**No. 21-_____**

**IN THE**
**SUPREME COURT OF THE UNITED STATES**

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**MAURICE STEWART,**

***Petitioner*,**

**v.**

**UNITED STATES OF AMERICA,**

***Respondent.***

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**On Petition for Writ of Certiorari**
**to the U.S. Court of Appeals**
**for the Sixth Circuit**

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# PETITION FOR WRIT OF CERTIORARI

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21 July 2021

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**MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS***

Petitioner Maurice Stewart respectfully asks leave to file his petition for writ of certiorari without prepayment of costs and to proceed in forma pauperis. Petitioner found indigent in the district court and was represented by appointed counsel for trial. Although his family retained counsel for sentencing and retained the undersigned counsel for the direct appeal, Petitioner has been incarcerated since October 2017 and remains indigent. His financial affidavit in support of this request will be supplemented due to mail delays.

Dated: 21 July 2021

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## QUESTIONS PRESENTED FOR REVIEW

Recently the Court recognized that the elements of the offense of possessing a firearm as a felon, 18 U.S.C. § 922(g)(1), includes that the defendant "knew he had the relevant status" as a felon at the time of possessing the firearm. *Rehaif v. United States*, 139 S. Ct. 2191, 2194, 204 L. Ed. 2d 594 (2020). The knowledge-of-status element is "a basic element of the crime;" but in pre-*Rehaif* trials the government "presented no evidence whatsoever to prove that basic element. * * * The simple, inevitable conclusion is that [such a] conviction fails to satisfy the Federal Constitution's demands." *Fiore v. White*, 531 U.S. 225, 229, 121 S. Ct. 212 (2001).

Post-*Rehaif*, a circuit split exists as to whether, under plain error review, a defendant's stipulation that he was a felon is sufficient for a circuit court to conclude that the jury would have inferred that the defendant also knew that he was a felon and, thus, that the evidence was sufficient to sustain the conviction. The Third Circuit has definitely answered, no, that "*Rehaif* itself blocks that line of reasoning" because the Court reported it did not believe Congress would have expected defendants "to know their own status." *United States v. Nasir*, 982 F.3d 144, 172 (3d Cir. 2020). The Sixth Circuit has taken the opposite approach, creating a circuit conflict, finding that when a defendant enters an *Old Chief* stipulation, the jury can infer that the defendant knew that he was a felon and, thus, that the evidence was sufficient to sustain the conviction. *United States v. Ward*, 957 F.3d 691, 696 (6th Cir. 2020). See, also, *United States v. Greer*, 798 Fed. Appx. 483, 486 (11th Cir. 2020) (pointing to evidence in the record from which a jury could infer that he knew he was a felon barred from possessing firearms), cert. granted, 208 L. Ed. 2d 510, 2021 U.S. LEXIS 486 (mem.), (U.S., Jan. 8, 2021).

Accordingly, the first question for the Court is whether, when applying plain-error review based on the Court's intervening decision in *Rehaif*, a circuit court of appeals errs in relying on a petitioner's stipulation of prior felony conviction for the jury to "infer" petitioner had knowledge of his status to prove that element of § 922(g) beyond a reasonable doubt and to conclude that the petitioner's substantial rights were not affected.

The second question is whether the facts cited in support of reasonable, articulable suspicion to justify a protective sweep under *Maryland v. Buie*, 494 U.S. 325, 110 S. Ct. 1093 (1990) can by the lack of information known to the police and witness silence. After an arrest of the subject of the arrest warrant without incident and outside of a home, the offices remained on the scene, entered the home without an exception to the warrant requirement, and questioned an occupant, seeking consent to search. The record shows that the search lasted "longer than it [took] to complete the arrest and depart the premises," because it occurred well after the arrest, see *Buie*, 494 U.S. at 327, 336, and the officers stood around for several minutes waiting to obtain oral consent. A split Sixth Circuit panel ruled that the officers had reasonable, articulable suspicion largely based upon what the officers did not know and two witnesses's refusal to talk. The dissent concluded that the majority's decision drew several inferences that ran contrary to the recognition that a lack of information cannot justify a protective sweep under *Buie*.

