No. _____

In the

Supreme Court of the United States

October Term, 2020

_____

JAMAR GARRISON, Petitioner

v

UNITED STATES OF AMERICA, Respondent

_____

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

MARGARET SIND RABEN (P39243)
GUREWITZ & RABEN, PLC
333 W. FORT STREET, SUITE 1400
DETROIT, MI 48226
(313) 628-4708
Attorney for Petitioner

QUESTIONS PRESENTED

I. Should a Writ of Certiorari Issue to Review the *Brady* and Rule 16 Due Process Violations in Defendant's Case Because the Sixth Circuit Found No Error or Harmless Error in the Government's Violations of its Discovery Obligations?

II. Should a Writ of Certiorari Issue Because the Sixth Circuit Denied Defendant's Due Process Right to a Fair Trial When it Found No Error in the Government's Use of False Testimony?

III. Should a Writ of Certiorari Issue Because Defendant was Denied His 5th and 6th Amendment Rights to Present a Defense When the Sixth Circuit Affirmed the District Court's Refusal to Permit Defendant to Cross-Examine Bullington Regarding Specific Instances of Conduct?

IV. Should a Writ of Certiorari Issue to Vacate as *Rehaif* Plain Error Defendant's Conviction and Sentence as an Armed Career Criminal?

PARTIES TO THE PROCEEDINGS

Petitioner

Petitioner Jamar Garrison is an individual and has no corporate affiliations.

Respondent

United States of America.

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

SUPREME COURT CASES *Page*

SIXTH CIRCUIT CASES:

***OTHER CIRCUIT CASES*:**

RULES & STATUTES

Petitioner Jamar Garrison respectfully requests that a Writ of Certiorari issue to review the unpublished decision of the United States Court of Appeals for the Sixth Circuit entered on December 29, 2020.

JURISDICTION

This Court's jurisdiction is invoked under 28 USC §1254(1). The Court of Appeals for the Sixth Circuit had jurisdiction over Petitioner's direct appeal pursuant to 28 USC §1291. The instant Petition is timely filed within 90 days of December 29, 2020, the date of the Sixth Circuit's opinion in Petitioner's appeal.

OPINIONS BELOW

On December 29, 2020, the Sixth Circuit of Appeals issued an unpublished opinion affirming Petitioner's convictions and sentences. The unpublished opinion can be found at __ Fed Appx __, 2020 WL 7705669. A copy of the Opinion is attached as Appendix A.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor 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; nor shall private property be taken for public use, without just compensation.

US Constitution, Amendment VI

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

INTRODUCTION

Defendant-Petitioner (hereafter Defendant)'s case originated in a traffic stop of a rented truck Defendant was driving, the search of the truck and the discovery of a gun and drugs hidden in the door of the truck. Defendant was indicted and jury convicted of violations of 18 USC §922(g)(1); §924(a)(2) and (e) (Count 1), 21 USC §841(a)(1) and (b)(1)(C) (Count 2) and 18 USC §924(c)(1)(A) (Count 3).

Defendant was sentenced as an Armed Career Criminal to 180 months on Count 1, a concurrent 180 months on Count 2, and 60 months on Count 3 consecutive to Counts 1 and 2. (ECF 127: Judgment docketed 7/2/19, Pg ID 901). Defendant's Notice of Appeal was docketed on July 8, 2019. (ECF 129: Notice of Appeal, Pg ID 913). As relevant to this Petition, Defendant raised these issues on appeal:

> I. Defendant's Convictions Should be Vacated Because the Government Suppressed and then Belatedly Disclosed Two Documents Material to Defendant's Case in Violation of its Obligations Under FRCrP 16 and *Brady v. Maryland.*
>
> II. Defendant's Convictions Should Be Vacated Because the District Court Denied Defendant the Right to Present a Defense and Abused its Discretion When it Refused to Allow Defendant to

Cross-examine Patrick Bullington about Specific Instances of Conduct.

III. Defendant's Convictions Should be Vacated Because the Government Knowingly Presented False Testimony on a Material Issue to Defendant's Jury.

V. Defendant's Conviction on Count 1 and His Sentence as an Armed Career Criminal Must Be Vacated For Plain Error Under *Rehaif v. United States*, 139 S Ct 2191 (2019).

The Sixth Circuit Court of Appeals rejected all of Defendant's claims either on the merits or as harmless error. Defendant asks this Court to issue a writ of certiorari to the Sixth Circuit on these issues:

I. Should a Writ of Certiorari Issue to Review the *Brady* and Rule 16 Due Process Violations in Defendant's Case Because the Sixth Circuit Found No Error or Harmless Error in the Government's Violations of its Discovery Obligations?

II. Should a Writ of Certiorari Issue Because the Sixth Circuit Denied Defendant's Due Process Right to a Fair Trial When it Found No Error in the Government's Use of False Testimony?

III. Should a Writ of Certiorari Issue Because Defendant was Denied His 5th and 6th Amendment Rights to Present a Defense When the Sixth Circuit Affirmed the District Court's Refusal to Permit Defendant to Cross-Examine Bullington Regarding Specific Instances of Conduct?

IV. Should a Writ of Certiorari Issue to Vacate as *Rehaif* Plain Error Defendant's Conviction and Sentence as an Armed Career Criminal?

STATEMENT OF THE CASE

The district court entered a pretrial order addressing the Government's obligation to disclose *Brady/Giglio* and material:

(3) Pretrial discovery and inspection.
(a) **No later than June 7, 2018,** the Assistant United States Attorney and defense counsel shall confer and, upon request, permit inspection and copying or photographing of all matter subject to disclosure under Federal Rule of Criminal Procedure 16.

(b) If additional discovery or inspection is sought, Defendant's attorney shall confer with the Assistant United States Attorney with a view to satisfying these requests in a cooperative atmosphere without recourse to the Court. The request may be oral or written, and the Assistant United States Attorney shall respond in like manner.

* * *

(ii) Brady (Giglio) material. The United States shall disclose any *Brady* material of which it has knowledge in the following manner and failure to disclose Brady material at a time when it can be effectively used at trial may result in a recess or a continuance so that Defendant may properly utilize such evidence:

(A) pretrial disclosure of any *Brady* material discoverable under Rule 16(a)(1);

(B) disclosure of all other *Brady* material in time for effective use at trial;

(C) if the United States has knowledge of *Brady* evidence and is unsure as to the nature of the evidence and the proper time for disclosure, then it may request an *in camera* hearing for the purpose of resolving this issue. . .

