APPENDIX

"A"

(Copy of 11th Circuit's Opinion Affirming Conviction and Sentence in United States v. Becker, Appeal No. 17-10902)

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-10902
Non-Argument Calendar

D.C. Docket No. 2:16-cr-14009-DMM-1

UNITED STATES OF AMERICA,

Plaintiff–Appellee,

versus

TODD ERLING BECKER,

Defendant–Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(February 19, 2019)

Before MARCUS, ROSENBAUM and JILL PRYOR, Circuit Judges.

PER CURIAM:

Todd Becker appeals his convictions and sentences on one count of conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a); three counts of Hobbs Act robbery, in violation of 18 U.S.C. §§ 1951(a) and 2; and three

counts of brandishing a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. §§ 924(c)(1)(A)(ii) and 2. On appeal, he argues that: (1) the district court erred in denying his motion to suppress based on a lack of probable cause for his arrest; (2) his post-arrest Miranda[1] waiver was rendered involuntary by statements made by the Federal Bureau of Investigation ("FBI") agent conducting the interrogation; (3) his convictions for Hobbs Act robbery do not qualify as "crime of violence" offenses under 18 U.S.C. § 924(c)(3)(A); (4) his Fifth Amendment right to remain silent was violated by the prosecutor's comment during closing argument; and (5) his 794-month total sentence was grossly disproportionate to the offense conduct for which he was convicted. After thorough review, we affirm.

Rulings on motions to suppress involve mixed questions of law and fact. United States v. Touset, 890 F.3d 1227, 1231 (11th Cir. 2018). We review a district court's factual findings for clear error and its application of the law to the facts de novo, and construe all facts in the light most favorable to the prevailing party. Id. A district court has committed clear error where we are left with a definite and firm conviction that a mistake was made. United States v. Villarreal, 613 F.3d 1344, 1349 (11th Cir. 2010). We review de novo whether a confession was voluntary, and construe the facts in a light most favorable to the prevailing party. United States v. Ransfer, 749 F.3d 914, 921 (11th Cir. 2014); United States v. Lall, 607 F.3d 1277,

[1] Miranda v. Arizona, 384 U.S. 436 (1966).

1285 (11th Cir. 2010). We also review de novo whether an offense qualifies as a "crime of violence" under 18 U.S.C. § 924(c). United States v. McGuire, 706 F.3d 1333, 1336 (11th Cir. 2013), overruled on other grounds by Ovalles v. United States, 905 F.3d 1231 (11th Cir. 2018) (en banc). And we review de novo the legality of a sentence under the Eighth Amendment. United States v. McGarity, 669 F.3d 1218, 1255 (11th Cir. 2012). Where a prosecutor has commented on a defendant's choice to remain silent, we review a district court's denial of a mistrial for abuse of discretion. United States v. Wilchcombe, 838 F.3d 1179, 1190 (11th Cir. 2016).

Where an issue was not raised below, we will review it only for plain error. United States v. Turner, 474 F.3d 1265, 1275 (11th Cir. 2007). To establish plain error, the defendant must show (1) an error, (2) that is plain, and (3) that affected his substantial rights. Id. at 1276. If the defendant satisfies these conditions, we may exercise our discretion to recognize the error only if it seriously affects the fairness, integrity, or public reputation of judicial proceedings. Id.

First, we are unpersuaded by Becker's claim that the district court erred in concluding that probable cause existed to arrest him and in denying his motion to suppress. "To determine whether an officer had probable cause for an arrest, we examine the events leading up to the arrest, and then decide whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to probable cause." Dist. of Columbia v. Wesby, 138 S. Ct. 577, 586 (2018)

(quotations omitted). Probable cause "requires only a probability or substantial chance of criminal activity, not an actual showing of such activity. Probable cause is not a high bar." Id. (quotations and citations omitted). Courts may examine the collective knowledge of law officers where the officers maintained a minimal level of communication during their investigation. United States v. Willis, 759 F.2d 1486, 1494 (11th Cir. 1985).

"[W]arrantless arrests for crimes committed in the presence of an arresting officer are reasonable under the Constitution." Virginia v. Moore, 553 U.S. 164, 176 (2008). "[W]hile States are free to regulate such arrests however they desire, state restrictions do not alter the Fourth Amendment's protections." Id. In Moore, police erroneously made an arrest for the misdemeanor of driving on a suspended license, in violation of a Virginia law that authorized only the issuance of a summons for the offense (and not an arrest), and during a search incident to the arrest, police found crack cocaine. Id. at 166–67. The Virginia Supreme Court overturned the conviction on Fourth Amendment grounds, reasoning that the officers were not authorized to arrest Moore under state law and the Fourth Amendment did not permit searches incident to citation. Id. at 168. The Supreme Court disagreed, holding that it is not the province of the Fourth Amendment to enforce state law and the arrest was permissible under the Fourth Amendment because it was supported by probable cause -- regardless of whether the arrest violated state law. Id. at 178.

In United States v. Goings, we addressed whether Moore required suppression where a defendant had been arrested in Florida by Georgia officers following a high-speed pursuit. 573 F.3d 1141, 1142 (11th Cir. 2009). The defendant argued that the Georgia officers exceeded their authority when they arrested him in Florida, in violation of state law, and thus, suppression of the drug-related evidence found incident to that arrest was warranted. Id. We rejected that argument, holding that any violation of state law was irrelevant to the Fourth Amendment analysis, so long as the arrest was supported by probable cause. Id. at 1143.