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## PETITION FOR WRIT OF CERTIORARI

Petitioner Maurice Stewart respectfully petitions the Court for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Sixth Circuit.

## OPINIONS BELOW

The U.S. Court of Appeals for the Sixth Circuit affirmed the district court's judgment, *United States v. Maurice Stewart*, No. 19-2054 (6th Cir., Jan. 19, 2021). Petitioner's Appendix ("Pet. App.") 1a, and denied Petitioner's timely-filed petition for rehearing and rehearing an banc. *United States v. Maurice Stewart*, No. 19-3442 (6th Cir., Feb. 22, 2021). Pet. App. 58a. Through multiple rulings, the district court denied Petitioner's challenges to the lawfulness of the warrantless search of the residence, Pet. App. 69a, 57a, 71a, 74a, and sentenced him to serve 220 months of imprisonment and 60 months of supervised release. *United States v. Maurice A. Stewart*, 5:17-cr-000111 (N.D. Ohio, Apr. 26, 2021). Pet. App. 79-80a.

## STATEMENT OF THE BASIS FOR JURISDICTION

The district court had jurisdiction, as the United States of America charged Petitioner with violations of the U.S. criminal code, including possession of a weapon as a prohibited person, in violation of 18 U.S.C. § 922(g)(1).

The Sixth Circuit had jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a), following the district court's final judgment order sentencing Petitioner to a term of 220 months of imprisonment. Pet. App. 79a.

This Court has jurisdiction under 28 U.S.C. § 1254(1) and the Court's Order dated Thursday, March 19, 2020 (temporarily extending the petition for writ of certiorari deadline), as

Petitioner is filing this petition within 150 days of the Sixth Circuit's order denying his timely-filed petition for rehearing and rehearing en banc. See Sup. Ct. R. 13.1, 13.3, 29.2.

## RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const., amend IV.

> No person shall * * * be deprived of life, liberty, or property, without due process of law.

U.S. Const., amend. V.

> In all criminal prosecutions, the accused shall enjoy to right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, * * * and to be informed of the nature and cause of the accusation * * *.

U.S. Const., amend. VI.

> It shall be unlawful for any person—
>
> > (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
> >
> > * * *
>
> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 922(g)(1).

## STATEMENT OF THE CASE

This case presents a first question whether a court of appeals may rely on a stipulation as to one element of the offense to find, under plain error review, that a defendant's substantial rights were not affected by the lack of another element appearing in the indictment or being mentioned in the jury instructions. More particularly, the relevant scenario is when a defendant's knowledge of status as a person prohibited from possessing a firearm—declared an element of 18 U.S.C. § 922(g) in *Rehaif v. United States*, 139 S. Ct. 2191, 204 L. Ed. 2d 594 (2019)—is not charged in the indictment and not found by the jury to have been proved beyond a reasonable doubt. In that circumstance, the question is whether a court of appeals may rely on a petitioner's stipulation that he had a prior felony conviction to usurp the role of the jury, speculate as to what the jury would have inferred, and affirm the conviction in the absence of a jury finding on this element.

To show that an error affected his substantial rights, a petitioner must "'show a reasonable probability that, but for the error,' the outcome of the proceeding would have been different." *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1343, 194 L. Ed. 2d 444 (2016) (quoting *United States v. Dominguez Benitez*, 542 U.S. 74, 76, 124 S. Ct. 2333 (2004)). The courts of appeals addressing the issue thus far appear to agree that plain error occurs when a jury is not instructed on the knowledge-of-status element and a defendant is nevertheless convicted of § 922(g). See, e.g., *United States v. Conley*, 802 Fed. Appx. 919, 923 (6th Cir. 2020); *United States v. Edelman*, 2012 U.S. App. LEXIS 3348, at *7 (7th Cir., Feb. 8, 2021) ("The omission in the jury instructions was plain and erroneous."). But the circuit courts have differed on whether the "plain error of a conviction on proof of less than all of the elements of the § 922(g) charge"

affects the substantial rights of the defendants. See *United States v. Nasir*, 982 F.3d 144, 170 (3d Cir. 2020).

