No. 23-12275

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**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE ELEVENTH CIRCUIT**

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SADIK BAXTER,

*Petitioner-Appellant*,

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

*Respondent-Appellee*.

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Appeal from the United States District Court
for the Southern District of Florida
Case No. 0:21-cv-62301
The Honorable Beth Bloom

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# PETITIONER-APPELLANT SADIK BAXTER'S MOTION TO EXPAND THE CERTIFICATE OF APPEALABILITY

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**CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT**

The undersigned hereby certifies the following list of trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations that may have an interest in the outcome of this appeal:

Ayalyne, Carolyne (Defense Counsel)

Bandell, Lanie B. ([former] Assistant State Attorney)

Baxter, Sadik (Appellant)

Bloom, The Honorable Beth (U.S. District Judge)

Callahan, Daniel (Defense Counsel)

Ciklin, The Honorable Cory J. (Fourth District Judge)

Conner, The Honorable Burton C. (Fourth District Judge)

Dighe, Utpal (Defense Counsel)

Dixon, Ricky, Secretary, Florida Department of Corrections (Appellee)

Egber, Mitchell ([retired] Assistant Attorney General)

Gerber, The Honorable Jonathan D. (Fourth District Judge)

Kantor, Bradley Jason (Victim)

Kuntz, The Honorable Jeffrey T. (Fourth District Judge)

Levenson, The Honorable Jeffrey R. (17th Circuit Judge)

Lewis, James S. (Defense Counsel)

Malave, Melanie (Defense Counsel)

Marsh, Janet Lynn (Victim)

Merrigan, The Honorable Edward H. (17th Circuit Judge)

Monta, Christine A. (Counsel for Petitioner-Appellant)

Moody, Ashley (Attorney General)

Oakley, Obrian Ricardo (Co-Defendant)

Ostapoff, Tatjana ([retired] Assistant Public Defender)

Perlman, The Honorable Sandra (17th Circuit Judge)

Raudt, Kevin (Defense Counsel)

Ribas, Alberto ([former] Assistant State Attorney)

Rosen, Samantha (Assistant State Attorney)

Rosenthal, The Honorable Lynn (17th Circuit Judge)

Russo, Joseph William (Victim)

Stone, Kathleen Engelhardt (Victim)

Stone, Charles Russell (Victim)

Valuntas, Richard (Senior Assistant Attorney General)

Warner, The Honorable Martha C. (Fourth District Judge)

Pursuant to Eleventh Circuit Rule 26.1-3, the undersigned further certifies that no publicly traded company or corporation has an interest in the outcome of the case or appeal.

Dated: December 20, 2023

Respectfully Submitted,

*s/ Christine A. Monta*
Christine A. Monta

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## INTRODUCTION

Petitioner-Appellant Sadik Baxter submits this application under 28 U.S.C. § 2253(c) to expand the certificate of appealability ("COA") granted by the district court. The district court has already determined that Mr. Baxter made a substantial showing of the denial of a constitutional right as to his Eighth Amendment challenge to his mandatory life sentence without the possibility of parole. The district court denied a COA, however, on three claims that Mr. Baxter's trial counsel rendered constitutionally ineffective assistance, in violation of the Sixth Amendment, for: (1) failing to advise Mr. Baxter that pleading guilty to the underlying burglary charges would necessarily concede elements of the felony murder counts; (2) failing to move to suppress Mr. Baxter's custodial statement to police, which was taken while he was heavily medicated and had repeatedly expressed confusion; and (3) failing to object to the introduction of gruesome and unsettling autopsy and accident scene photographs, which were not probative of any disputed issue in the case and served only to inflame the jury.

These claims are substantial and deserve to be considered by this Court with the benefit of the parties' briefing. The question at this stage is not whether this Court will ultimately grant relief but simply whether the district court's decision is "debatable" so as to merit full consideration. *Dean-Mitchell v. Reese*, 837 F.3d 1107, 1112 (11th Cir. 2016). Mr. Baxter's claims meet that standard.

## BACKGROUND

In the early morning hours of Sunday, August 5, 2012, Mr. Baxter and his friend, O'Brian Oakley, drove to a residential neighborhood in Florida, where Mr. Baxter began rifling through unlocked parked cars searching for valuables. A resident spotted Mr. Baxter enter his parked SUV and called 911. Police arrived within minutes, arrested Mr. Baxter, and placed him, handcuffed, in the back of a police cruiser. Doc. 10-2 at 356–57. From that point on, Mr. Baxter was in police custody and had no further contact with Mr. Oakley.

After Mr. Baxter's arrest, the resident noticed Mr. Oakley drive past in a silver Infiniti. *Id.* at 357, 714. Although the resident had not seen Mr. Baxter interact with Mr. Oakley or the Infiniti, the resident pointed out the Infiniti to police as having been involved with the burglary. *Id.* at 358, 362–63, 392. The Broward County Sheriff's Office then initiated a high-speed chase of Mr. Oakley through the residential neighborhood, in violation of its own policies prohibiting officers to engage in high-speed chases for non-violent property crimes. *Id.* at 393, 415, 591. After circling the neighborhood twice—at speeds exceeding 80 miles per hour—the chase exited onto a main road and continued for several miles until Mr. Oakley ran a red light, collided with another vehicle, and crashed into two passing cyclists, killing them instantly. *Id.* at 343, 393–400, 414, 436.

Although Mr. Baxter had been sitting in police custody, handcuffed in the back of a police cruiser, for over ten minutes when the accident occurred, *id. at* 392, 401, the State of Florida prosecuted him for first-degree felony murder for the cyclists' deaths. In Florida, first-degree felony murder is a capital offense carrying a mandatory penalty of life imprisonment without the possibility of parole if the State does not seek the death penalty. Fla. Stat. §§ 782.04(1)(a)(2), 775.082(1)(a). A jury found Mr. Baxter guilty of first-degree felony murder, and the state court sentenced him to mandatory life imprisonment without the possibility of parole. Doc. 10-2 at 842–43, 872–73; Doc. 9-1 at 22–54.

## I. State Proceedings

### A. Indictment and Plea Hearing

Mr. Baxter was indicted on two counts of first-degree felony murder for the cyclists' deaths, Fla. Stat. § 782.04(1)(a), and five counts of burglary of a conveyance for unlawfully entering parked vehicles with the intent to commit theft, Fla. Stat. §§ 810.02(1), (4)(b). Doc. 9-1 at 8–11.

On April 21, 2014, the parties convened to discuss a potential plea. Defense counsel indicated that Mr. Baxter had rejected an informal plea offer that would have required him to testify against Mr. Oakley, so he would be proceeding to trial on the

felony murder counts.[1] Doc. 10-1 at 2; *see id.* at 9, 16; Doc. 10-2 at 9–10. Defense counsel stated, however, that Mr. Baxter wished to enter open pleas—that is, guilty pleas without a plea agreement—to the five burglary counts. Doc. 10-1 at 2–3. The court recessed briefly to permit Mr. Baxter to complete the standard plea form, and then reconvened to conduct a plea colloquy. *Id.* at 10.

During the plea colloquy, the judge asked Mr. Baxter about his background and education, verified that Mr. Baxter's cognition was not impaired, and confirmed that Mr. Baxter understood that the judge could sentence him up to five years for each burglary count, for a total up to 25 years. *Id.* at 12–16. The judge also confirmed that Mr. Baxter had "had enough time to speak with" his lawyer about his decision; that his lawyer had "answered all [Mr. Baxter's] questions"; that he had "reviewed each paragraph" of the plea form carefully with his lawyer; that he and his lawyer had discussed "possible defenses" to the burglary counts "at length"; and that he was satisfied with his lawyer's advice. *Id.* at 18–21.

The judge did not, however, ask Mr. Baxter whether his lawyer had explained the consequences that pleading guilty to the burglary charges would have for the elements of felony murder. Nor did the judge explain those consequences himself;

[1] Mr. Baxter later explained that he could not accept a deal that would require him to testify against Mr. Oakley out of fear for the safety of his six-year-old daughter and family back in Jamaica, where Mr. Oakley was also from. Doc. 10-2 at 10; *see also* Doc. 9-2 at 131.

although the judge stated just prior to commencing the colloquy that the jury would "be aware of" Mr. Baxter's burglary pleas "in the trial that's going to address the murder counts," he did not explain that pleading guilty to burglary functioned to concede elements of felony murder, relieving the State of its burden to prove those elements beyond a reasonable doubt. *Id.* at 11–12. Indeed, the judge remarked that he thought Mr. Baxter had "a very defensible case, in terms of whether [he was] responsible for the homicide," suggesting that the State faced an uphill battle in prosecuting Mr. Baxter for felony murder. *Id.* at 28. The standard plea colloquy form that Mr. Baxter signed also did not inform him of the consequence his pleas would have for the felony murder counts. Doc. 9-1 at 16–17.

