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Procedural Default in North Carolina Death Penalty Litigation: An Application of the Independent and Adequate Rule

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Procedural Default in North Carolina Death Penalty Litigation: An Application of the "Independent and Adequate" Rule

No punishment is more final than death. Because a life hangs in the balance, it is imperative that the trial be free of prejudicial error.[1] In spite of this need, the United States Supreme Court has held that an individual sentenced to death may be denied federal review of his conviction in order to show deference to state procedural law.[2] In *Johnson v. Mississippi*,[3] however, the Court severely restricted procedural bars to collateral review when the state court has not followed its rules of procedure consistently concerning a petitioner's standing to appeal his conviction.[4]

This Note reviews *Johnson* and the standard pronounced by the Court for deciding when to grant collateral review. The Note then applies a *Johnson* analysis to the North Carolina Supreme Court's application of state procedural default rules in its review of death penalty cases. The Note concludes that because North Carolina does not strictly or regularly follow its rules, a procedural default should not prevent collateral review of North Carolina death penalty cases by the federal courts.

Samuel Johnson was convicted of murdering a Mississippi highway patrolman and sentenced to death.[5] The statute used to convict him called for a bifurcated proceeding.[6] During the sentencing phase of Johnson's trial, the prosecution's evidence included a New York felony conviction that had been reversed.[7] Johnson did not raise the issue of the erroneous admission of this conviction on direct appeal as required by the Mississippi Code.[8] After his

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1. Batey, *Federal Habeas Corpus Relief and the Death Penalty: "Finality with a Capital F,"* 36 U. FLA. L. REV. 252, 256 (1984); Marshall, *Remarks on the Death Penalty Made at the Judicial Conference of the Second Circuit*, 86 COLUM. L. REV. 1, 1 (1986).

2. Murray v. Carrier, 477 U.S. 478, 491-92 (1986); *see infra* notes 38-41 and accompanying text.

3. 108 S. Ct. 1981 (1988).

4. *Id.* at 1988.

5. *Id.* at 1984.

6. MISS. CODE ANN. § 99-19-101 (Supp. 1987). In *Gregg v. Georgia* the United States Supreme Court held that the eighth amendment was not violated by statutes that required separate trials for guilt and guided discretion sentencing in capital cases: "[Eighth amendment] concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information." Gregg v. Georgia, 428 U.S. 153, 195 (1976) (plurality opinion). For examples of bifurcated trial statutes, see MODEL PENAL CODE § 210.6 (Proposed Official Draft 1962); N.C. GEN. STAT. § 15A-2000 (1988). For a general discussion of capital sentencing schemes in the United States, see Hubbard, *"Reasonable Levels of Arbitrariness" in Death Sentencing Patterns: A Tragic Perspective on Capital Punishment*, 18 U.C. DAVIS L. REV. 1113, 1116-18 (1985).

7. *Johnson*, 108 S. Ct. at 1984-85.

8. *Id.* at 1985. The code states:

> Failure by a prisoner to raise objections, defenses, claims, questions, issues or errors either in fact or law which were capable of determination at trial and/or on direct appeal, regardless of whether such are based on the laws and the Constitution of the State of Mississippi or of the United States, shall constitute a waiver thereof and shall be procedurally barred, but the court may upon a showing of cause and actual prejudice grant relief from the waiver.

death sentence was affirmed on direct appeal,[9] Johnson initiated state collateral proceedings in which he raised the issue of the erroneous admission of the reversed conviction.[10] The Mississippi Supreme Court held that by failing to comply with the code requirement that all assignments of error must be raised on direct appeal, Johnson had waived his right to later review of the claim.[11]

The United States Supreme Court granted certiorari to review the Mississippi court's refusal to rule on the merits of Johnson's claim.[12] The Court, in a unanimous opinion, held that federal courts have the right to determine whether federal review is barred due to a state procedural default ruling.[13] The Court held further that a defendant's failure to follow a state procedural rule does not prevent federal review unless the state courts apply the rule in question on a consistent basis.[14] The Supreme Court held that the Mississippi courts had not only been inconsistent in following the procedural requirement at issue,[15] but also that "the weight of Mississippi law is to the contrary" of the procedural rule applied by the Mississippi court in *Johnson*.[16]

To explain the importance of the issue raised in *Johnson*, a brief summary of the two levels of review available to capital defendants should be noted. As insurance against trial error, the judicial system offers a two-tiered system of review. Although both levels of review are available to any criminal defendant, those sentenced to death are the most likely to utilize all available channels of review due to the gravity of the sentence and the tremendous amount of time spent exhausting the entire system.[17]

After a criminal defendant has been convicted at the trial level, the first tier of judicial review is a direct review of his case through the state appellate sys-

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MISS. CODE ANN. § 99-39-21(1) (Supp. 1987).

9. Johnson v. State, 477 So. 2d 196, 222 (Miss. 1985), *cert. denied*, 476 U.S. 1109 (1986).

10. Johnson v. State, 511 So. 2d 1333, 1336 (Miss. 1987), *rev'd*, 108 S. Ct. 1981 (1988). The motion for state post conviction relief was filed pursuant to Mississippi's Collateral Relief Act. *See* MISS. CODE ANN. §§ 99-39-1 to -29 (Supp. 1987).

11. *Johnson*, 511 So. 2d at 1337.

12. Johnson v. Mississippi, 108 S. Ct. 693 (1988) (granting certiorari). Because the Court determined that the issue had not been defaulted, the Court also ruled on the merits of Johnson's claim. *Johnson*, 108 S. Ct. at 1987.

13. *Johnson*, 108 S. Ct. at 1987. The Court concluded that " 'the question of when and how defaults in compliance with state procedural rules can preclude our consideration of a federal question is itself a federal question.' " *Id.* (quoting Henry v. Mississippi, 379 U.S. 443, 447 (1965)).

14. *Johnson*, 108 S. Ct. at 1987.

15. *Id.* at 1988 ("[W]e cannot conclude that the procedural bar relied on by the Mississippi Supreme Court has been consistently or regularly applied.").

16. *Id.* at 1987. The Court relied on two Mississippi Supreme Court decisions to reach this conclusion. *Id.* at 1987-88 (citing Phillips v. State, 421 So. 2d 476 (Miss. 1982) and Nixon v. State, 533 So. 2d 1078 (Miss. 1987)). In *Phillips* the court held that a sentencing hearing was not the appropriate forum to attack a prior conviction used to enhance a sentence. *Phillips*, 421 So. 2d at 481-82. In *Nixon*, under facts similar to those in *Johnson*, the court held that *Phillips* controlled. *Nixon*, 533 So. 2d at 1099.

17. Collateral review can be an extremely time-consuming process. In a typical example, during the 1987 term the United States Supreme Court granted relief to a federal habeas corpus petitioner sentenced to death more than ten years previously. Amadeo v. Zant, 108 S. Ct. 1771, 1774 (1988). Due to the time-consuming nature of the system, a prisoner receiving a relatively short sentence rarely uses all available levels of review. If the sentence is death, however, the incentive is great to pursue all available channels of review to fully exhaust all constitutional claims.

tem.[18] Most states allow criminal defendants only one appeal as of right, if any.[19] Therefore, once a state appellate court affirms a conviction, any subsequent review at either the state or federal level is discretionary.[20]

Once a conviction is affirmed on direct appeal, a defendant must petition first the state courts[21] and later the federal courts for further review.[22] This second tier is called collateral review. At the state level, collateral review is known by a variety of names;[23] at the federal level, collateral review is sought by a petition for habeas corpus.[24] In death penalty cases collateral review at both the state and federal level may present identical claims. Several Supreme Court justices as well as public opinion contend that such duplication abuses the judicial system.[25] A review of the statistics in recent death penalty cases, however, would seem to refute this claim.

