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PROCEDURAL DEFAULT IN STATE AND FEDERAL POST-CONVICTION PROCEEDINGS

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The issue of procedural default, also called procedural bar, arises in both state and federal post-conviction proceedings. Once a defendant is tried and convicted in state trial court, he or she has a right to appeal the conviction or sentence to the state appellate courts. This stage of the proceeding is referred to as the defendant's direct appeal. Direct appeals generally are used to correct errors or irregularities in the proceedings of the trial court. If the defendant is unsuccessful on direct appeal and wishes to raise additional challenges to his or her conviction and sentence, the defendant does so by seeking state post-conviction relief. In North Carolina, this is accomplished by filing a motion for appropriate relief (MAR) in state court. *See generally* G.S. 15A-1411 to 1422 (statutory provisions regarding MARs). Although some time restrictions apply to the types of claims that can be raised in a MAR, *see* G.S. 15A-1414(b) (specifying claims that defendant must raise within ten days of entry of judgment); G.S. 15A-1415(b) (specifying the "only" grounds that defendant may assert more than ten days after entry of judgment), the motion can assert "any error." *See* G.S. 15A-1414.

In order for a court to reach the merits of the claims raised in a MAR, the defendant must satisfy certain procedural rules. If the defendant fails to do so, he or she is deemed to have committed a procedural default. When this occurs and the defendant cannot establish that certain exceptions apply, the MAR is rejected by reason of procedural bar. Thus, the rule precludes consideration on the merits when a procedural error has occurred.

Once a defendant exhausts his or her post-conviction relief in state court, he or she may seek federal habeas relief for those claims alleging a violation of federal law. The defendant initiates this procedure by filing a petition for writ of habeas corpus in federal district court. *See* 28 U.S.C. § 2254. The federal rule of procedural default, however, may bar the habeas court from considering the merits of the petition. Under federal law, when a defendant's federal claim has been rejected on grounds of procedural bar by the state court, the defendant may not raise the defaulted claim in federal habeas, absent cause and prejudice or a fundamental miscarriage of justice. Thus, resolution of procedural default by the state court can have significant impact on the course of the federal proceedings.

For the federal doctrine of procedural default to apply, two prerequisites must be established. First, the state court must have rejected the defendant's claim on grounds of procedural default. Second, the procedural rule relied upon by the state court to find default must be an "adequate and independent" ground for its decision. Although the federal rule of procedural default is conceptually simple, its application in federal habeas can be difficult when the state court disposes of a claim in a summary manner or the basis of its decision is ambiguous. When this occurs, the federal court may have difficulty determining whether the prerequisites for federal procedural default are met.

Faced with a summary or ambiguous decision, the federal court must try to discern its basis. The court does this by applying presumptions, searching the language of the decision, and analyzing the procedural posture of the case for clues. If the federal habeas court erroneously concludes that the state court did not apply procedural default and goes on to find for defendant on the merits, it undermines the state's interest in enforcing its rules of criminal procedure. If the defendant loses on the merits, inefficiency results. If, on the other hand, the habeas court erroneously concludes that the state court applied procedural default, the defendant may be deprived of the right to seek federal habeas relief and of the opportunity to vindicate important rights. The potential for erroneous decision making can be avoided if state MAR decisions provide federal habeas courts with the information they need to properly apply their procedural default rule.

The purpose of this bulletin is twofold: to aid courts and litigants in their analysis of procedural default by explaining the relevant law, and to provide simple rules for opinion writing to ensure that state court decisions on procedural default are respected in the federal habeas process. This bulletin neither endorses existing law nor attempts to critique the policy choices underlying it. The primary source of law for the discussion of state law issues was the reported decisions of the North Carolina appellate courts. Although numerous state trial court decisions apply the procedural bar rules, trial court decisions in non-capital cases are not available in a centrally located library or database. As a result, it was not possible to incorporate all of those decisions. Where subsequently reported state or federal cases described the underlying state trial decisions, the trial decisions were incorporated if relevant. The North Carolina Department of Justice, Capital Litigation Section, has collected state trial court decisions in capital MAR proceedings. Many of those decisions were reviewed in connection with research for this bulletin. For federal law issues, research focused on the reported decisions of the United States Supreme Court and the United States Court of Appeals for the Fourth Circuit (hereinafter Fourth Circuit), decisions that would apply in any federal habeas proceeding initiated by a North Carolina defendant.

Part I of this bulletin discusses procedural default in state MAR proceedings. Part II discusses procedural default in federal habeas. Part II also describes the difficulties created by ambiguous state MAR decisions. Finally, Part III provides guidelines for state court opinion writing to facilitate federal habeas review and to ensure that state court decisions on state procedural law are enforced by the federal courts.

I. Procedural Default in State MAR Proceedings

For North Carolina defendants, the procedural rules that most commonly result in procedural default are found in G.S. 15A-1419(a) (reproduced in Appendix A).

A. Statutory Procedural Bars

Although certain exceptions apply, the G.S. 15A-1419(a) procedural bars provide that if an issue has been determined on appeal or in a prior MAR, it may not be raised again. Also, if the defendant failed to raise the issue in a timely manner or failed to raise it in a prior appeal or prior MAR, the claim will be barred. The four statutory procedural bars contained in G.S. 15A-1419(a) and their exceptions are discussed below. Figure 1 on page 4 illustrates their application.

1. The Statutory Bars and Their Specific Exceptions

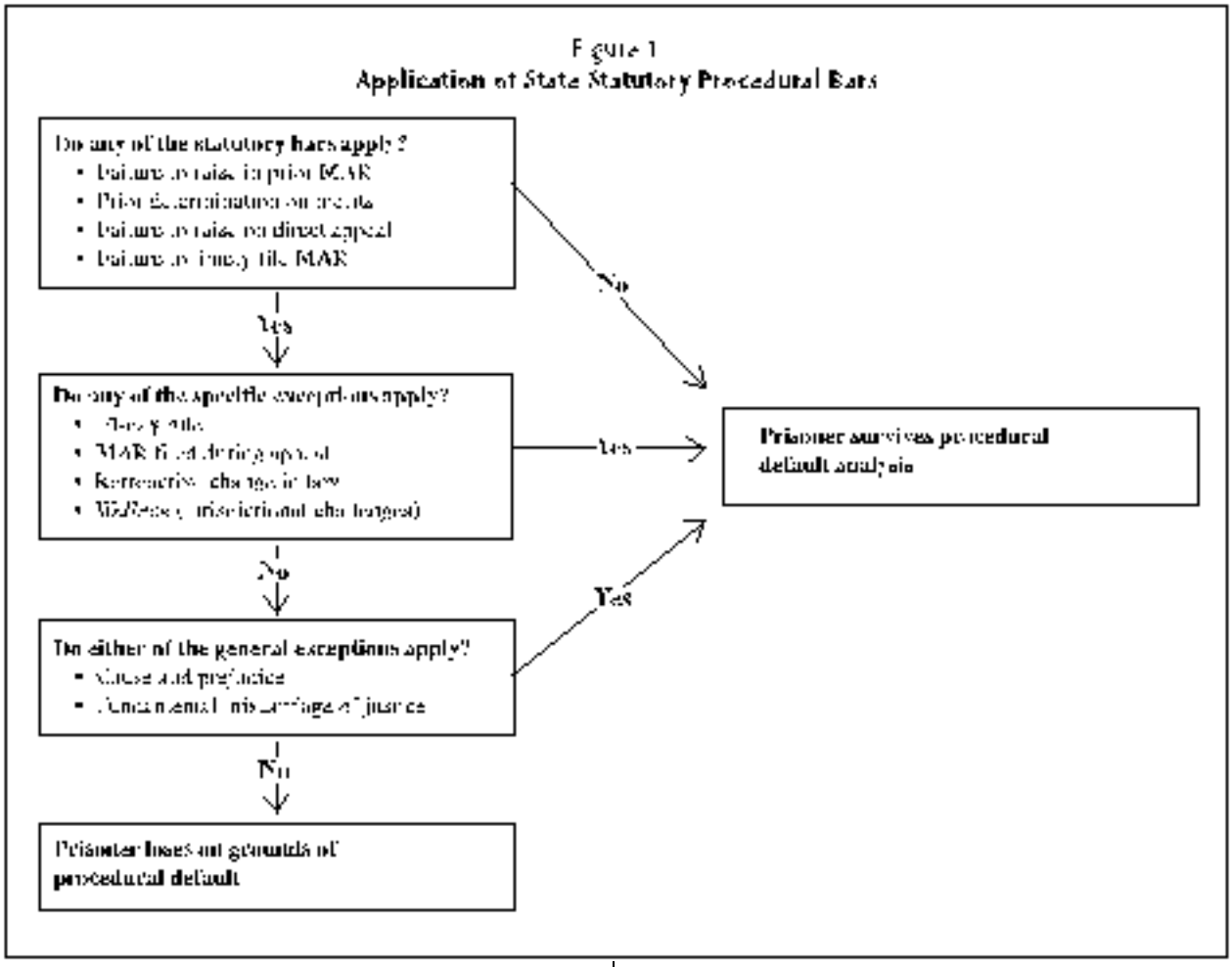
a. Failure to Raise the Ground in a Previous MAR

G.S. 15A-1419(a)(1) provides that it is grounds for denying a MAR, including a MAR in a capital case, if upon a previous MAR the defendant "was in a position to adequately raise the ground or issue . . . but did not do so."

State v. McKenzie, 46 N.C. App. 34 (1980), is the only published case applying the (a)(1) bar. In *McKenzie*, defendant argued that the trial court erred by denying his MAR based on the (a)(1) bar. Specifically, defendant argued that in his previous MAR, he was not represented by counsel and was not sufficiently advised of his legal rights to adequately raise the issues. The court of appeals disagreed, noting that although indigents are entitled to counsel in MAR proceedings, nothing in the record indicated that defendant requested and was denied assistance of counsel.[1] Thus, under *McKenzie*, a defendant cannot avoid the (a)(1) bar simply because he or she lacked counsel in the prior MAR proceeding; in order to avoid the bar, defendant must establish that he or she requested counsel and improperly was denied assistance. The *McKenzie* court went on to state: "[f]urther, we cannot say, without more, that defendant's lack of counsel impaired his right to raise adequately the issues in the motion that he raises now." *Id.* at 395. This implies that even if an indigent defendant shows that he or she expressly requested and improperly was denied counsel, defendant cannot avoid the (a)(1) bar without making the additional showing that the lack of counsel "impaired his or her right to raise adequately the issues" in the prior MAR. *Id.*

McKenzie does not preclude the possibility that in appropriate circumstances, lack of counsel may suffice to establish that a defendant was not in a position to adequately raise a ground or issue in a prior MAR. Also, it does not preclude a defendant from asserting that ineffectiveness on the part of prior post-conviction counsel rendered defendant unable to adequately raise the issue in a prior MAR. One potential difficulty with

1. G.S. 7A-451(a)(3) provides that an indigent defendant is entitled to counsel in MAR proceedings if the defendant has been convicted of a felony, has been fined $500 or more, or has been sentenced to a term of imprisonment.



such an assertion is that the statute specifically provides that ineffectiveness of post-conviction counsel cannot constitute good cause for excusing procedural defaults, including (a)(1) default. *See infra* p. 12 (noting that under North Carolina law, ineffective assistance of post-conviction counsel cannot constitute good cause).

Although *McKenzie* is the only published case applying the (a)(1) bar, one other published case should be considered. In *State v. McHone*, 348 N.C. 254 (1998), defendant filed a MAR on January 17, 1995. Without holding an evidentiary hearing, the trial court denied the MAR. Defendant then filed a motion to vacate the trial court's order and a "supplemental" MAR pursuant to G.S. 15A-1415(g).[2] A hearing was held on defendant's MAR as supplemented on December 9, 1996. On that same day, the trial court denied defendant's supplemental MAR. Defendant then petitioned the North Carolina Supreme Court for a writ of certiorari to review the December 9th order. Without addressing whether the trial court had the authority to consider defendant's supplemental MAR after it had denied his initial MAR and without addressing the applicability of the (a)(1) bar, the state Supreme Court held that the trial court erred in denying defendant's supplemental MAR without an evidentiary hearing.

McHone is significant because of its procedural posture: after having lost his initial MAR, defendant asserted new claims in a supplemental MAR under G.S. 15A-1415(g) instead of in a separate second MAR (which would have been subject to the (a)(1) bar if the defendant was in a position to adequately raise the issue in the initial MAR). It could be argued that *McHone* suggests that a supplemental MAR filed pursuant to G.S. 15A-1415(g) after an initial MAR has been denied is not subject to the (a)(1) bar. One

2. G.S. 15A-1415(g) allows a defendant to amend a MAR "at least 30 days prior to the commencement of a hearing on the merits of the claims asserted . . . or at any time before the date for the hearing has been set, whichever is later."

difficulty with this contention is that G.S. 15A-1415(g) does not contemplate that amendments may be made after the MAR being amended has been denied. *See* G.S. 15A-1415(g) (providing that amendments may be made 30 days before the commencement of the hearing on the merits or at any time before the date for the hearing has been set, whichever is later). Moreover, a court-created exception to the (a)(1) bar for supplemental MARs would swallow the rule; a defendant whose initial MAR has been denied could always avoid the (a)(1) bar by filing a supplemental MAR rather than a separate second MAR. It is unlikely that the Supreme Court meant to endorse such a reading of the statute in an opinion that did not even mention the issue or its ramifications.

