

No. \_\_\_\_\_

IN THE  
SUPREME COURT OF THE UNITED STATES

\_\_\_\_\_  
TODD E. BECKER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

\_\_\_\_\_  
On Petition For A Writ OF Certiorari To The United  
States Court of Appeals For The Eleventh Circuit

\_\_\_\_\_  
PETITION FOR WRIT OF CERTIORARI  
\_\_\_\_\_

Todd E. Becker, #10385-078

Pro Se Petitioner

United States Penitentiary - Lee

P.O. Box 305

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QUESTIONS PRESENTED

1. Whether there was probable cause to arrest Mr. Becker for the Florida burglary tool crime?
2. Did the FBI agent's implicit threat to Mr. Becker following the Miranda<sup>1</sup> warnings that he would receive harsher treatment from the "criminal justice system" if he did not cooperate and provide a self incriminating statement to the agent during custodial interrogation, render his Miranda waiver or ensuing confession, per se, involuntary?
3. Did FBI agents improperly coerce Mr. Becker into waiving his Miranda rights or confessing to the agents?
4. Does an aiding and abetting Hobbs Act robbery conviction count as a "crime of violence" as defined under 18 U.S.C. § 924(c)(3)(A)?

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<sup>1</sup> Miranda v. Arizona, 384 U.S. 436 (1966)

PARTIES TO THE PROCEEDING

Petitioner, Todd E. Becker was the appellant in the United States Court of Appeals for the Eleventh Circuit. Respondent, the United States, was the appellee in the Eleventh Circuit.

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## PETITION FOR WRIT OF CERTIORARI

The Petitioner, Todd E. Becker, respectfully petitions the Court for a writ of certiorari to review the Opinion of the Eleventh Circuit Court of Appeals.

### DECISIONS BELOW

The United States District Court for the Southern District of Florida issued an unpublished and unreported order rejecting Petitioner's arguments that his post-Miranda confession should be suppressed because (1) the confession was fruit of the poisonous tree obtained following an unlawful arrest for possession of burglary tools, in violation of Florida Statutes (F.S.) §810.06 (2016); (2) the confession was not the product of a knowing, voluntary, and intelligent Miranda waiver; and (3) the confession was coerced and not voluntarily made. The order is reproduced in the appendix at App. C1-C20.

The Eleventh Circuit's opinion affirming Petitioner's judgement and sentence is unpublished but reported at 762 Fed. Appx. 668. The Eleventh Circuit also heard two additional arguments from Petitioner raised for the first time on appeal: (1) FBI agents coerced Mr. Becker into waiving his Miranda rights by making impermissible promises; and (2) his convictions for Hobbs Act

robbery do not qualify as predicate crimes of violence for the purposes of 18 U.S.C. § 924(2)(3)(A). The opinion is reproduced in the appendix. App. A1-A15.

### STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. The Eleventh Circuit issued its Opinion on February 19, 2019. App. A1-A15. Mr. Becker petitioned the Eleventh Circuit for panel rehearing. The Eleventh Circuit summarily denied that petition without a written opinion on May 13, 2019. App. B1. The time requirement for filing a petition for writ of certiorari is not jurisdictional, Schacht v. United States, 398 U.S. 58 (1970), and Petitioner has filed a motion supported by affidavit, seeking waiver of this requirement. This petition for writ of certiorari follows. This Court has jurisdiction. 28 U.S.C. § 1254(1).

### CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth and Fifth Amendments of the United States Constitution. App. D1.

### STATUTORY PROVISIONS INVOLVED

In relevant part, 18 U.S.C. § 2, provides:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal ...

A "crime of violence" under the Armed Career Criminal Act means "an offense that is a felony" and -

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another.

18 U.S.C. § 924(c)(3).

Under the Hobbs Act, 18 U.S.C. § 1951 (b), the term robbery means:

the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

At the time of Mr. Becker's arrest for the Florida burglary tool crime, section 810.06, F.S., provided:

"Whoever has in his or her possession any tool, machine, or implement with intent to use the same, or allow the same to be used, to commit any burglary or trespass shall be guilty of a felony of the third degree."

F.S. § 810.06 (2016).

To convict a person under § 810.06, the state is required to prove that -

- (1) the defendant intended to commit a burglary or trespass;
- (2) the defendant had in his possession a tool, machine, or implement that he intended to use, or allow to be used, in the commission of the burglary or trespass; and
- (3) the defendant did some overt act toward the commission of a burglary or trespass.

Florida Standard Jury Instructions (Crim.) 13.2 (2016).

### STATEMENT OF THE CASE

1. Course of Proceedings and Disposition of the Courts Below

A federal grand jury in the Southern District of Florida returned a superseding indictment charging Todd Becker with one count of conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a) (Count 1); three counts of Hobbs Act Robbery, in violation of 18 U.S.C. §§ 1951(a) and 2 (Counts 2, 4, and 6); and with respect to each of those robbery counts, brandishing a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. §§ 924(d)(1)(A)(ii) and 2 (Counts 3, 5, and 7). Brf. of the Appellee at 2.

Prior to trial, Mr. Becker sought to suppress his confession made to FBI agents following his arrest on a state charge of possession of burglary tools, in violation of F.S. § 810.06. Id. In his motion to suppress, he argued that (1) his confession was fruit of the poisonous tree following an unlawful arrest for the burglary tool offense; (2) his confession was otherwise not made freely and voluntarily. Id. at 2-3. The district court rejected all of Mr. Becker's contentions, concluding there was probable cause for his arrest, that he validly waived his Miranda rights, and that his confession was made freely and voluntarily. Id. 2-4.