Since 1980, the Supreme Court has reviewed fifty-one capital cases. Of these, twenty-three made their way to the Court via petitions for federal habeas corpus.[26] In nine cases the Court granted relief on the basis of the federal

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18. North Carolina provides for an automatic review of first-degree murder trials by the state supreme court. The statute states:

> The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of North Carolina pursuant to procedures established by the Rules of Appellate Procedure. In its review, the Supreme Court shall consider the punishment imposed as well as any errors assigned on appeal.

N.C. GEN. STAT. § 15A-2000(d)(1) (1988).

19. 24 C.J.S. *Criminal Law* § 1626 (1961); *see, e.g.*, People v. Mulier, 12 Mich. App. 28, 162 N.W.2d 292 (1968) (Michigan constitutional provision allows all criminal defendants one appeal as of right); State v. Legg, 218 W. Va. 401, 151 S.E.2d 215 (1966) (right to review criminal convictions is wholly at the discretion of the state); N.C. GEN. STAT. § 15A-1444 (1988) (defendant found guilty of a crime is allowed an appeal as of right once the final judgment has been entered).

20. 24 C.J.S. *Criminal Law* § 1626 (1961).

21. In North Carolina a defendant petitions for collateral review by filing a motion for appropriate relief. *See* N.C. GEN. STAT. § 15A-1411 (1988). The statute states in relevant part: "Relief from errors committed in the trial division, or other post-trial relief, may be sought by a motion for appropriate relief." *Id.* at § 15A-1411(a).

22. Under the federal habeas corpus statute, "[t]he Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a) (1982).

23. These names include "motion for appropriate relief," N.C. GEN. STAT. § 15A-1411 (1988), "motion for post-conviction collateral relief," MISS. CODE ANN. § 99-39-9 (1984), and "writ of habeas corpus," CAL. PENAL CODE § 12-1474 (West 1982).

24. 28 U.S.C. § 2254 (1982).

25. Marshall, *supra* note 1, at 5 n.14; *see also* Note, *Summary Processes and the Rule of Law: Expediting Death Penalty Cases in the Federal Courts*, 95 YALE L.J. 349 (1985) (attempts to expedite the process violate the basic components of the judicial system and deny due process); Address by Associate Justice (retired) Lewis F. Powell, Criminal Justice Section American Bar Association (Aug. 7, 1988) (abuse is inherent in the time delays that accompany collateral review) (copy on file at North Carolina Law Review).

26. *See* Franklin v. Lynaugh, 108 S. Ct. 2320 (1988); Maynard v. Cartwright, 108 S. Ct. 1853 (1988); Amadeo v. Zant, 108 S. Ct. 1771 (1988); Lowenfeld v. Phelps, 108 S. Ct. 546 (1988); Burger v. Kemp, 107 S. Ct. 3114 (1987); Sumner v. Shuman, 483 U.S. 66 (1987); Ricketts v. Adamson, 483 U.S. 1 (1987); Hitchcock v. Dugger, 481 U.S. 393 (1987); McCleskey v. Kemp, 481 U.S. 279 (1987); Smith v. Murray, 477 U.S. 527 (1986); Ford v. Wainwright, 477 U.S. 399 (1986); Darden v. Wainwright, 477 U.S. 168 (1986); Lockhart v. McCree, 476 U.S. 162 (1986); Turner v. Murray, 476 U.S. 28 (1986); Cabana v. Bullock, 474 U.S. 376 (1986); Francis v. Franklin, 471 U.S. 307 (1985); Wainwright v. Witt, 469 U.S. 412 (1985); Strickland v. Washington, 466 U.S. 668 (1984); Wainwright v. Goode, 464 U.S. 78 (1983); Barefoot v. Estelle, 463 U.S. 880 (1983); Zant v. Stephens, 456 U.S. 410

habeas petition.[27] During the 1987 term alone, four of the eight capital cases reviewed by the Court reached the Court on federal collateral review.[28] Two other cases reached the Court on state collateral review.[29] The Court granted relief to the capital petitioner in two of the federal cases[30] and in both state cases.[31] As of November 1988, four of the six capital cases for which the Court had granted certiorari originated as federal habeas corpus petitions.[32] The high percentage of capital claimants who reach the Court by federal review does not suggest abuse of the statute; instead, the Court's acceptance of these cases indicates that collateral review is being utilized in a manner consistent with the intent of federal habeas corpus.[33]

Collateral review may be seen as creating tension between a state's right to manage its criminal justice system and the federal judiciary's inherent authority to act as a final check on federal questions.[34] The high court has noted that "[f]ederal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights."[35] Furthermore, "[c]ollateral review of a conviction extends the ordeal of trial for both society and the accused."[36] In spite of such arguments, the Supreme Court has justified the federal habeas proceedings on several grounds, including

> [t]he necessity that federal courts have the "last say" with respect to questions of federal law, the inadequacy of state procedures to raise and preserve federal claims, the concern that state judges may be unsympathetic to federally created rights, [and] the institutional constraints on the exercise of this Court's certiorari jurisdiction to review

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(1983); Hopper v. Evans, 456 U.S. 605 (1982); Estelle v. Smith, 451 U.S. 454 (1981). The Court has granted certiorari in other capital cases after the state court affirmed the defendant's sentence on direct appeal. *See* cases cited *infra* note 32.

27. *See Maynard*, 108 S. Ct. 1853; *Amadeo*, 108 S. Ct. 1771; *Sumner*, 483 U.S. 66; *Hitchcock*, 481 U.S. 393; *Ford*, 477 U.S. 399; *Turner*, 476 U.S. 28; *Cabana*, 474 U.S. 76; *Smith*, 451 U.S. 454.

28. *Lynaugh*, 108 S. Ct. 2320; *Maynard*, 108 S. Ct. 1853; *Amadeo*, 108 S. Ct. 1771; *Lowenfeld*, 108 S. Ct. 546.

29. *Johnson*, 108 S. Ct. at 1986; Yates v. Aiken, 108 S. Ct. 534 (1988).

30. *Maynard*, 108 S. Ct. 1853; *Amadeo*, 108 S. Ct. 1771.

31. *Johnson*, 108 S. Ct. 1981; *Yates*, 108 S. Ct. 534.

32. High v. Zant, 108 S. Ct. 2896 (1988); *Lynaugh*, 108 S. Ct. 2896; Zant v. Moore, 108 S. Ct. 1467 (1988); Dugger v. Adams, 108 S. Ct. 1106 (1988).

33. The Supreme Court has stated that "the essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and that the traditional function of the writ is to secure release from illegal custody." Preiser v. Rodriguez, 411 U.S. 475, 484 (1973). *But see* Barefoot v. Estelle, 463 U.S. 880, 887 (1983) ("The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited.").

34. *See* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821) (United States Supreme Court has appellate jurisdiction on constitutional questions).

