

A Meaningless Ritual? The Due Process Mandate for the Provision of Competent Counsel in Arkansas Capital Post-Conviction Proceedings

By MEGAN K. ROSICHAN*

LEDELL LEE'S LAWYER was drunk during Mr. Lee's state post-conviction hearing.¹ Under Arkansas law, during state habeas proceedings to conduct a comprehensive review of his death sentence, Mr. Lee was allegedly entitled to competent counsel.² Mr. Lee's lawyer was, however, so intoxicated that counsel for the State of Arkansas made the following request to the court:

Your Honor, I don't take this lightly, but with regard to [Mr. Lee's counsel's] performance in Court today, I'm going to ask that the Court require him to submit to a drug test. I don't think that he's, he's not, he's just not with us. He's reintroduced the same items of evidence over and over again. He's asking incoherent questions. His speech is slurred. He stumbled in the Court Room. As a friend of the Court, and I think it's our obligation to this Court and to this Defendant that he have competent counsel here today, and I don't—That's just my request of the Court, Your Honor.³

* Class of 2005; B.A., Saint Norbert College (2002). Editor-in-Chief, *U.S.F. Law Review*, Volume 39. I am extremely grateful for Professor Steven Shatz's assistance, as well as for his unwavering dedication to the Keta Taylor Colby Death Penalty Project. Thanks also to Jenniffer Horan, Bruce Eddy, and Maggie Hill of the Arkansas Federal Public Defender's Office. Most especially, I would like to thank my true friend, Arkansas partner-in-crime, and, coincidentally, my editor, Robert Tadlock, for his collaboration and patience—this Comment's half yours. For Riley.

1. See *Lee v. Norris*, 354 F.3d 846, 848 (8th Cir. 2004). Post-conviction proceedings, sometimes called collateral review or state habeas corpus, occur after a state supreme court or an intermediate appellate court, on direct appeal, affirms a sentence of death. If a state provides for post-conviction review, a person sentenced to death must present all claims in such a forum before proceedings to federal habeas corpus review. See 28 U.S.C. § 2254(b) (2003).

2. See S.B. 392, 81st Gen. Assem., Reg. Sess. (Ark. 1997) (as engrossed).

3. *Lee v. Norris*, 354 F.3d at 848 (alterations in original) (quoting court transcript).

The judge rejected this request and, not surprisingly, denied Mr. Lee's petition for state post-conviction relief from his death sentence.⁴

Timothy Kemp's appointed post-conviction counsel, despite meeting Arkansas's qualifications for appointment, neither independently reviewed Mr. Kemp's case nor conducted an independent investigation of his post-conviction claims.⁵ Rather, he delegated this responsibility to Mr. Kemp's trial counsel, the very attorney whose ineffectiveness at trial may have been a potential claim for relief.⁶ Mr. Kemp's post-conviction counsel did not seek funding, available to him under Arkansas law, for an investigator or mitigation specialist.⁷ As a result, Mr. Kemp's post-conviction counsel never discovered trial counsel's deficient investigation of Mr. Kemp's background, which included evidence that Mr. Kemp suffered from fetal alcohol syndrome, brain damage, and had suffered severe abuse as a child.⁸ None of this evidence was presented to the trial jury as mitigation on Mr. Kemp's behalf.⁹ Such evidence, had Mr. Kemp's post-conviction attorney discovered it, would have supported a claim of ineffective assistance of trial counsel. Ultimately, another attorney, not appointed by the court, prepared Mr. Kemp's post-conviction petition, which the appointed counsel only signed.¹⁰ Prior to submitting a seven page post-conviction petition, Mr. Kemp's post-conviction counsel met him only once. During that meeting they never discussed which issues to raise in the petition.¹¹ The Arkansas Supreme Court denied Mr. Kemp's petition for relief on all grounds.¹²

Riley Noel's appointed state post-conviction counsel simply failed to raise claims of ineffective assistance of trial counsel in state post-conviction proceedings on Mr. Noel's behalf. During Mr. Noel's trial his attorney failed to couch objections in constitutional terms when

4. See *Lee v. State*, 38 S.W.3d 334 (Ark. 2001). Mr. Lee subsequently filed a petition for a writ of habeas corpus in federal court. After reviewing the transcripts of the state post-conviction proceedings, the district court judge, on his own motion, raised the question of whether Mr. Lee had been deprived of his due process rights and his state right to competent counsel. The district court is currently holding Mr. Lee's petition in abeyance pending the outcome of Mr. Lee's attempts to litigate such claims in state court. See *Lee v. Norris*, 354 F.3d at 847.

5. Affidavit of Sam Heuer, app. 1, Petition for Habeas Corpus, *Kemp v. Norris* (E.D. Ark. 2003) (No. 5-03-CV-00055).

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. See *Kemp v. State*, 74 S.W.3d 224 (Ark. 2002).

the prosecution, for example, repeatedly called Mr. Noel a “psychopath.”¹³ Such deficient representation may have given rise to a claim of ineffective assistance of counsel. Mr. Noel’s appointed post-conviction counsel, however, did not assert this as a basis for relief in his state post-conviction proceedings.¹⁴ As a result, when Mr. Noel’s attorney attempted to raise an ineffective assistance of counsel claim against Mr. Noel’s trial counsel in federal habeas corpus proceedings, the federal district court could not consider the claim because of Mr. Noel’s state post-conviction counsel’s failure to raise the claim in the prior state post-conviction proceedings.¹⁵ Riley Noel died by lethal injection administered by the State of Arkansas on July 9, 2003 without ever having a federal court adjudicate on the merits all of his possible claims for relief from his death sentence.

The United States Supreme Court has held that the Constitution does not mandate the provision of counsel and thus effective assistance of counsel in state post-conviction proceedings.¹⁶ Therefore, defendants like Mr. Lee, Mr. Kemp, and Mr. Noel, regardless of the quality of representation that they in fact receive in their state post-conviction proceedings, are unable to raise claims of ineffective assistance of post-conviction counsel. Many states, however, including Arkansas, statutorily mandate the provision of competent counsel in state post-conviction proceedings.¹⁷ This Comment argues, first, that because the State of Arkansas statutorily mandates the appointment of competent counsel for indigent persons under sentence of death in its post-conviction proceedings, such counsel must provide effective assistance. Second, this Comment concludes that those under sentence of death in Arkansas who fail to receive the competent counsel to which they are entitled under state law have been deprived of due process of law under the Supreme Court’s holding in *Hicks v. Oklahoma*.¹⁸ Those defendants, therefore, may raise a claim that their due process rights have been violated when they received ineffective assistance of state post-conviction counsel.

13. *Noel v. Norris*, 194 F. Supp. 2d 893, 922 (E.D. Ark. 2002), *aff’d*, 322 F.3d 500 (8th Cir. 2003), *and cert. denied*, 539 U.S. 972 (2003).

14. *Id.* at 913–14.

15. *Id.* at 922–25.

16. *See Coleman v. Thompson*, 501 U.S. 722, 757 (1991); *Murray v. Giarratano*, 492 U.S. 1, 10 (1989); *Wainwright v. Torna*, 455 U.S. 586, 587–88 (1982).

17. *See Celestine Richards McConville, The Right to Effective Assistance of Capital Postconviction Counsel: Constitutional Implications of Statutory Grants of Capital Counsel*, 2003 Wis. L. REV. 31, 63–64.

18. 447 U.S. 343 (1980).

The result of ineffective assistance of state post-conviction counsel and the seeming inability to raise such a claim is dire. Under the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"),¹⁹ state post-conviction proceedings are supposed to provide a comprehensive review of a defendant's death sentence.²⁰ Death-sentenced persons such as Mr. Lee, Mr. Kemp, and Mr. Noel, however, whose counsel failed to raise claims in state post-conviction proceedings, are in almost all cases barred from raising such claims in federal habeas corpus proceedings.²¹ The inability to do so is difficult to overstate because federal courts are the forum in which a defendant stands the greatest chance of garnering relief from a death sentence.²²

Part I of this Comment presents background regarding the scope of the right to counsel and the concomitant right to the effective assistance of counsel as articulated by the United States Supreme Court. Part II first examines state post-conviction proceedings in general and the provision of counsel in such proceedings under Arkansas law. Part II then discusses the impact of the denial of effective assistance of counsel in Arkansas state post-conviction proceedings. Finally, Part III argues that the mandatory provision of competent counsel in Arkansas's post-conviction proceedings gives rise to an enforceable right to the effective assistance of counsel. This right is such that when a death-sentenced person does not receive the effective assistance that he is entitled to receive under state law, he has been deprived of due process of law under the Supreme Court's decision in *Hicks*. Ultimately, this Comment concludes that those under sentence of death in Arkansas who receive ineffective assistance of post-conviction counsel, appointed pursuant to Arkansas law, may raise claims in both state and federal court that the State's failure to provide them with their statutorily entitled effective assistance amounts to a deprivation of due process of law in violation of the Fourteenth Amendment to the United States Constitution.²³

19. 28 U.S.C. §§ 2262–2266 (2000).

20. See, e.g., ARK. CODE ANN. tit. 9, ch. 91, subch. 2, references & annots. (Michie 2003).

21. A federal district court does not have jurisdiction to review claims in federal habeas corpus proceedings that have not been raised in state appellate or state post-conviction proceedings. See 28 U.S.C. § 2254(b) (2003); *Wainwright v. Sykes*, 433 U.S. 72 (1977).

22. See JAMES LIEBMAN ET AL., A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973–1995, at 6 (2000), available at <http://justice.policy.net/jpreport/finreport/finrep.pdf> (last accessed Apr. 1, 2004); see also McConville, *supra* note 17, at 33.

