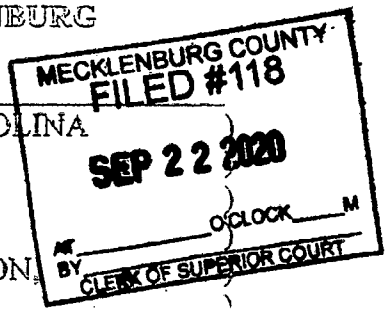
APPENDIX_A

STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
File No. 08-CRS-248884



STATE OF NORTH CAROLINA

v.

MARTY TARELL GASTON,

Defendant.

ORDER

This cause coming on to be heard by the undersigned Resident Superior Court Judge, in chambers, upon *pro se* Defendant's "Motion for Appropriate Relief" (hereafter referred to as "MAR"), pursuant to N.C.G.S. §15A, Article 89, filed August 6, 2019.

After considering the filings and the matters contained therein, and having reviewed the record proper and Court file, the Court makes the following:

Findings of Fact

1. On October 7, 2008, Defendant was indicted on a true bill charging First Degree Murder in violation of N.C.G.S. § 14-17.

2. Defendant was represented at trial by Attorney James Exum.

3. At the conclusion of his trial on July 20, 2012, the jury found Defendant guilty of Second Degree Murder, a Class B2 felony. The Court determined the prior record points of Defendant to be nine (9) and made no written findings because the prison term imposed was within the presumptive range of authorized sentences. Defendant was sentenced to a minimum term of 240 months and a maximum term of 297 months.

4. Defendant timely appealed the conviction and retained the services of Attorneys Noell Tin and Matthew Pruden.

5. On September 3, 2013, the North Carolina Court of Appeals upheld Defendant's conviction, finding no error in the trial court's denial of his request for jury instructions on self-defense and voluntary manslaughter. The Supreme Court of North Carolina subsequently denied discretionary review. *State v. Gaston*, 229 N.C. App. 407, *disc. rev. denied*, 367 N.C. 265 (2013).

6. Defendant filed a *pro se* Motion for Appropriate Relief on October 14, 2014. He alleged ineffective assistance of trial counsel based on Attorney Exum's decision to not present possible evidence of the decedent's past violent behavior. On November 13, 2014, the Honorable Judge W. Robert Bell found Defendant's Motion to be without merit and denied it.

7. On December 11, 2014, Defendant sought review of the denial of his first Motion for Appropriate Relief. The North Carolina Court of Appeals denied Defendant's Petition for Writ of Certiorari on December 29, 2014. Def.'s Memo. of Law in Supp. of Mot. for Appropriate Relief 4, Aug. 6, 2019.

8. In 2015 through 2016, Defendant unsuccessfully pursued a federal habeas corpus claim.

9. On August 6, 2019, Defendant filed the pending MAR along with a "Memorandum of Law in Support of Motion for Appropriate Relief." He claims that his "conviction was obtained in violation of the Constitution of the United States or the Constitution of North Carolina" pursuant to N.C.G.S. § 15A-1415(b)(3).

10. Defendant asserts, pursuant to *Strickland v. Washington*, 466 U.S. 668 (1984), that his appellate counsel was ineffective for two reasons:

    a. "Ineffective assistance of appellate counsel for failing to challenge on direct appeal the refusal of the trial court to give an involuntary manslaughter instruction." Def.'s Memo. of Law in Supp. of Mot. for Appropriate Relief 6, Aug. 6, 2019.

    b. "Ineffective assistance of appellate counsel for failing to raise an ineffective assistance of trial counsel claim during Defendant's direct appeal." *Id.* at 40.

11. The second ground for ineffective assistance of appellant counsel asserts five errors from trial counsel's representation of Defendant. They are as follows:

    a. Trial counsel's failure to interview and prepare the defendant for trial.

    b. Trial counsel's failure to interview the prosecution and defense witnesses prior to trial.

    c. Trial counsel [sic] failure to fully cross examine prosecution witness Leslie Gaither concerning her physical involvement with the defendant during the accidental discharge of the firearm.

    d. Trial counsel's failure to file a motion for exclusion of witnesses during trial prior to testifying.

    e. Trial counsel's failure to research defendant's possible sentencing exposure resulted in defendant's sentence being administered by an erroneous assessment of sentencing factors resulting in a sentencing error.

Id. at 41-42.

12. To establish an ineffective assistance of counsel claim—including appellate counsel—the defendant must satisfy the two-part test set forth by the United States Supreme Court in *Strickland*, and adopted by North Carolina in *State v. Braswell*, 312 N.C. 553, 324 S.E.2d 241 (1985). *State v. Simpson*, 176 N.C. App. 719, 722, 627 S.E.2d 271, 274 (2006).

13. First, a defendant must show that counsel's performance was "deficient"—falling below an objective standard of reasonableness. *Strickland*, 466 U.S. at 687-88. Second, a defendant must show that the deficient performance prejudiced the defense, meaning "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687. However, an error "does not warrant reversal of a conviction unless there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings." *Braswell*, 312 N.C. at 563, 324 S.E.2d at 248.