The judge accepted Mr. Baxter's guilty pleas to five counts of burglary of a conveyance, finding them "freely and voluntarily made with a knowing and intelligent waiver," and set the felony murder counts for trial. Doc. 10-1 at 26–27.

**B. Trial**

On the morning of trial, before jury selection, the judge conducted another colloquy to ensure that Mr. Baxter understood that, if the jury found him guilty, he would be sentenced to mandatory life without parole. Doc. 10-2 at 8–15. In doing so, the judge remarked that the jury instructions for felony murder are "pretty tough for a defendant" because the jury needed only to find that the deaths were a "natural consequence of" the burglaries, and that there was a "good possibility that the jury

may find beyond a reasonable doubt" that Mr. Baxter was guilty given that he "already admitted that [he] committed burglary of a conveyance." *Id.* at 8. In his federal habeas petition, Mr. Baxter attested, under penalty of perjury, that this was the first time he was ever informed that his pleas to burglary might have consequences for the elements of felony murder. Doc. 23 at 18, 40.

The trial, from voir dire to verdict, lasted three-and-a-half days. Just after opening statements, the State read two stipulations into the record: first, that Mr. Baxter committed, and had pled guilty to, the five counts of burglary of a conveyance charged in the indictment; and second, that the victims named in the indictment were, in fact, dead. Doc. 10-2 at 336–37; *see* Doc. 9-3 at 3, 5. Those elements having been conceded, the trial centered on whether the decedents' deaths were a "reasonably foreseeable consequence of the common design or unlawful act contemplated by" Mr. Baxter or instead resulted from an "independent act" of Mr. Oakley.[2] Doc. 10-2 at 775-776.

[2] The standard jury instructions for first-degree felony murder required the jury to find three elements: (1) the victims were dead; (2) the deaths occurred as a "consequence of and while Mr. Baxter was engaged in the commission of a burglary" or while he or an accomplice was "escaping from the immediate scene of a burglary"; and (3) that both Mr. Baxter and Mr. Oakley "were principals in the commission of the burglary." Doc. 10-2 at 773; *see* Fla. Stat. § 782.04(1)(a)(2)(e). The two stipulations effectively conceded all three elements.

However, Mr. Baxter requested and received an "independent act" instruction, which stated that, if the deaths resulted from an "independent act of O'Brian Oakley," then Mr. Baxter was not guilty of felony murder. The instruction defined

1. The State's principal evidence of a "common design" between Mr. Baxter and Mr. Oakley was a recorded custodial statement Mr. Baxter gave police on the afternoon of his arrest. In the statement, a videorecording of which was played for the jury, Mr. Baxter detailed how he and Mr. Oakley had gone to a casino the night before. *Id.* at 668, 673–74. Mr. Baxter stated that, at some point, they left the casino and began driving north, eventually arriving in a residential neighborhood called Cooper City. *Id.* at 625–26. Mr. Baxter said that he got out of the car and began trying cars to see if they were unlocked and that he entered the four or five cars that were unlocked, removed items from them, and put them into Mr. Oakley's car. *Id.* at 627–33, 660–61, 671–73.

Mr. Baxter told the detectives repeatedly that he did not know how he and Mr. Oakley ended up in Cooper City; that it was not "anybody's idea" to go there; that he and Mr. Oakley were just "vibing and driving" and ended up there; and that the burglaries were not "planned" but something he did spur-of-the-moment. *Id.* at 626–27, 637, 639; *see id.* at 639–40 ("There was no plan, there was no plan, we was just driving, I keep telling you, we was just driving."). Mr. Baxter emphasized that he had taken prescription pills for a medical issue before leaving the casino and thus

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an "independent act" as one that (1) Mr. Baxter "did not intend to occur," (2) in which he "did not participate," and (3) which "was outside of and not a reasonably foreseeable consequence of the common design or unlawful act [he] contemplated." Doc. 10-2 at 775–76. Only the third element of the instruction was in dispute.

was "drunk and on medication" during the events. *Id.* at 623, 641, 657, 663. Eventually, however, after repeated questioning, Mr. Baxter relented to the detectives' characterization of a "plan," admitting that his and Mr. Oakley's goal was to "try and get some money," that they were going to split any proceeds 50/50, and that they chose Cooper City because it was "a rich area." *Id.* at 668–70.

To blunt the impact of his police statement, Mr. Baxter took the stand in his own defense. Mr. Baxter testified, as he had initially told the detectives, that the burglaries were not planned, that he and Mr. Oakley never discussed what they would do if they got caught, and that if he had "known that [Mr. Oakley] would have sped off and put police on a high speed chase," he "would have never got in the car with him that night." *Id.* at 709, 714–15. On cross-examination, however, Mr. Baxter assented to the State's characterization that, after leaving the casino, he and Mr. Oakley "formulated a plan to commit burglaries," that they "both joined in that plan," and that they "both were going to either sell the items or split the cash." *Id.* at 728; *see also id.* at 733. In closing argument, the prosecutor relied heavily on Mr. Baxter's statements to establish a common design to commit burglary. *See, e.g.*, *id.* at 801 ("Mr. Baxter, did he have an intent to commit a burglary along with Mr. Oakley? You saw it not only live, but you saw it Memorex, if you will, on the DVD. Yeah, we planned it."); *see also id.* at 793–95. The prosecutor also capitalized on alleged discrepancies between Mr. Baxter's statements and other evidence to

impugn his credibility and argue that the discrepancies reflected consciousness of guilt. *See id.* at 801–02 ("[W]hy would he lie in the DVD? . . . Why would he create something? You know what that shows? . . . It shows you a consciousness of guilt, that's what it shows you."); *see also id.* at 795–96.

Without Mr. Baxter's police statement and his resultant testimony, the State's evidence of a "common design" between Mr. Baxter and Mr. Oakley to commit burglary was minimal and entirely circumstantial. Although the State's principal witness—Bradley Kantor, the neighbor who called the police—testified that he saw Mr. Baxter enter the SUV in his driveway, Mr. Kantor did not establish any connection between Mr. Baxter and Mr. Oakley. Indeed, although Mr. Kantor testified that he had noticed the silver Infiniti in the neighborhood before he saw Mr. Baxter enter his SUV, he did not testify that he saw Mr. Baxter interact with the Infiniti. *Id.* at 346–49. To the contrary, Mr. Kantor admitted that he never saw anyone get out of the Infiniti and that he never saw Mr. Baxter interact with the Infiniti or its driver. *Id.* at 362–63. Thus, in the absence of Mr. Baxter's own admissions, the State had no direct evidence of Mr. Baxter being in a "common design" with Mr. Oakley, and the only evidence circumstantially connecting him to Mr. Oakley was the testimony of a property crimes officer that items belonging to the persons Mr. Baxter had pled guilty to burglarizing were recovered from Mr. Oakley's Infiniti after the crash. *Id.* at 536–38; Doc. 9-3 at 3.

2. Although neither the fact nor the cause of the victims' deaths was in dispute, the State introduced—without objection from defense counsel—multiple gruesome autopsy and accident scene photographs depicting the decedents' horrific injuries. Doc. 9-6 at 31–34. The eight autopsy photographs, which were in color and published on a screen to the jury, were unusually graphic. One decedent was shown with bloody lacerations across his torso and an eye that appears to be either missing or covered in blood and gore. Another photograph showed his internal organs spilling out from one side of his stomach. Photographs of his lower body showed both legs twisted abnormally and covered in blood; one leg appears to be severed at the shin, with gore spilling out, while the other appears nearly severed at the ankle. *See* Ex. V to Amended Rule 3.850 Motion (State's Ex. 30).[3] The other decedent was likewise shown with multiple bloody lacerations across his face and torso, and one of his hands appears to be fractured or severed. A photograph of his lower body depicted his foot completely dismembered and placed on the table next to his leg, where a large bone emerged from his bloody and lacerated shin. *See* Ex. W to Rule 3.850 Motion (State's Ex. 31). The State also introduced a photograph

[3] Although the photographs admitted at Mr. Baxter's trial were in color, as were those attached to his state post-conviction motion, the State included only black-and-white scans in the appendix it submitted in the federal habeas proceedings below. *See* Doc. 9-3 at 7–45, 101–39. Mr. Baxter has filed a motion to supplement the record with the original color versions of the admitted photographs, copies of which he has filed separately under seal.

taken at the accident scene depicting a close-up shot of a bloody, amputated foot lying in the grass near a guardrail. Doc. 10-2 at 567; *see* Ex. R to Rule 3.850 Motion (State's Ex. 7M).

