24-6322

No. ______ ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

TODD ERLING 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

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PETITION FOR WRIT OF CERTIORARI

Todd E. Becker, #10385-078
Pro Se Petitioner
United States Penitentiary - Lee
P.O. Box 305
Jonesville, VA 24263

QUESTIONS PRESENTED

1. Did the Eleventh Circuit apply the correct certificate of appealability standard in denying Petitioner's 28 U.S.C. § 2255 claims?

2. Is Petitioner entitled to a certificate of appealability under 28 U.S.C. § 2253(c)(2) to appeal the denial of his 28 U.S.C. § 2255 claim that trial counsel was constitutionally ineffective for failing to competently litigate suppression of his confession based upon a violation of his Fifth Amendment right to counsel?

3. Is Petitioner entitled to a certificate of appealability under 28 U.S.C. § 2253(c)(2) to appeal the denial of his 28 U.S.C. § 2255 claim that his Hobbs Act robbery convictions that rest upon Eleventh Circuit Pattern Jury Instruction 070.3 do not count as "crime of violence" offenses under 18 U.S.C. § 924(c)(3)(A)?

PARTIES TO THE PROCEEDING

Petitioner, Todd Erling Becker, was the petitioner/appellant in the United States Court of Appeals for the Eleventh Circuit. Respondent, the United States, was the respondent/appellee in the Eleventh Circuit.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Todd Becker, respectfully petitions the Court for a writ of certiorari to review the Order of the Eleventh Circuit Court of Appeals denying a certificate of appealability ("COA").

DECISIONS BELOW

The United States District Court for the Southern District of Florida issued an unpublished and unreported order denying Petitioner's 28 U.S.C. §2255 motion to vacate, set aside, or correct sentence, and included a provision that no COA shall issue. The order is reproduced in the appendix at App. 5.

The Eleventh Circuit's order denying a COA is unpublished and unreported. The order is reproduced in the appendix at App. 1.

STATEMENT OF JURISDICTION

The district court had jurisdiction to entertain Mr. Becker's motion under 28 U.S.C. § 2255(a). The Eleventh Circuit had jurisdiction to review Mr. Becker's motion for a COA, and to authorize a COA, pursuant to 28 U.S.C. § 2253(c)(1)(B) and (c)(2). The Eleventh Circuit issued its Order on July 22, 2024. App. 1. Mr. Becker moved the Eleventh Circuit to reconsider its Order. The Eleventh Circuit denied Mr. Becker's motion to reconsider on September 30, 2024. App. 3.[1] This timely petition for writ of certiorari follows. This Court has jurisdiction. 28 U.S.C. §1254(1).

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[1] "A reconsideration motion is analogus to a petition for panel rehearing". In re Issac, 2023 U.S. App. LEXIS 6073 at *3 (11th Cir. March 14, 2023).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment guarantees that "[n]o person ... shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law." U.S. Const. amend V.

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall ... have the Assistance of Counsel for his defense." U.S. Const. Amend VI.

STATUTORY PROVISIONS INVOLVED

"Any person who, during and in relation to a crime of violence ... uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence ... if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years."

18 U.S.C. § 924(c)(1)(A)(ii).

At the time of Petitioner's convictions in 2016 for knowingly using, carrying, and brandishing a firearm during and in relation to a crime of violence, a "crime of violence" under § 924(c) was defined as "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, or

(B) that by its nature involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

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.

18 U.S.C. § 1951 (b).

"In a habeas corpus proceeding under section 2255 [28 U.S.C. § 2255] before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for which the proceeding is held." 28 U.S.C. § 2253 (a).

"Unless a circuit justice or judge issues a [COA], an appeal may not be taken to the court of appeals from ... the final order in a proceeding under section 2255 [28 U.S.C. § 2255]." 28 U.S.C. § 2253 (c)(1)(B).

"A [COA] may issue ... only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253 (c)(2).

Under 28 U.S.C. § 2255(a), "[a] prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside, or correct the sentence."

"Unless the motion and file and records of the case conclusively show that the prisoner is entitled to no relief, the court shall... grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringment of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate." 28 U.S.C. § 2255(b).

Under section 2255, "[a]n appeal may be taken to the court of appeals from the order entered on the motion as from the final judgment on application for a writ of habeas corpus." 28 U.S.C. §2255(d).