The custodial interrogation that produced Mr. Becker's confession was both audio and video recorded (U.S. Trial Exh't. 52) and, along with a transcript thereof (U.S. Trial

Exhibit 53), was produced at trial. A jury convicted Mr. Becker on all counts of the superseding indictment. App. A1-A2. The district court sentenced him to 794 months of imprisonment, which included consecutive terms of imprisonment for each of the three §924(c) convictions; 84, 300, and 300 months, respectively. App. A2.

Mr. Becker appealed his convictions and sentences. App. A1. He first argued that, "the district court erred in denying his motion to suppress based on a lack of probable cause for his arrest." App. A2. Specifically, he maintained that, because the officer could not reasonably infer that he had committed an "overt act" toward the commission of a burglary or trespass while in possession of tools, "a sledgehammer and crowbar", the government failed to establish probable cause to believe that he had the "specific intent" to violate the burglary tool statute. Brf. of the Appellant at 43. He also argued that, "his post arrest Miranda waiver [and confession] were rendered involuntary by statements made by the [FBI] agent conducting the interrogation." App. A2. Mr. Becker additionally contended that a conviction for Hobbs Act robbery "is not a crime of violence under §924(c)(3)'s 'use of force' provision." Brf. of the Appellant at 60-61. However, he recognized that his argument on that

particular issue was foreclosed by binding Eleventh Circuit precedent, but wanted to preserve the issue for further review by this Court. Id.

The Eleventh Circuit disagreed with all of Petitioner's arguments and, as a result, did not address the issue of harmless error in regards to his confession. App. A3-A12. First, the Eleventh Circuit concluded that, "a reasonable officer in [the arresting officer's] position could have inferred a substantial chance that [Mr.] Becker intended to or was in the process of committing a burglary using the tools in the van." App. A7 (citing United States v. Willis, 759 F.2d 1486, 1494 (11th Cir. 1985); and Dist. of Columbia v. Wesby, 138 S.Ct. 577, 586 (2018) ("Probable cause is not a high bar") (quotations omitted)). Also, the Eleventh Circuit determined that the FBI agent's statements made to Mr. Becker after the Miranda warnings were given, did not constitute "illegal inducement" sufficient to undermine or violate Miranda. App. A11 (citing United States v. Nash, 910 F.2d 752, 753 (11th Cir. 1990)). The Eleventh Circuit further held that Mr. Becker's §924(d) argument was foreclosed by binding precedent. App. A12 (citing In re Saint Fleur, 824 F.3d 1137, 1140 (11th Cir. 2016)). Mr. Becker petitioned the Eleventh Circuit for panel rehearing.

He argued that the panel's probable cause to arrest

determination was wrongly decided because, among other things,<sup>2</sup> the panel "lowered the bar" in regards to what constitutes "specific intent" for the burglary tool offense. Pet. Reh'g at 1, 9, 12-13. In holding that "[i]t was not necessary for [the arresting officer] to have conclusive proof of Mr. Becker's intent, so long as [the officer] had something more than a mere suspicion that [Mr.] Becker intended to commit a burglary" (App. A7), Mr. Becker asserted the panel clearly departed from the higher standard of proof regarding the "specific intent" element of the burglary tool offense prescribed by the Florida Supreme Court in Thomas v. State, 531 So. 2d 708, 709 (Fla. 1988) (the court holding that the offense requires, "not merely that the accused intended to commit a burglary or trespass while those tools were in his possession, but that the accused actually intended to use those tools to perpetrate the crime") (emphasis added). Pet. Reh'g at 9. Mr. Becker also observed that the Ninth

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<sup>2</sup> Petitioner also argued that (1) the panel utilized an outdated set of elements required for a conviction of the burglary tool crime (compare set of elements listed in Fla. Std. Jury Inst. (Crim) 13.2, *supra*, to those set forth by the Eleventh Circuit in its opinion (App. A5)) (Pet. Reh'g at 5-6, 8-9); (2) the panel injected facts into its probable cause analysis that were neither known or imputed to the arresting officer at the moment of arrest (Id. at 9-11); and (3) the panel cherry picked facts from his arrest that were somewhat consistent with parts of his arrest a year earlier, instead of examining "all" the circumstances to the arrest. (Id. at 15-20).

Circuit Court of Appeals has consistently held that, "an officer need not have probable cause for every element of the offense ... [but] when specific intent is a required element of the offense, the arresting officer must have probable cause for that element in order to reasonably infer that a crime has occurred." (Quoting Reed v. Lieurance, 863 F.3d 1196, 1205 (9th Cir. 2017)). Pet. Rehg at 6. Nevertheless, without looking to the "specific intent" element of the offense, Mr. Becker argued that, in any event, his conduct was clearly permissible under established Florida law, and not violative of the burglary tool offense. Id. at 13 (citing, e.g., Burke v. State, 672 So. 2d 829, 830 (Fla. Dist. Ct. App. 1995) (relying on Thomas, the court found no violation of the burglary tool statute occurred, although defendant was observed driving a vehicle containing potential burglary tools while casing his burglary target and intending to burglarize it)).

The Eleventh Circuit denied the petition for panel rehearing on May 13, 2019. App. B1. Mr. Becker now petitions the Court for a writ of certiorari.

## 2. Facts Relevant to Issues Presented for Review

In February 2015, Special Agent (S.A.) David Kadela of the "FBI began investigating [Mr.] Becker for burglaries committed outside the state of Florida." App. C1. The investigation remained

active at least until Mr. Becker's February 2016 arrest. App. C1.

On March 6, 2015, Mr. Becker, Matthew Bryant, and Vickie Jones were travelling in a rented minivan containing a safe that had been "stolen from a Latin business in South Carolina." App. C7. A state police officer stopped and arrested them. Id. In addition to the safe, local officers also "found masks, gloves, a sledgehammer, [a] pry bar, [a] reciprocating saw, [a] wedge, scissors, and other tools" within the van. Id.