23. U.S. CONST. amend. XIV, § 1.

I. The Constitutional Right to Counsel and Effective Assistance of Counsel

The evolution of the Supreme Court's right to counsel jurisprudence did not begin in earnest until 1932. In *Powell v. Alabama*,²⁴ a group of young African-Americans were convicted of rape and sentenced to death in a lynch-mob atmosphere without the aid of appointed counsel.²⁵ In *Powell*, discussing the importance of the right to counsel, the Supreme Court stated:

[I]n a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case. To hold otherwise would be to ignore the fundamental postulate . . . "that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard."²⁶

The Court's articulation of the right to counsel and the fundamental importance of receiving not just counsel, but the effective assistance of counsel, continued to expand in the years following *Powell*. Despite the expansion of this right, however, the Supreme Court has thus far refused to hold that those under sentence of death are entitled to counsel, and thus effective assistance of counsel, in state post-conviction proceedings.

Under the Supreme Court's current jurisprudence, whether a criminal defendant has a right to counsel and a right to the effective assistance of counsel is dependent upon the posture of the defendant's case. This is true whether the crime at issue is a capital or non-capital crime. The Sixth and Fourteenth Amendments to the United States Constitution guarantee indigent criminal defendants in both state and federal courts a right to the assistance of counsel at all critical stages of trial proceedings.²⁷ The Supreme Court, in fact, has held that representation by counsel is a right that is "fundamental and essential to fair trials."²⁸ The right to counsel in trial proceedings under the Sixth and Fourteenth Amendments also implies a concomitant

24. 287 U.S. 45 (1932).

25. *Id.* at 49-52.

26. *Id.* at 71-72 (quoting *Holden v. Hardy*, 169 U.S. 366, 389 (1898)).

27. *Gideon v. Wainwright*, 372 U.S. 335, 342-43 (1963).

28. *Id.* at 344.

right to the effective assistance of counsel,²⁹ a right that attaches regardless of whether counsel is retained or appointed.³⁰ The right to effective assistance of counsel derives from the fact that "the Constitution cannot tolerate trials in which counsel, though present in name, is unable to assist the defendant to obtain a fair decision on the merits."³¹

The Fourteenth Amendment also protects a defendant's right to counsel in direct appellate proceedings. While there is no constitutional right to a direct appeal,³² in *Douglas v. California*³³ the Supreme Court held that when a state chooses to provide criminal defendants with a direct appeal the state must provide indigents with counsel for that appeal.³⁴ The rationale for the constitutionally-based requirement of appointed counsel for direct appeals is that the Fourteenth Amendment's guarantees of Due Process and Equal Protection are offended where the indigent "has only the right to a meaningless ritual, while the rich man has a meaningful appeal."³⁵ Further, the Supreme Court has held that the right to counsel in a state-provided direct appeal implies a concomitant right to the effective assistance of counsel for such an appeal.³⁶

However, neither the Sixth nor the Fourteenth Amendment affords a defendant the right to counsel in discretionary proceedings including, *inter alia*, state post-conviction and habeas corpus review. State post-conviction proceedings, which are the primary focus of this Comment, are discretionary proceedings that occur after a state supreme court or intermediate appellate court on direct review affirms a sentence. Generally, post-conviction proceedings represent an opportunity for a convicted person to comprehensively challenge the constitutionality of his confinement. The Supreme Court has thus far refused to extend the Sixth and Fourteenth Amendment rights to counsel and effective assistance of counsel to post-conviction proceed-

29. *Cuyler v. Sullivan*, 446 U.S. 335, 344 (1980); *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970).

30. *See Strickland v. Washington*, 466 U.S. 668, 685 (1984).

31. *Evitts v. Lucey*, 469 U.S. 387, 395 (1985).

32. *See McKane v. Durston*, 153 U.S. 684, 687 (1894) ("[i]t is wholly within the discretion of the state" to grant an appeal as of right).

33. 372 U.S. 353 (1963).

34. *Id.* at 355-56.

35. *Id.* at 358.

36. *See Evitts*, 469 U.S. at 397 ("[T]he promise of *Douglas* that a criminal defendant has a right to counsel on appeal—like the promise of *Gideon* that a criminal defendant has a right to counsel at trial—would be a futile gesture unless it comprehended the right to the effective assistance of counsel.").

ings for persons under sentence of death or to any convicted persons for that matter.

The Court first considered the provision of counsel in discretionary proceedings in *Ross v. Moffitt*.³⁷ The question presented in *Ross* was whether *Douglas v. California*'s holding requiring appointed counsel for indigent defendants on direct appeal should be extended to require the appointment of counsel for discretionary state appeals and applications for review to the United States Supreme Court.³⁸ *Ross* was a consolidation of a defendant's two North Carolina forgery convictions.³⁹ In the first case, Moffitt's conviction was affirmed on direct appeal and his attorney for that appeal requested that he be appointed to represent Moffitt in discretionary state proceedings.⁴⁰ The trial court denied this request on the ground that the State was not required to furnish counsel for discretionary review.⁴¹ In the second case, respondent was represented in his discretionary proceedings by the public defender that had been appointed for his trial and direct appeal. The North Carolina Supreme Court denied certiorari in his post-conviction review, and he requested that counsel be appointed to assist in preparing a petition for a writ of certiorari to the United States Supreme Court.⁴² This request was denied.⁴³

The Supreme Court held in *Ross* that neither Due Process nor Equal Protection requires states to appoint counsel to represent indigent defendants for discretionary state proceedings or for applications for review to the United States Supreme Court.⁴⁴ Chief Justice Rehnquist, writing for the Court, reasoned that differences between the trial and discretionary appellate stages of criminal proceedings justified this holding, stating that in discretionary review "it is ordinarily the defendant, rather than the State, who initiates the appellate process, seeking not to fend off the efforts of the State's prosecut[ion] but rather to overturn a finding of guilt . . ." ⁴⁵ The Court stated that as long as the State does not discriminate against indigents, the Fourteenth Amendment does not require states to implement a system of

37. 417 U.S. 600 (1974).

38. *Id.* at 602-03.

39. *Id.* at 603.

40. *Id.*

41. *Id.*

42. *Id.* at 604.

43. *Id.* at 610.

44. *Id.*

45. *Id.*

appointed counsel for discretionary review.⁴⁶ The Court reasoned that because the State provided Moffitt with counsel for his trial and for his direct appeal, it could not be said "that a defendant in [Moffitt's] circumstances is denied meaningful access to the North Carolina Supreme Court simply because the State does not appoint counsel to aid him in seeking review to that court."⁴⁷

Following *Ross*, in a short per curiam opinion, *Wainwright v. Torna*,⁴⁸ the Court held that because a convicted person does not have a constitutional right to counsel to pursue discretionary review, a defendant may not be deprived of the effective assistance of counsel in discretionary state appellate proceedings.⁴⁹ In *Wainwright*, respondent's retained counsel failed to make a timely post-conviction application for certiorari contesting his felony convictions to the Florida Supreme Court.⁵⁰ As a result, the Florida Supreme Court dismissed the petition.⁵¹ The Supreme Court relied entirely on *Ross* for the proposition that "[s]ince respondent has no constitutional right to counsel, he could not be deprived of the effective assistance of counsel"⁵²

Three later cases expanded the holding of *Wainwright*. In *Pennsylvania v. Finley*,⁵³ the Court addressed whether the procedures mandated for the withdrawal of counsel from a non-capital direct appeal were required for the withdrawal of state post-conviction counsel provided by a state statute.⁵⁴ In *Finley*, the respondent was convicted of second-degree murder and sentenced to life imprisonment.⁵⁵ She lost on direct appeal and then sought relief under the Pennsylvania Post Conviction Hearing Act, proceeding *pro se*.⁵⁶ *Finley* was denied post-conviction relief in the trial court, but the Pennsylvania Supreme Court reversed, holding that she was entitled, under state law, to ap-

46. *Id.* at 618-19.

47. *Id.* at 615.

48. 455 U.S. 586 (1982) (per curiam).

49. *Id.* at 587-88.

50. *Id.* at 586.

51. *Id.*

52. *Id.* at 587-88.

53. 481 U.S. 551 (1987).

54. *Id.* at 553-54 (citing *Anders v. California*, 386 U.S. 738, 744 (1967) (holding that when an attorney seeks to withdraw as appellate counsel on direct appeal, believing an appeal to be wholly frivolous, the attorney must follow certain procedural protections, including filing a brief with the Court and his client setting forth anything in the record that might arguably support an appeal)).

55. *Id.*

56. *Id.* at 553.

pointed counsel for her post-conviction proceedings.⁵⁷ Finley was appointed counsel on remand, but this counsel withdrew when he concluded that Finley had no arguable basis for seeking post-conviction relief.⁵⁸ The trial court conducted an independent review of the record and agreed, dismissing respondent's petition.⁵⁹ Finley acquired new counsel and appealed to the superior court, contending that the conduct of her counsel in post-conviction proceedings violated her constitutional rights as established by *Anders*.⁶⁰ The Pennsylvania Supreme Court found that post-conviction counsel's failure to follow *Anders* had, in fact, violated Finley's constitutional rights.⁶¹

The Supreme Court granted certiorari and reversed, holding that because there is no underlying constitutional mandate of counsel in post-conviction proceedings, there is no constitutional right to the protections required by *Anders*.⁶² The *Anders* holding, according to the Court, was based upon "the underlying constitutional right to appointed counsel"⁶³ guaranteed by the Sixth Amendment. Finley's right to counsel, however, was based on a state statute, and the Court stated, "[I]t is the source of that right to a lawyer's assistance, combined with the nature of the proceeding, that controls the constitutional question."⁶⁴ Further, the Court stated that because the Pennsylvania courts found that the actions of counsel satisfied Pennsylvania law,⁶⁵ "respondent ha[d] received exactly that which she is entitled to receive under state law," and therefore she could not claim a "deprivation without due process."⁶⁶

57. See *Commonwealth v. Finley*, 440 A.2d 1183, 1184 (Pa. 1981).

58. *Pennsylvania v. Finley*, 481 U.S. 551, 553 (1987).