35. Engle v. Isaac, 456 U.S. 107, 128 (1986).

36. *Id.* at 126-27; *see also* Murray v. Carrier, 477 U.S. 478, 491-92 (1986) (unchecked collateral review extends risk of "sandbagging" colorable claims on direct appeal); Michigan v. Long, 463 U.S. 1032, 1040-41 (1983) (discussing danger of rendering advisory opinions). For a general discussion of these conflicting interests, see Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963); Catz, *Federal Habeas Corpus and the Death Penalty: Need for a Preclusion Doctrine Exception*, 18 U.C. DAVIS L. REV. 1177 (1985); Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970).

state convictions.[37]

Although the justifications for federal collateral review are strong, it is not an absolute right. In fact, "collateral review [may be] an empty promise for many capital defendants."[38] The Supreme Court "has long recognized that in some circumstances considerations of comity and concerns for the orderly administration of criminal justice require a federal court to forgo the exercise of its habeas corpus power."[39] For example, a federal court has limited discretion to deny habeas review on the basis of comity when the state court's ruling is not on the merits of a claim, but rather is based on "adequate and independent state grounds."[40] The purpose of deference to state court proceedings in this context is to "accord appropriate respect to the sovereignty of the States in our federal system."[41]

One common instance in which federal respect for state law bars collateral review occurs when the state court has relied on a state rule of procedure in ruling on the defendant's claim. Such rulings typically are referred to as "procedural defaults." Specifically, in *Wainwright v. Sykes*[42] the Supreme Court held that, absent a showing of cause and prejudice, a federal court may not review a habeas petitioner's federal claims when the state courts have declined to pass on those claims due to independent and adequate state procedural grounds.[43] In such cases an individual may be barred from federal collateral review of a state court conviction simply because her court-appointed lawyer failed to make a

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37. Kaufman v. United States, 394 U.S. 217, 225-26 (1969).

38. Marshall, *supra* note 1, at 1.

39. Francis v. Henderson, 425 U.S. 536, 539 (1975).

40. Herb v. Pitcairn, 324 U.S. 117, 125 ("This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds."), *decision announced in* 325 U.S. 77 (1945).

41. County Court v. Allen, 442 U.S. 140, 154 (1979). Deference also reflects a jurisdictional limitation in federal courts. The Court has stated that in certain instances review must be denied due to

> the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions.

Pitcairn, 324 U.S. at 125-26.

42. 433 U.S. 72 (1977).

43. *Id.* at 90-91 (federal habeas review denied because of defendant's failure to comply with state contemporaneous objection rule). The *Sykes* court held that the rule constituted independent and adequate grounds because

> [the state rule] in unmistakable terms and with specified exceptions require[d] that the motion to suppress be raised before trial. . . . [A]ll of the Florida appellate courts refused to review petitioner's federal claim on the merits after his trial, and . . . their action in so doing [was] quite consistent with a line of Florida authorities interpreting the rule in question as requiring a contemporaneous objection.

Id. at 85-86; *see* Henry v. Mississippi, 379 U.S. 443, 447 (1965) ("A procedural default which is held to bar challenge to a conviction in state courts, even on federal constitutional grounds, prevents implementation of the federal right."), *cert. denied*, 392 U.S. 931 (1968) (without prejudice to the bringing of federal habeas corpus relief); *see also* Murray v. Carrier, 477 U.S. 478, 482 (1986) (failure to raise error in the petition for appeal in violation of Virginia Supreme Court rule); Smith v. Murray, 477 U.S. 527, 531-33 (1986) (failure to raise issue in petition for appeal in violation of Virginia Supreme Court rule); Engle v. Isaac, 456 U.S. 107, 116 (1982) (failure to comply with state contemporaneous objection rule).

timely objection at trial[44] or because the issue in question was not raised on direct appeal.[45] The result of this procedural default rule is a requirement that the federal courts perform a three-pronged analysis prior to habeas review.[46] The court must determine whether the state grounds for default were independent and adequate, whether there was cause for the default, and whether the petitioner was prejudiced by the court's failure to rule on the merits of the claim.[47] This discussion will be limited to the threshold determination applied in *Johnson* that the state rule be independent and adequate.

To clarify the circumstances under which a procedural default at the state level will bar federal review, the Court has developed a set of guidelines defining what constitutes "independent and adequate" state grounds. Using these guidelines, a state procedural rule that is not firmly established or regularly followed is not entitled to respect as an independent and adequate state ground.[48] Furthermore, a state procedural bar must be applied evenhandedly in similar claims[49] and "clearly announced to defendant and counsel."[50] If the rule is not strictly or regularly followed, or if the state court does not clearly announce it, then the federal courts may rule on the issue that the state court refused to address.[51]

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44. *Sykes*, 433 U.S. at 91-92; *see also Isaac*, 456 U.S. at 124 (failure to challenge jury instruction); *Henry*, 379 U.S. at 446 (failure to object to admission of illegally seized evidence).

45. *See Johnson*, 108 S. Ct. at 1987 (claim that trial court erroneously admitted a reversed conviction defaulted by the state supreme court because defendant failed to raise it on direct appeal); Spinkellink v. Wainwright, 578 F.2d 582, 619-20 (5th Cir. 1978) (court defaulted petitioner's fifth and sixth amendment claims), *cert. denied*, 440 U.S. 976 (1979). In response to this harsh doctrine, some commentators have gone so far as to assert that a death row petitioner should never be barred from federal collateral review. *See* Batey, *supra* note 1, at 271. The Supreme Court has never adopted this position.

46. *See Sykes*, 433 U.S. at 84-86; *see also* Reynolds v. Ellingsworth, 843 F.2d 712, 717 (3d Cir.) (outlining three-pronged test drawn from *Sykes*), *cert. denied*, 109 S. Ct. 403 (1988).

47. *See Sykes*, 433 U.S. at 84-86. This Note will analyze only the requirement that the state court decision be made on independent and adequate grounds, because the standards of this requirement may be applied to an entire class of cases decided under similar rules of state law. *Sykes* allows relief in the face of independent and adequate state grounds upon a showing of cause and prejudice. *Id.* at 90-91. This test, however, must be applied on a case-by-case basis. *See id.* For further Supreme Court analysis of cause and prejudice, see *Carrier*, 477 U.S. at 485-92; *Smith*, 477 U.S. at 533; *Isaac*, 456 U.S. at 110. For general information about a showing of cause and prejudice, see Marcus, *Habeas Corpus after State Court Default: A Definition of Cause and Prejudice*, 53 FORDHAM L. REV. 663 (1985); Note, *Review Barred by Procedural Default:* Murray v. Carrier *and* Smith v. Murray, 100 HARV. L. REV. 240 (1986).

48. James v. Kentucky, 466 U.S. 341, 348-49 (1984) (federal review not prevented by Kentucky rule establishing a distinction between admonitions and instructions, because rule not firmly established or regularly followed); Barr v. City of Columbia, 378 U.S. 146, 149 (1964) (South Carolina procedural rule would not prevent federal review because the state supreme court had applied the rule inconsistently in three other cases litigated during the same two-month period); NAACP v. Alabama *ex rel.* Flowers, 377 U.S. 288, 301-02 (1964) (Alabama rule covering brief preparation not consistently followed and, therefore, not adequate to prevent federal review); *see also* Hathorn v. Lovorn, 457 U.S. 255, 262-63 (1982) (claim under the federal voting rights act reviewed in spite of the fact that it was raised for the first time on appeal); Wheat v. Thigpen, 793 F.2d 621, 624-27 (5th Cir. 1986) (federal claim reviewed because the Mississippi Supreme Court routinely reviewed claims raised for the first time on appeal), *cert. denied*, 480 U.S. 930 (1987).

