

No. 23-12275

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

SADIK BAXTER,

Petitioner-Appellant,

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent-Appellee.

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

**PETITIONER-APPELLANT SADIK BAXTER'S MOTION TO
SUPPLEMENT THE RECORD**

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**CERTIFICATE OF INTERESTED PERSONS &
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

Pursuant to Federal Rule of Appellate Procedure 10(e)(2)(C), Petitioner-Appellant Sadik Baxter respectfully requests that this Court supplement the record on appeal with the original, color versions of the autopsy and accident scene photographs that were admitted at Mr. Baxter's trial and ruled upon by the state post-conviction court but which Respondent-Appellee provided only indiscernible black-and-white scans of to the district court. *See* Doc. 9-3 at 6–45, 128–33, 134–39. Reviewing the correct version of the photographs is critical to this Court's consideration of a claim Mr. Baxter raises in his concurrently filed Motion to Expand the Certificate of Appealability. The color originals have been submitted under seal along with a Motion to File Exhibits Under Seal also filed concurrently with this motion. In support of this motion, Mr. Baxter states:

1. This is an appeal from the denial of Mr. Baxter's *pro se* Amended Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus. Mr. Baxter is currently incarcerated in a Florida state prison.

2. Mr. Baxter was convicted of two counts of first-degree felony murder for the accidental vehicular deaths of two cyclists caused by Mr. Baxter's co-defendant, who crashed into the cyclists while fleeing from police after Mr. Baxter was already under arrest and in police custody for a non-violent property crime. On June 6, 2014, Mr. Baxter was sentenced to mandatory life imprisonment without

possibility of parole. Doc. 9-1 at 22–25. The state appellate court affirmed Mr. Baxter’s convictions and sentence on February 9, 2017. Doc. 9-1 at 138.

3. On April 23, 2019, Mr. Baxter filed an amended motion for post-conviction relief under Rule 3.850 of the Florida Rules of Criminal Procedure. Doc. 9-2 at 2–41. Among the claims Mr. Baxter raised in his amended Rule 3.850 motion was a claim alleging that his trial counsel was constitutionally ineffective under *Strickland v. Washington*, 466 U.S. 668 (1984), for failing to challenge the admission of highly inflammatory, gruesome autopsy and accident scene photographs at his trial. Doc. 9-2 at 20–27. In support of that claim, Mr. Baxter’s counsel appended the color photographs the State introduced at trial (State’s Exhibits 7, 30, and 31) as Exhibits R, V, and W to the amended Rule 3.850 motion.¹

4. Due to the nature of the photographs, Mr. Baxter’s state post-conviction counsel filed a Notice of Confidential Information Within Court Filing designating Exhibits R, V, and W confidential pursuant to Florida Rule of Judicial Administration 2.420(d). *See* Attachment. As a result, the Broward County Circuit Court Clerk marked Mr. Baxter’s color submissions of Exhibits R, V, and W confidential but made black-and-white scans of the exhibits publicly available on the

¹ Mr. Baxter’s amended Rule 3.850 motion included additional photographs as part of the ineffectiveness claim. *See* Doc. 9-2 at 22–23; Doc. 9-3 at 101–127 (Exhibits T and U). On appeal, Mr. Baxter is not challenging counsel’s failure to object to the photographs in Exhibits T and U and thus does not include them in this request to supplement the record.

court's docket. *See* Doc. 9-1 at 2–3 (Docket, *Florida v. Baxter*, No. 12011455CF10A (Broward Cnty.), available at <https://www.browardclerk.org/Web2> (last accessed Dec. 20, 2023)).

5. The state post-conviction court denied Mr. Baxter's amended Rule 3.850 motion on February 3, 2020, Doc. 9-6 at 141, and the state appellate court affirmed that denial on March 4, 2021, Doc. 9-6 at 196.

6. Mr. Baxter thereafter filed a *pro se* federal habeas petition in the U.S. District Court for the Southern District of Florida raising 13 grounds for relief, including the ineffective assistance of counsel claim based on his trial counsel's failure to challenge the admission of the gruesome autopsy and accident scene photographs. Doc. 1 at 19; Doc. 23 at 27–29 (amended petition).

7. Because Mr. Baxter was an incarcerated prisoner proceeding *pro se*, the district court ordered Respondent-Appellee to submit a “comprehensive appendix” comprising all relevant transcripts and pleadings, including any Rule 3.850 motions. Doc. 4 at 2; Doc. 24 at 2.

8. Respondent-Appellee's appendix included Mr. Baxter's amended Rule 3.850 motion in full; however, Respondent-Appellee included only the publicly available black-and-white scans of exhibits R, V, and W, not the color originals that Mr. Baxter's post-conviction counsel had appended to his amended Rule 3.850 motion. *See* Doc. 9-3 at 6–45 (Exhibit R); *id.* at 128–33 (Exhibit V); *id.* at 134–39

(Exhibit W). The grainy black-and-white scans of the photographs included in Respondent-Appellee’s appendix are barely discernible and do not clearly depict the vivid, gory images seen by the jury and ruled on by the state post-conviction court. *See* Doc. 9-3 at 6–45, 128–33, 134–39.