As it has done in other cases,[1] the government argued below that Petitioner's stipulation that he was a felon, pursuant to *Old Chief v. United States*, 519 U.S. 172, 117 S. Ct. 644 (1997), leads to the inevitable conclusion that the outcome would have been no different—that the jury would have relied on the stipulation to infer that Petitioner knew he was a felon.[2] The Third Circuit has rejected this argument, pointing to this Court's decision in *Rehaif*. See *Nasir*, 982 F.3d at 172 ("The Supreme Court said there that it did not believe 'Congress would have expected defendants under § 922(g) * * * to known their own status[].") (quoting *Rehaif*, 139 S. Ct. at 2197). The Fourth Circuit was initially in line with the Third, stating, "[i]nferring that someone knew he was prohibited from possessing a firearm at the time of the offense based on a stipulation at trial that he was in fact a prohibited person would render [this] Court's language in *Rehaif* pointless." *United States v. Medley*, 972 F.3d 399, 414 (4th Cir.), vacated by, rehearing en banc granted, 2020 U.S. App. LEXIS 35628 (Nov. 12, 2020). But the en banc Fourth Circuit has vacated that decision and is rehearing those issues anew. *Id*.

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[1] See, e.g., *United States v. Nasir*, 982 F.3d 144, 172 (3d Cir. 2020) ("The government also argues that a fair inference, especially on plain-error review, is that Nasir's acknowledgment of his conviction in the *Old Chief* stipulation means he also acknowledged he knew of his status as a felon ever since becoming one."); *United States v. Medley*, 972 F.3d 399, 414-15 (4th Cir.) (government asserting that the defendant's *Old Chief* stipulation was evidence of knowledge-of-status, as was his "attempt to evade the police"), vacated by, rehearing en banc granted, 2020 U.S. App. LEXIS 35628 (Nov. 12, 2020).

[2] Appellee Brief (Sixth Circuit document 43) at ECF p. 51 ("Likewise here, Stewart stipulated to his prior felony."); *id*. ("In Stewart's case, the prior felony conviction at issue was for involuntarily manslaughter, and Stewart served nine years in prison. * * * Thus, '[i]t would have been exceedingly easy for the government to prove at trial that [Petitioner] knew he was a felony when he committed the firearms offense.") (citations omitted).

In direct contrast, the Sixth Circuit has concluded that, when the defendant makes "an *Old Chief* stipulation at trial" acknowledging that he is a convicted felon, "[t]he jury could have inferred from these statements that [the defendant] also knew that he was a felon" and, thus, that the evidence was sufficient to sustain the conviction. *United States v. Ward*, 957 F.3d 691, 696 (6th Cir. 2020); see Pet. App. 24a (quoting *Ward*, 957 F.3d at 695. This same stipulation means to the Sixth Circuit that "[n]o reasonable juror could have believed that he did not know" his status and, when reviewing for plain error, see *United States v. Olano*, 507 U.S. 725, 731, 113 S. Ct. 1770 (1993), if "there is clear evidence in the record from which to infer that the defendant knew he was a felon, failure to instruct the jury does not affect the defendant's substantial rights or the fairness or integrity of the proceedings." Pet. App. 24a (quoting *Ward*, 957 F.3d at 695).

This case presents a second question regarding the Fourth Amendment and protective sweeps under *Maryland v. Buie*, 494 U.S. 325, 110 S. Ct. 1093 (1990). A task force approached the residence with a warrant for Petitioner's co-defendant, who was wanted for drug and gun charges. Pet. App. 2a. The co-defendant exited the house and surrendered. Pet. App. 5a. Petitioner exited the house, was briefly arrested but released. Pet. App. 5a-6a. The task force stepped into the home, questioned a third resident, and then even waited in the home while that resident tried and failed to reach her mother by phone, eventually spoke to her mother by phone, and spoke to her for a period of time before agreeing to consent to a search. Pet. App. 5a. The district court ruled that the protective sweep was appropriate because of the consent given." Pet. App. 64a.