(ECF 14: Order Following Arraignment, Pg ID 31).

Defendant filed a pretrial Motion for Disclosure of Exculpatory and Impeaching Information, citing FRCrP 16(a)(1) and *Brady v. Maryland*, 373 US 83 (1963). (ECF 28: Motion, Pg ID 140). The district court granted Defendant's Motion as to "Any and all physical evidence, including but not limited to, records and

photos." (ECF 47: Order, Pg ID 216, 218-20). The Government did not provide any discovery in response.

Defendant's Trial

In Defendant's Opening Statement, Defendant told the jury the evidence would establish reasonable doubt as to whether the drugs and gun found hidden in a truck rented by Government witness Patrick Bullington belonged to Bullington or to Defendant, the driver of the truck. (ECF 143: TR 7/24/18, Defendant's Opening Statement, Pg ID 1041-43). Defendant also told the jury there was reasonable doubt of Defendant's guilt because the Government had not even tried to test the gun, the baggies or the screwdriver found in the truck for fingerprints. (Id, Pg ID 1043). Defendant concluded his Opening by saying:

> So staged photographs [of evidence], hidden [belatedly disclosed] witnesses, lack of fingerprint evidence, and two likely suspects create reasonable doubt in this case.

(Id, Pg ID 1045).

During trial, Defendant repeatedly asked the Government if there was any *Brady* or *Giglio* material for the Government witnesses. (See ECF 143: TR 7/24/18). Defendant's Request as to Government witness Patrick Bullington (Pg ID 1089-90, 1109-11); Defendant's Request as to Government witness Joseph Hicks. (ECF 65: TR 7/26/18, J. Hicks, Pg ID 403). No such evidence was provided.

Louisville Metro Police (LMP) Det. Joseph Vidourek testified he stopped a truck driven by Defendant for failing to signal when changing lanes and for having

excessively tinted windows. (ECF 143: TR 7/24/18, Det. J. Vidourek, Pg ID 1047-48). Defendant took about 20 seconds to stop the truck. (Id, Pg ID 1048, 1053). When the officers approached Defendant, Defendant stated it was his boss's truck. (Id, Pg ID 1049). When Det. Vidourek asked if there were any drugs or weapons in the truck, Defendant handed Vidourek a small bag of marijuana. (Id). The officers then asked Defendant to step out of the truck. As Defendant did, a "corner baggy" fell off his pants. (Id, Pg ID 1050-52). The district court then read the jury this stipulation:

> Prior to December 29, 2017, Defendant Jamar Garrison has been convicted in a court of a crime punishable by imprisonment for a term exceeding one year. That is a felony offense. The parties do not dispute this fact.

(Id, Pg ID 1051).

Because of the marijuana, Defendant was arrested and Defendant and the truck were searched incident to the arrest. (ECF 143: TR 7/24/18, LMP Det. J. Settles, Pg ID 1056).

Witness Phillip White testified he rented the truck for Defendant, who he called "Chris," at Defendant's request. (ECF 143; TR 7/24/18, P. White, Pg ID 1069-70). Defendant was to pay for the rental and had the only keys. (Id, Pg ID 1071-72). Later, White told Defendant to return the truck or get it out of White's name. (Id, Pg ID 1072, 1074). White rented the truck from December 4-21, 2017. (Id, Pg ID 1073). White could not say if anyone else had access to the truck while it was in White's name. (Id, Pg ID 1075-76).

Witness Patrick Bullington testified he became addicted to pain medication. after an injury. (ECF 143: TR 7/24/18, P. Bullington, Pg ID 1077). He made "some poor decisions," began using heroin and became addicted. (Id, Pg ID 1077-78). At trial, Bullington claimed he'd been "clean" for "months." (Id, Pg ID 1078, 1093). Bullington testified he rented a truck from Enterprise for Defendant. (Id, Pg ID 1079). Bullington testified Defendant offered him a "free" half-gram of heroin for the favor. (Id, Pg ID 1080). Bullington claimed he was surprised to find the truck rented in his name. (Id, Pg ID 1081-82). At trial, Bullington said the rental occurred "around Christmas" and when shown an Enterprise document, agreed it was dated 12/21/17. (Id, Pg ID 1085). Bullington knew Defendant was driving the truck and denied that he ever drove the truck. (Id, Pg ID 1083).

Bullington called or texted Defendant when he wanted to buy heroin. (Id, Pg ID 1088). At trial, Bullington he could not remember Defendant's phone number. (Id, Pg ID 1086). After reviewing a document that Bullington said was a list of his text messages, Bullington testified Defendant's phone number was 502-709-0398. (Id, Pg ID 1086-87).

During Defendant's cross-examination, Bullington testified he'd been interviewed once by "federal agents." Bullington claimed he used his own money to buy his heroin. (Id, Pg ID 1094). When asked if he "ever paid for [his] addiction in any other way," Bullington said he "would probably borrow it." (Id, Pg ID 1094). Bullington testified he'd been charged in 2017 with "a felony" and a "theft charge"

by the State of Indiana but "the charges" were dropped. (Id, Pg ID 1095-96). Defendant attempted to impeach Bullington's truthfulness and credibility with "specific instances of conduct" involved in this Indiana prosecution, which involved 2 felony drug charges and 5 counts of breaking into and stealing items from cars. Defendant was not permitted to do so. (Id, Pg ID 1095-1103).

Bullington testified Defendant gave him $300-$400 to pay for the rental but told Bullington to buy money orders for the actual payment. (Id, Pg ID 1105). Bullington claimed he bought two money orders for about $300 and $70. When confronted with the Enterprise receipt listing payment of $771, Bullington denied ever having $771 or paying $771. (Id, Pg ID 1105-06). Bullington knew before he was contacted by investigators that drugs and a gun had been found in the truck. Bullington testified: "I had told them [the investigators] the same information that I've given you today." (Id, Pg ID 1107-08).

LMP Det. Anthony James, a K-9 handler, put the K-9 into the truck. (ECF 144: TR 7/25/18, LMP Det. A. James, Pg ID 1127-28, 1130-31). The dog alerted on the inside of the driver side door. (Id, Pg ID 1132-33). During the video from Det. James' body cam, a single phone can be heard ringing inside the truck. (Id, Pg ID 1135-37).