49. *Hathorn*, 457 U.S. at 263; *Wheat*, 793 F.2d at 627.

50. Henry v. Mississippi, 379 U.S. 443, 448 n.3 (1965), *cert. denied*, 392 U.S. 931 (1968) (without prejudice to the bringing of federal habeas corpus relief).

51. *Johnson*, 108 S. Ct. at 1987; *Barr*, 378 U.S. at 149-50; Reynolds v. Ellingsworth, 843 F.2d 712, 720 (3d Cir.), *cert. denied*, 109 S. Ct. 403 (1988); *Wheat*, 793 F.2d at 626; *see also* Dugger v.

The Court applied this policy in *Ulster County Court v. Allen*.[52] In *Allen* the Supreme Court scrutinized New York statutes to determine whether the contemporaneous objection rule asserted by the New York attorney general constituted independent and adequate state grounds when applied to a post-trial insufficiency of evidence claim.[53] The Court determined that the policy did not qualify as independent and adequate because the New York courts allowed insufficiency of evidence claims to be raised at any time and because the New York court had recognized two exceptions to the contemporaneous objection rule.[54]

In light of *Sykes* and *Allen*, the *Johnson* Court's reliance on an independent and adequate analysis to determine whether to rule on the defendant's federal claim does not break any new legal ground.[55] However, within a year of the unanimous *Johnson* decision, a footnote in *Dugger v. Adams*,[56] a five-to-four decision, purported to clarify "independent and adequate" as used in *Johnson*. In *Adams*, a death penalty case, the United States Court of Appeals for the Eleventh Circuit ruled on a constitutional claim raised by Adams during post-conviction proceedings based on a Supreme Court decision made subsequent to his direct appeal.[57] By raising the issue for the first time on collateral review, Adams violated a Florida rule of procedure.[58] The defendant asserted, and the court of appeals agreed, that this rule was not adequate to bar federal review because Florida courts had reviewed similar claims raised for the first time on appeal in some cases.[59]

Although it ruled against Adams on other grounds, the Supreme Court suggested in a footnote that so long as a procedural rule is applied in the "vast majority of cases," it suffices as independent and adequate state grounds.[60] At first glance it appears that this footnote was intended to broaden the concept of independent and adequate state grounds as enunciated in *Johnson*.[61] Because the Court failed to define what constitutes a "vast majority of cases," however, it

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Adams, 109 S. Ct. 1211, 1217 n.6 (1989) (suggesting that so long as the state court follows the procedural rule in question in the "vast majority of cases," the rule will suffice as independent and adequate state grounds); discussed *infra* notes 56-63 and accompanying text.

52. 442 U.S. 140 (1979). In *Allen* three defendants had been convicted for illegal possession of a firearm pursuant to a New York statute that provided that the presence of a firearm in a vehicle was presumptive evidence of its possession by all of the occupants of the vehicle. *Id.* at 142.

53. *Id.* at 148-52.

54. *Id.* at 150-51 & n.10.

55. *Johnson*'s significance lies in the fact that it is the Supreme Court's first application of an "independent and adequate" analysis to a death penalty case.

In addition to the United States Supreme Court, the lower federal courts also have begun to apply an independent and adequate analysis in deciding whether to rule on federal claims that have been defaulted at the state level. *See Reynolds*, 843 F.2d 712 (federal court collateral review on the merits of a federal claim because the state court's use of a cause and prejudice analysis in ruling on a post-trial motion was inconsistent with other state court authority); Hawkins v. Lefevre, 758 F.2d 866 (2d Cir. 1985) (federal court collateral review of defendant's fifth and fourteenth amendment claims in spite of a violation of the state contemporaneous objection rule).

56. 109 S. Ct. 1211 (1989).

57. *Id.* at 1214.

58. *Id.*

59. *Id.* at 1217 n.6.

60. *Id.*

61. *See supra* notes 14-16 and accompanying text.

is unclear exactly how, if at all, the Court's footnote modifies the *Johnson* standard.[62] Furthermore, it is most unlikely that a "vast majority of cases" standard would be met in a case such as *Johnson*, where the state court clearly has articulated an exception to a procedural rule.[63]

Prior to *Johnson*, two circuit courts of appeal had applied similar analyses to death penalty cases in deciding to rule on the merits of a federal claim defaulted at the state level.[64] The United States Court of Appeals for the Eleventh Circuit considered this issue in *Spencer v. Kemp*.[65] The *Spencer* court ruled that the Georgia Supreme Court's retroactive application of a state habeas statute to a petition filed prior to its enactment did not constitute independent and adequate state grounds that would bar federal review.[66] Adhering to the requirement that any procedural bar be applied consistently,[67] the court held that

> "[n]ovelty in procedural requirements cannot be permitted to thwart review in this court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights." . . .
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> . . . [No] such . . . interpretation of Georgia procedural law . . . [can serve as] an independent and adequate state ground sufficient to preclude federal court consideration of the merits of [petitioner's] claim.[68]

The United States Court of Appeals for the Fifth Circuit also has applied a *Johnson*-type analysis. In *Wheat v. Thigpen*[69] the court reviewed the federal claim of a death row petitioner despite his failure to raise the federal claim on direct appeal.[70] In deciding to rule on the merits of the defendant's claim, the

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62. The only illustration of how the Court defines "vast majority of cases" is found in the facts of *Adams* as stated in the footnote. There the Court cited seventeen cases in which the Florida court had defaulted defendants on similar claims. The Court also distinguished four of the five cases cited by *Adams* as not expressly ruling on the defaulted issue. *Adams*, 109 S. Ct. at 1217 n.6. It is unclear, then, whether the Florida court actually had waived its rule of procedure. Finally, the Court distinguished the fifth case cited by *Adams* as not addressing the rule in question because defendant's failure to raise the issue did not occur on direct appeal, but in a previous state collateral proceeding. *Id.* Thus, under the facts of *Adams*, the Court's modification of independent and adequate to include rules applied in the "vast majority of cases" was unnecessary because there had been no express waiver of the rule by the Florida court.

63. *See supra* note 16 and accompanying text.

64. *See* Wheat v. Thigpen, 793 F.2d 621 (5th Cir. 1986), *cert. denied*, 480 U.S. 930 (1987); Spencer v. Kemp, 781 F.2d 1458 (11th Cir. 1986) (en banc).

65. 781 F.2d 1458 (11th Cir. 1986) (en banc).

66. *Id.* at 1471. James Lee Spencer was convicted of first-degree murder and sentenced to death. *Id.* at 1459. After trial, he filed a timely motion to alter or amend the judgment on several grounds pursuant to Georgia procedural rules. *Id.* When Spencer filed the motion, the Georgia habeas statute included a blanket nonwaiver provision for challenges to the composition of grand or traverse juries, one of Spencer's claims. *Id.* at 1466. In 1975, after petitioner had filed his posttrial motion, the statute was amended to deny the nonwaiver rule. *Id.* at 1468. It is the amended rule that the Georgia court used in its ruling. *Id.*

67. *See supra* notes 48-51 and accompanying text.

