial court, complete exhaustion will require the defendant to not only preserve the claim on appeal to the court of appeals, but also, to then petition the state supreme court to review the claim once it has been rejected by the intermediate court.

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289. *Id.* at 847–48.

290. *Id.* at 847.

291. *Id.* at 846. There is, of course, some inconsistency in directing state courts to consider marginally colorable claims presented in petitions for discretionary review in order to respect the notion of comity, in light of the Court’s explanation that its rule rested on respect for state court process. Because “it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation,” federal courts apply the doctrine of comity, which “teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter.” *Darr v. Burford*, 339 U.S. 200, 204 (1950).
Ultimately, the **Martinez/Trevino** principle will, in theory, enable those Arkansas petitioners who have been forced to proceed pro se in the Rule 37.1 appeal process, including filing the petition for review in the supreme court, to claim the excuse from procedural default in failing to file the petition for review afforded by the Court in **Trevino**. However, the Court’s recent decision in **Davila v. Davis** limits application of the **Martinez/Trevino** rule to claims of ineffective assistance based on trial counsel’s defective performance and does not afford an excuse for procedural default based on appellate counsel’s failure to properly argue issues that would arguably require relief on appeal. To the extent that a pro se Rule 37.1 petitioner’s failure to petition for review by the Arkansas Supreme Court following rejection of the federal constitutional claim by the Arkansas Court of Appeals would result in a failure to exhaust state remedies, this omission would appear to be excused by application of the **Martinez/Trevino** rationale.

C. Ineffective Assistance Claims and the Petition for Review

The rule applied in **Boerckel** requires the Arkansas Rule 37.1 petitioner asserting an ineffective assistance of counsel claim to petition the state supreme court for review of a decision rendered by the court of appeals rejecting the claim urged on appeal from the denial of relief ordered by the trial court of conviction. This two-step process for exhaustion of the usual appellate process in Arkansas appeals, predicated on the filing of the petition for review pursuant to Rule 2-4, would appear to apply to appeal in Rule 37.1 actions.

1. *The Arkansas Supreme Court’s Construction of Rule 1-2(b)*

The reassignment of appellate review in Rule 37.1 appeals from the Arkansas Supreme Court to the court of appeals, particularly with respect to appeals including ineffective assistance of counsel claims, raises a question of the propriety of filing the petition for review in the supreme court once the court of appeals has disposed of the ineffective assistance claims. The context in which the propriety of the petition for review arises, Rule 2-4(c) requires a showing of one of three grounds: a tie vote in the court of appeals; a court of appeals decision in conflict with published precedent; or

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293. See supra text accompanying note 106.
294. As of May 15, 2019, the author has found no decisions of the Arkansas Supreme Court indicating that it had either granted or denied review on a Rule 37.1 appeal that had been decided by the Arkansas Court of Appeals.
295. ARK. SUP. CT. R. 2-4. For text of Rule 2-4(c), see supra note 223.
a claim that the court of appeals erred in disposing of a ground set forth in Rule 1-2(b).

With respect to Rule 37.1 appeals presenting ineffective assistance of counsel claims, Rule 1-2(b), which provides for review of “issues involving federal constitutional interpretation,” would appear to include review of ineffectiveness claims that arise under the Sixth Amendment and involve application of Strickland v. Washington. However, in at least two unpublished decisions, the Arkansas Supreme Court has held that ineffective assistance claims are not within the purview of Rule 2-4. In Munn v. State, the defendant filed a petition for review after the court of appeals rejected his argument that appellate counsel had rendered ineffective assistance on direct appeal. In declining to review his ineffective assistance point raised in his pro se Rule 2-4 petition, the supreme court explained:

We find no ground pursuant to Ark. Sup. Ct. R. 2-4(c) to grant the petition for review. The rule provides that review will not be granted without a showing by the petitioner that the decision of the court of appeals is in conflict with a prior holding of a published opinion of either this court or the court of appeals or that the court otherwise erred with respect to one of the grounds enumerated in Ark. Sup. Ct. R. 1-2(b). An assertion of ineffective assistance of counsel, whether it pertains to trial or appellate counsel, is not a grounds included in our rule, and none of the other claims made by petitioner constitutes the requisite showing under the rule.

The per curiam order issued in Munn followed the supreme court’s reasoning in Murphy v. State. There, the court explained:

Petitioner Murphy’s sole ground for seeking review of the court of appeals decision is the allegation that he was not afforded adequate representation by his attorney on appeal. A claim of inadequate representation is not one of the grounds set out in Rule 2-4(c). Such claims are within

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296. ARK. SUP. CT. R. 2-4; see also ARK. SUP. CT. R. 1-2(b). For text of Rule 1-2(b), see supra note 16.
297. ARK. SUP. CT. R. 1-2(b)(3).
298. U.S. CONST. amend. VI.
the purview of our postconviction rule, Criminal Procedure Rule 37.1(d). The petition is therefore denied.\textsuperscript{304}

What is clear from these decisions is that both Munn and Murphy were attempting to litigate their ineffective assistance claims in the direct appeal process, filing for review under Rule 2-4 after losing on their claims on appeal in the court of appeals.\textsuperscript{305} The supreme court declined to review these claims on their merits, with the Murphy court expressly holding that ineffective assistance claims are deemed appropriate for litigation in Rule 37.1 proceedings.\textsuperscript{306} However, the court’s explanation of its rationale for declining review of these claims is not precisely correct because the limitation on review actually flows from the list of generic claims included in Rule 1-2(b),\textsuperscript{307} as the court explained in Munn.\textsuperscript{308}

