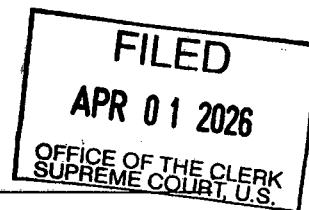


Record NO. **25-7622**



**IN THE
SUPREME COURT OF THE UNITED STATES**

**GARRY ARTIS YARBOROUGH,
Petitioner-Appellant**

V.

**LESLIE COOLEY DISMUKES,
Respondent-Appellee**

**ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE FOURTH CIRCUIT**

PETITION FOR WRIT OF CERTIORARI

**Garry Yarborough #0530117
Pender Correctional Institution
P.O. Box 1058
Burgaw, N.C. 28425
Petitioner Pro Se**

QUESTIONS PRESENTED

1. Whether the Fourth Circuit Court of Appeal's departed from the "accepted and usual course of judicial proceedings," Supreme Court Rule 10 (a) in a manner warranting this Courts supervisory review, by denying a certificate of appealability (COA) in a one- paragraph, unpublished per curiam order that neither engaged Petitioner's substantial constitutional questions and record evidence, thereby effectively applying a more stringent standard than that required by this Court's precedents, nor applied this Court's " relatively low" threshold requiring only that reasonable jurists could debate the district court's resolution, as articulated in *Miller- El v. Cockrell*, 537 U.S. 322, 336-37 (2003), *Slack v. McDaniel*, 529 U.S. 473 (2000), and *Buck v Davis*, 580 U.S. 100 (2017).
2. Whether the recurring practice among courts of appeals of summarily denying COAs in unpublished orders, without meaningful engagement with the "debatable among jurists of reason" standard, undermines the gatekeeping function of 28 U.S.C. § 2253(c) and forecloses appellate review of substantial constitutional claims, warranting this Court's intervention to ensure uniform application of its precedents and to resolve an important federal question under Rule 10(a)(c).

3. Whether the courts below unreasonably applied clearly established federal law and made an unreasonable determination of the facts, in violation of 28 U.S.C. § 2254(d), by rejecting petitioner's claim of ineffective assistance of counsel where trial counsel's failure to file a required motion to sever was not a strategic decision but the result of ignorance of controlling law, and where the record included unrefuted admissions by counsel and expert testimony establishing deficient performance and prejudice.

4. Whether the Fourth Circuit's summary disposition conflicts with its own precedent requiring consideration of whether an unfiled pretrial motion had "some substance" and was likely meritorious and outcome-affecting, thus risking disuniformity within the circuit and justifying certiorari under Rule 10(a).

LIST OF PARTIES

The parties to the proceeding in the United States Court of Appeals for the Fourth Circuit whose judgment is sought to be reviewed are:

- **Garry Artis Yarborough, Petitioner-Appellant**
- **Leslie Cooley Dismukes, Respondent-Appellee**

No party is a corporation. Therefore, no stock ticker symbol is applicable.

RELATED CASES

- **State v Yarborough No: COA19-752 North Carolina Court of Appeals
Judgement entered April 21, (2020)**
- **State v Yarborough NO: 236P20 North Carolina Supreme Court Judgment
entered December 15, 2020**
- **State v Yarborough NO: P23-522 North Carolina Court Of Appeals
Judgement entered November 14, 2023**
- **Yarborough v Ishee No: 5:23-hc-02279-BO United States District Court
Judgment entered December 13, 2024**
- **Yarborough v Dismukes No: 25-6031 United States Court of Appeals
Judgement entered September 13, 2025**

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**IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI**

Petitioner Garry Yarborough respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court Of Appeals for the Fourth Circuit appears at Appendix A to the petition and is not reported in Federal Reporter but is in West law at 2025 WL 2709380.

The opinion of the United States District Court for Eastern District Of North Carolina Appears at Appendix B to the petition and is unpublished.

The Order of the Superior Court of Franklin County in Louisburg North Carolina appears at Appendix D and is unpublished.

Jurisdiction

The Fourth Circuit entered its judgment denying a certificate of appealability (COA) and dismissing Yarborough's appeal on September 23, 2025, and subsequently denied rehearing and rehearing en banc on January 13th, 2026, and a copy of the order denying rehearing appears at Appendix C. This Court has jurisdiction under 28 U.S.C. § 1254(1), which authorizes certiorari to review "[c]ases in the courts of appeals." Denial of a COA by a court of appeals is a "case" within the meaning of 28 U.S.C. § 1254(1). *Hohn v. United States*, 523 U.S. 236, 241–44 (1998). Yarborough timely seeks review within the 90-day time prescribed by this Court Ruled 13.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. VI; U.S. Const. amend. XIV; 28 U.S.C. § 2254 (d):AEDPA standard; 28 U.S.C. § 2253(c)certificate of appealability standard as articulated in *Slack v McDaniel*, 529 U.S. 473 (2000); *Buck v Davis* 580 U.S. 100 (2017) and *Miller-El v Cockrell*, 527 U.S. 322 (2003) substantial showing of the denial of a constitutional right; 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

State proceedings and trial

Petitioner Garry Yarborough was tried in Franklin County, North Carolina Superior Court, for offenses arising from two discrete episodes on July 26, 2015: (a) the fatal shooting of Tracy Williams at a Food Lion parking lot, and (b) separate conduct at the home of Kim Elmore. The prosecution moved pretrial to join the charges; defense counsel opposed joinder in oral argument, warning of prejudice, but did not file the written motion to sever required by North Carolina statute, nor renew severance at the close of the State's case or of all evidence. Yarborough was convicted on August 2nd, 2018, of first-degree murder, kidnapping, breaking and entering, assault counts, discharging a firearm into an occupied dwelling, attempted first degree murder, and possession of a firearm by a felon.

