FEDERAL COURTS — HABEAS CORPUS — FOURTH CIRCUIT FAILS TO REACH A JUDGMENT ON THE MERITS OF A CONSTITUTIONAL CLAIM BASED ON THE STATE PROCEDURAL DEFAULT DOCTRINE. — *McNeill v. Polk*, 476 F.3d 206 (4th Cir. 2007).

Recent years have seen a tremendous cutback in the availability of federal habeas review for state prisoners. This trend is the product of Supreme Court jurisprudence[1] and congressional action[2] requiring state prisoners to surmount numerous challenges before federal courts will review their constitutional claims. In addition to the maze of constitutional and statutory restrictions, there are also prudential doctrines that create further hurdles for claimants. Recently, in *McNeill v. Polk*,[3] the Fourth Circuit relied on the prudential doctrine of procedural default[4] in declining to review the merits of a due process claim, thereby denying habeas relief to a state prisoner facing the death penalty. The court, however, failed to assess properly the applicability of the state procedural default doctrine by overlooking considerations that its own prior decisions and the Supreme Court recently addressed. In doing so, the court, as a full panel,[5] did not reach the merits of a constitutional claim brought by an individual sentenced to death. With its decision, the court compounded the confusion as to when a state procedural default is an adequate state ground to preclude federal habeas review and, moreover, affirmed the death sentence of an individual without reaching a judgment on the merits of his constitutional claim.

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[1] *See* Dion Austin Sullivan, *Habeas Corpus: Ending Endless Appeals and the Paradox of the Independent and Adequate State Ground Doctrine*, 11 WHITTIER L. REV. 783, 783 (1990) ("Under the guise of deciding cases to protect the role of state courts in the enforcement of federal law, the Court has constructed increasingly complex requirements that must be met before a federal court can consider the merits of a state prisoner's petition for habeas corpus.").

[2] *See, e.g.*, Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 18, 22, 28, 40, and 42 U.S.C.); *see also* Jordan Steiker, *Habeas Exceptionalism*, 78 TEX. L. REV. 1703, 1704 (2000) ("More recently, . . . Congress has used its power over jurisdiction and remedies in the contexts of immigration and state prisoner litigation to substantially curtail federal review of federal claims.").

[3] 476 F.3d 206 (4th Cir. 2007).

[4] Professor Kermit Roosevelt describes the doctrine as follows: "A litigant who fails to assert a federal right in the manner prescribed by state procedural rules will see his claim rejected on the basis of those rules — a state-law ground that a federal court has very limited power to second-guess." Kermit Roosevelt III, *Light from Dead Stars: The Procedural Adequate and Independent State Ground Reconsidered*, 103 COLUM. L. REV. 1888, 1889 (2003). The rule is dictated by neither the Constitution nor statute. Rather, it is grounded in prudential concerns. *See, e.g.*, Coleman v. Thompson, 501 U.S. 722, 730 (1991) ("In the habeas context, the application of the independent and adequate state ground doctrine is grounded in concerns of comity and federalism."); Catherine T. Struve, *Direct and Collateral Federal Court Review of the Adequacy of State Procedural Rules*, 103 COLUM. L. REV. 243, 246 (2003).

[5] Although two judges reached a decision on the merits, each differing in result, there was no majority opinion on the merits.

In 1992, John McNeill forcibly entered the apartment of his ex-girlfriend Donna Lipscomb and, after an argument, stabbed Lipscomb twelve times in the chest, back, arms, abdomen, and breast.[6] When the police arrived, McNeill readily admitted to the stabbing.[7] At trial, a jury found McNeill guilty of first-degree murder and first-degree burglary.[8] During a recess in the sentencing deliberations, one of the jurors consulted a dictionary to determine the meaning of the term "mitigate" and proceeded to share the dictionary definition with fellow jurors.[9] At sentencing, the jury found one aggravating circumstance, two statutory mitigating circumstances, and seven nonstatutory mitigating factors; after weighing these considerations, the jury unanimously recommended the death penalty for the murder charge.[10] Accordingly, the trial court sentenced McNeill to death for the murder conviction.[11] McNeill's conviction was affirmed on direct appeal by the North Carolina Supreme Court,[12] and his petition for writ of certiorari to the Supreme Court was denied.[13]