Fast forward, almost a year later, on February 5, 2016, Detective (Det.) Andrew Bolonka of the St. Lucie County Sheriff's Office, S.A. Kadela, and other law enforcement officers, surveilled Mr. Becker's residence. App. C2. Their "purpose" was to execute an outstanding Georgia warrant to arrest Ms. Jones, who then resided with Mr. Becker. App. C2 and C8. During the surveillance, Ms. Jones and Mr. Becker left the residence in a minivan. App. C2. Mr. Becker drove while Ms. Jones rode as a passenger. Id. Police officers stopped the van "to execute [the] arrest warrant for Ms. Jones." Id.

"Upon approaching the [van]... [Det.] Bolonka glanced inside the rear cargo area where he saw what appeared to be tools, a sledgehammer and crowbar." App. C8. Because Det. Bolonka "was familiar with" the details of Mr. Becker's and Ms. Jones' March 2015 arrest and had worked with S.A. Kadela and other FBI

agents during their investigation (App. C2), he had personal knowledge of Mr. Becker's "history of committing previous burglaries" (App. C3). Based on this knowledge and his observations at the time of the stop, he arrested Mr. Becker for a state charge of possession of burglary tools. App. A6-A7.

Neither the district court or the Eleventh Circuit's factual findings mentioned Det. Bolonka's testimony during an evidentiary hearing on the motion to suppress, where testified to having no information indicating Mr. Becker had been involved in a burglary in the area where the arrest occurred, nor did he have information from any source that Mr. Becker intended to commit a burglary using the tools in the van or otherwise. Crim. D.E. 86 at 75-77.

After he was arrested, Mr. Becker was taken to the St. Lucie County Sheriff's Office, where he was questioned by S.A. Kadela and S.A. T.J. Sypniewski. U.S. Trial Ex't 52 and 53. At the outset of the interview, Mr. Becker was twice read the Miranda warnings and indicated he understood. U.S. Trial Ex't 53 at 2 and 4. S.A. Sypniewski began by alerting Mr. Becker about the gravity of the situation he faced with the FBI and the federal charges he was looking at. Id. at 5-9. Upon learning that the agents expected him to make a statement about the crimes he had committed and others involved in criminal activity, Mr. Becker interrupted S.A. Sypniewski mid-sentence and the following exchange occurred:

Mr. B. : Of course, I do not know what all you know, so I don't know, and I would not want to make a statement without ya know and then say, Oh well, we already got that person or [UI] [OU]

S.A.S. : OK.

Mr. B. : ... this person.

S.A.S. : Okay, let's do this then ... let's do this. If you do not want to make a statement, we don't need you to make a statement. Okay?

Mr. B. : Okay.

S.A.S. : If you don't want to make a ... uh uh ... a statement we don't need to it's late on a Friday, okay?

Mr. B. : Mmhmm.

S.A.S. : I'm sure you're hungry and you'd like to go lay down, ya know, at the jail. That's, that's fine.

Mr. B. : That's not [UI] ...

S.A.S. : We're, we're here because I, I want to give you a chance to help yourself and I firmly believe that everybody deserves a chance to cooperate. Okay? Um, but before we can get there before we can talk about what you have to offer us, and I think you do, um we gotta cover some bases first where you gotta prove that you really do want to cooperate with us.

Despite Mr. Becker's efforts to inform the agents he did not want to make a statement to them about his illegal activities, S.A. Sypniewski remained unaffected and moved forward, stating, "Okay, well let's just cut to the chase. Tell us about the um... burglaries you've committed in the last 12 months, starting with the most recent," Id. at 10. However, Mr. Becker's response was one of shock, "Really?" (meaning, I can't believe you would expect me to do that after I just told you that I would not want to make a statement at this time) Id.

Nevertheless, minutes later, S.A. Sypniewski began to cajole and threaten Mr. Becker into providing the agents with a self incriminating statement through, for the lack of a better term, a "speech":

S.A.S.: Okay, um... that's what you are dealing with right now. So, um I would really love to make this time right now valuable for you. [US] It's not doing anything for me, I don't get a raise if you take responsibility for burglaries. [S.A. Kadela] doesn't get a raise or bonus or anything, this is not where I want to be on a Friday night. But, ya know what... you're... you're a human being and I want to give you an opportunity to take responsibility for some things so that we can say to the judge and the prosecutor this is a guy who is willing to work,

Mr. B.: [UI]

S.A.S.: No, no... listen to me please... the justice system truly does reward people who take responsibility and it punishes people who don't. So... you can not say anything to us right now and we will see ya at court... at arraignment. Federal arraignment, and then by then you might want with your lawyer... talking to the prosecutors, you might want to set up a proffer where you can... but by then it's going to be so far down the road, that's taken into consideration in sentencing, okay. You know that, you know how it works. We are not allowed to promise anything, but I can promise you this... if you take responsibility now, at first opportunity versus making the government drag you through this whole procedure, set up a... you know... [UI] ready for trial, get ready for all that other stuff, and then say, Oh, I got something I want to take responsibility for now, I want to take responsibility for now. Guess what, it's a whole different ballgame than right now. So... I can see by the way you're looking at me, you're not buying it and that's fine.

Mr. B.: [UI] I'm not. I absolutely believe what you are saying. And I've...

Id. at 13-14 (emphasis added) (herein referred to as "speech")

Following the agent's speech, Mr. Becker became upset and started ranting and using expletives. Id. at 14-16. S.A. Sypriewski then took this opportunity to entice Mr. Becker into speaking with the agents:

S.A.S. : Mmhmm. [OV]. Well, here's the, here's where you may want to talk to us. Whatever state charges you're looking at for burglary...

Mr. B. : Mmhmm.

S.A.S. : The FBI can come in and sup... the U.S. Attorney's office can come in and supersede. And then they'll get rid of the state charges and we can absorb those charges because they are part of our case anyways.

Id. at 16.