14. Defendant also claims that his judgment was illegally imposed because it "contained a type of sentence disposition or a term of imprisonment not authorized for the particular class of offense and prior record or conviction level" pursuant to N.C.G.S. § 15A-1415(b)(8). He contends that the sentence imposed was above the presumptive range allowed at the time, but the Court did not stipulate to any deviations or make any written findings to elevate Defendant's sentence into the aggravated range. Def.'s Memo. of Law in Supp. of Mot. for Appropriate Relief 67, Aug. 6, 2019.

15. Defendant requests dismissal or a new trial for any of his charges, a new sentencing hearing, appointment of counsel, and an evidentiary hearing.

Based upon the foregoing findings of fact, the Court makes the following:

Conclusions of Law

1. The Court has the requisite jurisdiction to address the matters contained within Defendant's MAR.

2. Defendant has not established the asserted ground for relief with his second ineffective assistance of appellate counsel allegation.

3. Appellate counsel's failure to challenge the trial court's refusal to give an involuntary manslaughter instruction may constitute error. See *State v. Wallace*, 309 N.C. 141, 146, 305 S.E.2d 548, 552 (1983) (holding that nearly all unintentional killings caused by reckless firearm use, without an intent to discharge the weapon, is involuntary manslaughter) (quoting *State v. Foust*, 258 N.C. 453, 459, 128 S.E.2d 889, 893 (1963)); *State v. Lytton*, 319 N.C. 422, 427-28, 355 S.E.2d 485, 488 (1987) (finding that the trial court should have instructed the jury on involuntary manslaughter when defendant testified that he did not intend to pull the trigger on his second and third shots, did not aim the pistol, and did not intend to shoot the victim).

4. Moreover, an error involving the omittance of an involuntary manslaughter instruction is not cured by a guilty verdict of second degree murder, nor is it cured by the inclusion of an instruction on accident. *Wallace*, 309 N.C. at 146-47, 305 S.E.2d at 552.

5. However, both ineffective assistance of appellate counsel claims in Defendant's pending MAR alleged pursuant to N.C.G.S. § 15A-1415(b)(3) are procedurally barred. N.C.G.S. § 15A-1419(a)(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." *Id.* Defendant had sufficient information to raise his ineffective assistance of appellate counsel claims in his initial Motion for Appropriate Relief from 2014.

6. The fact that Defendant operated in a *pro se* manner in his previous Motion does not excuse the procedural default. *State v. McKenzie*, 46 N.C. App. 34, 39, 264 S.E.2d 391, 395 (1980).

7. Defendant has not demonstrated good cause to excuse this ground for denial, nor has defendant demonstrated actual prejudice resulting from his claims. N.C.G.S. § 15A-1419(b)(1). The ineffective assistance of appellate counsel alleged in the pending MAR does not constitute good cause for Defendant's failure to raise these issues in his 2014 Motion for Appropriate Relief, as Defendant argues. N.C.G.S. § 15A-1419(c)(1)-(3). Furthermore, based on Defendant's filings, he has failed to establish that any mistake raises "a reasonable probability, viewing the record as a whole, that a different result would have occurred but for the error." N.C.G.S. § 15A-1419(d).

8. Defendant has also not demonstrated that failure to consider these claims will result in a fundamental miscarriage of justice. N.C.G.S. § 15A-1419(b)(2). The Court does not find that "more likely than not, but for the error, no reasonable fact finder would have found the defendant guilty of the underlying offense." N.C.G.S. § 15A-1419(e)(1).

9. Moreover, Defendant's MAR does not establish a sentencing anomaly as required by N.C.G.S. §§ 15A-1415(b)(8). The trial court used the appropriate Felony Punishment Chart and properly sentenced Defendant within the presumptive range of possible minimum imprisonment terms for a defendant convicted of a Class B2 felony and with a prior record level of IV.

10. The pending MAR presents only questions of law and is without merit. Accordingly, Defendant's MAR does not require an evidentiary hearing. N.C.G.S. § 15A-1420(c)(1), (3); *see State v. McHone*, 348 N.C. 254, 257, 499 S.E.2d 761, 763 (1998).

IT IS THEREFORE ORDERED:

1. That Defendant's MAR is DENIED.

2. That pursuant to N.C.G.S. § 15A-1419(a)(1)-(4), Defendant's failure to assert any other grounds in this MAR shall be treated in the future as a BAR to any other claims, assertions, petitions, or motions that he might hereafter file in this case.

3. That a filed copy of this order be forwarded by the Clerk of Superior Court of Mecklenburg County to the District Attorney's Office for the Twenty-Sixth Prosecutorial District and to Defendant at his current place of confinement.

This the 17th day of September 2020.

Donnie Hoover
Resident Superior Court Judge
Twenty-Sixth Judicial District

CERTIFICATE OF SERVICE

This is to certify that I have this date served the following parties in interest with a copy of the attached ***Order Regarding Motion for Appropriate Relief*** of the United States Post Office in Charlotte, North Carolina with adequate postage pre-paid, addressed to the following:

Marty Gaston #0142745
Defendant
C/o Maury Correctional Institution
P.O. Box 506
Maury, N.C. 28554

Mr. Spencer Merriweather
Office of the District Attorney
700 East Trade Street
Charlotte, NC 28202

Mecklenburg County Clerk of Superior Court – Criminal Division
Mecklenburg County Courthouse
832 East Fourth Street
Charlotte, NC 28202

This the **22nd** day of **September**, 2020.

