

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 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: 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 Supplement the Record with color originals of autopsy and accident scene photographs that were part of the relevant state court proceedings but which Respondent-Appellee submitted only as black-and-white scans to the district court (“State’s Response”). Mr. Baxter explained in his original filing why the motion should be granted under Federal Rule of Appellate Procedure 10(e)(2)(C) or, alternatively, this Court’s inherent equitable power. Mr. Baxter does not reiterate those arguments here but submits this reply to respond to several assertions made in Respondent-Appellee’s response.

Respondent-Appellee does not dispute either that (1) given Mr. Baxter’s status as an incarcerated prisoner acting *pro se*, the district court ordered Respondent-Appellee to submit a “comprehensive appendix” comprising all relevant documents from the state court record, *see* Doc. 4 at 2; Doc. 24 at 2; or (2) that in response to that order, Respondent-Appellee submitted only indiscernible black-and-white scans of the autopsy and crash scene photographs at issue in Claim 10 of Mr. Baxter’s *pro se* federal habeas petition, omitting the color originals that were before the jury and the state post-conviction court, *see* Doc. 9-3 at 6–45, 128–33, 134–39.

Respondent-Appellee nevertheless faults Mr. Baxter—a *pro se* incarcerated prisoner—for not noticing Respondent-Appellee’s error and taking some step to

correct it below, such as lodging an objection to the deficiency, moving the district court to “compel the filing of the color photos,” or “attempt[ing] to provide color versions to the District Court” himself. State’s Response at 3. Respondent-Appellee goes so far as to speculate that Mr. Baxter possessed the color photographs “all along” and “simply chose not to file them with the District Court” for some inexplicable reason. *Id.* at 5. Mr. Baxter is compelled to address these assertions.

First, Mr. Baxter was entitled to trust that counsel for Respondent-Appellee, as an officer of the court, would provide an accurate appendix in compliance with the district court’s detailed order and had no reason to believe or know that Respondent-Appellee had not done so. Incarcerated prisoners do not have access to the federal courts’ electronic records system. Although Mr. Baxter was sent a copy of Respondent-Appellee’s eight-volume, 2,449-page appendix via U.S. mail, *see* Doc. 9 at 3; Doc. 10 at 2, he has informed undersigned counsel that he did not receive the black-and-white scanned photographs as part of that mailing;¹ that he did not realize that the district court did not have access to the color photographs until he read undersigned counsel’s Motion to Supplement the Record in this appeal; and

¹ Undersigned counsel presumes that Respondent-Appellee sent Mr. Baxter the full appendix but that the facility removed the photographs during their screening of his mail, as his prior facility had done when his post-conviction counsel attempted to send him the exhibits to his Rule 3.850 motion. *See infra* pp. 4–5 & n.3.

that, had he known at the time, he would have reached out to his post-conviction counsel and asked them to provide the color photographs to the district court.²

Moreover, even if Mr. Baxter had received the State's full appendix, he had no reason to know that the indiscernible black-and-white scans of the photographs embedded in the third volume represented what Respondent-Appellee actually submitted to the district court as opposed to photocopies—particularly given the Florida Department of Corrections' (FDOC) rule prohibiting prisoners from receiving photographs that could be deemed a security threat, of which Mr. Baxter could have expected Respondent-Appellee to be aware. *See infra* p. 4. And regardless, this Court has not required parties—much less incarcerated *pro se* litigants—to have noticed the omission of material documents in the district court and made some effort to correct it below before supplementing the record on appeal. *See, e.g., Ryles v. Comm'r, Ala. Dep't of Corr.*, No. 21-13934, 2022 WL 17485660, at *4 (11th Cir. Dec. 7, 2022) (per curiam) (granting State's motion to supplement the record with 150 pages of trial testimony not transmitted to the district court, which State did not notice until briefing on appeal); *Dickerson v. Alabama*, 667 F.2d

² Mr. Baxter would be happy to swear to these affirmations under oath in an affidavit should the Court request it. Undersigned counsel was unable to obtain a sworn declaration from Mr. Baxter given the short deadline for filing this reply and the difficulties and delays in corresponding with incarcerated prisoners.