At joinder, defense counsel articulated that inflammatory evidence from the Elmore incident would prejudice the jury's consideration of the homicide. The court granted joinder. On direct appeal, the North Carolina Court of Appeals held any misjoinder/severance challenge was waived because counsel never moved to sever, and it declined to exercise supervisory review. It dismissed the ineffective assistance claim without prejudice to postconviction litigation. See *State v. Yarborough* 271 N.C. App 159 at 164 (2020)

Postconviction (MAR) proceedings

In a Motion for Appropriate Relief (MAR), filed on December 6th, 2021, and amended on September 27th, 2022, Yarborough asserted ineffective assistance in two respects: (1) failing to file and preserve a motion to sever; and (2) failing to request a case tailored “lack of mental capacity” instruction to link trial evidence to the specific-intent elements. Trial counsel submitted affidavits and testified that they never made a strategic decision to forgo severance; they simply failed to think about filing the required written motion and did not consider the statute. Counsel acknowledged they anticipated prejudice from trying the incidents together. Yarborough’s expert, David Rudolf, opined that filing and preserving severance in these circumstances was “mandatory practice” and that counsel’s failure fell “well below” professional standards.

As to jury instructions, counsel testified they believed a modified lack-of-capacity instruction tailored to the case should be given; the expert explained why tailoring was essential to connect law to evidence on specific intent. The State’s case included powerful testimony from Ms. Elmore about threats and physical blows, which the defense contended inflamed the jury on the homicide count that otherwise turned on Williams’s having shot Yarborough first and the nature of Yarborough’s response. The MAR court denied relief, finding no deficiency and no prejudice, and characterizing the failure to move to sever as potentially “sound strategy”—**a characterization unsupported by the testimonial record.**

Despite the gravity of the charges and the complexity of the case, Yarborough's trial was marred by a fundamental breakdown in the adversarial process. His own attorneys, by their sworn admissions, did not make a strategic decision to forgo a motion to sever the charges; rather, they simply failed to recognize the necessity of such a motion under North Carolina law. This was not a calculated risk, but a product of legal ignorance—a failure that left Yarborough exposed to the devastating impact of high prejudicial evidence from an unrelated incident, evidence that the jury should never have considered in determining his guilt for first-degree murder. The record is clear: both trial counsel and the defense expert confirmed that this omission was not only unreasonable, but also contrary to the most basic standards of professional competence expected in a case where a man's life and liberty were at stake.

Federal habeas proceedings

On December 19th, 2023, Yarborough filed a 28 U.S.C. § 2254 petition raising these ineffective-assistance claims. The district court granted summary judgment to Respondent and denied a COA. Yarborough appealed and filed an informal opening brief detailing the record and legal support for a COA under *Slack v McDaniel*, 529 U.S. 473, (2000) and *Miller-El v. Cockrell* 537 U.S.322 (2003) , arguing the MAR court unreasonably applied clearly established federal law and unreasonably determined the facts given counsel's admissions and expert testimony, and explaining why severance had substance and the prejudice was at least debatable.

The Fourth Circuit summarily denied a COA and dismissed the appeal in a one-paragraph per curiam, citing the correct general standard but providing no analysis of the specific constitutional questions or the record proffer, and dispensing with oral argument. Yarborough sought panel rehearing and rehearing en banc, asserting that the panel overlooked the substantial showing required for a COA and applied a more stringent standard than Miller-El; rehearing was denied.

REASON FOR GRANTING THE WRIT

1. The Fourth Circuit departed from the accepted and unusual course of judicial proceeding by denying a COA through summary disposition that effectively heightened the COA standard beyond Miller-El, Slack, and Buck.

Supreme Court Rule 10 (a) recognizes certiorari is warranted to correct "departures from the accepted and unusual course of judicial proceeding." This Court has repeatedly emphasized that a COA should issue where "reasonable jurist could debate " the district court's assessment or where issues are "adequate to deserve encouragement to proceed further" --- a " relatively low" threshold distinct from ultimate merits review. Miller- El v. Cockrell 537 U.S.322 at 336-37(2003); Slack v McDaniel, 529 U.S. 473, at 484 (2000); Buck v Davis 580 U.S. 100 at 115-17 (2017). Critically, as this Court made clear in Buck v. Davis 580 U.S. 100 at 115 "[a]t the COA stage, the only question is whether the applicant has shown that jurists of

reason could disagree with the district court's resolution of his constitutional claim or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further."

Here, the Fourth Circuit's one-paragraph order recited the standard but engaged in no analysis, notwithstanding a record that included (a) trial counsel's unrefuted admissions that the severance omission was nonstrategic and due to ignorance of a controlling statute; (b) expert testimony that the omission fell below professional norms and likely affected outcome; and (c) detailed prejudice resulting from joined trial dynamics and lack of tailored mental-capacity instruction.

Yarborough also identified controlling Fourth Circuit precedent *Grueniger v. Dir., Va Dept of Corr* 813 F. 3d 517 at 524-525(2016) that refines *Strickland* where counsel fails to file a pretrial motion: it is enough at deficiency that the unfiled motion had "some substance," and prejudice asks whether the motion was meritorious/likely granted and outcome-affecting.

Despite that record, the court of appeals summarily denied a COA with no engagement of the Constitutional issues. The court's failure to acknowledge that debatability - and its summary dismissal - reflects application of a more demanding standard than this Court's precedents allow. When an appellate court cites the correct standard but then disposes of a case without acknowledging substantial, debatable showing, it risks collapsing the COA inquiry into a merit's adjudication

precisely what Miller-El and Buck forbid. This is the type of departure from the usual course warranting review under Rule 10(a).

II. The questions presented are exceptionally nationally important and recur with frequency, whether courts are applying an unduly stringent COA standard that forecloses appellate review of substantial Sixth Amendment claims.

A. COA denials that bypass the Miller-El threshold.

The question whether lower courts are applying an unduly stringent standard for issuing a COA is of exceptional national importance. Summary denials of COA, without meaningful engagement with the record or the correct standard, risk foreclosing appellate review of substantial constitutional claims for thousands of habeas petitioners each year. This issue recurs Across circuits, unpublished, summary COA denials sometimes elide the distinct "debatable among jurist of reason" standard and collapse it into merits agreement. This undermines the 28. U.S.C. 2253 (c) gate keeping function and denies appellate consideration to serious constitutional claims. The issue is important, and this case cleanly presents it because Yarborough's claims rest on concrete, undisputed record admissions and established legal standard.