A more promising argument for defendants might be that once a trial court has agreed to reconsider an order denying an initial MAR, the initial MAR has been reopened and new claims properly may be asserted by way of a G.S. 15A-1415(g) amendment rather than by a second MAR. Whether this argument ultimately will be successful is unclear. *Cf. State v. Basden*, 350 N.C. 579 (1999) (by allowing defendant time to respond to state's motion for summary denial of defendant's motion to vacate denial of MAR, trial court "resurrected" defendant's MAR and made it "pending" for purposes of MAR discovery provision); *Bacon v. Lee*, 225 F.3d 470, 477 (4th Cir. 2000) ("Because the state MAR court reopened the original MAR, the question of whether a governing state rule was regularly and consistently applied to treat a motion to amend thereafter as a second MAR is in some doubt.").

Some may suggest that by analogy to the cause prong of federal procedural default law, a defendant "was [not] in a position to adequately raise the ground or issue" when "some objective factor external to the defense" impeded his or her ability to do so. *Murray v. Carrier*, 477 U.S. 478, 488 (1986). Under federal law, the relevant objective factors include (1) unavailability of the factual or legal basis of the claim, (2) ineffective assistance of counsel, and (3) interference by government officials. *See infra* pp. 18–20 (discussing these factors in relation to the cause prong of the federal rule of procedural default). The related purposes of the state and federal procedural default rules may support the contention that analogy to federal law is appropriate. The North Carolina procedural default rule reflects the legislature's interest in finality in criminal cases. *See* Official Commentary to G.S. 15A-1419 (reproduced in Appendix B). The federal procedural default rule, rooted in concepts of comity and federalism, *see infra* p. 15, seeks to vindicate that interest. *See McCleskey v. Zant*, 499 U.S. 467, 493 (1991) ("procedural default . . . [is] designed to lessen the injury to a State that results through reexamination of a state conviction on a ground that the State did not have the opportunity to address at a prior, appropriate time[] and . . . seek[s] to vindicate the State's interest in the finality of its criminal judgments."). On the other hand, it may be argued that to the extent analogy to federal law is appropriate, it is only appropriate on analogous prongs of the procedural default analysis. Thus, while the federal court's interpretation of the cause prong of its default rule may inform interpretation of the cause prong of North Carolina's rule, the federal court's interpretation of that aspect of the federal rule may not be relevant to the predicate determination of whether a particular state procedural bar applies.

i. Specific Exception

Subsection (a)(1) does not apply when the previous MAR was made (1) within ten days after entry of judgment or (2) during the pendency of the direct appeal. *See* G.S. 15A-1419(a)(1).

The Official Commentary indicates that the first part of this exception allows counsel who made a MAR in open court to make an additional motion within ten days "without being faced with a bar on the basis of not having raised the available grounds when he stood in open court and made his first motion." Official Commentary to G.S. 15A-1419 (reproduced in Appendix B). However, this exception is not limited to MARs made in open court; it applies to all MARs made within ten days of entry of judgment. For a case applying the ten-day exception to subsection (a)(1), see *State v. Garner*, 136 N.C. App. 1 (1999), *appeal dismissed and cert. den. by*, 351 N.C. 477 (2000).

Under the second part of this exception, a defendant may file an initial MAR while the direct appeal is pending and later make a second MAR raising new claims without danger of procedural default under subsection (a)(1).

ii. Illustrative Cases

There is only one published North Carolina case applying the (a)(1) bar. *See State v. McKenzie*, 46 N.C. App. 34 (1980); *supra* p. 3 (discussing *McKenzie*). At least two unpublished North Carolina cases applying the bar are reported in the subsequent federal case law. *See Boyd v. French*, 147 F.3d 319, 331–32 (4th Cir. 1998) (noting without analysis that MAR court found claim defaulted under (a)(1)); *Felton v. Barnett*, 912 F.2d 92, 93 (4th Cir. 1990) (same).

b. Prior Determination of the Issue

G.S. 15A-1419(a)(2) provides that it is grounds for denying a MAR, including a motion in a capital case, when "[t]he ground or issue underlying the motion was previously determined on the merits upon

an appeal from the judgment or upon a previous motion or proceeding in the courts of this State or a federal court." This provision establishes that as a general rule, a defendant has one chance to raise an issue; once an issue has been raised and lost, the defendant is precluded from litigating it again in MAR proceedings.

Although North Carolina courts call the (a)(2) bar a "procedural bar," that nomenclature is inapt. Subsection (a)(2) does not bar a claim because the defendant committed a procedural error. Rather, (a)(2) bars a claim because it was properly raised and decided (unfavorably) for the defendant. As such, (a)(2) codifies the rules of res judicata and law of the case. Although this point has no implications in state proceedings, it becomes relevant if the case proceeds to federal habeas court. *See infra* pp. 15–16.

i. Specific Exception

G.S. 15A-1419(a)(2) expressly excepts situations where "since the time of such previous determination there has been a retroactively effective change in the law controlling such issue." Thus, if a claim was decided against the defendant on the merits in earlier litigation, the defendant may raise the issue again if, at that time, it would be decided in his or her favor based on a change in the law that retroactively applies to the case.

The relevant change in law can be either a new state or federal criminal rule. If the defendant alleges that the claim now would succeed because of a new federal criminal rule, he or she faces the difficult burden of establishing that the rule retroactively applies to his or her case under the test set forth in *Teague v. Lane*, 489 US. 288 (1989), and its progeny. In *State v. Zuniga*, 336 N.C. 508 (1994), the North Carolina Supreme Court adopted the *Teague* test for determining whether new federal rules of criminal procedure apply retroactively in state MAR proceedings.

The *Teague* test involves a three-step inquiry. *See O'Dell v. Netherland*, 521 U.S. 151, 156 (1997). First, the court determines the date on which defendant's conviction became final. Second, the court determines whether "a state court considering [defendant's] claim at the time his [or her] conviction became final would have felt compelled by existing precedent to conclude that the rule [defendant] seeks was required by the Constitution." *Id.* (quotation omitted). If not, the court must conclude that the rule is new. If the rule is new, it cannot apply retroactively unless the court finds, in the third step of the analysis, that it falls within one of two narrow exceptions.

The first "limited" *Teague* exception applies to rules "'forbidding criminal punishment of certain primary conduct [and] . . . prohibiting a certain category of punishment for a class of defendants because of their status or offense.'" *Id.* at 157 (quoting *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989)). Thus, for example, if the United States Supreme Court held that the Eighth Amendment to the Federal Constitution prohibits the execution of mentally retarded persons regardless of the procedures followed, this rule would fall under the first *Teague* exception. Such a rule would forbid punishment of a class of defendants because of their status as mentally retarded persons. *See Penry*, 492 U.S. at 330.

The second "even more circumscribed[] exception" permits retroactive application of "watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *O'Dell*, 521 U.S. at 157 (quotation omitted). The precise scope of this exception remains to be defined. However, the United States Supreme Court has made clear that it is only meant to apply "to a small core of rules requiring observance of those procedures that . . . are implicit in the concept of ordered liberty." *Id.* (quotation omitted).

Although a defendant bears a heavy burden of establishing that a new federal rule applies retroactively, that burden has been satisfied in at least one North Carolina case. At issue in *State v. Zuniga*, 336 N.C. 508 (1994), was whether *McKoy v. North Carolina*, 494 U.S. 433 (1990), which invalidated the unanimity requirement of North Carolina's capital sentencing scheme, should be applied retroactively under *Teague*. The unanimity requirement prevented the jury from considering, in deciding whether to impose the death penalty, any mitigating factor that the jury had not unanimously found. Following the lead of the Fourth Circuit, the North Carolina Supreme Court held that the *McKoy* rule fell within the second *Teague* exception and thus retroactively applied to defendant's case.

The *Zuniga* court was careful to note that in the case before it, defendant had objected to the relevant instructions at trial and had assigned them as error on appeal. Thus, it concluded, "there is no issue of waiver." *Id.* at 514. The court expressly left for another day the question of whether a defendant sentenced under the unanimity instruction who did not assign the instruction as error on direct review waived the right to assert the *McKoy* issue in MAR proceedings. *See id.* at 514 n.2. In the context of the subsection (a)(2) bar, this open question does not create difficulty. The (a)(2) bar only comes into play where there has been a prior determination on the issue. Where the defendant failed to object to an alleged error and failed to raise it on appeal, there will be no prior determination triggering application of the bar.

If the change in law that would result in a favorable ruling for the defendant is one of state law, the relevant retroactivity rule is that articulated in *State v. Rivens*, 299 N.C. 385 (1980). *See Zuniga*, 336 N.C. at 513 (noting that *Rivens* "correctly states the retroactivity standard applicable to new state rules"). Under *Rivens*, a new state rule is presumed to operate retroactively unless there is a compelling reason to make it prospective only. *See Rivens*, 299 N.C. 385.

ii. Illustrative Cases

There are no published North Carolina appellate cases interpreting the subsection (a)(2) bar. For an example of a trial court decision applying the bar, see *Sexton v. French*, 163 F.3d 874, 880 (4th Cir. 1998) (noting that the MAR court held several claims barred under subsection (a)(2)).

c. Failure to Raise the Ground on Direct Appeal

G.S. 15A-1419(a)(3) provides that it is grounds for denying a MAR, including a motion in a capital case, when "[u]pon a previous appeal the defendant was in a position to adequately raise the ground or issue underlying the present motion but did not do so."

Two published North Carolina cases deal with the (a)(3) bar and jurisdictional issues. The first case, *State v. Riley*, 137 N.C. App. 403 (2000), *review denied, cert. denied by*, 352 N.C. 596 (2000), *cert. denied by*, __S. Ct.__ (Jan. 8, 2001), has been called into question by the second, *State v. Wallace*, 351 N.C. 481 (2000), *cert. denied by*, 121 S. Ct. 581 (2000). In *Riley*, defendant filed a MAR in the court of appeals challenging the constitutionality of the short form indictment used to charge him with first-degree murder.[3] Prior to defendant's appeal, the North Carolina Supreme Court held that the short form indictment was adequate to charge first-degree murder. *See State v. Avery*, 315 N.C. 1 (1985). While defendant's appeal was pending, the United States Supreme Court decided *Jones v. United States*, 526 U.S. 227 (1999). *Jones*, which dealt with the federal carjacking statute, stated that any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in the indictment, submitted to the jury, and proven by the government beyond a reasonable doubt. In *Riley*, a majority of the court denied the MAR, applying the (a)(3) bar on the reasoning that defendant did not contend that *Jones* enunciated a new principle of law and that he could have raised the issue on appeal but chose not to do so. Dissenting, Judge Green reasoned, in part, that a defense based on the trial court's lack of jurisdiction over the subject matter of an action cannot be waived and may be asserted at any time. Less than a month later, the North Carolina Supreme Court weighed in, essentially adopting Judge Green's dissent.

In *Wallace*, 351 N.C. 481, defendant filed a MAR challenging the constitutionality of the short-form indictments used to charge him. Defendant contended that the constitutionally inadequate indictments deprived the trial court of jurisdiction to hear his case. He further argued that notwithstanding his failure to challenge the indictments on direct appeal, the issue could be heard in the MAR proceeding. Although the court ultimately rejected defendant's contention on the merits, it held that while (a)(3) generally precludes a defendant from raising an issue that could have been raised on direct appeal, defendant's challenge to the trial court's jurisdiction was properly presented. Thus, under *Wallace*, the (a)(3) bar does not prohibit a defendant from raising jurisdictional issues in a MAR that were not raised on appeal. Whether *Wallace* will be extended to any of the other statutory procedural bars remains to be seen.

The case law interpreting the "in a position to adequately raise" language of the (a)(1) bar may apply to the (a)(3) bar given that identical language is used in both provisions. *See supra* p. 3. Also, it may be argued by analogy to the cause prong of federal procedural default law that a defendant is "in a position to adequately raise [a] ground or issue" for the purposes of the (a)(3) bar when (1) the factual and/or legal basis of the claim was reasonably available at the time of the previous appeal, (2) there was no ineffective assistance of counsel, and (3) there was no interference by government officials. *See infra* pp. 18-20 (discussing these factors in relation to the cause prong of the federal rule of procedural bar). For a discussion of the propriety of such an analogy, see *supra* p. 5.

i. Ineffective Assistance of Counsel Claims

The question of whether ineffective assistance of counsel claims can be barred by subsection (a)(3) if not raised on direct appeal has not been directly addressed by the North Carolina appellate courts. Defense counsel likely will argue that the (a)(3) bar should not apply to any ineffective assistance of counsel claims. In support of this argument, counsel will cite the many appellate decisions stating that a MAR proceeding, or other post-conviction action that allows the defendant an evidentiary hearing, is a more appropriate vehicle for asserting an ineffective assistance of counsel claim than a direct appeal. *See State v. Milano*, 297 N.C. 485, 496 (1979) (such claims "normally" raised in MAR

3. For the law regarding when a MAR may be filed in the appellate division, see G.S. 15A-1418.

proceedings), *overruled on other grounds by*, *State v. Grier*, 307 N.C. 628 (1983); *State v. Vickers*, 306 N.C. 90, 95 (1982) (such claims more appropriately raised in post-conviction hearing), *overruled on other grounds by*, *State v. Barnes*, 333 N.C. 666 (1993); *State v. Godforth*, 130 N.C. App. 603, 605 (1998) (same); *State v. Wise*, 64 N.C. App. 108, 110 (1983) (same); *State v. Dockery*, 78 N.C. App. 190, 192 (1985) (same); *State v. James*, 60 N.C. App. 529, 533 (1983) (same).