Jana Ellison
Judicial Assistant
26th Judicial District – Mecklenburg County
832 East Fourth Street, Suite 9600
Charlotte, NC 28202

On behalf of:
Hon. Lisa Bell, Resident Superior Court Judge

APPENDIX B

North Carolina Court of Appeals

DANIEL M. HORNE JR., Clerk
Court of Appeals Building
One West Morgan Street
Raleigh, NC 27601
(919) 831-3600

Fax: (919) 831-3615
Web: https://www.nccourts.gov

Mailing Address:
P. O. Box 2779
Raleigh, NC 27602

No. P21-8

STATE OF NORTH CAROLINA

VS

MARTY TARELL GASTON

From Mecklenburg
(08CRS24884)

ORDER

The following order was entered:

The petition for writ of certiorari filed in this cause by defendant Marty Tarrell Gaston on 5 January 2021 is denied.

By order of the Court this the 7th of January 2021.

The above order is therefore certified to the Clerk of the Superior Court, Mecklenburg County.

WITNESS my hand and the seal of the North Carolina Court of Appeals, this the 7th day of January 2021.

Daniel M. Horne Jr.
Clerk, North Carolina Court of Appeals

Copy to:
Attorney General, For State of North Carolina
Marty Tarrell Gaston, For Gaston, Marty Tarell
Hon. Elisa Chinn-Gary, Clerk of Superior Court

APPENDIX C

United States District Court
Western District of North Carolina
Charlotte Division

Marty Tarell Gaston,	)	JUDGMENT IN CASE
	)	
Petitioner(s),	)	3:22-cv-00015-MR
	)	
vs.	)	
	)	
State of NC,	)	
Respondent(s).	)	

DECISION BY COURT. This action having come before the Court and a decision having been rendered;

IT IS ORDERED AND ADJUDGED that Judgment is hereby entered in accordance with the Court's June 28, 2022 Order.

June 28, 2022

Frank G. Johns, Clerk
United States District Court

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
CASE NO. 3:22-cv-00015-MR

MARTY TARELL GASTON,	)	
	)	
Petitioner,	)	
	)	**MEMORANDUM OF**
	)	**DECISION AND ORDER**
vs.	)	
	)	
STATE OF NORTH CAROLINA,	)	
	)	
Respondent.	)	
	)	

THIS MATTER comes before the Court on initial review of the Petition for Writ of Habeas Corpus filed by the Petitioner, Marty Tarell Gaston, pursuant to 28 U.S.C. § 2254 on January 11, 2022. [Doc. 1].

I. BACKGROUND

Marty Tarell Gaston (the "Petitioner") is currently serving a sentence of 240 to 297 months of incarceration following a July 20, 2012 conviction in Mecklenburg County Superior Court for second-degree murder. [Doc. 1 at 1-2]; State v. Gaston, 748 S.E.2d 21 (N.C. Ct. App. 2013). The Petitioner filed a direct appeal on grounds that he was entitled to a voluntary manslaughter instruction based on self-defense. The appellate court found no error and upheld the conviction. [Id.]. The Petitioner subsequently filed a petition for discretionary review with the North Carolina Supreme Court and

his request was denied on November 7, 2013. [Doc. 1 at 2-3]; State v. Gaston, 367 N.C. 265 (N.C. 2013).

On October 14, 2014, the Petitioner filed a post-conviction motion for appropriate relief ("MAR") in the Mecklenburg County Superior Court, raising ineffective assistance of trial counsel for failure to present evidence. [Doc. 1 at 3]. The MAR was denied on November 13, 2014. [Id. at 3-4]. The Petitioner then sought certiorari review, which the appellate Court denied on December 29, 2014. [Id. at 17].

On March 17, 2015, the Petitioner filed a § 2254 petition for writ of habeas corpus in this Court on grounds that counsel was ineffective for failing to introduce evidence and that the trial court erred by denying the Petitioner's request for a voluntary manslaughter instruction. See [Docs. 1, 10] of Gaston v. Secretary, N.C. Dept. of Corrections, 3:15-cv-00126 (W.D.N.C.). This Court dismissed the petition on November 16, 2015 as barred by procedural default. Id. The Petitioner sought appellate review and the Fourth Circuit Court of Appeals upheld the dismissal. [Doc. 1 at 18]. The Petitioner then sought certiorari review by the U.S. Supreme Court, and his petition was denied on October 2, 2017. [Id.]; Gaston v. Perry, 138 S.Ct. 190 (Mem.), 199 L.Ed.2d 128 (2017).