This Court COA precedents ensure that potentially meritorious constitutional claims receive appellate review. The record here raises substantial questions on both Strickland prongs:

DEFICIENCY: Ineffective assistance where counsel fails to file and preserve a dispositive pretrial motion. Yarborough's severance claim exemplifies when the failure to file a required pretrial motion necessary to preserve appellate review and to invoke mandatory trial- court reconsideration at key stages can be both deficient and prejudicial. Counsel's admissions of legal ignorance track this Court's teaching that such ignorance is "a quintessential example of unreasonable performance." *Hinton v Alabama*, 571 U.S. 263, at 274 (2014) Yarborough's counsel admitted ignorance - not strategy - regarding the statutory requirement to move to sever and preserve renewals, and the expert deemed filing "mandatory practice".

In her affidavit, Malumphy stated: "It never occurred to me that we needed to do a separate motion to sever the offenses either at the outset at trial or the close of the evidence." [DE 17-15, p. 59, Affidavit of Christine Malumphy]. In his affidavit, Freedman stated: "The Court joined the offenses for trial. I failed to file a motion to sever the offenses for trial." [DE 17-15, pp. 66-71, Affidavit of Stephen Freedman].

Yarborough's trial counsel expounded on their affidavits at the MAR evidentiary hearing:

Defense Counsel: Now, when the State filed the motion for joinder, were you concerned about that?

Malumphy: Yes, of course.

Defense Counsel: Why were you concerned?

Malumphy: We believed that it would be prejudicial for the charges to be held together, because even though . . . we felt there was a strong defense in the murder of Ms. Williams, our concern was that the conduct at Ms. Elmore's residence would be so inflammatory to the jury that it would affect how they viewed the evidence concerning the first-degree murder.

Defense Counsel: And did you discuss that with Mr. Freedman?

Malumphy: Yes.

Defense Counsel: To the best of your recollection, did he share your concern?

Malumphy: Yes

Defense Counsel: Would it be fair to say that you thought joinder would compromise Mr. Yarborough's ability to get a fair trial?

Malumphy: Yes.

* * * *

Malumphy testified that the failure to file a motion to sever offenses was not a strategic decision:

Defense Counsel: Now even though you were concerned about the two sets of offenses being joined together, you did not file a motion to sever the offenses prior to trial?

Malumphy: We did not.

Defense Counsel: So, it would be fair to say that your failure to file a motion to sever was not a strategic decision?

Malumphy: **It absolutely was not a strategic decision.**

[DE 17-18, Trans. of Evid. Hear. p. 67].

Freedman also testified that the failure to file a motion to sever offenses was not a strategic decision.

Defense Counsel: And at the time, you were not aware that you were supposed to file a written motion to sever prior to trial if the State had filed a motion to join?

Freedman: You know, I can't tell you if I knew it on some other occasion. But in this instance, I just - - I did not think to do it.

Defense Counsel: And that was not a strategic decision?

Freedman: **No. I just did not think about the statute. So, I don't think it was a strategic decision because we didn't consider it.**

[DE 17-18, Trans. of Evid. Hear. pp. 111-112].

* * * *

Defense Counsel: Did you feel like the judge's granting the motion to join made your job in terms of representing Mr. Yarborough more difficult?

Prosecutor: Objection.

Court: Overruled.

Freedman: We had opposed the joinder because we thought that trying both instances in the same trial would be prejudicial to Mr. Yarborough.

Defense Counsel: Mr. Freedman, why is it you [felt] that joinder would prejudice him?

Prosecution: Objection.

Court: Overruled.

Freedman: Well, I thought that . . . due to the nature of the evidence with Ms. Elmore, I just thought that it would be difficult for the jury to separate that incident from their decision in the homicide of Ms. Williams. [DE 17-18, Trans. of Evid. Hear. pp. 113-114].

The testimony of Yarborough's trial counsel, Malumphy and Freedman, completely undercuts the MAR court's conclusion that trial counsels' performance was not deficient under the first prong of Strickland. The unreasonableness of the MAR court's conclusions is further revealed by the testimony of Yarborough's

expert, David Rudolf. Rudolf testified as an expert in the fields of criminal law and trial advocacy and offered his opinion of the performance of Yarborough's trial counsel:

Defense Counsel: What opinion did you reach as to claim number one regarding the motion to sever?

Rudolf: Well, you asked me whether I reached opinions about the standard. I can tell you that I know what the standard - I believe I have an opinion about what the standard is based on the Performance Guidelines, . . . the Capital Trial Manual, my own experience, what I've taught in trial advocacy, what I've heard other people talk about at various seminars over the years, what I've talked about over the seminars over the years. And the bottom line is you - that you preserve your appeal issues when you are a trial lawyer. You -that is fundamental.

You know, yes, you're a trial lawyer, but you have to keep in mind what the appellate issues may be because a judge may not agree with you on a legal issue and you need to make sure you preserved it for the appellate court.

And so with regard to the standard, that's the standard. The standard is that, above all else, you make sure you preserve the issue for appeal.

Defense Counsel: Okay. And based on North Carolina Statute 15A-927, does that specifically say that a motion to sever should be filed prior to trial?

* * * *

Rudolf: [I]n North Carolina under the statute [,] . . . [i]f you don't file your motion, and you don't review it at various times, you've waived the issue.

So regardless of whether Judge Lambeth agreed or disagreed with the argument that was made at trial, the issue is are you preserving the issue. And the statute says you must do that. You must file the motion to preserve the issue.

And in this case, we saw what happened because they didn't file that. It got up to the Court of Appeals and the Court of Appeals in its opinion said we're not going to . . . to deal with that. You waived it. And it said, but if you want to file ineffective assistance of counsel claim because they waived it, you know, we're not going to deny your right to do that or find against you and find it's prejudice, so go ahead and file that. So, I don't think that it's open really to question that - - that that was what they should have done is file the motion.

[DE 17-18, Trans. of Evid. Hear. pp. 176, 185-87].

* * * *

Defense Counsel: Well, would your opinion be, that based on prevailing standards in North Carolina, if you feel like there's a need to move for severance, and if you feel like your client would be prejudiced by joinder, that the prevailing practice would be [to] file a written motion to sever prior to trial?