In response, the state is likely to point out that many of these decisions also state that ineffective assistance of counsel claims *may* be considered on direct appeal. *See, e.g., James*, 60 N.C. App. at 533. The state also is likely to point out that many of these decisions have gone on to adjudicate such claims on direct appeal. *See, e.g., Milano*, 297 N.C. at 496 (rejecting claim on merits); *Vickers*, 306 N.C. at 95 (same); *James*, 60 N.C. App. at 533 (same).

The rationale for suggesting that ineffective assistance claims are more appropriately considered in MAR proceedings than on direct appeal is that many such claims cannot be resolved on the record on appeal and require an evidentiary hearing. *See, e.g., State v. Kinch*, 314 N.C. 99, 106 (1985) (holding it could not "properly" rule on ineffective assistance claim on direct appeal because there had been no evidentiary hearing). While an evidentiary hearing is available in MAR proceedings, *see* G.S. 15A-1420(c), it is not available on direct appeal. *See Milano*, 297 N.C. at 496 (on direct appeal, court is "bound by the record of the trial proceedings below"). Thus, if a defendant asserts an ineffective assistance claim on direct appeal that depends on matters outside of the record, the claim will fail. *See Wise*, 64 N.C. App. at 111–12 (noting that if court were to rule on ineffective assistance claim on direct appeal without considering matters outside the record, claim would fail); *Dockery*, 78 N.C. App. at 192 (finding that although evidence "needs to be presented" on ineffective assistance claim, court was "constrained" by the record on appeal and must deny claim).[4]

The rule that ineffective assistance of counsel claims may be adjudicated on direct appeal can be reconciled with these principles. Where the defendant does not rely on matters outside of the record to support the claim, there is no need for an evidentiary hearing and no difficulty created by adjudicating it on direct appeal. It is only when the claim genuinely depends on evidence outside of the record that it is not properly adjudicated on direct appeal. *State v. Wise*, 64 N.C. App. 108 (1983), is one of several cases that illustrate these points. In *Wise*, defendant appealed his conviction, arguing that his trial counsel was ineffective because of a conflict of interest created by his attorney's previous representation of key prosecution witnesses. The court noted that by its very nature, a conflict of interest claim would not "appear on the face of the record." *Id.* at 111. It held that in order to properly adjudicate the claim, additional evidence must be received, such as testimony by the attorney concerning his relationship with the witnesses and testimony from the witnesses themselves. The court pointed out that if its review was confined to the record, defendant's claim would fail because the record did not reveal the conflict of interest. Rather than overrule defendant's assignment of error and decide the issue on the basis of "an inadequate record," the court dismissed it and allowed the defendant to raise it in a MAR, where there could be an evidentiary hearing. *Id.* at 112; *see also State v. House*, 340 N.C. 187, 196 (1995) (holding that record was inadequate to rule on ineffective assistance claim and that "appropriate remedy" was for defendant to file a MAR; noting that ruling was without prejudice to defendant's right to file such a motion); *Kinch*, 314 N.C. at 106 (holding that court could not properly determine ineffective assistance claim on direct appeal because evidentiary hearing was needed; noting that decision was without prejudice to defendant's right to file a MAR realleging the claim); *State v. Ware*, 125 N.C. App. 695, 697 (1997) (noting that record was insufficient to determine defendant's ineffective assistance claim on direct appeal and that "[u]pon the filing of a [MAR], the trial court will determine the motion, and make appropriate findings of fact").

Given this and the absence of controlling appellate case law, the following framework is suggested for use by trial courts analyzing ineffective assistance of counsel claims vis-à-vis the subsection (a)(3) bar. At a minimum, the (a)(3) bar should not apply to ineffective assistance of counsel claims when the claim (1) alleges that defendant was denied effective assistance of appellate counsel, (2) alleges that defendant was denied effective assistance of trial counsel and trial counsel continued to represent defendant on appeal, or (3) genuinely depends in whole or in part on matters outside of the record. As to the first exception, a claim that appellate counsel was ineffective should not be considered to have been reasonably available on direct appeal where the very counsel alleged to have been ineffective was representing defendant. Similarly, a claim that trial counsel rendered ineffective assistance

4. It should be noted that most properly presented ineffective assistance claims will require evidence outside the record to rebut the presumption of sound trial strategy. *See infra* p. 12 (discussing relevant presumption).

should not be considered reasonably available on appeal when trial counsel continues to represent defendant on appeal. The third exception should apply for the reasons discussed above; because direct appeal review is limited to the record, a defendant whose ineffective assistance claim genuinely depends on matters outside of the record would be unable to prove the claim on direct appeal or severely disadvantaged in attempting to do so.[5]

One cautionary note is in order. Courts must be diligent in examining the basis of the ineffective assistance of counsel claim to ensure that it does not genuinely depend in whole or in part on matters outside of the record. Some claims obviously will depend on matters outside of the record. *See, e.g.*, *Wise*, 64 N.C. App. 108 (conflict of interest claim "will not appear on the face of the record"). Others may require closer inquiry. Consider a case where the defendant alleges that trial counsel was ineffective for failing to object to improper statements made by the prosecutor at trial. The statements and the failure to object are part of the record. At first blush, it appears that this claim does not rely on matters outside of the record. Suppose further, however, that the defendant argues that counsel's failure to object was not a tactical decision but resulted from complete ignorance of trial procedure and seeks to prove this with testimony from trial counsel admitting ignorance. So stated, the claim depends on matters outside of the record. Such a defendant should not be penalized for failing to raise the claim on direct appeal where he or she would not have been able to obtain the relevant testimony.

The propriety of this approach is apparent in light of the dilemma defendant will face if it is not endorsed. Consider again the example just offered. If defendant is forced to assert the claim on direct appeal, defendant will lose because the appellate court will be bound by the record and will not consider counsel's testimony. Furthermore, having asserted the claim on direct appeal and lost (albeit on the basis of an inadequate record), defendant will be procedurally barred by G.S. 15A-1419(a)(2) (prior determination on the merits), *see supra* pp. 5–7 (discussing the (a)(2) bar), from raising it again in a MAR. If, on the other hand, knowing that the claim depends on matters outside of the record, defendant does not raise it on direct appeal and includes it in a later-filed MAR, he or she may fare no better. If the MAR court holds the claim barred under (a)(3) for failure to raise on direct appeal, defendant again is precluded from a merits adjudication.

Given the lack of controlling law on point, the suggested framework does not resolve the dilemma currently faced by appellate defense counsel who learn of an ineffective assistance of counsel claim on direct appeal but require evidence outside of the record to prove it. Should counsel raise the claim and risk losing on an inadequate direct appeal record and the subsequent application of the (a)(2) bar, or should counsel wait until the MAR proceeding and risk the (a)(3) bar? One alternative is to raise the claim on direct appeal solely to preserve the issue for purposes of the (a)(3) bar. A ruling endorsing such a procedure would not be without precedent. *See House*, 340 N.C. at 196–97 (holding record was inadequate to rule on ineffective assistance claim, that "appropriate remedy" was for defendant to file a MAR, and stating that ruling was without prejudice to defendant's right to file a MAR); *Kinch*, 314 N.C. at 106 (holding court could not properly determine ineffective assistance claim on direct appeal and specifying that decision was without prejudice to defendant's right to raise the claim in a MAR); *Wise*, 64 N.C. App. at 112 (holding court could not properly adjudicate defendant's ineffective assistance claim on direct appeal, dismissing assignment of error, and allowing defendant to seek relief by way of a MAR). Another option is to file a MAR while the appeal is pending.

To the extent that the Fourth Circuit's decision in *McCarver v. Lee*, 221 F.3d 583 (4th Cir. 2000), *cert. denied by*, __S. Ct.__ (Jan. 8, 2001), should be afforded any consideration in the interpretation of state law, that decision is not inconsistent with the framework proposed. In *McCarver*, after unsuccessfully appealing his convictions, the North Carolina defendant filed a MAR alleging ineffective assistance of counsel. The superior court denied the MAR, finding the claim procedurally barred by subsection (a)(3). Defendant then proceeded to federal habeas court, asserting ineffective assistance of counsel. Applying the federal rule of procedural default, *see infra* pp. 15–23 (discussing the federal rule of procedural default), the Fourth Circuit inquired whether North Carolina courts consistently and regularly apply the (a)(3) bar to ineffective assistance of counsel claims that could have been brought on direct appeal. In a 2-1 decision, the court held that defendant failed to show that the North Carolina courts did not consistently and regularly apply the bar to ineffective

5. Although the third exception is framed in terms of ineffective assistance of counsel claims, it more generally informs the interpretation of the "in a position to adequately raise" language of the (a)(3) bar. A defendant should not be considered to have been in a position to adequately raise any issue on direct appeal if the issue genuinely depends on evidence outside the record that could not have been presented on appeal.

assistance of counsel claims that could have been raised on direct appeal. Significantly, the court did not examine the North Carolina Superior Court's finding that the particular ineffective assistance of counsel claim asserted could have been raised on direct appeal. Thus, *McCarver* can be read to hold only that defendant failed to show that the North Carolina courts do not consistently and regularly apply the subsection (a)(3) bar to ineffective assistance of counsel claims that could have been raised on appeal. This holding is consistent with the framework articulated above: where the claim could have been raised on appeal because it does not depend on matters outside of the record, it may be adjudicated on direct appeal and subject to the subsection (a)(3) bar.

ii. Specific Exception

Although the statute does not contain any specific exceptions to the (a)(3) bar, *Wallace* should be viewed as excepting jurisdictional challenges not raised on appeal. *See supra* p. 7 (discussing *Wallace*). Also, a recent court of appeals case can be read as excepting MARs filed during the pendency of direct appeal from the scope of the (a)(3) bar. See *State v. Bates*, __ N.C. App. __ (Dec. 5, 2000). *Bates*, however, is difficult to reconcile with the language of the statute, which expressly includes an exception to the (a)(1) bar for MARs filed during the pendency of appeal but does not include such an exception to the (a)(3) bar.[6]

iii. Illustrative Cases

State v. Riley, 137 N.C. App. 403 (2000) *review denied, cert. denied by*, 352 N.C. 596 (2000), *cert. denied by*, __S. Ct.__ (Jan. 8, 2001), and *State v. Wallace*, 351 N.C. 481 (2000), *cert. denied by*, 121 S. Ct. 581 (2000), are the only published North Carolina appellate cases applying the (a)(3) bar. *See supra* p. 7 (discussing *Riley* and *Wallace*). Examples of trial court decisions applying the bar are reported in the subsequent federal case law. *See McCarver v. Lee*, 221 F.3d 583 (4th Cir. 2000) (discussed above), *cert. denied by*, __S. Ct.__ (Jan. 8, 2001); *Williams v. French*, 146 F.3d 203, 208 (4th Cir. 1998) (noting that MAR court found many claims barred by (a)(3) but not offering any comment on proper application or scope of the bar); *Green v. French*, 143 F.3d 865, 894 (4th Cir. 1998) (same), *overruled on other grounds by*, *Williams v. Taylor*, 529 U.S. 362 (2000); *Sexton v. French*, 163 F.3d 874, 880 (4th Cir. 1998) (same); *Felton v. Barnett*, 912 F.2d 92, 93 (4th Cir. 1990) (same).

d. Failure to File a Timely MAR

G.S. 15A-1419(a)(4) provides that it is grounds for denying a MAR, including a motion in a capital case, if "[t]he defendant failed to file a timely [MAR] as required by G.S. 15A-1415(a)." G.S. 15A-1415(a) provides that in non-capital cases, a defendant may file a MAR at any time after verdict.[7] In capital cases, the statute provides that a MAR must be filed within 120 days from the latest of the following:

(1) the court's judgment has been filed, but the defendant failed to perfect a timely appeal;
(2) the mandate issued by a court of the appellate division on direct appeal pursuant to N.C.R. App. P. 32(b) and the time for filing a petition for writ of certiorari to the United States Supreme Court has expired without a petition being filed;
(3) the United States Supreme Court denied a timely petition for writ of certiorari of the decision on direct appeal by the Supreme Court of North Carolina;
(4) following the denial of discretionary review by the Supreme Court of North Carolina, the United States Supreme Court denied a timely petition for writ of certiorari seeking review of the decision on direct appeal by the North Carolina Court of Appeals;
(5) the United States Supreme Court granted the defendant's or the State's timely petition for writ of certiorari of the decision on direct appeal by the Supreme Court of North Carolina or North Carolina Court of Appeals, but subsequently left the defendant's conviction and sentence undisturbed; or
(6) the appointment of post-conviction counsel for an indigent capital defendant.

G.S. 15A-1415(a). The 120-day deadline for capital cases was enacted in 1996. It applies to all cases in which the trial court enters judgment after October 1, 1996. *See* An Act To Expedite The Postconviction

6. To the extent *Bates* holds that the term "previous appeal" as used in (a)(3) does not include direct appeal, it is at odds with the North Carolina Supreme Court's decision in *Wallace*. *See Wallace*, 351 N.C. 481 (holding that (a)(3) generally precludes a defendant from raising an issue that could have been raised on direct appeal).

7. If a defendant waits to file his or her MAR until more than ten days after entry of judgment, only certain grounds may be asserted. *See* G.S. 15A-1415(b), (c) (specifying the only grounds that may be asserted in a MAR made more than ten days after entry of judgment).