59. *Id.*

60. *Id.* at 553-54.

61. See *Commonwealth v. Finley*, 479 A.2d 568, 571 (Pa. 1984).

62. *Pennsylvania v. Finley*, 481 U.S. at 555-57.

63. *Id.* at 554.

64. *Id.* at 556.

65. The dissent took strong issue with this finding, contending that the Pennsylvania post-conviction law, in fact, required effective assistance of counsel. See *Pennsylvania v. Finley*, 481 U.S. at 566-68 (Brennan, J., dissenting). Just one year later the Pennsylvania Supreme Court held that its state post-conviction statute requiring the appointment of counsel in post-conviction proceedings necessarily gave rise to a right that such counsel be effective. See *Commonwealth v. Albert*, 561 A.2d 736, 738 (Pa. 1989) ("It is axiomatic that the right to counsel includes the concomitant right to effective assistance of counsel. Indeed, the right to counsel is meaningless if effective assistance is not guaranteed.") (internal citations omitted).

66. *Pennsylvania v. Finley*, 481 U.S. at 558.

The Court considered the applicability of *Finley* to capital cases in *Murray v. Giarratano*.⁶⁷ In *Murray*, a group of indigent death row inmates brought a civil rights class action in the Eastern District of Virginia against officials of the Commonwealth of Virginia, alleging that the United States Constitution required that they be appointed counsel for the purposes of pursuing state post-conviction relief.⁶⁸ The inmates' claim was principally based upon *Bounds v. Smith*,⁶⁹ wherein the Court held on due process and equal protection grounds that prisoners' "right of access" to the courts required a state to furnish adequate access to law libraries.⁷⁰ The district court agreed, finding that the special time limitations placed on death row inmates and the complexity of their cases mandated that the dictates of *Bounds* could not be fulfilled unless counsel was provided to indigent death row inmates to assist in preparing post-conviction petitions.⁷¹ The United States Court of Appeals for the Fourth Circuit reversed,⁷² but subsequently reheard the case en banc and affirmed the district court.⁷³

On review, the Supreme Court stated that neither the Eighth Amendment nor due process requires that states appoint counsel for indigent death row inmates seeking post-conviction relief.⁷⁴ The Court held that *Finley*, and not *Bounds*, was the controlling precedent and that *Finley* was applicable to both capital and non-capital cases.⁷⁵ The Court rejected *Bounds*'s applicability to a right to counsel analysis, stating that to allow a district court to partially overrule *Finley* in a particular state based on its factual findings "regarding matters such as the perceived difficulty of capital sentencing law and the general psychology of death row inmates" would be to sway from the Court's "categorical holdings as to what the Constitution requires with respect to a particular stage of a criminal proceeding in general."⁷⁶

*Coleman v. Thompson*⁷⁷ is the most recent case in which the Supreme Court considered the right to counsel in post-conviction pro-

67. 492 U.S. 1 (1989).

68. *Id.* at 3. Under Virginia law at the time there was no state statute that required the appointment of counsel prior to the filing of a petition for post-conviction relief. *See id.* at 5.

69. 430 U.S. 817 (1977).

70. *Id.* at 828.

71. *See Giarratano v. Murray*, 668 F. Supp. 511, 513 (E.D. Va. 1986).

72. *See Giarratano v. Murray*, 836 F.2d 1421, 1423 (4th Cir. 1988).

73. *See Murray v. Giarratano*, 847 F.2d 1118, 1121 (4th Cir. 1988) (en banc).

74. *Murray v. Giarratano*, 494 U.S. 1, 10 (1989).

75. *Id.* at 10-11.

76. *Id.* at 12.

77. 501 U.S. 722 (1991).

ceedings. In *Coleman*, the Court held that, because there is no constitutional right to appointed counsel in state post-conviction proceedings, an attorney error that results in a procedural default of a defendant's claims in state habeas corpus proceedings cannot constitute "cause"⁷⁸ to excuse the default in federal habeas corpus.⁷⁹ Thus, under current Supreme Court precedent, because there is no constitutional right to effective assistance of counsel in state post-conviction proceedings, claims that are not raised in state post-conviction proceedings may not be raised in federal habeas corpus proceedings on the basis of an allegation that the ineffective assistance of post-conviction counsel was cause for the failure to raise the claim in state court. On its face, this means that ineffective assistance of counsel received by a death-sentenced person in state post-conviction proceedings results in the defendant losing, for all intents and purposes, those claims that were not raised in state post-conviction proceedings.

II. Post-Conviction Proceedings in Arkansas and the Problem of Ineffective Assistance of Post-Conviction Counsel

While under the United States Constitution the State of Arkansas has no duty to provide counsel to death-sentenced persons in its post-conviction proceedings, Arkansas, in an attempt to comply with the Anti-Terrorism and Effective Death Penalty Act of 1996, mandates the provision of "competent counsel" in its post-conviction proceedings.⁸⁰ However, simply providing for the mandatory provision of competent counsel and a capital defendant receiving *effective* assistance from such counsel in their post-conviction proceedings is not one in the same. For a person under sentence of death, this difference between simply receiving counsel and actually receiving the effective assistance of counsel has deadly consequences.

78. The failure to raise a claim during state direct appellate review or state post-conviction review is called a "procedural default." A federal district court may not rule on claims in habeas corpus proceedings that have been procedurally defaulted. In order to overcome a procedural default and be able to raise a defaulted claim in federal habeas corpus proceedings, the appellant must show both "cause" for the default and resulting "prejudice." See 28 U.S.C. § 2254(b) (2000); see also *Wainwright v. Sykes*, 433 U.S. 72 (1977).

79. *Coleman*, 501 U.S. at 757.

80. See ARK. CODE ANN. tit. 9, ch. 91, subch. 2, references & annots. (Michie 2003) (stating that the intent of the act is to comply with the AEDPA).

A. The Provision of Counsel in Post-Conviction Proceedings in Arkansas

Following a capital conviction, Arkansas, like many death penalty states, provides those under sentence of death with an automatic direct appeal.⁸¹ If the Arkansas Supreme Court on direct review affirms the death sentence, a defendant is then entitled to state post-conviction review. The system of post-conviction review in Arkansas is set forth in Rule 37.1 *et seq.* of the Arkansas Rules of Criminal Procedure (“Rule 37”).⁸² The purpose of Rule 37 proceedings in Arkansas is to determine whether an accused’s constitutional or statutory rights were violated in the underlying trial.⁸³ By both statute and judicial rule, except in rare circumstances, a petitioner is allowed to file only one Rule 37 petition and must set forth in that petition all possible grounds for relief.⁸⁴ Rule 37 petitions are filed at the circuit court level and may be appealed to the Arkansas Supreme Court.⁸⁵ When a petition for post-conviction relief is denied, federal habeas corpus is then the last available forum in which a defendant may seek relief.

States, including Arkansas, have been motivated to provide counsel in their post-conviction proceedings primarily so that they can comply with AEDPA.⁸⁶ If a state can show compliance with AEDPA,⁸⁷ principally by showing that the state provides for the mandatory appointment and compensation of competent counsel in its post-conviction proceedings, the state receives the “benefit” of streamlined

81. ARK. CODE ANN. § 16-91-101(a) (Michie 2003).

82. ARK. R. CRIM. P. 37.1–37.5 (Michie 2003).

83. *Cigainero v. State*, 906 S.W.2d 282, 283–284 (Ark. 1995); *see also* *Bohanan v. State*, 985 S.W.2d 708, 709 (Ark. 1999); ARK. R. CRIM. P. 37.1(a)–(d).

84. *See* ARK. R. CRIM. P. 37.2(b); *Williams v. State*, 619 S.W.2d 628, 629 (Ark. 1981). Prior to *Williams*, the Arkansas Supreme Court allowed, by judicial rule, the filing of multiple Rule 37 petitions:

85. *See* ARK. R. CRIM. P. 37.2(c).

86. Arkansas explicitly states in its post-conviction statute that the purpose of the statute is to comply with the requirements of AEDPA. *See* ARK. CODE ANN. tit. 9, ch. 91, subch. 2, references & annots. (Michie 2003).