STATEMENT OF THE CASE

Todd Becker was charged by superseding indictment with one count of conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. §1951(a); three counts of substantive Hobbs Act robbery, in violation of 18 U.S.C. §§ 1951(a) and 2; and with respect to each of those robbery counts, three counts of knowingly using, carrying and brandishing a firearm, during and in relation to a crime of violence, in violation of 18 U.S.C. §§924(c)(1)(A)(ii) and 2. App. 6-7. Prior to trial, Mr. Becker, through counsel, filed a motion to suppress his February 5, 2016, statement ("confession") made to a St. Lucie County Sheriff's Office ("SLCSO") Detective and FBI Special Agents during a custodial intercogation that followed his arrest earlier that same evening for possession of burglary tools. App. 7. In support of the motion, defense counsel argued that SLCSO Deputies lacked probable cause to arrest Mr. Becker for the burglary tool crime; the search of the vehicle driven by Mr. Becker was illegal; and that the Special

Agents coerced Mr. Becker into waiving his Fifth Amendment right to remain silent. App. 7. The district court conducted hearings on the matter and denied the motion to suppress; finding there was probable cause to arrest Mr. Becker and to search the vehicle he was operating, as well as determining that Mr. Becker's _Miranda_[2] waiver was knowing and voluntary. App. 7.

Mr. Becker proceeded to trial and a jury convicted him on all counts. App. 7. The district court sentenced him to an aggregate term of 794 months imprisonment; 110 months on the conspiracy count; 110 months on each of the robbery counts, to run concurrently with each other and concurrently with the conspiracy sentence; and 84, 300, and 300 months on the §924(c) counts, to run consecutively to each other and consecutively to the conspiracy and robbery sentences. App. 7.

Mr. Becker appealed his convictions and 794 month sentence. App. 7. He argued, in relevant part, (1) the district court erred in denying the motion to suppress; (2) his _Miranda_ waiver was rendered involuntary due to statements made by the Special Agents during the interrogation that produced his confession; and (3) his Hobbs Act robbery convictions do not qualify as "crime of violence" offenses under 18 U.S.C. §924(c)(3)(A). App. 7-8. The Eleventh Circuit Court of Appeals affirmed Mr. Becker's convictions and sentences in an unpublished but reported decision. _See_ _United States v. Becker_, 762 Fed. App'x 668 (11th Cir. 2019). Mr. Becker petitioned this Court for a writ of certiorari, but the petition was denied on June 22, 2020. _See_ _Becker v. United States_, 141 S. Ct. 145 (2020).

On June 21, 2021, Mr. Becker filed his initial §2255 motion in the district court collaterally attacking the constitutionality of his convictions and sentences, wherein he sought to vacate them, set them aside and the granting of a new trial. App. 5, 8. Per order of the

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[2] _Miranda v. Arizona_, 384 U.S. 436 (1966).

district court, Mr. Becker filed an amended § 2255 motion[3] and argued, in relevant part, that trial counsel ineffectively litigated his motion to suppress because counsel failed to argue that police agents violated his right to counsel in obtaining his confession, as that right has been explained by this Court in Miranda, 384 U.S. 436 and Edwards v. Arizona, 451 U.S. 477, 484-85 (1981) (once a suspect invokes his right to counsel all questioning of the suspect must cease until counsel is furnished). App. 8, 14-15 (citing CV ECF No. 10 at 3, 11-16).[4] In support thereof, Mr. Becker contended he provided trial counsel with information during pretrial meetings that demonstrates he invoked his right to counsel at the scene of his arrest for burglary tools and that FBI Special Agents interrogated him shortly after his arrest, without counsel present. CV ECF No. 10 at 3, 11-14. As such, he maintained that, because the information he supplied to trial counsel showed an Edwards violation had occurred which required suppression of his confession as a matter of law, no competent counsel would have omitted such a meritorious argument from the motion to suppress and that its omission was not part of any trial strategy. Id. at 14-15. Mr. Becker further asserted that had trial counsel litigated the Miranda-Edwards argument, the motion to suppress would have been successful and his confession deemed inadmissible at trial, thereby creating the reasonable probability that the outcome of his trial would have resulted in a not-guilty verdict. Id. at 15-16.

While the amended § 2255 was pending and following this Court's Decision in United States v. Taylor, 142 S.Ct. 2015 (2022), Mr. Becker filed a second supplemental pleading, and an amendment thereto, raising an additional ground for § 2255 relief. App. 5, 9. Therein he argued that the Hobbs Act robbery jury instruction given in his case is "categorically overbroad" with respect to the elements set forth in

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[3] The district court later granted Mr. Becker's motion to correct text inadvertently omitted from his amended § 2255 motion. App. 8.

[4] "CV" refers to the record in the district court in Becker v. United States, Case No. 2:21-cv-14254-DLG (S.D. Fla. 2021).