Process In North Carolina, N.C. Session Laws 1995 (Reg. Session, 1996) ch. 719, section 8.[8]

For "good cause shown," a defendant may obtain an extension of time to file a MAR. G.S. 15A-1415(d). The "presumptive length" of an extension is up to thirty days but the extension can be longer if the court finds "extraordinary circumstances." *Id.* Defendants may amend their MARs, provided the amendments are filed at least thirty days prior to the commencement of a hearing on the merits of the claims asserted in the MAR or at any time before the date of the hearing has been set, whichever is later. *See* G.S. 15A-1415(g). The time limits for filing do not apply to MARs alleging newly discovered evidence. *See* G.S. 15A-1415(c). A MAR alleging newly discovered evidence, however, must be made "within a reasonable time of its discovery." *Id.*

The subsection (a)(4) bar has not been applied or interpreted by any reported cases. One issue that may arise regarding it is whether amendments to MARs in capital cases raising new claims must be filed within the 120-day deadline of G.S. 15A-1415(a). On the one hand, it may be argued that allowing new claims to be asserted in amendments filed after the deadline will frustrate the purpose of the 1996 legislative revisions; i.e., to expedite the post-conviction process. *See State v. Buckner*, 351 N.C. 401, 408 (2000) (purpose of amendments to G.S. 15A-1415 was to expedite the post-conviction process while ensuring thorough and complete review). In support of this argument it may be pointed out that G.S. 15A-1415(g) contains no language allowing for relation back of new claims raised in amended MARs. *See generally* N.C.R. Civ. Pro. 15(c) ("[a] claim asserted in an amended pleading is deemed to have been interposed at the time the claim in the original pleading was interposed").

On the other hand, since G.S. 15A-1415(g) was enacted in 1996 along with the 120-day rule, it arguably was meant to serve as a limited exception to that rule, allowing, in certain circumstances, new claims to be asserted outside of the 120-day period. Under this view, G.S. 15A-1415(g) is not an exception that swallows the rule; rather, it allows new claims to be raised in connection with a properly filed MAR only within a limited window of time, ending thirty days prior to the hearing or before the hearing date is set, whichever is later.

8. Prior to the 1996 amendments, MARs in capital cases, like MARs in non-capital cases, could be filed at any time after verdict. *See* G.S. 15A-1415(a) (superceded).

2. General Exceptions to the Statutory Bars

G.S. 15A-1419(b) provides that a defendant can avoid the G.S. 15A-1419(a) bars if he or she can show cause and prejudice or a fundamental miscarriage of justice.

a. Cause and Prejudice

A defendant can avoid application of the G.S. 15A-1419(a) bars if he or she can demonstrate "[g]ood cause for excusing the [default] . . . and . . . actual prejudice resulting from the defendant's claim." G.S. 15A-1419(b)(1). Since these requirements are stated in the conjunctive, both must be established.

i. Cause

G.S. 15A-1419(c) provides that good cause "may only be shown" if the defendant establishes "that his failure to raise the claim or file a timely motion" resulted from (1) a violation of the defendant's constitutional rights, (2) the retroactive application of a new right, or (3) a factual predicate that could not have been discovered with reasonable diligence "in time to present the claim on a previous State or federal post-conviction review." The defendant must prove the ground asserted by a preponderance of the evidence. *See* G.S. 15A-1419(c). The good cause grounds were added to the statute in 1996 and have not yet been interpreted by the North Carolina appellate courts.

Because it states that "good cause may only be shown if the defendant establishes . . . that his failure to raise the claim or file a timely motion" resulted from one of the good cause grounds, G.S. 15A-1419(c) does not apply to procedural defaults under subsection (a)(2). Where a defendant's claim is barred by (a)(2), the defendant has neither failed to raise a claim nor failed to file a timely motion; a claim is barred by subsection (a)(2) because the defendant properly raised the claim and it was decided unfavorably. In light of the statutory language employed in G.S. 15A-1419(c), it could be argued that good cause cannot excuse an (a)(2) default. On the other hand, it could be argued that subsection (c) only restricts the good cause inquiry when the default resulted from a failure to raise the claim or timely file and that the court is not limited in the "good cause" grounds it may use to excuse (a)(2) defaults. *See* G.S. 15A-1419(b)(1).

(1) Constitutional Violations, Including Ineffective Assistance of Counsel

G.S. 15A-1419(c)(1) provides that a defendant can establish good cause for failure to raise a claim or file a timely motion if he or she can establish by a preponderance of the evidence that the failure was "[t]he result of State action in violation of the United States Constitution or the North Carolina Constitution

including ineffective assistance of trial or appellate counsel." With regard to ineffective assistance, a trial attorney's ignorance of a claim, inadvertence, or tactical decision to withhold a claim may not constitute good cause. *See* G.S. 15A-1419(c). Also, ineffective assistance of prior post-conviction counsel may not constitute good cause. *See id.*

Because subsection (c)(1) requires constitutionally ineffective counsel, a proper analysis of an ineffective assistance claim asserted under this provision must proceed under the framework set forth in *Strickland v. Washington*, 466 U.S. 668 (1984).[9] Under *Strickland*, counsel is constitutionally ineffective if (1) his or her performance falls "below an objective standard of reasonableness" and (2) the deficient performance was prejudicial. *Id.* at 687–88. With regard to the first prong, a defendant must demonstrate that counsel's performance fell below an objective standard of reasonableness under "prevailing professional norms." *Id.* at 688. In evaluating counsel's performance, a court must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 688–89. The court must not engage in hindsight; rather, it must evaluate the reasonableness of counsel's performance within the context of the circumstances at the time of the alleged error. *See id.* at 690. Under *Strickland*'s second prong, a defendant must establish that there is a "reasonable probability that, but for counsel's unprofessional error, the results of the proceeding would have been different." *Id.* at 694. A reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Id.*

(2) Retroactive Application of a New Right

G.S. 15A-1419(c)(2) provides that a defendant can establish good cause for a failure to raise a claim or file a timely motion if he or she can establish by a preponderance of the evidence that the failure was "[t]he result of the recognition of a new federal or State right which is retroactively applicable."

The test for retroactivity of new federal rights is the stringent one set forth in *Teague v. Lane*, 489 U.S. 288 (1989). Under *Teague*, new federal rules of criminal procedure may be applied retroactively only if they fall within one of the two limited exceptions. *See supra* p. 6 (discussing *Teague* in more detail). A new state rule is presumed to operate retroactively unless there is a compelling reason to make it prospective only. *See supra* p. 7 (discussing retroactive application of new state rules).

The question left open by *State v. Zuniga*, 336 N.C. 508 (1994), should not create difficulty for defendants relying on the (c)(2) retroactivity exception to excuse a subsection (a)(3) default (failure to raise issue on previous appeal). *See supra* p. 7 (discussing (a)(3) bar). In *Zuniga*, the court held that *McKoy v. North Carolina*, 494 U.S. 433 (1990), which invalidated the unanimity requirement of North Carolina's capital sentencing scheme, applied retroactively under *Teague*. *See supra* p. 6 (discussing *Zuniga* in greater detail). The *Zuniga* court noted that because defendant had objected to the relevant instructions at trial and had assigned them as error on appeal, there was no issue of waiver. *See Zuniga*, 336 N.C. at 514. The court left open the question of whether a defendant sentenced under the unanimity instruction who did not assign the instruction as error on direct review waived the right to assert the *McKoy* issue in MAR proceedings. *See id.* at 514 n.2.

Zuniga should not be read to prevent a defendant from employing the (c)(2) good cause exception when he or she failed to raise the claim on direct appeal. *Zuniga* was decided in 1994, two years before the current good cause provision was enacted. By adding subsection (c)(2) in 1996, the legislature specifically contemplated a situation where a defendant's failure to raise an issue on appeal would be excused for good cause if his or her failure was attributable to the recognition of a new right that applies retroactively. Thus, as for waiver in connection with retroactivity, the 1996 amendments answered the question left open by *Zuniga*.

(3) Factual Predicate Not Discoverable through Reasonable Diligence

G.S. 15A-1419(c)(3) provides that a defendant can establish good cause for a failure to raise the claim or file a timely motion if he or she can establish by a preponderance of the evidence that the failure was "[b]ased on a factual predicate that could not have been discovered through the exercise of reasonable diligence in time to present the claim on a previous State or federal postconviction review."

As noted, there are no published North Carolina cases interpreting the new good cause provisions. It may be argued that in interpreting subsection (c)(3), analogy to federal procedural default law is appropriate. Under federal law, a defendant may establish the requisite cause excusing a procedural default by showing that the factual basis of the claim "was not reasonably available" at the time of the default. *See infra* p. 18 (discussing federal standard); *supra* p. 5 (discussing appropriateness of analogy to federal law).

9. The *Strickland* test also applies to ineffective assistance of counsel claims asserted under the state constitution. *See State v. Braswell*, 312 N.C. 553 (1985).

The fact that the North Carolina legislature did not import the federal cause standard into the state procedural default statute may suggest that analogy to federal law is not appropriate.

ii. Prejudice

A defendant can show "actual prejudice" only if he or she can establish by a preponderance of the evidence "that an error during the trial or sentencing worked to the defendant's actual and substantial disadvantage, raising a reasonable probability, viewing the record as a whole, that a different result would have occurred but for the error." G.S. 15A-1419(d). The actual prejudice provision was added with the 1996 amendments and has not yet been applied in any published North Carolina cases.

The North Carolina standard is similar to both the standard of actual prejudice applied in the federal procedural default analysis, *see infra* p. 20, and the prejudice prong of the *Strickland* test for constitutionally ineffective assistance of counsel. *See supra* p. 12; *see also infra* p. 20 (one open question regarding the standard of actual prejudice in federal procedural default is whether it is the same as any of the Supreme Court's other formulations of prejudicial or harmful error).

b. Fundamental Miscarriage of Justice

The second exception to the G.S. 15A-1419(a) procedural bars applies when the defendant can establish that failure to consider the claim "will result in a fundamental miscarriage of justice." G.S. 15A-1419(b)(2). According to the statute, a fundamental miscarriage of justice only results if:

(1) the defendant establishes that more likely than not, but for the error, no reasonable fact finder would have found the defendant guilty of the underlying offense; or
(2) the defendant establishes by clear and convincing evidence that, but for the error, no reasonable fact finder would have found the defendant eligible for the death penalty.

G.S. 15A-1419(e). Where a defendant raises a claim of newly discovered evidence of factual innocence or ineligibility for the death penalty, fundamental miscarriage of justice only may be established by proving "by clear and convincing evidence that, in light of the new evidence, if credible, no reasonable juror would have found the defendant guilty beyond a reasonable doubt or eligible for the death penalty." *Id.*

Research has revealed no published North Carolina cases applying the fundamental miscarriage of justice exception. The language of the North Carolina provision is similar to the fundamental miscarriage of justice exception applied in the federal procedural default analysis. *See infra* pp. 20–21 (discussing the fundamental miscarriage of justice prong of the federal analysis); *supra* p. 5 (discussing the appropriateness of analogy to federal law).

B. Court-Imposed, Case-Specific Procedural Rules

Although North Carolina courts have defaulted claims based on a defendant's failure to abide by a court-imposed, case-specific procedural rule, it is unclear whether such a rule could constitute an independently sufficient basis to sustain a default. Additionally, such a default is unlikely to be enforced by a federal habeas court. In *State v. Felton*, defendant filed fourteen MARs in the North Carolina courts. *See Felton v. Barnett*, 912 F.2d 92, 92–93 (4th Cir. 1990) (describing the state proceedings). On March 4, 1988, defendant filed another MAR, alleging discrimination in the selection of the foreperson of the grand jury that indicted him. This claim had not been included in any of the defendant's prior MARs. The superior court denied the March 4th MAR relying, in part, on a court order denying an earlier MAR stating that defendant's failure to "raise and present any other . . . claims in this paper writing shall be a BAR to any later assertion of said claims." *Id.* at 93–94. Significantly, the superior court based its finding of procedural bar only in part on defendant's failure to abide by the court rule; the court also found that the MAR was barred under G.S. 15A-1419(a)(1) and (a)(3). Thus, it is unclear whether the court-imposed procedural rule in *Felton* was an independently sufficient basis to impose procedural bar.

In *State v. Keel*, the court barred two of the capital defendant's claims because his MAR was not filed within a case-specific sixty-day deadline set by the North Carolina Supreme Court. *See Keel v. French*, 162 F.3d 263, 267 & n.3 (4th Cir. 1998) (discussing proceeding in state court). The then-effective version of G.S. 15A-1415(a) did not impose a deadline for the filing of defendant's MAR. *See* G.S. 15A-1415(a) (superceded) (providing that capital defendants could file MARs "[a]t any time after verdict"). Defendant then petitioned for a writ of habeas corpus in federal court and the case eventually went to the Fourth Circuit on appeal. The Fourth Circuit rejected the procedural bar for two reasons. First, the sixty-day time limit was directly at odds with the then-applicable state statute. Second, there was no evidence that the sixty-day deadline was regularly imposed on capital defendants and thus it could not be considered firmly established and regularly followed state procedure. *See Keel*, 162

F.2d at 268–69; *see generally infra* pp. 17–18 (discussing federal requirement that state procedural rule be adequate). This latter requirement for enforcement of the bar in federal court—that the bar be firmly established and regularly followed in state practice—is unlikely to be met for any case-specific rule.