9. On April 25, 2023 the district court denied all 13 claims raised in Mr. Baxter’s *pro se* federal habeas petition. Doc. 31. Based only on the indiscernible black-and-white scans included in Respondent-Appellee’s appendix, the district court denied Mr. Baxter’s ineffectiveness claim on the ground that the autopsy and accident scene photographs “were admissible” and thus any objection to them would have been “meritless.” *Id.* at 14. The district court granted a certificate of appealability (COA) on Mr. Baxter’s Eighth Amendment claim challenging his sentence, *id.* at 9, 17-18, and Mr. Baxter filed a timely notice of appeal.

10. Concurrently with this motion, Mr. Baxter has filed a motion to expand the COA to include three additional ineffective assistance of counsel claims, including the aforementioned claim concerning trial counsel’s failure to challenge the admission of the gruesome autopsy and accident scene photographs at his trial.

11. Because Mr. Baxter’s ineffective assistance of counsel claim turns on the graphic nature of the autopsy and crash scene photographs, it is critical that this

Court, in reviewing whether to grant a COA on that claim, be able to see these photographs clearly and in color as the jury and state post-conviction court did.²

12. Federal Rule of Appellate Procedure 10(e)(2)(C) authorizes this Court to modify or correct the record on appeal “[i]f anything material to either party is omitted from or misstated in the record by error or accident.”

13. The color versions of the photographs that were admitted at Mr. Baxter’s trial and ruled upon by the state post-conviction court are material to Mr. Baxter’s request to expand the COA to include this claim. As noted above, the black-and-white scans are barely discernible and do not reflect the unusually gruesome nature of the photographs, which is critical to Mr. Baxter’s claim that counsel was constitutionally ineffective for not seeking to shield the photographs from the jury.

14. Moreover, Mr. Baxter assumes that Respondent-Appellee was acting in good faith below and that their failure to include the color versions in their comprehensive appendix was an inadvertent error and not a deliberate effort to mislead the district court, which was relying on Respondent-Appellee to compile an accurate appendix. *See supra* ¶ 7; Doc. 4 at 2; Doc. 24 at 2; *cf. Dickerson v.*

² Because the color versions of the photographs were marked “confidential” in the state post-conviction proceedings, Mr. Baxter has submitted them under seal rather than attaching them to this motion. *See* 11th Cir. R. 25-3(h) (“Documents filed under seal in the court from which an appeal is taken will continue to be filed under seal on appeal to this court.”) Mr. Baxter has filed a separate Motion to File Exhibits Under Seal concurrently with this motion.

Alabama, 667 F.2d 1364, 1368 (11th Cir. 1982) (supplementing the record where the State, in a *pro se* habeas proceeding, had failed to transmit a key trial transcript to the district court and “cannot in good faith contend that they were without notice of the existence of this transcript or of its contents”).

15. Accordingly, because the color photographs are “material” to Mr. Baxter’s claim and Respondent-Appellee omitted them from the district court record “by error or accident,” this Court can and should supplement the record on appeal with the color originals pursuant to Federal Rule of Appellate Procedure 10(e)(2)(C). *See Ryles v. Comm’r, Ala. Dep’t of Corr.*, No. 21-13934, 2022 WL 17485660, at *4 (11th Cir. Dec. 7, 2022) (applying Rule 10(e)(2)(C), in a federal habeas appeal under 28 U.S.C. § 2254, to supplement the record on appeal with 150 pages of trial testimony that was “part of the record before the adjudicating state court” but was not transmitted to the district court “likely . . . due to an uploading error”); *Ross v. Kemp*, 785 F.2d 1467, 1474 n.12 (11th Cir. 1986) (supplementing the record under Rule 10(e)(2) is appropriate where “the parties have treated the material as if it was part of the [district court] record and later discover that for some unexplained reason it was not”).

16. Alternatively, this Court has the inherent equitable power to supplement the record if doing so would be in the interests of justice. *Young v. City of Augusta ex rel. Devaney*, 59 F.3d 1160, 1168 (11th Cir. 1995). This Court reviews

requests to supplement the record “on a case-by-case basis” and considers factors such as judicial economy and whether the added material will aid the Court in “making an informed decision.” *Id.*; *see also Schwartz v. Millon Air, Inc.*, 341 F.3d 1220, 1225 n.4 (11th Cir. 2003).