The status of the decisions in Munn and Murphy as controlling precedent is somewhat questionable. First, the per curiam orders issued by the state supreme court were not published when issued. Reliance on these opinions as precedent is precluded by the current version of Rule 5-2(c).\textsuperscript{309} Nevertheless, it is not clear what the current court would do with respect to these prior, online-accessible statements that question whether Rule 2-4 petitions would be subject to review in postconviction actions in which ineffective

\textsuperscript{304} Id. (emphasis added). But see cases cited supra notes 248–54 and accompanying text. Claims of ineffective assistance may be litigated in the direct appeal following conviction when the record includes evidence of counsel’s explanation of the objectively-reasonable strategic decision explaining counsel’s decision-making when their performance is alleged to have been defective. The claim would have been reserved by motion for new trial resulting in an evidentiary hearing for development of the record necessary for review by the appellate court. See Missildine v. State, 314 Ark. 500, 507, 863 S.W.2d 813, 818 (1993).

\textsuperscript{305} It is not unlikely that the claims of ineffectiveness were raised for the first time in the petition for review after the court of appeals declined to address claims on their merits because trial counsel failed to preserve error, arguably demonstrating that the first prong of the Strickland claim, defective performance by counsel, had been demonstrated by the appellate court’s refusal to address the claim on the merits.

\textsuperscript{306} Murphy, 1999 WL 1212876, at *1; see also Munn, 2005 WL 2462251, at *1.

\textsuperscript{307} ARK. SUP. CT. R. 1-2(b). For the text of subsection (b), see supra note 223.

\textsuperscript{308} 2005 WL 2462251, at *1.

\textsuperscript{309} ARK. SUP. CT. R. 5-2(c). The Explanatory Note to this rule states that this version of Rule 5-2 was effective as of July 1, 2009. The previous version of Rule 5-2(a) provided that “[a]ll signed opinions of the Supreme Court shall be designated for publication.” In re Ark. Supreme Court & Court of Appeals Rule 5-2, 2009 Ark. 330, at 3, 2009 Ark. Lexis 357, at *4. The order in Munn was issued per curiam; the court did not issue a signed opinion, which would have required publication affording the disposition precedential value. 2005 WL 2462251, at *1. In Luna-Holbird v. State, the court explained, “An [sic] unanimous opinion of this court may be rendered as a Per Curiam opinion and not designated for publication at the discretion of the court. Only those opinions of this court which are signed must be designated for publication.” 315 Ark. 735, 736, 871 S.W.2d 328, 329 (1994) (citing ARK. SUP. CT. R. 5-2(a)).
assistance of counsel is asserted as an issue, often the only issue perhaps, raised in the Rule 37.1 petition.

A significant consequence of any continuing viability of the unpublished orders lies in whether the jurisdictional preclusion of ineffective assistance claims from the Arkansas Supreme Court’s authority pursuant to Rules 2-4 and 1-2(b) serves to finalize these claims in the Arkansas system of review. If so, then a state court petitioner filing for federal habeas corpus relief would have exhausted the state remedies available to him once the court of appeals rules on the merits of his ineffective assistance claim. Because preclusion of ineffective assistance issues from the ambit of the supreme court’s exercise of jurisdiction under Rules 2-4 and 1-2(b) would permit no further state court review of the claim raised in the Rule 37.1 action, the state court defendant petitioning for federal habeas relief would have exhausted available remedies, affording the federal court jurisdiction to consider the Sixth Amendment ineffective assistance claim on the merits. There would be no failure to exhaust state remedies barring the federal court from addressing the ineffectiveness issue because the highest court in the state had not ruled on the claim.

Apart from the fact that Munn and Murphy are of dubious precedential value due to the fact that they were issued as unpublished, per curiam orders, a second problem posed by their continuing viability lies in the fact that the holding that ineffectiveness assistance claims are not cognizable in Rule 2-4 petitions is simply incorrect. The Arkansas Supreme Court might well overrule, or “retreat”310 from those dispositions rendered in unsigned opinions, despite the fact that the two cases reflect the same approach over a period of time, clearly representing the court’s position at that point. In doing so, the court might explain that redirection in the appeal from the denial of Rule 37.1 relief requires the court to reconsider its prior understanding of jurisdiction for purposes of Rule 2-4 petitions. Otherwise, the court might foreclose review of appellate court decisions ordering relief on appeal from the trial court, precluding the State from contesting cases in which the ineffective assistance claim is found to warrant relief.311

310 See, e.g., McCoy v. State, 347 Ark. 913, 921, 69 S.W.3d 430, 435 (2002) (emphasis added) (for court’s use of the term “retreat,” in lieu of “overrule”: “The holding in Thompson v. State, 284 Ark. 403, 682 S.W.2d 742 (1985) and its successors is in direct conflict with the plain language of section 5-1-110. Accordingly, we retreat from those holdings to the extent that they conflict with the statutory law.”).