"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." Fla. Stat. § 810.06. To sustain a conviction under § 810.06, the government must prove the defendant intended to (1) commit a burglary or trespass while in the possession of burglary tools and (2) use those tools to commit the crime. Brooks v. State, 23 So. 3d 1227, 1229 (Fla. Dist. Ct. App. 2009). The requisite specific intent exists when the defendant engages in or causes some overt act toward the commission of the burglary. Thomas v. State, 531 So. 2d 708, 710 (Fla. 1988). "Although probable cause requires more than suspicion, it does not require convincing proof, and need not reach the same standard of conclusiveness and probability as the facts necessary to support a conviction." United States v. Dunn, 345 F.3d 1285, 1290 (11th Cir.

2003) (brackets and quotations omitted). Whether probable cause exists depends on the elements of the alleged crime and the facts of the case. Skop v. City of Atlanta, Ga., 485 F.3d 1130, 1137–38 (11th Cir. 2007) (discussing probable cause in the context of a 42 U.S.C. § 1983 suit). Officers can infer that a defendant possessed the requisite mens rea giving rise to probable cause where that inference is reasonable under the totality of the circumstances. Wesby, 138 S. Ct. at 586.

Here, the district court did not err in denying Becker's motion to suppress because probable cause existed to arrest Becker for possession of burglary tools.[2] The circumstances of the arrest, when viewed in their totality, show that: (1) Detective Andrew Bolonka, a member of an FBI task force with knowledge of Becker's 2015 burglary arrest, had been conducting surveillance on Becker's home in February 2016 in order to find Vickey Jones, with whom Becker had been when he was arrested in 2015, and to serve a warrant on her; (2) when Becker and Jones

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[2] As part of our probable cause analysis, we reject the government's claim that Florida law is irrelevant. In both Moore and Goings, the question was whether suppression was warranted under the Fourth Amendment where an officer exceeded their authority to make an arrest despite having probable cause to do so. Both this Court and the Supreme Court held that an arrest that violated state law was valid for the purposes of the Fourth Amendment so long as the arrest was supported by probable cause. Goings, 573 F.3d at 1143; Moore, 553 U.S. at 178. Here, we're not asking whether an unlawful arrest amounted to a constitutional violation where the arrest was supported by probable cause but was made in violation of state law on some other basis; in contrast, we're looking to Florida law to inform the analysis of whether probable cause existed for the purposes of the Fourth Amendment. The probable cause analysis for a given arrest is necessarily framed by the nature of the law allegedly violated, insofar as the reasonableness of that arrest can be determined only by looking at the alleged criminal conduct and comparing it to the conduct prohibited by law. See Skop, 485 F.3d at 1137–38. In other words, it is only possible to know whether an officer's decision to arrest was objectively reasonable if one knows what the alleged crime entails, an analysis that necessarily implicates state law.

left his home in a minivan, Bolonka stopped the vehicle to execute the warrant on Jones; (3) as Bolonka approached the van, he observed the presence of a pry bar, sledgehammer, and powered saw in the van that he knew were similar to those found in the rented van Becker had been driving when arrested in 2015 on burglary charges; and (4) at that point, Bolonka arrested Becker. In light of this evidence and Bolonka's familiarity with Becker's 2015 burglary arrest -- including the involvement of the same people, mode of transportation, and tools -- a reasonable officer in Bolonka's position could have inferred a substantial chance that Becker intended to or was in the process of committing a burglary using the tools in the van. Willis, 759 F.2d at 1494; Wesby, 138 S. Ct. at 586 ("Probable cause is not a high bar." (quotations omitted)). It was not necessary for Bolonka to have conclusive proof of Becker's intent, so long as Bolonka had something more than a mere suspicion that Becker intended to commit a burglary, which the circumstances surrounding Becker's 2016 arrest supplied. Dunn, 345 F.3d at 1290.

Becker adds that Florida courts have sought to limit "pretextual arrests" that lack an overt act evidencing the defendant's specific intent to commit burglary with the tools he possessed, so that an officer familiar with the defendant's criminal history cannot arrest him any time he knows the defendant possesses a burglary tool. But that is not the case before us. Here, Detective Bolonka based his arrest on more

than mere possession, including the use of a rental van, Jones's presence, and Becker's criminal history and modus operandi. Thomas, 531 So. 2d at 710.

As for Becker's argument that the district court clearly erred in finding, as part of its probable cause analysis, that Bolonka saw a mask and bandana in the van before he arrested Becker, we do not address it because the record supports a finding of probable cause without consideration of the mask and bandana. Nor is there any reason to undergo a "fruit of the poisonous tree" analysis, since we've concluded that the arrest did not violate the Fourth Amendment. In short, the district court did not err in holding that Bolonka had probable cause to arrest Becker.

We also are unconvinced by Becker's challenge to his Miranda waiver. Before the government may introduce a defendant's uncounseled statements made during custodial interrogation, it must show that he made a voluntary, knowing, and intelligent waiver of his privilege against self-incrimination and his right to counsel. Lall, 607 F.3d at 1282. This showing requires: (1) the relinquishment of the right to have been voluntary, i.e., "the product of free and deliberate choice rather than intimidation, coercion, or deception"; and (2) the waiver to 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." Id. at 1283 (quotations omitted). Miranda rights are effectively waived if the "totality of the circumstances surrounding the interrogation reveal both an uncoerced choice and the requisite level of comprehension." Ransfer,

749 F.3d at 935 (quotations omitted). In determining whether a defendant was coerced, we consider the defendant's education, level of intelligence, the failure to appraise the defendant of his rights, the length of detention, the length and nature of the questioning, and the use of physical punishment. Id.