The medical examiner did not rely upon or refer to the photographs during her testimony. Indeed, the State did not introduce the photographs until near the end of her testimony, after she had already described the decedents' injuries in detail, and its sole question regarding the photographs was whether they would assist her and the jury in understanding the decedents' external injuries—an issue not in dispute. Doc. 10-2 at 604, 607. Similarly, although the close-up photograph of the severed foot lying in the grass was introduced in a series of accident scene photographs through the traffic homicide investigator, he did not use it to assist him in reconstructing the crash—the professed purpose of his testimony. *Id.* at 561–62. Instead, he merely described the content of the photograph, highlighting that it showed "one of the victim's foot, which was amputated above the ankle." *Id.* at 567.

The prosecutor acknowledged the gruesome nature of the photographs at Mr. Baxter's sentencing, observing, "The deaths in this case, those photos, it's like a war zone, I mean, limbs were lost, these men were just cut down." *Id.* at 862. Indeed, there was evidence the photographs were deeply upsetting to the jury; after they were published, defense counsel noted, during a break in testimony, that he was "concerned" that a juror was "crying when she was looking at the autopsy pictures,

and then she averted her eyes after the first set." *Id.* at 653. Yet, despite the gratuitously inflammatory nature of the photographs and the parties' stipulation to the victims' deaths, defense counsel did not object to the photographs' admission.

3. The jury deliberated less than an hour before returning a guilty verdict on both felony murder counts. *Id.* at 842–844; Doc. 9-1 at 19–20. On June 6, 2014, the court sentenced Mr. Baxter to eight years total imprisonment for the five counts of burglary of a conveyance and mandatory life without parole for the two counts of felony murder. Doc. 10-2 at 872–73; Doc. 9-1 at 22–54. Mr. Baxter appealed on grounds not relevant to this motion, and the Florida Fourth District Court of Appeal affirmed per curiam without a written opinion. Doc. 9-1 at 138.

### C. State Post-Conviction Motion

#### 1. *Mr. Baxter's Amended Rule 3.850 Motion*

Mr. Baxter filed an amended motion for postconviction relief under Rule 3.850 of the Florida Rules of Criminal Procedure.[4] Doc. 9-2 at 2–41. Mr. Baxter's amended Rule 3.850 motion raised three claims of ineffective assistance of counsel that are relevant to this motion:

*First*, Mr. Baxter argued that his trial counsel rendered constitutionally ineffective plea advice by failing to advise him that pleading guilty to the burglary

[4] Mr. Baxter originally filed a Rule 3.850 motion *pro se*. Doc. 9-1 at 192–200. After securing counsel, he filed an amended Rule 3.850 motion. Doc. 9-2 at 2–41. The amended motion is the operative one. *See* Doc. 9-6 at 141; Doc. 31 at 3.

charges would function to concede the principal elements of felony murder, leaving just one element for the State to prove beyond a reasonable doubt—the victims' deaths, which were not in dispute. Doc. 9-2 at 10–11, 17–20. Mr. Baxter attested under penalty of perjury that trial counsel "failed to discuss these ramifications with him," *id.* at 17, and that, had counsel done so, he would not have pled guilty to the burglary charges but would have proceeded to trial on all counts, *id.* at 20, 40; *see also id.* at 10–11, 13–14, 17–20.[5]

*Second*, Mr. Baxter argued that his trial counsel was constitutionally ineffective for failing to move to suppress Mr. Baxter's police statement on the ground that his waiver of rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), was not knowing and intelligent. *Id.* at 33–36. Mr. Baxter noted that he informed the officers repeatedly throughout the interrogation that he was under the influence of alcohol and medication and that "his ability to understand what was happening . . . was impaired."[6] *Id.* at 34. Mr. Baxter argued that this evidence provided compelling

[5] Mr. Baxter raised this argument in two separate claims: a challenge to the voluntariness of his pleas (Claim II) and an ineffective assistance claim (Claim III). *See* Doc. 9-2 at 9–20. The state post-conviction court treated them as the same claim, *see* Doc. 9-6 at 141; Doc. 9-5 at 18, and Mr. Baxter presented the argument as a single claim in his *pro se* federal habeas petition, Doc. 23 at 17–22 (Claim 7). Accordingly, we treat them as one claim here.

[6] In addition to having taken prescription medication before the events at issue, Mr. Baxter was taken to a hospital after his arrest to be treated for a medical issue before going to the police station for his interrogation. *See* Doc. 9-5 at 122;

support for a claim that his "impairment . . . resulted in his inability to understand the rights being abandoned, and the consequences of his decision to abandon them," and that, had counsel moved to suppress the statement on that ground, the motion likely would have been granted. *Id.* at 35. Mr. Baxter contended that that failure prejudiced him because the recorded police statement was "the only evidence offered at trial . . . directly linking Mr. Baxter to the vehicle that Mr. Oakley was driving," other than Mr. Baxter's trial testimony, which, he asserted under penalty of perjury, he would not have given had his interrogation statement been suppressed. *Id.* at 35 & n.5, 40.

*Third*, Mr. Baxter argued that his trial counsel was constitutionally ineffective for failing to object to the admission of the gruesome autopsy and accident scene photos. *Id.* at 20–27. Mr. Baxter urged that that "any competent defense attorney" would have objected to the photographs' admission, as they were not probative of any disputed issue—the fact and manner of death were conceded—and any possible probative value was "substantially outweighed by" the gory photographs' "unfair prejudicial effect on the jury." *Id.* at 20–21, 25. Mr. Baxter also contended that there was a reasonable probability that the admission of the photographs prejudiced his defense, as they served no purpose other than to "inflame the passions of the

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Doc. 10-2 at 716–18. Mr. Baxter was still wearing a hospital gown in the videorecording of the interrogation shown to the jury. Doc. 9-5 at 193.

jury." *Id.* at 25–26. Indeed, Mr. Baxter noted, there was record evidence that the photographs had that effect—a juror cried and averted her eyes when the photographs were shown, and the jury convicted him in under an hour. *Id.* at 26.

Finally, Mr. Baxter also raised a claim of cumulative error, arguing that the cumulative effect of the asserted errors deprived him of a fair trial. *Id.* at 39. Mr. Baxter requested an evidentiary hearing on each claim as an alternative to granting relief outright.[7] *Id.* at 20, 27, 36, 40.

2. *The State's Response*

The State filed its response eight months later. Doc. 9-5 at 2–30. With respect to Mr. Baxter's plea-advice claim, the State did not refute Mr. Baxter's assertions that his trial counsel did not explain to him that pleading guilty to burglary would concede elements of felony murder or that, had he understood those consequences, he would not have pled guilty. Instead, the State highlighted the facts that the trial court informed Mr. Baxter that "the jury would be advised about his" pleas and "conducted a thorough colloquy" before accepting them. *Id.* at 11. The State also pointed to discussions that occurred on the first day of trial, weeks after the plea hearing, including: (1) the trial court's observation that "there was a good possibility the jury would find [Mr. Baxter] guilty of" felony murder given that he had pled to

[7] Mr. Baxter moved again for an evidentiary hearing eight months later, after the State failed to file any response to his amended Rule 3.850 motion. *See* Doc. 9-1 at 2 (docket entry #256); Doc. 9-6 at 154.

the burglaries; (2) defense counsel's statement that the defense was making a "strategic decision" to stipulate to the burglaries and mention that concession in opening statements, and that he had "discussed that at length" with Mr. Baxter; and (3) a discussion during which defense counsel previewed that his defense would be that it was not a foreseeable consequence of the burglaries that the police would initiate a high-speed chase in a residential neighborhood for a non-violent property crime. *Id.* at 10–15. The State argued that these facts collectively demonstrated that Mr. Baxter's counsel utilized his guilty pleas as a "trial strategy" to establish that Mr. Baxter accepted responsibility for the burglaries while also "separat[ing] himself from the decisions and actions of his co-defendant." *Id.* at 15.

With regard to trial counsel's failure to move to suppress Mr. Baxter's police statement, the State acknowledged that Mr. Baxter told the detectives "on multiple occasions" during the interrogation that he was under the influence of alcohol and medication and that his "repeated claims of impairment caused the detectives to question his memory as well as his clarity at the time he gave the statement." *Id.* at 25. The State argued, however, that, the record "clearly showed he was not impaired at the time he spoke with the detectives" because Mr. Baxter answered affirmatively when the detectives asked whether he understood their questions. *Id.* at 27. The State also argued that the account Mr. Baxter gave about getting caught and arrested was consistent with Bradley Kantor's testimony. *Id.* Accordingly, the State

contended, defense counsel "would not have [had] a good faith basis" to move to suppress Mr. Baxter's statement on the ground that he "was impaired and did not understand what occurred at the time he spoke with the detectives." *Id.*

Finally, with respect to counsel's failure to object to the photographs' admission, the State acknowledged that the parties had stipulated to the victims' deaths but contended that the State was still responsible for proving the elements of felony murder, including the deaths. *Id.* at 19–20. The State also argued that there was "nothing to establish" that excluding the photographs would have affected the defense's "argument or presentation of its case." *Id.* at 20. Accordingly, the State urged that Mr. Baxter failed to establish either deficient performance or prejudice with regard to defense counsel's failure to object to the photographs. *Id.*

3. *State Court Decision*

Five days after the State filed its response, the trial court issued a blanket denial of all of Mr. Baxter's claims "[f]or the reasons articulated in the State's response." Doc. 9-6 at 141. The Florida Fourth District Court of Appeal affirmed the denial per curiam, without a written opinion. Doc. 9-6 at 196.