311 Moreover, the range of potential relief accorded to the circuit court is broad and, presumably, the court of appeals could either affirm an order granting relief, or order relief from the same range of options in reversing the circuit court on appeal: “If the circuit court finds that for any reason the petitioner is entitled to relief, then the circuit court may set aside the original judgment, discharge the petitioner, resentence him or her, grant a new trial, or otherwise correct the sentence, as may appear appropriate in the proceedings.” ARK. R. CRIM. P. 37.4.
But, as a substantive matter, *Munn* and *Murphy* simply got it wrong. Claims of ineffective assistance are clearly recognized as arising from federal constitutional protections included in the Sixth Amendment.\(^{312}\) The application of the federal test for Sixth Amendment ineffective assistance of counsel claims controls disposition of those claims for defendants in Arkansas state courts.\(^{313}\) Rule 1-2(b), which identifies those issues addressed on direct appeal by the Arkansas Court of Appeals that may be considered in the Rule 2-4 petition to the Arkansas Supreme Court for review of the appellate court’s disposition, expressly includes “issues involving federal constitutional interpretation.”\(^{314}\) This ground for review can hardly be distinguished from review that requires interpretation of *Strickland* and application of the *Strickland* standard for relief in assessing the ineffective assistance claim on the merits.

The federal habeas court’s authority to grant relief requires a showing either that the state court erred in its interpretation or in its application of United States Supreme Court precedent\(^{315}\) in addressing the state court defendant’s ineffective assistance claim.\(^{316}\) Justice O’Connor explained the

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313. See, e.g., Conley, 2014 Ark. 172, at 4–5, 433 S.W.3d at 39; see also discussion of *Strickland* supra notes 160.


315. The amended federal habeas statute, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, reflects the retroactivity approach adopted by the Court in *Teague v. Lane*, 489 U.S. 288 (1989). See, e.g., (Terry) Williams v. Taylor, 529 U.S. 362, 380–81 (2000) (“AEDPA has added, immediately following the ‘clearly established law’ requirement, a clause limiting the area of relevant law to that ‘determined by the Supreme Court of the United States.’” (quoting 28 U.S.C. § 2254(d)(1) (1994 ed., Supp. III))); see also *Teague*, 489 U.S. at 296 (holding that only the Supreme Court can adopt new rules of constitutional criminal procedure and determine whether they will be applicable retroactively to cases in which the direct appeal process has been concluded and the conviction is final and reliance on newly announced rules is barred by the retroactivity doctrine).

316. 28 U.S.C. § 2254(d)(1) (2018). The federal habeas corpus petitioner is entitled to relief on a federal constitutional claim only by making one of two alternative showings. First, the petitioner can prevail by showing that the state court judgment “resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States . . . .” *Id.* (emphasis added). Alternatively, subsection (2) affords the habeas court authority to grant relief if the state court’s determination “resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” *Id.* § 2254(d)(2) (emphasis added).
effect of this provision in her concurring opinion in Williams v. Taylor, writing:

Under the “contrary to” clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the “unreasonable application” clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court’s decisions but unreasonably applies that principle to the facts of the prisoner’s case.  

The developing law of ineffective assistance of counsel under the Sixth Amendment illustrates the necessity for continuing state court involvement in the interpretation of this class or category of federal constitutional claims when addressed by state courts. The Court’s approach leaves factually novel situations subject to review within the very general Strickland framework, not limited to the Court’s previous applications of the holding to specific fact complexes underlying the claims of defective performance and demanding the assessment of probable prejudice be based on the evidentiary record presented in individual cases.

For example, in recent years the Court has applied the Strickland defective performance prong to counsel’s duty to properly advise the client of potential deportation consequences following entry of a guilty plea, to counsel’s mistaken explanation of applicable law leading the client to reject a favorable plea offer, to counsel’s failure to convey a plea offer to the client, and to counsel’s failure to accept the trial court’s offer of funds for employment of a qualified expert witness. With regard to each variation on the defective performance issue raised in state proceedings, the Supreme Court of the United States ultimately applied Strickland to warrant relief from counsel’s error in representing the petitioner convicted in state court.

The holding in (Michael) Williams v. Taylor limits relief on this theory of state court error to those facts actually developed in the state court proceedings. 529 U.S. 420, 440 (2000). This ground precludes development of additional factual evidence in an evidentiary hearing in the habeas court unless the petitioner can demonstrate cause on the part of the State to prevent development of the factual record necessary to support his claim in the federal habeas process, under the test set forth in 28 U.S.C. § 2254(e)(2).

318. Id. at 412–13 (O’Connor, J., concurring) (emphasis added).
323. Hinton, 571 U.S. at 274; Frye, 566 U.S. at 145; Lafler, 566 U.S. at 169; Padilla, 559 U.S. at 368–69.
These decisions demonstrate that continued interpretation of the Sixth Amendment guarantee of effective assistance is warranted, even though there may be little additional development of Strickland-based deficiency issues. The court’s position in *Munn* and *Murphy* can hardly be consistent with the broad authority for review under section 1-2(b)(3) since state courts are obliged to at least consider arguments regarding interpretation of federal constitutional protections, when those issues are raised in state proceedings.

It would seem appropriate for the Arkansas Supreme Court to retreat from its position in *Munn* and *Murphy* both because the redirection of the Rule 37.1 appeal process would preserve the State’s right to seek review of court of appeals’ decisions adverse to its position and reserve the role of review of federal constitutional claims in Arkansas actions to the supreme court. It is not altogether clear that the state supreme court is firmly committed to exercising its authority to interpret federal constitutional claims generally in the Rule 2-4 process.