McNeill then initiated state postconviction proceedings by filing a motion for appropriate relief (MAR) with the Cumberland County Superior Court.[14] McNeill raised multiple ineffective assistance of counsel claims,[15] as well as two juror misconduct claims, one of which alleged that a juror's consultation with outside sources during deliberation violated his right to due process.[16] McNeill sought to support this claim with two affidavits containing hearsay and an unsworn, signed statement by the juror.[17] The MAR court concluded that the juror misconduct claims were procedurally defaulted because McNeill had failed to comply with a state rule requiring that "[a] motion for appropriate relief . . . must be supported by affidavit or other documentary evidence."[18] Specifically, the MAR court interpreted the rule to require *admissible* evidence, and McNeill's claims — supported

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6 *McNeill*, 476 F.3d at 228 (Gregory, J., dissenting in part and concurring in part).

7 *Id.*

8 *Id.* at 209 (opinion of Shedd, J.).

9 *See id.* at 226 (King, J., concurring in part and concurring in the judgment).

10 McNeill v. Polk, No. 5:00-HC-606-H, 2005 WL 5153834, at *1 (E.D.N.C. Mar. 21, 2005).

11 *Id.* The court sentenced McNeill to life imprisonment for the burglary conviction.

12 State v. McNeill, 485 S.E.2d 284, 290 (N.C. 1997).

13 McNeill v. North Carolina, 522 U.S. 1053 (1998).

14 *McNeill*, 2005 WL 5153834, at *2.

15 *See McNeill*, 476 F.3d at 215. The MAR court considered and denied the ineffective assistance of counsel claims on the merits. *Id.*

16 *See id.* at 224–26 (King, J., concurring in part and concurring in the judgment). The other claim alleged that the failure of a juror to disclose the murder of his half-sister by her boyfriend prejudiced the defendant. *Id.* at 224.

17 *Id.* at 211, 214 (opinion of Shedd, J.). The two affidavits were submitted by law students who had interviewed several of the jurors. *See McNeill*, 2005 WL 5153834, at *5.

18 *McNeill*, 476 F.3d at 211–12 (quoting N.C. GEN. STAT. § 15A-1420(b)(1) (2005)).

only by hearsay and an unsworn statement — were *inadmissible* evidence.[19] In the alternative, the MAR court reviewed the substance of McNeill's juror misconduct claims and found that they failed on the merits.[20] Accordingly, the MAR court denied relief. After the state supreme court declined review,[21] McNeill filed a petition for a federal writ of habeas corpus, which the District Court for the Eastern District of North Carolina denied.[22]

The Fourth Circuit affirmed. Writing for the panel with respect to McNeill's ineffective assistance of counsel claims, Judge Shedd found that the MAR court properly concluded that McNeill's trial representation "was not objectively unreasonable" under *Strickland v. Washington*,[23] and therefore upheld the MAR court's decisions on the claims.[24] Although Judges King and Gregory agreed with Judge Shedd's analysis of the ineffective assistance of counsel claims,[25] the three judges did not agree on the proper analysis of the juror misconduct claims.

Judge Shedd found that McNeill's procedural default precluded federal habeas review on the merits because "a federal habeas court may not review constitutional claims when a state court has declined to consider their merits on the basis of an adequate and independent state procedural rule."[26] Citing *Coleman v. Thompson*,[27] Judge Shedd described the state procedural default test as follows:

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[19] *Id.* Notably, the relevant rule does not explicitly require motions for appropriate relief to be supported by nonhearsay evidence; the interpretation that nonhearsay evidence is required draws in part from a state civil procedure rule requiring affidavits in support of motions for summary judgment to be based on "personal knowledge." *Id.* at 222 (King, J., concurring in part and concurring in the judgment) (quoting N.C. GEN. STAT. § 1A-1, R. 56(e) (2005)) (internal quotation mark omitted).

[20] *Id.* at 218 n.2.