QUESTIONS PRESENTED

§924(c)(3)(A), such that his convictions for Hobbs Act robbery cannot serve as "crime of violence" offenses to sustain his §924(c) convictions and sentences and, thus, they must be vacated; citing United States v. Louis, Case No. 21-cr-20252, 2023 U.S. Dist. LEXIS 32231 (S.D. Fla. February 27, 2023) (the district court judge there arresting judgment and dismissing Louis' six-§924(c) counts after subjecting the elements of the Hobbs Act robbery jury instruction employed at trial, Eleventh Circuit Pattern Jury Instruction 070.3, to Taylor's categorical approach test and finding the Instruction to be "categorically overbroad" with respect to §924(c)(3)(A) such that Louis' Hobbs Act robbery convictions were not "crime(s) of violence" as required under §924(c)(1)(A)). App. 9, 12-13 (citing CV ECF Nos. 34 and 36-1). Specifically, Mr. Becker focused on the robbery element listed in the Hobbs Act robbery jury instruction and argued it was broader than the compliment of elements found in §924(c)(3)(A). CV ECF Nos. 34 at 4-5; 36-1 at 4,5. He acknowledged that the robbery element is satisfied upon a showing that a defendant "caus[ed] the victim to fear harm", and noted that the jury instruction defined the term "fear" to mean "a state of anxious concern, alarm, or anticipation of harm... [i]t includes the fear of financial loss as well as physical violence." CV ECF Nos. 34 at 4-5; 36-1 at 4-5. As such, Mr. Becker argued that under the plain language of the jury instruction, a defendant can commit Hobbs Act robbery without using, attempting to use, or threatening to use physical force. CV ECF Nos. 34 at 5; 36-1 at 5.

Without conducting an evidentiary hearing under 28 U.S.C. §2255(b), the district court rejected both of Mr. Becker's arguments on the merits. App. 12-16.[5] Regarding the ineffective assistance of counsel argument, the district court concluded that trial counsel "performed effectively because the argument [Mr. Becker] faults

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[5] The district court declined to analyze "timeliness" and "procedural default" concerns raised by the government. App. 11.

counsel for not making was without merit." App. 15-16.[6] The district court's conclusion rested on its finding that "the record shows that [Mr. Becker] voluntarily waived his Miranda rights and initiated contact with law enforcement subsequent to [his purported] invocation [of the right to counsel]." App. 15 (emphasis added) (citing Everett v. Sec'y Fla. Dep't of Corr., 779 F.3d 1212, 1245-46 (11th Cir. 2015) ("Consistent with Edwards, the officers did not resume questioning of Everett until after Everett both voluntarily initiated further discussion and voluntarily waived his previously invoked right to counsel.")).[7] Citing excerpts from the record, the district court noted: "[t]he record reflects that [Mr. Becker] voluntarily spoke with law enforcement in an attempt to avoid dealing with state authorities and that [his] confession followed his knowing and voluntary Miranda waiver." App. 15-16. The district court made no mention of the record that shows Mr. Becker voluntarily

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[6] The district court did not address the "prejudice" prong of the two-part test courts use to resolve ineffective assistance of counsel claims, as set forth in Strickland v. Washington, 466 U.S. 668 (1984).

[7] Without deciding, the district court assumed that Mr. Becker "invoked his right to counsel at the scene of his arrest" (App. 15) based upon the following allegations in his sworn §2255 motion:

> Agent Kadela asked [Mr. Becker] if he had "been to Georgia lately?" ... [Mr. Becker] responded, "I want to cooperate with you through my attorney, but he said that he hasn't heard back from you." Kadela then replied, "I can't talk to you, you have an attorney." But [Mr. Becker] wanted his attorney involved with any further questioning and directed Kadela to "call [his] attorney right now." However, Kadela answered [Mr. Becker] in the negative, telling him "I'm not calling your attorney... I'm not making any calls it's late on a Friday."

App. 14 (citations omitted).

spoke with law enforcement and waived his previously asserted Miranda rights only after SLCSO Detective Andrew Bolonka and FBI Special Agents David Kadela and T.J. Sypniewski reinitiated contact with Mr. Becker shortly after his arrest for the burglary tool crime, for the express purpose of interrogating him at SLCSO. CV ECF No. 18-7 (transcripts of Mr. Becker's confession).

In regards to the argument centering around the "categorically overbroad" Hobbs Act robbery jury instruction, the district court determined the argument "fails because it does not demonstrate actual prejudice from this instruction." App. 13 (citing Hedgpeth v. Pulido, 555 U.S. 57, 58 (2008)). In reaching its determination, the district court examined the evidence introduced at Mr. Becker's trial and concluded, "[t]he record does not provoke grave doubt about whether [Mr. Becker's] § 924(c) convictions rested on invalid grounds." App. 13 (citing Granda v. United States, 990 F.3d 1272, 1294 (11th Cir. 2021)). It found that Mr. Becker's "§ 924(c) convictions were based on the jury's findings that he aided and abetted another in causing the victims to fear physical violence, as opposed to fear of financial loss only." App. 13-14 (emphasis added) (citing United States v. Gibbs-King, 808 Fed. App'x 738, 744 (11th Cir. 2020)). The district court offered no opinion on the correctness of the ruling in Louis, Case No. 21-cr-20252, 2023 U.S. Dist. LEXIS 32231, or the categorical approach analysis utilized by the district court there to resolve the same question of law Mr. Becker raised here. The district court declined to issue a COA with respect to Mr. Becker's § 2255 claims. App. 21.