1364, 1367–68 (11th Cir. 1982) (*sua sponte* supplementing the record with critical state trial transcript in *pro se* habeas case, over State’s objection).

Second, Mr. Baxter is not now, and has never been, in possession of the color versions of the gruesome and inflammatory autopsy and accident scene photographs that the State introduced at his trial. Mr. Baxter has been incarcerated in an FDOC facility since 2014, and was so confined, in four different institutions, throughout the pendency of his federal district court proceedings. *See, e.g.*, Doc 1 at 1; Doc. 23 at 1; Doc. 30; Doc. 32 at 1, 24–26. As an incarcerated prisoner, Mr. Baxter is not permitted to retain photographs that “present a threat to the security or order of the institution or the rehabilitative interests of the inmate,” even if they are case-related. Fla. Admin. Code R. 33-210.102(6)(a)(3); *see also* Fla. Admin. Code R. 33-210.101. The gory autopsy and accident scene photographs, depicting gruesome fatal injuries, internal organs, severed limbs, and the decedent’s genitalia, fall within this restriction. *See* Fla. Admin. Code R. 33-210.101(4)(d), (8).

Indeed, it is undersigned counsel’s understanding that when Mr. Baxter’s state post-conviction lawyers attempted to mail him a copy of his amended Rule 3.850 motion, which included black-and-white photocopies of the exhibits, the Tomoka Correctional Institution deemed the autopsy and crime scene photographs

“unauthorized” due to their explicit nature and confiscated them.³ In short, Mr. Baxter did not personally possess the color photographs while he was litigating his *pro se* federal habeas petition from an FDOC facility and thus could not have “attempted to provide color versions of the photos” himself. State’s Response at 3.⁴

Finally, although Respondent-Appellee implies that only the “publicly available” black-and-white scans “were in its possession,” State’s Response at 3, Respondent-Appellee possessed the color originals, both actually and constructively, at the time it filed its appendix in the district court.⁵

The State of Florida, represented by the Office of the State Attorney for the 17th Judicial Circuit of Florida, introduced the photographs at Mr. Baxter’s trial. Doc. 10-2 at 567, 603–607; *see* Fla. Stat. § 27.02 (state attorneys represent the State

³ Undersigned counsel reached out to the Tomoka Correctional Institution to obtain documentation of this event, *see* Fla. Admin. Code R. 33-210.102(7), but was told that the facility did not retain such documentation from the time period in question. The Tomoka representative confirmed, however, that Mr. Baxter would not have been permitted to receive or retain autopsy or crime scene photographs.

⁴ Undersigned counsel obtained the color exhibits from Mr. Baxter’s state post-conviction counsel in November 2023. Counsel attempted to obtain them from the Broward County Clerk’s office but was unable to due to their confidential nature.

⁵ Even if Respondent-Appellee had not possessed the photographs, the district court made clear in its order that it expected Respondent-Appellee to make efforts to obtain the relevant state-court documents in compiling its appendix. *See, e.g.*, Doc. 4 at 4 (requiring appendix to contain all relevant state-court transcripts and stating that it “shall be no excuse” that a transcript was not transcribed or made part of the state appellate record); *id.* (requiring that any extension motion based on “inability to procure state-court records” be “accompanied by documentation” showing that Respondent-Appellee requested them “in a timely fashion”).

in criminal prosecutions). The Office of the State Attorney also received color versions of the photographs as Exhibits R, V, and W to Mr. Baxter's amended Rule 3.850 motion. *See* Doc. 9-2 at 41; Motion to Supplement the Record at 2. Although the Office of the Attorney General represents the State in Mr. Baxter's federal habeas proceeding and was the office that submitted the district court appendix, *see* Doc. 7 at 1; Doc. 9, under Florida law, the Attorney General is the "chief state legal officer," Fla. Const. Art 4 § 4(b), and exercises "general superintendence and direction over" the various State Attorney's Offices, Fla. Stat. § 16.08. Accordingly, the Office of the Attorney General had constructive possession over the color photographs by virtue of its "general superintendence and direction over" the State Attorney's Office that introduced the color photographs at Mr. Baxter's trial and represented the State in defending against his amended Rule 3.850 motion. *Id.*