87. Compliance with AEDPA is generally termed “opting in.” A state complies with the requirements of AEDPA if the state establishes by statute, by rule of its court of last resort, or by another agency authorized by state law, a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in state post-conviction proceedings brought by indigent capital defendants who have had their sentences affirmed on direct appeal by the state’s court of last resort or who have otherwise had their sentences become final for state law purposes. The state must also provide for competency standards of appointed state post-conviction counsel. *See* 28 U.S.C. 2261(b) (2000). *See generally* Burke W. Kappler, *Small Favors: Chapter 154 of the Antiterrorism and Effective Death Penalty Act, the States, and the Right to Counsel*, 90 J. CRIM. L. & CRIMINOLOGY 467 (2000). The issue of Arkansas’s opt-in status has not been litigated.

federal habeas corpus procedures applicable to the state's death-sentenced persons.⁸⁸

Until 1997, Arkansas did not provide persons under sentence of death with counsel for Rule 37 proceedings.⁸⁹ In 1997, however, the Legislature amended Rule 37 by enacting the Arkansas Effective Death Penalty Act of 1997, which added Rule 37.5, entitled "Special Rule for Persons Under Sentence of Death."⁹⁰ This provision provides that within twenty-one days after the Arkansas Supreme Court affirms a sentence of death on direct review, the circuit court that imposed the sentence of death, "shall inform the person of the existence of possible relief under this rule and shall determine whether the person desires the appointment of an attorney" to represent him in Rule 37 proceedings.⁹¹ Waiver of the right to an attorney for post-conviction relief must be made in open court, on the record, and the circuit court must issue written findings regarding waiver of the right.⁹²

Rule 37 sets forth specific qualifications that counsel must meet and provides that the circuit court must make a written order concerning the appointment of counsel.⁹³ Specifically, under Rule 37.5(c)(1) an attorney must meet the following standards:

- (A) Within ten (10) years immediately preceding the appointment, the attorney shall have:
 - (i) represented a petitioner under sentence of death in a state or federal post-conviction proceeding; or
 - (ii) actively participated as defense counsel in at least five (5) felony jury trials tried to completion, including one trial in which the death penalty was sought; and
- (B) Within ten (10) years immediately preceding the appointment, the attorney shall have:
 - (i) represented a petitioner in at least three state or federal post-conviction proceedings, one of which proceeded to an evidentiary hearing and all of which involved a conviction of a violent felony, including one conviction of murder; or

88. See 28 U.S.C. §§ 2262–66. Capital defendants in opt-in states are subject to a six month statute of limitations for the filing of federal habeas corpus petitions rather than the standard one year statute of limitations. This statute of limitations also begins to run as soon as the defendant's conviction is affirmed on direct review by the state supreme court rather than upon the completion of Supreme Court certiorari review, as is the case in non-opt-in states. See *id.*; see also McConville, *supra* note 17, at 62–63.

89. See generally Porter v. State, 2 S.W.3d 73, 74 (Ark. 1999) (discussing how the enactment of Rule 37.5 has changed post-conviction review in Arkansas).

90. ARK. R. CRIM. P. 37.5 (Michie 2003).

91. *Id.* at 37.5(b).

92. *Id.* at 37.5(b)(2).

93. *Id.* at 37.5(b)(2) & (c).

- (ii) represented a defendant in at least three (3) appeals involving a conviction of a violent felony, including one conviction of murder, and represented a petitioner in at least one evidentiary hearing in a state or federal post-conviction proceedings; and
- (C) The attorney shall have been actively engaged in the practice of law for at least three (3) years; and
- (D) Within two (2) years immediately preceding the appointment, the attorney shall have completed at least six (6) hours of continuing legal education or other professional training in the representation of persons in capital trial, capital appellate, or capital post-conviction proceedings.⁹⁴

An attorney may also be appointed by the court that does not meet these qualifications “if the circuit court determines that the attorney is clearly qualified because of his unique training, experience, and background to represent a person under sentence of death in post-conviction proceedings,” provided that the court makes a written finding to that effect.⁹⁵

B. Failures of Competence: The Problem of Ineffective Assistance in Arkansas Post-Conviction Proceedings

The legislative comments that accompanied the enactment of Rule 37.5 state that the purpose of the rule was to provide “a mechanism for the appointment, compensation, and reimbursement of competent counsel for all indigent capital defendants in state post-conviction proceedings.”⁹⁶ The desire to appoint competent counsel by enforcing qualification requirements does not, however, guarantee actual effective assistance by such counsel once appointed. State post-conviction proceedings in Arkansas represent a comprehensive opportunity for a person under sentence of death to challenge the constitutionality of his sentence.⁹⁷ This means that post-conviction counsel plays a fundamental role in reviewing the performance of trial counsel for possible claims of ineffectiveness, reviewing the trial record for potential constitutional claims, such as jury and prosecutorial misconduct, and reviewing the performance of direct appellate counsel. Such a review often involves a complete reexamination of not only

94. *Id.* at 37.5(c)(1).

95. *Id.* at 37.5(c)(4). It is impossible to know with any certainty whether most counsel appointed under Rule 37 meet the competency requirements of Rule 37.5(c)(1) or the special requirements of Rule 37.5(c)(4) because Arkansas does not keep or report such statistics.

96. ARK. CODE ANN. tit. 9, ch. 91, subch. 2, references & annots. (Michie 2003).

97. *Cigainero v. State*, 906 S.W.2d 282, 283 (Ark. 1995); *Echols v. State*, 42 S.W.3d 467, 470 (Ark. 2001).

the trial record but also of the alleged crime and the resulting investigation.⁹⁸ The Arkansas Supreme Court has recognized the importance of post-conviction proceedings, stating “[p]ostconviction proceedings under Rule 37 are intended to avoid persons being unjustly imprisoned. This rule enables the courts to correct a manifest injustice ‘Rule 37 is . . . designed to prevent wrongful incarceration under a sentence so flawed as to be void.’”⁹⁹

Effective representation of death-sentenced persons in Arkansas’s Rule 37 proceedings is especially important because, almost without exception, a person is entitled to only one Rule 37 petition.¹⁰⁰ The petition must also conform to stringent format and filing requirements in order to even be considered.¹⁰¹ Further, the Arkansas Supreme Court has specifically held that the other forms of collateral relief available in the State, a writ of error coram nobis¹⁰² and a petition for state habeas corpus, may not be used to address issues that properly should have been raised in Rule 37 proceedings.¹⁰³ The result of this system is that a death-sentenced person, such as Mr. Lee, Mr. Kemp, or Mr. Noel, whose attorney fails to raise a claim, conduct an investigation, or even follow procedural guidelines when filing a Rule 37 petition entirely loses the opportunity to have his constitutional claims evaluated in state court.

The result goes much further, however, because state post-conviction proceedings play a fundamentally important role in later federal habeas corpus review. With limited exception, all claims for relief from a death sentence must be raised in state post-conviction proceedings and decided on the merits in order to be reviewed in subsequent

98. See Letty S. Di Giulio, *Dying for the Right to Effective Assistance of Counsel in State Post-Conviction Proceedings: State Statutes & Due Process in Capital Cases*, 9 B.U. PUB. INT. L.J. 109, 114–15 (1999).

99. *Bohanan v. State*, 985 S.W.2d 708, 709 (Ark. 1999) (citations omitted).

100. See *Williams v. State*, 619 S.W.2d 628, 629 (Ark. 1981) (holding that subsequent petitions under Rule 37 will only be considered if the original petition was specifically denied without prejudice to refile).

101. See *O’Brien v. State*, 3 S.W.3d 332, 333 (Ark. 1999) (denying an appellant’s request to file a second Rule 37 after original petition was denied on the basis of untimeliness). Rule 37 petitions must be ten pages in length unless amendments are permitted by the court and must be filed within ninety days of the appointment of post-conviction counsel. ARK. R. CRIM. P. 37.1(e), 37.5(e) (Michie 2003).

102. A writ of error coram nobis is “[a] procedural tool whose purpose is to correct errors of fact only, and its function is to bring before the court rendering the judgment matters of fact which, if known at time judgment was rendered, would have prevented its rendition.” BLACK’S LAW DICTIONARY 337 (6th ed. 1990).

103. See *Renshaw v. Norris*, 989 S.W.2d 515, 517 (Ark. 1999); *Williams v. Langston*, 688 S.W.2d 285, 286 (Ark. 1985).

federal habeas corpus proceedings.¹⁰⁴ This is significant, as it is estimated that forty percent of all death penalty cases were reversed in federal habeas corpus proceedings from 1973 through 1995.¹⁰⁵ Thus, a death-sentenced person who receives ineffective assistance in state post-conviction proceedings loses not only the ability to have his constitutional claims addressed in the first available state forum, but also in federal court, where he stands the greatest chance of garnering relief. Given the known rate of reversal and error in death penalty cases that actually are evaluated by appellate and post-conviction courts on the merits, it is highly likely that many death-sentenced persons in Arkansas, such as Mr. Noel, are executed without even having the opportunity to present valid claims for relief as a result of ineffective post-conviction counsel.

The rate at which death sentences are reversed, in both the United States as a whole and Arkansas, illustrates the fundamental importance of comprehensive appellate review. A recent statistical examination of the death penalty revealed that from 1973 to 1995 there was an overall error rate of seventy percent in Arkansas death penalty cases.¹⁰⁶ The rate of error found in federal habeas corpus review of Arkansas death penalty cases was forty-eight percent, the highest of any state in the Eighth Circuit.¹⁰⁷ Nationally, during the twenty-three years of the study, more than two out of every three death penalty cases that were judicially reviewed were found to be seriously flawed.¹⁰⁸ Importantly, however, these numbers are likely an underestimation of the true level of error in death penalty cases because these statistics only include those claims that were actually raised and decided on the merits by courts on review. They do not account for those claims, such as Mr. Lee's, Mr. Kemp's, and Mr. Noel's, that were not raised because of ineffective post-conviction counsel.