Mr. Becker moved the Eleventh Circuit to issue a COA on the denial of both his ineffective assistance of claim and his argument involving the Hobbs Act robbery jury instruction. Mot. for COA at 26-31, 41-43 (Issues "Two" and "Six"; reflecting the claims raised in "Ground One" of the amended § 2255 motion and the second supplemental pleadings that were denied in the district court (App. 12-16)). First, with respect to his ineffective assistance of counsel claim, Mr. Becker argued the district court's factual finding that the record shows he "initiated" contact with law enforcement subsequent to his purported invocation of the right to counsel was not supported by the record and was at odds with "Edwards" (Mot. for COA at 28-29) and, absent that finding, his amended § 2255 motion states a valid claim alleging the denial of his Sixth amendment right to effective assistance of counsel (Mot. For COA at 29-31; citing Strickland, 466 U.S. 668 and Kimmelman v. Morrison, 477 U.S. 365 (1986)).[8] In regards to the Hobbs Act robbery jury instruction argument, Mr. Becker argued that reasonable jurists would debate both the district court's use of the legal standard it applied to resolve the matter (i.e. a harmless error analysis) and its conclusion that the argument was meritless. Mot. For COA at 41-43 (citing Louis, Case No. 21-cr-20252, 2023 U.S. Dist. LEXIS 32231).[9]

A circuit judge from the Eleventh Circuit denied the motion for COA and held that Petitioner "failed to show that the district court was incorrect in its procedural ruling and make a substantial showing of the denial of a constitutional right." App. 2 (citing 28 U.S.C. § 2253(c)(2); Slack v. McDaniel, 529 U.S. 473, 484 (2000)). Mr. Becker moved the Eleventh Circuit to reconsider its Order App. 4.

In relevant part, Mr. Becker argued that, under Slack, to obtain a COA on his § 2255 claims that were denied on the merits only, he was only required to make a substantial showing of the denial of a constitutional right, and not an additional showing that a procedural ruling made by the district court was incorrect. Mot. to reconsider at 3-5 (citing Slack, 529 U.S. at 484-85). He further contended that the district court's factual finding that he "initiated" contact with law enforcement subsequent to his purported invocation was not only unsupported by the record, it was clearly erroneous. Mot. to reconsider

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[8] Mr. Becker's argument should be read in conjunction with the factual basis behind his argument. See Mot. For COA at 8-13.

[9] Mr. Becker's argument should be read in conjunction with the factual basis behind his argument. See Mot. for COA at 20-22.

at 6-7 (citing Berenguela-Alvarado v. Castanos, 950 F.3d 1352, 1357 (11th Cir. 2020)). Mr. Becker further observed that the district court in Louis, Case No. 21-cr-20252, 2023 U.S. Dist. LEXIS 32231, resolved the Hobbs Act robbery jury instruction issue in his favor by employing Taylor's, 142 S.Ct. at 2020, categorical approach test, and that the Eleventh Circuit has yet to overrule the Louis decision. Mot. to reconsider at 11-12.

The Eleventh Circuit denied the motion for reconsideration on September 30, 2024. App. 4. Mr. Becker now petitions this Court for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

1. This Court should Clarify the COA Standard applicable to Petitioner's §2255 claims Denied in the district court.

An appeal from a final order in a section 2255 proceeding may not be undertaken to the court of appeals, "[u]nless a circuit justice or judge issues a [COA]". 28 U.S.C. § 2253(c)(1)(B). To obtain a COA, an applicant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Generally, that burden is not more than demonstrating that "reasonable jurists would find the district court's assessment of the claim debatable or wrong." Slack, 529 U.S. at 484. However, when a district court denies a habeas petition on procedural grounds, an applicant is required to show that reasonable jurists would debate both (1) whether the district court's procedural ruling was correct, and (2) whether a habeas petition states a valid claim alleging the denial of a constitutional right. Ibid.

With these COA standards in mind, the record shows that Petitioner was only required to make a substantial showing of the denial of a constitutional right to obtain a COA from the

Eleventh Circuit, with respect to Issues "Two" and "Six" appearing in the motion for COA. Mot. for COA at 26-31, 41-43.[10] However, it is unclear from the Eleventh Circuit's order denying a COA, whether it applied the correct COA standard to those Issues. See App. 2 (Eleventh Circuit denying all issues submitted for COA review because Petitioner "failed to show that the district court was incorrect in its procedural ruling and make a substantial showing of the denial of a constitutional right.") (emphasis added). Arguably, the Eleventh Circuit's order implicitly infers that it applied the same COA standard to deny Mr. Becker a COA on all his issues, in part, on the basis that he failed to show a procedural ruling made by the district court was incorrect. If so, because Mr. Becker was not required to make that showing with respect to Issues "Two" and "Six", the Eleventh Circuit erred in applying an incorrect COA standard to deny those Issues. Slack, 529 U.S. at 484.

Nevertheless, to the extent the Eleventh Circuit's order denying a COA is ambiguous concerning the COA standard it applied to each of Mr. Becker's Issues, this Court should grant certiorari review and resolve the question because its answer is relevant in deciding the second and third questions presented for review.