Rudolf: I think it's the mandatory practice.

ADA Capps: I'm going to object to the form of the question.

The Court: Overruled. Go ahead.

Rudolf: I believe that it's the mandatory practice given the statute that once a lawyer determines that there's possible prejudice from joinder that you have to go ahead and file that motion for severance in order to preserve the issue forevermore.

Defense Counsel: Okay. And in this case, since both Mr. Freedman and Ms. Malumphy testified that they did not file the motion to sever and it was not a strategic decision, would you say that fell below the standard expected of someone handling a first-degree murder case?

Rudolf: **My opinion, based on all the things we've talked about already, is that it was well below the standard of what's required by any lawyer handling any case involving a severance motion, but certainly in a first-degree murder case. [DE 17- 18, Trans. of Evid. Hearing pp. 187-189].**

Rudolf also provided the sources upon which he based his opinions. After Rudolf gave his expert opinion that trial counsels' performance was deficient under the first prong of *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984) he testified regarding the sources on which he based his opinion. [DE 17-18, Trans. of Evid. Hear. pp. 192-94].

Rudolf testimony was un rebutted, the state did not have a expert testify. Despite the compelling testimony of Freedman, Malumphy and Rudolf, the MAR

court concluded that Yarborough had failed to show that his trial counsel were "deficient" under the first prong of *Strickland*. 28 U.S.C. § 2254(d)(1). The MAR court's order stated that, "this court cannot, and does not find that trial counsel's failure to file a motion to sever fell below an objective standard of reasonableness." [DE 17-19, p. 6, ¶33]. The MAR court continued, "In light of all the circumstances of this matter, defense counsel's failure to file a motion to sever falls within the wide range of professionally competent assistance." [DE 17-19, p. 5, ¶34]; see also [DE 17-19, p. 17, conclusion of law no. 2]. The MAR court's conclusions involved an unreasonable application of clearly established federal law and were based on an unreasonable determination of the facts. 28 U.S.C. §2254(d)(1), (d)(2).

The MAR court's conclusions are entirely inconsistent with the evidence presented at the evidentiary hearing. The objective unreasonableness of the MAR court's order is capsulized in finding of fact no. 31, where the MAR court found that "[d]efense counsel's **decision** not to file a motion to sever, but to allow the jury to hear Kim Elmore's firsthand, eyewitness recollection of Defendant's conduct and demeanor on that date to support the Defense's theory negating the specific intent element of the charges, **could be considered sound strategy.**" [DE 17-19, p. 5, ¶31, emphasis added]. **That finding of fact has no evidentiary basis in the record.**

The MAR court's statement that trial counsel made a "decision" not to file a motion to sever is entirely unsupportable. Yarborough's trial counsel testified that they did not make a decision to forego filing a motion to sever but rather they were under the mistaken belief that they were not required to make a motion to sever offenses, so long as they objected to the State's motion for joinder.

The undisputed testimony unequivocally established that trial counsel's failure to file a motion to sever offenses was the result of ignorance of the law and therefore was objectively unreasonable performance. The Supreme Court held that, "An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*." *Hinton v. Alabama*, 571 U.S. 263, 274 (2014). **Yarborough invoked that principal.** The MAR court's speculation about possible strategic reasons, in the face of uncontradicted evidence to the contrary, is precisely the type of unreasonable factual determination that 28 U.S.C. § 2254(d)(2) is designed to correct.

The Fourth Circuit compounded this error by summarily denying a COA without engaging with the record or applying the correct standard, as required by *Miller-El*, *Slack*, and *Buck*. This departure from established precedent warrants this Court's intervention. Furthermore, the MAR court's speculation that it could have been a sound trial strategy is directly inconsistent with Yarborough's trial counsel's testimony that it was not a strategy at all, but rather an error.

In any event, the MAR court's suggestion that it could be a sound trial strategy to allow the Elmore evidence into the trial of the Williams case is objectively unreasonable. **No reasonably competent lawyer would choose to have the jury hear this type of extremely damaging evidence if there was a mechanism to prevent it.**

The MAR court seems to have been operating under the assumption that, if it could come up with any reason for not filing a motion to sever, then there can be no ineffectiveness under *Strickland*. *See also Lafler v. Cooper*, 566 U.S. 156, 173 (2012) ("By failing to apply *Strickland* to assess the ineffective assistance of counsel claim respondent raised, the state court's adjudication was contrary to clearly established federal law."). But that approach completely ignores and conflicts with the facts. Yarborough's trial counsel expressly stated that their failure to file a motion to sever offenses was not the result of any strategic decision, or any decision at all. Rather, it was the result of ignorance of the law.

"Once a defendant presents evidence rebutting the presumption of reasonableness, [which Yarborough's MAR did], the court is not at liberty to invent for counsel a strategic justification which counsel does not offer and which the record does not disclose." *State v. Oglesby*, 382 N.C. 235, 243, 876 S.E.2d 249, 257 (2022).

The MAR court's ruling that Yarborough's trial counsel was not deficient in failing to file a motion to sever offenses is premised on a clear factual error and is based on an "unreasonable determination of the facts." 28 U.S.C. §2254 (d)(2). See *Wiggins v. Smith*, 539 U.S. 510 at 528 (2003) (granting habeas relief when state court's decision was based on "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding" because it was based, in part, "on a clear factual error."); 28 U.S.C. 2254(d)(2); *Brumfield v. Cain*, 576 U.S. 305, 314-16 (2015) (granting habeas relief when the state court's decision was "based on an unreasonable determination of the facts considering the evidence presented in the State Court proceeding, because the state court's decision was based on the erroneous assumption that an IQ score of 75 precluded a finding of intellectual disability.)

The MAR court essentially ignored all the evidence presented at the MAR evidentiary hearing and engaged in speculation in formulating its decision. Such speculation was the linchpin of its order denying relief. The same rationale that the Supreme Court applied in *Wiggins* and *Brumfield* should be applied in this case where the trial court made an unfounded assumption that resulted in an unreasonable determination of the facts under 28 U.S.C. §2254(d)(2). Because the MAR court's order is based on an unreasonable determination of the facts presented at the MAR evidentiary hearing, it is objectively unreasonable. See *Wiggins v. Smith*, 539 U.S. 510 at 528 (2003).