III. The Due Process Mandate for Effective Assistance of Post-Conviction Counsel in Arkansas

The Supreme Court has clearly found that the Sixth Amendment does not require a state to provide counsel in post-conviction proceed-

104. See 28 U.S.C. § 2254(b) (2000); see also *Wainwright v. Sykes*, 433 U.S. 72 (1977).

105. LIEBMAN ET AL., *supra* note 22, at 35.

106. *Id.* at 66 tbl.7. The study, conducted as a statistical consolidation of the over 5,760 capital sentences and 4,578 appeals in states imposing the death penalty from 1973-1995, defines overall error rate as the proportion of fully reviewed capital judgments that were overturned at one of the three stages of review due to serious error. *Id.* at 2.

107. *Id.* at 69 tbl.8.

108. *Id.* at 2.

ings.¹⁰⁹ Thus, a defendant is not constitutionally entitled to effective assistance of counsel in such proceedings.¹¹⁰ This would seem to foreclose any argument that death-sentenced defendants in Arkansas are entitled to raise claims of ineffective assistance of state post-conviction counsel. The Supreme Court has held, however, that a state-created statutory right may also create a liberty or property interest that is subject to the protections of the Fourteenth Amendment's Due Process Clause.¹¹¹ Thus, because the State of Arkansas grants death-sentenced defendants an unequivocal entitlement to competent counsel in post-conviction proceedings, the Federal Constitution's Fourteenth Amendment Due Process Clause,¹¹² as interpreted principally by the Supreme Court's holding in *Hicks v. Oklahoma*, mandates that death-sentenced persons who receive ineffective assistance of counsel in their state post-conviction hearings have been deprived of a due process right and may raise such a claim in state or federal court.

A. State-Created Liberty Interests Protected by the Fourteenth Amendment's Due Process Clause

Until the last quarter of the twentieth century the Supreme Court narrowly defined those liberty interests protected by the Fourteenth Amendment's Due Process Clause.¹¹³ Recently however, the Supreme Court has repeatedly held in many contexts that state statutes may create liberty interests that are above and beyond those granted to citizens substantively by the United States Constitution.¹¹⁴ Once a state has granted such an interest, due process protections attach to that interest and the state-created right "may not be arbitrarily abrogated."¹¹⁵ Further, the Court has stated that "[a] state-created right

109. See *Murray v. Giarratano*, 494 U.S. 1, 10 (1989).

110. See *Coleman v. Thompson*, 501 U.S. 772 (1991).

111. See, e.g., *Bush v. Gore*, 531 U.S. 98, 104–05 (2000); *Mills v. Rogers*, 457 U.S. 291, 303 (1982); *Conn. Bd. of Pardons v. Dumschat*, 452 U.S. 458, 463–64 (1981); *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980); *Vitek v. Jones*, 445 U.S. 480, 488–89 (1980); *Bd. of Regents v. Roth*, 408 U.S. 564, 570–71 (1972); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972); *Goldberg v. Kelly*, 397 U.S. 254, 267–68 (1970); *Griffin v. Illinois*, 351 U.S. 12, 18 (1956).

112. U.S. CONST. amend. XIV, § 1.

113. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 262–68 (1970) (abrogating the Court's traditional distinction between "rights" and "privileges" and finding that where receipt of welfare aid was a matter of statutory entitlement that such aid is a property right subject to due process protections and not merely a privilege granted by state law); see generally ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW* 534–36 (Aspen Law & Bus., 2d ed. 2002).

114. See *Vitek v. Jones*, 445 U.S. 480, 488 (1980).

115. *Id.* at 488–89 (citations omitted).

can, in some circumstances, beget yet other rights to procedures essential to the realization of the parent right."¹¹⁶

*Board of Regents of State Colleges v. Roth*¹¹⁷ was the Supreme Court's first clear articulation of how a state may create liberty interests protected by the Due Process Clause. *Roth* arose from a suit brought by a non-tenured college professor whose fixed one-year faculty term ended without him being rehired.¹¹⁸ The professor brought suit alleging, *inter alia*, that he had a liberty interest protected by the Due Process Clause in continued employment.¹¹⁹ The Supreme Court held that because the state law in question left the decision to "rehire a nontenured teacher for another year to the unfettered discretion of university officials,"¹²⁰ the plaintiff did not have a liberty interest in continued employment protected by the Due Process Clause.¹²¹ In the course of its analysis, however, the Court defined those liberty interests protected by the Due Process Clause to include not only rights specifically granted by the Constitution but also those rights that are not enumerated in the Constitution and arise from independent sources, such as state law.¹²²

In a number of cases following *Roth*, the Court held that specific state laws created liberty interests protected by the Due Process Clause. For example, while there is no constitutional right to parole,¹²³ in *Morrissey v. Brewer*,¹²⁴ the Court found a liberty interest protected by the Due Process Clause in remaining free on parole once a state created a right to parole.¹²⁵ The Court reasoned that once parole is unequivocally granted by a state statute "the liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a 'grievous loss' on the parolee [T]he liberty is valuable and must be seen within the protection of the Fourteenth Amendment."¹²⁶ Likewise, the Court held in *Vitek v. Jones*¹²⁷ that a prisoner has a protected liberty interest in not being involuntarily transferred to a mental hospital when a

116. *Conn. Bd. of Pardons v. Dumschat*, 452 U.S. 458, 463 (1981) (citations omitted).

117. 408 U.S. 564 (1972).

118. *Id.* at 566.

119. *Id.* at 568.

120. *Id.* at 567.

121. *Id.* at 572.

122. *Id.* at 572-77.

123. *See Greenholtz v. Neb. Penal Inmates*, 442 U.S. 1, 7 (1979).

124. 408 U.S. 471 (1972).

125. *Id.* at 472.

126. *Id.* at 482.

127. 445 U.S. 480 (1980).

state law mandates that only those determined to suffer from mental diseases will be transferred to mental hospitals.¹²⁸

Hicks v. Oklahoma represents the clearest mandate and description by the Supreme Court of the due process requirements of state statute-created liberty interests. In *Hicks*, the defendant, Flynn Hicks, was tried before a jury in an Oklahoma state court for a single count of unlawful distribution of heroin.¹²⁹ Hicks twice before had been convicted of felony offenses within the preceding ten years.¹³⁰ Therefore, under Oklahoma's habitual offender statute, the members of Hicks's jury were instructed that if they found Hicks guilty, they "shall assess [the] punishment at forty (40) years imprisonment."¹³¹ Upon returning a verdict of guilty the jury imposed the mandatory forty-year prison term as instructed by the trial court.¹³²

Following Hicks's conviction, however, the Oklahoma Court of Criminal Appeals in *Thigpen v. State*¹³³ declared Oklahoma's habitual offender statute, under which Hicks had been sentenced, unconstitutional under the Oklahoma State Constitution.¹³⁴ Hicks thereafter appealed his own sentence arguing that *Thigpen* mandated re-sentencing. The Oklahoma Court of Criminal Appeals on review acknowledged that the habitual offender statute was unconstitutional, but nonetheless refused to reverse Hicks' sentence.¹³⁵ The court reasoned that the unconstitutional statute did not prejudice Hicks because his sentence of forty years was still within the range of punishment that the jury could have imposed regardless of the habitual offender statute.¹³⁶ The United States Supreme Court granted certiorari.¹³⁷

The Supreme Court began its analysis by stating that under Oklahoma law "a convicted defendant is entitled to have his punishment fixed by the jury."¹³⁸ According to the Court, if the jury in Hicks's case had been properly instructed, given the unconstitutional-

128. *Id.* at 488-90 (citing *Wolff v. McDonnell*, 418 U.S. 539 (1974); *Greenholtz*, 442 U.S. 1 (1979)).

129. *Hicks v. Oklahoma*, 447 U.S. 343, 344 (1980).

130. *Id.*

131. *Id.* at 344-45 (alterations in original).

132. *Id.* at 345.

133. 571 P.2d 467 (Okla. Crim. App. 1977).

134. *Id.* at 471.

135. See *Hicks*, 447 U.S. at 345 (citing *Hicks v. State*, 583 P.2d 1117 (Okla. Crim. App. 1979)).

136. *Id.*

137. See *Hicks v. Oklahoma*, 444 U.S. 963 (1979) (granting certiorari).

138. *Hicks*, 447 U.S. at 345.

ity of the habitual sentencing statute, they would have been instructed under Oklahoma law to impose any sentence not less than ten years.¹³⁹ The Court reasoned that, “[i]t is therefore, wholly incorrect to say that the petitioner could not have been prejudiced by the instruction requiring the jury to impose a 40-year prison sentence.”¹⁴⁰

The Court found that the failure of the State to afford Hicks his state-created right to have the jury affix his sentence was not simply a violation of state law. Rather, because of the unequivocal liberty interest created by the state statute, Oklahoma violated Hicks’s rights under the Fourteenth Amendment’s Due Process Clause. The Court reasoned:

It is argued that all that is involved in this case is the denial of a procedural right of exclusively state concern. Where, however, a State has provided for the imposition of criminal punishment in the discretion of the trial jury, it is not correct to say that the defendant’s interest in the exercise of that discretion is merely a matter of state procedural law. The defendant in such a case has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion, and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State. In this case Oklahoma *denied the petitioner the jury sentence to which he was entitled under state law Such an arbitrary disregard of the petitioner’s right to liberty is a denial of due process of law.*¹⁴¹

Under *Hicks*, therefore, it is clear that a state statute does not merely create a state right subject only to the protections and procedures of state law.¹⁴² Rather, a state statute that creates an entitlement gives rise to a liberty interest protected by the Due Process Clause of the Fourteenth Amendment. A person who has not received that which he was guaranteed to receive under state law, such as punishment set by a jury as in *Hicks*, has been denied due process of law by

139. *Id.* at 346.