The use of deception to obtain a confession is an important factor when considering the totality of the circumstances. Lall, 607 F.3d at 1285. While misrepresentations of fact are not enough to render a suspect's subsequent confession involuntary or to undermine a suspect's Miranda waiver, misrepresentations of law are more likely to render a confession involuntary. Id. Where a law enforcement officer promised a defendant that nothing he said would be used to prosecute him, we held that the promise rendered the defendant's subsequent confession involuntary because it completely undermined the previously-administered Miranda warning's prophylactic effect. Id. at 1287. In United States v. Nash, on the other hand, where a law enforcement officer promised to make it known to the prosecutor that the defendant had cooperated, encouraged the defendant to tell the truth, and noted that defendants who cooperate generally received better sentences, we held that the officer had not illegally induced the defendant's ensuing confession. 910 F.2d 749, 752–53 (11th Cir. 1990). We explained that the officer had not promised that the defendant would receive a

reduced sentence, but had only afforded the defendant the opportunity to make an informed decision regarding the advantages of cooperating with the government. Id.

Here, the district court did not err in concluding that Becker voluntarily and knowingly waived his Miranda rights. Becker argues that statements made by Special Agent T.J. Sypniewski rendered Becker's Miranda waiver involuntary and tainted everything that followed, focusing on Sypniewski's statements that (1) the justice system rewards those who cooperate and punishes those that do not, and (2) any state charges could be superseded by the federal charges. As for Becker's argument that he was coercively promised assistance avoiding state charges, Special Agent 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. Further, Becker was given two separate Miranda warnings, was a self-described law clerk with ten years of legal experience, and advised that the "number one sin" was to talk to law enforcement without an attorney present, all of which indicated that he was aware of his rights and the risks of waiving them. Becker also made several statements that showed that his decision to confess was largely due to

his desire to remain in federal custody and to avoid dealing with state authorities. On this record, we cannot say that Special Agent Sypniewski coerced Becker into waiving his Miranda rights by making impermissible promises. Lall, 607 F.3d at 1285, 1287; Ransfer, 749 F.3d at 935.

As for Becker's claim that Special Agent Sypniewski made two statements that undermined the content of the Miranda warnings, we disagree. Sypniewski informed Becker that cooperation could work in his favor, said he would inform the prosecutor of any cooperation Becker chose to give, and repeatedly told Becker that he could not promise him anything. These statements, absent some other coercive measure, do not constitute illegal inducement. Nash, 910 F.2d at 752–53.

As for Becker's argument that Sypniewski's ameliorative measures were unable to remove the taint of his initial misstatement, we again disagree. Becker suggests that it would be impossible for law enforcement to correct an error made during a custodial interrogation, even where the defendant is well-acquainted with the criminal legal process and the error is repeatedly corrected before any incriminating statements are made. But our case law makes clear that we consider a Miranda waiver under the totality of the circumstances. Ransfer, 749 F.3d at 935. And the circumstances here indicate that Becker knowingly made the calculated choice to confess without any promise of a benefit for doing so. Thus, the district

court did not err in concluding that Becker voluntarily and knowingly waived his Miranda rights, and we affirm the district court's denial of the motion to suppress.[3]

In his next issue on appeal, Becker concedes that our binding precedent forecloses the argument that his convictions for Hobbs Act robbery do not qualify as predicate crimes of violence for the purposes of 18 U.S.C. § 924(c)(3)(A). See In re Saint Fleur, 824 F.3d 1337, 1340 (11th Cir. 2016). We are bound by prior panel precedent unless and until that holding is overruled by this Court en banc or by the Supreme Court. United States v. Kaley, 579 F.3d 1246, 1255 (11th Cir. 2009). Moreover, published successive application orders are binding precedent on all subsequent panels of this Court. United States v. St. Hubert, 909 F.3d 335, 346 (11th Cir. 2018). Thus, based on In re Saint Fleur, we reject Becker's argument that convictions for Hobbs Act robbery do not constitute "crimes of violence" under § 924(c)(3)(A), but deem Becker's argument as preserved for further review.

We also find no merit to Becker's claim that the prosecutor made comments in closing argument that violated his Fifth Amendment right to remain silent. It is axiomatic that a defendant in custody has an indisputable right under the Fifth Amendment to remain silent after they have received their Miranda warning.

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[3] In resolving Becker's challenge to his Miranda waiver, we decline to apply the plain error standard of review, even though we usually review only for plain error when an issue was not raised below. Turner, 474 F.3d at 1275. It is not obvious from the record whether Becker sufficiently raised his due process argument before the district court to preserve it for appeal, and, in any event, as we've explained, Becker has failed to show that the district court erred under the more lenient de novo standard of review.

Wilchcombe, 838 F.3d at 1190. At the same time, we allow comments on a defendant's pre-Miranda, post-arrest statements to be used as both direct and impeachment evidence. Id.

Here, Becker challenges the prosecutor's comment during closing arguments that Becker never mentioned the gun used or other means by which he could scare people. Becker admits he did not object at trial to this comment, so we review only for plain error. Turner, 474 F.3d at 1275. But Becker's brief does not begin to develop any plain error argument, beyond asserting that the comment was improper and that he is simply preserving it for further review. Among other things, Becker has not explained what the prosecutor was referring to, how the comment amounted to error, whether that error was plain, or how it affected his substantial rights. Id. at 1276. Accordingly, we cannot say the district court plainly erred as to this issue.