[21] State v. McNeill, 544 S.E.2d 237 (N.C. 2000).

[22] *McNeill*, 2005 WL 5153834, at *25. The court refused to review the juror misconduct claims, finding that the state procedural default constituted an independent and adequate basis for declining review on the merits. *Id.* at *5–7. However, the court granted a certificate of appealability (COA) for two ineffective assistance of counsel claims and one due process claim that was eventually abandoned. *McNeill*, 476 F.3d at 210. On appeal, the Fourth Circuit expanded the COA to include three other issues — two relating to the juror misconduct claims that were initially dismissed, and one relating to the ineffective assistance of counsel claim. *Id.*

[23] 466 U.S. 668 (1984).

[24] *McNeill*, 476 F.3d at 215–18. Judge Shedd applied the AEDPA standards, *see id.* at 211, which state: "An application for a writ of habeas corpus . . . shall not be granted . . . unless the [state] adjudication of the claim resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States . . . ." 28 U.S.C. § 2254(d) (2000).

[25] *McNeill*, 476 F.3d at 218 (King, J., concurring in part and concurring in the judgment); *id.* at 227 n.1 (Gregory, J., dissenting in part and concurring in part).

[26] *Id.* at 211 (opinion of Shedd, J.) (quoting Burket v. Angelone, 208 F.3d 172, 183 (4th Cir. 2000)) (internal quotation marks omitted).

[27] 501 U.S. 722 (1991).

> A state procedural rule is adequate if it is regularly or consistently applied by the state courts, and it is independent if it does not depend on a federal constitutional ruling. Where a state procedural rule is both adequate and independent, it will bar consideration of the merits of claims on habeas review unless the petitioner demonstrates cause for the default and prejudice resulting therefrom or that a failure to consider the claims will result in a fundamental miscarriage of justice.[28]

Applying this test to McNeill's juror misconduct claims, Judge Shedd first found that the state procedural rule was adequate, despite McNeill's showing of five cases in which the rule could have been applied but was not.[29] He distinguished the cases[30] and asserted that "consistent or regular application of a state rule of procedural default does not require that the state court show an undeviating adherence to such rule admitting of no exception."[31] Judge Shedd then noted that McNeill had failed to overcome the procedural error by demonstrating cause for the default.[32] Thus, Judge Shedd declined to reach the merits of the juror misconduct claim.[33]

Judge King concurred in part and concurred in the judgment: although he did not find the juror misconduct claims procedurally defaulted, he concluded that relief should be denied because the claims failed on the merits.[34] In assessing the adequacy of the state rule, Judge King invoked the burden-shifting framework of the Ninth and Tenth Circuits, under which the burden of proving the consistent application of a state procedural rule falls on the state once the defendant has made "specific factual allegations" concerning the rule's inconsistent application.[35] According to Judge King, McNeill had made a "'colorable showing' of the inadequacy of the state procedural rule"[36] and the state had failed to carry its burden;[37] thus, Judge King proceeded to review the substance of McNeill's claims.[38] However, Judge

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[28] *McNeill*, 476 F.3d at 211 (citations omitted).

[29] *Id.* at 212–13.

[30] *See id.* at 213–14.

[31] *Id.* at 213 (quoting Brown v. Lee, 319 F.3d 162, 170 (4th Cir. 2003)) (internal quotation mark omitted).

[32] *Id.* at 214–15.

[33] *Id.* at 215.

[34] *Id.* at 218 (King, J., concurring in part and concurring in the judgment).

[35] *Id.* at 220–21 (quoting Bennett v. Mueller, 322 F.3d 573, 586 (9th Cir. 2003)); *see also* Hooks v. Ward, 184 F.3d 1206, 1217 (10th Cir. 1999).

[36] *McNeill*, 476 F.3d at 221 (King, J., concurring in part and concurring in the judgment) (quoting McCarver v. Lee, 221 F.3d 583, 589 (4th Cir. 2000)).

[37] *Id.*

[38] *Id.* As an alternative justification for reaching the merits, Judge King rejected the view that affidavits in support of motions for appropriate relief must conform to the requirements of affidavits in support of motions for summary judgment. *See id.* at 222; *supra* note 19.