The Sixth Circuit did not address whether the third resident validly consented, electing to resolve the issue on whether the protective sweep was justified regardless of consent. Pet. App.

16a. The majority acknowledged that Petitioner and his co-defendant voluntarily walked outside of the house, Pet. App. 5a, and the officers let themselves in the home before seeking consent and stood around for several minutes, patiently waiting while a third resident made a lengthy phone call to her mother to discuss whether to give consent. Pet. App. 5a. But the majority of the panel nevertheless ruled that "these facts, taken together, are sufficient for a reasonable, prudent officer to suspect the presence of others inside the house who could pose a threat." Pet. App. 21a.

The dissenting circuit judge ruled that she would have granted the motion to suppress, finding no reasonable, articulable grounds for entering the home without a warrant. To the dissenting judge, rather than being able to articulate what was known to support a protective sweep, nearly everything the police cited in support of the sweep showed simply that they did not know if anyone was in the home:

> In situations like this one—where the police have already arrested their suspect outside of a home—protective sweeps are allowed only if the officers can point to specific, articulable facts that another dangerous person may still be inside the home. In large part, the majority suggests that the government makes this showing because the police did not know if anyone remained in the home. But lack of knowledge does not justify this type of sweep.

Pet. App. 26a.

1. The Grand Jury for the U.S. District Court for the Northern District of Ohio returned an indictment charging Petitioner with possession with intent to distribute methamphetamine, possession with intent to distribute cocaine and cocaine base, possession of a firearm in furtherance of drug trafficking, and being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). The indictment did not allege that Petitioner knew that his felony meant he could not legally possess the firearm.

2. Before Petitioner was arrested, his co-defendant filed a motion to suppress on grounds including that the task force unlawfully conducted a protective sweep of the home. The district court denied the motion, concluding that the protective sweep was lawful on a finding that a resident consented to it. Pet. App. 64a. Petitioner filed a series of motions to suppress, and the district court stated that "the ruling would be the same" as it had entered earlier, meaning based upon consent. Pet. App. 69a. Petitioner filed a motion to reopen the suppression issues, the district court again ruled that the sweep was "consensual," but agreed to review the protective sweep ruling again following hearing evidence at trial. Pet. App. 72a.

3. The jury was not instructed to determine whether Stewart had knowledge of his status as a person prohibited from possessing a firearm, and the jury did not make that finding. Without notice that an element of the offense was his knowledge of his status, Petitioner entered into an *Old Chief* stipulation that he was a felon. The issue for trial on the § 922(g) charge was whether Petitioner constructively possessed one or more of the firearms found in the home.

4. A jury found Petitioner guilty. Petitioner renewed his suppression motion post-trial, noting that the evidence showed that the resident consented to a search of the home only after the task force had conducted the protective sweep. The district court again denied the motion following trial, summarily ruling without expressly recognizing the significant material differences between the suppression hearing and trial testimony as to the events preceding the protective sweep. Pet. App. 75a-76a.

5. The district court imposed a sentence that included a term of 220 months of incarceration and five years of supervised release.

6. After sentencing, this Court issued its decision in *Rehaif*, holding that "in a prosecution under * * * § 922(g) * * *, the Government must prove both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm." *Rehaif*, 139 S. Ct. at 2200.

7. On appeal, the Sixth Circuit skipped over the question whether, in light of *Rehaif*, it was plain error for Petitioner to have been convicted without the jury being instructed that knowledge-of-status was an element of the offense that needed to be proved beyond a reasonable doubt. Instead, it ruled that Petitioner's substantial rights were not affected "'where there is clear evidence in the record from which to infer that the defendant knew he was a felon.'" Pet. App. 24a. (citation omitted).