Finally, we are unpersuaded by Becker's claim that his sentence violated the Eighth Amendment in that it was grossly disproportionate to his offense of conviction. The defendant bears the burden of proof to make a threshold showing that his sentence is grossly disproportional to the offense committed. United States v. Johnson, 451 F.3d 1239, 1243 (11th Cir. 2006). Generally, a sentence within statutorily-prescribed limits is neither excessive nor cruel or unusual under the Eighth Amendment. Id. So while a narrow principle of proportionality applies to

noncapital sentences, there have been few successful challenges to the proportionality of a sentence. McGarity, 669 F.3d at 1256.

Where a defendant has been convicted for a crime of violence under § 924(c) that involved the brandishing of a firearm, the statutory minimum sentence for a first conviction is 84 months' imprisonment. 18 U.S.C. § 924(c)(1)(A)(ii). In the case of a second or subsequent conviction, the minimum sentence is 300 months' imprisonment. Id. § 924(c)(1)(C)(i). Any sentence imposed on a defendant under § 924(c) shall run consecutively with any other term of imprisonment imposed. Id. § 924(c)(1)(D)(ii).

Becker has failed to make the threshold showing that his 794-month statutory-minimum sentence violates the Eighth Amendment. For starters, although he claims that he did not personally wield a gun, he does not dispute that he was properly prosecuted and sentenced as an aider and abettor pursuant to 18 U.S.C. § 2. Moreover, the district court was bound to sentence Becker pursuant to the statutory minimums listed under 18 U.S.C. § 924(c), and a sentence within statutorily-prescribed limits is neither excessive nor cruel or unusual under the Eighth Amendment. Johnson, 451 F.3d at 1243. Becker has not otherwise shown why his sentence is so grossly disproportional that it constitutes a constitutional violation; rather, he acknowledges that we have never held that a non-capital offense imposed

on an adult violated the Eighth Amendment. Thus, he has failed to carry his burden, and we affirm. Id.

AFFIRMED.

APPENDIX

"B"

(Copy of 11th Circuit's Order Denying Motion for Panel Rehearing in United States v. Becker, Appeal No. 17-10902)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-10902-FF

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

TODD ERLING BECKER,

Defendant - Appellant.

Appeal from the United States District Court
for the Southern District of Florida

BEFORE: MARCUS, ROSENBAUM and JILL PRYOR, Circuit Judges.

PER CURIAM:

The petition(s) for panel rehearing filed by Appellant is DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

ORD-41

APPENDIX

"C"

(Copy of District Court's Order Denying Motion to Suppress in United States v. Becker, Case No. 16-14009)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No. 16-14009-CR-MIDDLEBROOKS/LYNCH

UNITED STATES OF AMERICA,

vs.

TODD ERLING BECKER,

Defendant.
_____/

ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS

THIS CAUSE came before the Court upon Defendant Todd Becker's Opposed Motion to Suppress Evidence [D.E. 52].

THE COURT has reviewed the pleadings and is otherwise fully advised in the premises. Additionally, the Court considers the testimony heard and evidence received at the hearings held on July 11, 2016 [D.E. 70], and September 1, 2016 [D.E. 86]. For the following reasons, Defendant Becker's motion is denied.

I. Background

During February of 2015, the Federal Bureau of Investigation (FBI) began investigating Defendant Becker for burglaries committed outside the State of Florida. Special Agent David Kadela has been the lead agent for the case since that time. Between February of 2015 and February of 2016, the FBI actively investigated Defendant Becker's involvement in multiple burglaries committed outside the state of Florida. Agents with the FBI were able to determine how

Defendant Becker carried out the burglaries based upon witness interviews, suspect statements, and police reports. The burglaries committed by Defendant Becker were performed in the same manner using the same tools. Multiple people, including Defendant Becker, were involved in carrying out various burglaries. The group was known to use masks, gloves, bolt cutters, pry bars, cutting saws, and two-way radios. Defendant Becker would often use rental vans or SUV's for removal of the stolen property. The group would return to Florida with the stolen property in the rental vehicles.

On February 5, 2016, Defendant Becker's Florida residence was surveilled by Saint Lucie County Sheriff's Office in conjunction with an outstanding arrest warrant from Gwinnett County, Georgia for a female acquaintance, Vickey Jones, who resided with Defendant Becker. Ms. Jones departed the residence in a vehicle driven by Defendant Becker. The vehicle was stopped by police officers shortly after leaving the residence in order to execute an arrest warrant for Ms. Jones.

When stopped by officers, Defendant Becker was driving a minivan rented in the name of his sister, Stephanie Favors. Defendant Becker was properly authorized by Ms. Favors to operate the vehicle. Following the vehicle stop and subsequent identification of Defendant Becker and Ms. Jones by officers, Ms. Jones was directed to exit the vehicle in order that officers could affect her arrest. In the course of moving Ms. Jones to the rear of

the vehicle to place her in custody Saint Lucie County Deputy Sheriff Bolonka's testified that he was able to see in plain view a sledgehammer and a crowbar through the vehicle's rear window.