The Petitioner filed a second MAR in Mecklenburg County on August 6, 2019 raising ineffective assistance of appellate counsel for failure to challenge the court's refusal to give manslaughter instruction and failure to raise ineffective assistance of trial counsel. [Id. at 4; 39-42]. The court denied the second MAR on September 17, 2020, holding that the Petitioner's claims were procedurally barred because he had sufficient information to raise his claims in his initial MAR filed in 2014. Id. The Petitioner sought certiorari review, which was denied on January 7, 2021. [Doc. 1 at 8; 46].

The Petitioner filed the pending § 2254 petition for writ of habeas corpus on January 6, 2022. [Doc. 1]. The petition raises infective assistance of trial counsel for deficient performance at trial and ineffective assistance of appellate counsel for failing to challenge the trial court's failure to give a voluntary manslaughter instruction. [Doc. 1 at 6-14].

II. DISCUSSION

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") expressly limits a petitioner's ability to attack the same criminal judgment in multiple collateral proceedings. See 28 U.S.C. § 2244(b)(3). Under 28 U.S.C. § 2244(b)((3)(A), "[b]efore a second or successive application ...is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

Id. Failure to obtain authorization from the appellate court deprives the district court of jurisdiction to consider the petitioner's successive petition. Burton v. Stewart, 549 U.S. 147, 153, 127 S.Ct. 793, 166 L.Ed.2d 628 (2007).

This Court dismissed the Petitioner's previous § 2254 petition on March 17, 2015 as barred by procedural default. See [Docs. 1, 10] of Gaston v. Secretary, N.C. Dept. of Corrections, 3:15-cv-00126 (W.D.N.C.). That dismissal was a decision on the merits and any subsequent habeas petition challenging the same conviction is successive under § 2244(b). See Harvey v. Horan, 278 F.3d 370, 379-380 (4th Cir. 2002)(dismissal of habeas petition for procedural default is a dismissal on the merits for purposes of determining whether § 2254 petition is successive).

The Petitioner has not obtained authorization from the appellate court to file a successive habeas petition as required by 28 U.S.C. § 2244(b)(3)(A). The instant § 2254 petition is an effort to challenge his judgment of conviction on grounds that were previously available. Therefore, this Court is without jurisdiction to review the merits of the instant § 2254 petition. As such, the § 2254 petition shall be dismissed.

Pursuant to Rule 11(a) of the Rules Governing Section 2254 Cases, the Court declines to issue a certificate of appealability. See 28 U.S.C. § 2253(c)(2); Miller-El v. Cockrell, 537 U.S. 322, 338 (2003) (in order to satisfy

§ 2253(c), a petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong); Slack v. McDaniel, 529 U.S. 473, 484 (2000) (when relief is denied on procedural grounds, a petitioner must establish both that the dispositive procedural ruling is debatable and that the petition states a debatable claim of the denial of a constitutional right).

IT IS, THEREFORE, ORDERED that:

1. The Petition for Writ of Habeas Corpus [Doc. 1] is **DISMISSED** as an unauthorized successive petition under 28 U.S.C. § 2244(b)(3).
2. Pursuant to Rule 11(a) of the Rules Governing Section 2254 Cases, the Court declines to issue a certificate of appealability.
3. The Clerk of Court is directed to close this case.

IT IS SO ORDERED.

Signed: June 27, 2022

Martin Reidinger
Chief United States District Judge

APPENDIX D

FILED: December 27, 2022

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-6851
(3:22-cv-00015-MR)

MARTY TARRELL GASTON

Petitioner - Appellant

v.

STATE OF NORTH CAROLINA

Respondent - Appellee

J U D G M E N T

In accordance with the decision of this court, a certificate of appealability is denied and the appeal is dismissed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-6851

MARTY TARRELL GASTON,

Petitioner - Appellant,

v.

STATE OF NORTH CAROLINA,

Respondent - Appellee.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. Martin K. Reidinger, Chief District Judge. (3:22-cv-00015-MR)

Submitted: December 20, 2022 Decided: December 27, 2022

Before NIEMEYER and QUATTLEBAUM, Circuit Judges, and FLOYD, Senior Circuit Judge.

Dismissed by unpublished per curiam opinion.

Marty Tarrell Gaston, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Marty Tarrell Gaston seeks to appeal the district court's order dismissing his 28 U.S.C. § 2254 petition as an unauthorized, successive § 2254 petition. The order is not appealable unless a circuit justice or judge issues a certificate of appealability. *See* 28 U.S.C. § 2253(c)(1)(A). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When, as here, the district court denies relief on procedural grounds, the prisoner must demonstrate both that the dispositive procedural ruling is debatable and that the petition states a debatable claim of the denial of a constitutional right. *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012) (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

We have independently reviewed the record and conclude that Gaston has not made the requisite showing. Accordingly, we deny a certificate of appealability and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

DISMISSED

APPENDIX E

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA

MARTY TARELL GASTON Defendant -vs- STATE OF NORTH CAROLINA Respondent	(	MECKLENBURG COUNTY STATE COURT CASE # 08-CRS-24884

MEMORANDUM OF LAW IN SUPPORT OF PETITIONER'S § 2254 MOTION

COMES NOW? Marty Tarell Gaston, pro-se, in good faith seeking redress of defendant's filed Writ of Habeas Corpus, entitled as a Motion For Appropriate Relief within the State of North Carolina, and now within the Federal Court system as a § 2254 petition citing violations and infringements upon his United States Constitutional Rights under the 5th and 6th Amendments involving ineffective assistance of counsel and the right to a fair and impartial trial. As regarded to all citizens of this United States regardless of race, religion, sex, or national origin.