LMP Det. Kevin Crawford testified he patted Defendant down at the scene and found rubber-banded money in Defendant's two pockets. ((ECF 76: TR 7/25/18, LMP Det. K. Crawford, Pg ID 510-514). Crawford found three cell phones in the

truck which he testified "were going off . . . the majority of the time" during Crawford's search of the truck. (Id, Pg ID 514, 532-33). Crawford described Defendant as sweating despite the colder temperature and "locked on" to Crawford during his search of the truck. (Id, Pg ID 515-16, 545).

Crawford identified GX 2B-D, I and J as photos of the gun and the drugs. (Id, Pg ID 518, 520, 524). Data was retrieved from two of the three cell phones. (Id, Pg ID 534-37). A printout of phone numbers of incoming and outgoing calls, saved contacts, and text messages was generated from one of the two phones. (Id, Pg ID 537-38). Audio/Video from Crawford's body camera showed Crawford removing one roll of money ($3,397) from one of Defendant's pockets and one phone in the truck ringing. (Id, Pg ID 538-39).

On cross-examination, Crawford insisted all of the phones in the truck were ringing the "majority of the time of the stop." (Id, Pg ID 544-45, 556). Crawford admitted that photos GX 2A and GX 2C did not depict the original location of the gun or drugs or the screwdriver because those items were moved by the police for the photos. (Id, Pg ID 547-48, 550-51). Crawford described GX 2C, which showed the drugs on one side of the void and the gun on the other, as "accurate." (Id, Pg ID 547-48). He testified his written report that the drugs were on top of the gun, was "a typo" because "on top of" means "beside." (Id, Pg ID 549). Crawford denied GX 2C was a staged photo. (Id, Pg ID 549). Crawford claimed his report that said money was found in two of Defendant's pockets was also "a typo." (Id, Pg ID 555). Crawford

did not preserve any evidence for DNA testing or fingerprinting although he "believed" there was an attempt to lift fingerprints from the gun. (Id, Pg ID 551).

At a bench conference, Defendant asked for the fingerprint report Crawford alluded to and argued that the failure to provide Defendant with the report was a *Brady* and FRCrP 16 violation. (ECF 144: TR 7/25/18, Pg ID 1143-47). The Government stated it did not have a fingerprint report. After the lunch recess, the Government gave Defendant the fingerprint report. (Id, Pg ID 1143, 1145). The report was "negative," i.e., no latent prints were found on the gun, the gun magazine, or the bullets. (ECF 144: TR 7/25/18, T. Pennington, Pg ID 1181-82).

Defendant argued he was prejudiced by this belated disclosure of the fingerprint report because his announced defense was based on the Government's failure to test the evidence. (Id, Pg ID 1145). Defendant argued the report was exculpatory under *Brady*. (Id, Pg ID 1147, 1149). The district court suggested Defendant recall Det. Crawford to testify. (Id, Pg ID 1146-47, 1149). Defendant responded that recalling Det. Crawford to testify would not remedy the prejudice to Defendant's defense or the Government's failure to disclose the report because Defendant's theory of reasonable doubt, as stated in his Opening Statement, was chiefly the Government's "sloppy" failure to test the gun or any other evidence for Defendant's fingerprints. (Id, Pg ID 1149).

Defendant further argued his request in his Pretrial Motion for Disclosure (ECF 28) and the district court's discovery order (ECF 14) required the pretrial

disclosure of the fingerprint report under FRCrP 16. (Id, Pg ID 1174-75). The district court did not agree that Defendant's pretrial Motion covered any results of fingerprint testing but did not address the directive in the Pretrial Order governing discovery. (Id, Pg ID 1175-76). The district court stated the fingerprint report was not exculpatory and not *Brady* material and its late disclosure did not prejudice Defendant. (ECF 144: TR 7/25/18, Pg ID 1209-10).

A Kentucky State Police forensic chemist testified she tested heroin and fentanyl with a total net weight of 4.33 grams and cocaine with a net weight of .527 grams. ((ECF 144: TR 7/25/18, T. Easton, Pg ID 1153-58, 1161). One of Defendant's recorded jail calls was admitted as GX 13. ((ECF 144: TR 7/25/18, D. Heacock, Pg ID 1165-66, 1172-73).

ATF Special Agent Joseph Hicks, the case agent, testified Defendant's case was "adopted" by ATF from the LMP. (ECF 64: TR 7/25/18, J. Hicks, Pg ID 363-64). When Hicks interviewed Government witness Patrick Bullington, Bullington gave Hicks Bullington's phone number. (ID, Pg ID 365-67). Hicks could not remember Bullington's phone number at trial and asked if he could review "my report for that interview." (Id, Pg ID 367). The Government then gave Hicks a report written by LMP Lt. Larry Walker (the Walker report) and, for the first time, showed the Walker report to Defendant. (Id).

Hicks testified he had data for "two phones for Mr. Garrison" and communications between "Mr. Garrison's phone" and "Bullington's phone

number."(Id, Pg ID 368). Defendant objected to Hicks' testimony that any of the phones recovered from the truck were Defendant's. The Government stated "Maybe" they needed to "connect the dots" between Bullington's testimony about the number he said he called to reach Defendant and the phone number of the phone Hicks was discussing. (Id, Pg ID 369). Hicks then testified the phone number he was describing was 502-709-0398 and he'd received that phone number from Bullington. (Id, Pg ID 370).

Defendant objected to this testimony as inadmissible hearsay. (Id, Pg ID 371). The Government said it was being used to prove Bullington previously gave "that number" to investigators and "that he didn't come in here and fabricate that information for the jury. (Id, Pg ID 371). The district court admitted Hicks' testimony about the 0398 phone number being Defendant's as a prior consistent statement of Bullington. (Id, Pg ID 373). Defendant then objected to Hicks' testifying to the contents of any text messages in the data printout, including a text message read by the Government during its Opening. The district court disallowed all of the text messages, including the text message the Government read in its Opening. (Pg ID 374-384).

Before Defendant cross-examined Hicks, the Government gave Defendant Hicks' 4 pages of contemporaneous handwritten notes of his interview of Bullington. Hicks' notes were initialed by Hicks and Det. Larry Walker, the composer of the Walker report. Defendant again made "a final request" for *Brady*/*Jencks* materials

relating to Hicks because Walker's report of Bullington's interview and Hicks' contemporaneous handwritten notes of the interview said Bullington stated he rented the truck for Defendant in October 2017, information that contradicted Bullington's trial testimony about when he rented the truck and was *Brady* material for impeachment of Bullington. (Id, Pg ID 403, 405). The district court stated the information was not exculpatory. (Id, Pg ID 405).