8. The Sixth Circuit affirmed the district court's protective-sweep analysis, pointing to reasonable, articulable facts including a witness's refusal to answer questions, Pet. App. 20a, and a second witness's refusal to answer questions and nervousness. Pet. App. 21a. The dissent found no reasonable articulable suspicion and concluded that the majority's decision "draws several inferences that run contrary to our recognition that a lack of information cannot justify a protective sweep under *Buie*." Pet. App. 42a.

Petitioner remains in custody, currently incarcerated at the Wayne County Jail in Detroit, Michigan.

## REASONS FOR GRANTING THE PETITION FOR WRIT

This case presents two important questions, one concerning plain error when an element was never charged or submitted to the jury, and one concerning whether the lack of information known to police justifies a warrantless entry into a home under the protective sweep exception.

The first question is whether, when applying plain-error review based on an intervening *Rehaif* decision, a circuit court errs in relying on a stipulation of prior felony conviction (a) to conclude the evidence was sufficient for the jury to "infer" the knowledge-of-status element and (b) to find that a petitioner's substantial rights are not affected. This is a subject of circuit conflict. Cf. *Ward*, 957 F.3d at 696 ("[t]he jury could have inferred from these statements that [the defendant] also knew that he was a felon."), with *Nasir*, 982 F.3d at 172 (rejecting the government's argument that, on plain error review, a fair inference from an *Old Chief* stipulation to being a felon at the time of firearm possession would be that the defendant knew of his status at that time). The Court should grant certiorari in order to resolve the conflict on these important questions for the lower courts. See Sup. Ct. R. 10(a), 10(c).

The second question is whether a lack of information and speculation justify a warrantless entry into a home under the protective sweep exception. This exception permits officers "to take reasonable steps to ensure their safety after, and while making, the arrest." *Buie*, 494 U.S. at 334. This kind of warrantless "quick and limited search" must last "no longer than it takes to complete the arrest and depart the premises." *Id*. at 327, 336. But in this case, the arrest of the target had occurred, peaceably, outside the home. Pet. App. 5a. Petitioner also stepped outside, was briefly detained, and released. Pet. App. 5a-6a. Even though the purpose of the visit to the home was completed, the officers nevertheless voluntarily remained at the home to ask a third resident

questions. Pet. App. 5a. Although later claiming to have reasonable suspicion that they were in danger, the officers perceived no threats, and stepped inside the residence and stood around, patiently waiting for a third resident of the home to call her mother, fail to reach her mother, then finally reach her mother and spend minutes arguing over whether to consent. *Id*. Viewed in a light most favorable to the government, the record shows that the search lasted "longer than it [took] to complete the arrest and depart the premises," because it occurred well after the arrest, see *Buie*, 494 U.S. at 327, 336, and that no reasonable officer could have perceived a threat after voluntarily entering the home and standing around for several minutes waiting to obtain oral consent.

## I. The Court Should Grant Certiorari to Address and Resolve the Circuit Split on the Important Questions of whether an *Old Chief* Stipulation is Constitutionally Sufficient to Affirm a Conviction in the Absence of a Jury Finding on the Knowledge-of-status Element and to Find that the Petitioner's Substantial Rights were Not Affected.

### A. The Constitutional Right to be Convicted Only upon a Jury's Finding on All Elements of the Offense beyond a Reasonable Doubt

"Only a jury, acting on proof beyond a reasonable doubt, may take a person's liberty." *United States v. Haymond*, 139 S. Ct. 2369, 2373, 204 L. Ed. 2d 897 (2019). "That promise stands as one of the Constitution's most vital protections against arbitrary government." *Id*. "As Blackstone explained, no person could be found guilty of a serious crime unless 'the truth of every accusation * * * should * * * be confirmed by the unanimous suffrage of twelve of his equals and neighbors, indifferently chosen, and superior to all suspicion.'" *Ramos v. Louisiana*, 140 S. Ct. 1390, 1395, 206 L. Ed. 2d 583 (2020) (citing 4 W. Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND *343 (1769)). Accordingly, the Sixth Amendment's trial guarantee

"reflect[s] a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges." *Duncan v. Louisiana*, 391 U.S. 145, 156, 88 S. Ct. 1444 (1968).