King denied both claims on their merits,[39] and thus joined Judge Shedd's judgment.[40]

Judge Gregory dissented in part and concurred in part.[41] He agreed with Judge King's reasoning that the procedural default should not bar review[42] but would have reached a different result on the merits of McNeill's due process claims. After discussing the special significance of mitigation evidence in capital sentencing,[43] Judge Gregory concluded that he would have granted McNeill an evidentiary hearing to determine whether the juror's consultation with an outside source resulted in any prejudice.[44]

Unfortunately, not much can be gleaned from the fractured opinions in *McNeill* regarding when juror consultation with outside sources violates due process or when a state procedural default is sufficiently adequate to bar federal review of constitutional claims on their merits. The court had at its disposal tools that would have enabled the entire panel, not just two judges, to address the merits of the juror misconduct claim; instead, by failing to incorporate faithfully the many elements of the adequacy inquiry, the court affirmed an individual's death sentence without resolving the merits of his claim.[45]

Although the court articulated the correct standard under *Coleman* regarding when habeas review will be precluded by state procedural default, the court improperly assessed the adequacy of the state procedural rule by disregarding recent precedents from the Supreme Court as well as from its own circuit. Specifically, in determining adequacy, the court looked only to whether state courts had consistently applied the procedural rule; it failed to incorporate the Supreme Court's more expansive understanding of adequacy, which also embraces an as-applied analysis by looking to the specific consequences of the rule. In

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[39] Judge King assessed the merits of the claims under AEDPA standards, and with reference to Supreme Court precedent. *McNeill*, 476 F.3d at 224 (King, J., concurring in part and concurring in the judgment). With regard to the juror misconduct claim concerning dictionary consultation, Judge King noted the absence of governing Supreme Court authority and accordingly invoked a test set forth by the Tenth Circuit in *Mayhue v. St. Francis Hospital of Wichita, Inc.*, 969 F.2d 919, 924 (10th Cir. 1992). *See McNeill*, 476 F.3d at 226 (King, J., concurring in part and concurring in the judgment).

[40] *See McNeill*, 476 F.3d at 227 (King, J., concurring in part and concurring in the judgment).

[41] *Id.* (Gregory, J., dissenting in part and concurring in part).

[42] *Id.* at 228 n.2.

[43] *Id.* at 228 ("[T]he Supreme Court emphasized that the importance of mitigation in a capital sentencing proceeding arises from the vastly different and permanent nature of a death sentence and the need to consider each capital defendant in a particularly individualized way." (citing Lockett v. Ohio, 438 U.S. 586, 605 (1978))).

[44] *Id.* at 231.

[45] Had Judge Shedd reached the merits as well — even if he had found the claim without merit — there would have been an opinion of the court as to whether the juror's consultation with an outside source deprived McNeill of due process.

Lee v. Kemna,[46] the Court recognized that there are instances in which "exorbitant application of a generally sound rule renders the state ground inadequate to stop consideration of a federal question."[47] Under *Lee*, even when a substantively valid state procedural rule has been consistently applied, a constitutional claim defaulted on such state procedures might still warrant habeas review on the merits.[48]

The Fourth Circuit has previously acknowledged *Lee* and incorporated elements of this analysis into its adequacy determinations, making its failure to do so in *McNeill* inconsistent with previous decisions. In *Hedrick v. True*,[49] the court described the adequacy determination as a two-pronged test: a rule is inadequate if it is inconsistently applied *or* if it "is exorbitantly applied to the circumstances at issue."[50] Similarly, in *Wilson v. Ozmint*,[51] the court relied on *Lee* in recognizing the consistent application of the state rule but nevertheless proceeding to inquire into whether the circumstances represented an "exceptional case in which exorbitant application of a generally sound rule renders the state ground inadequate to stop consideration of a federal question."[52] Given these earlier Fourth Circuit decisions incorporating *Lee*'s analysis, it is unclear why the court in *McNeill* failed to apply the same two-pronged test, especially when doing so may have contributed to a more holistic assessment of adequacy and may have caused the panel — in its entirety — to review McNeill's constitutional claims.