68. *Spencer*, 781 F.2d at 1470-71 (quoting NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 457-58 (1958)). The court restricted its analysis to federal claims made prior to the change in the statute. *Id.* at 1471 n.24.

69. 793 F.2d 621 (5th Cir. 1986), *cert. denied*, 480 U.S. 930 (1987).

70. *Id.* at 626-27. Kenneth Wheat was convicted of first-degree murder and sentenced to death. Wheat v. State, 420 So. 2d 229, 230 (Miss. 1982), *cert. denied*, 460 U.S. 1056 (1983). At trial the

court, like the Eleventh Circuit, examined the line of cases requiring consistent application of a procedural rule for it to constitute independent and adequate state grounds.[71] The court noted that "in death penalty cases the [Mississippi Supreme Court] does not consistently follow the narrow scope of review outlined in some of its opinions,"[72] and concluded that because the rule was not "clearly announced or strictly or regularly followed . . . no independent and adequate state grounds exist[ed] to prevent federal review."[73]

In contrast to the holdings of the United States Courts of Appeal for the Fifth and Eleventh Circuits, the Fourth Circuit has neither applied the *Johnson*[74] analysis to an appeal from a death sentence nor considered the North Carolina procedural default rule in a capital context. The court, however, has examined the rule in a noncapital context. In *Cole v. Stevenson*[75] the Fourth Circuit implicitly conducted a threshold "independent and adequate" analysis. In *Cole* the court held that a defendant could not raise a claim on federal review that he had failed to raise on direct appeal in violation of the North Carolina Rules of Appellate Procedure.[76] Although the issue raised in his claim was resolved in Cole's favor prior to the proceeding in question and declared retroactive,[77] the court refused to consider the claim. The court did not use the expression "independent and adequate" in its analysis.[78] It did, however, state that the North Carolina courts consistently had failed to review like claims that had not been raised on direct appeal and routinely reviewed these claims when they had been raised on direct appeal.[79] Because a rule that is followed regularly is also independent and adequate,[80] the court's statement may be viewed as the equivalent of an express independent and adequate analysis.

The Fourth Circuit has failed to do an independent and adequate analysis in other cases. In *Reed v. Ross*[81] both the Fourth Circuit and the Supreme Court appeared to skip the threshold analysis,[82] beginning instead with a "cause and prejudice" analysis.[83] In *Davis v. Allsbrooks*[84] the Fourth Circuit also failed

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prosecutor stated that Wheat would be able to appeal a death sentence, so "it's not like he will be killed tomorrow." *Wheat*, 793 F.2d at 628 n.7. Wheat did not assign the prosecutor's statement as error on direct appeal. *Id.* at 623.

71. *Id.* at 624.

72. *Id.* at 625.

73. *Id.* at 627.

74. *See supra* notes 12-16 and accompanying text.

75. 620 F.2d 1055 (4th Cir.), *cert. denied*, 449 U.S. 1004 (1980). James Lewis Cole was convicted of second-degree murder in 1972. *Id.* at 1056. On direct appeal, defendant failed to raise the issue of improper shifting of the burden of proof, but he later raised the issue in this collateral proceeding. *Id.* Three years after his sentence was affirmed, the Supreme Court ruled that improper burden-shifting constituted a due process violation. Mullaney v. Wilbur, 421 U.S. 684, 704 (1974). The Supreme Court determined that *Mullaney* would apply retroactively in 1977. Hankerson v. North Carolina, 432 U.S. 233, 240 (1977).

76. *Cole*, 620 F.2d at 1063.

77. *See supra* note 75.

78. *See Cole*, 620 F.2d at 1060.

79. *Id.*

80. *See supra* notes 48-54 and accompanying text.

81. 468 U.S. 1 (1984).

82. *See supra* note 47 and accompanying text.

83. *Reed*, 468 U.S. at 11. Pursuant to the rule enunciated in *Wainwright v. Sykes*, a cause and

to apply this threshold test. Instead, after determining that a federal claim is deemed procedurally defaulted at the state level even when the state court also gave an alternative holding on the merits, the court moved directly to a cause and prejudice analysis.[85]

By not performing a threshold independent and adequate analysis, these two cases suggest that the Fourth Circuit considers North Carolina's procedural default rule to constitute independent and adequate state grounds. In *Richardson v. Turner*,[86] however, the court implied, by remanding petitioner's case to state court to exhaust his remedies, that the North Carolina procedural bar is not consistently applied[87] and, therefore, not independent and adequate.[88] In *Turner* the court rejected the "futility of exhaustion" doctrine that applies when a state court so consistently applies a procedural bar that returning a petitioner to state court inevitably would lead to a procedural ruling against her.[89] The court relied upon the "interest of justice and for good cause shown" exception[90] expressly stated in the North Carolina collateral review statute[91] in determining that the futility of exhaustion doctrine did not apply.[92] By highlighting this exception and remanding the case, the Fourth Circuit recognized that a state court remedy may have been available in spite of the procedural default.[93] The existence of a state court remedy suggests that the procedural rule is not consistently followed as required under *Johnson*.[94]

Thus, while one line of Fourth Circuit authority implies that in North Carolina a procedural bar rises to the level of an independent and adequate state ground,[95] at least one decision, *Richardson*, recognizes exceptions to procedural default in this state.[96] Furthermore, the Fourth Circuit never has considered

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prejudice analysis must follow a threshold determination that the state procedural grounds are independent and adequate. *See supra* note 47 and accompanying text. Although the Fourth Circuit held that sufficient cause existed, the Supreme Court held to the contrary. *Reed*, 468 U.S. at 11.

84. 778 F.2d 168 (4th Cir. 1985).

85. *Id.* at 176.

86. 716 F.2d 1059 (4th Cir. 1983). Norbert Glen Richardson was convicted of rape, a crime against nature, and felonious breaking and entering. His two unexhausted claims were ineffective assistance of counsel and error in making his three sentences run consecutively. *Id.* at 1060.

87. *Id.* at 1062.

88. *See supra* notes 48-51 and accompanying text.

89. *Richardson*, 716 F.2d at 1062; *see also* Engle v. Isaac, 456 U.S. 107, 125 (1982) (Ohio procedural bar makes state court relief unavailable to petitioner).

90. *Richardson*, 716 F.2d at 1062.

91. The statute outlines various procedural grounds that may be used to deny a motion for appropriate relief. It provides, however, that "in the interest of justice and for good cause shown [the court] may in its discretion grant the motion [in spite of these procedural grounds] if it is otherwise meritorious." N.C. GEN. STAT. § 15A-1419 (1988).

92. *Richardson*, 716 F.2d at 1060 n.1.

93. *Id.* at 1061-62. The court distinguished *Engle v. Isaac* and held that North Carolina law more closely resembled that of New Jersey, where the Court of Appeals for the Third Circuit applying New Jersey law held that " 'in the absence of a state court decision clearly foreclosing [relief on the potentially defaulted issue], we cannot conclude that petitioner has demonstrated compliance with the exhaustion requirement.' " *Id.* at 1062 (quoting Santana v. Fenton, 685 F.2d 71, 75 (3d Cir. 1982), *cert. denied*, 459 U.S. 1115 (1983)).