**II. Federal Proceedings**

Mr. Baxter filed a *pro se* federal habeas petition in the U.S. District Court for the Southern District of Florida in which he asserted, among other claims, the three

ineffective assistance of counsel claims raised in his amended Rule 3.850 motion. Doc. 23.[8] The district court denied all three claims. Doc. 31.

First, the district court found that Mr. Baxter's claim concerning his counsel's plea advice was "refuted by the record," pointing to defense counsel's remarks in his opening statement and closing argument that Mr. Baxter had "taken responsibility for the five burglaries" but was "not responsible for those deaths." *Id.* at 12. The court stated that the record showed both that Mr. Baxter's pleas were "knowing and voluntary" and that his pleas were "also used as part of a trial strategy to separate himself from the actions of his co-defendant." *Id.*

Second, the district court found the state court's rejection of Mr. Baxter's claim concerning counsel's failure to move to suppress his police statement not "unreasonable," adding that "[s]trategic choices—such as whether to file a certain motion—are virtually unchallengeable." *Id.* at 15. Thus, the court denied the claim under both the performance and prejudice prongs of *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). Doc. 31 at 15.

Finally, the district court found "nothing unreasonable" about the state court's denial of Mr. Baxter's claim concerning counsel's failure to object to the gruesome autopsy and crash scene photographs. *Id.* at 14. The court concluded that the

[8] Mr. Baxter's amended habeas petition, Doc. 23, is the operative petition. *See* Doc. 22 at 6; Doc. 31 at 1.

photographs "were admissible" and thus that defense counsel "cannot be deemed ineffective for failing to make a meritless objection." *Id.*

The district court granted a COA as to Mr. Baxter's Eighth Amendment challenge to his sentence but denied a COA as to all other claims. *Id.* at 17–18. Mr. Baxter filed a timely notice of appeal. Doc. 34.

## ARGUMENT

### I. Standard of Review

A COA is required to appeal "the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court." 28 U.S.C. § 2253(c)(1)(A). To obtain a COA, a habeas petitioner must make a "substantial showing of the denial of a constitutional right." *Id.* § 2253(c)(2). This requires showing that "reasonable jurists could debate" whether the petition should have been resolved differently or that the issues were adequate to proceed further—that is, whether "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Miller-El v. Cockrell*, 537 U.S. 322, 336, 338 (2003) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

Where, as here, a state court has adjudicated a petitioner's claim on the merits, the federal habeas court reviews the state court's decision under the standard set forth in the Antiterrorism and Effective Death Penalty Act (AEDPA). To grant a writ of habeas corpus under AEDPA, the federal court must find that the state court's

adjudication of the claim either "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "(2) 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." 28 U.S.C. § 2254(d). Thus, in assessing whether to grant a COA, this Court must "look to the District Court's application of AEDPA to petitioner's constitutional claims and ask whether that resolution was debatable among jurists of reason." *Miller-El*, 537 U.S. at 336. Because Mr. Baxter filed his federal habeas petition *pro se*, this Court must construe it liberally and hold it to "less stringent standards than formal pleadings drafted by lawyers." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam) (cleaned up).

Critically, the COA analysis is a "threshold inquiry" that "does not require full consideration of" the merits of a claim—"[i]n fact, the statute forbids it." *Miller-El*, 537 U.S. at 336. Indeed, a claim can be debatable even if "every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Id.* at 338. As such, Mr. Baxter need not show that he will ultimately succeed on appeal to be granted a COA, nor should this Court decline his application for a COA because it believes he will not demonstrate an entitlement to relief after full briefing. *Id.* at 337. On a motion to

expand the COA, "[t]he question is the debatability of the underlying constitutional claim, not the resolution of that debate." *Id.* at 342.

## II. This Court Should Grant a COA To Hear Mr. Baxter's Claims That Trial Counsel Was Constitutionally Ineffective.

Although the district court recognized the substantiality of Mr. Baxter's Eighth Amendment claim, it failed to recognize that reasonable jurists could also debate whether Mr. Baxter's trial counsel rendered constitutionally ineffective assistance, in violation of the Sixth Amendment, in three ways: (1) by failing to advise him that pleading guilty to burglary functioned to concede elements of felony murder; (2) by failing to move to suppress his videorecorded interrogation statement; and (3) by failing to object to the admission of graphic, gruesome autopsy and accident scene photographs. This Court should expand the COA to consider these substantial constitutional claims with the benefit of the parties' briefing.

### A. Trial counsel provided constitutionally ineffective plea advice by failing to advise Mr. Baxter that pleading guilty to burglary would concede the only contestable elements of the felony murder charges.

As Mr. Baxter attested under penalty of perjury, he pled guilty to burglary because of a grave omission by trial counsel, who failed to explain that his pleas would concede elements of the felony murder charges, leaving "just one element for the state to prove beyond a reasonable doubt"—the decedents' deaths, which were undisputed and incontestable. Doc. 9-2 at 10–11; *see id.* at 40 (attesting under

penalty of perjury). Mr. Baxter also attested that, had trial counsel "properly advised" him of the "adverse consequences his plea would have at his trial for the two felony murder counts," he would not have pled guilty to burglary but "would have proceeded to trial on all counts," holding the State to its "burden of proving each and every element, of each and every crime." Doc. 9-2 at 13, 20, 40. The state post-conviction court did not discredit either factual attestation. Doc. 9-5 at 11–15.[9]

Reasonable jurists could conclude that trial counsel's omission amounted to constitutionally ineffective plea advice. In *Hill v. Lockhart*, 474 U.S. 52 (1985), the Supreme Court held that the two-part *Strickland* standard governs claims of ineffective assistance in plea advice. In such cases, the petitioner must establish (1) that counsel's plea advice "fell below an objective standard of reasonableness," and (2) "that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* at 57, 59 (citing *Strickland*, 466 U.S. at 687–88).

[9] Because the Florida appellate court denied Mr. Baxter's claims without a written opinion, this Court must "look through" that decision to the "last related state-court decision that does provide a rationale" and presume the appellate court "adopted the same reasoning." *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018). Here, the last reasoned state-court decision was the state trial court's ruling denying Mr. Baxter's amended Rule 3.850 motion. Because the state court denied that motion "[f]or the reasons articulated in the State's response," Doc. 9-6 at 141, we refer to the State's response when discussing the court's rulings.

Here, reasonable jurists could conclude that counsel's failure to advise Mr. Baxter that pleading guilty to burglary would concede the only contestable elements of felony murder was objectively unreasonable. "The failure of an attorney to inform his client of the relevant law [before taking a plea] clearly satisfies the first prong of the *Strickland* analysis . . . as such an omission cannot be said to fall within 'the wide range of professionally competent assistance' demanded by the Sixth Amendment." *Finch v. Vaughn*, 67 F.3d 909, 916 (11th Cir. 1995) (quoting *Hill*, 474 U.S. at 62 (White, J., concurring in the judgment)). Indeed, the state post-conviction court never held that trial counsel's failure to advise Mr. Baxter of the consequences of pleading guilty to burglary for the felony murder charges did not constitute deficient performance; instead, as addressed below, the court appeared to conclude that any such deficiency was offset by other factors. Doc. 9-5 at 11–15.

Reasonable jurists could also conclude that "there is a reasonable probability that," but for counsel's failure, Mr. Baxter "would not have pleaded guilty" to burglary but "would have insisted on going to trial" on all counts. *Hill*, 474 U.S. at 59. To establish prejudice in the context of a defective guilty plea, Mr. Baxter does not need to establish that he would ultimately prevail at trial but only that he would have made a different decision with respect to the plea and that doing so would have been "rational under the circumstances." *Padilla v. Kentucky*, 559 U.S. 356, 372 (2010); *see also Lee v. United States*, 582 U.S. 357, 370–71 (2017).