STATEMENT OF THE CASE

This case arises from the shooting death of Larry Gaither ("the decedent"), which occurred at the home of Sheree Thomas, in the early morning hours of October 11, 2008. In which decedent gathered with a number of other individuals at Thomas's home to celebrate Thomas's album release. Between 2:30 and 3:00 a.m. on October 11, a Cadillac car arrived at Thomas's house There were two people in the car. One person identified as the defendant, got out and went inside. When defendant entered the house, he grabbed Thomas by the hair and pulled her upstairs while she

struggled. The decedent became upset and confronted defendant; they exchanged words. Defendant and Thomas continued up the stairs and the two eventually entered a bedroom and closed the door. After hearing a scream, the decedent entered the bedroom with his cousin and others. Defendant was holding Thomas's gun. Defendant's initial statement and trial testimony largely corroborates the events that were described in the preceding paragraph. Defendant admitted to grabbing Thomas's hair, but denied pulling her up the stairs. Defendant testified that, after entering the bedroom with Thomas, he heard the decedent say he was going to his trunk and get a gun...that shoot like a missile. Defendant testified that he got a little scared, picked up Thomas's gun, and opened the door, intending to leave.

When the defendant opened the door, the decedent's sister, Leslie Gaither entered the room and grabbed him around the waist; they began struggling. During the struggle, defendant heard footsteps and recognized the decedent. He testified that "the gun went off at that moment. One time. I didn't aim the gun." He also testified that he did not know anyone had been shot and did not intend to kill Larry Gaither. He stated he did not pull the trigger on purpose, and taht the gun went off accidentally, in corroboration with his initial statement given at the time of arrest.

Argument (Ground One)

All defendant's claims as raised within his MAR filed in the Superior Court arise from a standard of unreasonableness in the manner in which both trial and appellate counsels represented the facts of his case within a very non chalant manner denying the defendant an ample opportunity to a fair and impartial trial through the guarantee of the 5th and 6th Amendments of the

the United States Constitution's guarantee towards a fair and impartial trial associated too through the exercise of the effective representation of counsel.

The North Carolina Court of Appeals, Supreme Court and United States Supreme Court has held that to show ineffective assistance of appellate counsel, defendant must meet the same standards of proving ineffective assistance of trial counsel." State v. Simpson, 176 N.C. App. 719, 722, 627 S.E. 2d 271, 275 (citation omitted), appeal denied 360 N.C. 653, 637 S.E. 2d 191 2006. Under Strickland v. Washington, 466 U.S. 668, 80 L.Ed. 2d 674 (1984), two factor test, "a defendant must show that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense", in order to prevail upon an ineffective assistance of counsel claim State v. Phillips, 365 N.C. 103, 118 711 S.E. 2d 122, 135 (2011) (Citations and quotations marks onitted), cert denied 565 U.S. 1204 1[illegible] 1204 182 L.Ed. 2d 176 (2012). State v. Braswell, 312 N.C. 553, 562-63, 32[illegible] 562-63, 324 S.E. 2d 241, 248 (1985).

Deficient performance may be established by showing that counsel's representation fell below an objective standard of reasonableness. Generally to establish prejudice, adefendant must show that, but for the error of counsel, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. State v. Allen, 360 N.C. 297[illegible] 316, 626 S.E. 2d 271, 286, cert. denied 549 U.S. 867, 166 L.Ed. 2d 116 (2006). "To show prejudice in the context of appellate representation, a petitioner must establish a reasonable probability

he would have prevailed on appeal but for his counsel's unreasonable failure to raise an issue." United States v. Rangel, 781 F.3d 736, 745 (4th Cir. 2015); State v. Spruiell, N.C. App. 798 S.E. 2d 802, 805 (2017).

Attorney Matthew Pruden's appellate brief ignored the fact that defendant's trial counsel, James Exum, had failed to object to the Court's refusal to give an instruction to the jury for involuntary manslaughter, at the moment when the Court stated upon the record during the Charge Conference that it would not. All the evidence presented by the State and testimony of the many witnesses, both prosecution and defense witnesses, along with the initial statements and testimony of the defendant implicated that when the fatal shot was made, the defendant was in a struggle with Leslie Gaither about his waist with both arms around him pushing him back into the bedroom as he opened the door to leave. At this moment also the decedent entered the room as the gun was accidentally discharged striking the decedent and killing him.

Matthew Pruden could have raised this issue under plain error review on direct appeal. Instead Pruden's brief only referenced the Court's refusal to give instructions on voluntary manslaughter and self defense, in light of the fact that these instructions are only to be stipulated when the evidence demonstrates an intentional act to kill on part of a criminal defendant. Gaston's testimony was that he did not intend to kill Larry Gaither.