Deputy Bolonka was assigned to an interagency task force that had arrested Defendant Becker in March 2015 in conjunction with a traffic stop in which alleged burglary tools were recovered from the vehicle operated by Defendant Becker. Based upon Deputy Bolonka's personal knowledge of Defendant Becker's history of committing previous burglaries, as well as the presence of the tools he observed in the vehicle at the time of the February 5, 2016 traffic stop, Defendant Becker was detained, transported to the Saint Lucie County Jail, and charged with possession of burglary tools. Because Defendant Becker's name did not appear on the rental agreement for the vehicle, officers impounded the vehicle for return to the rental company. In conjunction with the impound process a detailed inventory of the contents of the vehicle was performed. This inventory identified additional tools and other items with the potential for use during a burglary, including saw blades, gloves, a log splitting wedge, and an electric saw battery.

While in custody, Defendant Becker was twice read his Miranda rights. After confirming his understanding of his rights, Defendant Becker gave a lengthy videotaped interview to law enforcement representatives including Deputy Bolonka and multiple FBI special agents.

a. Procedural Background

Defendant Becker was charged by indictment on February 26, 2016, with one count of robbery affecting interstate commerce, in violation of Title 18, United States Code, Section 1951(a); and use of a firearm in furtherance of a crime of violence, in violation of Title 18, United States Code, Section 924(c). On March 24, 2016, Defendant Becker was charged by superseding indictment with one count of conspiracy to commit robbery affecting interstate commerce, in violation of Title 18, United States Code, Section 1951(a); three counts of robbery affecting interstate commerce, in violation of Title 18, United States Code, Section 1951(a); and three counts of use of a firearm in furtherance of a crime of violence, in violation of Title 18, United States Code, Section 924(c).

On June 24, 2016, Defendant Becker filed this motion to suppress. [D.E. 52]. Defendant Becker contends that the arresting officer lacked probable cause for the search of the rental vehicle that he was driving and his subsequent arrest. As a result, Defendant Becker argues, the evidence obtained during the warrantless search of the vehicle should be suppressed. [D.E.52]. Additionally, Defendant Becker asserts that because he was coerced into waiving his right to remain silent his confession was improperly obtained, and all evidence derived therefrom should also be suppressed. Id.

The Government responds that because the collective knowledge of law enforcement established probable cause for the search of the vehicle and resulting arrest of Defendant Becker, his motion should be denied. Moreover, the Government contends that there was no coercive statement by law enforcement to Defendant Becker, and he voluntarily waived his right to remain silent. [D.E. 53]. On this basis, the Government argues, the Court should deny Defendant Becker's motion in its entirety.

On July 11, 2016, the Court held an evidentiary hearing on Defendant Becker's Motion to Suppress. The hearing was continued until, and concluded on, September 1, 2016. At the conclusion of the September 1, 2016 hearing, the Court requested that the parties submit closing arguments to address four specific issues: (1) whether or not there was probable cause to arrest the defendant; (2) whether there was probable cause to search the vehicle being driven by the defendant; (3) whether or not the defendant needed to specifically state that he waived his Miranda rights for the waiver to be valid; and (4) whether or not the defendant had a "legitimate expectation of privacy" in the van in order to have standing to challenge a warrantless search.

II. Motion to Suppress

a. Probable Cause to Arrest Becker

Defendant Becker argues that there was no probable cause to arrest him for possession of burglary tools in violation of Florida

Statute § 810.06. Specifically, Defendant Becker asserts that the government failed to establish probable cause for his arrest because there is no evidence that he intended to use the tools in the rental car to perpetrate a burglary nor that he committed an overt act in furtherance of the alleged offense. Also, Defendant Becker contends that the officer's collective knowledge and reliance upon his criminal history is not evidence of specific intent and alone fails to establish the probable cause necessary to arrest him for possession of burglary tools. [D.E. 77].

The government responds that when considering the collective knowledge of law enforcement, and the totality of the circumstances, ample probable cause existed to arrest Defendant Becker for the crime of possession of burglary tools. Specifically, the government asserts that the officer's observations at the scene, combined with their extensive collective knowledge of the defendant's criminal history and *modus operandi*, warranted a reasonable belief that the tools in his possession were possessed with the intent to be used to commit a burglary, or trespass, in violation of Florida Statute § 810.06.

An officer may "arrest a suspect without a warrant if there is probable cause to believe that the suspect has committed or is committing an offense." Michigan v. DeFillippo, 443 U.S. 31, 37, 99 S.Ct. 2627, 61 L.Ed.2d 343 (1979). Probable cause means more than bare suspicion. Brinegar v. United States, 338 U.S. 160, 175, 69

S.Ct. 1302, 93 L.Ed. 1879 (1949); Durruthy v. Pastor, 351 F.3d 1080, 1088 (11th Cir.2003). "Probable cause ... exists where the facts and circumstances within the collective knowledge of law enforcement officials, of which they had reasonably trustworthy information, are sufficient to cause a person of reasonable caution to believe that an offense has been or is being committed." United States v. Willis, 759 F.2d 1486, 1494 (11th Cir. 1985)(internal citation omitted). "A reviewing court may examine the collective knowledge of law officers if they maintained at least a minimal level of communication during their investigation." Id.

Here, Deputy Bolonka, a Task Force Officer with the FBI, worked with Special Agent Kadela and Special Agent Richards during their investigation of Defendant Becker. Bolonka and Kadela were familiar with the arrest of Defendant Becker and Ms. Jones for burglary in March 2015. On March 6, 2015, the St. Lucie County Sheriff's Office found Defendant Becker, Vicky Jones and Matthew Bryant, in a rented van containing the safe stolen from a Latin business in South Carolina. Within the van, in addition to the stolen safe, deputies found masks, gloves, a sledge hammer, pry bar, reciprocating saw, wedge, scissors, and other tools. From this March 2015 investigation and arrest, Deputy Bolonka learned that Defendant Becker's *modus operandi* included the use of certain tools.