Here, Mr. Baxter attested under penalty of perjury that he would not have pled guilty to the burglaries had he understood that doing so functioned to concede elements of felony murder. The state post-conviction court did not discredit that attestation. Doc. 9-5 at 11–15. Reasonable jurists could conclude that choosing not to plead guilty to burglary and instead hold the government to its burden on all counts would have been "rational under the circumstances." *Padilla*, 559 U.S. at 372. Mr. Baxter received no benefit from pleading guilty to the burglaries—he entered open pleas, without a plea agreement. Indeed, the State, at sentencing, urged the court to give Mr. Baxter a higher sentence for the burglaries than the court ultimately chose to impose. *See* Doc. 9-2 at 119 (State recommending 10-20 years for the burglaries); *compare Lee*, 582 U.S. at 370–71 (rational for petitioner to go to trial, even though losing at trial would result in a longer sentence than he received with government's plea deal, because trial gave a chance of acquittal and thus avoiding deportation).

By contrast, pleading guilty to the burglaries made the State's job at Mr. Baxter's felony murder trial considerably easier, as it relieved the State of having to prove beyond a reasonable doubt two of the three elements of felony murder. The trial judge himself acknowledged this consequence on the morning of trial. *See* Doc. 9-3 at 167 (noting that there was "a good possibility that the jury may find beyond a reasonable doubt" that Mr. Baxter was guilty of felony murder because he had "already admitted that [he] committed burglary of a conveyance"). Accordingly,

even if prevailing on the burglary charges was a long shot, Mr. Baxter had nothing to lose and everything to gain by trying. *See Lee*, 582 U.S. at 368 (recognizing that going to trial was rational, even if victory was "highly improbable," because it still gave the defendant a "Hail Mary" chance at acquittal, rather than facing certain deportation via a plea); *Esslinger v. Davis*, 44 F.3d 1515, 1530 (11th Cir. 1995) (petitioner satisfied both *Strickland* prongs where guilty plea based on inadequate advice resulted in petitioner receiving the same mandatory 99-year sentence he would have received had he been found guilty at trial, and thus petitioner had "nothing to gain" by pleading and "nothing to lose by going to trial").[10]

As noted above, the state post-conviction court did not discredit either factual assertion Mr. Baxter made under penalty of perjury, nor did it make findings to the contrary. That is, the court did not find that Mr. Baxter's trial counsel did, in fact, advise him of the consequences pleading guilty to the burglaries would have for the elements of felony murder. Nor did the court find incredible or otherwise disbelieve Mr. Baxter's assertion that he would not have pled guilty to the burglaries had he understood that doing so functioned to concede elements of felony murder. Instead,

[10] Moreover, as noted below, Mr. Baxter also claims that trial counsel's failure to move to suppress his videorecorded interrogation statement was constitutionally ineffective. Had the statement been suppressed, Mr. Baxter would not have testified, leaving the State with no direct evidence connecting Mr. Baxter to Mr. Oakley. Suppression of the statement thus would have given Mr. Baxter added reason not to plead to the burglary counts.

the court rejected Mr. Baxter's claim based on other factors: the trial court's "thorough" plea colloquy and conclusion that Mr. Baxter's pleas were entered knowingly and voluntarily; its remark informing Mr. Baxter that the jury would "be aware" he had pled guilty to burglary; and statements defense counsel made on the first day of trial, weeks after Mr. Baxter entered his pleas, indicating that the defense planned, with Mr. Baxter's approval, to stipulate to the pleas and use them strategically at trial. Doc. 9-5 at 11–15. Reasonable jurists could debate whether the state court's denial of Mr. Baxter's claims on these grounds was "contrary to, or an unreasonable application of," *Hill* and its progeny. 28 U.S.C. § 2254(d)(1).

First, the fact that the trial court conducted a "thorough colloquy" and found that Mr. Baxter was entering his burglary pleas knowingly and voluntarily, Doc. 9-5 at 11, cannot override counsel's error in failing to advise Mr. Baxter of the consequence pleading guilty would have for the felony murder counts. Indeed, the Supreme Court expressly rejected that exact argument in *Padilla* and then again in *Missouri v. Frye*, 566 U.S. 134 (2012). *See id.* at 141 (noting that the *Padilla* Court rejected the argument, also made by the State in *Frye*, that "a knowing and voluntary plea supersedes errors by defense counsel" in rendering plea advice). Thus, reasonable jurists could find that the state post-conviction court's reliance on the trial court's "thorough" plea colloquy to reject Mr. Baxter's claim, Doc. 9-5 at 11, was contrary to, or an unreasonable application of, *Padilla* and *Frye*.

That is especially true because nowhere in the "thorough colloquy" did the trial court discuss the consequences that pleading guilty would have on the felony murder counts. The trial court discussed the consequences pleading guilty would have on Mr. Baxter's *burglary* charges—*i.e.*, that he would waive his jury trial right and could receive up to five years for each burglary count. Doc. 9-2 at 62. The trial court also discussed certain *other* collateral consequences—the pleas' potential impact on Mr. Baxter's probation, potential immigration consequences, and the possibility of civil commitment if he had prior qualifying offenses. Doc. 9-2 at 65, 71–72. But the trial court never explained to Mr. Baxter that pleading guilty to burglary would function to concede elements of the remaining felony murder charges. Doc. 9-2 at 62–78. Nor did the standard plea form apprise Mr. Baxter of that consequence. Doc. 9-2 at 49–50.

The trial court's passing comment, just before commencing the plea colloquy, that the jury would "be aware of" Mr. Baxter's guilty pleas during the felony murder trial, Doc. 9-5 at 11, did not provide such notice. Knowing that the jury might become aware that he pled guilty to the burglaries is not the same as knowing that the State was required to prove his participation in the burglaries beyond a reasonable doubt to convict him of felony murder, nor that, by pleading guilty to them, he would relieve the State of that burden and leave just one element for it to prove—the decedents' deaths, which were not in dispute. Indeed, the trial court's

statement later during the plea hearing that it believed Mr. Baxter had "a very defensible case" on the felony murder counts signaled the exact opposite—that the State faced an uphill battle in prosecuting Mr. Baxter for felony murder. Doc. 9-2 at 79. The trial court's passing comment earlier certainly did not constitute a clear or detailed explanation that pleading guilty to burglary would concede elements of felony murder. *See United States v. Wilson*, 245 F. App'x 10, 12 (11th Cir. 2007) (counsel's failure to explain consequences of plea "was cured by the district court," which "itself explained to Wilson—in detail—the consequences of the plea agreement . . . before accepting Wilson's guilty plea"); *Kealy v. United States*, 722 F. App'x 938, 946 (11th Cir. 2018) (plea agreement and colloquy cured counsel's alleged deficient performance where agreement specifically noted collateral consequences of pleas and trial court "on no less than four occasions at the plea hearing" confirmed that petitioner understood those consequences).[11]

Finally, the state post-conviction court relied heavily on the use defense counsel made of Mr. Baxter's burglary pleas at trial, finding that the defense made a "strategic decision" to highlight the pleas to show that Mr. Baxter "accepted responsibility for his part of the criminal actions" while also "separat[ing] himself

[11] *See also Lee*, 582 U.S. at 369 n.4 (observing that several lower courts had "noted that a judge's warnings at a plea colloquy may undermine a claim that the defendant was prejudiced by his attorney's misadvice" but that the trial court's statements there had not done so).

from the decision and actions of his co-defendant." Doc. 9-5 at 13–15. The district court also relied largely on this factor in denying Mr. Baxter's habeas petition. Doc. 31 at 12. But the fact that defense counsel tried *at trial* to reframe to Mr. Baxter's advantage the pleas he had already entered says nothing about whether Mr. Baxter would have entered those pleas *weeks earlier* had he understood that doing so functioned to concede elements of the felony murder charges. To the extent the state post-conviction court was suggesting it would have been irrational for Mr. Baxter to have insisted on going to trial on the burglary counts because pleading guilty to them gave him a better defense to felony murder, reasonable jurists could certainly debate that. As the Court said in *Lee*, the fact that "[n]ot everyone" in Mr. Baxter's position would "make the choice to" force the government to prove the burglaries beyond a reasonable doubt does not mean "it would be irrational to do so." 582 U.S. at 371.

In sum, because reasonable jurists could debate whether the state post-conviction court's resolution of Mr. Baxter's plea-advice claim was "contrary to, or an unreasonable application of," *Hill* and its progeny, 28 U.S.C. § 2254(d)(1), this Court should grant Mr. Baxter a COA on that claim and allow him to brief it in full.

### B. Trial counsel was constitutionally ineffective in failing to move to suppress Mr. Baxter's police statement.

Mr. Baxter also contended in his state post-conviction motion that his trial counsel was constitutionally ineffective for failing to seek suppression of his police statement on the ground that his *Miranda* waiver was not knowing and intelligent.