After the Government rested, Defendant moved for a mistrial or a curative instruction because in the Government's Opening, the Government read the jury a prejudicial text message that had now been deemed inadmissible. (ECF 145: TR 7/26/18, Defendant's Oral Motion, Pg ID 1236-1237). The district court denied Defendant's request. (Id, Pg ID 1246, 1302-03).

The parties stipulated to the jury instruction for Count 1:

> For you to find the defendant guilty of this crime you must find that the government has proved each and every element of the following elements beyond a reasonable doubt. First, that the defendant has been convicted of a crime punishable by imprisonment for more than one year. The government and the defendant have agreed or stipulated that defendant has previously been convicted of a crime punishable by imprisonment for more than one year, therefore you must accept this fact as proved.
>
> Second, that the defendant following his conviction knowingly possessed a firearm specified in the indictment. Third, that the specified firearm crossed a state line prior to the alleged possession. It is sufficient for this element to show that the firearm was manufactured in a state other than Kentucky. Now I will give you more detailed instruction on some of these elements. . .

(ECF 145: Jury Instructions, Pg Id 1260-61).

Defendant was convicted on all counts. (Id, Jury Verdict, Pg ID 1307-08). Defendant's Motion for New Trial was denied. (ECF 59: Motion for New Trial, Pg ID 295; ECF 84: Sealed Exhibits filed 10/29/18); ECF 87: Opinion & Order, Pg ID 623).

The district court determined Defendant's guideline range was 360 months to life, he qualified as a guideline Career Offender and had the convictions which triggered a sentence on Count 1 as an Armed Career Criminal. (Id, Pg ID 1350-56). The district court sentenced Defendant to the mandatory minimum 15 year term on Count 1 under 18 USC §924(e), a concurrent 15 year term on Count 2, and 60 months on Count 3, consecutive to Counts 1 and 2. (ECF 147: TR 7/1/19, Sentencing, Pg ID 1378-79, 1381-82).

Defendant filed a timely Notice of Appeal. The Court of Appeals rejected all of Defendant's claims on the merits or as harmless error.

REASON FOR GRANTING THE PETITION

I. A WRIT OF CERTIORARI SHOULD ISSUE TO REVIEW THE *BRADY* AND RULE 16 DUE PROCESS VIOLATIONS IN DEFENDANT'S CASE BECAUSE THE SIXTH CIRCUIT FOUND NO ERROR OR HARMLESS ERROR IN THE GOVERNMENT'S VIOLATIONS OF ITS DISCOVERY OBLIGATIONS.

The Government failed to disclose before trial, and only disclosed during trial, two reports of evidentiary value to Defendant: a "negative" fingerprint report and the Walker report of Patrick Bullington's interview. Defendant argued that the Government's actions violated Defendant's rights under *Brady v. Maryland*, 373 US 83 (1963) and FRCrP 16. The Sixth Circuit denied relief.

The pretrial suppression and belated disclosure of this evidence violated Defendant's 5th Amendment rights by damaging Defendant's defense, preventing Defendant from using the fingerprint report to create and prepare his defense, and preventing Defendant from having a full and fair opportunity to use the Walker report to cross-examine Patrick Bullington and SA Joseph Hicks. This Court should grant certiorari to determine if *Brady* and FRCrP Rule 16 permit the Government to do what it did here, i.e., violate with impunity the Due Process requirements of *Brady,* Rule 16 and the district court's pretrial order and force Defendant to reform his defense during trial to avoid a finding of error.

In its Opinion and Order, the Sixth Circuit observed: "Withholding *Brady* evidence, which is evidence that is favorable to a Defendant and material to either guilt or punishment, violates due process and requires that we grant a new trial. *Brady*, 373 US at 87." The Court also correctly noted that Defendant must show 2three elements to establish a *Brady* violation:

> [1] the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; [2] that evidence must have been suppressed by the State, either willfully or inadvertently; and [3] prejudice must have ensued. *Ibid*. The third inquiry is also described as a "materiality" requirement because evidence must be material for its suppression to prejudice the defendant. *See Brooks v. Tennessee*, 626 F3d 878, 890-92 (6th Cir, 2010)(citing *Strickler*, 527 US at 282).

(Appendix A: Opinion & Order, p. 9).

To ensure the fairness of criminal proceedings, due process requires the Government to disclose evidence favorable to the accused and material to guilt or punishment. *Brady v. Maryland* 373 US 83, 87 (1963). For *Brady* purposes, evidence is "material" if it consists of, or would lead directly to, evidence admissible at trial for substantive or impeachment purposes. *United States v. Phillips*, 948 F2d 241, 249-50 (6th Cir, 1991). Evidence is also "material" if there is "a reasonable probability" that the result of the proceeding would have been different if the evidence had been disclosed. *United States v. Bagley*, 473 US 667, 682, 685 (1985). A "reasonable probability" is a showing that the evidence undermines the fairness of the trial and confidence in the verdict. *Id*. In deciding whether evidence is material, the reviewing court assesses the cumulative effect of all of the suppressed evidence. *Kyles v. Whitley*, 514 US 419, 436-37 (1995).

There is no difference between exculpatory and impeachment evidence for purposes of the Government's *Brady* disclosure obligations. *Brady* obligations do not depend on whether the defendant has requested the information. *Bagley, supra.* at 682. The prosecutor's duty to disclose relates to information possessed by its office and extends to information in the possession of the law enforcement agencies investigating the offense, regardless of whether the police bring the favorable evidence to the prosecutor's attention. *Kyles v. Whitley*, 514 US at 437-38 (1995). A *Brady* violation is not subject to harmless error analysis. *Kyles v. Whitley*, 514 US at 435.

A. The Negative Fingerprint Report

The Sixth Circuit concluded the negative fingerprint was favorable to Defendant and had been suppressed but denied relief because the delayed disclosure of this evidence was not material because Defendant had failed to show what he would have done differently that could undermine the Court's confidence in the outcome. (Appendix A: Opinion and Order, pp. 11-12).

Disclosure pursuant to FRCrP Rule 16 applies to items that are "material to preparing the defense." "Material to the preparation of the defendant's defense," as used in Rule 16, means items material to Defendant's response to the Government's case-in-chief. *United States v. Armstrong*, 517 US 456, 462 (1996). The Government doesn't get to decide what Defendant's defense is and then determine its Rule 16 obligations.