In the alternative, the Court should remand to the Eleventh Circuit with instructions to clarify its order with respect to the COA standard it applied in denying Issues "Two" and "Six" of the COA motion and hold this case in abeyance pending clarification.

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[10] Issue "Two" in the COA motion reflects the ineffective assistance of counsel claim set forth in "Ground One" of the amended § 2255 motion that was denied by the district court on the merits (App. 14-16). Issue "Six" in the COA motion reflects the "categorically overbroad" Hobbs Act robbery jury instruction raised in the second supplemental pleading(s) in the district court and denied on the merits (App. 12-14). Mr. Becker raised additional issues in his COA motion, but none of those are relevant here.

2. <u>This Court should Decide whether Petitioner is Entitled to a COA under 28 U.S.C. §2253(c)(2) to Appeal the Denial of his 28 U.S.C. §2255 claim that Trial Counsel was Constitutionally Ineffective for Failing to Competently Litigate Suppression of his Confession based upon a Violation of his Fifth Amendment Right to Counsel.</u>

If the Court agrees with Mr. Becker that he was only required to make a substantial showing of the denial of a constitutional right to obtain a COA from the Eleventh Circuit with respect to Issue Two of his COA motion, then it should resolve the second question, that is, whether Petitioner is entitled to a COA under §2253(c)(2) to appeal the denial of his §2255 claim that trial counsel was constitutionally ineffective for failing to competently litigate suppression of his confession based upon a violation of his Fifth Amendment right to counsel. Again, as previously addressed in the first question presented, the burden to prove entitlement to a COA under §2253(c)(2) with respect to Mr. Becker's claim is not more than a showing that "reasonable jurists would find the district court's assessment of his claim debatable or wrong." <u>Slack</u>, 529 U.S. at 484. Whether Mr. Becker has met this burden here depends upon the validity of his claim that implicates a violation of his Sixth Amendment rights.

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall... have the Assistance of Counsel for his defense." U.S. Const. amend VI. In <u>Strickland</u>, the Court explained that a criminal defendant not only has the right to assistance of counsel, but also "the right to effective assistance of counsel." 466 U.S. at 686. To prevail on a claim of ineffective assistance of counsel, a petitioner must demonstrate both (1) that counsel's performance was deficient; and (2) a reasonable probability that the deficient performance prejudiced the defense. <u>Id.</u>, 466 U.S. at 687-88. Where, as here, the principal allegation of ineffectiveness is that counsel failed to competently litigate suppression of statements obtained in violation of the Fifth Amendment right to counsel, a movant must necessarily "prove that his [Fifth] Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence." Kimmelman, 477 U.S. at 375.

With these precepts in mind, Mr. Becker's ineffective assistance of counsel claim first turns on the viability of his argument that law enforcement violated his Fifth Amendment right to counsel in obtaining his confession. In Miranda, the Court determined not only does the Fifth Amendment prohibit compelled self incrimination, it grants an individual facing custodial interrogation the right to the presence of an attorney. 384 U.S. at 469. The Court further held that once an individual requests counsel, "the interrogation must cease until an attorney is present." Id., 384 U.S. at 474. The Court later expounded on its ruling in Miranda and held, "an accused ... having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communications, exchanges, or conversations with the police. Edwards, 451 U.S. at 484 (herein referred to as the "Edwards rule").

Here, the allegations made by Mr. Becker in his sworn §2255 motion are consistent with a finding that law enforcement agents violated the Edwards rule when they interrogated him at SLCSO headquarters, in the absence of counsel. The following is a summary of those allegations, in relevant part:

- On February 5, 2016, shortly after being stopped near his home in Port St. Lucie, Florida, Mr. Becker's minivan was surrounded by multiple unidentified law enforcement agents wearing tactical vests and sidearms, who were positioned in a manner to prevent him from leaving the scene.

- At the time of the stop, Mr. Becker was free on bail for the charge of burglary out of Gwinnett County, Georgia. He also understood at that time that the FBI was investigating him for his involvement in multi-state burglaries and that they had probable cause to arrest him whenever they chose to.
- While the agents were surrounding the minivan, FBI Special Agent David Kadela approached Mr. Becker, who remained seated in the vehicle, and asked whether he had "been to Georgia lately?". Mr. Becker, who was familiar with Agent Kadela, responded - "I want to cooperate with you through my attorney, but he said that he hasn't heard back from you." Agent Kadela, who was periodically in touch with Mr. Becker's attorney, replied - "I can't talk to you, you have an attorney.
- But Mr. Becker wanted his attorney involved right away with any further questioning and directed Agent Kadela to "call [his] attorney right now." Agent Kadela then informed Mr. Becker, "I'm not calling your attorney, I'm not making any calls its late on a Friday."
- Following his encounter with Agent Kadela, Mr. Becker was removed from the minivan and secured with an agent present at the scene. A search of the minivan was conducted. Once the search was completed, SLCSO Detective Andrew Bolonka informed Mr. Becker that he was under arrest for possession of burglary tools.
- Mr. Becker was then transported from the scene of arrest and placed inside an interview room at SLCSO headquarters. Although he made no request to speak with law enforcement following his encounter with Agent Kadela at the scene of arrest, Mr. Becker was visited by Detective Bolonka, who left the room after providing Miranda warnings, and then he was visited again, a second time, by Agent Kadela and a fellow Special Agent T.J. Sypniewski, and provided the Miranda warnings a second time, at which time he was interrogated by the Special Agents.