The Office of the Attorney General also had actual possession of the color photographs. The Office of the Attorney General represented the State of Florida in Mr. Baxter's appeal of the denial of his amended Rule 3.850 motion to the Florida Fourth District Court of Appeal. *See* Doc. 9-6 at 194. The color versions of the photographs were made part of the record in that appeal, *see* Appendix A (unopposed motion to order a supplemental record including the color versions); Appendix B (order granting unopposed motion to supplement record), and the supplemental record containing those color photographs was served directly on the West Palm

Beach office of the Office of the Attorney General—the same office representing the State of Florida in Mr. Baxter’s federal habeas proceeding. Appendix C (excerpts from Supplemental Record on Appeal).⁶

Accordingly, the office representing Respondent-Appellee in Mr. Baxter’s federal habeas proceeding had actual possession of the color originals of the photographs when it submitted its appendix in response to the district court’s order. Notwithstanding this fact, Respondent-Appellee elected to submit to the district court only black-and-white scans of the photographs, which Respondent-Appellee knew to be indiscernible. *See, e.g.*, Appendix A at 2 (Mr. Baxter’s post-conviction counsel stating, in support of unopposed motion to include the color photographs in the state appellate record, that “the quality” of the black-and-white scans “is severely distorted” and that reviewing the color versions was “necessary” for the court “to make a proper determination” of Mr. Baxter’s ineffectiveness claim).

The color autopsy and accident scene photographs introduced at trial are critical to this Court’s ability to “mak[e] an informed decision” on whether to grant

⁶ Because Mr. Baxter has moved to submit the color photographs under seal, we have excluded the exhibits from Appendix C. The Master Index to the Supplemental Record on Appeal shows that the color photographs submitted to the state post-conviction court as Exhibits R, V, and W to Mr. Baxter’s amended Rule 3.850 motion were included in it, and the cover page shows that the Supplemental Record was furnished to the Office of the Attorney General, West Palm Beach office. Appendix C at 1–2. Mr. Baxter will submit under seal the full Supplemental Record on Appeal excerpted in Appendix C should this Court request it.

a certificate of appealability on one of Mr. Baxter’s constitutional claims. *Young v. City of Augusta ex rel. Devaney*, 59 F.3d 1160, 1168 (11th Cir. 1995); *see also* Fed. R. App. P. 10(e)(C) (supplementation authorized where omitted documents are “material to either party”). The color versions were “part of the record before the adjudicating state court,” *Ryles*, 2022 WL 17485660, at *4, and Respondent-Appellee “cannot in good faith contend” that it was unaware that the photographs were in color before the state court when it submitted only indiscernible black-and-white copies to the district court, *Dickerson*, 667 F.2d at 1368. Including the color originals in the record on appeal would pose no injustice to Respondent-Appellee, whereas excluding them would be severely unfair to Mr. Baxter.

Dated: January 9, 2024

Respectfully Submitted,

s/ Christine A. Monta

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Counsel for Petitioner-Appellant

Sadik Baxter

CERTIFICATE OF COMPLIANCE

I hereby certify that:

This reply complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(C) because it contains 1,954 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 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

APPENDIX A

IN THE FOURTH DISTRICT COURT OF APPEAL
STATE OF FLORIDA

SADIK BAXTER,)
Appellant,)
vs.) CASE NO.: 4D20-749
STATE OF FLORIDA,)
Appellee.)
_____)

**UNOPPOSED MOTION TO ORDER A SUPPLEMENTAL
APPELLATE RECORD AND TOLL TIME**

Appellant, SADIK BAXTER, by and through undersigned attorney, pursuant to the Florida Rules of Appellate Procedure, requests this Honorable Court to order the Broward County Clerk’s Office to supplement the appellate record, and to toll the time for filing the Initial Brief. In support of this motion, the Appellant further states:

1. Appellant’s Initial Brief is presently due for service.
2. Undersigned substituted as counsel on June 30, 2020.
3. Appellant’s 3.850 motion included a total of 78 photographs. (*See* SR,¹ 320-59; 415-53; 458-62) Those photographs were included with the Defendant’s motion, *in color*, and e-filed with the clerk of court as the following exhibits:

¹ “SR” references the summary record on appeal, and is followed by the relevant .pdf page number, as displayed by the Adobe software.

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- a. Exhibit R – 39 colored photographs (40 pages total)²
 - b. Exhibit T – 19 colored photographs (20 pages total)
 - c. Exhibit U – 6 colored photographs (7 pages total)
 - d. Exhibit V – 5 colored photographs (6 pages total)
 - e. Exhibit W – 5 colored photographs (6 pages total)
 - f. Exhibit Y - 4 colored photographs (5 pages total)
4. The summary record on appeal includes copies of the above-referenced exhibits; however, the photographs within each exhibit are *not in color*, and the quality of each photograph is severely distorted. (See SR, 320-59; 415-53; 458-62)
5. It is necessary for this Court to review the colored photographs so as to make a proper determination of an issue raised by Appellant in this appeal.
6. Additionally, absent from the summary record on appeal is:
- a. The Defendant’s motion for rehearing and request for an evidentiary hearing, timely filed pursuant to Rule 3.850(j) of the Florida Rules of Criminal Procedure, and docketed with the Broward Clerk of Court on February 18, 2020;

² Each exhibit is preceded by an “Exhibit” cover page.

- b. The court's order requiring the State to respond, signed by the Judge on February 19, 2020, and docketed with the Broward County Clerk of Court on February 20, 2020;
 - c. The State's response, docketed with the Broward County Clerk of Court on March 30, 2020; and
 - d. The court's order of denial, docketed with the Broward County Clerk of Court on April 17, 2020.
7. Appellant respectfully requests this Honorable Court to direct the Broward County Clerk of Court to prepare a supplemental record, which includes only the following: color copies of the exhibits referenced in paragraph 3, *supra*, as well as the documents outlined in paragraph 6, *supra*.
8. Appellant carries the burden of perfecting the record on appeal. *See Fla. R. App. P.9.200(e)*.
9. Upon filing of the supplemental record, undersigned counsel is requesting an extension of one (1) day to edit record citations within the initial brief.
10. Counsel for the State of Florida, Luke Napodano, Esq., has indicated that he has **no objection** to undersigned's request for a supplemental record, as outlined herein.
11. This request is being made in good faith, not for the purpose of delay, and is absolutely necessary to protect the constitutional rights of the Appellant.

WHEREFORE, Appellant respectfully requests this Honorable Court order the Broward County Clerk's Office to provide a supplemental appellate record, consistent with the requests made herein. Further, Appellant respectfully requests this Honorable Court toll the time for service of Appellant's Initial Brief for one (1) day, following receipt of the supplemental record.

Respectfully Submitted,

BY: /s/ Melanie Malavé, Esq.
MELANIE MALAVE, ESQ.
Florida Bar No.: 103086

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copy of the foregoing has been e-served to Counsel for Appellee, Luke Napodano, Esq., at Luke.Napodano@myfloridalegal.com and crimappwpb@myfloridalegal.com (Department of Legal Affairs, 1515 North Flagler Drive, West Palm Beach, FL 33401), this 27th day of August, 2020. Additionally, a .pdf copy of the foregoing, with an electronic signature, has been electronically filed at <https://edca.4dca.org>.