Doc. 9-2 at 33–36. The state court denied that claim under both the performance and prejudice prongs of *Strickland*, concluding that Mr. Baxter's interrogation statement "clearly showed he was not impaired at the time he spoke with the detectives" and thus counsel "would not have a good faith basis to file a motion to suppress." Doc. 9-5 at 27. The district court found "nothing unreasonable" about that decision, adding that "[s]trategic choices—such as whether to file a certain motion—are virtually unchallengable" under *Strickland*. Doc. 31 at 15. Reasonable jurists could debate the correctness of that ruling.

A valid *Miranda* waiver must have been made "with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Moran v. Burbine*, 475 U.S. 412, 421 (1986). It is the State's burden to prove that a *Miranda* waiver was knowing, voluntary, and intelligent. *Colorado v. Connelly*, 479 U.S. 157, 167–68 (1986). "[T]o establish a claim of ineffective assistance of counsel based on the failure to file a motion to suppress," Mr. Baxter "must demonstrate that counsel knew a valid basis existed to suppress the relevant evidence, yet counsel failed to file the motion." *Jefferson v. State*, 351 So. 3d 266, 271 (Fla. Dist. Ct. App. 2022) (citing *Harrison v. State*, 562 So. 2d 827, 827–28 (Fla. Dist. Ct. App. 1990)).

Here, there were numerous indications on the face of the interrogation video that Mr. Baxter was under the influence of medication and thus unable to knowingly

and intelligently waive his *Miranda* rights. Almost immediately after the interrogation started, the detective observed that Mr. Baxter was "talking real low," prompting Mr. Baxter to inform the detectives that he was "taking a lot of medication," including Percocet and several others.[12] Doc. 9-5 at 126. This exchange caused the detective to question whether Mr. Baxter was "coherent right now" and understood the questions being asked and his *Miranda* rights. *Id.* Later in the interrogation, Mr. Baxter told the detectives he was "taking seven different pills." *Id.* at 147. Subsequently, after exhibiting confusion at the detective's questions, Mr. Baxter pleaded, "I'm just saying it's the pills messing with my head still." *Id.* at 164. This prompted the detective again to question whether Mr. Baxter was impaired, asking, "Sadik, are you fucked up right now?" *Id.* Mr. Baxter responded, "I honestly think I am. I'm feeling like I'm straight, but I'm [unintelligible]." *Id.* Shortly thereafter, Mr. Baxter started to plead his confusion again but was cut off by the detective. *Id.* at 165 ("A.: Honestly, I'm telling you the honest truth, sir, my head is like . . . Q.: All right. What were you – How were you dressed tonight?" (ellipses in original)). Later, Mr. Baxter reminded the detectives that he was "still on the medication" when they asked about a discrepancy in his story. *Id.* at 180. Finally, when the detectives questioned again at the end of the

[12] The first question the detective asked Mr. Baxter was, "Are you awake?" Doc. 9-5 at 122.

interrogation whether Mr. Baxter understood everything they had discussed, Mr. Baxter responded that "a lot was confusing." *Id.* at 188. The detective asked what was confusing, and Mr. Baxter responded, "Just everything." *Id.* When pressed, Mr. Baxter ultimately stated that he understood the detectives' questions. *Id.*

In short, Mr. Baxter informed the detectives on no fewer than seven occasions during the recorded interrogation that he was on medication and that it was affecting his ability to process information, and the detectives themselves questioned on three separate occasions whether Mr. Baxter was in fact coherent. Reasonable jurists could conclude that these circumstances provided counsel a good faith basis to move to suppress the statement on the ground that Mr. Baxter's impairment rendered him unable to knowingly, intelligently, and voluntarily waive his *Miranda* rights. *See, e.g.*, *Slade v. State*, 129 So. 3d 461, 463–464 (Fla. Dist. Ct. App. 2014) (post-conviction petitioner adequately alleged deficient performance where the record "clearly indicate[d] that [petitioner] was likely intoxicated when he was interrogated" but counsel did not move to suppress on that basis); *Harrison*, 562 So. 2d at 827–28 (where petitioner was "so thoroughly under the influence of crack cocaine that he was unable to understand the constitutional rights he was waiving," counsel's failure to move to suppress gave rise to ineffective assistance claim); *Reddish v. State*, 167 So. 2d 858, 862–63 (Fla. 1964) (per curiam) (confession given by defendant at hospital while under the influence of narcotic painkillers not

voluntary). Mr. Baxter's counsel "knew a valid basis existed to suppress the relevant evidence," yet "failed to file the motion." *Jefferson*, 351 So. 3d at 271.

Moreover, the detective acknowledged at the start of the interrogation that Mr. Baxter had been at the hospital before going to the police station, and, indeed, the video showed that Mr. Baxter was still wearing his hospital gown. Doc. 9-5 at 122, 193. Reasonable jurists could conclude that a reasonably competent defense attorney would have investigated further by, for example, obtaining Mr. Baxter's hospital records to determine what medications he had been given at the hospital and how close in time to the interrogation they were administered, and retaining an expert opinion as to the potential effect those medications could have had on Mr. Baxter's ability to comprehend his waiver of rights. There is no indication in the record that Mr. Baxter's counsel pursued any of those steps before deciding not to move to suppress Mr. Baxter's interrogation statement.[13] Reasonable jurists could debate whether counsel's decision not to move to suppress the statement "was an unreasonable choice based on an inadequate investigation of the facts." *Smith v. Dugger*, 911 F.2d 494, 498 (11th Cir. 1990) (per curiam) (concluding that trial

[13] The state post-conviction court did not hold an evidentiary hearing on Mr. Baxter's Rule 3.850 motion, despite his repeated requests that it do so. As a result, the record contains no testimony from his trial counsel concerning the basis for his decision not to file a suppression motion.

counsel's "failure to file some motion in an attempt to limit the use of" petitioner's confessions at trial was constitutionally ineffective).

To the extent the state post-conviction court's remark that Mr. Baxter's interrogation statement "clearly showed he was not impaired at the time he spoke with the detectives" constitutes a factual finding, Doc. 9-5 at 27, reasonable jurists could debate whether that was "an unreasonable determination of the facts" under 28 U.S.C. § 2254(d)(2). Although Mr. Baxter stated during the interrogation that he understood the questions being asked, there were numerous countervailing indications that his comprehension was impaired due to medication. Moreover, as noted above, defense counsel failed to conduct any investigation into the medications Mr. Baxter had been administered at the hospital or their potential effects on his comprehension—investigation that could have bolstered Mr. Baxter's multiple statements to the detectives that the medication was "messing with [his] head." Doc. 9-5 at 164. The interrogation statement alone was not so "clear[]," Doc. 9-5 at 27, as to absolve defense counsel of his obligation to investigate the circumstances of Mr. Baxter's apparent impairment and "file some motion in an attempt to limit the use of" Mr. Baxter's statement at trial. *Smith*, 911 F.2d at 498.

Reasonable jurists could also debate the district court's depiction of counsel's failure to file a suppression motion as a "[s]trategic choice[]," Doc. 31 at 15—a characterization that, notably, the state post-conviction court did not apply, Doc. 9-

5 at 25–27. Indeed, it is difficult to conceive of what possible trial strategy could have been served by not making any effort to exclude the most damaging evidence of Mr. Baxter's involvement in the burglaries and connection to Mr. Oakley—Mr. Baxter's own detailed confession. As the Supreme Court has said, "A confession is like no other evidence. Indeed, the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him." *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991) (cleaned up). As in *Smith*, reasonable jurists could conclude that defense counsel's decision—whether branded "strategic" or not—was "unreasonable and outside the wide range of professionally competent assistance," given the centrality of Mr. Baxter's confession to the State's case. [14] *Smith*, 911 F.2d at 497.

Reasonable jurists could also debate whether there is a "reasonable probability" that, but for counsel's deficiency in failing to investigate the circumstances of Mr. Baxter's *Miranda* waiver and move to suppress his interrogation statement, "the result of the proceeding would have been different."

[14] As noted above, *supra* n.13, because the state post-conviction court denied Mr. Baxter's multiple requests for an evidentiary hearing, the record contains no testimony from trial counsel regarding the reasoning behind his decision not to move to suppress Mr. Baxter's statement. *Contrast, e.g.*, *Zamora v. Dugger*, 834 F.2d 956, 959 (11th Cir. 1987) (assuming without deciding that counsel's failure to file suppression motion was "not a reasonable tactical decision" notwithstanding counsel's testimony at a Rule 3.850 evidentiary hearing that he did not seek suppression because the petitioner had made other damaging admissions).