2. *The Application of Rule 1-2(h) in Rule 37.1 Appeals*

Arkansas Supreme Court Rule 1-2(h) provides:

In all appeals from criminal convictions or postconviction relief matters heard in the Court of Appeals, the appellant shall not be required to petition for rehearing in the Court of Appeals or review in the Supreme Court following an adverse decision of the Court of Appeals in order to be deemed to have exhausted all available state remedies respecting a claim of error. When the claim has been presented to the Court of Appeals or the Supreme Court, and relief has been denied, the appellant shall be deemed to have exhausted all available state remedies.

The rule addresses the process of exhaustion in a direct way, in which the Arkansas Supreme Court disavows any requirement that it provide for review of constitutional claims that have been rejected by the court of appeals in the direct appeal or postconviction process. Initially, it is difficult to reconcile its promulgation and adoption by the court in 2001, following the


325. Michigan v. Long, 463 U.S. 1032, 1042 n.8 (1983) (“The state courts are required to apply federal constitutional standards, and they necessarily create a considerable body of ‘federal law’ in the process.”) (emphasis added); see Barnes v. State, 2017 Ark. 76, at 1 n.1, 511 S.W.3d 845, 846 n.1.

326. Ark. Sup. Ct. R. 1-2(h) (emphasis added). Subsection (h) was adopted by the state supreme court in its order *In re Ark. Rules of Criminal Procedure 24.3 and 33.3; Supreme Court Rule 1-2*, 343 Ark. 872, 875 (Feb. 15, 2001) (per curiam).
United States Supreme Court’s issuance of its decision in *O’Sullivan v. Boerckel*, 327 two years earlier in 1999. However, the *Boerckel* Court also recognized by implication that some state appellate systems might apparently do more than simply discourage litigants from pursuing discretionary relief in state supreme courts for review of adverse rulings on federal constitutional claims rendered by intermediate appellate courts. 328

Rule 1-2(h) parallels the position taken by the South Carolina Supreme Court in 1990, 329 where that court explained its position on exhaustion:

We recognize that criminal and post-conviction relief litigants have routinely petitioned this Court for writ of certiorari upon the Court of Appeals’ denial of relief in order to exhaust all available state remedies. We therefore declare that in all appeals from criminal convictions or post-conviction relief matters, a litigant shall not be required to petition for rehearing and certiorari following an adverse decision of the Court of Appeals in order to be deemed to have exhausted all available state remedies respecting a claim of error. Rather, when the claim has been presented to the Court of Appeals or the Supreme Court, and relief has been denied, the litigant shall be deemed to have exhausted all available state remedies. This order shall become effective immediately. 330

The South Carolina court adopted this rule well before the Supreme Court of the United States issued its decision in *Boerckel* nine years later and six years before the effective date of the Antiterrorism and Effective Death Penalty Act, 331 which includes strict statutory requirements for exhaustion of state remedies. 332

The *Boerckel* majority noted the South Carolina rule and, additionally, an Arizona decision, *State v. Sandon*, 333 in addressing the argument *Boerckel* advanced that its holding would result in increased filing of unwanted peti-

328. Supra, note 288, and accompanying text. The majority noted: “In this regard, we note that nothing in our decision today requires the exhaustion of any specific state remedy when a State has provided that that remedy is unavailable.” 526 U.S. at 847.
330. *In re Exhaustion of State Remedies*, 321 S.C. at 564, 471 S.E.2d at 454.
332. 28 U.S.C. § 2254(b)–(c) (2018). In subsection (c), the federal habeas statute expressly requires exhaustion of any state remedy available to assert a federal constitutional claim “(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.” Id. § 2254(c).
tions for discretionary review in the Illinois Supreme Court, arguably frustrating its usual rationale that federal review should respect state court decision-making as a matter of *comity*. While the South Carolina court’s position on exhaustion reflected an affirmative statement regarding the exhaustion process generally, the Arizona approach was the product of evolution. Initially, the Arizona court had directed counsel not to file petitions for review in cases in which counsel had filed *Anders* briefs, concluding that the appeal was without merit, or frivolous. But *Sandon* expanded upon its rationale regarding the futility of petitioning for review in cases in which the court of appeals had held, based on an *Anders* assessment that the appeal was without merit. *Sandon* relied on *State v. Shattuck*, where the state supreme court had considered, but rejected, availability of review following disposition by the court of appeals based on its finding that the appeal was without merit, or frivolous. The *Shattuck* court explained:

Since we are not required to accept petitions for review in *Anders* type cases, we do not invite them. The system is strained to the point that we cannot afford the luxury of repeated review of trivia or issues of small merit. The time available to prosecutors, defenders, judicial staff and judges must be devoted to issues of substance.

It concluded: “Neither retained nor appointed counsel should seek review by this court when the only issues that can be raised are without merit or frivolous.”

In *Sandon*, the court expanded upon the *Shattuck* holding and held that when the appellate had obtained a ruling on all issues presented on direct appeal, further review was not required for exhaustion of state court remedies. It concluded that the same rule applied to cases not based on *Anders* filings. Only limited circumstances warranted review of cases decided by the court of appeals, such as newly discovered evidence of innocence or undermining the finding of guilt or a change in law implicating the petitioner’s conviction of such significance that the rule should be applied retroactively. Thus, in *Shattuck*, the Arizona court had addressed the same issues

334. 526 U.S. at 847.
335. Comity may be defined as “[t]he legal principle that political entities (such as states, nations, or courts from different jurisdictions) will mutually recognize each other’s legislative, executive, and judicial acts. The underlying notion is that different jurisdictions will reciprocate each other’s judgments out of deference, mutuality, and respect.” *Comity Definition, Cornell L. Sch.*, https://www.law.cornell.edu/wex/comity (last visited Mar. 30, 2018).
338. *Id.* at 157.
339. *Id.* at 158.
of strained judicial resources prompting the Illinois court’s position in Rule 315(a).\textsuperscript{341}