140. *Id.*

141. *Id.* (citations omitted) (emphasis added) (citing *Greenholtz*, 442 U.S. 1; *Vitek*, 445 U.S. 480; *Morrissey*, 408 U.S. 471).

142. The Eighth Circuit, Arkansas’s circuit, has indicated that it will apply *Hicks* in a way that essentially limits it to its facts, stating that *Hicks* created only a very narrow rule that “some aspects of the sentencing process, created by state law, are so fundamental that the state must adhere to them in order to impose a valid sentence.” *Chambers v. Bowersox*, 157 F.3d 560, 565 (8th Cir. 1998); *see also Lannert v. Jones*, 321 F.3d 747, 751–52 (8th Cir. 2003); *Carter v. Bowersox*, 265 F.3d 705, 714–15 (8th Cir. 2001). However, limiting *Hicks*’s application in this way is incorrect for at least two reasons. First, there is nothing in the Court’s language or reasoning in *Hicks* from which it may be inferred that the Court was limiting *Hicks* only to its facts. Second, the precedents relied on by the Court to reach the holding in *Hicks*, particularly *Morrissey* and *Vitek*, clearly support the broader principle that a state-entitlement is a liberty interest protected by the Due Process Clause.

the state. Thus, as the section that follows concludes, under *Hicks* a death-sentenced person in Arkansas who does not receive the competent counsel that he was entitled to receive under Rule 37 has not merely been deprived of a state right, but rather has also been deprived of a federal constitutionally-protected liberty interest and therefore due process of law.

B. Applying the Legacy of *Hicks* to Arkansas's Rule 37.5

Neither the Arkansas nor the federal courts have been asked to address the issue of whether or not Arkansas's mandatory provision of competent counsel to death-sentenced persons in state post-conviction proceedings creates a liberty interest in the effective assistance of counsel protected by the Due Process Clause of the Fourteenth Amendment.¹⁴³ However, when the Supreme Court's jurisprudence regarding this area of law, particularly the Court's holding in *Hicks*, is applied to Arkansas' statute and its cases describing Rule 37, the inescapable conclusion is that the State's provision of counsel to death-sentenced persons is a liberty interest protected by the Due Process Clause under *Hicks*. Further, this protected liberty interest is not simply an interest in receiving counsel, but rather is an interest in receiving *effective* assistance of such counsel.

1. Arkansas's Rule 37.5: A Due Process Entitlement to Competent Counsel

The Arkansas statute providing for the appointment of counsel in state post-conviction proceedings for persons sentenced to death falls squarely within the Supreme Court precedents, principally *Hicks*, which hold that a state law entitlement can create a liberty interest. Like the defendant in *Hicks* who was entitled under state law to receive a sentence determined by a jury, a death-sentenced person under Arkansas law is entitled to receive competent counsel for his post-conviction proceedings pursuant to Rule 37. First and foremost, the preamble to the statute could not be more clear as to the purpose of the Act: "to provide for the appointment and compensation of *compe-*

143. Counsel for Ledell Lee has asserted this claim in Mr. Lee's federal habeas corpus proceedings. See *Lee v. Norris*, 354 F.3d 846, 847 (8th Cir. 2004) (affirming a federal district court order staying Mr. Lee's habeas corpus petition and holding it in abeyance pending the outcome of further proceedings in state court so that Mr. Lee may raise claims of ineffective assistance of post-conviction counsel). The Eighth Circuit specifically passed on considering the merits of such a claim pending further litigation. *Id.*

tent counsel in state post-conviction proceedings.”¹⁴⁴ Second, the language of the statute itself regarding the provision of counsel is in all senses mandatory. For example, the statute provides, “If a capital conviction and sentence are affirmed on direct appeal, the circuit court in which the conviction was obtained *shall*, within two (2) weeks after the affirmance, conduct a hearing and enter a written order appointing counsel.”¹⁴⁵ Likewise, the standards set forth that counsel must satisfy in order to be appointed under Rule 37 are stated as being “the exclusive criteria which counsel *must* satisfy.”¹⁴⁶

Third, changes to the statute as originally introduced as a bill in the Arkansas Legislature evince an intent by the legislature to create a mandatory and significant right to counsel for capital defendants in post-conviction proceedings.¹⁴⁷ Originally introduced into the Arkansas State Senate on February 13, 1997 as Senate Bill 392, the statute’s first provision, under what would become § 16-91-202(a)(1),¹⁴⁸ required that the convicted capital defendant, and not the circuit court, initiate appointment proceedings.¹⁴⁹ Thus, the introduced version of the bill stated: “If a person who has received the death penalty intends to file a post-conviction petition . . . he must file a motion for the appointment of counsel in that proceeding in the circuit court.”¹⁵⁰ In sharp contrast, the enacted bill, as amended by the House on March 5, 1997,¹⁵¹ requires the circuit court in which the conviction was obtained to initiate appointment proceedings within two weeks of the affirmance of the sentence on direct appeal.¹⁵² Further, the amended version of the same provision of the statute provides that “[t]he court may decline to appoint counsel for the petitioner only upon a written finding that the petitioner rejects the appointment of counsel and un-

144. S.B. 392, 81st Gen. Assem., Reg. Sess. (Ark. 1997) (as engrossed) (emphasis added).

145. ARK. CODE ANN. § 16-91-202(a)(1)(A)(i) (Michie 2003) (emphasis added).

146. *Id.* § 16-91-202(c)(1) (emphasis added).

147. As committee reports and legislative hearing transcripts are unavailable for the Arkansas Legislature, the best way to evince legislative intent is to examine the language of the statute itself, as well as changes that were made to the bill by the legislature during the legislative process.

148. This section of the Arkansas Code is replicated in the Arkansas Rules of Criminal Procedure at Rule 37.5.

149. Ark. S.B. 392 (as introduced).

150. *Id.*

151. A report detailing the status of the bill as it was introduced, amended, and enacted is available through the ARKANSAS GENERAL ASSEMBLY, 1997 REGULAR SESSION BILLS AND RESOLUTIONS: VIEW STATUS OF A BILL, at www.arkleg.state.ar.us/1997 (last accessed Feb. 6, 2004).

152. ARK. CODE ANN. § 16-91-202(a)(1)(A)(i) (Michie 2003).

derstands the legal consequences,”¹⁵³ whereas the introduced version was silent on this issue.¹⁵⁴

Further changes to the introduced bill also evince a statutory entitlement protected by the Due Process Clause. The amended versions of the statute contain a provision that provides that the circuit court may not appoint an attorney to represent a death-sentenced person in their post-conviction proceedings if that attorney previously represented the person at trial or on direct appeal, unless a request is made to the contrary.¹⁵⁵ Even if trial or appellate counsel is requested and appointed for the defendant’s post-conviction proceedings, the provision requires that the court appoint a second attorney to assist on the case.¹⁵⁶ Moreover, the provision mandates that if the defendant elects to proceed *pro se*, the “waiver of the assistance of counsel shall be made in open court and on the record.”¹⁵⁷ None of these requirements were included in the original bill, but again were added as amendments.¹⁵⁸

These amendments are extremely important in determining whether Arkansas’s provision of competent counsel creates a substantive interest protected by the Due Process Clause. The first amendment to Rule 37 changed the nature of the right to counsel from one that required the death-sentenced defendant to act affirmatively to a right that was mandated upon the happening of a certain event. Rather than being a possible right, the amendment as enacted created an entitlement. The death-sentenced person is required to do nothing in order to be entitled to the right to competent counsel: upon the happening of an event—the affirmance of the death sentence on direct appeal—the entitlement exists and requires a mandated government action.

Additionally, the amendments also added in two places what are essentially waiver of counsel requirements that closely correlate to the “knowing, voluntary, and intelligent” standard required for the waiver of constitutional rights.¹⁵⁹ Further, by adding the provision that limits the ability of trial and appellate counsel to serve as post-conviction counsel, the legislature seems to have intended to ensure that poten-

153. *Id.* § 16-91-202(a)(1)(c).

154. *See* S.B. 392, 81st Gen. Assem., Reg. Sess. (Ark. 1997) (as introduced).

155. ARK. CODE ANN. § 16-91-202(a)(2)(A).

156. *Id.* § 16-91-202(a)(2)(B).

157. *Id.* § 16-91-202(a)(2)(C).

158. *Compare* S.B. 392, 81st Gen. Assem., Reg. Sess. (Ark. 1997) (as introduced), *with* S.B. 392, 81st Gen. Assem., Reg. Sess. (Ark. 1997) (as engrossed).

159. *See, e.g.,* Brady v. United States, 397 U.S. 742 (1970).

tial conflicts of interest are minimized for those counsel appointed under the statute. Due process protections are implicated by both of these additions that protect against the defendant losing his right to counsel and protect the defendant from conflicts of interest.

It would be antithetical to assert that Rule 37.5, which creates a mandatory entitlement to competent counsel for all those under sentence of death and protects this entitlement with due process-like protections, creates an interest that can be arbitrarily deprived by the State. The right created under Arkansas law, in fact, is directly analogous to the right to have a jury affix a sentence, as in *Hicks*. In *Hicks* a defendant was specifically entitled under state law upon the happening of an event—his conviction—to have the jury determine his sentence.¹⁶⁰ This created a protected liberty interest in receiving that right, and the defendant was deprived of due process when the state did not have the jury pronounce the defendant's sentence.¹⁶¹ *A fortiori*, a death-sentenced person is entitled to receive competent counsel for Rule 37 proceedings under Arkansas law. When he does not receive the competent counsel that he was entitled to receive under state law, then that defendant, like Mr. Hicks, has been deprived of due process of law.