Moments later, however, S.A. Sypriewski, again, made it clear to Mr. Becker that, "he could not promise [him] anything". Id. When Mr. Becker began to inquire further about the matter, the agents started providing examples from their experiences demonstrating that he would not be prosecuted by state authorities. Id. at 17-19. Confused, Mr. Becker kept returning to the subject of state charges just disappearing, seeking clarification of the subject from the agents. Id. at 17-19, 22-23. At one point, S.A. Kadela gave Mr. Becker his personal assurance

that Mr. Becker would not have to face state charges, stating, "[Y]ou can only speak through experience. What he (S.A. Sypniewski) is saying is absolutely true, it happens all the time." Id. at 18. (emphasis added). Moments later, S.A. Kadela, again, assured Mr. Becker that state charges would not be forthcoming in exchange for his self incriminating statement; i.e. "we can only talk in our experience. It happens all the time." Id. at 23 (emphasis added). Again, seconds later, S.A. Kadela reassured Mr. Becker, "[W]e can just talk to you to [O]ur experience and what happens. And in our experience, yes, it's assumed..." Id. (emphasis added). Finally, just prior to confessing, S.A. Sypniewski also gave Mr. Becker his personal assurance that Mr. Becker would not be prosecuted by state authorities in exchange for his self incriminating statement, as evidenced in the following exchange between S.A. Sypniewski and Mr. Becker:

S.A.S. : But, do you know why we can't promise it?

Mr. B. : I know that you can't.

S.A.S. : Cause then it's... then it looks like... what you said.

Mr. B. : Coerced.

S.A.S. : It's coerced, exactly. And... I, I don't want to coerce you, I don't wanna get into trouble for coercion, and um... so... but, we told you in our experience that's what happens.

Id. (emphasis added).

At trial, S.A. Sypniewski admitted he falsely told Mr. Becker that federal authorities had the power to supersede state authorities from bringing charges against him. Brf. of the Appellant at 59. In fact, S.A. Sypniewski testified that he did not know if any of Mr. Becker's state charges had been absorbed into this case (Id.), and nothing in the record indicates that they have. Both the district court and the Eleventh Circuit concluded that, "[Mr.] Becker's decision to speak with law enforcement was motivated by his desire to remain in Federal custody and not deal with state charges," App. C19; App. A10-A11.

### REASONS FOR GRANTING THE WRIT

1. This Court should Decide whether Mr. Becker's Florida Arrest for Possession of Burglary Tools was Reasonable under the Fourth Amendment.

The Fourth Amendment protects the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search and seizures. *Wesby*, 138 S.Ct. at 585. Because arrests are seizures of persons, they must be reasonable under the circumstances. *Id.* An officer may "arrest a suspect without a warrant if there is probable cause to believe the suspect has committed or is committing an offense." *Michigan v. DeFillippo*, 443 U.S. 31, 37 (1979). "[A]n

arrest without probable cause to believe a crime has been committed violates the Fourth Amendment. Madiwale v. Savaiko, 117 F.3d 1321, 1324 (11th Cir. 1997).

In Wesby, this Court addressed whether officers had probable cause to arrest partygoers for "unlawful entry", in violation of Dist. of Columbia Code, 1385.4, at 577. The legality of the arrests in Wesby hinged on whether the officers could reasonably infer that the partygoers had the requisite mens rea giving rise to probable cause. Id. In other words, was there sufficient proof of the "general intent" (guilty knowledge) element of the crime to support the validity of the arrest. Similar, but distinct however, the Florida statute at issue here, F.S. §810.06, contains a "specific intent" element to the crime. The "specific intent" to commit an offense is a more stringent standard of proof and encompasses the lower standard of "general intent". See generally, United States v. Doe, 136 F.3d 631, 637 (9th Cir. 1998).

Section 810.06, F.S., provides:

"Whoever has in his or her possession any tool, machine, or implement with intent to use the same, or allow the same to be used, to commit any burglary or trespass shall be guilty of a felony of the third degree."

Under §810.06, "the specific intent to commit a burglary or trespass using [tools] in the defendant's possession or control exists when [he] engages in or causes some overt act toward the commission of the burglary or trespass, which goes beyond merely thinking or talking about it." Thomas, 531 So. 2d at 710 (emphasis added). Thus, "probable cause to [arrest Mr. Becker] would only exist if [he] engaged in some overt act that manifested a specific intent to commit a burglary or trespass using [the tools in his possession]." Dunn v. City of Boynton Beach, 192 F.Supp. 3d 1310, 1321 (S.D. Fla. 2016).

Utilizing the list of circumstances surrounding Mr. Becker's arrest, as found by the Eleventh Circuit (App. A6-A7), no police officer in Det. Bolonka's position, could have reasonably inferred that Mr. Becker committed the requisite "overt act" manifesting his "specific intent" to use the tools in his possession in an illegal manner. See Thomas, 531 So. 2d at 710 ("the overt act [is] necessary to prove intent"). Here, Det. Bolonka and other officers surveilling his residence, merely observed Mr. Becker and his live-in girlfriend, Ms. Jones,<sup>3</sup> depart their residence together in a minivan containing tools (App. A6; App. C2, (8),

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<sup>3</sup> There was ample evidence showing that Ms. Jones resided with Mr. Becker (App. C2), and that they were romantically involved (Pet. Rel'g at 20; FN4).

"a pry bar, sledgehammer, and powered saw" (App. A7),<sup>4</sup> and they followed him until Det. Bolonka conducted the stop of the van a short distance away from the residence (App. A7). Because Det. Bolonka was able to follow Mr. Becker from the moment he left his home, he was able to observe the full extent of Mr. Becker's conduct while in possession of the tools which, evidently, was nothing more than lawfully and safely operating a motor vehicle.