In adopting Rule 1-2(h), the Arkansas Supreme Court was unequivocal in its position in light of Boerckel. The Reporter’s Notes to Rule 1-2(h)\textsuperscript{342} specifically address the state supreme court’s view. The Notes cite the Court’s language from its decision relating to the “availability” of review under state law in determining whether there were additional steps in the exhaustion process that must be completed before a state petitioner could seek federal review.\textsuperscript{343} The Notes conclude: “Petitions for review, which are discretionary under subdivision (e) of this rule, should not be required in order for a state prisoner to exhaust his state remedies.”\textsuperscript{344}

The controlling issue in determining when state processes are essential for exhaustion would appear to be whether the petitioner has a right to further review in state appellate process, or whether review is available only if afforded by the state supreme court. The South Carolina rule and Arizona decisions rest on the notion that if the petitioner only has the right to petition for review rather than the right to review, the remedy is not “available” to the petitioner. Rule 1-2(h) fits within this same analysis and is applicable to Arkansas postconviction process with the Arkansas Supreme Court’s decision in Barnes, redirecting appellate jurisdiction in Rule 37.1 actions to the Arkansas Court of Appeals instead of Rule 37.1 appeals traditionally being filed and heard by the state supreme court. Thus, under the process ordered in the Barnes footnote, the language in Rule 1-2(h) relating to postconviction proceedings raises the same question concerning the availability of the

\textsuperscript{341} 684 P.2d at 157.
\textsuperscript{342} Ark. Sup. Ct. R. 1-2(h) note (holdings of the Supreme Court of the United States were the reason for adding Subdivision h). The full text of the note provides:

Subdivision (h) was added in response to language in O’Sullivan v. Boerckel, 526 U.S. 838 [] (1999)(“[N]othing in our decision today requires the exhaustion of any specific state remedy when a State has provided that that remedy is unavailable. Section 2254(c), in fact, directs federal courts to consider whether a habeas petitioner has ‘the right under the law of the State to raise, by any available procedure, the question presented,’ . . . The exhaustion doctrine, in other words, turns on an inquiry into what procedures are ‘available’ under state law. In sum, there is nothing in the exhaustion doctrine requiring federal courts to ignore a state law or rule providing that a given procedure is not available.”) Id., 526 U.S. at 848. Petitions for review, which are discretionary under subdivision (e) of this rule, should not be required in order for a state prisoner to exhaust his state remedies.

\textit{Id.}

\textsuperscript{343} Id. (“The exhaustion doctrine, in other words, turns on an inquiry into what procedures are ‘available’ under state law. In sum, there is nothing in the exhaustion doctrine requiring federal courts to ignore a state law or rule providing that a given procedure is not available.” (quoting Boerckel, 526 U.S. at 838)).

\textsuperscript{344} Id.
petition for review by the state supreme court in Arkansas cases as that formerly addressed by the South Carolina Supreme Court. The South Carolina court was clear:

We therefore declare that in all appeals from criminal convictions or post-conviction relief matters, a litigant shall not be required to petition for rehearing and certiorari following an adverse decision of the Court of Appeals in order to be deemed to have exhausted all available state remedies respecting a claim of error. Rather, when the claim has been presented to the Court of Appeals or the Supreme Court, and relief has been denied, the litigant shall be deemed to have exhausted all available state remedies. 345

Now, with the change in appellate jurisdiction over Rule 37.1 appeals, the application of Arkansas Supreme Court Rule 1-2(h) has become particularly relevant, some eighteen years after its adoption by the supreme court. 346

Reliance on Boerckel’s oblique reference to the South Carolina’s rule to excuse the final step in Arkansas appellate process, the petition for review pursuant to Rule 2-4, remains troublesome. The Supreme Court has not clearly indicated that states may opt out of discretionary review by rule or case law and neither the majority’s brief reference, nor Justice Souter’s explicit discussion, arguably stand for more than dicta. There are apparently no decisions from the United States Court of Appeals for the Fourth Circuit or South Carolina federal district court formally excusing a federal habeas petitioner from the Boerckel requirement that discretionary review be denied before the federal habeas action is ripe.

In State v. McKennedy, 347 the South Carolina court confirmed its reliance on the court’s 1990 statement rejecting the petition for discretionary review as a necessary step for exhaustion of state remedies. 348 The McKennedy court relied on the explicit reference in Boerckel to the “ordinary appellate procedure . . . in the State” 349 in response to the question: “What remedies must a habeas petitioner invoke to satisfy the federal exhaustion requirement?” 350 It then explained that it had defined the discretionary review petition as “outside South Carolina’s standard review process.” 351 In so explaining, the court relied on the Ninth Circuit’s treatment of the Arizona approach to exhaustion of state remedies:

346. See supra note 326 referring to adoption of Rule 1-2(h) by order of the Arkansas Supreme Court in 1990.
347. 559 S.E.2d 850.
348. Id. at 854.
350. Id. at 842.
351. McKennedy, 559 S.E.2d at 854.
Based on the Arizona statute and several Arizona opinions supporting
the statute, the Ninth Circuit held post-conviction review by the Arizona
Supreme Court to be a remedy that is “unavailable” within the meaning
of [Boerckel]. Honoring the Arizona statute, the Ninth Circuit held that
“claims of Arizona state prisoners are exhausted for purposes of federal
habeas once the Arizona Court of Appeals has ruled on them.”