The underlying purpose of the criminal discovery rules is to preserve Defendant's ability to defend himself effectively at trial. *United States v. Presser*, 844 F2d 1275, 1283 (6th Cir, 1988).

In Defendant's Opening Statement, Defendant stated:

> This case is not about truth versus what you say when you get caught. It's about reasonable doubt . . . [R]easonable doubt . . . You can find it in the . . . lack of evidence . . .
>
> You have two likely suspects in this case . . . what is reasonable is the dope and the gun could have belonged to either one. You're not here to decide who it belonged to either one. You're not here to decide who it belonged to, just whether or not there is a reasonable doubt it belonged to [Defendant].

> Now the Government could have solved this for you pretty simply in the beginning. They could have fingerprinted the baggies of dope, they could have fingerprinted the gun, they could have fingerprinted the screwdriver they say was used to pop open the panel but they didn't. They didn't even try. . . I think that would have solved the issue from the get-go. . .
>
> So staged photographs, hidden witnesses, lack of fingerprint evidence, and two likely suspects create reasonable doubt in this case . . .

(R143: TR 7/24/18, Defendant's Opening Statement, Pg ID 1041-43, 1045).

The Sixth Circuit denied Defendant any relief because Defendant failed to show what Defendant would have done if the Government had timely disclosed the fingerprint report. Essentially, the Sixth Circuit made Defendant responsible for remediating the Government's violation of its discovery obligations as a condition of relief. Due Process does not impose an obligation on Defendant to create harmless error in response to the Government's malfeasance. Due Process does not require Defendant to recalibrate his defense to accommodate the Government's misbehavior. See *United States v. Stevens*, 380 F3d 1021, 1026 (7th Cir, 2004).

B. The Walker Report.

The Walker report is a summary report of the interview of Government witness Patrick Bullington written by LMP Lt. Larry Walker, one of the interviewers. Walker did not testify at Defendant's trial. SA Hicks referred to the Walker report as "his [Hicks'] report during his testimony and asked to review it to refresh his memory. It was then disclosed for the first time to Defendant.

The Sixth Circuit determined the Walker report was favorable to Defendant

because it could have been used to impeach Bullington. The Court then concluded the Walker report was not *Brady* material because it was not discoverable so not suppressed and not material because it did not undermine the Court's confidence in the outcome. (App A, pp. 12-13).

Bullington identified Defendant as his drug seller and rented the truck which Defendant was driving and in which the gun and controlled substances were concealed. The Walker report was *Brady* impeachment evidence as to Patrick Bullington and SA Joseph Hicks. To refute Defendant's defense, the Government had to establish that Patrick Bullington was not a suspect. The Government's version of the facts was that Bullington was merely a small time drug buyer from Defendant who rented the vehicle on December 21, 2017 for Defendant to use.

The Walker report was first shown to Defendant during SA Hicks' testimony, when Hicks asked for "my report" to refresh his memory. (ECF 64: TR 7/25/18, Hick, Pg ID 367). The Walker report was not Hicks' report; Hicks had not adopted it. Defendant received the Walker report the day after Bullington ended his testimony and was released from his subpoena. The Walker report had impeachment evidence against Patrick Bullington that contradicted Bullington's trial testimony and was favorable to Defendant and material as to his innocence.

Bullington testified, only after his memory was refreshed by the rental car receipt, that on December 21, 2017 he rented the truck Defendant was driving on December 29, 2017. However, the Walker report stated that during his interview,

Bullington said he rented a truck for Defendant "Octoberish" 2017.

The Walker report was material for impeachment. If Bullington had been confronted with his statement from the Walker report, Bullington would have had to admit he was lying at trial or had lied during his interview or admit he did not remember at trial the events that he recounted during the interview, and perhaps have to admit that he had rented a vehicle for Defendant in October and that's what his testimony concerned. Bullington's testimony that he did not know in December 2017 that he was renting the truck would be suspect. Bullington's testimony about calls from Enterprise about money due could be tied to an earlier rental for himself or for Defendant, rather than for the truck he was letting Defendant drive in December. At a minimum, Bullington's testimony, once impeached, would have become questionable across the board.

The Walker report also materially contradicted the handwritten notes of ATF SA Hicks. Hicks' handwritten notes of Bullington's interview differ in one critical aspect from the Walker report. After reviewing the Walker report, Hicks testified to a critical "fact" – what Bullington said was Defendant's phone number – that is directly contradicted by Hicks's own notes.

Walker's report stated that Bullington gave three phone numbers for Defendant during his interview: (502) 709-0398, (502) 224-8511, and (502) 407-9872. After reviewing the Walker report, Hicks testified Bullington said Defendant's phone number was (502)-709-0398, corroborating Bullington's

testimony. (ECF 64: TR 7/25/18, J. Hicks, Pg ID 370). But Hicks' notes state Bullington gave Defendant's phone number as (502) 407-9872, and Bullington told Walker and Hicks that (502) 224-8511 belonged to another person, a large man with "dreads," a person Bullington described as the "biggest guy round" and not Defendant. Hicks's notes don't include (502) 709-0398 at all.

Defendant's opening statement made it clear that his defense was the evidence would show there were two equally plausible suspects for possession of the drugs and gun in Bullington's rental car: Bullington and Defendant. Defendant's defense was predicated in part on the absence of any police testing of the evidence, testing which might conclusively link him to the drugs or gun found in the truck rented by Bullington.

Bullington's attribution of a different phone number to Defendant in his interview contradicted his refreshed testimony that he recalled Defendant's number was (502) 709-0398 but corroborated the significance of a phone with the 0398 number – which contained information concerning apparent drug dealing – in the truck Bullington rented. This was *Brady* material for Defendant's defense.

Defendant was entitled to rely on the Government's obligations under *Brady* and Rule 16, the Pretrial Order, and the district court's order of disclosure. When no reports were disclosed by the Government, Defendant reasonably assumed, and could reasonably assume, the Government had done its due diligence under *Kyles v. Whitley*, no testing had been done, and Defendant could create a defense – "shoddy

investigation" – relying on that fact. Instead of guaranteeing Defendant a fair trial consistent with due process, the goal of *Brady* and Rule 16 disclosure, the Government withheld the Walker report and the fingerprint report from the defense until the last moment, when they could no longer be effectively used by Defendant to prepare a defense or against Bullington at trial. This is a *Brady* and Rule 16 violation as to both documents. These violations prejudiced Defendant's defense and deprived Defendant of a fair trial. Had this evidence been turned over to the defense in a timely manner, this favorable evidence "could reasonably be taken to put the whole case in a different light as to undermine confidence in the verdict." *Kyles v. Whitley,* 514 US at 435. A writ of certiorari should issue to address the Sixth Circuit's resolution of this issue.