C. Raising Default in State Court and Mandatory Nature of the Bars

Under federal law, procedural default is not jurisdictional; it is an affirmative defense that must be raised by the state. *See infra* pp. 16–17. The North Carolina appellate courts have not ruled on this issue. Nor have they ruled on whether the courts have discretion to decline to apply a statutory procedural bar when the issue is properly presented.

G.S. 15A-1419(a), which contains the statutory bars, begins as follows: "The following are grounds for the denial of a [MAR]. . . ." Standing by itself, this provision could be read as allowing the court discretion in whether to apply the bars. However, G.S. 15A-1519(b) states that "[t]he court *shall* deny the [MAR]" (emphasis added) if any of the procedural bars apply and the defendant is unable to establish cause and prejudice or a fundamental miscarriage of justice. The 1996 amendments to this provis ion are informative. As initially enacted, G.S. 15A-1419(b) stated: "Although the court *may* deny the motion under any circumstances specified in this section, in the interest of justice and for good cause shown it may in its *discretion* grant the motion if it is otherwise meritorious." G.S. 15A-1419(a) (superceded) (emphasis added). The current version, put in place in 1996, substitutes the word "shall" for the word "may." Also, the court no longer has discretion to overlook a procedural bar in the "interest of justice and for good cause shown." Now, a court "shall" deny the MAR unless the defendant can demonstrate cause and prejudice or a fundamental miscarriage of justice. These changes indicate that the bars now are mandatory.

Litigants seeking to avoid the mandatory nature of the bars may offer two pre-1996 cases that disregarded applicable procedural bars. *See State v. Harbison*, 315 N.C. 175 (1985) (assuming arguendo that defendant "waived" right to raise issue in MAR by failing to raise it during direct appeal but considering issue under court's "power of discretionary review"); *State v. Price*, 331 N.C. 620, 630 (1992) (noting applicable procedural bar but electing to review defendant's MAR "in the interests of both judicial economy and thorough scrutiny of this capital case"), *vacated on other grounds by*, *Price v. North Carolina*, 506 N.C. 1043 (1993). Because these cases were decided prior to the 1996 amendments, they are not relevant to an interpretation of G.S. 15A-1419 as amended.

Litigants seeking to avoid the mandatory nature of the bars also may offer two post-1996 MAR cases in which the North Carolina Supreme Court did not comment on potentially applicable statutory procedural bars. *See State v. McHone*, 348 N.C. 254 (1998) (not mentioning potential applicability of the (a)(1) bar in a case reviewing the trial court's denial of a supplemental MAR filed after the trial court denied the initial MAR); *State v. Basden*, 350 N.C. 579 (1999) (not mentioning the (a)(1) bar in a case where an initial MAR was deemed to have been "resurrected" by defendant's motion to vacate for the purposes of applying post-1996 MAR discovery provisions). Because the applicability of the statutory procedural bars was not at issue in either of these cases, they offer little if anything in support of the notion that courts have discretion to avoid applicable bars.

Finally, litigants seeking to avoid the mandatory nature of the statutory bars may offer cases decided on direct appeal where the courts overlooked waivers. Although certain exceptions apply, G.S. 15A-1446(a) provides that an error may not be asserted on appeal unless it was brought to the attention of the trial court "by appropriate and timely objection or motion." *See also* N.C.R. App. P. 10(b)(1). Where a litigant fails to properly preserve an issue, he or she is deemed to have waived the right to raise it on appeal. *See* G.S. 15A-1446(b). When waiver occurs, the plain error rule applies: the error may be made the basis of an assignment of error only where the questioned action is specifically contended to amount to plain error. N.C.R. App. P. 10(c)(4).

Some appellate decisions have overlooked waivers and the failure to argue plain error. *See, e.g., State v. Gregory*, 342 N.C. 580 (1996) (applying plain error standard when defendant had not objected at trial or alleged plain error on appeal). The authority to do so is found in G.S. 15A-1446(b) (notwithstanding failure to raise errors in trial court, appellate court may review "such errors affecting substantial rights in the interest of justice if it determines it appropriate to do so"), and N.C.R. App. P. 2 ("[t]o prevent manifest injustice to a party, or to expedite decision in the public interest," appellate courts may "suspend or vary the requirements or provisions of any of these rules"). Although G.S. 15A-1446(b) and Rule 2 authorize courts to overlook waivers and failure to argue plain error, they do not authorize courts to suspend the statutory procedural bars or overlook procedural default. Thus, direct

appeal waiver cases do not inform the procedural default analysis.[10]

II. Procedural Default in Federal Habeas Proceedings

Once a state defendant exhausts his or her remedies in state court, the defendant may challenge the conviction or sentence by filing a petition for writ of habeas corpus in federal district court for those claims alleging a violation of federal law. If a state court has rejected the defendant's claims on grounds of procedural default, the federal procedural default rule is triggered. Figure 2 on page 16 illustrates application of the federal rule.

A. The Federal Rule

The federal rule of procedural default that applies today was first announced by the United States Supreme Court in *Wainwright v. Sykes*, 433 U.S. 72 (1977).[11] The rule, which is grounded in notions of comity and federalism, *see Coleman v. Thompson*, 501 U.S. 722, 730 (1991), provides that a federal habeas court may not review on the merits a claim that has been denied by a state court on grounds of an adequate and independent state procedural rule. *See id.* at 750; *Harris v. Reed*, 489 U.S. 255, 260 (1989). Thus, if a defendant loses in state court on grounds of a state procedural default rule and that rule is adequate and independent, the federal court cannot consider the claim on the merits. Federal procedural default can be avoided only where the defendant can demonstrate cause for the default and prejudice resulting from it or that a failure to consider the claim will result in a fundamental miscarriage of justice. *See Coleman*, 501 U.S. at 750.

The *Wainwright* federal procedural default rule applies to all federal habeas cases brought by North Carolina prisoners, non-capital as well as capital. *See* Smith v. Murray, 477 U.S. 527, 538 (1986) (rejecting suggestion that Wainwright applies differently depending on the nature of the penalty imposed).[12] The relevant state procedural rule triggering application of federal procedural default may be one that applies at trial, on appeal, or in state post-conviction proceedings. See generally James S. Liebman & Randy Hertz, 2 Federal Habeas Corpus Practice & Procedure § 26.1 at p. 1035 n.2 (1998) (offering examples of state rules triggering federal procedural default). Because most North Carolina prisoners pursue state post-conviction relief before proceeding to federal habeas court, the procedural defaults at issue in their federal habeas cases generally arise in the context of the G.S. 15A-1419(a) bars. See supra pp. 3-11 (discussing these bars).[13]

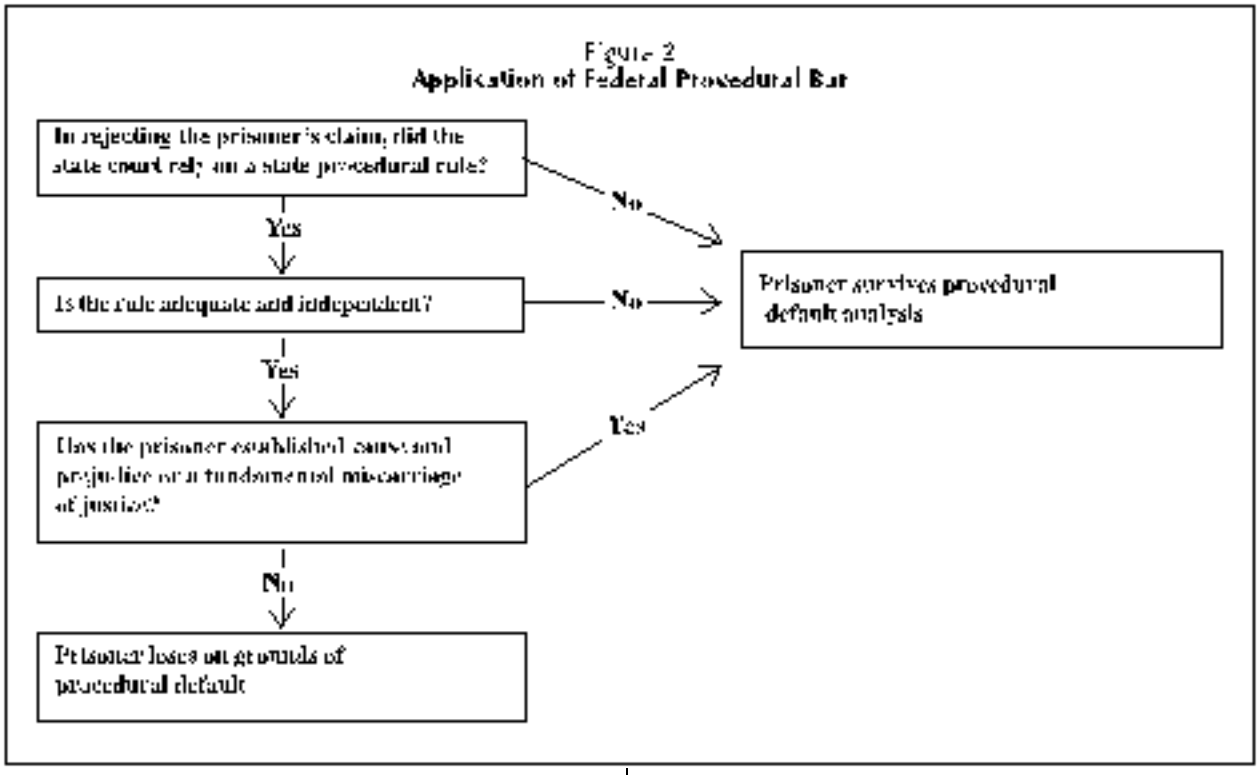
Notwithstanding the above, when a defendant raises a federal claim in state court and loses on the merits, the defendant is entitled to have the federal habeas court make its own independent determination on the issue without being bound by the state court's ruling. *See Wainwright*, 433 U.S. at 87. The federal rule of procedural default applies only to federal claims that were not resolved on the merits in state proceedings due to the defendant's failure to raise

10. The Fourth Circuit's comments in *Smith v. Dixon*, 14 F.3d 956 (4th Cir. 1994), suggesting that North Carolina's statutory procedural bars are mandatory should not be considered in this analysis. The decision was by an evenly divided en banc court and as such has no precedential value. *See Ashe v. Styles*, 39 F.3d 80, 86 n.4 (4th Cir. 1994).

11. For a discussion of the history of federal procedural default prior to 1977, see CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER, 17A FEDERAL PRACTICE & PROCEDURE § 4266 (1988).

12. The *Wainwright* rule does not apply to capital cases in states that qualify for "opt in" status under The Anti-terrorism and Effective Death Penalty Act of 1996, Pub. L. 104-32, 110 Stat. 1214 (1996). To date, North Carolina has not been found to be an opt-in state.

13. If the defendant skips MAR proceedings and goes directly to federal habeas, the G.S. 15A-1419(a) bars will not come into play. The defendant, however, still may be subject to bar. In *State v. Bruno*, 108 N.C. App. 401 (1993), for example, defendant appealed his conviction arguing, in part, that the trial court erred in allowing certain testimony at trial. The court of appeals rejected the assignment of error on grounds that although defendant objected when the testimony was initially presented, he did not object when another witness subsequently testified, giving substantially the same testimony. The court stated: "It is well settled that where evidence is admitted over objection, and the same evidence is later admitted without objection, the benefit of the objection is lost." *Id.* at 410 (quotation omitted). The North Carolina Supreme Court denied discretionary review. Bruno then bypassed state MAR proceedings and sought relief in federal habeas court, raising a constitutional claim regarding the testimony challenged on direct appeal. The Fourth Circuit held defendant's claim procedurally barred because the state appellate court on direct review had found the error defaulted under state law. *See Bruno v. Freeman*, 1997 WL 176452 *5 (unpublished) (4th Cir. 1997). Apparently, the adequacy of the state rule relied upon was not at issue in *Bruno*.



them as required by state procedure. *See id*. Thus, while the default rules in G.S. 15A-1419(a)(1), (3), and (4) trigger application of federal procedural default, G.S. 15A-1419(a)(2) does not. The (a)(2) bar merely codifies the rules of res judicata and law of the case and as such applies not where the defendant failed to properly present his or her claim to the state courts as required by state procedure but rather where the claim was properly presented but rejected on the merits. *See supra* p. 6 (so characterizing the (a)(2) bar); *Green v. French*, 978 F. Supp. 242, 252 (E.D.N.C. 1997) (holding that (a)(2) cannot preclude federal review and noting that a holding otherwise "would effectively eviscerate federal habeas review of North Carolina cases because any decision by the North Carolina Supreme Court resting on federal principles, absent an exception, would be procedurally barred from subsequent federal review based on the 'raised and decided' rhetoric of [(a)(2)]"), *aff'd*, 143 F.3d 865 (4th Cir. 1998), *overruled on other grounds by*, *Williams v. Taylor*, 529 U.S. 362 (2000).

1. Distinguished from Exhaustion

Procedural default should not be confused with exhaustion. Exhaustion is a distinct doctrine requiring a defendant to exhaust all available state remedies before filing a federal habeas petition; if all remedies have not been exhausted, the claim must be dismissed. *See* 28 U.S.C. § 2254(b)(1)(A); *Coleman v. Thompson*, 501 U.S. 722, 730 (1991).