17. Here, supplementing the record with the original color versions of the autopsy and accident scene photographs would be in the interests of justice. Resolving Mr. Baxter’s motion to expand the COA requires this Court to determine whether “reasonable jurists” could debate the state post-conviction court’s conclusion that trial counsel was not ineffective for failing to object to the photographs’ admission. *See Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). This Court cannot “effectively review” the state post-conviction court’s ruling or make an “informed decision” on the debatability of its decision without reviewing the versions of the photographs on which the state post-conviction court actually based its ruling. *Young*, 59 F.3d at 1168; *see also Schwartz*, 341 F.3d at 1225 n.4 (supplementing record on appeal with “clearer copies” of medical records where the photocopies that were before the district court were “not always clear”); *Dickerson*, 667 F.2d at 1366-67 (supplementing record on appeal where district court “could not have properly made . . . a determination” that the state court’s ruling was “adequately supported by the record” given that the key state trial transcript “was never made part of the habeas corpus record”).

18. Additionally, given that this Court reviews a district court's denial of a federal habeas claim based on ineffective assistance of counsel *de novo*, it would be a more "efficient use of judicial resources" for this Court to supplement the record on appeal with the color photographs rather than remanding for the district court to supplement the record and review Mr. Baxter's ineffectiveness claim anew based on the color versions of the photographs upon which it should have decided Mr. Baxter's petition. *Dickerson*, 667 F.2d at 1367.

19. Finally, it would be unfair to punish Mr. Baxter for Respondent-Appellee's presumed oversight in submitting unrecognizable scans in lieu of the color originals to the district court given that he was an incarcerated prisoner pursuing his federal habeas petition *pro se*, without the assistance or resources of counsel, and appropriately relied on Respondent-Appellee to create an accurate record pursuant to the district court's order. *See* Doc. 4 at 2; Doc. 24 at 2.

20. Undersigned counsel reached out to counsel for Respondent-Appellee to ascertain their position on this motion. Respondent-Appellee's counsel responded that they oppose this motion because the color originals of the photographs "(1) were never presented to the District Court, and (2) are irrelevant to the issue contained in the [existing] Certificate of Appealability."

WHEREFORE, Petitioner-Appellant Sadik Baxter respectfully requests that this Court supplement the record to include the original color versions of the autopsy

and accident scene photographs that were attached to his amended Rule 3.850 petition and ruled on by the state post-conviction court but which Respondent-Appellee submitted to the district court only as indiscernible black-and-white scans. *See* Doc. 9-3 at 6–45 (Exhibit R); 128–33 (Exhibit V); 134–39 (Exhibit W).

Dated: December 20, 2023

Respectfully Submitted,

s/ Christine A. Monta

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Counsel for Petitioner-Appellant

Sadik Baxter

CERTIFICATE OF COMPLIANCE

I hereby certify that:

This motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 2,014 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 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

ATTACHMENT

Filing # 88426054 E-Filed 04/23/2019 11:45:09 PM

IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT
IN THE [NAME OF COURT], BROWARD COUNTY
FLORIDA

CASE NO.: 12-011455-CF-10A

STATE OF FLORIDA

Plaintiff/Petitioner,

vs.

SADIK RASHAD BAXTER

Defendant/Respondent.

NOTICE OF CONFIDENTIAL INFORMATION WITHIN COURT FILING

Pursuant to Florida Rule of Judicial Administration 2.420(d)(2), I hereby certify:

(x)(1) I am filing herewith a document containing confidential information as described in Rule 2.420(d)(1)(B) and that:

(a) The title/type of document "Exhibit V" and "Exhibit W", and

(b) (X) the entire document is confidential, or

() the confidential information within the document is precisely located at:

OR

(x)(2) A document was previously filed in this case that contains confidential information as described in Rule 2.420(d)(1)(B), but a Notice of Confidential Information within Court Filing was not filed with the document and the confidential information was not maintained as confidential by the clerk of the court. I her[e]by notify the clerk that this confidential information is located as follows:

(a) Title/type of document: "Exhibit R" and "Exhibit T" and "Exhibit U";

(b) Date of filing (if known): April 23, 2019;

(c) Date of document: N/A;

(d) Docket entry number: N/A;

*** FILED: BROWARD COUNTY, FL BRENDA D. FORMAN, CLERK 04/23/2019 11:45:08 PM.***

Unique Code : CAA-FAA-BCABB-DIEEFIHID-HIDCFD-F Page 1 of 2



(e) Entire document is confidential, or

() Precise location of confidential information in document: _____

James Lewis, Esq.

Filer's Signature

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished by (e-mail) (delivery) (mail) (fax) on: (All parties and Affected Non-Parties. Note: If the name or address of a Party or Affected Non-Party is confidential, DO NOT include such information in this Certificate of Service. Instead, serve the State Attorney or request court Service. See Rule 2.420(k)).
courtdocs@sao17.state.fl.us, on April 23, 2019.

James Lewis, Esq.

Filer's Signature

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