Although the validity of *Lee*'s as-applied approach has been disputed,[53] the Supreme Court has often engaged in this type of analysis when determining the adequacy of state procedural rules: "[T]he Court's prior analyses in a variety of branches of adequacy review cover a spectrum that ranges from purely facial to quite fact-

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[46] 534 U.S. 362 (2002).

[47] *Id.* at 376.

[48] *See id.* As Justice Holmes once stated, "Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." Davis v. Wechsler, 263 U.S. 22, 24 (1923).

[49] 443 F.3d 342 (4th Cir. 2006).

[50] *Id.* at 360 (citing *Lee*, 534 U.S. at 376).

[51] 357 F.3d 461 (4th Cir. 2004).

[52] *Id.* at 466 (quoting *Lee*, 534 U.S. at 376) (internal quotation marks omitted). Moreover, several district court decisions have also taken into account the principles set forth in *Lee* to determine the adequacy of a state rule. *See, e.g.*, Smallwood v. Young, 425 F. Supp. 2d 717, 723–24 (E.D. Va. 2006); Schmitt v. True, 387 F. Supp. 2d 622, 633–34 (E.D. Va. 2005).

[53] The *Lee* dissenters criticized the majority for adopting the "flawed analytical approach" of *Henry v. Mississippi*, 379 U.S. 443 (1965), which had first proposed the as-applied analysis, *see id.* at 447–49, but whose approach had not been "further ratified or in fact used to set aside a procedural rule until today." *Lee*, 534 U.S. at 393 (Kennedy, J., dissenting); *see also* Struve, *supra* note 4, at 247–48 (noting that, before *Lee*, *Henry* had been perceived as a radical departure and had been neglected by the Court).

intensive."[54] Moreover, the criticisms of this approach — which generally focus on inconsistencies and increased adjudication costs — are primarily targeted at the institutional weaknesses of the Supreme Court and can be avoided by delegating this analysis to lower federal courts.[55] Thus, had the Fourth Circuit adopted *Lee*'s approach, it would not have raised concerns similar to those that have been expressed about the Supreme Court's use of the as-applied analysis.

In fact, the *Lee* analysis seems particularly well suited to the circumstances of McNeill's case, and applying it might have caused the panel, in its entirety, to evaluate the merits of McNeill's constitutional claims. After all, although *Lee* listed three factors militating in favor of federal review of a procedurally defaulted claim, the Court found substantial compliance to be the most significant.[56] Indeed, McNeill had substantially complied with the North Carolina rule,[57] falling short only because the documentation he submitted was inadmissible evidence. In addition, under the Fourth Circuit's analyses in *Hedrick* and *Wilson*, it is probable that the state rule, even if generally sound, had been exorbitantly applied to McNeill's case,[58] especially given the

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[54] Struve, *supra* note 4, at 249; *see also id.* at 255–64 (cataloguing the levels of fact-specificity the Court has employed in determining procedural adequacy). Indeed, in several cases including *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288 (1964), and *Staub v. City of Baxley*, 355 U.S. 313 (1958), the Court excused procedural defaults after determining that the defendant's actions, although not in perfect compliance with the state rule, satisfied the rule's purpose — an inquiry that necessarily involves a fact-intensive analysis. *See, e.g.*, *Flowers*, 377 U.S. at 297 ("We are at a loss to understand how it could be concluded that the [defendant's essentially complying actions] did not fully meet the requirement [of the rule]."); *Staub,* 355 U.S. at 320 ("To require [the defendant], in these circumstances, to [comply with the state procedural rule] would be to force resort to an arid ritual of meaningless form."). The Court's as-applied analyses in such cases have not received the same criticisms as *Henry*, perhaps because the argument for substantial compliance in *Henry* was entirely "unpersuasive." RICHARD H. FALLON, JR. ET. AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 563 (5th ed. 2003). Moreover, the Court's more intensive inquiries in cases like *Flowers* and *Staub* were likely motivated by a concern that courts in Southern states were blatantly discriminating against the federal rights of black defendants or members of unpopular groups, *see id.* at 551, a concern that was not present in *Lee*.