94. *See supra* notes 12-16 and accompanying text.

95. *See supra* notes 75-85 and accompanying text.

96. *See supra* notes 86-94 and accompanying text.

North Carolina capital cases as a separate and distinct class to which different standards of review may apply in determining whether to defer to the state court's procedural default. An examination of capital litigation in North Carolina over the last ten years reveals that although the North Carolina Supreme Court has applied procedural bars in some instances, it has done so inconsistently.[97] Under a *Johnson* analysis, such procedural defaults should not be used to bar federal review of North Carolina capital cases.

An understanding of the North Carolina Supreme Court's application of procedural default to capital cases requires a brief explanation of the rule itself. The most common form of procedural default occurs when a defendant fails to preserve an issue for appeal at the trial level. An issue is preserved by making a specific objection to any erroneous trial conduct at the time it occurs.[98] The policy behind the contemporaneous objection rule is to afford the trial judge adequate opportunity to remedy the error at the time it is made.[99] The rule is codified in the North Carolina General Statutes,[100] is stated in a rule of appellate procedure,[101] and is present in the common law.[102] The North Carolina Supreme Court has relied on all three sources in making procedural default rulings in death penalty cases.[103]

A review of the different ways that the North Carolina Supreme Court handles unpreserved issues illustrates the court's inconsistent use of the contemporaneous objection rule on direct review of capital cases.[104] When faced with a defendant's failure to preserve an issue, the North Carolina Supreme Court has two options when ruling on the potentially defaulted claim. The court can find that the defendant has defaulted the claim and decline to rule on the merits of the claim,[105] or the court can make a discretionary review of the claim.[106]

The court's first option is to apply the procedural default rule so that the defendant effectively is barred from relief on the unpreserved issue. The court

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97. Most frequently the court applies the contemporaneous objection rule to bar review of claims raised in capital proceedings. *See infra* note 98 and accompanying text. This discussion will be limited to procedural bars that rely on this rule.

98. N.C. GEN. STAT. § 15A-1446 (1988); N.C. R. APP. P. 10(b)(2). A defendant may default a claim by failing to comply with other procedural rules. This discussion will be limited to the contemporaneous objection rule as it appears the most frequently in appellate review of capital cases. *See, e.g.*, State v. Stokes, 319 N.C. 1, 14, 352 S.E.2d 653, 659 (1987); State v. Rogers, 316 N.C. 203, 231, 341 S.E.2d 713, 729 (1986); State v. Noland, 312 N.C. 1, 14, 320 S.E.2d 642, 651 (1984), *cert. denied*, 469 U.S. 1230; State v. McDougall, 308 N.C. 1, 9, 301 S.E.2d 308, 314 (1983).

99. N.C. GEN. STAT. § 15A-1446 official commentary (1988).

100. *Id.* § 15A-1446(a)-(b).

101. N.C. R. APP. P. 10(b)(2).

102. *See* State v. White, 307 N.C. 42, 51, 296 S.E.2d 267, 272 (1982); State v. Brock, 305 N.C. 532, 536-37, 290 S.E.2d 566, 570 (1982).

103. *See, e.g.*, State v. Robbins, 319 N.C. 465, 525, 356 S.E.2d 279, 314 (N.C. GEN. STAT. § 15A-1446(a) (1988)), *cert. denied*, 108 S. Ct. 269 (1987); State v. Rogers, 316 N.C. 203, 231, 341 S.E.2d 713, 729-30 (1986) (N.C. R. APP. P. 10(b)(2)), *overruled on other grounds*, State v. Vandiver, 321 N.C. 570, 364 S.E.2d 373 (1988); State v. Noland, 312 N.C. 1, 14, 320 S.E.2d 642, 651 (1984) (common law), *cert. denied*, 469 U.S. 1230 (1985).

104. *See infra* notes 124-43 and accompanying text.

105. *See infra* notes 107-14 and accompanying text.

106. The court's discretionary review may use a higher standard of scrutiny. *See infra* notes 115-23 and accompanying text.

may accomplish this bar in one of two ways. The first way is to hold that the defendant waived his claim and deny review. On at least three occasions, the court has followed this approach.[107] The second way the North Carolina Supreme Court has handled unpreserved claims has been to declare holdings on both the procedural default issue and on the merits of the claim, ruling against the defendant in both instances. The court has used this approach in at least four cases on three different types of claims.[108] Under the rule set forth in *Davis v. Allsbrooks*,[109] the Fourth Circuit treats holdings based both on procedural grounds and on the merits as procedural defaults.[110] Therefore, absent some exception to the doctrine of deference to state court procedural rulings,[111] these cases would be ineligible for federal habeas review.

With one exception,[112] the North Carolina Supreme Court has applied the contemporaneous objection rule in capital cases without explaining why it chose to do so. The cases cited involve defaulted claims of five different types.[113] Furthermore, the court relies on different types of authority in applying the rule.[114] In summary, there appears to be no common factor among these capital cases to explain why the court singled them out for default rulings.

Although the North Carolina Supreme Court has applied this procedural

107. *Robbins*, 319 N.C. at 525, 356 S.E.2d at 314 (court refused to review defendant's armed robbery conviction on which his felony murder conviction was based because defendant did not object at trial); State v. Stokes, 319 N.C. 1, 14-15, 352 S.E.2d 653, 660-61 (1987) (court held that defendant had waived his suppression issue by failing to object to the evidence at trial); State v. Williams, 308 N.C. 47, 60, 301 S.E.2d 335, 344 (court refused to rule on the merits of defendant's claim that his confession should have been suppressed because the defendant failed to raise the issue at trial), *cert. denied*, 464 U.S. 865 (1983). Although *Robbins* and *Williams* cited no particular rationale for the court's decision to apply the procedural default rule, in *Stokes* the court stated that defendant's claim had been waived because the defendant failed to object at trial for tactical reasons. *Stokes*, 319 N.C. at 14-15, 352 S.E.2d at 660-61.

108. *Robbins*, 319 N.C. at 525-26, 356 S.E.2d at 314-15 (claim that trial court failed to find mitigating circumstances); State v. Gladden, 315 N.C. 398, 435-36, 340 S.E.2d 673, 696-97 (claim that court failed to find obligatory mitigating circumstance), *cert. denied*, 479 U.S. 871 (1986); State v. Young, 312 N.C. 669, 685, 292 S.E.2d 181, 191 (1985) (claim that an aggravating circumstance admitted during sentencing phase was unconstitutional); State v. Smith, 305 N.C. 691, 701-02, 292 S.E.2d 264, 271 (claim that trial judge made prejudicial misstatements), *cert. denied*, 459 U.S. 1056 (1982).

109. 778 F.2d 168 (4th Cir. 1985).

110. *Id.* at 176; *see supra* notes 84-85 and accompanying text.

111. *See supra* notes 38-47 and accompanying text.

112. The exception is *Stokes*, in which the court ruled that it would default the claim because the defendant's failure to object at trial was deemed a tactical decision. State v. Stokes, 319 N.C. 1, 14-15, 352 S.E.2d 653, 660-61 (1987).

113. The claims defaulted include improper felony conviction, trial judge's failure to suppress evidence, trial judge's improper statements, unconstitutionality of an aggravating circumstance, and failure to find a mitigating circumstance. *See supra* notes 107-08.