In State v.Kaalund, 741 S.E. 2d 926 (N.C. Ct. App. 2013) "Involuntary manslaughter is the unintentional killing of a human being without either express or implied malice (1) by some unlawful act not amounting to a felony or naturally dangerous to human life,

or (2) by an act or omission constituting culpable negligence." Wilkerson, 295 N.C. at 579, 247 S.E. 2d at 916; see also State v. McConnaughey, 66 N.C. App. 92, 96 311 S.E. 2d 26, 29 (1984) ("The killing of a human being proximately resulting from the wanton or reckless handling of a firearm but without the intent to discharge the firearm is Involuntary manslaughter."). The killing of a human being proximately resulting from the wanton or wreckless handling of a firearm but without the intent to discharge the firearm is involuntary manslaughter. State v. Wallace, supra, State v. Moore, 275 N.C. 198, 166 S.E. 2d 652 (1969). Careless handling of a loaded firearm has been held to constitute culpable negligence, Wallace 309 N.C. 141 305 S.E. 2d 548 (1983).

Had appellate counsel raised this omission of the court in not giving this instruction to the jury, in light of the evidence presented, under plain error review, there is an overwhelming probability that the outcome of defendant's appeal would have merited a different outcome, more favorable outcome for the defendant. State v. Odom, 307 N.C. 655, 660, 300 S.E. 2d 375, 378 (1983). In order to prevail on a theory of plain error "defendant must convince this Court not only that there was plain error, but that absent the error, the jury would have reached a different result." State v. Haselden, 357 N.C. 1, 13, 577 S.E. 2d 594, 602 (quoting State v. Jordan, 333 N.C. 431, 440, 426 S.E. 2d 692, 697 (1993), quoted in State v. Roseboro, 351 N.C. 536, 553, 528 S.E. 2d 1, 12, cert. denied, 531 U.S. 1019 (2000)), cert. denied 540 U.S. 988 (2003)

Further consideration for such that a different outcome would

have been rendered by the jury, during deliberations, had the court instructed the jury on involuntary manslaughter, cand be substantiated in the fact that the jury requested the given instructions to be administered twice (2) times more, after the initial instructions. The jurors were not willing to convict on a theory of first degree murder based on premeditation and lying in wait. Nor were they willing to acquit based on accident and a finding of not guilty. So the only available alternative to be considered by the jury was second degree murder. Yet it took three separate readings of the instructions to even render this verdict. Had an involuntary manslaughter instruction been given as a lesser included offense, in light of the evidence presented associated with the events leading up to the accidental discharging of the firearm, then this consideration by the jury could have reasonably rendered another alternative verdict and possible outcome for the defendant. A truly meritorious that warranted review on appeal.

Under Strickland and Braswell, defendant did demonstrate appellate counsel's deficient performance in failing to raise this issue on appeal. Appellate counsel's issues raised on appeal concerning the court's refusal to give the jury instructions on self defense and voluntary manslaughter were not appropriate arguments in light of the evidence presented. On both defenses of self defense and voluntary manslaughter a defendant must exert an intent to commit the murderous act. Gaston clearly expressed in his statement and trial testimony that he did not aim the weapon at the decedent, intend to pull the trigger, nor did he intend to kill the decedent. And to further substantiate these facts, the defendant was engaged

in a struggle with the decedent's sister wrestling and tussling against him about his waist, Leslie Gaither, when the firearm was acidentally discharged, striking the decedent.

In State v. Mills, NO. COA 17-147 (May 15, 2018) citing Jones v. Barnes, 463 U.S. 745, 751-52 77 L.Ed. 2d 987, 994 (1983) ("Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues.").

The evidence, considered in light most favorable to the defendant in this case before the Court would permit a ressonable juror to find defendant guilty of involuntary manslaughter. Involuntary manslaughter, which is a lesser included offense of second degree murder, State v. Thomas, 325 N.C. 583, 591, 386 S.E. 2d 555, 559 (1989).involuntary manslaughter is the "unlawful killing of a human being without malice, without premeditation and deliberation, and without intention to kill or inflict serious bodily injury." State v. Drew, 162 N.C. App. 482, 685, 592 S.E. 2d 27, 29 (1989).

A jury charge on involuntary manslaughter in the State of North Carilina entails, "while in the commission of some unlawful act on part of himself, or that decedent's death resulted from culpable or criminal negligence on tha part of the defendant, and that he was acting in a heedless, reckless manner regardless of the consequences of his act, and the death of the deceased ensued, it would be your duty to find him guilty of involuntary manslaughter." State v. Crisp, 244 N.C. 407, 94 S.E. 2d 402 (1956). State v. Lytton, 319 N.C. 422, 427. 335 S.E. 2d 458, 488 (1987)(even though, during a struggle,

defendant had his finger on the trigger of a loaded pistol and intentionally shot a warning shot shot, the trial court should have instructed the jury on involuntary manslaughter when defendant testified that he did not intend to pull the trigger on the second and third shots, did not aim the pistol, and did not intend to shoot the victim .