*Strickland*, 466 U.S. at 694. Notably, the state post-conviction court's *Strickland* prong-two finding rested entirely on its conclusion that trial counsel "would not have had a good faith basis to file" a suppression motion; the court did *not* find that, had such a motion been filed and granted, the outcome of Mr. Baxter's trial would have been the same. Doc. 9-5 at 27. Nor could it. The interrogation video was the State's primary evidence establishing a "common design" between Mr. Baxter and Mr. Oakley, other than Mr. Baxter's trial testimony, which Mr. Baxter attested under penalty of perjury he would not have given had his recorded statement been suppressed, Doc. 9-2 at 35, 40—an attestation that the state court never discredited, Doc. 9-5 at 25–27. As noted above, *supra* p. 9, the government's principal eyewitness, Bradley Kantor, did not witness any interaction between Mr. Baxter and Mr. Oakley; thus Mr. Baxter's admissions constituted the State's only direct evidence of his connection to Mr. Oakley.

While Mr. Baxter's pleas circumstantially connected him to Mr. Oakley insofar as items belonging to the persons Mr. Baxter pled to burglarizing were found in Mr. Oakley's car, that barebones, circumstantial link was not nearly as powerful as the detailed confession Mr. Baxter gave the police, which filled out the story of his night with Mr. Oakley step-by-step. As noted above, the Supreme Court has recognized the uniquely "probative and damaging" nature of confessions and the "profound impact" they have on juries. *Fulminante*, 499 U.S. at 296. Without Mr.

Baxter's confession, the State's case of a "common design" between him and Mr. Oakley was skeletal at best; the jury would have known nothing about Mr. Baxter's relationship with Mr. Oakley, their whereabouts leading up to the accident, or the manner in which they jointly carried out the vehicle burglaries. It is unsurprising, then, that the State relied almost exclusively on Mr. Baxter's confession to establish a "common design" between him and Mr. Oakley in closing argument. Doc. 10-2 at 793–95, 801–02; *see Albert v. Montgomery*, 732 F.2d 865, 870–71 (11th Cir. 1984) (prosecutor's reliance on evidence in closing argument compounds its prejudicial effect). Moreover, Mr. Baxter contends that, but for trial counsel's ineffective plea advice, he would not have pled guilty to the burglaries at all. Thus, the cumulative impact of these two errors is unquestionably prejudicial, as without either the pleas or Mr. Baxter's confession, the State would have had *no* evidence linking Mr. Baxter to Mr. Oakley.

Finally, beyond the confession's obvious evidentiary import, the State utilized Mr. Baxter's confession throughout its closing argument both to paint Mr. Baxter as a liar and to urge the jury to infer that the supposed "lie[s]" he told reflected "consciousness of guilt." Doc. 10-2 at 801-802; *see also id.* at 793–97. This use of Mr. Baxter's own words to impugn his character and trustworthiness added to the prejudicial impact of the statement's admission.

In sum, reasonable jurists could debate the reasonableness of the state post-conviction court's conclusion that trial counsel's failure to move to suppress Mr. Baxter's custodial confession—the most damaging evidence against him and the principal evidence establishing his connection to Mr. Oakley—was not constitutionally ineffective. Accordingly, this Court should grant a COA on that issue and allow Mr. Baxter to brief it in full.

### C. Trial counsel was constitutionally ineffective in failing to object to the admission of grisly autopsy and accident scene photographs where the fact, cause, and manner of death were undisputed.

Mr. Baxter also contended that his trial counsel rendered constitutionally ineffective assistance in failing to object to the admission of the gruesome autopsy and accident scene photographs depicting the decedents' horrific injuries. Specifically, Mr. Baxter argued that any reasonable defense lawyer would have objected to the photographs' admission, as they were not probative of any disputed issue—the victims' deaths were stipulated—and thus served no purpose but to inflame the jury. The state post-conviction court denied this claim under both prongs of *Strickland*, concluding that the State "still ha[d] an obligation to prove the elements of the crimes charged," notwithstanding the stipulations, and that Mr. Baxter had not shown that his "argument or presentation of the case would have changed had these photographs been excluded." Doc. 9-5 at 19–20. The district court found "nothing unreasonable" with that decision, concluding that the

photographs "were admissible" and thus any objection would have been "meritless." Doc. 31 at 14. Reasonable jurists could debate the correctness of that ruling.

First, reasonable jurists could disagree with the district court's conclusion that the photographs were "admissible" as a matter of law and conclude, instead, that an objection to their admission had a reasonable probability of being sustained. The Florida Supreme Court has repeatedly admonished trial courts to exercise "caution" when considering the admission of gruesome photographs and to "scrutinize such evidence carefully for prejudicial effect." *Marshall v. State*, 604 So. 2d 799, 804 (Fla. 1992); *see also Jackson v. State*, 213 So. 3d 754, 777 (Fla. 2017) (citing cases). To that end, the Florida Supreme Court has held that the basic relevancy standard is not "a carte blanche for the admission of gruesome photos," and that, "[t]o be relevant, a photo of a deceased victim must be probative of an issue *that is in dispute*." *Almeida v. State*, 748 So. 2d 922, 929 (1999) (emphasis in original). Moreover, even where photographs might have some relevance, Florida law, like the Federal Rules of Evidence, holds that relevant evidence is "inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence." Fla. Stat. § 90.403. And where the issue the photographs are introduced to prove is "freely conceded" or "abundantly proved by other evidence," the photographs are not "independently relevant" and thus more likely to be

inadmissible as unduly prejudicial. *Dyken v. State*, 89 So. 2d 866, 866–67 (Fla. 1956) (en banc).

In light of these principles, the Florida Supreme Court has regularly held that trial courts erred in admitting gruesome autopsy or crime scene photographs where they bore limited probative value. *See, e.g.*, *Doorbal v. State*, 983 So. 2d 464, 499 (Fla. 2008) (per curiam) (error to admit photograph of a decomposed corpse introduced to show rate of decomposition, which was not an issue in dispute); *Looney v. State*, 803 So. 2d 656, 670 (Fla. 2001) (per curiam) (error to admit autopsy photographs showing burned corpses where the damage caused to the bodies by arson was not in dispute); *Hertz v. State*, 803 So. 2d 629, 642–43 (Fla. 2001) (per curiam) (same); *Almeida*, 748 So. 2d at 929 (error to admit autopsy photograph of the victim's gutted body cavity, introduced to show trajectory of the bullet and nature of the injuries, where those issues were not in dispute and "[a]dmission of the inflammatory photo thus was gratuitous"); *Czubak v. State*, 570 So. 2d 925, 929 (Fla. 1990) (per curiam) (error to admit photographs of victim's decomposed and discolored body where the "probative value of the photographs was at best extremely limited" and was "outweighed by their shocking and inflammatory nature"); *Reddish*, 167 So. 2d at 863 (error to admit autopsy photographs, even though "not unusually gruesome," because "the cause of death had been clearly established" and the photographs were not relevant to any "fact or circumstance in issue"); *Dyken*, 89

So. 2d at 866–67 (error to admit "indescribably horrible photograph of the deceased lying on a mortuary slab" to show location of the fatal wound, where that point was "freely conceded and abundantly proved by other evidence").

The Florida District Courts of Appeal, Florida's intermediate appellate courts, have likewise found gruesome photographs inadmissible in these circumstances.[15] In *Conner v. State*, 987 So. 2d 130 (Fla. Dist. Ct. App. 2008), for example—a case involving the vehicular homicide of a cyclist—the Second District Court of Appeal held that the trial court reversibly erred in admitting a photograph of "the bicyclist's uncovered body sprawled . . . on his stomach in a pool of blood" because it was admitted to prove an issue not before the jury and which it did not actually show (the body's final resting point). *Id.* at 132–33. Similarly, in *Ramroop v. State*, 174 So. 3d 584 (Fla. Dist. Ct. App. 2015), *quashed on other grounds* 214 So. 3d 657 (Fla. 2017), a first-degree murder case stemming from a vehicular death during a police chase, the Fifth District Court of Appeal held that the trial court erred in admitting a gruesome photograph of the decedent's body where the parties had "mutually stipulated" to the location of the accident, the cause of death, and the decedent's identity, leaving the photograph "limited, if any, probative value." *Id.* at 590–91;

[15] District Court of Appeal decisions "represent the law of Florida" unless and until overruled by the Florida Supreme Court; thus, in the absence of interdistrict conflict, District Court of Appeal decisions "bind all Florida trial courts" whether or not they fall within that district. *Pardo v. State*, 596 So. 2d 665, 666 (Fla. 1992) (citation omitted).

*see also Beagles v. State*, 273 So. 2d 796, 798–99 (Fla. Dist. Ct. App. 1973) (reversible error to admit "gory and gruesome" autopsy photographs where the defense had admitted the decedent's identity and the fact and manner of death); *cf. Donohue v. State*, 801 So. 2d 124, 126 (Fla. Dist. Ct. App. 2001) (finding the relevance of "gruesome autopsy photographs" admitted at murder trial "questionable" but reserving judgment on their admissibility in light of remand on other issues).