Although procedural default and exhaustion are distinct doctrines, there is some interplay between them. A defendant's claims will be considered exhausted if they have been procedurally defaulted under state law or would be if the defendant attempted to present them. *See Castille v. Peoples*, 489 U.S. 346, 351 (1989); *Baker v. Corcoran*, 220 F.3d 276, 288 (4th Cir. 2000) *pet. for cert. filed* (Dec. 13, 2000). Using procedural default to satisfy the exhaustion requirement, however, will not work to the defendant's advantage. The procedural default that satisfies the exhaustion requirement provides an independent and adequate state-law ground for the conviction and sentence, thus preventing review of the defaulted claim in federal habeas court unless the defendant can demonstrate cause and prejudice or a fundamental miscarriage of justice. *See Baker*, 220 F.3d at 288.

2. Not a Jurisdictional Rule

The federal rule of procedural default is not a jurisdictional one. See Trest v. Cain, 522 U.S. 87, 89 (1997). Thus, a federal habeas court is not required to

raise the issue sua sponte. See id. Whether a court may raise the issue sua sponte is an open question. See id. (declining to rule on this issue).

Generally, the issue is an affirmative defense and the state must plead it or waive the right to assert it later. *See id.*; *see also Roach v. Angelone*, 176 F.3d 210, 215 n.3 (4th Cir. 1999); *Yeatts v. Angelone*, 166 F.3d 255, 261 (4th Cir. 1999). The Fourth Circuit has held that notwithstanding the state's failure to properly preserve the issue, a federal court, in its discretion, may hold a claim procedurally defaulted when the issue is raised on appeal. *See Royal v. Taylor*, 188 F.3d 239, 246 (4th Cir. 1999); *Yeatts*, 166 F.3d at 261. In deciding whether to exercise this discretion, the Fourth Circuit considers whether the state's waiver was intentional or inadvertent, whether justice requires that the defendant be afforded notice and a reasonable opportunity to present briefing and argument opposing dismissal, and whether interests of comity and judicial economy support the exercise of discretion. *See Yeatts*, 166 F.3d at 262 (exercising discretion); *Roach*, 176 F.3d at 215 n.3 (declining to exercise discretion).

3. State Rule Must Be Adequate and Independent

Federal procedural bar applies only where the state decision rests on an "adequate" and "independent" state procedural rule. The fact that procedural bar is an affirmative defense for the state suggests that the government bears the burden of establishing that the rule satisfies this standard. *But see McCarver v. Lee*, 221 F.3d 583 (4th Cir. 2000) (suggesting defendant had burden of showing G.S. 15A-1419(a)(3) is not consistently and regularly applied), *cert. denied by*, __S. Ct.__ (Jan. 8, 2001).

a. Adequate

A state procedural rule is adequate if it is consistently or regularly followed. *See Johnson v. Mississippi*, 486 U.S. 578, 587–89 (1988). Consistent or regular application does not require "undeviating adherence . . . admitting of no exception." *Meadows v. Legursky*, 904 F.2d 903, 907 (4th Cir. 1990) (en banc), *superceded on other grounds by*, *Trest v. Cain*, 522 U.S 87 (1997). What is required is that the rule has been applied "in the vast majority of cases." *Plath v. Moore*, 130 F.3d 595, 602 (4th Cir. 1997) (quotation omitted). The purpose of the adequacy requirement is to ensure that novel, aberrational procedural requirements are not used to thwart federal habeas review of state court criminal judgments. *See Skipper v. French*, 130 F.3d 603, 609 (4th Cir. 1997).

One Fourth Circuit case suggests that in determining whether a state has consistently applied a procedural rule, the federal habeas court looks only to cases in which the state advanced the issue of procedural default. *See Meadows*, 904 F.2d at 907 (distinguishing case offered by defendant to show inadequacy of state rule on grounds "it is not evident from the opinion whether the State even advanced the issue of procedural default"). The rationale for such a rule presumably is that a federal court cannot say that a state court inconsistently applied a procedural rule that was not presented for its consideration. If the state procedural bar is deemed to be jurisdictional, this rule would not be appropriate; in such a situation, the relevant body of state case law would include all MAR cases. *See generally supra* pp. 14–15 (discussing nature of North Carolina's statutory bars).

The relevant time period for determining whether a rule has been regularly or consistently applied is the period prior to the time the defendant violated it. *See Meadows*, 904 F.2d at 907 & n.3; WAYNE R. LAFAVE, JEROLD H. ISRAEL AND NANCY J. KING, 6 CRIMINAL PROCEDURE § 28.4(b) at 59 (1999).

A number of Fourth Circuit cases have upheld G.S. 15A-1419(a) as adequate. *See Boyd v. French*, 147 F.3d 319, 332 (4th Cir. 1998) (G.S. 15A-1419 is adequate); *Williams v. French*, 146 F.3d 203, 208–09 (4th Cir. 1998) (G.S. 15A-1419(a)(3) is adequate); *Green v. French*, 143 F.3d 865, 894 & n.13 (4th Cir. 1998) (stating G.S. 15A-1419(a)(3) is adequate but noting that defendant did not challenge adequacy), *overruled on other grounds by*, *Williams v. Taylor*, 529 U.S. 362 (2000); *Ashe v. Styles*, 39 F.3d 80, 87–88 (4th Cir. 1994) (G.S. 15A-1419(a) is adequate). Two recent Fourth Circuit cases, however, point out that there still may be room for defendants to challenge the adequacy of the state procedural bars.

In *McCarver v. Lee*, 221 F.3d 583 (4th Cir. 2000), *cert. denied by*, __S. Ct.__ (Jan. 8, 2001), defendant conceded that G.S. 15A-1419 was "generally" adequate but contended that the (a)(3) bar was inadequate as applied to his ineffective assistance of counsel claim. Although a majority of the *McCarver* court rejected defendant's argument and held that G.S. 15A-1419(a)(3) is adequate as applied to bar ineffective assistance of counsel claims that could have been raised on direct appeal, Judge Motz dissented.

In *Bacon v. Lee*, 225 F.3d 470 (4th Cir. 2000), defendant also conceded that G.S. 15A-1419 "generally" provides an adequate procedural default. Defendant argued, however, that the (a)(1) bar was not adequate as applied to the unique procedural posture of his case. Specifically, he argued that the state court, by granting a motion for reconsideration of its denial of his initial MAR, reopened the initial MAR with the effect that his later-filed motion to amend was not a second MAR

barred by (a)(1). The court found that there was "some doubt" as to the adequacy of the (a)(1) bar as applied to these unique facts and decided the claims on the merits rather than on grounds of procedural default.

Bacon and Judge Motz's dissent in *McCarver* suggest that notwithstanding the Fourth Circuit cases holding that G.S. 15A-1419(a) is an adequate procedural bar, defendants may have room to challenge the adequacy of the bars if they frame their challenges not as general ones but as specific challenges to the adequacy of the bars as applied to factually or procedurally analogous cases.

b. Independent

A state procedural rule is independent if its application does not depend on federal law. *See Ake v. Oklahoma*, 470 U.S. 68, 75 (1985). Stated another way, for a state procedural rule to be independent, the basis of the state court decision cannot be interwoven with or dependent upon federal law. This requirement does not bar the state court from reaching the merits of a federal claim in an alternative holding. *See Harris v. Reed*, 489 U.S. 255, 264 n.10 (1989); *see also Ashe v. Styles*, 39 F.3d 80, 86 (4th Cir. 1994); *Skipper v. French*, 130 F.3d 603, 609 (4th Cir. 1997); *Bush v. Legursky*, 966 F.2d 897, 899 n.4 (4th Cir. 1992); *Felton v. Barnette*, 912 F.2d 92, 96 (4th Cir. 1990). In fact, when a state court denies a defendant's claim with alternative holdings—one procedural and one substantive—the federal habeas court must respect the state law procedural ground for the decision even if it believes the analysis of federal law is incorrect. *See Ashe*, 39 F.3d at 86.

4. Grounds for Avoiding Procedural Bar

A defendant who wishes to avoid application of federal procedural bar must establish cause and prejudice for the default or that a failure to consider the claim will result in a fundamental miscarriage of justice. *See Coleman v. Thompson*, 501 U.S. 722, 750 (1991).

a. Cause and Prejudice

A defendant can avoid federal procedural default if he or she can show cause for the noncompliance with state law and actual prejudice resulting from the alleged violation of federal law. *See Wainwright v. Sykes*, 433 U.S. 72, 84 (1977). These requirements are stated in the conjunctive. *See Engle v. Isaac*, 456 U.S. 107, 134 n.43 (1982).

i. Cause

In order to establish cause, a defendant must show "that some objective factor external to the defense" impeded his or her effort to comply with the state's procedural rule. *Murray v. Carrier*, 477 U.S. 478, 488 (1986). Although the Supreme Court has declined to provide a limited list of circumstances that would justify a finding of cause, *see Smith v. Murray*, 477 U.S. 527, 533–34 (1986), it has stated that the following objective factors constitute cause: (1) unavailability of the claim, (2) ineffective assistance of counsel, and (3) interference by government officials. *See Carrier*, 477 U.S. at 488. The Court also has made it clear that a "tactical" or "intentional" decision to forego a procedural opportunity normally cannot constitute cause. *Amadeo v. Zant*, 486 U.S. 214, 221–22 (1988).

(1) Unavailability of the Claim

Failure to raise a claim during a state proceeding will be excused for cause if the factual or legal basis of the claim "was not reasonably available" to the defendant at the relevant time. *McCleskey v. Zant*, 499 U.S. 467, 494 (1991) (quotation omitted). The United States Supreme Court has applied both legal and factual unavailability to excuse procedural defaults. *See Reed v. Ross*, 468 U.S. 1, 13–20 (1984) (finding cause where at the time of the default, the claim was so novel that its legal basis was not reasonably available to counsel); *see also Williams v. Taylor*, 529 U.S. 420 (2000) (concluding that defendant met the burden of showing diligence in efforts to develop the facts regarding some claims so as to avoid application of 28 U.S.C. § 2254(e)(2) and noting that this conclusion "should suffice to establish cause for any procedural default [he] may have committed"). *But see Smith v. Murray*, 477 U.S. 527, 537 (1986) (rejecting defendant's argument that claim was not reasonably available when, at the time of the default, various forms of it had been "percolating in the lower courts for years"); *Engle v. Isaac*, 456 U.S. 107, 130–34 (1981) ("respondents' claims were far from unknown at the time of their trials").

The Fourth Circuit several times has declined to find the "not reasonably available" standard met. *See Felton v. Barnette*, 912 F.2d 92, 96 (4th Cir. 1990); *Fisher v. Angelone*, 163 F.3d 835, 845 (4th Cir. 1998); *Williams v. French*, 146 F.3d 203 (4th Cir. 1998); *Stockton v. Murray*, 41 F.3d 920, 924–25 (4th Cir. 1994). In one recent, short-lived case, however, it found the standard satisfied. *See Mickens v. Taylor*, 227 F.3d 203 (4th Cir. 2000) (defendant established cause for failing to assert conflict of interest claim where factual basis became available to federal habeas counsel "by chance" when clerk mistakenly gave him confidential records revealing that at the time of the victim's death, lead trial counsel was representing the victim on criminal charges), *rehearing en banc granted, opinion vacated* (October 23, 2000). *Mickens* was scheduled to be heard by an en banc panel of the Fourth Circuit in December 2000.

The futility of making an objection or raising a constitutional question cannot constitute cause. *See Engle*, 456 U.S. at 130; *see also Kornahrens v. Evatt*, 66 F.3d 1350, 1358–59 (4th Cir. 1995).[14]

(2) Ineffective Assistance of Counsel

A defendant can show cause to excuse a procedural default if he or she can establish ineffective assistance of counsel under the *Strickland* standard. *See Murray v. Carrier*, 477 U.S. 478, 488 (1986). Under *Strickland*, counsel is constitutionally ineffective if his or her performance falls below an objective standard of reasonableness and the deficient performance was prejudicial. *See Strickland v. Washington*, 466 U.S. 668 (1984); *see supra* p. 12 (discussing the *Strickland* standard in more detail).

For attorney error to constitute cause, a defendant must first possess a constitutional right to assistance of counsel. *See Coleman v. Thompson*, 501 U.S. 722, 752 (1991). The United States Supreme Court has held that a defendant has no independent federal constitutional right to assistance of counsel in state post-conviction proceedings. *See Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987); *Murray v. Giarratano*, 492 U.S. 1 (1989); *Coleman*, 501 U.S. at 752. It has been suggested that these cases did not decide whether cause may be established by attorney error in situations when state post-conviction review is the first place that a defendant can present a challenge to the conviction. *See* WAYNE R. LAFAVE, JEROLD H. ISRAEL AND NANCY J. KING, 6 CRIMINAL PROCEDURE § 28.4(e) at 66 (1999). In *Mackall v. Angelone*, 131 F.3d 442 (4th Cir. 1997) (en banc), the Fourth Circuit declined to create an exception for such cases. In *Mackall*, defendant contended that he possessed a constitutional right to effective assistance of counsel in his first state habeas proceeding in order to raise claims of ineffective assistance of counsel that he could not raise on direct appeal. Relying on the Supreme Court cases holding that there is no right to effective assistance of counsel in state post-conviction proceedings, the Fourth Circuit rejected defendant's contention. *Accord Hill v. Jones*, 81 F.3d 1015 (11th Cir. 1996); *Bonin v. Calderon*, 77 F.3d 1155 (9th Cir. 1996); *Nolan v. Armontrout*, 973 F.2d 615 (8th Cir. 1992).