The district court upheld the MAR court's order and concluded that Yarborough did not establish that his counsel was deficient under the first prong of *Strickland*. [DE 24, p. 12]. The district court based its conclusion on the fact that "although Yarborough's trial attorneys did not file a motion to sever, attorney Freedman vigorously opposed the prosecution's pretrial motion for joinder." [DE 24, p. 11]. **But arguing against a motion for joinder is not an adequate substitute for filing a motion to sever offenses.** The law and the evidence unequivocally established that Yarborough's trial counsel was ignorant of the law and constitutionally deficient in failing to move to sever the offenses.

Under North Carolina law, motions to sever offenses must be made prior to trial. N.C.G.S. §15A-952(b)(1) & (2). Moreover, if a pre-trial motion to sever offenses has been filed, and denied, then the defendant may renew such motion at or before the close of all the evidence. N.C.G.S. §15A-927(a)(2). But "[a]ny right to severance is waived by failure to renew the motion." *Id.*

If a motion to sever offenses is timely made or renewed, the trial court "must grant a severance of the offenses whenever," N.C.G.S. 15A-927(b), "it is found necessary to achieve a fair determination of the defendant's guilt or innocence of each offense." N.C.G.S. 15A-927(b)(2). And "the court must consider whether, in view of the number of offenses charged and the complexity of the evidence to be offered, the trier of fact will be able to distinguish the evidence and apply the law intelligently as to each offense." *Id.*

Had Yarborough's trial counsel not waived Yarborough's right to severance by failing to file a pre-trial motion for severance, counsel could have renewed the motion to sever offenses at the close of all the evidence, when it would have been more apparent to the trial court that joining the Elmore case with the Williams case would deny Yarborough his right to "a fair determination of [his] guilt or innocence of each offense." N.C.G.S. §15A-927(b)(2).

Had Yarborough's counsel filed a pre-trial motion to sever offenses and then renewed that motion at the close of the evidence, it is likely that such *renewed motion* would have been granted. This is so because "...the close of the evidence is the moment the [trial] court can fully ascertain whether the joinder of multiple counts was unfairly prejudicial to the defendant's right to a fair trial." *United States v. Rollins*, 301 F.3d 511, 518 (7th Cir. 2002). Once the trial court heard the extremely inflammatory and prejudicial testimony of Elmore, of which the trial court was not fully aware prior to trial, *United States v. Crumley*, 528 F.3d 1053, 1062 (8th Cir. 2008), the trial court would have been statutorily compelled to grant a renewed motion to sever offenses.

Here, however, because Yarborough's trial counsel never filed a motion to sever offenses at all, there was nothing to renew. As it was, the trial court was never under any statutory obligation to grant a severance because Yarborough's counsel had "waived any right to severance" that Yarborough may have had by failing to file a motion to sever offenses.

Additionally, and importantly, unless defense counsel files a motion to sever, he waives his client's right to raise this issue on appeal. N.C.G.S. §15A-927(a)(1) ("Any right to severance is waived if the motion [to sever offenses] is not made at the appropriate time.").

By failing to file a motion to sever offenses, Yarborough's trial counsel unwittingly waived Yarborough's right to appellate review of the trial court's ruling on the joinder issue. By failing to move to sever offenses, as required by N.C.G.S. §15A-927(a)(1), Yarborough's trial counsel erased Yarborough's right to have the joinder ruling reviewed on its merits by a court other than the original trial court and relegated the issues on post-conviction review to whether Yarborough's trial counsel was ineffective.

Had Yarborough's trial counsel filed a motion to sever the Elmore and Williams offenses, this issue could have been raised and reviewed on direct appeal, where the joinder issue would have been reviewed to determine whether "a joint trial has deprived [Yarborough] of a fair trial." *State v. Distance*, 163 N.C. App. 711, 715, 594 S.E.2d 221, 224 (2004) (although the decision to join offenses for trial is in the "discretion of the trial judge," such decision will be reversed upon "a showing that a joint trial has deprived a defendant of a fair trial."). The motion to sever offenses would have had merit. But for trial counsel's error here, there is a reasonable probability, given the facts of the Elmore case, that the state appellate

court would have ruled that the trial court's joinder of the Williams and Elmore offenses deprived Yarborough of a fair trial.

PREJUDICE: The prejudice showing is substantial

The MAR court also held that there was no prejudice from trial counsel's failure to file a motion to sever offenses. Conclusion of law no. 3 in the MAR court's order states: "There is no reasonable probability that, but for counsel's failure to file a Motion to Sever, the result of the Defendant's trial would have been different." [DE 17-19, p. 17]. The MAR court's conclusion of law regarding prejudice was also an unreasonable application of *Strickland* and is objectively unreasonable. First, because the offenses were joined, the State was able to use the testimony of Kim Elmore, a completely innocent woman who was struck in the head and traumatized by Yarborough after he broke into her home seeking medical assistance, to persuade the jurors to convict Yarborough of first-degree murder in Williams' death. Elmore testified at trial that "He had pulled a gun out and was holding it to my head and said he was going to kill me." (T p 829). She also testified that Yarborough started hitting her head with the gun and that she could "feel the blood pouring out of my head." (T p 829). She went on to testify that she was begging Yarborough, "Please, don't kill me. I don't want to die." (T p 834). Elmore told the jury how she hid in her bathroom after escaping and being unable to figure out how to use her smart phone to call for help. (T pp 825-829).

Without Elmore's prejudicial testimony, the jury would have been confined to focus on the facts of the Williams case and the fact that Yarborough's actions in the Williams case were in response to Williams shooting him in the leg and that she probably would have killed him had her gun not jammed. Had the jury been presented solely with the facts of the Williams case, and not the prejudicial and inflammatory evidence from the Elmore case, there is a reasonable probability the jury would not have found Yarborough guilty of first-degree murder in the death of Williams. The jury likely would have opted to convict Yarborough of second-degree murder or voluntary manslaughter.