II. A WRIT OF CERTIORARI SHOULD ISSUE BECAUSE THE SIXTH CIRCUIT DENIED DEFENDANT'S DUE PROCESS RIGHT TO A FAIR TRIAL WHEN IT FOUND NO ERROR IN THE GOVERNMENT'S PRESENTATION OF FALSE TESTIMONY.

The Government presented false testimony by Patrick Bullington and ATF SA Joseph Hicks regarding a phone number attributed to Defendant, a denial of due process. This false testimony "connected the dots" of the government's case. The Sixth Circuit denied relief on this issue, finding that there was no false testimony because Defendant did not establish that Bullington or Hicks' statements were false. (App A: COA Opinion, pp. 19-20). A writ of certiorari should issue because their testimony was demonstrably false.

A conviction based on false testimony must be set aside if there is any

reasonable likelihood that the false testimony could have affected the judgment of the jury. *Giglio v. United States*, 405 US 159, 154 (1972); *United States v. Lochmondy*, 890 F3d 817, (6th Cir, 1989) quoting *United States v. Bagley*, 473 US 667, 678 (1985). In order to establish a denial of due process. Defendant must show the evidence was actually false, the evidence was material, and the prosecution knew the evidence was false. *United States v. O'Dell*, 805 F2d 637, 641-42 (6th Cir, 1986).

Three phones were found in the rented truck Defendant was driving. (ECF 76: TR 7/25/18, K. Crawford, Pg ID 514, 532-33). Data was extracted from one of the phones, including a log of calls to and from Patrick Bullington's phone which Bullington testified were about drug sales with Defendant. (ECF 76: TR 7/25/18, K. Crawford Pg ID 535-36; ECF 143: TR 7/24/18, P. Bullington, Pg ID 1086; ECF 64: TR 7/25/18, J. Hicks, Pg ID 368). The Government had to prove the phone number Bullington claimed was Defendant's was Defendant's and also prove the number was that of one of the phones recovered from the truck.

At trial, Bullington remembered his own phone number but did not remember Defendant's. (Id, Pg ID 1086). Bullington's memory was refreshed with a printout of a list of text messages from his phone and was asked if he recognized any receiving number as Defendant's. (Id, Pg ID 1086-87). Bullington said he did: "502-709-0398." (Id). Bullington then testified he'd given "the same information" to two LMP Det. Larry Walker and ATF SA Joseph Hicks during their interview of him. (Id, Pg ID 1107). Bullington's testimony about giving the 0398 number to the

interviewers as Defendant's phone number is demonstrably false.

ATF SA Joseph Hicks interviewed Bullington. (ECF 64: TR 7/25/18, J. Hicks, Pg ID 363). During Hicks' testimony, he reviewed the data download for a phone number ending in 0398 and then testified he received the 0398 phone number from Bullington as Defendant's phone number. (Id, Pg ID 369-70). Hicks' testimony about getting the 0398 number from Bullington as Defendant's phone number is demonstrably false.

Hicks wrote 4 pages of notes during Bullington's interview. Hicks' notes state Bullington gave one phone number for Defendant: 502-407-9872. (ECF 143: TR 7/24/18, P. Bullington, Pg ID 1079-80). The 0398 number identified by Bullington at trial as Defendant's phone number, and identified by Hicks as the phone number received from Bullington, is not in Hicks' notes at all.

The Walker report of Bullington's interview stated Bullington gave three phone numbers for Defendant: 502-407-9872, 502-224-8511 and 502-709-0398. But Walker's report was also materially false because Hicks' notes said Bullington gave Hicks only the 9872 number for Defendant. According to Hicks' notes, Bullington gave the 9511 number as belonging to a "guy with dreads" "the biggest guy around," a guy who was <u>not</u> Defendant.

Hicks' handwritten notes are the most reliable record of what Bullington actually said during his interview. Walker initialed them as accurate. Bullington's testimony about giving "this information," i.e., the 0398 number, to the investigators is false. Hicks' testimony about receiving the 0398 phone number from

Bullington is false. Walker's report, dated two weeks after Bullington's interview and never approved by Hicks, that Bullington gave the 0398 number is false.

Defendant's jury heard Bullington's testimony and Hicks' false testimony. This evidence was false and the Government knew it before trial. The Government had Hicks' handwritten notes and the Walker report long before trial. Connecting Defendant to the calls placed by Bullington to a phone used by Defendant was critical to the Government's proofs against Defendant. Connecting Defendant to a phone found in the truck rented by Bullington with the hidden gun and drugs was critical to the Government's proofs against Defendant. The Government knew they had to strengthen Bullington's credibility by showing he had provided the critical information of Defendant's phone number to investigators before his testimony at trial:

> [AUSA McKenzie]:I mean, I think Mr. Bullington's credibility has been challenged. There's been the suggestion that he recently fabricated his – I assume his entire testimony in the hope of some benefit he might receive in the pending misdemeanor case in Indiana.
>
> * * *
>
> [AUSA McKenzie]: And [Hicks' testimony about Bullington giving him the 0398 phone number] a prior consistent statement because Mr. Bullington's testimony was attacked and it was –
>
> [THE COURT]: What's it being used to prove?
>
> [AUSA McKenzie]: It's being used to prove that Mr. Bullington previously gave that number, that he didn't come in here and fabricate that information for the jury, which is the implication that I think counsel attempted to make with

> regard to all of the testimony.
>
> * * *
>
> [AUSA McKenzie]: . . . The point is that before Mr. Bullington ever saw that document or ever came into a federal courthouse or knew my name even he gave that number to the agents before he had any incentive to make it up.

(ECF 64: TR 7/25/18, Colloquy, Pg ID 371-72).

This false testimony was material evidence which supported the Government's allegations that Defendant possessed the gun and the drugs in the rented truck. The Government deliberately presented false material evidence to Defendant's jury. This was not harmless error.

Defendant has established the testimony was false. There is a reasonable likelihood that this false testimony could have affected the judgment of the jury. A writ of certiorari should issue to review the Sixth Circuit's resolution of this issue.