Whether a federal constitutional right to counsel exists where counsel is required under state law is a question that has been considered but not decided by the Fourth Circuit. In *Ashe v. Styles*, 67 F.3d 46 (4th Cir. 1995), defendant procedurally defaulted a claim that his due process rights were violated because he did not receive the benefit of his plea bargain with the state of North Carolina. Attempting to establish cause to overcome his default, defendant argued that state law guarantees indigent felons the assistance of counsel in MAR proceedings. Defendant continued, arguing that he was denied due process by virtue of the failure of the state to provide counsel when counsel was required by state law. Accordingly, he concluded, "[a]t that level, it is not merely a violation of state law, but rather a federal constitutional violation." *Id.* at 50. The Fourth Circuit declined to rule on the defendant's argument, rejecting his claim on the merits.

A claim of ineffective assistance of counsel must be presented to a state court as an independent claim before it can be asserted as cause for procedural default. *See Murray*, 477 U.S. at 489; *Williams*, 146 F.3d at 210 n.9 (quoting *Murray*); *Pruett v. Thompson*, 996 F.2d 1560, 1570 (4th Cir. 1993) (same). The courts reason that if a defendant could raise a claim of ineffective assistance for the first time in federal habeas to show cause for a procedural default, the federal court would be in the "anomalous position" of adjudicating a claim for which state court review might still be available, thus violating the exhaustion doctrine. *Murray*, 477 U.S. at 489.

If the ineffective assistance claim asserted as cause for the procedural default of another claim has been defaulted, the default must be excused on grounds of cause and prejudice or fundamental miscarriage of justice before the ineffective assistance claim can constitute cause for the other claim. *See Edwards v. Carpenter*, 529 U.S. 466 (2000).

The Fourth Circuit has rejected several assertions of ineffective assistance of counsel as grounds to excuse a procedural default. *See Roach v. Angelone*, 176 F.3d 210, 222–23 (4th Cir. 1999) (holding defendant did not establish ineffective assistance under the *Strickland* standard); *Williams*, 146 F.3d at 215–16 (same); *Felton v. Barnette*, 912 F.2d 92, 97 (4th Cir. 1990) (same).

(3) Interference by Government Officials

Interference by officials that makes compliance with the state's procedural rule "impracticable" is an objective factor constituting cause for a procedural default. *McCleskey v. Zant*, 499 U.S. 467, 493–94 (1991). Such interference includes, for example, deliberate concealment by government officials of evidence supporting a claim if that concealment causes the defendant not to assert the claim and thus procedurally default. *See Amadeo v. Zant*, 486 U.S. 214 (1988)

14. For a discussion of the practical difficulty associated with asserting the unavailability ground for cause in light of *Teague v. Lane*, 489 U.S. 288 (1989), and recent changes to 28 U.S.C. § 2254(d), see WAYNE R. LAFAVE, JEROLD H. ISRAEL AND NANCY J. KING, 6 CRIMINAL PROCEDURE § 28.4(e) at 67 (1999).

(upholding district court's finding that officials concealed racial disparity on jury lists and that if defendant's lawyers had known of the facts, they would have challenged the jury composition); *see also Strickler v. Greene*, 527 U.S. 263, 289 (1999) (defendant established cause for failing to raise *Brady* claim where (1) prosecution withheld exculpatory evidence, (2) defendant reasonably relied on prosecution's open file policy as fulfilling the prosecution's duty to disclose such evidence, and (3) the state confirmed defendant's reliance on the open file policy by asserting during state proceedings that defendant had received "everything known to the government").

To some extent, the official interference ground for cause is duplicative of the factual unavailability of the claim ground for cause discussed above, *see supra* pp. 18–19; if government interference prevents a defendant from developing the factual basis of a claim, surely the factual basis is "reasonably unavailable."

(4) Other Possible Bases for Cause

It has been argued that the illiteracy or functional illiteracy of a pro se defendant is sufficient to demonstrate cause. Although the Fourth Circuit has not ruled on the viability of such an argument, *see Forsyth v. Williams*, 1991 WL 10078 *4 (4th Cir. Feb. 4, 1991) (unpublished), it has been rejected by the majority of courts that have considered it. *See Hughes v. Idaho State Bd. of Corrections*, 800 F.2d 905, 909 (9th Cir. 1986); *Henderson v. Cohn*, 919 F.2d 1270, 1272–73 (7th Cir.1990); *Smith v. Newsome*, 876 F.2d 1461, 1465–66 (11th Cir. 1989); *Vasquez v. Lockhart*, 867 F.2d 1056, 1058 (8th Cir. 1988). Such holdings are consistent with *Murray's* mandate that the factors constituting cause must be "objective" ones "external to the defense." *Murray v. Carrier*, 477 U.S. 478, 488 (1986).

ii. Prejudice

A defendant must show actual prejudice resulting from the error of which he or she complains; a possibility of prejudice is not enough. *See United States v. Frady*, 456 U.S. 152, 170 (1981). Where a trial error is claimed, the defendant must show that the error "worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *Id.* at 170.

Once a federal habeas court finds that the defendant lacks cause for his or her default, it ordinarily does not consider whether the defendant also suffered actual prejudice. *See Kornahrens v. Evatt*, 66 F.3d 1350, 1359 (4th Cir. 1995); *Cole v. Stevenson*, 620 F.2d 1055, 1062 (4th Cir. 1980). Because many Fourth Circuit cases are resolved on the cause prong, there are few decisions on the prejudice prong. Thus, aside from the general propositions drawn from Supreme Court cases and stated above, the specifics of this prong of the test have yet to be clarified. Among the unanswered questions is whether the showing of prejudice required to excuse a procedural default is the same as any of the other formulations of prejudicial or harmful error that have been adopted by the Supreme Court. *See, e.g., Strickland v. Washington*, 466 U.S. 668, 694 (1984) ("prejudice" necessary to establish ineffective assistance of counsel claims); *United States v. Bagley*, 473 U.S. 667, 683 (1985) ("materiality" element of *Brady* claim); *see generally* JAMES S. LIEBMAN & RANDY HERTZ, 2 FEDERAL HABEAS CORPUS PRACTICE & PROCEDURE § 26.3c (1998) (discussing the Court's various formulations of prejudicial or harmless error and their relation to the prejudice prong of the procedural default analysis); *Williams v. French*, 146 F.3d 203, 210 n.10 (4th Cir. 1998) (declining to decide whether showing of prejudice required to excuse procedural default is the same as showing required under *Strickland*). One recent Supreme Court case, *see Strickler v. Greene*, 527 U.S. 263 (1999), seems to treat the prejudice standard for procedural default as synonymous with *Brady* materiality. Further litigation on this issue is likely.

To date, prejudice has proved difficult to establish. *See id.* (no prejudice); *Tucker v. Catoe*, 221 F.3d 600, 614–15 (2000) (same), *cert. denied by*, 121 S. Ct. 661 (2000); *Felton v. Barnette*, 912 F.2d 92, 97 (4th Cir. 1990) (same); *Royal v. Taylor*, 188 F.3d 239, 246 (4th Cir. 1999) (same); *Bond v. Procunier*, 780 F.2d 461, 463–64 (4th Cir. 1986) (same).[15]

b. Fundamental Miscarriage of Justice

If a defendant can demonstrate that failure to consider the defaulted claim will result in a fundamental miscarriage of justice, a federal habeas court may review the claim on the merits without regard to the procedural default. *See Murray v. Carrier*, 477 U.S. 478, 495–96 (1986). This exception is concerned with actual innocence, not legal innocence, and is very narrow in scope. *See Calderon v. Thompson*, 523 U.S. 538, 559 (1998).

The test for determining whether a fundamental miscarriage of justice has occurred is whether the defendant is actually innocent of the crime charged, *see Schlup v. Delo*, 513 U.S. 298, 327 (1995), or "actually innocent of the death penalty." *Sawyer v. Whitley*, 505

15. Other federal courts have found the prejudice prong satisfied. *See generally* CHARLES ALAN WRIGHT, ARTHUR R. MILLER AND EDWARD H. COOPER, 17A FEDERAL PRACTICE & PROCEDURE § 4266.1 at p. 465 n. 59 (1988) (citing cases).

U.S. 333 (1992). In order to demonstrate actual innocence of the crime charged where the alleged violation resulted in the fact finder not having before it additional reliable and exculpatory evidence, a defendant "must show that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." *Schlup*, 513 U.S. at 327. To establish ineligibility for capital sentencing, the defendant must show by clear and convincing evidence that but for the error no reasonable juror would have found him or her eligible for the death penalty. *See Calderon*, 523 U.S. at 560.

Procedurally, a claim of actual innocence is not a freestanding constitutional claim but rather a "gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." *O'Dell v. Netherland*, 95 F.3d 1214, 1246 (4th Cir. 1996) (quoting *Herrera v. Collins*, 506 U.S. 390, 404 (1993)), *affirmed on other grounds*, 521 U.S. 151 (1997). The test for actual innocence creates a "demanding burden" for the defendant, *Townes v. Murray*, 68 F.3d 840 (4th Cir. 1995), unmet in the great majority of cases. *See Royal v. Taylor*, 188 F.3d 239, 243–45 (4th Cir. 1999); *Breard v. Pruett*, 134 F.3d 615, 620 (4th Cir. 1998); *Green v. French*, 143 F.3d 865, 894 (4th Cir. 1998), *overruled on other grounds by*, *Williams v. Taylor*, 120 S. Ct. 1495 (2000); *Townes*, 68 F.3d at 846–47; *Mackall v. Angelone*, 131 F.3d 442, 446 n.7 (4th Cir. 1997); *Matthews v. Evatt*, 105 F.3d 907, 916 (4th Cir. 1997); *O'Dell*, 95 F.3d at 1246–54; *Savino v. Murray*, 82 F.3d 593, 603 (4th Cir. 1996); *Epperly v. Booker*, 997 F.2d 1, 10–11 (4th Cir. 1993); *Wise v. Williams*, 982 F.2d 142, 145–46 (4th Cir. 1992); *Bunch v. Thompson*, 949 F.2d 1354, 1367 (4th Cir. 1991). In fact, research reveals no published Fourth Circuit cases excusing procedural default on grounds of fundamental miscarriage of justice.

One final point further complicates the possibility of relief on this ground: the Fourth Circuit has stated that even if the defendant establishes a fundamental miscarriage of justice, the court still may have discretion to decline to review the procedurally defaulted claim. *See O'Dell*, 95 F.3d at 1247 n.27.

B. Implications of Summary and Ambiguous State MAR Decisions on the Federal Habeas Process

When the grounds of a state court decision denying a MAR are ambiguous, a federal habeas court must engage in guesswork to determine whether federal procedural bar applies. This wastes resources and creates the potential for erroneous decision making.

1. Federal Habeas Court Must Engage in Guesswork

The federal rule of procedural bar applies only when the state court denies the MAR on the basis of an adequate and independent state procedural rule. Therefore, being able to determine whether the state decision actually rests on such a rule is critical. *See Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985) ("state court must actually have relied on the procedural bar"); *Skipper v. French*, 130 F.3d 603, 609 (4th Cir. 1997) ("[I]t is not sufficient that the state court could have applied a procedural default under state law; it must actually have done so.").

In some cases, the federal habeas court has no trouble conducting the requisite analysis. *See, e.g.*, *Rogers v. Lee*, 1991 WL 1817 *5 (4th Cir. Jan. 14, 1991) (unpublished) (concluding North Carolina court "explicitly" relied on G.S. 15A-1419(a) bar). In others, this is not the case. The state procedural rule at issue can be difficult to identify and doubts may exist as to whether the rule was actually relied upon. *See Harris v. Reed*, 489 U.S. 255, 262 (1989) (noting that question of whether state court rested its judgment on a procedural default is sometimes difficult to answer); *see also Wilson v. Moore*, 178 F.3d 266, 273 (4th Cir. 1999) (stating that procedural bar "can be difficult to apply when the state court renders an ambiguous order or disposes of the claim in summary fashion"). Consider the following two examples from North Carolina case law.

In a case where the federal habeas court had to determine whether procedural bar applied, it had only the following ruling from the superior court: "Defendant's [MAR] is without merit in that the allegations therein set forth no probable grounds for the relief requested in law or in fact." *Brooks v. N.C. Dep't of Corrections*, 984 F. Supp. 940, 949 (E.D.N.C. 1997).

In another case before the Fourth Circuit on the same determination, the relevant North Carolina ruling stated: "The Court, having thoroughly considered the matters raised in the [MAR] and having determined that none require an evidentiary hearing for determination and that none allow defendant any grounds for relief, the motion is therefore denied." *Skipper*, 130 F.3d at 611–12.

Such summary dispositions present obvious difficulties for a federal habeas court attempting to make the requisite procedural bar findings. Ambiguous decisions present similar challenges. When a state MAR decision discusses federal questions at length and mentions a state law basis only briefly, it may be difficult for the federal habeas court to determine if the state law discussion is an independent basis for

decision or merely a passing reference. *See Coleman v. Thompson*, 501 U.S. 722, 732 (1991). Also, when state MAR decisions purporting to apply state constitutional law derive principles by reference to federal constitutional decisions of the United States Supreme Court, it can be unclear whether the state law decision is independent of federal law. *See id*.