On February 5, 2016, Deputy Bolonka and Agent Kadela were

present during the surveillance of Defendant Becker's residence. The purpose of the surveillance was the execution of an outstanding warrant for the arrest of Ms. Jones related to the Georgia burglary. Bolonka and Kadela located Ms. Jones in a rented minivan driven by Defendant Becker in St. Lucie County.

Upon approaching the vehicle driven by Defendant Becker, Deputy Bolonka glanced inside the rear cargo area where he saw what appeared to be tools, a sledgehammer and crowbar. Also, as Deputy Bolonka opened the passenger side door of the vehicle where Ms. Jones was sitting, he observed a mask and bandanna beneath a pair of flip-flop shoes in the pocket of the door. Thereafter, Bolonka arrested Defendant Becker for violating Florida Statute § 810.06, prohibiting the possession of burglary tools.

Section 810.06 of the Florida statutes provides: "[w]hoever 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...." "The elements of possession of burglary tools are (1) the defendant had in his possession a tool, and (2) the defendant had a fully formed conscious intent that the tool would be used by him or someone else to commit a burglary." Jones v. State, 608 So.2d 797, 798 (Fla.1992).

For at least a year prior to his arrest on February 5, 2016, law enforcement accumulated information through their

investigations detailing how Defendant Becker burglarized businesses throughout the United States. Also, during the year-long investigation agents knew from several sources that Defendant Becker used specific tools to commit the burglaries, including a pry bar, reciprocating saw, sledge hammer, wedge, gloves, masks, two-way radios and rental vans. Based on the collective knowledge of law enforcement, and having observed the specific tools known to be used by Defendant Becker in the cargo area of the minivan, Deputy Bolonka had sufficient probable cause to believe that Defendant Becker had been involved in, or was about to commit, a burglary or trespass in violation of Florida Statute § 810.06.

The Court finds that given the collective knowledge of law enforcement and the totality of the circumstances, as outlined above, there was probable cause to arrest Defendant Becker. Accordingly, Defendant's motion is denied on this basis.

b. Warrantless Search of Rental Car

Defendant Becker maintains that for the same reasons officers lacked probable cause to arrest him for possession of burglary tools, they lacked probable cause to search the rental vehicle he was driving. Additionally, Defendant Becker argues that the government cannot justify its warrantless search of the rental car on the basis of the exigent circumstances exception to the warrant requirement. Moreover, Defendant Becker contends that because he had a legitimate expectation of privacy in the rental vehicle he

was driving when stopped by officers, he had standing to contest the warrantless search of same.

The government responds that the probable cause to search the vehicle for instrumentalities of a crime was based upon the same totality of circumstances and collective knowledge supporting the probable cause to arrest Defendant Becker. Additionally, the government contends that application of the plain view doctrine and automobile exception further support law enforcement's search of the vehicle.

With regard to Defendant Becker's standing to challenge the warrantless search of the van, the government contends that because Defendant Becker, as an unauthorized driver, had no relationship- contractual or otherwise- with the vehicle owner, Dollar Thrifty Automotive Group, Inc. ("Dollar"), there was no reasonable expectation of privacy. Moreover, because Dollar views the use of a vehicle by an unauthorized driver as a breach of contract, and Defendant Becker knowingly drove the rental vehicle without Dollar's authorization, his use of the vehicle is more akin to that of the driver of a stolen vehicle as opposed to that of a renter under an expired contract. As such, the government contends, Defendant Becker did not have a reasonable, subjective or objective, expectation of privacy and, on this basis, his motion should be denied.

The automobile exception to the warrant requirement is based

on a car's ready mobility and the exigent circumstances created by that mobility. See Carroll v. United States, 267 U.S. 132, 153, 45 S.Ct. 280, 69 L.Ed. 543 (1925). Under the automobile exception, a warrantless search of an automobile is constitutional if (1) the automobile is readily mobile and (2) there is probable cause to believe that it contains contraband or evidence of a crime. United States v. Lanzon, 639 F.3d 1293, 1299-1300 (11th Cir. 2011). The evidence of exigent circumstances need not be overwhelming to justify the warrantless search of an automobile. United States v. Tobin, 923 F.2d 1506, 1513 (11th Cir. 1991). The requirement of exigent circumstances is "satisfied by the ready mobility inherent in all automobiles that reasonably appear to be capable of functioning." United States v. Watts, 329 F.3d 1282, 1286 (11th Cir. 2003)(citations omitted). In other words, the first prong is satisfied if the car is operational, which is not contested here. United States v. Watts, 329 F.3d 1282, 1286 (11th Cir. 2003).

Regarding the second prong, probable cause exists when, under the totality of the circumstances, there is a fair probability that contraband or evidence of a crime will be found in the vehicle. Lanzon, 639 F.3d at 1300. Here, Deputy Bolonka's sighting of the tools, known to be used by Defendant Becker in burglaries, in the cargo area of the minivan clearly gave rise to probable cause to believe the minivan contained evidence of a crime. Because both elements of the automobile exception are satisfied, law enforcement

was authorized to conduct a warrantless search of the minivan driven by Defendant Becker.