/s/ Melanie Malavé, Esq.
MELANIE MALAVE, ESQ.
Florida Bar No.: 103086

200 Southeast 6th Street, Suite 301
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APPENDIX B

**IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT, 110 SOUTH TAMARIND AVENUE, WEST PALM BEACH, FL 33401**

August 28, 2020

CASE NO.: 4D20-0749

L.T. No.: 12-011455CF10A

SADIK RASHAD BAXTER

v. STATE OF FLORIDA

Appellant / Petitioner(s)

Appellee / Respondent(s)

BY ORDER OF THE COURT:

ORDERED that appellant's August 27, 2020 unopposed motion to supplement the record and toll time to serve initial brief is granted. The material requested in the motion shall be included in the record on appeal. The clerk of the lower tribunal shall prepare and file the supplemental material in this court within twenty (20) days from the date of this order. Appellant shall monitor the supplementation process; further,

ORDERED that the time for filing appellant's initial brief is tolled until one (1) day after the supplemental record is received.

Served:

cc: Attorney General-W.P.B.
State Attorney-Broward

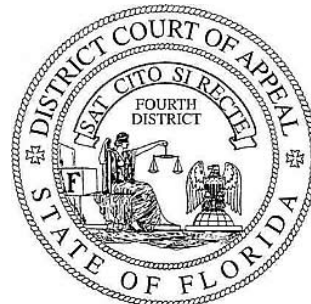
Melanie Malave
Clerk Broward

Sadik Rashad Baxter

kk



LONN WEISSBLUM, Clerk
Fourth District Court of Appeal



APPENDIX C

**IN THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT
WEST PALM BEACH, FLORIDA**

**RECORD ON APPEAL FROM THE CIRCUIT
COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT IN
AND FOR BROWARD COUNTY, FLORIDA**

**SADIK RASHAD BAXTER
APPELLANT**

**CASE NUMBER:
12-011455CF10A**

VS

**STATE OF FLORIDA
APPELLEE**

APPEAL NUMBER: 4D20-749

SUPPLEMENTAL

**RECORD ON
APPEAL**

**COPIES FURNISHED:
ATTORNEY GENERAL, WEST PALM BEACH
MELANIE MALAVE, ESQ.**

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**MASTER INDEX ON APPEAL
APPELLATE DIVISION**

**Case NO: 12-011455-CF10A
Appeal NO: 4D14 - 2424; 4D20-0749**

DATE:	KIND OF INSTRUMENT	PAGES:
04/23/2019	EXHIBIT R	1264 - 1303
04/23/2019	EXHIBIT T	1304 - 1323
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03/30/2020	File States Response	1352 - 1356
04/17/2020	File Order Denying Def Motion	1357 - 1362

17TH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY

CERTIFICATE OF THE CLERK

SADIK BAXTER

Appellant

CASE NUMBER: **12-011455CF10A**

vs.

STATE OF FLORIDA

Appellee

APPEAL NUMBER: **4D20-749**

I, BRENDA D. FORMAN, CLERK OF THE CIRCUIT COURT, 17TH JUDICIAL CIRCUIT FOR THE COUNTY OF BROWARD, STATE OF FLORIDA, DO HEREBY CERTIFY THAT THE FOREGOING **PAGES 1264 TO 1362**, CONTAIN, A TRUE AND CORRECT COPY OF ALL SUCH PLEADINGS AND PROCEEDINGS IN SAID CAUSE AS APPEARS FROM THE RECORDS AND FILES OF MY OFFICE THAT HAVE BEEN DIRECTED TO BE INCLUDED IN SAID RECORD. .

PAGES TO INCLUSIVE EMBRACE THE TRANSCRIBED NOTES OF THE REPORTER AS MADE AT THE TRIAL AND CERTIFIED TO ME BY THEM.

IN WITNESS WHEREOF, I HAVE HEREUNTO SET MY HAND AND AFFIXED THE SEAL OF SAID COURT THIS 17TH DAY OF **September, 2020**.

BRENDA D. FORMAN, CLERK
CIRCUIT COURT
BROWARD COUNTY, FLORIDA

BY /s/ Veronica Kelly

DEPUTY CLERK
VERONICA KELLY
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vkelly@browardclerk.org