The consequences of this error were not abstract or technical. Yarborough, already facing the trauma of being shot and the chaos that followed, was further prejudiced by the introduction of inflammatory testimony that painted him as a violent aggressor, rather than a man reacting in fear for his life. The jury heard harrowing accounts from Ms. Elmore—accounts that, while deeply sympathetic to her ordeal, had no bearing on the critical question of whether Yarborough acted with premeditation or malice in the confrontation with Ms. Williams. The effect was to conflate two distinct episodes, depriving Yarborough of the fair and individualized consideration that our justice system promises to every defendant.

By joining the Elmore case with the Williams case, the State was able to divert attention from the fact that Williams was the aggressor in the incident at the ATM machine that resulted in her death. Christopher Lewis, an employee at Food

Lion, said that he was taking a break when he heard someone scream for help. (T p 741). As he turned his attention to the source of the commotion in the parking lot, he saw Williams and Yarborough "flustering" for about two minutes and then the gun went off. "That's when Tracy had shot Yarborough." (T p 741). Scott Dunlap, who was admitted at trial as an expert in the field of "media forensics and information technology," testified about what was shown on the video from the ATM machine. He testified that at the 9:26:10 mark on the video, there was an exposure of light that "would be consistent with a gunshot." That flash was caused by Williams shooting Yarborough. During her closing argument, the prosecutor conceded that Williams was the first one to brandish a firearm during the incident stating, "I don't believe there's any doubt that she introduces this 9mm into this situation. . . ." (T p 2144). Furthermore, Yarborough testified on direct examination that Williams shot him first:

Defense Counsel: Did something happen while you were at Tracy's car?

Defendant: Yes. As I was calling Tracy, I was kneeled down. As I was calling Tracy['s] cell phone, I turned around and looked at the back of Tracy's car, and when I turned back around there was just a gun. I just seen a gun and my life flashed in front of me. I just dived [sic] into the vehicle. When I dived [sic] in the vehicle, she shot, boom, and we were tussling for the gun. And as we was tussling for the gun, I told her to stop and bit her arm. (T p 1350).

The effect of the admission of the Elmore evidence into the trial was to create the erroneous impression that Yarborough must have also been the aggressor during the encounter at the ATM machine with Williams. This undermined the defense arguments that Yarborough acted in self-defense and that he was entitled, at the very least, to an instruction on imperfect self-defense.¹

Additionally, the joinder of the offenses undercut the defense's argument that Yarborough shot Williams in the heat of passion after adequate provocation. First degree murder requires premeditation and deliberation. As Malumphy contended in her closing argument: "Malice requires an intention to take a life in a certain state of mind, and a finding of malice is inconsistent with the evidence that shows overwhelmingly that this shooting was done in the heat of passion." (T p 2090).

After Williams shot Yarborough, it was apparent that Williams was trying to kill him. But for her gun being jammed, she might have. Williams apparently tried to take Yarborough's car. Yarborough reacted to these acts of violence against him and killed Williams. Absent the damaging and inflammatory evidence from the Elmore case, there is a reasonable probability that the jury would have more fairly evaluated Williams' actions against Yarborough and rendered a verdict less than first degree murder. *See State v. Williams*, 144 N.C. App. 526, 530, 548 S.E.2d 802,

(1)At the charge conference, ADA Capps argued, "He doesn't get the self-defense [instruction] because he is clearly the aggressor." (T p 1968)

805 (2001) ("Although there may have been time for deliberation, if the purpose to kill was formed and immediately executed in a passion, especially if the passion was aroused by a recent provocation or by mutual combat, the murder is not deliberate and premeditated."); accord *State v. Faust*, 254 N.C. 101, 108, 118 S.E.2d 769, 773(1961).

Finally, the joinder of offenses prevented Yarborough from presenting coherent defenses to the two discrete sets of offenses. The defense wanted the court to instruct the jury on either self-defense or imperfect self-defense as to the shooting death of Williams. (T pp 1969-70). In considering a request for a jury instruction, the court must view the evidence in the light most favorable to the defendant. See *State v. Moore*, 363 N.C. 793, 796, 688 S.E.2d 447, 449 (2010). The evidence presented at trial showed: (1) Williams had previously attempted to kill Yarborough when she shot the windows out of his car while he was inside the car; (2) Williams shot Yarborough in the parking lot without any provocation and before he attempted to use his gun; and (3) Yarborough was "in fear for his life" and thought he was "about to die." (T pp 1351-52). That evidence should have been sufficient to warrant an instruction on perfect or imperfect self-defense, but the trial court rejected any instruction involving self-defense.

In *United States v. Foutz*, 540 F.2d 733 (4th Cir. 1976), this Court recognized three ways in which a defendant may be prejudiced by joinder of multiple offenses. [Three sources of prejudice are possible which may justify the granting of a

severance under Rule 14: **(1) the jury may confuse and cumulate the evidence, and convict the defendant of one or both crimes when it would not convict him of either if it could keep the evidence properly segregated; (2) the defendant may be confounded in presenting defenses, as where he desires to assert his privilege against self-incrimination with respect to one crime but not the other; or (3) the jury may conclude that the defendant is guilty of one crime and then find him guilty of the other because of his criminal disposition.]**

Id. at 736 (emphasis added).

In the case *sub judice*, it is highly probable that Yarborough was convicted of first degree murder in the Williams case, rather than a more appropriate lesser offense, because of what the jurors perceived to be his "criminal disposition" and "bad character."

Severance of the offenses was the only way that Yarborough would have been able to get a fair trial in the Williams case. The circumstances of the Williams case and the circumstances of the Elmore case were distinct. Had Yarborough not been shot in the leg by Williams, then he would never have gone to Elmore's house. His sole purpose for going to Elmore's house was to seek medical care for his gunshot wound. In addition, eight of the ten offenses on which Yarborough was indicted stemmed from the events that occurred at Elmore's home and had nothing to do with Williams' death.

By failing to file a pre-trial motion for severance, Yarborough's trial counsel waived "any right to severance" that Yarborough might have had. N.C.G.S. 15A-927(a)(1) & (2) (emphasis added). Based on the foregoing, it is manifest that Yarborough was prejudiced by the joinder of the Williams case and the Elmore case and the MAR court's contrary ruling is objectively unreasonable.