The Court notes that the question of whether an unauthorized driver has standing to contest the search of a rental vehicle, even though he has the permission of the renter, has yet to be decided by the Supreme Court or the Eleventh Circuit. The circuit courts that have addressed this question have come to different conclusions. Some courts appear to adopt a bright-line approach, reasoning that an individual not listed on the rental agreement as an authorized driver lacks standing to object to a search even though he has the permission of the renter. See United States v. Wellons, 32 F.3d 117, 119 (4th Cir.1994); United States v. Boruff, 909 F.2d 111, 117 (5th Cir.1990); United States v. Obregon, 748 F.2d 1371, 1374-75 (10th Cir.1984). Other circuits have concluded that an unauthorized driver of a rental car may have standing to challenge the warrantless search of the car where he received permission from the lessee to use the vehicle. See United States v. Thomas, 447 F.3d 1191, 1197-98 (9th Cir.2006); United States v. Best, 135 F.3d 1223, 1225 (8th Cir.1998); United States v. Muhammad, 58 F.3d 353, 355 (8th Cir.1995). The Third and Sixth Circuits have determined that an unauthorized driver does not have standing to challenge the search, but has noted the possibility that exceptional circumstances might create the legitimate expectation of privacy. United States v. Kennedy, 638 F.3d 159, 165

(3d Cir.2011); United States v. Smith, 263 F.3d 571, 586-87 (6th Cir.2001)(rejecting a bright-line test and adopting a totality-of-the-circumstances approach). Notwithstanding the circuit split, the fourth amendment does not protect merely subjective expectations of privacy but only those "expectation[s] that society is prepared to recognize as 'reasonable.'" Katz v. United States, 389 U.S. 347, 361, 88 S.Ct. 507, 516, 19 L.Ed.2d 576 (1967).

The Eleventh Circuit recently declined to address a similar issue in regard to unlicensed and unauthorized drivers. United States v. Gayle, 608 Fed. Appx. 783, 789 (11th Cir.2015) ("[W]e have yet to consider whether an unlicensed and unauthorized driver of a rental car has standing to challenge the search of the rented vehicle. ... [W]e need not decide this standing question here."). The Eleventh Circuit has, however, assessed a defendant's expectation of privacy in a rental car. United States v. Cooper, 133 F.3d 1394 (11th Cir. 1998). In Cooper, the Eleventh Circuit reviewed whether a defendant had a legitimate expectation of privacy in a rental car four days after the rental contract expired. Id. The Court explained that "[a]lthough fact-specific, case law has established some general boundaries as to what society will accept as reasonable regarding privacy in a motor vehicle." Id. at 1398. For example, while a "passenger usually lacks a privacy interest in a vehicle that the passenger neither owns nor rents ... a driver using a vehicle with the permission of an absent

owner has been found to possess a reasonable expectation of privacy therein." Id. The Eleventh Circuit then compared the situation of a driver of an expired rental car to that of a hotel patron over-staying past the checkout time, noting that in the latter case, a patron did not lose his objective expectation of privacy until the room was repossessed by the hotel staff. Id. at 1400. The Eleventh Circuit concluded that the defendant, a renter who did not return the rental car on time, had an objectively reasonable expectation of privacy. Id.

Although it is unclear how the Eleventh Circuit would view the privacy expectations of a driver allowed to operate a rental car with the consent of the renter but in direct violation of the terms of the rental contract, the Court does not believe that society would accept as reasonable the subjective privacy expectations of Defendant Becker. This case differs from Cooper in that Defendant Becker had no contract with the vehicle owner, expired or otherwise. In fact, Defendant Becker not only knew that he was not an authorized driver of the rental vehicle, he practiced a deception upon the rental car company in obtaining that vehicle. Ms. Favors, Defendant Becker's sister, testified at the suppression hearing that he asked her to rent the vehicle because Defendant Becker's credit card was "maxed out" and therefore he was unable to rent it himself. [D.E. 70, p.19: 12-16]. The Court concludes, where Defendant Becker, as the unauthorized driver, colluded with the

lessee of the vehicle to deceive the rental car company as to who would be actually operating their vehicle, thereby resulting in a breach of the rental contract, there is no legitimate expectation of privacy in the rental car. Therefore, he is unable to claim the protections of the Fourth Amendment, regardless of whether he had the authorized renter's permission to drive the vehicle. Specifically, Defendant Becker lacked any property or possessory interest in the minivan to object to the search. United States v. McCulley, 673 F.2d 346, 352 (11th Cir. 1982); United States v. Mincey, 321 F. App'x 233, 240 (4th Cir. 2008). Consequently, Defendant Becker's motion is denied.

Even assuming arguendo that Defendant Becker had standing to challenge the search of the rental car, as explained above, the totality of the circumstances and the collective knowledge of law enforcement provided sufficient probable cause for the officers to arrest Defendant Becker and to search the vehicle he was driving. On this basis, Defendant Becker's standing argument is rendered moot and fails.

c. Waiver of Miranda

Although Defendant Becker concedes that there is no requirement that a waiver of *Miranda* rights be explicit, he maintains that because there was no written waiver or express waiver, there is no evidence that he knowingly and intelligently waived his *Miranda* rights. Also, Defendant Becker asserts that

conflicting versions of *Miranda* given by law enforcement were confusing and tantamount to coercion. Specifically, Defendant Becker compares Deputy Bolonka's reading of *Miranda* rights, including the statement that anything Defendant Becker said "can and will be used" against him in court [Govt. Exhibit 14 at page 2], to Agent Kadela's slightly different reading of *Miranda* that anything Defendant Becker said "can be used" against him in court. [Govt. Exhibit 14 at page 4]. Defendant Becker contends that yet another Special Agent confused aspects of the *Miranda* warnings when he told Defendant Becker that "... the justice system truly does reward people who take responsibility, ok, and it punishes people who don't." [Govt. Exhibit 14 at page 13]. Defendant Becker asserts that this statement was untrue, deceptive, conflicts with *Miranda* and was so confusing that Defendant Becker could not knowingly and intelligently waive his *Miranda* rights, either explicitly or implicitly.