2. Due Process Protections: The Arkansas Supreme Court's Interpretation of Rule 37 Proceedings

The fact that the Arkansas Supreme Court has recognized that Due Process protections apply in Rule 37 proceedings for those under sentence of death strongly supports the conclusion that the State of Arkansas has created a due process protected entitlement to competent counsel. The Arkansas Supreme Court has stated, “[W]hile there is no constitutional right to a post-conviction proceeding, when a State undertakes to provide collateral relief, due process requires that the proceeding be fundamentally fair.”¹⁶² While the Arkansas Supreme Court has never recognized that Rule 37.5 requires that counsel be effective, the court has stated that “Rule 37.5 mandates very specific requirements, including a quality of appointed counsel for persons pursuing Rule 37.5 relief.”¹⁶³ Finally, the Arkansas Supreme

160. *Hicks v. Oklahoma*, 447 U.S. 343, 345 (1980).

161. *Id.* at 346.

162. *Porter v. State*, 2 S.W.3d 73, 75 (Ark. 1999) (analyzing whether it is “fundamentally fair” to require a person under sentence of death to abide by Rule 37’s filing deadlines when whether he was currently represented by counsel was legally ambiguous).

163. *Jackson v. State*, 37 S.W.3d 595, 598 (Ark. 2001).

Court has also described the purpose of the requirements of Rule 37.5 as being to provide “a *comprehensive* state-court review of a defendant’s claims.”¹⁶⁴ These descriptions illustrate the Arkansas Supreme Court’s acknowledgment of the importance of post-convictions proceedings to death-sentenced persons as an individual right under state law.

One case is illustrative of the level of protection that Arkansas courts have provided for the right to counsel provided by Rule 37. Karl Roberts, currently on Arkansas’s death row, was convicted and decided that he did not wish to challenge his sentence either on appeal or in post-conviction proceedings.¹⁶⁵ Pursuant to Rule 37’s requirements, the circuit court held a hearing regarding Mr. Roberts’s waiver of his right to pursue post-conviction relief.¹⁶⁶ Mr. Roberts proceeded *pro se*.¹⁶⁷ During the hearing the judge indicated that he had reviewed the trial record in its entirety and then advised Mr. Roberts of the availability of relief and the provision of counsel under Rule 37.¹⁶⁸ Mr. Roberts then testified on the record that he did not wish to have an attorney and that he understood that he was waiving his right to pursue post-conviction relief.¹⁶⁹ He stated that he was “intelligently and knowingly” waiving his rights and was not under the influence of any medication or substances.¹⁷⁰ The Arkansas Supreme Court reviewed the record and found Mr. Roberts’s waiver to be sufficient.¹⁷¹

On its face, the Arkansas courts’ treatment of a case like Mr. Roberts’s might seem inconsequential. However, the careful manner in which both the circuit court and state supreme court examined Mr. Roberts’s waiver of his right to pursue post-conviction relief and be appointed counsel for such proceedings is illustrative of what seems to be an unstated recognition that the right of a person sentenced to death to pursue post-conviction relief in Arkansas and receive a competent attorney for such purposes is in fact a fundamental entitlement under the State’s law. This proposition is highly supported by the mandatory nature of Arkansas’s counsel provision and the substantive protections of the right that are directly provided for in Rule 37. It is an inescapable conclusion that Arkansas has created an entitlement to competent counsel protected by the Due Process Clause under *Hicks*.

164. *Echols v. State*, 42 S.W.3d 467, 470 (Ark. 2001) (emphasis in original).

165. *State v. Roberts*, 123 S.W.3d 881, 881 (Ark. 2003) (per curiam).

166. *Id.*

167. *Id.* at 882.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

3. An Entitlement to Competent Counsel Is an Entitlement to the Effective Assistance of Counsel

At least one court has found that a state post-conviction statute that mandated the appointment of competent counsel only required that the appointed attorney be "competent" in the sense that the attorney meets the criteria mandated by the statute prior to appointment.¹⁷² Under such an analysis, due process protections would only apply to protect against the deprivation of the right to competent counsel at the time of appointment. This argument, however, is flawed for at least three reasons.

First, the Supreme Court has never differentiated "competence" from "effectiveness." The Court has, in fact, used the terms interchangeably and has used "competence" to describe the mandates of effective assistance of counsel. In *McMann v. Richardson*,¹⁷³ the Court examined the advice and representation that a defendant is entitled to receive before entering a guilty plea and stated, "[A] defendant's plea of guilty based on reasonably competent advice is an intelligent plea," and "defendants cannot be left to the mercies of incompetent counsel."¹⁷⁴ Later the Court concluded that "a plea of guilty in a state court is not subject to collateral attack . . . unless the defendant was incompetently advised by his attorney."¹⁷⁵ Further, in *Strickland v. Washington*,¹⁷⁶ wherein the Court established the prevailing standard for determining constitutionally ineffective assistance of counsel under the Sixth Amendment,¹⁷⁷ the Court specifically used "competence" in setting forth the level of deficiency in performance that must be shown to establish a claim of ineffective assistance of counsel. The Court stated that the reviewing court must "determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance."¹⁷⁸ It must be assumed, therefore, that the Arkansas Legislature, when it enacted a statute that clearly used the word "competent," did not intend to contradict the established jurisprudence of the Supreme Court that has long equated competent representation with effective assistance of counsel.

172. See, e.g., *Ex parte Graves*, 70 S.W.3d 103 (Tex. Crim. App. 2002).

173. 397 U.S. 759 (1970).

174. *Id.* at 770-71.

175. *Id.* at 772.

176. 466 U.S. 668 (1984).

177. See *id.* at 687.

178. *Id.* at 690. For the Court's interchanging use of "competence" and "effectiveness," see also, for example, *Williams v. Taylor*, 529 U.S. 362, 399 (2000).

Second, the right to effective assistance of counsel is the due process right that is concomitant with or arises from a right to counsel, let alone a right to competent counsel. Thus, even if the Arkansas Legislature did not intend competent counsel to mean effective assistance of counsel, due process requires it. The Supreme Court's cases examining the provision of counsel for direct appeals, *Douglas v. California*¹⁷⁹ and *Evitts v. Lucey*,¹⁸⁰ grounded the requirement of counsel and effective assistance of counsel in the Fourteenth Amendment's Due Process and Equal Protection Clauses. Both cases cited to *Griffin v. Illinois*,¹⁸¹ wherein the Court held, in striking down a mandatory transcript fee, that a state may not grant appellate review in such a way as to discriminate against convicted defendants because of their poverty.¹⁸² Analogizing to *Griffin*, the Court in *Douglas* found that the denial of counsel to an indigent defendant for a direct appeal violated the Fourteenth Amendment, stating that "[t]he indigent, where the record is unclear or the errors hidden, has only the right to a meaningless ritual."¹⁸³ In *Evitts*, the Court found that "if a State has created appellate courts as 'an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant,' the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution."¹⁸⁴ The Court went on to hold in *Evitts* that "the promise of *Douglas* that a criminal defendant has a right to counsel on appeal . . . would be a futile gesture unless it comprehended the right to the effective assistance of counsel."¹⁸⁵ Likewise, Arkansas's promise that a death-sentenced person has a right to a competent attorney for Rule 37 proceedings would be a futile gesture unless, consistent with the dictates of the Due Process Clause, such counsel in fact renders effective assistance.

Finally, both state and federal courts have recognized that a state statute that entitles a defendant to counsel, even though such a right to counsel does not arise under the Sixth Amendment, gives rise to a concomitant right to the effective assistance of counsel. These courts have reached such a conclusion in most cases rather summarily, finding that a statutory right to counsel obviously and necessarily implies a

179. 372 U.S. 353 (1963).

180. 469 U.S. 387 (1985).

181. 351 U.S. 12 (1956).

182. *Id.* at 18 (finding unconstitutional an Illinois law that required the purchase of a transcript for a full appellate review).

183. *Douglas*, 372 U.S. 353, 358 (1963).

184. *Evitts*, 469 U.S. 387, 393 (1985) (omissions in original) (citations omitted).

185. *Id.* at 397.

concomitant right that such counsel be effective. The Iowa Supreme Court has stated that “the statutory grant of a post-conviction applicant’s right to court-appointed counsel necessarily implies that that counsel be effective. . . . It would seem to be an empty gesture to provide counsel without any implied requirement of effectiveness.”¹⁸⁶ Likewise, the Connecticut Supreme Court has held that “[i]t would be absurd to have the right to appointed counsel who is not required to be competent,”¹⁸⁷ and an Illinois Appellate Court has concluded that “the legislature could not have intended to provide an individual subject to involuntary commitment with the right to counsel and to permit that counsel to be prejudicially ineffective.”¹⁸⁸ The Supreme Courts of Nevada, Pennsylvania, and South Dakota have all reached the exact same conclusion: a statutory right to counsel necessarily implies a concomitant right to the effective assistance of counsel.¹⁸⁹

For these reasons, the State of Arkansas’s provision of competent counsel in post-conviction proceedings to persons under sentence of death creates an entitlement under state law to not just counsel for such proceedings, but rather to the effective assistance of counsel during post-conviction proceedings. A person who fails to receive such assistance has been deprived of their entitlement granted by state law. Under *Hicks*, this person has not only been deprived of a state right to effective assistance of counsel—they have been deprived of the due process of law protected by the Fourteenth Amendment.