It is particularly troubling that the courts below dismissed these concerns without meaningful engagement with the record. The MAR court's finding that counsel's failure to move for severance "could be considered sound strategy" is not only unsupported by any evidence but is directly contradicted by the sworn testimony of both trial attorneys. To suggest that this was a matter of strategy is to ignore the lived reality of Yarborough's defense—a reality in which his counsel's error was not a choice, but a failure to perform the most basic research and preparation required by the law. Such disregard for the facts and for Yarborough's right to a fair trial cannot be squared with the principles of justice and due process.

Yarborough's case is not just about procedural missteps; it is about the real human cost of legal error. The joinder of unrelated offenses, and the resulting inability to present a coherent defense or to have the jury focus on the true circumstances of the Williams incident, meant that Yarborough was denied the opportunity to have his actions judged in the proper context. The law recognizes that every defendant is entitled to a fair determination of guilt or innocence on each charge, free from the taint of unrelated and prejudicial evidence. Here, that promise

was broken, and the consequences for Yarborough have been profound and enduring.

The district court upheld the MAR court's order and also concluded there was no prejudice from the joinder of the two cases "due to the overwhelming evidence of Yarborough's guilt presented at trial." [DE 24, p. 12]. **This is incorrect.** Fair consideration of the evidence in the Williams case, without consideration of the severely damaging evidence in the Elmore case, reveals a case of voluntary manslaughter based on heat of passion, imperfect self-defense based on excessive force or second-degree murder. The district court's reliance on Yarborough's alleged threatening text messages to Williams, such as the "Frog" and "Peaches" text, is overly narrow. The fact of the matter is there was overwhelming evidence that Williams initiated a gun into the situation, and that she shot Yarborough in the leg and that she would have continued to shoot him had her gun not jammed. Yarborough's actions and reactions must be viewed through the lens of someone who had just been shot with a gun by someone who was obviously trying to kill him. It cannot be reasonably said that, even absent the evidence from the Elmore case, there was overwhelming evidence to convict Yarborough of first-degree murder. *State v. Williams*, 144 N.C. App. at 530, 548 S.E.2d at 805("Although there may have been time for deliberation, if the purpose to kill was formed and immediately executed in a passion, especially if the passion was aroused by a recent provocation or by mutual combat, the murder is not deliberate and premeditated.").

Based on the foregoing, Yarborough respectfully submits that he has “demonstrate[d] that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” *Slack v. McDaniel*, 529 U.S. at 484 and that the Fourth Circuit Court of Appeals departed from the usual course of judicial proceeding warranting certiorari review under Supreme Court Rule 10(A). As such, Yarborough has made a “substantial showing” of the denial of a constitutional right, 18 U.S.C. § 2253(c), such that a certificate of appealability should be issued. Yarborough respectfully requests that this Court issue a certificate of appealability.

B. The Lower Courts’ Refusal to Grant Relief for Failure to Request a Modified Jury Instruction on Lack of Mental Capacity Represents a Departure from the Usual Course of Judicial Proceedings Warranting Certiorari Review under Supreme Court Rule 10(a).

This case presents an exceptional circumstance where the state courts and the Fourth Circuit have departed from the accepted and usual course of judicial proceedings by denying relief for trial counsel’s failure to request a modified jury instruction on lack of mental capacity, despite uncontroverted evidence that such a request was necessary to ensure a fair trial. The record demonstrates that trial counsel’s omission was not strategic, but rather a clear oversight, and that the failure to tailor the instruction to the specific evidence of Yarborough’s mental

infirmities deprived the jury of the guidance necessary to properly consider his defense.

Ignoring Uncontroverted Evidence of Deficient Performance

The MAR court and the district court both concluded that trial counsel's failure to request a modified instruction did not fall below an objective standard of reasonableness. This conclusion is contrary to the undisputed testimony of both trial counsel and the defense expert, who agreed that a tailored instruction was required under prevailing professional norms. Lead counsel Stephen Freedman testified that he believed it was important to request a modification to the standard instruction so that the jury would understand what evidence to consider regarding Yarborough's mental capacity. The defense expert, David Rudolf, further explained that tailoring instructions to the evidence is a "mandatory practice" in serious cases, especially where the defense hinges on the defendant's mental state.

Despite this, the MAR court found that counsel's conduct "falls well within the wide range of professionally competent assistance," and the district court echoed this conclusion, reasoning that the instructions given were "proper" and thus sufficient. This approach disregards the Supreme Court's clear guidance that the adequacy of counsel's performance must be assessed in light of prevailing professional norms and the specific circumstances of the case, not by rote reference

to the general propriety of the instructions given *Strickland v. Washington*, 466 U.S. 668, (1984).

The courts below further departed from the usual course by failing to recognize that a general instruction on lack of mental capacity, untethered to the specific evidence presented, is inadequate where the defense is predicated on complex psychiatric testimony. Dr. Corvin, Yarborough's forensic psychiatric expert, testified extensively about Yarborough's diagnoses of PTSD and borderline personality disorder, and how these conditions critically contributed to his actions at the time of the offense. The jury, however, convicted Yarborough of every specific intent offense, suggesting that the generic instruction failed to provide the necessary framework for the jury to apply the law to the facts.

Misapplying Prejudice Analysis

The MAR court and the district court also erred in their prejudice analysis. Both courts concluded that there was no reasonable probability of a different outcome had the instruction been modified, relying on the "overwhelming evidence" of guilt. This analysis ignores the Supreme Court's mandate that prejudice exists where there is a reasonable probability that, but for counsel's errors, at least one juror would have reached a different result, *Wiggins v. Smith* 539 U.S. 510 at 537 (2003). Here, the jury was presented with extensive evidence of Yarborough's mental illness but was not given adequate legal guidance to connect that evidence

to the specific intent elements of the charged offenses. The failure to request tailored instruction thus undermined the fundamental fairness of the trial.