Here in Gaston's case it would have been possible to find that Gaston acted carelessly and recklessly in his handling of the gun, while Leslie Gaither wrestled and struggled against him, and that his actions proximately resulted in Larry Gaither's death. The jury could have found the defendant guilty of involuntary manslaughter and appellate counsel was ineffective in not raising this cardinal issue on appeal. Prejudice is demonstrated in that appellate's counsel's failure to raise this meritorious issue in light of the preponderance of the evidence supporting such, denied the defendant a reasonable review of his conviction for second degree murder and sentencing for such being a 20 to 24 year sentence. Whereas under plain error review and the issue raised concerning the court's failure to give the involuntary manslaughter instruction, along with credible evidence to support such an instruction, there is a reasonable probability that defendant would have had a successful outcome on appeal. A sentencing for the conviction of involuntary manslaughter, for this defendant is decades lesser than that imposed for second degree murder. Under North Carolina's General Statute § 14-18 Punishment for Manslaughter, it cites:

> Voluntary manslaughter shall be punishable as a Class D Felony and involuntary manslaughter shall be punishable as a Class F felony

The defendant at sentencing had a total of 9 criminal history

points situated under a Prior Record Level of IV. This corresponds under involuntary manslaughter for a Class F crime to a sentencing within the Presumptive Range of 20 to 25 months term of prison. The overall prejudice in comparison to the sentencing exposure for the defendant, in light of a conviction for the lesser included offense of involuntary manslaughter, is overwhelming and demonstrates the necessary showing of deficient performance and actual prejudice need to meet the Strickland and Braswellstandards of ineffective assistance of appellate counsel for not raising this cardinal and relevant issue on appeal.

Argument (Grounds Two thru Four)

Ineffective assistance of counsel claims, within the State Appellate Courts are appropriately raised and reviewed on direct appeal when the cold record reveals that no further investigation is required, i.e. claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing. State v. James, N.C. APP. 774 S.E. 2d 871, 876 (2015), aff'd, 368 N.C. 728, 782 S.E. 2d 509 (2016).

During defendant's trial, defendant was represented by Attorney James Exum. Defendant's issues as will be raised in this context, involve trial counsel's errors during his trial and appellate counsel's failure to raise an ineffective assistance of counsel claim within the defendant's direct review on appeal. The following error will be asserted as follows:

Trial Counsel's failure to interview and prepare the defendant for trial.

Trial counsel's failure to fully cross examine Leslie Gaither a witness for the prosecution, concerning her physical involvement with the defendant during the accidental discharge of the firearm.

Trial counsel failure to research defendant's sentencing being administered by an erroneous assessment of sentencing factors resulting in a sentencing error.

DISCUSSION

The above referenced grounds for consideration of Defendant's MAR filed within the State courts, were denied, but yet not expounded upon for the merits of the claims based on being procedurally barred under the State's procedures in filing a second MAR. At question here for the District Court to consider is the denial of such claims without factoring in the standards of Strickland v Washington, 466 U.S. 668, 80 L.Ed. 2d 674 (1984), two factor test, " a defendant must show that (1) councel's performance was deficient and (2) that deficient performance prejudiced the defense", in order to prevail upon an ineffective assistance of counsel claim. State v. Phillips, 365 N.C. 103, 118 711 S.E. 2d 122, 135 (2011). "To show prejudice in the context of appellate representation, a petitioner must establish a reasonable probability he would have prevailed on appeal but for his counsel's unreasonable failure to raise an issue." United States v. Rangel, 781 F.3d 736, 745 (4th Cir. 2015); State v. Spruiell, N.C. App. 798 S.E. 2d 802, 805 (2017).

Within the State Court's Order denying relief on the grounds as raised, the Court did not reference any of the claims concerning

trial counsel's errors which prejudiced the defense of Gaston's case during the pendency of trial. Therefore Defendant requests of this Court to remand the MAR back to within the State jurisdiction for further review of the merits of all claims involving trial counsel errors under the Strickland standard for deficient performance and the resulting prejudice that ensued as a result of such. The record is incomplete for review within the Federal District Courts since the lower court did not expound upon those sub claims as detailed and outlined within Defendant's filed MAR.

Furthermore the lower court's reliance upon the requirements for filing a second MAR as addressed within N.C.G.S. § 15A-1419 (a)(1), (b)(2), (c)(1), (d), and (e)(1), is misplaced in light of the general requireemnt dictating the showing of a fundamental miscarriage of justice.

Respectfully Submitted on this 6th day of January, 2022

Marty Tarell Gaston
0142745
Maury Correctional Institution
P.O. Box 506
Maury, N.C. 28554

CERTIFICATE OF SERVICE

I, Marty Tarell Gaston do hereby certify that I have submitted two exact copies of a Motion under title 2254 and attached Memorandum of Law, to the Clerk of Court at the below listed address and to the State Attorney General Offfice located at the below listed addresses;

On copy to the Clerk of Court at:

Clerk of Court
United States District
Western District of North Carolina Rm 204
401 West Trade Street
Charlotte, N.C. 28202

One copy to the Attorney General's Office locate at:

Attorney General Office
P.O. Box 629
Raleigh, NC 27602

Respectfully Submitted on this 6th day of January, 2022

Marty Tarell Gaston

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P.O. Box 506
Maury, NC 28554

APPENDIX F

§ 15A-1417. Relief available.