C. Enforcing the Entitlement to Competent Counsel in Rule 37 Proceedings

A death-sentenced person who has been deprived of his due process-protected right to competent counsel in his Rule 37 proceedings may enforce this right in two possible forums: state court or federal court. However, because the Arkansas Supreme Court’s jurisprudence has limited the availability of secondary Rule 37 proceedings as well as

186. *Patchette v. State*, 374 N.W.2d 397, 398–99 (Iowa 1985); *see also Dunbar v. State*, 515 N.W.2d 12 (Iowa 1994).

187. *Lozada v. Warden*, 613 A.2d 818, 821–22 (Conn. 1992); *see also Iovieno v. Comm’r of Correction*, 699 A.3d 1003 (Conn. 1997).

188. *In re Carmody*, 653 N.E.2d 977, 983–84 (Ill. App. Ct. 1995).

189. *See Commonwealth v. Albert*, 561 A.2d 736 (Pa. 1989); *McKague v. Whitley*, 912 P.2d 255, 258 n.5 (Nev. 1996); *Crump v. Warden*, 934 P.2d 247, 248 (Nev. 1997); *Jackson v. Weber*, 637 N.W.2d 19 (S.D. 2000); *Krebs v. Weber*, 608 N.W.2d 322 (S.D. 2000); *see also Cullins v. Crouse*, 348 F.2d 887 (10th Cir. 1965); *United States v. Wren*, 682 F. Supp. 1237 (S.D. Ga. 1988). *But see In re Goff*, 250 F.3d 273, 275 (5th Cir. 2001); *Martinez v. Johnson*, 255 F.3d 229 (5th Cir. 2001); *Ex parte Graves*, 70 S.W.3d 103, 111 (Tex. Crim. App. 2002).

other forms of collateral relief, federal habeas proceedings present the most likely forum in which a death-sentenced person can enforce their due-process right to competent post-conviction counsel.

1. Bringing the Claim in Arkansas Courts

A defendant may attempt to assert in an Arkansas state court that he has been denied due process of law under *Hicks* because he has received ineffective assistance of Rule 37 counsel. Although the Arkansas courts have never explicitly held that there is no right to redress ineffective assistance of post-conviction counsel within its courts, current jurisprudence provides some doubt as to whether Arkansas courts have an available forum in which to assert this claim. Asserting such a claim would require a petitioner to file a second Rule 37 petition. However, the Arkansas Supreme Court has explicitly held that unless a Rule 37 petition is dismissed without prejudice to re-file, a petitioner is entitled to file only one Rule 37 petition.¹⁹⁰ In one recent case, however, *Robbins v. State*,¹⁹¹ the Arkansas Supreme Court reopened the case of a death-sentenced person whose sentence had been affirmed in Rule 37 proceedings.¹⁹² The supreme court in *Robbins* was explicit that it was re-opening the case because of the “unique circumstances” of the petitioner’s case, but also stated that its decision to re-open the case was a result of the fact that it was a death-sentence case and that “it is now incumbent on the states to do a comprehensive state-court review of all death cases.”¹⁹³ The *Robbins* decision is clearly contrary to the otherwise prevailing rule that a defendant is entitled to one Rule 37 hearing. Therefore, this leaves open the question of the availability of Rule 37 as a forum for relief based on a claim of ineffective assistance of post-conviction counsel as a due process denial.

If death-sentenced persons are not entitled to a second Rule 37 hearing, it is likely that no other state forum is available in which to raise claims of ineffective assistance of post-conviction counsel as a deprivation of due process under *Hicks*.¹⁹⁴ Allegations of constitu-

190. See *Williams v. State*, 619 S.W.2d 628, 629 (Ark. 1981).

191. 114 S.W.3d 217 (Ark. 2003).

192. *Id.* at 222.

193. *Id.* at 223. The unique circumstances cited by the court in *Robbins* included the fact that the petitioner’s jury verdict form was likely deficient under a prior holding of the Arkansas Supreme Court, an error missed in petitioner’s first Rule 37 proceeding. See *id.* at 221.

194. If Arkansas, in fact, provides no state forum in which to address defendants’ claims that they have been denied their due-process protected rights to competent counsel

tional error and ineffective assistance of counsel have been restricted by the Arkansas Supreme Court to direct appeals and post-conviction petitions only. They may not be raised in other possible claims, such as in a petition for a writ of habeas corpus or a writ of error coram nobis.¹⁹⁵ Standard tort remedies, finally, would be insufficient to enforce these claims because, generally, such remedies merely provide financial relief.

2. Bringing the Claim in Federal Court

A claim that a defendant under sentence of death in Arkansas has been deprived of his due process interest in competent counsel for his Rule 37 hearing would be cognizable in federal habeas corpus proceedings. Such a claim would be based on not merely a violation of state law, but rather on a Fourteenth Amendment due process violation, as the Supreme Court in *Hicks* stressed.¹⁹⁶ To assert a claim for federal habeas corpus relief, a defendant must assert that he is in custody of the state in violation of the Constitution of the United States.¹⁹⁷ A due process violation under *Hicks* would meet this requirement. The defendant would assert that the state's failure to afford him his right under state law to competent counsel violated his substantive rights under the Fourteenth Amendment's Due Process Clause. This would be a claim that attacks the constitutional validity of the process that results in the ultimate imposition of the death sentence and the legality of the defendant's confinement. Additionally, to state a claim for habeas corpus relief a defendant must also show that he has exhausted all available state remedies or that state remedies are unavailable to him.¹⁹⁸ Thus, a death-sentenced person in Arkansas would likely have to attempt to exhaust state remedies, such as attempting to

under *Hicks*, this in and of itself may be a violation of procedural due process because the State would be denying death-sentenced persons the minimal procedural protections mandated by the Due Process Clause for the deprivation of a protected interest. *See, e.g.*, *Hewitt v. Helms*, 459 U.S. 460, 470–71 (1983); *Goss v. Lopez*, 419 U.S. 565, 574 (1975); *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974); *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972); *Bell v. Burson*, 402 U.S. 535, 539 (1971).

195. *See Renshaw v. Norris*, 989 S.W.2d 515, 517 (Ark. 1999); *Williams v. Langston*, 688 S.W.2d 285, 286 (Ark. 1985).

196. The federal habeas corpus statute contains a provision stating that claims of ineffective assistance of state post-conviction counsel are not grounds for relief in federal habeas corpus proceedings. *See* 28 U.S.C. § 2254(i) (2000). However, the claim for relief discussed in this Comment would not be such a claim—rather, the claim would be, under *Hicks*, a claim for relief on the basis of a due process violation, that the defendant has failed to receive his state statutory entitlement to competent counsel.

197. *See* 28 U.S.C. § 2254(a) (2000).

198. *See id.* § 2254(b)(1).

file a second Rule 37 petition or showing that doing so would be impossible, prior to asserting a claim for relief in habeas corpus.

A defendant asserting such a claim in federal habeas corpus proceedings would be asserting that the State of Arkansas's failure to provide the defendant with the competent counsel that he was entitled to receive under the State's statute constituted a deprivation of the defendant's liberty in violation of the Fourteenth Amendment's Due Process Clause. The defendant would be asking the federal court in a habeas corpus proceeding to grant the same relief that Mr. Hicks was granted by the Supreme Court in *Hicks*—the opportunity for the defendant to receive the competent counsel and the effective assistance of counsel that he was entitled to receive under Arkansas law.

Conclusion

The Supreme Court's refusal thus far to extend the Sixth Amendment right to counsel to death-sentenced persons in post-conviction proceedings forecloses claims of ineffective assistance of counsel during post-conviction reviews, such as in Rule 37 proceedings in Arkansas. However, the denial of a defendant's state statutory right to competent post-conviction counsel is not a Sixth Amendment claim; it is a due process claim. The State of Arkansas has by legislative choice granted its capital defendants an entitlement to competent counsel for Rule 37 proceedings. It is antithetical to argue that Rule 37, a self-described system of comprehensive review for which "competent counsel" is appointed and due process protections apply, does not entitle a death-sentenced person in Arkansas to effective assistance of counsel in post-conviction proceedings. The mandatory provision of competent counsel to persons under sentence of death in Arkansas would be of no value, both to the represented and to the state system of post-conviction appeals, if such a right may be guaranteed to all whom are under sentence of death and then arbitrarily abrogated by the State's failure to provide that which it has promised.

When the State of Arkansas fails to provide a death-sentenced person with the competent counsel that it has promised under state law, it has deprived that person of a protected liberty interest under the Supreme Court holding in *Hicks*. In doing so, the State has offended the mandate of due process secured by the United States Constitution. For those currently under sentence of death, such as Ledell Lee and Timothy Kemp, these commands of the Fourteenth Amendment are of fundamental importance in the future: if they are not enforced, Mr. Lee and Mr. Kemp may lose forever the ability to assert

possibly meritorious claims for relief from their death sentences. The cases of those who have already been executed after having received less than effective representation in post-conviction proceedings, such as Mr. Noel, show that the commands of the Due Process Clause have proven hollow in Arkansas's Rule 37 proceedings. The State of Arkansas simply cannot, consistent with the dictates of the Fourteenth Amendment's Due Process Clause, grant those under sentence of death an unequivocal entitlement to competent counsel and then utterly fail to meet this promise. Borrowing from the Supreme Court's own words in *Hicks*, "[s]uch an arbitrary disregard of the [defendant's] right to liberty is a denial of due process of law."¹⁹⁹ For death-sentenced persons in Arkansas this denial of due process is not just about abstract liberty—rather, it is inextricably related to whether or not the State of Arkansas may deprive a person of a right that it has made of fundamental importance in its system of determining the question of who gets to live and who is forced to die.

199. *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980).