In Swoopes v. Sublett, the Ninth Circuit considered the Arizona position
on remand from the Supreme Court of the United States for reconsider-
ation of its initial decision in light of Boerckel. The circuit court had ini-
tially held in an unpublished memorandum that Swoopes had failed to fully
exhaust all but one of his claims in the state courts before bringing the ex-
hausted and unexhausted claims in his federal habeas action. The Ninth
Circuit had earlier ruled that a petitioner who had relief on Arizona prece-
dent in not petitioning the state supreme court to review the adverse decision
by the state court of appeals rejecting his federal constitutional claims was
entitled to relief from the exhaustion requirement in the federal habeas stat-
ute because he had been misled by the state court interpretation of the role of
discretionary review for purposes of exhaustion of remedied. But
Swoopes had petitioned for review of one of his claims, relating to allegedly
tainted identifications by eye-witnesses and, as a consequence, the Circuit
Court initially concluded that he could not plead that he had been misled by
the state court’s exhaustion policy because he had, in fact, availed himself of
the discretionary review process with respect to the claimed tainted eye-
worth testimony.

On remand from the Supreme Court of the United States on Swoopes’s
petition for certiorari, the Ninth Circuit retreated from its position that he
had failed to properly exhaust because he could not rely on the argument
that he had been misled into not petitioning the state supreme court for re-
view of the intermediate appellate court’s adverse rulings on his constitu-

352. Id. (quoting Swoopes v. Sublett, 196 F.3d 1008, 1010 (9th Cir. 1999)).
353. 196 F.3d 1008 (9th Cir. 1999).
356. Harmon v. Ryan, 959 F.2d 1457, 1462–63 (9th Cir. 1992) (concluding that the peti-
tioner had been misled by the Arizona Supreme Court’s approach to the exhaustion require-
ment imposed by the federal habeas statute). The Ninth Circuit noted that in Jennison v.
Goldsmith, 940 F.2d 1308, 1311–12 (9th Cir. 1991), it had held that the Arizona exhaustion
document was not consistent with the requirements for exhaustion under the federal habeas
statute, 28 U.S.C. § 2254(e) (2018). Harmon, 959 F.2d at 1462–63. However, because Har-
mon had been misled by the Arizona precedent, the circuit court concluded that the rule for
procedural default for unexhausted claims, it excused his failure to exhaust by failing to peti-
tion for review. Id.
tional claims. Instead, it relied on Justice Souter’s concurring opinion in *Boerckel*, in which he observed that the discretionary petition to a state supreme court could be seen as being “outside the standard review process” and not required for exhaustion of state remedies necessary for review of constitutional claims on the merits in federal habeas proceedings. The State then unsuccessfully petitioned for certiorari to review the Ninth Circuit’s decision on remand from the Supreme Court of the United States. Subsequently, the Arizona federal district court summarized the state of Arizona exhaustion policy for purposes of federal habeas review in *Crowell v. Knowles*, explaining:

Reviewing Arizona law, the court finds that the State has plainly removed discretionary supreme court review from the standard review process for individuals sentenced to life in prison, and that Petitioner therefore exhausted even though he did not timely utilize that procedure. Contrary language in prior cases is both dictum and erroneous in its description of relevant Arizona statutes.

What appears clear is that the exhaustion policies adopted by the South Carolina and Arizona Supreme Courts have both served to satisfy federal habeas courts that the petition for review by the state supreme court is not required for exhaustion of federal constitutional claims that have been addressed and rejected by lower courts in those states. Instead, apparently relying on Justice Souter’s observation in *Boerckel*, those state supreme courts have avoided the unnecessary filings for review that the majority did not consider a sufficient basis to excuse discretionary review in the Illinois exhaustion process. Their policies on exhaustion, in contrast to the Illinois Supreme Court’s strong suggestion to litigants that discretionary review will almost always be futile, appear to have circumvented the majority’s usual preference for the petitioner to exhaust any available remedy in order to preserve a claim for federal review.

When the petitioner does not exhaust the federal constitutional claim to be urged in the federal habeas petition by seeking discretionary review in a state supreme court, the ninety-day period for petitioning for certiorari in the

360. *Swoopes*, 196 F.3d at 1010–11 (“In Moreno v. Gonzalez, 192 Ariz. 131, 962 P.2d 205 (Ariz. 1998) the Arizona Supreme Court considered certified questions from us, and reiterated that a petition for review from the Arizona Court of Appeals is not part of a defendant’s right to appeal.”).
363. *Id.* at 927.
Supreme Court of the United States does not toll the one-year limitations period for filing the federal petition. Instead, the one-year period for filing the federal habeas petition, is tolled only by the time for filing for state discretionary review, as the Court clarified in *Gonzales v. Thaler*. For those state court litigants who do not petition for review in the direct appeal process, the ninety-day filing period to petition the Supreme Court of the United States for certiorari does not toll the one-year period in which to file the federal habeas corpus petition, as the Court explained. Importantly, the ninety-day tolling period does not apply to petitioning for certiorari following denial of relief in state postconviction matters, as a matter of statutory language.