The district court's assertion that counsel cannot be ineffective for failing to request additional instructions if the ones given are "proper" is inconsistent with this Court's precedent. In *United States v. Luck*, 611 F.3d 183, 186-87 (2010) the Fourth Circuit held that counsel may be ineffective for failing to request a special instruction even where the general instructions are legally correct, if the special instruction is necessary to alert the jury to unique evidentiary issues. The same principle applies here: a tailored instruction was necessary to ensure the jury understood how to evaluate the evidence of Yarborough's mental disorders in relation to specific intent

III. The decision conflicts with the Fourth Circuit's own precedent and risks disuniformity.

Yarborough's briefing invoked Fourth Circuit authority refining *Strickland* where counsel fails to file substantive pretrial motions, requiring consideration whether the unfiled motion had "some substance" and was likely meritorious and outcome-affecting. The panel's summary denial, without engagement with that framework or the testimonial record, undermines uniform application within the circuit. Yarborough sought en banc intervention precisely to maintain uniformity; it was denied.

IV. This case satisfies multiple Rule 10 considerations.

Rule 10(a): This case thus presents the rare situation contemplated by Rule 10(a), where the lower courts have so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power. The lower courts' refusal to grant relief in the face of uncontroverted evidence of deficient performance, their failure to require a tailored instruction on a central defense, and their misapplication of the prejudice standard collectively undermine the integrity of the adversarial process and the right to a fair trial. The Fourth Circuit's summary treatment is a departure that warrants the Court's supervisory correction, particularly where the panel did not grapple with record facts central to the COA threshold.

Rule 10(c): Important federal question. The administration of the COA standard under 28 U.S.C. § 2253(c) affects thousands of habeas litigants and the uniform application of this Court's precedents.

V. This Case is an excellent vehicle and Yarborough's case readily meets the COA standard because the record is developed. 28 U.S.C. § 2254(d)(2) – UNREASONABLE DETERMINATION OF THE FACTS

In addition to the arguments already presented, Yarborough respectfully submits that the courts below departed from the accepted and usual course of judicial proceedings by denying relief based on an unreasonable determination of

the facts, in violation of 28 U.S.C. § 2254(d)(2). This error is manifested in the MAR court's findings and conclusions, which were adopted by the district court and left undisturbed by the Fourth Circuit, despite clear and undisputed evidence presented at the MAR evidentiary hearing. Section 28 U.S.C. § 2254(d)(2) provides that a federal court may grant habeas relief where the state court's adjudication "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

Here, the MAR court's order was not merely incorrect, but objectively unreasonable, because it ignored or mischaracterized the uncontroverted testimony of both trial counsel and the defense expert, and instead speculated about possible strategic reasons for counsel's conduct that were flatly contradicted by the record.

As detailed in Yarborough's informal brief, the MAR court found that "defense counsel's decision not to file a motion to sever, but to allow the jury to hear Kim Elmore's firsthand, eyewitness recollection of Yarborough's conduct and demeanor on that date to support the Defense's theory negating the specific intent element of the charges, could be considered sound strategy." However, this finding is wholly unsupported by the evidentiary record. Both trial attorneys, Christine Malumphy and Stephen Freedman, testified unequivocally that their failure to file a motion to sever was not a strategic decision, but rather the result of ignorance of the law and a mistaken belief that their oral objection to joinder was sufficient. The defense expert, David Rudolf, further confirmed that prevailing professional

standards in North Carolina made it “mandatory practice” to file a written motion to sever under these circumstances, and that the omission was “well below the standard of what’s required by any lawyer handling any case involving a severance motion, but certainly in a first degree murder case.”

The MAR court’s speculation that counsel’s conduct “could be considered sound strategy” is not only unsupported but **directly contradicted by the only evidence on the point.** As Yarborough argued in his informal brief, “the MAR court’s statement that trial counsel made a ‘decision’ not to file a motion to sever is entirely unsupportable. Yarborough’s trial counsel testified that they did not make a decision to forego filing a motion to sever but rather they were under the mistaken belief that they were not required to make a motion to sever offenses, so long as they objected to the State’s motion for joinder.” The Supreme Court has recognized that “an attorney’s ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under Strickland.” *Hinton v. Alabama*, 571 U.S. 263, 274 (2014).

Moreover, the MAR court’s order was based on a “clear factual error,” as it ignored the undisputed testimony of both trial counsel and the defense expert, and instead invented a strategic justification that the record does not disclose. As Yarborough’s brief explains, “Once a defendant presents evidence rebutting the presumption of reasonableness, [which Yarborough’s MAR did], the court is not at

liberty to invent for counsel a strategic justification which counsel does not offer and which the record does not disclose." The MAR court's approach is precisely the kind of unreasonable factual determination that 28 U.S.C. § 2254(d)(2) is designed to correct.

The district court and the Fourth Circuit compounded this error by deferring to the MAR court's findings, despite the fact that those findings were not merely debatable, but objectively unreasonable in light of the evidence presented at the MAR hearing. This departure from the accepted and usual course of judicial proceedings—summarily denying a COA and habeas relief based on a plainly unreasonable determination of the facts—warrants this Court's intervention under Rule 10(a).

Even if the Court were to grant, vacate, and remand for application of the proper COA standard, that relief would reinforce uniform adherence to *Miller-El*, *Slack*, and *Buck* across the circuits.

Based on the foregoing, Yarborough respectfully submits that he has "demonstrate[d] that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. at 484 and that the Fourth Circuit Court of Appeals departed from the usual course of judicial proceeding warranting certiorari review under Supreme Court Rule 10(A). As such, Yarborough has made a "substantial showing" of the denial of a

constitutional right, 18 U.S.C. § 2253(c), such that a certificate of appealability should be issued. Yarborough respectfully requests that this Court issue a certificate of appealability.

CONCLUSION

Petitioner Garry Yarborough respectfully asks this Court to intervene, not only to correct a legal error, but to ensure that the fundamental promise of a fair trial is not denied to those whose liberty is at stake. For these reasons, the Petition for Writ of Certiorari should be granted to address the lower courts departure from the usual course of judicial proceedings and to clarify the standards governing Certificate of Appealability, Sixth Amendment claims and to clarify the standards governing counsel's duty to request tailored jury instructions in cases involving complex mental health defenses. In the alternative, the Courts may grant, vacate, and remand for reconsideration under the correct COA standard.

Respectfully Submitted this the 12th day of June, 2026.

Garry adis Yarborough
Signature

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