III. A WRIT OF CERTIORARI SHOULD ISSUE BECAUSE DEFENDANT WAS DENIED HIS 5TH AND 6TH AMENDMENT RIGHTS TO PRESENT A DEFENSE WHEN THE SIXTH CIRCUIT AFFIRMED THE DISTRICT COURT'S REFUSAL TO PERMIT DEFENDANT TO CROSS-EXAMINE BULLINGTON REGARDING SPECIFIC INSTANCES OF CONDUCT.

The district court denied Defendant's request to cross-examine Patrick Bullington about specific instances of conduct admissible under FRE 608(b). These specific instances of conduct were the facts underlying Bullington's five Indiana charges of breaking into cars and thefts of items from those cars. This conduct was relevant to the truthfulness of Bullington's testimony that he used his own money or money borrowed from friends to buy his drugs. The district court denied any questioning about the specific instances of conduct, saying Bullington had admitted

he had a "theft" conviction. The Sixth Circuit determined this was not an abuse of discretion because Defendant's proposed questions were "marginally relevant." (App A: Opinion and Order, pp. 17-18). A writ of certiorari should issue because the Sixth Circuit's decision violated Defendant's Sixth Amendment right present his defense through the cross-examination of Bullington.

The Sixth Amendment's Confrontation Clause guarantees a Defendant the opportunity to defend himself by impeaching the credibility of a witness with cross-examination. *Davis v. Alaska*, 415 US 308, 315-18 (1974). The Sixth Amendment and the Due Process Clause guarantee Defendant "a meaningful opportunity to present a complete defense." *Crane v. Kentucky*, 476 US 683, 690 (1986).

FRE 608, titled "A Witness's Character for Truthfulness or Untruthfulness" provides:

> **(b) Specific Instances of Conduct**. Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But they court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of:
>
> **(1)** the witness; or . . .

Patrick Bullington was a key witness for the Government, the witness who established Defendant's possession of the rented truck, Defendant's heroin selling, and by implication, the drugs and gun hidden in the truck Bullington rented. Bullington presented himself as a college student-athlete, an unfortunate user of prescribed pain medication who later made "poor decisions," began using heroin,

and then became addicted. (ECF 143: TR 7/24/18, P. Bullington, Pg ID 1077-78). Bullington testified he was now "clean" (as of 4 months before Defendant's trial), working in a family business, with a fiancé and restored to good citizenship. (Id). Defendant knew Bullington's story was not that tidy.

On cross-examination, Bullington testified he paid for his $100-$150 daily heroin habit with his own money. (Id, Pg ID 1094). When asked if he paid for his heroin "in any other way," Bullington said he would "probably borrow money." (Id, Pg ID 1094). Bullington was vague about his State of Indiana criminal prosecution in late 2017 and vaguer about its resolution in early 2018, just four months before Defendant's trial. (Id, Pg ID 1095-96). Defendant attempted to impeach Bullington's sanitized testimony with specific instances of conduct which were the facts underlying the five theft crimes charged against Bullington in the 2017 Indiana criminal case, including Bullington's thefts of money, debit and credit cards, cell phones and other items from the cars Bullington broke into. This is conduct which is characteristic of drug users who steal to fund their drug use and impeachment of the credibility of his testimony that he self-funded his drug habit. (Id, Pg ID 1095-1103). This was admissible inquiry under FRE 608(b) and relevant to Bullington's credibility at trial.

Defendant argued that the jury should consider Patrick Bullington a suspect in the crimes charged against Defendant. (ECF 143: TR 7/24/18, Defendant's Opening Statement, Pg ID 1041-43, 1045). The Government presented Bullington at trial as an unfortunate dupe, now "clean" and now an upstanding credible

citizen. Bullington never admitted he was a thief. He never even admitted he was convicted of a crime in the Indiana prosecution. (R143: TR 7/24/18, P. Bullington, Pg ID 1095-96).

How Bullington paid for his heroin wasn't the issue. Bullington's credibility, which would be reflected by his forthright acknowledgment of his own criminal activity, was. Defendant had State of Indiana case records showing that in October 2017, 9 months before Defendant's trial, Bullington had been arrested in Indiana breaking into a vehicle and stealing a phone. When he was arrested, Bullington had heroin, the stolen phone, unrelated credit and debit cards stolen within the last week, and a stolen social security card which he'd stolen within the last few days. The victims of Bullington's thefts also reported a stolen computer, clothing and $280 cash, items easily used to buy drugs.

The State of Indiana charged Bullington with 2 drug felonies, 4 theft misdemeanors and a misdemeanor charge of unauthorized entry in a vehicle. Four months before Defendant's trial, Bullington pled guilty to a single misdemeanor theft offense and was immediately sentenced to a suspended jail sentence, 1 year probation and financial penalties. Three weeks later, Bullington became a Government witness and was interviewed about Defendant by SA Hicks and LMP Det. Walker. Bullington's vague answers about his Indiana case were fair game for cross-examination under FRE 608(b). If the Government was entitled to present Bullington's testimony to persuade the jury that the gun and drugs hidden in the truck Bullington rented were Defendant's, Defendant was entitled to present

evidence to persuade the jury that Bullington was not credible.

During its closing argument, the Government capitalized on Defendant's lack of impeachment of Bullington:

> . . .And one more thing about Patrick's testimony, you know, there was some – something on cross. The defense attorney asked Patrick about some misdemeanor theft charges in Indiana and he – I'm not sure what the argument is there. I'm not sure.
>
> Maybe it's just to say addicts like this guy are a nuisance. They steal stuff. They break into people's cars. It's not really a credibility or a truthfulness argument. It's an attempt to dirty him up and make you not like him. "He's a drug addict. What he says doesn't matter."

(ECF 145, TR 7/26/18, Government Closing Argument, Pg ID 1279).

In its rebuttal, the Government again returned to Defendant's lack of impeachment of Bullington and Defendant's defense:

> I wrote this down. There were two likely suspects here, meaning the defendant and Patrick, and Patrick hid the heroin and the gun in the truck he rented. Patrick is not credible because he's an addict. And there was all this talk about being on felony bond.
>
> That was no in evidence. That did not come from the witness stand. It came from an attorney's mouth several times but there's no evidence. And the only evidence that anyone in this courtroom is a felon is the Defendant. Again, this is an attempt to dirty this witness up, make you not like him, make you devalue him because he's an addict. He can't be credible because he's scum.

(Id, Pg ID 1294-95).