Arkansas petitioners who have failed to timely file for federal relief within the one-year period of limitations for filing the habeas petition have argued that they were entitled to rely on the additional ninety days for filing when the petitioner files for review by certiorari in the Supreme Court of the United States. But neither the Eighth Circuit Court of Appeals nor

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364. *Gonzales*, 565 U.S. 134 (2012). The Court abrogated the Eighth Circuit’s holding in *Riddle v. Kemna*, 523 F.3d 850 (8th Cir. 2008) (en banc) where the circuit court had held that the one-year habeas corpus filing period was tolled until the mandate of the state court issued. *Gonzales*, 565 U.S. at 139.
367. 28 U.S.C. § 2244 (2018) provides, in pertinent part:
   - (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—
     - (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
     - (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
     - (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
     - (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
   - (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.
368. Under § 2244(d)(1)(A), the time for filing the federal habeas petition is tolled while a timely-filed certiorari petition is pending in the Supreme Court of the United States, which the Court held, in *Griffith v. Kentucky*, 479 U.S. 314, 320 n.8 (1987). Thus, the minimal ninety-day period for petitioning for certiorari tolls the one-year filing period while the certiorari remains pending. Clay v. United States, 537 U.S. 522, 527 (2003) (citing Smith v. Bowersox, 159 F.3d 345, 348 (8th Cir. 1998); Williams v. Bruton, 299 F.3d 981, 982 (8th Cir. 2002). Then, in *Gonzales v. Thaler*, 565 U.S. 154 (2013) the Court held that the petition-
Arkansas federal district courts have ruled that petitioners could rely on Rule 1-2(h) to claim the additional ninety-day period for petitioning for certiorari following rejection of their federal constitutional claims by the Arkansas Court of Appeals to extend the one-year limitations for filing the federal habeas petition without having exhausted the remedy of filing for review under Rule 2-4.\footnote{In \textit{Parmley v. Norris}, the Eighth Circuit explicitly rejected reliance on Rule 1-2(h) as a basis for claiming that the one-year period for petitioning for federal habeas corpus was tolled for the ninety days permitted to petition the Supreme Court of the United States for certiorari. Parmley argued unsuccessfully that he could have properly petitioned for certiorari following rejection of his federal constitutional claim by the court of appeals without first petitioning for review in the Arkansas Supreme Court to exhaust review of the claim in the state appeal process.} Since Arkansas Supreme Court Rule 1-2(h) is not specifically mentioned in \textit{Boerckel}, it is not clear that application of the rule would be recognized along with the exception for the South Carolina and Arizona approaches noted by the Court in its opinion. In light of the fact that the court did not include Rule 1-2(h) in its decision, the Eighth Circuit’s decision in \textit{Parmley} will foreclose reliance on the Rule by Arkansas petitioners to expand the one-year period for filing for federal habeas relief by the ninety days that toll the filing to permit state court defendants to petition the Supreme Court of the United States by certiorari to review the rejection of federal constitutional claims by the court of appeals.

Without United States Supreme Court recognition that Rule 1-2(h) affords Arkansas Rule 37.1 litigants an alternative to the exhaustion of state remedies through Rule 2-4, required by \textit{Boerckel}, a postconviction petitioner appealing denial of relief by the trial court must exhaust the petition for review process. Otherwise, they face dismissal of their claims on the merits based on procedural default in failing to file for review pursuant to Rule 2-4.

\footnote{\textit{ Parmley v. Norris}, 402 F. Supp. 2d 1026, 1029–30 (E.D. Ark. 2005) (holding that because petitioner’s claim was not cognizable for petition for review under Rule 2-4 based on acceptable categories of claims under Rule 1-2(b), making the Arkansas Court of Appeals the “highest court” upon which a decision could be had on the claim, but denying relief on the merits), \textit{aff’d}, 485 F.3d 415, 421, 426–27 (8th Cir. 2007); Ben-Yah v. Norris, 570 F.Supp.2d 1086, 1094 (E.D. Ark. 2008) (rejecting \textit{Collier’s} conclusion that Arkansas Court of Appeals was the “highest court” of the State as incorrectly reasoned).}

\footnote{586 F.3d 1066 (8th Cir. 2009).}

\footnote{Id. at 1070–71 (holding state court of appeals not “highest court” for purposes of petitioning the Supreme Court of the United States for review by certiorari when claim not presented in Rule 2-4 petition).}

\footnote{Id. at 1071–72.}
Arkansas petitioners who have not proceeded through Rule 2-4 seeking review of claims they intend to assert in the federal habeas process will likely be required to respond to argument that these claims have not been properly preserved in the state court exhaustion process. Although the habeas court might hold the petition in abeyance to permit the petitioner to return to state court to explore exhaustion options, the time limits for filing the Rule 2-4 review petition will have undoubtedly expired at that point. In this scenario, the untimely filing in the Arkansas Supreme Court might result in dismissal of the petition without a definitive statement that Rule 1-2(h) does not require further exhaustion attempts under state law. A dismissal reinforcing Rule 1-2(h) as a controlling statement of Arkansas law might serve to avoid application of the procedural default in the federal habeas process but would also result in delay that could have been avoided by timely petitioning for review under Rule 2-4.

At the worst, however, a procedural morass could result, including dismissal of the “unexhausted” claim by the habeas court based on a conclusion that dismissal of the Rule 2-4 petition as untimely, rather than mooted by Rule 1-2(h), constituted procedural default of the federal claim. A clear statement from the supreme court supporting application of Rule 1-2(h) to explain the petitioner’s correct exhaustion of state remedies, arguably protecting the right to proceed in federal court without first petitioning for review. Without such a statement, the habeas court would likely find that it is required to defer to the state court dismissal on untimeliness grounds and conclude that this claim is procedurally defaulted. The “default” applied by the state court would bar review on the merits of the claim by the federal habeas court.

