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 REPLY IN SUPPORT OF 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: January 9, 2024

Respectfully Submitted,

s/ Christine A. Monta
Christine A. Monta

Pursuant to Federal Rule of Appellate Procedure 27(a)(4), Petitioner-Appellant Sadik Baxter submits this reply to Respondent-Appellee's January 2, 2024, response opposing Mr. Baxter's Motion to Expand the Certificate of Appealability (COA) ("State's Response").

I. Reasonable jurists could debate whether trial counsel provided constitutionally ineffective plea advice.

Respondent-Appellee does not claim that Mr. Baxter's trial counsel informed him that pleading guilty to burglary would concede elements of felony murder—nor can it, as the record contains no evidence refuting Mr. Baxter's attestation that counsel failed to advise him of this critical consequence. Respondent-Appellee argues, however, that a COA on this issue should be denied because (1) Mr. Baxter affirmed that he knew the jury would "be aware" he pled guilty to burglary, and (2) pleading to burglary was a "reasonable, strategic decision" given the other evidence against him. State's Response at 5–6. Neither argument undermines the debatability of Mr. Baxter's claim that counsel's plea advice was constitutionally ineffective.

First, as Mr. Baxter explained in his Motion to Expand the COA, knowing that the jury might learn about the pleas is qualitatively different from understanding that pleading guilty would relieve the State of its burden to prove key elements of felony murder beyond a reasonable doubt. Motion to Expand the COA at 27–28. Reasonable jurists could certainly debate whether the trial court's passing comment that the jury might become "aware" of the pleas could even come close to curing

trial counsel's failure to explain to Mr. Baxter that pleading guilty to burglary would concede the only contestable elements of felony murder.

Second, Respondent-Appellee misstates the prejudice standard Mr. Baxter is required to meet. State's Response at 6. Under *Hill v. Lockhart*, 474 U.S. 52 (1985), Mr. Baxter does not need to prove that, had he gone to trial on the burglary charges, he would have won. He need only show that, had he been properly advised that pleading guilty to burglary would concede elements of the felony murder charges, he "would not have pleaded guilty" to burglary but "would have insisted on going to trial" on all counts. *Id.* at 59; *see Lee v. United States*, 582 U.S. 357, 367–68, 370–71 (2017). Reasonable jurists could conclude that Mr. Baxter's attestation under penalty of perjury that he would not have pled to burglary had he understood that doing so all but eliminated the government's burden of proof on felony murder—a rational attestation that the state post-conviction court never discredited—satisfied *Hill*'s prejudice standard.

Respondent-Appellee's assertion that pleading guilty to burglary was a "reasonable, strategic decision" in light of the State's other evidence, State's Response at 6, misses the point. The question under *Hill* is not whether pleading guilty to burglary was a reasonable trial strategy; the question is whether Mr. Baxter would have still pursued that strategy *as a matter of fact* had he been properly advised that doing so would function to concede the only contestable elements of

felony murder. Mr. Baxter has attested under penalty of perjury that he would not have, and reasonable jurists could certainly find a decision to hold the government to its burden on those counts to avoid an effective concession on felony murder rational. *See Lee*, 582 U.S. at 368, 371 (concluding that "throwing a 'Hail Mary' at trial" to avoid certain deportation, even though conviction at trial would result in a higher sentence, was not irrational even though others similarly situated would choose to take a plea deal); Motion to Expand the COA at 24–25. Mr. Baxter was entitled to be informed of the consequence his guilty pleas would have on the elements of felony murder before deciding what strategy to pursue, and trial counsel's failure to so advise him was constitutionally ineffective. *See Hill*, 474 U.S. at 58–59; *cf. McCoy v. Louisiana*, 138 S. Ct. 1500, 1505 (2018) ("[I]t is the defendant's prerogative, not counsel's, to decide on the objective of his defense: to admit guilt . . . or to maintain his innocence, leaving it to the State to prove his guilt beyond a reasonable doubt."). At the very least, reasonable jurists could debate that question—the only standard Mr. Baxter need meet at this stage.

II. Reasonable jurists could debate whether trial counsel's failure to move to suppress Mr. Baxter's confession was constitutionally ineffective.

Respondent-Appellee asserts, without citation, that trial counsel's failure to move to suppress Mr. Baxter's detailed confession—the principal evidence against him and the only direct evidence connecting him to the person who caused the decedents' deaths—was a "strategic decision" made "after thorough investigation of

law and facts relevant to plausible options." State's Response at 7. There is no support in the record for that assertion. The state post-conviction court denied Mr. Baxter's multiple requests for an evidentiary hearing; consequently, the record contains no evidence of trial counsel's reasons for not filing a suppression motion and no evidence that trial counsel conducted any investigation of the circumstances surrounding Mr. Baxter's apparent impairment, much less a "thorough" one.[1] It is difficult to imagine what possible trial strategy could compel a defense lawyer to not even attempt to exclude "the most probative and damaging evidence" against Mr. Baxter. *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991) (cleaned up). At the very least, reasonable jurists could debate whether counsel's failure to do so constituted deficient performance. *See Smith v. Dugger*, 911 F.2d 494, 496–98 (11th Cir. 1990).