Contrarily, the government argues that based on the totality of the circumstances surrounding his statement, Defendant Becker freely and voluntarily waived his *Miranda* rights during his statement on February 5, 2016. The government argues that Defendant Becker made a voluntary statement and agents never made any promises. Rather, throughout the conversation, the agents repeatedly told Defendant Becker that they could not make any promises and Defendant Becker acknowledged that fact. Although they discussed

how cooperating may benefit Defendant Becker and how they were willing to report Defendant Becker's willingness to cooperate, he was never told that his statement would not be used against him. Instead, Defendant Becker was merely urged to be forthcoming because taking responsibility would be a part of showing his willingness to cooperate.

The government cannot introduce a suspect's statement taken without the presence of an attorney without first showing that the suspect made a voluntary, knowing, and intelligent waiver of his *Miranda* rights. Hart v. Att'y Gen. of Florida, 323 F.3d 884, 891 (11th Cir. 2003) (citing Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602); see also United States v. Beale, 921 F.2d 1412, 1434 (11th Cir. 1991) ("Before the government may introduce a suspect's uncounselled statement made during custodial interrogation, it must show that the suspect made a voluntary, knowing and intelligent waiver of his privilege against self-incrimination and his right to counsel.").

"The waiver inquiry 'has two distinct dimensions': waiver must be 'voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception,' and 'made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.'" Berghuis v. Thompkins, 560 U.S. 370, 382-83, 130 S.

Ct. 2250, 2260, 176 L. Ed. 2d 1098 (2010)(internal citation omitted). The government does not need to show that a waiver of *Miranda* rights was express. An "implicit waiver" of the "right to remain silent" is sufficient to admit a suspect's statement into evidence. Thompkins, 560 U.S. 370, 384, 130 S. Ct. 2250, 2261, 176 L. Ed. 2d 1098 (2010)(citing North Carolina v. Butler, 441 U.S. 369, 99 S.Ct. 1755 (1979)). Butler made clear that a waiver of *Miranda* rights may be implied through "the defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver." Butler, 441 U.S., at 373, 99 S.Ct. 1755. In some cases waiver can be clearly inferred from the actions and words of the person interrogated. Id.

Although the government bears a "heavy burden" to demonstrate that the waiver was voluntary, knowing, and intelligent, the Supreme Court has "stated that this "heavy burden" is not more than the burden to establish waiver by a preponderance of the evidence. Thompkins, 130 S.Ct. at 2261 (quoting Colorado v. Connelly, 479 U.S. 157, 168, 107 S.Ct. 515, 522, 93 L.Ed.2d 473 (1986)).

Here, the totality of the circumstances indicate, by a preponderance of the evidence, that Defendant Becker's waiver of his *Miranda* rights and his subsequent confession were given knowingly, intelligently, and voluntarily. Hall v. Thomas, 611 F.3d 1259, 1288 (11th Cir. 2010). Defendant Becker was twice read his

Miranda rights and Defendant Becker orally confirmed that he understood those rights. Defendant Becker never asked law enforcement for clarification or to further explain his *Miranda* rights. Defendant Becker never invoked his right to an attorney or his right to remain silent. Instead, during the course of the interview, Defendant Becker told agents he had been a law clerk for 10 years while incarcerated, and that he "wanted to cooperate." [Gov. Exhibit 14 at pages 6 and 15]. Additionally, Defendant Becker repeatedly indicated that he understood Agents could not make any promises to him. Moreover, Defendant Becker's decision to speak with law enforcement was motivated by his desire to remain in federal custody and not deal with state charges. [Gov. Exhibit 14 at page 16].

Although Defendant Becker contends that his statements should be suppressed because agents told him he would be punished if he did not accept responsibility, misrepresentations of fact are not enough to render a suspect's ensuing confession involuntary, nor does it undermine the waiver of the defendant's *Miranda* rights. See, e.g., Frazier v. Cupp, 394 U.S. 731, 739, 89 S.Ct. 1420, 22 L.Ed.2d 684 (1969). Here, agents made no misrepresentations of either fact or law that would warrant suppression of Defendant Becker's statement. Merely promising to bring the defendant's cooperation to the attention of the prosecutor is not objectionable. United States v. Stokes, 631 F.3d 802 (6th Cir.

2011). To be clear, the Court does not find law enforcement statements during Defendant Becker's interview elevate to the level of coercion. Nor does the totality of the circumstances support a finding of involuntariness.

Viewing the totality of the circumstances, including Defendant Becker's extensive criminal history and familiarity with the judicial system and his rights, the Court finds, by a preponderance of the evidence, Defendant Becker's waiver to be knowing and voluntary. Therefore, Defendant Becker's motion to suppress his statement for lack of waiver and lack of voluntariness is denied.

III. Conclusion

Based on the foregoing, it is therefore,

ORDERED AND ADJUDGED that Defendant Todd Becker's Opposed Motion to Suppress Evidence [D.E. 52] is **DENIED**.

DONE AND ORDERED in Chambers at Miami, Florida, this 7th day of November, 2016.

DONALD L. GRAHAM
UNITED STATES DISTRICT JUDGE

cc: All Counsel of Record

APPENDIX

"D"

(United States Const. Amend. Four and Five)