Further, although he had knowledge of Mr. Becker's criminal background for committing burglaries, Det. Bolonka had no information from any source that Mr. Becker intended to commit a burglary, or that he was suspected of committing burglaries in the area of the arrest, or that a burglary had recently occurred in the area, or that the area had been frequently burglarized. Pet. Rel'g at 19. In fact, Det. Bolonka did not stop Mr. Becker because he suspected that criminal activity was afoot, instead, he stopped the van to execute an arrest warrant for Ms. Jones. App. A6-A7.

Lawfully operating a motor vehicle in the State of Florida, which happens to contain tools, even while intending to commit

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<sup>4</sup> Mr. Becker asserted that there was no evidence showing that Det. Bolonka observed a "powered saw", prior to the arrest. Pet. Rel'g at 9-10. The district court observed the same. App. C3, C8.

a burglary,<sup>5</sup> without more, is not an "overt act" toward the commission of a burglary manifesting Mr. Becker's "specific intent", nor is such conduct criminal in nature. See, e.g., Burke, 672 So.2d at 831-32 (reasonably inferring that casing a burglary target in a motor vehicle containing a cutting torch, crowbars, and bolt cutters, while intending to burglarize the target, is not an "overt act" manifesting "specific intent", nor is such conduct violative of the burglary tool statute; inferring overt act occurred when defendant was observed "reaching toward the roof" of burglary target); also, e.g., Carbone v. State, 98 So.3d 657, 659 (Fla. Dist. Ct. App. 2012) (reasonably inferring that driving a vehicle containing tools to a burglary target, while intending to burglarize the target, is not an "overt act" manifesting "specific intent", nor is such conduct violative of the burglary tool statute; inferring overt act occurred when defendant "approached the house [with] a handkerchief"). These cases, both Burke and Carbone, also teach that a person must be "using or attempting to use" the items inside the vehicle as burglary tools, at the time he engaged in the overt act. 672 So.2d at 831 (but, see dissenting opinion); 98 So.3d at 658-59 (citing State v. Thomas, 362 So.2d 1348, 1350 (Fla. 1979); "[n]o crime is committed until the [tools] are in the actual or constructive possession of a person who is using or attempting to use the

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<sup>5</sup> A fact that was not known to Det. Bolonka.

objects as burglary tools").

Here, the record is devoid of any evidence which might reasonably infer that Mr. Becker was "using or attempting to use" the tools in the van<sup>6</sup> to perpetrate a crime, much less that he engaged in an "overt act" that manifested his "specific intent". Nevertheless, the Eleventh Circuit posits that, by adding Det. Bolonka's prior knowledge of Mr. Becker's criminal history and modus operandi for committing burglaries to the probable cause analysis, probable cause existed to arrest Mr. Becker. App. A6-A7. But that supposition ignores the "overt act" requirement promulgated by the Florida Supreme Court in Thomas, and forces arbitrary enforcement of the burglary tool statute, depending on whether the arresting officer has knowledge of Mr. Becker's criminal background. 531 So. 2d at 709 (the purpose of the overt act requirement is to prevent "abusive or pretextual arrest of persons merely found to possess common household items"). Under the Eleventh Circuit's probable cause analysis, there would be no circumstances under which Mr. Becker and Mrs. Jones could travel together in a minivan to Home Depot to lawfully purchase a powered saw, or any combination of tools, and hope to drive away without being arrested. Unless, of course, the officer has no knowledge of Mr. Becker's criminal background.

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<sup>6</sup> The tools were located in the rear cargo area. App. C3, C9.

This Court has never explicitly held that, under the Fourth Amendment, it is reasonable to arrest a person for committing an offense where the offense's "specific intent" element is completely absent from the probable cause inquiry. In contrast, however, Wesby lends support requiring the "intent" element of an offense to be sufficiently present to preserve the validity of the arrest under the probable cause standard. 138 S.Ct. at 577; see also Reed, 863 F.3d at 1205 (when "specific intent" is an element of the offense, "the arresting officer must have probable cause for that element in order to reasonably infer that a crime has occurred").

Nevertheless, the touchstone of the Fourth Amendment is reasonableness, and endorsing the Eleventh Circuit's probable cause determination here would be tantamount to abrogating the Fourth Amendment. That is because, as the government so adamantly pointed out to the district court and the Eleventh Circuit, the totality of the circumstances here surrounding Mr. Becker's arrest show, at best, that he intended to commit a crime at some point in the future. See Brf. of the Appellee at 43 (alleging the circumstances showed, "[Mr.] Becker probably intended to use the tools seen in the vehicle to commit further burglaries"); Crim. D.E. 73 at 2 (contending the circumstances showed, "the tools located in the van being driven by [Mr.] Becker would be use[d] to commit future burglaries") (emphasis added).

It would be unreasonable, under the Fourth Amendment, to allow police officers to arrest a suspect based only upon a showing that he "probably intended" to commit a crime in the future. See United States v. Jenkins, 876 F.2d 1085, 1089 (2d Cir. 1989) (concurring with district court that probable cause to arrest was not present where, "all the government had was the belief that [defendant] would commit a crime in the future").

Because Mr. Becker's arrest was unreasonable under the Fourth Amendment, the Eleventh Circuit erred when it concluded otherwise. Accordingly, this Court should grant this petition and remand the matter to the Eleventh Circuit for further consideration.

2. This Court should Clarify whether a Law Enforcement Officer's Implicit Threat to a Suspect During Custodial Interrogation that He Will Receive Harsher Treatment from a Court or Prosecutor if He Exercises His Miranda Right to Remain Silent, Per Se Violates a Suspect's Fifth Amendment Privilege Against Self Incrimination or Right to Due Process, Rendering His Miranda Waiver or Ensuing Confession Involuntary.