As to prejudice, Respondent-Appellee argues that suppressing Mr. Baxter's confession would not have made a difference at trial because there was other circumstantial evidence establishing that Mr. Baxter committed burglaries in concert

[1] As such, Respondent-Appellee's reliance on *Premo v. Moore*, 562 U.S. 115, 124 (2011), is misplaced, as there the state post-conviction court held an evidentiary hearing at which trial counsel gave a detailed explanation as to why he did not file a suppression motion and testified that he had discussed the decision with his client. *Id.* at 119–20. Here, the state court, having denied an evidentiary hearing, did not take any testimony from Mr. Baxter's trial counsel and thus would have had no basis to conclude that counsel's failure to file a suppression motion was a "strategic decision" resulting from a "thorough investigation." State's Response at 7.

with Obrian Oakley—namely, Mr. Baxter's pleas.[2] State's Response at 7–8. Mr. Baxter explained at length in his motion (a) why Mr. Baxter's detailed confession (and his trial testimony that resulted from it) was qualitatively different from the State's other circumstantial evidence, both in its evidentiary import and the way the State used it to impugn his character and trustworthiness; and (b) that the prejudice of its admission was amplified by counsel's ineffective plea advice, without which the State would not have had Mr. Baxter's pleas, the only other evidence circumstantially connecting him to Mr. Oakley. Motion to Expand the COA at 35–37. Respondent-Appellee does not engage with these points.

III. Reasonable jurists could debate whether trial counsel's failure to object to the admission of gruesome, inflammatory autopsy and crash scene photographs was constitutionally ineffective.

Respondent-Appellee's contention that Mr. Baxter "does not identify any United States Supreme Court precedent offended by the introduction of the autopsy/crime scene photographs," State's Response at 8, fundamentally misunderstands Mr. Baxter's claim. Mr. Baxter's claim is not that the trial court's

[2] The "two eyewitnesses" who "saw [Mr. Baxter] commit the crimes," State's Response at 8—by which Respondent-Appellee presumably means Bradley Kantor and his wife—did not establish any connection between Mr. Baxter and Mr. Oakley. As explained in Mr. Baxter's motion, Mr. Kantor testified only to seeing Mr. Baxter enter and remove items from his own vehicle; he did not witness Mr. Baxter interact with Mr. Oakley or burglarize any other cars, and Mr. Kantor's stolen items were not found in Mr. Oakley's vehicle. Motion to Expand the COA at 9, 36. Mr. Kantor's wife, the other presumed "eyewitness," did not testify at Mr. Baxter's trial.

admission of the photographs, in the absence of any defense objection, violated the Constitution. Rather, his claim is that trial counsel's *failure to object to their admission* constituted ineffective assistance of counsel in violation of the Sixth Amendment. The governing Supreme Court precedent for that claim is *Strickland v. Washington*, 466 U.S. 668 (1984), which established the constitutional standard for ineffective assistance of counsel claims.

The relevant question under *Strickland* is whether there is a reasonable probability that, had trial counsel objected to the photographs' admission, the trial court would have sustained that objection. *See Arvelo v. Sec'y, Fla. Dep't of Corr.*, 788 F.3d 1345, 1348 (11th Cir. 2015) (where lawyer failed to seek exclusion of evidence, both *Strickland* prongs "turn on the viability of" the objection). Had such an objection been lodged, the trial court's decision would have been governed by state evidentiary law. Mr. Baxter cited nearly a dozen binding Florida Supreme Court and appellate court cases holding that trial courts erred in admitting gruesome photographs where, as in this case, they were not probative of any disputed issue and any possible relevance was outweighed by the danger of unfair prejudice. Motion to Expand the COA at 39–42. There is a reasonable probability that the trial court, guided by that governing evidentiary law, would have excluded the unquestionably gruesome autopsy and crash scene photographs had Mr. Baxter's trial counsel objected to them—at the very least, reasonable jurists could debate that question.

The two Florida cases Respondent-Appellee cites (at 8)—which both involved heinous malice murders that required the State to prove premeditation—do not undermine the debatability of the constitutional question in this very different case.

IV. The cumulative impact of trial counsel's multiple deficiencies must be considered in weighing *Strickland* prong two.

Finally, Respondent-Appellee's effort to dissuade this Court from considering the cumulative effect of trial counsel's deficiencies is meritless. Mr. Baxter's cumulative impact argument is not a separate "claim," State's Response at 9; it is an argument about how this Court must analyze the prejudice stemming from trial counsel's multiple errors asserted in Mr. Baxter's three *Strickland* claims.

This Court has repeatedly recognized—including in cases brought under 28 U.S.C. § 2254—that, where counsel's performance was deficient in multiple respects, the prejudice inquiry "should be a cumulative one" rather than assessing the harm of each error in isolation. *Evans v. Sec'y, Fla. Dep't of Corrs.*, 699 F.3d 1249, 1269 (11th Cir. 2012); *see also, e.g.*, *Pye v. Warden, Ga. Diagnostic Prison*, 50 F.4th 1025, 1055 (11th Cir. 2022). Respondent-Appellee does not and cannot dispute that, if Mr. Baxter satisfies *Strickland* prong one on the three ineffectiveness claims he asserts, the cumulative impact of counsel's errors was damning. At the very least, reasonable jurists could debate whether there is a "reasonable probability" that, but for trial counsel's multiple errors, "the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

CONCLUSION

Mr. Baxter respectfully requests that this Court grant his motion to expand the COA so that it may consider these three substantial constitutional claims with the benefit of the parties' full briefing.

Dated: January 9, 2024

Respectfully Submitted,

s/ Christine A. Monta

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

I hereby certify that:

This reply complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(C) because it contains 1,847 words, excluding the parts of the reply exempted by Fed. R. App. P. 27(a)(2)(B).

This reply 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 January 9, 2024, I electronically filed the foregoing *Reply in Support of 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