The Sixth Amendment provides, "as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of 'guilty.'" *Sullivan v. Louisiana*, 508 U.S. 275, 277, 113 S. Ct. 2078 (1993) (citing *Sparf v. United States*, 156 U.S. 51, 105-06, 15 S. Ct. 273 (1895)). From this flows the "unmistakable" condition that a "jury must reach a unanimous verdict in order to convict." See *Ramos*, 140 S. Ct. at 1395. And for a jury to be unanimous, the Fifth Amendment requires a unanimous finding of guilt on "all elements" of the charged offense. *Sullivan*, 508 U.S. at 277-78. "Together, these pillars of the Bill of Rights," *Haymond*, 139 S. Ct. at 2376, ensure that "[t]he Constitution gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged." *United States v. Gaudin*, 515 U.S. 506, 522-23, 115 S. Ct. 2310 (1995).

### B. A Circuit Split Exists on whether an *Old Chief* Stipulation is Constitutionally Sufficient to Affirm a Conviction in the Absence of a Jury Finding on the Knowledge-of-status Element.

When a defendant fails to object to an error, such as an element not appearing in the indictment, the jury instructions, or in the jury's consideration for whether all elements of the offense had been proved beyond a reasonable doubt, the challenges are reviewed for plain error, including whether the error was plain and affected the substantial rights of the defendant. See *United States v. Olano*, 507 U.S. 725, 731, 113 S. Ct. 1770 (1993).

The courts of appeals appear to agree that plain error occurs when a jury is not instructed on the knowledge-of-status element and a defendant is nevertheless convicted of § 922(g). See

*United States v. Greer*, 798 Fed. Appx. 483, 486 (11th Cir. 2020) ("[P]lain error occurred when the district court failed to instruct the jury to find that Greer knew he was a felon," "when his indictment failed to allege that he knew he was a felon and when the government was not required to prove that Greer knew of his prohibited status"), cert. granted sub nom. *Greer v. United States*, 208 L. Ed. 2d 510, 2021 U.S. LEXIS 486 (U.S., Jan. 8, 2021); *United States v. Conley*, 802 Fed. Appx. 919, 923 (6th Cir. 2020); Pet. 11a ("In light of *Rehaif*, the district court plainly erred by not including the knowledge-of-status element); *United States v. Edelman*, 2012 U.S. App. LEXIS 3348, at *7 (7th Cir., Feb. 8, 2021) ("The omission in the jury instructions was plain and erroneous."). But the circuit courts do not agree as to whether the substantial rights of a defendant, who has proceeded to trial and entered a stipulation that he or she has a prior felony conviction, have been affected and whether that stipulation is sufficient to infer that the jury would have found the defendant guilty beyond a reasonable doubt if it had been instructed as to the knowledge-of-status element.

The Sixth Circuit draws a direct line from an *Old Chief* stipulation to the knowledge-of-status element. An *Old Chief* stipulation, which is an admission as to what is known at the time of trial—that the defendant is a felon—is not the same as the knowledge-of-status element, which concerns what is known about the felon status months earlier, at the time of firearm possession. The Sixth Circuits gives lip service to recognizing the difference, writing that the stipulation of a prior felony "does not automatically establish knowledge of felony status." *Conley*, 802 Fed. Appx. at 923. But with the *Ward* and *Conley* decisions, the Sixth Circuit sets those differences aside and leaps to finding that those two completely different elements might as well be one and the same.

In *Ward*, the Sixth Circuit found that the *Old Chief* stipulation was constitutionally sufficient for a court of appeals to find that the jury would have found that the defendant knew he was a felon and convicted him:

> As discussed earlier, Ward made an *Old Chief* stipulation at trial, pursuant to which he acknowledged that he "was a convicted felon on and prior to the date of the charged conduct[.]" Ward's lawyer also told the jury that Ward was "stipulating that he has a felony. So you can check that one off the box." The jury could have inferred from these statements that Ward also knew that he was a felon.