The Government's closing arguments highlight the irreparable damage to Defendant's defense by the district court's erroneous denial of this admissible cross-examination. A writ of certiorari should issue to address the Sixth Circuit's analysis

of this issue.

IV. A WRIT OF CERTIORARI SHOULD ISSUE TO VACATE DEFENDANT'S CONVICTION AND HIS SENTENCE AS AN ARMED CAREER CRIMINAL FOR PLAIN ERROR UNDER *REHAIF V. UNITED STATES*, 139 S CT 2191 (2019).

Defendant was charged in Count 1 with being a felon in possession of a firearm in violation of 18 USC §922(g) and §924(e). (ECF 1: Indictment, Pg ID 1). His conviction on Count 1 triggered a 15 year mandatory minimum sentence under 18 USC §924(e) as an Armed Career Criminal. The Sixth Circuit concluded, apparently after reviewing Defendant's Presentence Report, that Defendant's prior record of 27 felonies, including a State of Kentucky conviction for illegal possession of a firearm as a felon, conclusively established that Defendant knew he was convicted of a felony and the *Rehaif* deficiencies in his indictment and jury instructions did not compromise Defendant's substantial rights or the fairness and integrity of his trial. (App A: Opinion and Order, pp. 20-22).

In *Rehaif v. United States*, 139 S Ct 2191 (2019), this Court held that to convict a person of violating 18 USC §922(g), the Government must prove the person knew he possessed a firearm and also knew he belonged to the category of persons prohibited from possessing a firearm. 139 S Ct at 2020. The opinion in *Rehaif* issued June 21, 2019, 10 days before Defendant was sentenced. Neither the Government, the district court, or Defendant raised the *Rehaif* holding at Defendant's sentencing. The holding in *Rehaif* applies to Defendant's case on direct review. *Griffith v. Kentucky*, 479 US 314, 328 (1987).

On appeal, Defendant argued his Count 1 conviction must be vacated as plain error because his indictment did not allege, the Government did not prove, and the jury was not instructed to find all of the elements of a §922(g) offense as defined in *Rehaif*. The Sixth Circuit did not dispute that Defendant's indictment and jury instructions were deficient under *Rehaif*. The Sixth Circuit denied relief under the third and fourth prongs of this Court's plain error review, i.e., whether Defendant's substantial rights were affected and whether the error seriously affected the fairness, integrity or public reputation of judicial proceedings. *Olano v. United States*, 507 US 725 (1993). The Sixth Circuit reached this conclusion by improperly examining information outside of the record of Defendant's trial. The use of information outside of Defendant's trial record is plain error requiring review and correction by this Court.

To establish that his substantial rights were affected, Defendant must establish a reasonable probability that, but for the error, the outcome of his trial would have been different. *Molina-Martinez v. United States*, 136 S Ct 1338, 1333 (2016). When evaluating for plain error, this Court reviews the claim of error in light of the entire record of the trial. *United States v. Young*, 470 US 1, 16 (1985).

The Sixth Circuit relied on *United States v. Ward*, 957 F3d 691 (6th Cir, 2020). In *Ward,* the Sixth Circuit held that there was no *Rehaif* error because the defendant stipulated to a prior felony conviction and the government would have been able to prove that Ward knew he was a felon if it had been required to do so at

Ward's trial. 957 F3d at 695. The *Ward* court relied on this Court's opinion in *United States v. Vonn*, 535 US 55, 59 (2002) for the rationale that "as a reviewing court, the panel "may consult the whole record when considering the effect of any error on substantial rights." *Ward*, at 695, fn. 1. But *Vonn* is not the correct analysis for the effect of a erroneous jury instruction on Defendant's substantial trial rights.

Vonn involved errors at a Rule 11 plea proceeding. Where, as here, the error is a defective jury instruction, this Court has said the reviewing court must examine the evidence presented to the jury at the trial to determine whether the omitted element was contested and supported by overwhelming evidence. *Neder v. United States*, 527 US 1, 17 (1999); *United States v. Miller*, 954 F3d 551, 558 (2nd Cir, 2020); *United States v. Maez*, 960 F3d 949 (7th Cir, 2020). Under this Court's holding in *Neder*, Defendant's stipulation that he had a prior felony conviction is not conclusive evidence that Defendant knew he had a felony conviction.

There is no evidence from Defendant's trial record that shows that Defendant's jury, had it been properly instructed, would have found the fact of Defendant's knowledge of his status beyond a reasonable doubt. Defendant did not testify at his trial. Defendant stipulated that he had a prior felony conviction. (ECF 143: TR 7/24/18, Trial, Pg ID 1043). Defendant's stipulation to a prior felony does not automatically establish his knowledge of his status as a felon, regardless of how many convictions he has. *United States v. Conley*, 802 Fed Appx 919 (6th Cir, 2020); *United States v. Benamor*, 937 F3d 1182, 1188 (9th Cir, 2019); *United States v. Reed*,

941 F3d 1018, 1021-22 (11th Cir, 2019). The appellate courts that have considered a stipulation of a prior felony as implicit proof of knowledge of prohibited status have relied on evidence of that knowledge in the trial record. See *United States v. Reed*, 941 F3d at 1020, (defendant testified at his trial that he knew he wasn't supposed to have a gun); *United States v. Haynes*, 798 Fed Appx 560, 565 (11th Cir, 1/10/20) (law enforcement officer testified at defendant's trial that defendant admitted he knew he was not supposed to possess a gun because he was a convicted felon); *United States v. Hollingshead*, 940 F3d 410, 416 (8th Cir, 2019) (trial evidence of a recorded phone call in which the defendant admitted he knew he had the requisite prior felony conviction). There was no such evidence in Defendant's trial.

The Sixth Amendment permits Defendant's conviction only if his jury finds all of the facts of his §922(g) offense or could have found this from the evidence before them. The Government obtained an illegal conviction of an offense that triggered a mandatory minimum sentence of 15 years. Such a result affects Defendant's substantial rights and seriously affects the fairness, integrity and public reputation of Defendant's proceedings. Since there is plain error, this Court should issue a writ of certiorari to the Sixth Circuit to consider the merits of this issue.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully Submitted,

GUREWITZ & RABEN, PLC

By: /s/ Margaret Sind Raben
Margaret Sind Raben
Attorney for Petitioner
333 W. Fort Street, Suite 1400
Detroit, MI 48226
(313) 628-4708
Email: msraben@aol.com

DATE: January 15, 2016