The Fifth Amendment provides, in pertinent part, "[n]o person ... shall be compelled in any criminal case to be a witness against himself," U.S. Const. Amend. V. When an individual is subjected

to custodial interrogation, "the privilege against self incrimination is jeopardized." Miranda, 384 U.S. at 478. Miranda employed "procedural safeguards ... to protect the privilege", requiring law enforcement officers to give suspects so-called Miranda warnings before any custodial interrogation. Id. at 478-79. Those warnings include: (1) the right to remain silent; (2) that anything the suspect says can be used against him in a court of law; (3) the right to have an attorney present; and (4) the right to have an attorney appointed for the suspect before any questioning, if the suspect so desires. Id. at 467-74.

A suspect may waive his Miranda rights either explicitly or implicitly. Berghuis v. Thompson, 560 U.S. 370, 384 (2010), but even if the suspect initially waives his rights he, nonetheless, may invoke his Miranda rights at any time during the interrogation. Miranda, 384 U.S. at 479. Thus, a suspect must be afforded the opportunity to exercise his Miranda rights throughout the interrogation. Id. That means an officer may not vitiate or undermine the Miranda warnings during the interrogation through deceptive conduct, even after a suspect has explicitly waived his rights. Hart v. Atty Gen. of Fla., 323 F.3d 884, 893 (11th Cir. 2003). But that is exactly what S.A. Sypriewski did here during the interrogation.

Minutes after receiving the Miranda warnings, Mr. Becker was implicitly threatened by S.A. Sypriewski in a speech. U.S.

Trial Exh't. 53 at 13-14; reproduced above at 13-14. Taken into context, S.A. Sypriewski told Mr. Becker that he would be "punishe[d]" by the "[criminal] justice system", if he exercised his right to remain silent and did not incriminate himself; i.e. "the justice system truly does reward people who take responsibility and it punishes people who don't". U.S. Trial Exh't 53 at 13. Specifically, S.A. Sypriewski inferred that Mr. Becker would be punished by the sentencing court with a longer sentence, if he did not provide the agents with a self incriminating statement; i.e. "but by then it's going to be so far down the road, that's taken into consideration in sentencing." Id. In fact, S.A. Sypriewski expounded on his implicit threats by making a specific "promise" to Mr. Becker that, in essence, things would go much worse for him if he did not incriminate himself at that moment; i.e. "[W]e are not allowed to promise anything, but I can promise you this [if you want to waive your right to remain silent until another time] [g]uess what, it's a whole different ball game than right now." Id. at 13-14. Importantly, Mr. Becker indicated he "absolutely believe[d]" every word of S.A. Sypriewski's speech. Id. at 14.

It is axiomatic that it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under custodial interrogation. Miranda, 384 U.S. at 468. In fact, although the "Miranda warnings contain no express assurance that silence will carry no penalty, such assurance is implicit

to any person who receives the warnings." Doyle v. Ohio, 426 U.S. 610, 618 (1976). Thus, when S.A. Sypniewski misled Mr. Becker by falsely telling him that, in effect, he would be "punish[ed]" by the "[criminal] justice system", if he exercised his right to remain silent and did not incriminate himself, he directly contradicted the very right the Miranda warnings seek to safeguard.

Before the government may introduce a defendant's uncounselled statements made during a custodial interrogation,<sup>7</sup> it must show that he made a voluntary, knowing, and intelligent waiver of his privilege against self incrimination and his right to counsel.<sup>8</sup> United States v. Lall, 607 F.3d 1277, 1282 (11th Cir. 2010). "First, the relinquishment of the right must have been voluntary, in the sense that it was a product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the 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).

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<sup>7</sup> The Due Process Clause of the Fifth Amendment forbids the government's use of involuntary confessions. Miller v. Fenton, 474 U.S. 104, 109-10 (1985).

<sup>8</sup> "Voluntariness" means the same thing in both the Miranda waiver and due process contexts; i.e. freedom from official coercion. Colorado v. Connelly, 479 U.S. 157, 169-79 (1986).

Here, instead of correcting the falsity of his "punish[ment]" speech; i.e. that Mr. Becker could not be punished for exercising his right to remain silent, S.A. Sypniewski reinforced it; inferring that he would not be punished with a longer sentence if he waived his right to remain silent:

Mr. B.: Yes, I already know that I'm going to do time.

S.A.S.: No, you are. You're ... you're definitely going to do time.

Mr. B.: Yeah, I understand that.

S.A.S.: Okay ... okay.

Mr. B.: That's fine. I ... I ...

S.A.S.: Well good, so we're on the same page.

Mr. B.: The only thing [OV] to do is try to minimize that time by giving information ... [OV]

S.A.S.: That's what we are trying to tell you of. And I'm sorry if I am being kind of short.

U.S. Trial Ex't 53 at 17-18 (emphasis added)

At this point, taking into account S.A. Sypniewski's threatening and deceptive speech, along with Mr. Becker's "[absolute belief]" of every word of it (Id. at 14), a suspect in his position would have reasonably believed that any attempt to exercise his right to remain silent would have led to detrimental consequences; i.e. that he would be punished with a longer sentence. Thus, S.A. Sypniewski's threatening and deceptive tactics made it impossible for Mr. Becker

to make a free and deliberate choice to waive or exercise his right to remain silent and, consequently, he did not understand the nature of his right or the true consequences of his desire to abandon it.

In the same respect, in the context of a due process violation under the Fifth Amendment, the Ninth Circuit has "repeatedly found that a threat of harsher treatment renders any subsequent confession involuntary." United States v. Casillas, 538 Fed. Appx. 751, 752 (9th Cir. 2013) (cases cited therein). In Casillas, after the suspect had received the Miranda warnings, the officer told the suspect, "[b]ecause if you don't want to cooperate, you don't want to talk, you don't want - no, well, they're going to say, 'This man doesn't have - is not sorry about anything, Throw the book at him.' Right?" Id. at 751. The Ninth Circuit holds that, "there are no circumstances in which law enforcement officers may suggest that a suspect's exercise of the right to remain silent may result in harsher treatment by a court or prosecutor." Id. at 752.