Dismissal by the state supreme court for procedural default, however, would contradict the clear intent of its own Rule 1-2(h), in holding that such claims would be treated as exhausted and would seem unlikely. But, in any event, the delay in reaching a proper result recognizing the continuing viability of the rule could readily be avoided with the timely filing for review pursuant to Rule 2-4. In the event this issue were to reach the supreme court while a federal petition is being held in abeyance to permit exhaustion, the court could extricate itself from further procedural skirmishes by issuing an opinion including a statement affirming the court’s adherence to Rule 1-2(h) and its underlying policy, such as the South Carolina Supreme Court did in State v. McKennedy.

Whether such affirmation would bind the federal

373. See, e.g., Rhines v. Weber, 544 U.S. 269 (2005); see also supra notes 272–73 and accompanying text.


375. 348 559 S.E.2d 850, 852 (S.C. 2002); see case cited and accompanying text supra note 345.
habeas courts in light of the holding in Gonzales v. Thaler, effectively denying reliance on the ninety day filing period for petitioning the Court for review by certiorari when the federal habeas petition failed to exhaust state discretionary review proceedings, would be questionable. It is a question that only the Supreme Court of the United States could answer authoritatively.

VI. CONCLUSION

Nothing in the Barnes footnote explains why the Arkansas Supreme Court found it necessary to redirect primary appellate jurisdiction in Rule 37.1 appeals that included ineffective assistance of counsel claims from the court to the Arkansas Court of Appeals, nor did the court offer clarification of its newly-announced approach through a formal rule that would address questions not answered with respect to the scope of its order by footnote, even though the court has usually followed this approach, often after soliciting public and professional comment on the proposed change in a rule.

The unresolved questions raised by the court’s action in redirecting appellate jurisdiction in Rule 37.1 cases in which counsel’s effectiveness has been challenged, a claim urging a Sixth Amendment violation that might ultimately be resolved in the Supreme Court of the United States or federal habeas courts, will likely be resolved over time. The resolution of the issues not addressed by formal order that will eventually be decided by judicial decisions, necessarily means that litigants and practitioners will have less direction from the Arkansas Supreme Court than would be preferred in light of the complexity of state and federal postconviction processes.

376. See supra note 364. In Gonzales v. Thaler, the Court already abrogated the Eighth Circuit Court holding that extended the one-year period for petitioning for federal habeas review by the period of time during which the state appellate court mandate had not issued. 565 U.S. 134, 152–53 (2012), abrogating, Riddle v. Kemna, 523 F.3d 850 (8th Cir. 2008). The Court held that the extended period of time was limited to the time for petitioning for review, avoiding the administrative difficulties caused by referencing differing state procedures in the issuance of the mandate. Id.


378. See, e.g., In re Changes to Ark. Rules of Criminal Procedure, 294 Ark. 674, 674–75, 742 S.W.2d 949, 949 (1988) (per curiam) (“The Committee on Rules of Criminal Procedure has submitted to us proposed changes in the rules of criminal procedure . . . . We invite comment upon the following changes, which will become effective on March 1, 1988 unless altered or withdrawn by per curiam order prior to that date.”) (emphasis added).

379. At this point, there is apparently no decision rendered by the Arkansas Supreme Court on a petition for review following a decision by the Arkansas Court of Appeals in an
What is clear is that the directive in the *Barnes* footnote has been implemented to provide for initial appellate review of Rule 37 appeals not involving cases in which a death sentence or sentence of life imprisonment has been imposed by the Arkansas Court of Appeals. What has not been made clear is whether the petition for review will remain an integral and necessary part of the Rule 37 appellate process, a critical issue with respect to exhaustion of state remedies to permit review of federal constitutional claims by the Supreme Court or federal habeas courts.

The Arkansas Supreme Court could, of course, decide to expedite the process of informing petitioners and their attorneys, if represented by counsel, of the necessity for petitioning for review by Arkansas Supreme Court Rule 2-4, of the viability of Supreme Court Rule 1-2(h), for instance, among other unresolved questions noted in this article. Or, the court might simply leave the questions to be addressed or answered on a case-by-case approach.

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appeal from denial of Rule 37.1 relief by a state circuit court. In two recent decisions, for instance, the supreme court ruled in Rule 37.1 appeals, but neither involved review of claims that had been rejected by the court of appeals in a direct appeal from denial of relief by the trial court. See *Hinton* v. State, 2019 Ark. 136, at 5, 2019 WL 1948729, at *2 (upholding denial of relief on ineffective assistance of trial counsel claim); *Reynolds* v. State, 2019 Ark. 144, at 1, 2019 WL 2051786, at *1 (remanding for completion of the record). *Hinton* and *Reynolds* were decided by the Arkansas Supreme Court in appeals arising from 37.1 proceedings in which the supreme court had decided the direct appeal in the case. *Hinton*, 2017 Ark. 107, 515 S.W.3d 121; *Reynolds*, 2016 Ark. 214, 492 S.W.3d 491. See Ark. Sup. Ct. R. 1-2(a)(7) (providing that the supreme court has jurisdiction over “[s]econd or subsequent appeals following an appeal which has been decided in the Supreme Court.”).