114. In three cases the court cited common law authority. *Stokes*, 319 N.C. at 14, 352 S.E.2d at 660 (citing State v. Black, 308 N.C. 736, 303 S.E.2d 804 (1983), as authority); State v. Gladden, 315 N.C. 398, 436, 340 S.E.2d 673, 696 (citing State v. Johnson, 298 N.C. 47, 257 S.E. 2d 597 (1979), as authority), *cert. denied*, 479 U.S. 871 (1986); State v. Williams, 308 N.C. 47, 60, 301 S.E.2d 335, 344 (citing State v. Hunter, 305 N.C. 106, 286 S.E.2d 535 (1982) and State v. Oxendine, 305 N.C. 126, 286 S.E.2d 546 (1982), as authority), *cert. denied*, 464 U.S. 865 (1983). In one case the court cited statutory authority. State v. Robbins, 319 N.C. 465, 525, 356 S.E.2d 279, 314 (citing N.C. GEN. STAT. § 15A-1446(a) (1988), as authority), *cert. denied*, 108 S. Ct. 269 (1987). And in one case the court cited the Rules of Appellate Procedure. State v. Young, 312 N.C. 669, 685, 325 S.E.2d 181, 191 (1985) (citing N.C. R. APP. P. 10(b)(2) as authority).

bar and refused to review some claims in capital cases, frequently the court exercises its second option when faced with unpreserved errors: going forward with a discretionary review of the merits of the case.[115] Discretionary reviews are handled in two ways. Frequently the court has reviewed the claim in spite of the defendant's failure to preserve the error, but has imposed a higher standard of review.[116] This higher standard requires that " 'the *impropriety* of the argument . . . be *gross* indeed in order for [the] Court to hold that a trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument which defense counsel apparently did not believe was prejudicial when he heard it.' "[117]

There seems to be no common characteristic among these cases to explain the court's use of a higher standard of review when errors are not properly preserved. This standard has been applied to at least three different types of claims.[118] Furthermore, the standard is identified by three different names,[119] and while some cases cite judicial authority for its application,[120] at least one case states the standard as a rule of law absent any authority.[121]

The second way that the North Carolina Supreme Court makes a discretionary review in capital cases is to review the unpreserved claims on their merits without imposing a stricter standard of review. In some cases the court does so without any explanation at all.[122] In some other cases, however, the court does explain why it has gone forward with discretionary review in spite of the

115. State v. Brown, 320 N.C. 179, 196, 358 S.E.2d 1, 22 (1987), *cert. denied*, 108 S. Ct. 467 (1988); *Robbins*, 319 N.C. at 487-88, 356 S.E.2d at 292-93; *Gladden*, 315 N.C. at 398, 340 S.E.2d at 685; State v. Huffstetler, 312 N.C. 92, 113, 322 S.E.2d 110, 123 (1984), *cert. denied*, 471 U.S. 1009 (1985); State v. Noland, 312 N.C. 1, 15, 320 S.E.2d 641, 651 (1984), *cert. denied*, 469 U.S. 1230 (1985); *Williams*, 308 N.C. at 75, 301 S.E.2d at 353-54.

116. This standard goes by a variety of names such as "*ex mero motu*," "plain error," and "grossly improper." *See, e.g.*, State v. Holden, 321 N.C. 125, 149, 362 S.E.2d 513, 528-29, 532 (1987) (gross improprieties), *cert. denied*, 108 S. Ct. 2835 (1988); State v. Smith, 320 N.C. 404, 413, 358 S.E.2d 329, 334 (1987) (plain error); State v. Pinch, 306 N.C. 1, 17, 292 S.E.2d 203, 218 (1982) (*ex mero motu* standard), *cert. denied*, 459 U.S. 1056 (1983).

117. State v. Kirkley, 308 N.C. 196, 210, 302 S.E.2d 144, 152 (1983) (quoting State v. Johnson, 298 N.C. 355, 259 S.E.2d 752 (1979)), *overruled on other grounds*, State v. Shank, 322 N.C. 243, 367 S.E.2d 639 (1988).

118. The three types of claims are improper jury instructions, State v. Rogers, 316 N.C. 203, 231, 341 S.E.2d 713, 729-30 (1986), *overruled on other grounds*, State v. Vandiver, 321 N.C. 570, 364 S.E.2d 373 (1988); State v. Hamlet, 312 N.C. 162, 171, 321 S.E.2d 837, 843-44 (1984); State v. Boyd, 311 N.C. 408, 427, 319 S.E.2d 189, 202-03 (1984), *cert. denied*, 471 U.S. 1030 (1985); improper admission of evidence, *Huffstetler*, 312 N.C. at 105, 322 S.E.2d at 118-19, and prosecutorial misconduct, *Holden*, 321 N.C. at 148-49, 362 S.E.2d at 528-29, *Gladden*, 315 N.C. at 425-26, 340 S.E.2d at 685; State v. Maynard, 311 N.C. 1, 32, 316 S.E.2d 197, 205, *cert. denied*, 469 U.S. 963 (1984); State v. Moose, 310 N.C. 482, 492, 313 S.E.2d 507, 514-15 (1984); *Pinch*, 306 N.C. at 17, 292 S.E.2d at 218.

119. *See supra* note 116.

120. *Holden*, 321 N.C. at 149, 362 S.E.2d at 528-29 (citing *Pinch* as authority); State v. Brown, 320 N.C. 179, 196, 358 S.E.2d 1, 12-13 (1987) (citing State v. Johnson, 298 N.C. 355, 259 S.E.2d 752 (1979), as authority), *cert. denied*, 108 S. Ct. 467 (1988); *Hamlet*, 312 N.C. at 172, 321 S.E.2d at 843-44 (citing State v. Craig, 308 N.C. 446, 302 S.E.2d 740 (1983), as authority); *Pinch*, 306 N.C. at 17, 292 S.E.2d at 218 (citing State v. Smith, 294 N.C. 365, 241 S.E.2d 674 (1978), as authority).

121. State v. Zuniga, 320 N.C. 233, 250, 357 S.E.2d 898, 910 (1987).

122. State v. Young, 312 N.C. 669, 684, 325 S.E.2d 181, 190 (1985) (misstatement in jury instructions); State v. Williams, 308 N.C. 47, 77, 301 S.E.2d 335, 350-51 (incorrect form of jury instructions), *cert. denied*, 464 U.S. 865 (1983).

defendant's failure to comply with the contemporaneous objection rule. In at least eight decisions, involving as many different types of claims, the North Carolina Supreme Court expressly stated that review was granted and given in spite of the defendant's failure to comply with the contemporaneous objection rule because the penalty at stake was death.[123]

The foregoing synopsis reveals glaring inconsistencies in the North Carolina Supreme Court's treatment of improperly preserved claims. Like claims are not treated with like standards of review. Specifically, in claims involving the improper admission of evidence, the court has held the defendant to a higher level of review in one case,[124] while giving discretionary review in two cases.[125] In claims involving jury instructions, the court has held four claimants to a higher level of review,[126] while allowing a normal standard of review in five other cases.[127] In claims involving jury selection, the court has applied a high standard of review to two cases,[128] while using a normal standard of review for one other claim.[129]