(a) The following relief is available when the court grants a motion for appropriate relief:

(1) New trial on all or any of the charges.

(2) Dismissal of all or any of the charges.

(3) The relief sought by the State pursuant to G.S. 15A-1416.

(3a) For claims of factual innocence, referral to the North Carolina Innocence Inquiry Commission established by Article 92 of Chapter 15A of the General Statutes.

(4) Any other appropriate relief.

(b) When relief is granted in the trial court and the offense is divided into degrees or necessarily includes lesser offenses, and the court is of the opinion that the evidence does not sustain the verdict but is sufficient to sustain a finding of guilty of a lesser degree or of a lesser offense necessarily included in the one charged, the court may, with consent of the State, accept a plea of guilty to the lesser degree or lesser offense.

(c) If resentencing is required, the trial division may enter an appropriate sentence. If a motion is granted in the appellate division and resentencing is required, the case must be remanded to the trial division for entry of a new sentence.

History.
1977, c. 711, s. 1; 2006-184, s. 3; 2010-171, s. 5.

§ 15A-1418. Motion for appropriate relief in the appellate division.

(a) When a case is in the appellate division for review, a motion for appropriate relief based upon grounds set out in G.S. 15A-1415 must be made in the appellate division. For the purpose of this section a case is in the appellate division when the jurisdiction of the trial court has been divested as provided in G.S. 15A-1448, or when a petition for a writ of certiorari has been granted. When a petition for a writ of certiorari has been filed but not granted, a copy or written statement of any motion made in the trial court, and of any disposition of the motion, must be filed in the appellate division.

(b) When a motion for appropriate relief is made in the appellate division, the appellate court must decide whether the motion may be determined on the basis of the materials before it, whether it is necessary to remand the case to the trial division for taking evidence or conducting other proceedings, or, for claims of factual innocence, whether to refer the case for further investigation to the North Carolina Innocence Inquiry Commission established by Article 92 of Chapter 15A of the General Statutes. If the appellate court does not remand the case for proceedings on the motion, it may determine the motion in conjunction with the appeal and enter its ruling on the motion with its determination of the case.

(c) The order of remand must provide that the time periods for perfecting or proceeding with the appeal are tolled, and direct that the order of the trial division with regard to the motion be transmitted to the appellate division so that it may proceed with the appeal or enter an appropriate order terminating it.

History.
1977, c. 711, s. 1; 2006-184, s. 5; 2010-171, s. 5.

§ 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.

History.
1977, c. 711, s. 1; 1995 (Reg. Sess., 1996), c. 719, s. 2.

§ 15A-1420. Motion for appropriate relief; procedure.

(a) **Form, Service, Filing. —**

(1) A motion for appropriate relief must:

a. Be made in writing unless it is made:

1. In open court;
2. Before the judge who presided at trial;
3. Before the end of the session if made in superior court; and
4. Within 10 days after entry of judgment;

b. State the grounds for the motion;

c. Set forth the relief sought;

c1. If the motion for appropriate relief is being made in superior court and is being made by an attorney, the attorney must certify in writing that there is a sound legal basis for the motion and that it is being made in good faith; and that the attorney has notified both the district attorney's office and the attorney who initially represented the defendant of the motion; and further, that the attorney has reviewed the trial transcript or made a good-faith determination that the nature of the relief sought in the motion does not require that the trial transcript be read in its entirety. In the event that the trial transcript is unavailable, instead of certifying that the attorney has read the trial transcript, the attorney shall set forth in writing what efforts were undertaken to locate the transcript; and

d. Be timely filed.

(2) A written motion for appropriate relief must be served in the manner provided in G.S. 15A-951(b). When a motion for appropriate relief is permitted to be made orally the court must determine whether the matter may be heard immediately or at a later time. If the opposing party, or his counsel if he is represented, is not present, the court must provide for the giving of adequate notice of the motion and the date of hearing to the opposing party, or his counsel if he is represented by counsel.

(3) A written motion for appropriate relief must be filed in the manner provided in G.S. 15A-951(c).

(4) An oral or written motion for appropriate relief may not be granted in district court without the signature of the district attorney, indicating that the State has had an opportunity to consent or object to the motion. However, the court may grant a motion for appropriate relief without the district attorney's signature 10 business days after the district attorney has been notified in open court of the motion, or served with the motion pursuant to G.S. 15A-951(c).

(5) An oral or written motion for appropriate relief made in superior court and made by an attorney may not be granted by the court unless the attorney has complied with the requirements of sub-subdivision c1. of subdivision (1) of this subsection.

(b) **Supporting Affidavits. —**

(1) A motion for appropriate relief made after the entry of judgment must be supported by affidavit or other documentary evidence if based upon the existence or occurrence of facts which are not ascertainable from the records and any transcript of the case or which are not within the knowledge of the judge who hears the motion.

(2) The opposing party may file affidavits or other documentary evidence.

(b1) **Filing Motion With Clerk. —**

(1) The proceeding shall be commenced by filing with the clerk of superior court of the