Here, the eight color autopsy photographs and close-up photograph of a severed foot lying in the grass were unquestionably gruesome and inflammatory; indeed, the State recognized as much during sentencing when it described the photographs as "like a war zone, I mean, limbs were lost." Doc. 10-2 at 862. On the flip side, the gruesome photographs were not probative of any issue in dispute. The parties had stipulated to the victims' deaths; indeed, the State told the jury in opening statements that the deaths were "not a fact in dispute." *Id.* at 326. There was also no dispute that the deaths were caused by Mr. Oakley crashing his car into their bicycles during a high-speed chase with the BSO. *See, e.g.*, *id.* at 330, 335 (defense opening statement); *id.* at 490, 501 (defense stipulating that victims' DNA was found on the outside of Mr. Oakley's vehicle); *id.* at 562 (trial court noting that defense "agree[s] the other guy caused the deaths"); *id.* at 607 (defense declining to cross-examine the medical examiner). The sole disputed issue for the jury was

whether Mr. Oakley's act of fleeing and leading police on a high-speed chase was a foreseeable consequence of a "common design" between him and Mr. Baxter to burglarize parked vehicles or instead an "independent act" on Mr. Oakley's part. *Id.* at 776. The grisly autopsy and crash scene photographs were neither relevant to nor probative of that issue.

Moreover, even assuming the State was entitled to present some evidence of the decedents' injuries, notwithstanding that the fact, cause, and manner of their deaths were not in dispute, those injuries were "abundantly proved by other evidence." *Dyken*, 89 So. 2d at 867. The medical examiner described each of the decedents' injuries in painstaking detail: she testified that both victims died of "multiple blunt force injuries," including traumatic brain injury, laceration of the brain stem, fractures of the spine and ribs, contusions on the lungs, hemorrhages of various internal organs, and "traumatic amputation" of their legs. Doc. 10-2 at 601–03, 605–06. An eyewitness also described running to the scene within 20 seconds of the crash, finding the cyclists already dead, and seeing both of their severed legs in the roadway. *Id.* at 436–37. Thus, the jury was amply aware of the injuries the victims suffered; subjecting the jury to close-up, color photographs of their bloody, mangled bodies and severed limbs served no independent relevance.

Indeed, the medical examiner did not even refer to or use the autopsy photographs during her testimony to assist her in describing the victims' injuries to

the jury. *See, e.g.*, *Looney*, 803 So. 2d at 670 (error to admit gruesome autopsy photographs where "the medical examiner's testimony about the cause of death did not rely at all on the photographs"). Rather, she extensively detailed the victims' injuries orally without the assistance of any visual aid. It was only after the medical examiner had described each decedent's injuries and cause of death that the State introduced the graphic autopsy photographs and asked the medical examiner a single perfunctory question: whether the photographs collectively would "assist" the jury in understanding the "external" injuries she had described. Doc. 10-2 at 603–04, 606–07. Likewise, the traffic homicide investigator, through whom the close-up photograph of a severed foot in the grass was introduced, did not use that photograph to assist him in reconstructing the crash—the ostensible purpose of his testimony. *Id.* at 561–62. Instead, he merely described the content of the photograph as depicting an area "just below where [a] tire was found" that showed "two gloves" and "one of the victim's foot, which was amputated above the ankle." *Id.* at 567.

In sum, given the photographs' indisputably gruesome nature, their minimal to nonexistent probative value on any disputed issue, and the Florida courts' repeated admonition that trial courts should exercise caution when considering the admission of such photographs, there is a reasonable probability that, had defense counsel objected to the photographs' admission, the trial court would have sustained the objection. Indeed, the prosecutor specifically flagged the autopsy photographs as

something the defense might object to. *Id.* at 533 ("I have autopsy photos, if we want to address that now, should the Defense have any objection."). Yet inexplicably, when the court later asked defense counsel whether he had reviewed the photographs, counsel stated only, "They're admissible," and lodged no objection when the State introduced the photographs into evidence. *Id.* at 596, 603, 606. Reasonable jurists could debate whether defense counsel's failure to make any effort to keep these gory, gruesome, and wholly gratuitous photographs from the jury "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 687–88.

Reasonable jurists could also debate whether there is a reasonable probability that counsel's failure to object to the inflammatory photographs' admission affected the outcome of Mr. Baxter's trial. Given the unspeakably gory nature of the photographs, reasonable jurists could find it reasonably likely that their admission distracted the jury from its sole job at trial—determining whether Mr. Oakley's miles-long, high-speed flight from police was a foreseeable consequence of the burglaries or an "independent act"—and inflamed its passions such that its verdict, arrived at in under an hour, reflects an emotional response rather than a logical evaluation of the evidence. That a juror cried and averted her eyes while the State projected the photographs to the jury, Doc. 10-2 at 653—photographs that the prosecutor himself described as "like a war zone," *id.* at 862—is strong evidence that the photographs had such an improper inflammatory effect. The state post-

conviction court's skepticism that Mr. Baxter's "argument or presentation of its case would have changed had these photographs been excluded," Doc. 9-5 at 20, is beside the point—the question is whether there is a reasonable probability the photographs affected the jury's verdict, not whether counsel's trial strategy would have changed had they been excluded.[16] Because reasonable jurists could debate whether Mr. Baxter meets that standard, this Court should grant him a COA on this issue.

### D. The cumulative impact of counsel's deficient performance prejudiced Mr. Baxter.

This Court recognizes that *Strickland*'s prejudice inquiry "should be a cumulative one as to the effect of all the failures of counsel that meet the performance deficiency requirement." *Evans v. Sec'y, Florida Dep't of Corrs.*, 699 F.3d 1249, 1269 (11th Cir. 2012). While Mr. Baxter maintains that he established prejudice as to each of trial counsel's abovementioned failures standing alone, reasonable jurists certainly could debate whether those deficiencies, considered cumulatively, deprived him of a fair trial.

The compounding effect of defense counsel's two pretrial errors are obvious. Had counsel sought and achieved suppression of Mr. Baxter's police statement, the

[16] Of course, it's obvious that it would have: defense counsel expended considerable effort in closing argument imploring the jury not to let the "horrendous pictures" showing the victims' injuries cause it to convict Mr. Baxter out of anger or disgust. Doc. 10-2 at 811–12; *see also id.* at 821–24. Had the photographs not been admitted, defense counsel could have focused more on the evidence and independent act argument and less on tamping down the jurors' inflamed passions.

State would have been left with no direct evidence connecting Mr. Baxter to Mr. Oakley or his vehicle; its case would have hinged entirely on Mr. Baxter's burglary pleas, which circumstantially connected him to Mr. Oakley's Infiniti via the items recovered from it after the crash. Doc. 10-2 at 536–38; Doc. 9-3 at 3. But if counsel had advised Mr. Baxter correctly on the consequences pleading guilty to burglary would have for the elements of felony murder, Mr. Baxter would not have pled at all—leaving the State with *no* evidence, direct or circumstantial, that he was acting in concert with Mr. Oakley. And of course, had counsel successfully sought suppression of Mr. Baxter's police statement, that weakening of the State's case would have given Mr. Baxter added reason not to enter open pleas to burglary, making a decision to insist on a trial on all counts even more rational.

As it were, counsel's pretrial errors meant that Mr. Baxter went to trial on felony murder having both conceded his involvement in the underlying burglaries and provided the State a detailed accounting of his connection to Mr. Oakley—concessions that even the trial judge acknowledged created a "good possibility" that the jury would find him guilty. Doc. 10-2 at 8. Add to this counsel's failure to object to the gruesome, inflammatory autopsy and accident scene photographs, and the three errors cumulatively magnified the potential that the jury would dispense with a careful evaluation of the independent act issue and convict Mr. Baxter based on anger and disgust over the victims' senseless deaths.

## CONCLUSION

Mr. Baxter respectfully requests that this Court grant his motion to expand the COA to include the claims outlined above.

Dated: December 20, 2023

Respectfully Submitted,

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**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT**

I hereby certify that:

This motion complies with the type-volume limitation of 11th Cir. R. 22-2 because it contains 12,300 words, excluding the parts of the motion exempted by Fed. R. App. P. 27(a)(2)(B).

This motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionately spaced typeface using Microsoft Word for Office 365 and Times New Roman 14-point font.

*s/ Christine A. Monta*
Christine A. Monta

**CERTIFICATE OF SERVICE**

I hereby certify that on December 20, 2023, I electronically filed the foregoing *Motion to Expand the Certificate of Appealability* with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the CM/ECF system. I certify that participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

*s/ Christine A. Monta*
Christine A. Monta