In addition to applying different standards to like claims, the court has applied different standards of review within the same case. In *State v. Robbins*, the court ruled that the defendant's claims involving his robbery conviction[130] and the trial court's failure to instruct the jury on a mitigating circumstance were barred by procedural default.[131] The court did, however, rule on the merits of Robbins' other unpreserved issues using two different standards of review. The court applied a gross impropriety standard of review[132] to his claim of prosecutorial misconduct, but applied a typical standard to review his jury selec-

123. *Brown*, 320 N.C. at 211, 358 S.E.2d at 13-14 (claim that use of aggravating circumstance was unconstitutional); State v. Robbins, 319 N.C. 465, 487-88, 356 S.E.2d 279, 292-93 (claim that jury selection was improper), *cert. denied*, 108 S. Ct. 269 (1987); *Gladden*, 315 N.C. at 417, 340 S.E.2d at 696 (claim of improper opening statement); *Young*, 312 N.C. at 683, 325 S.E.2d at 190 (claim of improper jury instructions in sentencing phase); State v. Vereen, 312 N.C. 499, 514, 324 S.E.2d 250, 260 (insufficiency of the evidence claim), *cert. denied*, 471 U.S. 1094 (1985); State v. Noland, 312 N.C. 1, 15, 320 S.E.2d 642, 651 (1984) (claim of improper remarks in closing argument), *cert. denied*, 469 U.S. 1230 (1985); State v. Oliver, 309 N.C. 326, 336, 307 S.E.2d 304, 311-12 (1983) (admissibility of evidence, prosecutorial misconduct, and improper sentencing recommendation claims); State v. Jerrett, 309 N.C. 239, 265-66, 307 S.E.2d 339, 352 (1983) (claim of improper jury instructions).

124. State v. Huffstetler, 312 N.C. 92, 105, 322 S.E.2d 110, 118-19 (1984), *cert. denied*, 471 U.S. 1009 (1985).

125. *Brown*, 320 N.C. at 196, 358 S.E.2d at 13-14; State v. McDougall, 308 N.C. 1, 9, 301 S.E.2d 308, 314, *cert. denied*, 464 U.S. 865 (1983).

126. State v. Rogers, 316 N.C. 203, 231, 341 S.E.2d 713, 729-30 (1986), *overruled on other grounds*, State v. Vandiver, 321 N.C. 570, 364 S.E.2d 373 (1988); State v. Hamlet, 312 N.C. 162, 171-72, 321 S.E.2d 837, 843-44 (1984); State v. Boyd, 311 N.C. 408, 427, 319 S.E.2d 189, 202 (1984), *cert. denied*, 471 U.S. 1030 (1985); *Oliver*, 309 N.C. at 336, 307 S.E.2d at 311-12.

127. *Gladden*, 315 N.C. at 427-28, 340 S.E.2d at 696; *Noland*, 312 N.C. at 24, 320 S.E.2d at 656; *Young*, 312 N.C. at 684, 325 S.E.2d at 190; *Jerrett*, 309 N.C. at 263-64, 307 S.E.2d at 352; State v. Williams, 308 N.C. 47, 70, 301 S.E.2d 335, 350-51, *cert. denied*, 464 U.S. 865 (1983).

128. State v. Smith, 320 N.C. 404, 412-13, 358 S.E.2d 329, 334 (1987); State v. Zuniga, 320 N.C. 233, 250, 357 S.E.2d 898, 910 (1987).

129. State v. Robbins, 319 N.C. 465, 487-88, 356 S.E.2d 279, 293, *cert. denied*, 108 S. Ct. 269 (1987).

130. *Robbins*, 319 N.C. at 525, 356 S.E.2d at 314.

131. *Id.*

132. *Id.* at 523-24, 356 S.E.2d at 313.

tion claim.[133] In *State v. Gladden*, the court held the defendant's claim of prosecutorial misconduct to a higher standard,[134] while defaulting his claim of error in jury instructions.[135] In *State v. Young* the court reviewed the defendant's jury instruction claim without comment,[136] but held his prosecutorial misconduct claim to a gross impropriety standard[137] and ruled that his jury instruction claim was defaulted.[138] Finally, in *State v. Brown*, the court inexplicably performed a discretionary review of the defendant's inadmissible aggravating factor claim,[139] while holding him to a gross impropriety standard of review on his prosecutorial misconduct claims.[140]

In light of the foregoing discussion, it is clear that the North Carolina Supreme Court applies a plethora of standards to the review of capital defendants' improperly preserved claims. There is no explanation or line of analysis to determine when the court will apply procedural default to a capital litigant and when review will be allowed. The situation in North Carolina, therefore, parallels the Mississippi court's treatment of default that the United States Supreme Court reviewed in *Johnson*.[141] Like the Mississippi rule that the Supreme Court declared inadequate, the weight of North Carolina law does not apply the contemporaneous objection rule to capital review.[142] Therefore, in light of *Johnson*, the supreme court's hesitancy to default claims on this basis should prevent this form of procedural default from barring federal review.[143]

Unfortunately, some capital litigants still face default rulings. Because the possibility exists that a capital litigant may raise a potentially defaulted claim during federal review, it is imperative, in light of *Johnson*'s consistent application requirement,[144] that the Fourth Circuit recognize that a failure to comply with North Carolina's contemporaneous objection rule does not establish in-

133. *Id.* at 487-88, 356 S.E.2d at 292-93.

134. State v. Gladden, 315 N.C. 398, 423, 340 S.E.2d 673, 685, *cert. denied*, 479 U.S. 871 (1986).

135. *Id.* at 436, 340 S.E.2d at 696-97.

136. State v. Young, 312 N.C. 669, 683-84, 325 S.E.2d 181, 190 (1985).

137. *Id.* at 683, 325 S.E.2d at 189-90.

138. *Id.* at 685, 325 S.E.2d at 191.

139. State v. Brown, 320 N.C. 179, 211, 358 S.E.2d 1, 13-14 (1987), *cert. denied*, 108 S. Ct. 467 (1988).

140. *Id.* at 194, 358 S.E.2d at 12-13.

141. *See supra* notes 7-16 and accompanying text (discussion of *Johnson*).

142. *See supra* notes 124-41 and accompanying text.

143. A recent case further indicates that the North Carolina Supreme Court treats death cases differently. During oral arguments for the court's direct review of *State v. McLaughlin*, Chief Justice James Exum summarily dismissed the attorney general's procedural default argument. Both the Chief Justice and Associate Justice Willis Whichard responded to the attorney general's argument by stating that the court reviews the entire record on appeal because of the severe nature of the punishment. Tape of the oral argument is available from the clerk of the North Carolina Supreme Court. State v. McLaughlin, 323 N.C. 68, 372 S.E.2d 49 (1988).

The Supreme Court recently modified the definition of "independent and adequate" to include state procedural rules applied by the state courts in the "vast majority of cases." Dugger v. Adams, 109 S. Ct. 1211, 1217 n.6 (1989). The discussion herein, *supra* notes 104-142 and accompanying text, in no way undermines this conclusion. The Supreme Court, however, may choose to clarify what constitutes a "vast majority;" the sporadic application of North Carolina's contemporaneous objection rule in death penalty cases, *see supra* notes 104-142 and accompanying text, should not qualify.

144. *See supra* text accompanying note 14.

dependent and adequate state grounds. Once it does so, capital defendants in North Carolina will be guaranteed complete access to all levels of review created to ensure federal constitutional protection.

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