*Ward*, 957 F.3d at 696.

In *Conley*, the Sixth Circuit found that the *Old Chief* stipulation was sufficient for the purposes of the third prong of plain error review:

> Although the stipulation of a prior felony does not automatically establish knowledge of felony status, it is strongly suggestive of it. Thus, any error did not affect Conley's substantial rights and was certainly harmless.

*Conley*, 802 Fed. Appx. at 923. As reviewed below, blurring the lines between these elements ignores this Court's decision in *Rehaif*.

The Third Circuit disagrees with this approach, recognizing the stark differences between the *Old Chief* stipulation and the knowledge-of-status element and then refusing to find that the stipulation as to one element is sufficient to prove the other and affirm the conviction:

> In the natural course, a defendant agrees to an *Old Chief* stipulation after having committed the crime of unlawfully possessing a firearm. Nasir's stipulation, for example, post-dates his offense by sixteen months. All the stipulation demonstrates is that he knew he was a felon at the time he signed the stipulation; based on the stipulation alone, it cannot rightly be said that he knew of his status as a felon when he possessed the firearms at issue. In other words, a stipulation of the sort submitted in this case will not, on its own, suffice to prove that, at the relevant time, the defendant had knowledge of his status as a person prohibited to possess a firearm.

*Nasir*, 982 F.3d at 172-73. The Third Circuit also found that, despite the *Old Chief* stipulation, the defendant's substantial rights were "definitely affected by his conviction upon proof of less than all of the elements of the offense outlawed by § 922(g)."[3] *Id*. at 174. The Third Circuit went on to find that it should exercise its discretion to notice and correct the error because it would seriously affect the fairness, integrity or public reputation of judicial proceedings. *Id*. at 174-75.

### C. The Third Circuit Reasoning Comports with this Court's Precedent, while the Sixth and Eleventh Circuits' Views Conflict with that Precedent.

#### 1. Relying on an *Old Chief* stipulation to find that the jury would have convicted a defendant strays from this Court's precedent, including its decision in *Rehaif*.

"When this Court deals with the content of th[e] [right to jury] guarantee—the only one to appear in both the body of the Constitution and the Bill of Rights—it is operating upon the spinal column of American democracy." *Neder v. United States*, 527 U.S. 1, 30, 119 S. Ct. 1827 (1999) (Scalia, J., concurring in part and dissenting in part). For that right to have been provided, the Fifth Amendment requires a unanimous finding of guilt on each and every element of the offense charged beyond a reasonable doubt. *Sullivan v. Louisiana*, 508 U.S. 275, 277-78, 113 S. Ct. 2078 (1993). In pre-*Rehaif* cases a "reviewing court can only engage in pure speculation—its view of what a reasonable jury would have done [if evidence of a missing element had been offered]." *Sullivan*, 508 U.S. at 281. "And when it does that, 'the wrong entity judge[s] the defendant guilty.'" *Id*. (quoting *Rose v. Clark*, 478 U.S. 570, 578, 106 S. Ct. 3101 (1986)).

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[3] For a time, the Fourth Circuit agreed with this view. See *Medley*, 972 F.3d at 413 (responding to the government's *Old Chief* argument noting that it has "held that it is inappropriate to speculate whether a defendant could have challenged the element that was not then at issue.") (citation omitted), vacated by, rehearing en banc granted, 2020 U.S. App. LEXIS 35628 (Nov. 12, 2020).

Accordingly, when a jury does not decide a necessary element of an offense, the defendant "could not have received the guarantees of the Fifth and Sixth Amendments as originally understood." *Nasir*, 982 F.3d at 184 (Matey, J., concurring in part). But the plain error doctrine is present, making the question more complicated. Now, post-*Rehaif*, the question for the circuits has been whether, when applying plain error review, they can speculate that an *Old Chief* stipulation that addresses one element can be relied upon to conclude—Petitioner would say speculate—that the jury would have necessarily found another element was proved beyond a reasonable doubt.