In order to deal with summary and ambiguous state decisions, the federal courts have developed a series of rules to guide their analysis of whether procedural bar applies. The federal habeas court begins by examining the opinion of the last state court presented with the federal claim. *See Ylst v. Nunnemaker*, 501 U.S. 797, 801 (1991). Then, the habeas court applies the conclusive presumption that a state court's denial of a petition for post-conviction relief does not rest on an independent and adequate state ground unless the state court "clearly and expressly" states that its judgment rests on a state procedural default. *Harris*, 489 U.S. at 263. This presumption applies a plain statement rule: absent a plain statement that a decision rests on state-law grounds, the federal habeas court presumes that federal law was the basis for the decision (and consequently that the state decision was not based on adequate and independent state procedural grounds). *See id*. at 262–63 (adopting the plain statement rule of *Michigan v. Long*, 463 U.S. 1032 (1983)). This presumption is subject to a significant qualification; it only applies if the decision of the last state court to which the defendant presented his or her federal claim "fairly appears" to rest "primarily" on federal law or is "interwoven" with federal law. *Coleman*, 501 U.S. at 735, 739. That is, it applies only "in those cases where a federal court has good reason to question whether there is an independent and adequate state ground for the decision." *Id*. at 739.

In determining whether the state decision "fairly appears" to rest on federal law, the federal court looks first for clues in the text of the state decision. *See Skipper*, 130 F.3d at 611. One clue is whether the state ruling mentions federal law. *See Wilson*, 178 F.3d at 273. According to the Fourth Circuit, failure to mention federal law is a "significant indication" that the state order does not rest on such law, even if it does not refer expressly to state law. *Id*. at 274.

Another clue may be found in the language used by the state court in disposing of the claim. *See id*. The Supreme Court has indicated that the state court's use of the word "denied" as opposed to "dismissed" may suggest a disposition on the merits. *See Ylst*, 501 U.S. at 802. The Fourth Circuit has warned, however, that although the terms "deny" or "dismiss" "might provide a hint as to the basis [of] . . . a . . . disposition," a federal habeas court may not "conclude blindly" that a summary "denial" of a habeas petition means that the state court considered the merits. *Wilson*, 178 F.3d at 274. "Context is important," the Fourth Circuit admonished. *Id*. at 274–75. Citing the United States Supreme Court's decision in *Coleman*, 501 U.S. 722, the appellate court noted that the state court's use of the term "dismissal" was deemed significant in that case only because the order expressly indicated that the court was granting the state's motion to dismiss, which was based solely on procedural grounds. *See Wilson*, 178 F.2d at 275. If the text is not dispositive or if it would aid the inquiry, a federal habeas court may look to the procedural posture of the decision, including the motion papers before the court, and, if available, any factually relevant precedent. *See Skipper*, 130 F.3d at 611.

A final rule applied by federal habeas courts attempting to glean meaning from a state court order is the "look[] through" approach of *Ylst v. Nunnemaker*, 501 U.S. 797, 804 (1991). Under *Ylst*, where there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim are presumed to rest upon the same ground. *See id.* at 803. Thus, if an earlier opinion fairly appears to rest primarily upon federal law, the federal court will presume that no procedural default has been invoked by a subsequent unexplained order that leaves the judgment or its consequence in place. *See id.* Where the last reasoned opinion on the claim explicitly imposes a procedural default, the federal court will presume that a later decision rejecting the claim did not silently disregard that bar and consider the merits. *See id*; *see also Boyd v. French*, 147 F.3d 319, 332 (4th Cir. 1998) (applying *Ylst*); *Bush v. Legursky*, 966 F.2d 897, 899–900 (4th Cir. 1992) (same); *Bunch v. Thompson*, 949 F.2d 1354, 1362–63 (4th Cir. 1991) (same). Where a lower state court grants relief on the federal claim and that judgment is reversed in an explained state appellate order, the lower court's opinion offers no clue as to the reasoning behind the appellate court's disposition. *See Thomas v. Davis*, 192 F.3d 445, 453 n.6 (4th Cir. 1999).

2. Inefficiency, Error, and Undermining the State's Interest in Enforcing Its Laws

Armed with the rules set forth above for interpreting state decisions, the federal habeas court may be able to make a confident guess as to the basis of a summary or ambiguous decision. *See, e.g., Coleman v. Thompson*, 501 U.S. 722, 740 (1991) (state court order "fairly appear[ed]" to rest on state law since it "stated plainly" that the court was granting the state's motion to dismiss for untimely filing of the appeal notice). The

requisite analysis, however, creates the possibility for error. If the federal habeas court erroneously concludes that the state court did not apply procedural default and goes on to find for the defendant on the merits, it will order relief. Habeas relief can take a number of forms, including unconditional or conditional release. The latter form requires the state to retry the defendant or take other action sufficient to cure the found violation if it wishes to maintain custody. Thus, if a state court properly rejected a defendant's claims on adequate and independent state procedural default grounds but the federal court could not discern this, the state may be required to retry or release a defendant who otherwise may have been barred from relief because of procedural error. Such a result undercuts the state's interest in enforcing its rules of criminal procedure. *Cf. Coleman v. Thompson*, 501 U.S. 722, 750 (1991) (recognizing "important interest in finality served by state procedural rules, and the significant harm to the States that results from the failure of the federal courts to respect them.").[16] Even if the federal habeas court ultimately rejects the defendant's claims on the merits, there has been a waste of resources in both the state and federal court systems. If the habeas court erroneously concludes that the state court applied procedural default, the defendant may be deprived of the right to seek federal habeas relief and of the opportunity to vindicate important rights. The possibility for error can be avoided if state MAR decisions provide federal habeas courts with the information they need to properly apply their procedural default rule.

III. Guidelines for Opinion Writing in State MAR Proceedings

A. State Court Must Explicitly Mention Procedural Default

In order for the federal habeas court to apply its procedural default rule, it must be able to determine whether the state court relied on a procedural default in denying a MAR and whether the rule is adequate. *See supra* p. 21. It is a simple matter for state courts to be explicit in their reliance on procedural default. The United States Supreme Court has noted that "a state court that wishes to rely on a procedural bar rule in a one-line pro forma order easily can write that 'relief is denied for reasons of procedural default.'" *Harris v. Reed*, 489 U.S. 255, 265 n.12 (1989). Further clarity would result if the specific statutory provision relied upon is expressly mentioned. *See Ashe v. Styles*, 39 F.3d 80, 87 (4th Cir. 1994) (where the North Carolina court denied relief based on G.S. 15A-1419(a), the court noted that "in a perfect world, the order would have indicated with greater clarity whether it was under (a)(1) or (a)(2) that the procedural bar arose").

The following language would achieve the necessary clarity in decisions denying a claim on grounds of procedural default:

> The claim raised in the MAR is denied on grounds of procedural default. Specifically, the claim is denied because [describe the rule relied upon, e.g., the defendant failed to file a timely MAR as required by G.S. 15A-1415(a)]. [Add citation to statutory procedural bar, e.g., G.S. 15A-1419(a)(4) and relevant facts].

Similarly, a state court rejecting an assertion of procedural default should do so expressly, noting the allegedly applicable bar and the court's reasons for rejecting its application.

B. State Court May Reach the Merits in the Alternative

A state court that has found a federal claim defaulted need not fear reaching the merits of the claim in an alternative holding so long as it explicitly invokes the state procedural default as a separate and independent basis for decision. *See supra* p. 18. In fact, in some situations, it may be desirable to include an alternate holding on the merits. One such situation is when the court is applying a procedural bar in a novel circumstance. If the bar is rejected in subsequent proceedings, efficiency will be served by having an alternate ruling on the merits.

The following sample language could be employed in this context:

> [Insert after finding of procedural default.] Notwithstanding the fact that defendant's procedural default is an independently sufficient basis for denying his [or her] claim, this court holds in the alternative that the claim fails on the merits. [Discuss merits of claim.]

C. Procedural Defaults Are Not Immortal

State procedural defaults are not "immortal." *Ylst v. Nunnemaker*, 501 U.S. 797, 801 (1991). If, notwithstanding proper application of a procedural

16. In recent years, the risk of retrial or release has been minimized by the fact that the Fourth Circuit rarely has ordered relief for state prisoners in habeas proceedings.

default by a lower court to deny a defendant's claim, the last state court to be presented with the claim decides it on the merits and disregards the default, that court removes any bar to federal court review that might otherwise have been available. *See id.*

Where a state appellate court excuses a procedural default, it should do so expressly. Where the appellate court wishes to preserve the procedural default but also rule on the merits, it should clearly and expressly adopt the findings of the lower court with regard to procedural default or include its own analysis of procedural default and then state that it is ruling on the merits in the alternative. Such a course will avoid the possibility that an appellate court will inadvertently void a finding of procedural default.

Conclusion

When a state MAR court rules on procedural default, its decision has implications beyond the state proceedings. If the state court finds procedural default has occurred and if the rule relied upon is adequate and independent and the relevant exceptions do not apply, the federal habeas court will enforce the state court's decision and will decline to consider the federal claim on the merits. Where, however, the federal habeas court is unable to discern the basis of the state court decision, inefficiency is created, as is the potential for erroneous decision making (including the erroneous release of state prisoners and the erroneous denial of the federal habeas remedy). All of these undesirable effects can be avoided through clarity in state court opinion writing.

APPENDIX A: STATUTORY APPENDIX
G.S. 15A-1419

§ 15A-1419 When motion for appropriate relief denied.

(a) The following are grounds for the denial of a motion for appropriate relief, including motions filed in capital cases:
   (1) Upon a previous motion made pursuant to this Article, the defendant was in a position to adequately raise the ground or issue underlying the present motion but did not do so. This subdivision does not apply when the previous motion was made within 10 days after entry of judgment or the previous motion was made during the pendency of the direct appeal.
   (2) The ground or issue underlying the motion was previously determined on the merits upon an appeal from the judgment or upon a previous motion or proceeding in the courts of this State or a federal court, unless since the time of such previous determination there has been a retroactively effective change in the law controlling such issue.
   (3) Upon a previous appeal the defendant was in a position to adequately raise the ground or issue underlying the present motion but did not do so.
   (4) The defendant failed to file a timely motion for appropriate relief as required by G.S. 15A-1415(a).

(b) The court shall deny the motion under any of the circumstances specified in this section, unless the defendant can demonstrate:
   (1) Good cause for excusing the grounds for denial listed in subsection (a) of this section and can demonstrate actual prejudice resulting from the defendant's claim; or
   (2) That failure to consider the defendant's claim will result in a fundamental miscarriage of justice.

(c) For the purposes of subsection (b) of this section, good cause may only be shown if the defendant establishes by a preponderance of the evidence that his failure to raise the claim or file a timely motion was:
   (1) The result of State action in violation of the United States Constitution or the North Carolina Constitution including ineffective assistance of trial or appellate counsel;
   (2) The result of the recognition of a new federal or State right which is retroactively applicable; or
   (3) Based on a factual predicate that could not have been discovered through the exercise of reasonable diligence in time to present the claim on a previous State or federal postconviction review.

A trial attorney's ignorance of a claim, inadvertence, or tactical decision to withhold a claim may not constitute good cause, nor may a claim of ineffective assistance of prior postconviction counsel constitute good cause.

(d) For the purposes of subsection (b) of this section, actual prejudice may only be shown if the defendant establishes by a preponderance of the evidence that an error during the trial or sentencing worked to the defendant's actual and substantial disadvantage, raising a reasonable probability, viewing the record as a whole, that a different result would have occurred but for the error.

(e) For the purposes of subsection (b) of this section, a fundamental miscarriage of justice only results if:
   (1) The defendant establishes that more likely than not, but for the error, no reasonable fact finder would have found the defendant guilty of the underlying offense; or
   (2) The defendant establishes by clear and convincing evidence that, but for the error, no reasonable fact finder would have found the defendant eligible for the death penalty.

A defendant raising a claim of newly discovered evidence of factual innocence or ineligibility for the death penalty, otherwise barred by the provisions of subsection (a) of this section or G.S. 15A-1415(c), may only show a fundamental miscarriage of justice by proving by clear and convincing evidence that, in light of the new evidence, if credible, no reasonable juror would have found the defendant guilty beyond a reasonable doubt or eligible for the death penalty.

APPENDIX B: OFFICIAL COMMENTARY

OFFICIAL COMMENTARY TO G.S. 15A-1419

As indicated in the commentary to G.S. 15A-1415, one of the interests in the balance in determining what motions may be made long after the trial is the interest in finality of criminal judgments. The balancing by the Commission included liberality in permitting matters to be raised at times subsequent to the trial, restricted by provisions that once a matter has been litigated or there has been opportunity to litigate a matter, there will not be a right to seek relief by additional motions at a later date. Thus this section provides, in short, that if a matter has been determined on the merits upon an appeal, or upon a post-trial motion or proceeding, there is no right to litigate the matter again in an additional motion for appropriate relief. Similarly, if there has been an opportunity to have the matter considered on a previous motion for appropriate relief or appeal the court may deny the motion for appropriate relief.

There are two exceptions to the rule with regard to the opportunity to present a matter on a previous motion for appropriate relief. The first is the rather obvious one of deprivation of the right to counsel. The other exception relates to a motion made within 10 days after the entry of judgment. The latter exception permits counsel who has moved in open court for a new trial or other relief to come back within 10 days and make additional motions for appropriate relief in the trial court, without being faced with a bar on the basis of not having raised the available grounds when he stood in open court and made his first motion.

Subsection (b) contains the customary provision for the court, in its direction, to grant relief even though the right to relief is barred under the provisions of subsection (a).

Sections similar in import to these are found in New York Criminal Procedure Law in §§ 440.10 and 440.20.

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