Here, S.A. Sypniewski's speech was much more egregious than the rhetorical question posed to the suspect in Casillas. Yet, the Eleventh Circuit never addressed the impropriety of the statement, or the effect it had on Mr. Becker, but merely concluded that the "punish[ment]" statement was not sufficiently coercive to constitute an "illegal inducement." App. All. However, the coercive

effect of S.A. Sygniewski's speech was readily apparent where, Mr. Becker, a self described law clerk with ten years of legal experience (App. A10), confessed to the agents even though he knew that the "number one sin" was to confess to the agents at that time (Id.).

An officer's threat of harsher treatment, especially one that suggests a suspect's exercise of the right to remain silent may result in harsher treatment from a court or prosecutor, is inherently coercive and clearly offensive to the Fifth Amendment. The only purpose for an officer to engage in such tactics is to undermine the Miranda warnings and place additional compulsions on a suspect to speak (see Miranda, 384 U.S. at 458 (the presumption of coercion is present at any police custodial interrogation setting)). The Ninth Circuit's per se rule that, "a threat of harsher treatment renders any subsequent confession involuntary" (Casillas, 538 Fed. Appx. at 751-52), as a matter of law, is consistent with the dictates of Miranda and its progeny cited herein.

Nonetheless, the Eleventh Circuit does not have such a per se rule, and rejected Mr. Becker's argument that the context of S.A. Sygniewski's "punish[ment]" statement rendered his Miranda waiver and ensuing confession involuntary. App. A10-A11. This Court should grant certiorari review and resolve this question.

3. The Court should Decide whether Mr. Becker's Miranda waiver and Confession were Obtained in Violation of His Fifth Amendment Rights.

If the Court answered the preceding question in the negative, then it should resolve the third question presented, that is, whether FBI agents coerced Mr. Becker into waiving his Miranda rights and confessing, in violation of the Fifth Amendment. But, even if the Court was unwilling to adopt the Ninth Circuit's per se rule, it can still conclude that the reasoning set forth therein, in respect to the impropriety of S.A. Sypniewski's "punish[ment]" statement, is sufficient to show that Mr. Becker's Miranda waiver and confession were coerced. Yet, if the Court finds that reasoning unpersuasive, it may still consider that reasoning in conjunction with other statements made by the agents here during the interrogation. See Burbine, 475 U.S. at 421 (Miranda waiver inquiry examines the "totality of the circumstances surrounding the interrogation").

Here, following his speech, S.A. Sypniewski further sought to coerce Mr. Becker into providing a self incriminating statement, as evidenced in the following excerpt taken from interrogation transcripts:

S.A.S. : Mmhmm. [ov]. Well, here's the, here's where you may want to talk to us. Whatever state charges you're looking at for burglary...  
Mr. B. : Mmhmm.

S.A.S. : The FBI can come in and sup... the U.S. Attorney's Office can come in and supersede. And then they'll get rid of the state charges and we can absorb those charges because they are part of our case anyways.

U.S. Trial Exhibit 53 at 16; reproduced at 15, supra.

At first glance it would appear that S.A. Sypniewski is attempting to coerce Mr. Becker into waiving his right to remain silent in exchange for non-prosecution of state charges. However, the Eleventh Circuit determined that:

"As for Becker's argument that he was coercively promised assistance avoiding state charges, [S.A.] Sypniewski said that he could not promise Becker anything immediately following his statement that the federal charges could supersede equivalent state charges and later clarified that Becker's state charges might be dropped if equivalent federal charges are pursued. Sypniewski repeated his inability to promise anything several more times before Becker confessed, and Becker said that he understood that no such promises could be made because it would make any subsequent confession look coerced."

App. A10

Nevertheless, the absence of an express "quid pro quo" bargain here does not insulate the agents from claims of undue influence or coercion. See United States v. Walton, 10 F.3d 1024, 1029 (3d Cir. 1993) ("whether, under the totality of the circumstances, the statements induced the confession, not whether on its face it was a promise"). While it is true that S.A. Sypniewski repeatedly told Mr. Becker that he could make no promises, he also made it clear early on through a specific "promise" that, despite his inability to make an explicit promise, he was in control of how events would unfold involving Mr. Becker. See U.S. Trial Exh't 53 at 13-14 (S.A. Sypniewski stating, "[w]e are not allowed to promise anything, but I can promise you this..."; then inferring things would go worse for Mr. Becker if he did not cooperate with the agents). In fact, when Mr. Becker repeatedly sought clarification from the agents regarding the non-prosecution of state charges, both agents gave Mr. Becker their personal assurance that he would not have to face any state charges. See U.S. Trial Exh't 53 at 18 and 23 ("[w]hat he is saying is absolutely true, it happens all the time"; "[w]e can only talk in our experience. It happens all the time"; "[and] in our experience, yes, it's assumed"; "so... but, we told you in our experience that's what happens").

A suspect in Mr. Becker's position would have reasonably believed that any promise could not be "on the books", so to speak, and that the agents had the ability to control events involving him.

In fact, Mr. Becker confessed immediately after S.A. Sypniewski assured him, "that's what happens" (Id. at 23), in regards to state charges disappearing when one confesses to the agents. Further, both the district court and the Eleventh Circuit concluded that Mr. Becker's decision to confess was based largely, in part, on his desire to remain in federal custody and not deal with state charges. App. 419; App. A10-A11.