- During the interrogation, Mr. Becker implicated himself in the Hobbs Act robberies charged in the superseding indictment.

CV ECF No. 10 at 3, 11-14.

For starters, the question that Agent Kadela posed to Mr. Becker, "been to Georgia lately?", constituted "interrogation" because it was "likely to elicit an incriminating response from Mr. Becker, who was out on bail for the Georgia burglary charge." Rhode Island v. Innis, 446 U.S. 291, 301 (1980). Next, the fact that Agent Kadela confronted Mr. Becker with his knowledge of the Georgia burglary, coupled with the multiple law enforcement agents surrounding the minivan to prevent him from leaving the scene, a reasonable person in Mr. Becker's position would have felt he was under arrest and not at liberty to terminate the interrogation and leave and, thus, he was "in custody" for Miranda purposes when questioned by Agent Kadela. Thompson v. Keohane, 516 U.S. 99, 112 (1995). Further, Mr. Becker's response to Agent Kadela's question - "I want to cooperate with you through my attorney..." - and his request to Agent Kadela coming on the heels of that response - "call [my] attorney right now" - would lead a reasonable officer in Agent Kadela's circumstances to conclude that Mr. Becker was invoking his right to counsel with respect to any further police questioning. Davis v. United States, 512 U.S. 452, 459 (1994). Thus, when Agent Kadela and his fellow agents initiated contact and discussions with Mr. Becker inside the interview room at SLCSO headquarters for the express purpose of interrogating him, the agents violated the Edward's rule when they interrogated him in the absence of counsel. Edwards, 451 U.S. at 484.

Nevertheless, although Mr. Becker's allegations went unchallenged during § 2255 proceedings, the district court concluded there was "no meritorious argument to suppress [Mr. Becker's] confession on the basis of [his] purported invocation of the right to counsel." App. 16. In other words, the district court concluded that law enforcement agents did not violate the Edwards rule when they initiated contact with Mr. Becker at SLCSO headquarters and obtained his confession in the absence of counsel. Dispositive of its conclusion, the district court found "the record shows that [Mr. Becker] voluntarily waived his Miranda rights and initiated contact with law enforcement subsequent to [his] invocation [of the right to counsel]." App. 15 (emphasis added). However, the record here compels a different conclusion.

As shown above, Mr. Becker's sworn § 2255 allegations show that law enforcement agents, not Mr. Becker, initiated the meeting inside the interview room at SLCSO headquarters following his arrest and subsequent invocation of the right to counsel. In fact, transcripts taken from the interrogation that produced Mr. Becker's confession confirm that Detective Bolonka and Special Agents Kadela and Sypniewski initiated the meeting. CV ECF No. 18-7 at 2-3. Additionally, Mr. Becker's request to Agent Kadela at the scene of the arrest to "call [my] attorney right now", did not "initiate further communications, exchanges, or conversations" within the meaning of Edwards, 451 U.S. at 484. The request was clearly a follow-up invocation coming directly on the heels of Mr. Becker's initial invocation of the right to counsel, made to Agent Kadela during their brief exchange at the scene of arrest, and it did not "evince a willingness and a desire for a generalized discussion about the [FBI's] investigation." Oregon v. Bradshaw, 462 U.S. 1039, 1045-46 (1983) (clarifying the meaning of "initiate" from the Edwards decision).

Moreover, the district court did not cite to any part of the record that would support its finding that Mr. Becker "initiated" contact with law enforcement subsequent to his invocation, such that law enforcement was able to initiate the meeting at SLCSO headquarters and interrogate him in the absence of counsel. App. 14-16. Instead, it noted "the record reflects that [Mr. Becker] voluntary spoke with law enforcement in an attempt to avoid dealing with state authorities and that [his] confession followed his knowing and voluntary Miranda waiver." App. 16. However, notwithstanding the fact that the record does not indicate that a violation of the Edwards rule was at issue in those prior findings or, more importantly, whether Mr. Becker "initiated" contact with law enforcement subsequent to his invocation, the fact that Mr. Becker spoke with law enforcement after invoking his right to counsel is not dispositive of a finding that he actually "initiated" contact with law enforcement subsequent to his invocation. See Edwards, 451 U.S. at 486-87 (the Court recognizing that Edwards met and spoke with law enforcement after previously asserting his right to counsel the day before, but finding that law enforcement initiated the meeting; indicating the two inquiries are separate and distinct). As such, Mr. Becker has established through clear and convincing evidence that the record does not show he "initiated" contact with law enforcement subsequent to his purported prior invocation of the right to counsel and, thus, the district court's finding to the contrary is not binding on this Court. Tharpe v. Sellers, 583 U.S. 33, 34 (2018).