[55] Employing an as-applied approach necessarily "transform[s] rule-like rules into standard-like rules," which "increase[s] the costs of judicial application." Struve, *supra* note 4, at 277. However, the Supreme Court's employment of an as-applied rule is more costly, as compared to that of lower federal courts, because of the Court's distinct institutional incentives and relevant expertise. *See id.* at 282–85.

[56] *See Lee*, 534 U.S. at 381–82.

[57] Judge King found that McNeill had "complied with the statutory mandate, presenting and filing affidavits in support of both of his juror misconduct claims" and distinguished *Richmond v. Polk*, 375 F.3d 309 (4th Cir. 2004), which turned on the same statute at issue in *McNeill* but in which the defendant had provided no, or irrelevant, documentary evidence. *McNeill*, 476 F.3d at 223 (King, J., concurring in part and concurring in the judgment).

[58] In *Wilson*, the court found an "otherwise sound state rule" to be inadequate to bar federal review when the defendant had substantially complied with the state rule and the state had misled the defendant regarding the applicability of the rule. *See* Wilson v. Ozmint, 357 F.3d 461, 466

difficulties he would have had in gathering admissible evidence from the very jurors whom he was charging with misconduct.[59] Thus, the court in *McNeill* did not thoroughly assess the adequacy of the state procedural rule. The court should have pursued a more rigorous adequacy analysis that incorporated *Lee* and its Fourth Circuit progeny, which not only would have provided guidance to lower courts concerning the applicability of *Lee*, but also might have led the court — as a full panel — to review McNeill's claims on their merits.

Although there is no right to have a federal court review the merits of a federal constitutional claim,[60] some take issue with the state procedural default doctrine: "What needs explanation is not the fact that federal courts can on occasion look through state procedural rules, but rather the idea that a state procedural rule can *ever*, of its own force, prevent federal review of a federal claim."[61] Regardless of the merits of that argument, it is especially problematic when a state procedural rule — of questionable application and whose purposes have been substantially served — blocks federal review of a claim brought by a litigant sentenced to death. In such cases, federal courts should pay special attention to the many intricacies of the state procedural default doctrine and exercise review when they have the tools to do so. Even if such review will not change the resulting death sentence, it will at least give the defendant himself, society as a whole, the sense that he has received meaningful review of his sentence.

(4th Cir. 2004). In contrast, the court in *Hedrick* found the rule to be adequate, even as applied, because the defendant had failed even to raise the issue in his brief. *See* Hedrick v. True, 443 F.3d 342, 362 (4th Cir. 2006). McNeill's situation falls somewhere in between these two extremes but is arguably closer to *Wilson* because McNeill had substantially complied with the requirements and had failed only because of external impediments.

[59] *See McNeill*, 476 F.3d at 223 (King, J., concurring in part and concurring in the judgment) ("[I]t would create a 'classic catch-22' if an MAR defendant were obliged to submit admissible evidence to the MAR court in order to be accorded an evidentiary hearing, when the defendant is seeking the hearing because he cannot, without subpoena power or mechanisms of discovery, otherwise secure such evidence.") (quoting Conaway v. Polk, 453 F.3d 567, 584 (4th Cir. 2006)) (internal quotation marks omitted); *id.* at 230 (Gregory, J., dissenting in part and concurring in part) ("[The] rule effectively hamstrings any defendant who could make a viable claim of juror misconduct, no matter how egregious, but who cannot prove prejudice resulting from that misconduct without the evidence that he might develop in a hearing.").

[60] *See, e.g.*, Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 606 (1981) ("The participation of the state courts in the formulation and application of federal constitutional principles is, after all, the explicit premise of the supremacy clause, and has been deeply engrained in our institutional structure since the beginning." (footnote omitted)).

[61] Roosevelt, *supra* note 4, at 1893; *see also id.* (explaining that the doctrine originally emerged to address independent and adequate state *substantive* grounds).