At trial, S.A. Sypniewski testified he falsely told Mr. Becker that federal authorities could supersede state authorities and prevent state charges from being brought against him. Brf. of the Appellant at 59. He also confessed that he did not know if any of Mr. Becker's state charges had been absorbed into this case. Id. Moreover, nothing in the record indicates that they have. Examining the totality of the circumstances, including S.A. Sypniewski's "punish [ment]" speech and the agents personal assurances (albeit false) that Mr. Becker's state charges would be superseded by federal authorities if he provided a self incriminating statement, one can easily conclude that the agents coerced Mr. Becker into waiving his Miranda rights and confessing to the agents. The agents coercive and deceptive conduct is the antithesis of the Fifth Amendment and this Court's Miranda decision.

The Eleventh Circuit erred when it inferred that an explicit promise was necessary to run afoul of Miranda, and that the

context of S. A. Sypniewski's "punish[ment]" statement did not undermine the Miranda warnings. App. A10-A11. It further erred in concluding that the cumulative statements of the agents, discussed in detail above, "absent some other coercive measure, did not constitute illegal inducement." App. A11. This Court should grant this petition and consider the case on the merits.

4. This Court should Clarify whether Aiding and Abetting A Hobbs Act Robbery Constitutes a "Crime of Violence" under 18 U.S.C. § 924(c)(3)(A).

A "crime of violence" under § 924(c)(3)(A) is any felony that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." To decide whether a person's conviction falls within this definition, courts generally apply the categorical approach. See Taylor v. United States, 495 U.S. 575, 598 (1990); Mathis v. United States, 136 S. Ct. 2243, 2248-49 (2016); see also, e.g., United States v. Munro, 394 F.3d 865, 870 (10th Cir. 2015) (employing categorical approach to determine whether an offense is a "crime of violence" under § 924(c)). Under that approach, all that counts are "the elements of the statute of conviction." Taylor, 495 U.S. at 601. The particular facts of the conviction are immaterial. Descamps v. United States, 133 S. Ct. 2276, 2284 (2013) ("The key... is elements, not facts.").

The federal aiding and abetting statute, 18 U.S.C. § 2, provides, in pertinent part:

- (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

The Hobbs Act, 18 U.S.C. § 1951 (b), defines "robbery" to mean:

the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

Under the categorical approach, "looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions", Taylor 495 U.S. at 600, aiding and abetting Hobbs Act robbery should not be considered a crime of violence because it does not have as an element the use, attempted use, or threatened use of physical force against the person of another.

In fact, the instant case is a perfect example illustrating why aiding and abetting Hobbs Act robbery is not categorically a "crime of violence". The elements of the aiding and abetting statute, 18 U.S.C. § 2, are "(1) [the defendant] takes an affirmative act in furtherance of [the robbery], (2) with the intent of facilitating the [robbery's] commission." Rosemond v. United States, 572 U.S. 65, 71 (2014). Here, Mr. Becker was the alleged get-away driver in four of the five robberies presented to the jury at trial. See Br.f. of the Appellee at 34-37. Thus, Mr. Becker could commit the offense of aiding and abetting Hobbs Act robbery without using, attempting to use, or threatening to use the requisite force against the person or property of another. See also, In re Colon, 826 F.3d 1301, 1307 (11th Cir. 2016) (dissenting judge providing a plethora of examples showing why aiding and abetting may not be categorically a "crime of violence").

Nevertheless, every United States Court of Appeals to consider the issue has concluded that aiding and abetting Hobbs Act robbery is a crime of violence under § 924(c)(3)(A). See United States v. Garcia-Ortiz, 904 F.3d 102, 109 (1st Cir. 2018); United States v. McElvey, 773 Fed. Appx. 74, 75 (3d Cir. 2019); United States v. Richardson, 2020 U.S. App. LEXIS 2480 (6th Cir. 2020); United States v. Dieter, 890 F.3d 1203, 1215-16 (10th Cir. 2018); In re Colon, 826 F.3d at 1305. However, in each and every one of the listed cases, the Circuit's have relied upon prior circuit precedent holding that substantive Hobbs Act robbery is a crime of

violence, without ever conducting the categorical approach for the real issue, i.e. whether aiding and abetting Hobbs Act robbery is a crime of violence under § 924(c)(3)(A). Ostensibly, the rationale behind each of those decisions is that, because the aiding and abetting statute, § 2, is merely a "theory of liability", the courts were not required to include the elements of § 2, when conducting the categorical approach inquiry.

However, it cannot be gainsaid that when a defendant is charged with aiding and abetting a substantive offense, both the elements of aiding and abetting and the substantive offense are presented to the jury at trial. Thus, when the government charges a defendant with aiding and abetting a substantive offense, the elements of each are inextricably intertwined because proof of each of those elements is essential to obtain a conviction. In essence, then, aiding and abetting is akin to the inchoate crimes of conspiracy, solicitation, or attempt. In that respect, lower courts, without exception, include the elements of conspiracy and attempt when conducting a categorical approach to determine whether a conspiracy or attempt to commit a Hobbs Act robbery is categorically a "crime of violence" under § 924(c)(3)(A).

Here, as noticed by the government (Brf. of the Appellee at 2), the predicate crimes of violence used to support Mr. Becker's § 924(c)

convictions were predicated upon violations of 18 U.S.C. §§ 1951 (a) and 2. However, Mr. Becker mistakenly presented to the Eleventh Circuit only the question of whether substantive Hobbs Act robbery is a crime of violence under § 924(c)(3)(A) (App. A2), not whether aiding and abetting Hobbs Act robbery is a crime of violence. That distinction is of no moment because the Eleventh Circuit had already rejected both arguments. See In re Saint Fleur, 824 F.3d at 1340 (Hobbs Act robbery is a crime of violence); In re Colon, 826 F.3d at 1305 (aiding and abetting Hobbs Act robbery is a crime of violence). This Court should grant certiorari and resolve this question of paramount importance.

### CONCLUSION

Petitioner Todd E. Becker respectfully requests that this Court grant this petition for a writ of certiorari and review the proceedings below, or alternatively, grant this petition and remand for further proceedings.

Respectfully Submitted,

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