Absent the district court's factual finding, Mr. Becker's sworn § 2255 allegations establish that law enforcement agents here violated the Edwards rule when they interrogated Mr. Becker at SLCSO headquarters in the absence of counsel. Edwards, 451 U.S. at 484. And because the agents obtained Mr. Becker's confession during that interrogation (CV ECF No. 18-7), the confession was due to be suppressed as a matter of law. Id., 451 U.S. at 485, 487. As such, trial counsel here had a meritorious Fifth Amendment argument to suppress Mr. Becker's confession.[11] But, as discussed above, in addition to showing that his Fifth Amendment claim is meritorious, Mr. Becker need also show "that there is a reasonable probability

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[11] In Kimmelman, the Court determined that Strickland's deficient performance prong turns on whether the underlying claim - the claim purportedly requiring suppression - is "meritorious". 477 U.S. at 374-75.

that the verdict would have been different absent the excludable evidence", to prove actual prejudice from counsel's failure to competently litigate the claim in the motion to suppress. Kimmelman, 477 U.S. at 375.

In his amended § 2255 motion, Mr. Becker alleged that during the interrogation at SLCSO headquarters, he "made self incriminating statements to the agents implicating his involvement in the offenses charged in the superseding indictment." CV ECF No. 10 at 14. He further claimed that his "statements stood as the only evidence presented to the jury directly connecting him to the charged robberies." Id. at 16. For these reasons, Mr. Becker asserted that, absent his confession, "there is a reasonable probability that the outcome of [his] trial would have resulted in a not-guilty verdict." Ibid.[12] Mr. Becker's § 2255 allegations in this respect went unchallenged in the district court.[13]

Thus, in light of the foregoing, Mr. Becker has demonstrated both ineffective assistance of counsel under either Strickland or Kimmelman, or both, and an entitlement to relief under § 2255(a) and (b). It follows that reasonable jurists would find the district court's assessment of Mr. Becker's ineffective assistance of counsel claim debatable or wrong; or at the very least, jurists of reason could debate whether Mr. Becker has shown by clear and convincing evidence that the district court's factual finding (i.e. that the record shows that Mr. Becker "initiated" contact with law enforcement subsequent to his purported prior invocation of the right to counsel) was wrong. Slack, 529 U.S. at 484

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[12] "A confession is like no other evidence. Indeed the defendant's own confession is probably the most probative and damaging evidence that may be admitted against him." Arizona v. Fulminante, 499 U.S. 279, 296 (1991).

[13] See FN 6, supra.

Likewise, it follows that the Eleventh Circuit erred in its conclusion that Mr. Becker failed to make a substantial showing of the denial of a constitutional right and denying him a COA to appeal the denial of his ineffective assistance of counsel claim. App. 2. This Court should grant certiorari review and resolve the question to avoid the risk of undoing the public's confidence in the judicial process.

Alternatively, the Court should remand the case to the Eleventh Circuit for further consideration of the question whether Mr. Becker is entitled to a COA on his claim.

3. This Court should Decide whether Petitioner is Entitled to a COA under 28 U.S.C. § 2253(c)(2) to Appeal the Denial of his 28 U.S.C. § 2255 claim that his Hobbs Act robbery Convictions that rest upon Eleventh Circuit Pattern Jury Instruction 070.3 do not Count as "crime of violence" Offenses under 18 U.S.C. § 924(c)(3)(A).

If the Court agrees with Mr. Becker that he was only required to make a substantial showing of the denial of a constitutional right to obtain a COA from the Eleventh Circuit with respect to Issue Six in his COA motion, then it should resolve the third question, that is, whether Petitioner is entitled to a COA under 28 U.S.C. § 2253(c)(2) to appeal the denial of his 28 U.S.C. § 2255 claim that his Hobbs Act robbery convictions that rest upon Eleventh Circuit Pattern Jury Instruction 070.3 do not count as "crime of violence" offenses under 18 U.S.C. § 924(c)(3)(A). Again, as previously addressed in the first question presented, the burden to prove entitlement to a COA under § 2253(c)(2) with respect to Mr. Becker's claim is not more than a showing that "reasonable jurists would find the district court's assessment of [his] claim debatable or wrong." Slack, 529 U.S. at 484. The satisfaction of that burden here depends on whether the robbery element listed in Eleventh Circuit Pattern Jury Instruction 070.3 (herein referred to as "Instruction") articulates an offense broader than Hobbs Act robbery that would not categorically qualify as a "crime of violence" under §924(c)(3)(A).

A "crime of violence" under §924(c)(3)(A) is a 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, a court must apply the categorical approach test, Taylor, 142 S.Ct. at 2020. This test primarily relies on the elements that the criminal statute sets out (ibid), but "Standard Pattern Jury Instructions and case law are consulted for what elements are needed to prove the crime" (Robinson v. United States, 2017 U.S. Dist. LEXIS 17157 at *26 (S.D. Fla. February 6, 2017). The particular facts of how a defendant may have committed the crime are immaterial. Taylor, 142 S.Ct. at 2020. In other words, the only relevant inquiry under the test is "whether the federal felony at issue always requires the government to prove - beyond a reasonable doubt, as an element of its case - the use, attempted use, or threatened use of force." ibid.

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 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.

Under the categorical approach test, looking only to the statutory definition of the crime and not the particular facts, the Eleventh Circuit holds that substantive Hobbs Act robbery is a "crime of violence" because it has as an element the use, attempted use, or threatened use of physical force against the person or property of another. In re St. Fleur, 824 F.3d 1339, 1340-41 (11th Cir. 2016); United States v. St. Hubert, 909 F.3d 335, 345-46 (11th Cir. 2018). However, the Eleventh Circuit has not considered, either pre or post-Taylor, 142 S. Ct. 2015, whether the Instruction itself articulates an offense broader than Hobbs Act robbery that would not categorically qualify as a "crime of violence".

The Instruction, the same Hobbs Act robbery jury instruction implemented at Mr. Becker's trial (CV ECF No. 29-3 at 15) provides, in relevant part:

> (2) the Defendant took the property against the victim's will, by using actual or threatened force, or violence, or causing the victim to fear harm, either immediately or in the future []
>
> . . .
>
> "Fear" means a state of anxious concern, alarm, or anticipation of harm. It includes the fear of financial loss as well as fear of physical violence.

Eleventh Circuit Pattern Jury Instruction 070.3 (emphasis added).

Under this Instruction, Hobbs Act robbery should not be considered a "crime of violence" because it does not "require[] the government to prove - beyond a reasonable doubt, as an element of its case - the use, attempted use, or threatened use of physical force." Taylor, 142 S. Ct. at 2020.

In Louis, the district court there found that the Instruction created a "categorically overbroad Hobbs Act robbery offense" with respect "to the elements of [] § 924(c)(3)[(A)]". Case No. 21-cr-20252, 2023 U.S. Dist. LEXIS 32231 at *2-3. Specifically, the Louis court focused on the robbery element set forth in the Instruction and, in particular, the definition of the term "fear". Id., Case No. 21-cr-20252, 2023 U.S. Dist. LEXIS 32231 at *3. It found that the Instruction allowed "the jury to convict Mr. Louis [of Hobbs Act robbery] for fear of financial loss as well as fear of physical violence in addition to the use, attempted use, or threatened use of physical force." ibid (comparing § 924 (c)(3)(A) to the Instruction) (internal quotes omitted) (emphasis added). Thus, "[g]iven the categorically overbroad nature of the Hobbs Act robbery charges relative to § 924(c)(3)[(A)]", the Louis court admitted it was "constrained" from entering judgment on the companion 18 U.S.C. § 924(c)(1)(A)(ii) charges following this Court's decision in Taylor, 142 S.Ct. 2015, and therefore, it arrested judgment on the six-§ 924(c) counts and dismissed them. Louis, Case No. 21-cr-20252, 2023 U.S. Dist. LEXIS 32231 at * 5.

Like the defendant in Louis, if Mr. Becker's § 924(c)(1)(A)(ii) convictions cannot survive the Court's analysis in Taylor, due to Hobbs Act robbery convictions that rest upon the Instruction,[14] his § 924(c) convictions and sentences are due to be vacated. Louis, Case No. 21-cr-20252, 2023 U.S. Dist. LEXIS 32231 at * 5. As such, Mr. Becker would be entitled to relief under § 2255(a) and (b) with respect to his claim.

Thus, because the district court's ruling in Louis has not been overruled by a higher court, reasonable jurists could debate both the legal standard employed by the district court here to resolve Mr. Becker's claim (i.e. a harmless error analysis) and its

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[14] The district court wrongly stated that Mr. Becker's "§ 924(c) convictions were based on the jury's finding that [he] aided and abetted another in causing the victims to fear physical violence, as opposed to fear of financial loss." App. 13-14. The record here shows that a general jury verdict form was used in Mr. Becker's trial, which did not require jury unanimity on the manner he may have committed the robbery in order to convict him. CV ECF No. 18-11 (verdict form).

conclusion that his claim is "meritless" (App. 12-14). Slack, 529 U.S. at 484. Accordingly, the Eleventh Circuit erred in denying Mr. Becker a COA to appeal the denial of his claim. App. 2.

This Court should grant certiorari review and resolve this question of paramount importance.

Alternatively, the Court should remand the case to the Eleventh Circuit for further consideration of the question whether Mr. Becker is entitled to a COA on his claim.

CONCLUSION

Petitioner Todd Erling Becker respectfully requests that this Court grant this petition for a writ of certiorari and review the proceedings below.

Respectfully submitted,

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