The Third Circuit's rationale is that the answer must be, "No," because to find otherwise would be conflict with this Court's decision in *Rehaif*:

> The government also argues that a fair inference, especially on plain-error review, is that Nasir's acknowledgment of his conviction in the *Old Chief* stipulation means he also acknowledged he knew of his status as a felon ever since becoming one. But *Rehaif* itself blocks that line of reasoning. The Supreme Court said there that it did not believe "Congress would have expected defendants under § 922(g) * * * to know their own status[ ]." *Rehaif*, 139 S. Ct. at 2197. If one were to conclude otherwise, the Court said, "these provisions might apply to a person who was convicted of a prior crime but sentenced only to probation, who does not know that the crime is 'punishable by imprisonment for a term exceeding one year.'" *Id*. at 2198 (quoting 18 U.S.C. § 922(g)(1)).

*Nasir*, 982 F.3d at 172.

Petitioner respectfully submits that the Third Circuit's view, finding that an *Old Chief* stipulation can stand in as proof beyond a reasonable doubt as to the knowledge-of-status element, runs afoul of this Court's precedent, including *Rehaif* itself. The Sixth Circuit's view, including its decision in Petitioner's case, should be vacated and reversed for several reasons, including the point addressed next.

### 2. The Sixth Circuit view appears to conflict with this Court's case law holding that showing plain error does not mean showing innocence.

In *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 201 L. Ed. 2d 376 (2018), the Court observed that "*Olano* rejected a narrower rule that would have called for relief only * * * where a defendant is actually innocent." *Id*. at 1906. And yet when reviewing Petitioner's *Rehaif*-based arguments for plain error, the Sixth Circuit appears to have found that defendants including Petitioner would only be able to show plain error if they were able to show actual innocence. Pet. App. 24a. ("Thus, as in *Ward*, 'the record "reveals no reason to think that the government would have had any difficulty at all in offering overwhelming proof that [Petitioner] knew he" was a felon.'") (citing *Ward*, 957 F.3d at 695 (quoting *United States v. Burghardt*, 939 F.3d 397, 4040 (1st Cir. 1999))).

### 3. While applying plain error review, the Sixth Circuit doubly punished Petitioner by finding that his substantial rights were not affected because he failed to object.

As the majority decision of *Nasir* has noted, while defendants shoulder blame for failing to foresee *Rehaif* and object, the government must bear just as much responsibility for failing to foresee *Rehaif* and ask for a jury instruction for the knowledge-of-status element:

> Failure to object at trial begets plain-error review on appeal; it does not reverse the constitutionally mandated burden of proof and does not put the government on moral high ground in our assessment of the consequences of plain error, as the Dissent seems to think. If the Dissent wants to think in terms of fault—an exercise that seems unproductive, especially in light of the marked change in the law wrought by *Rehaif*—then surely some fault must fall on the government for failing to recognize that knowledge-of-status is an element of the offense and therefore failing to introduce evidence about Nasir's knowledge of his prior felony.

*Nasir*, 982 F.2d at 161 n.14.

When a defendant fails to object, plain error review is applied on appeal, creating an uphill battle for defendants who must make four showings before relief is warranted. See *Olano*, 507 U.S. 725, 731. It is improper, then, to rely on the defendant's failure to object again as a reason to find that he has not met his burden—that he had not shown that his substantial rights were affected—and to benefit the government, which also failed to foresee the error. And yet that is precisely what the Sixth Circuit has done in this case.

In response to Petitioner's argument that he should be granted relief on appeal as a result of *Rehaif* and the indictment's failure to charge him with the knowledge-of-status element, the Sixth Circuit found that his substantial rights were not affected in part because, unlike the defendant in *Rehaif*, he had failed to object in the district court:

> And, finally, "the fact that the defendant in *Rehaif* ultimately prevailed at the Supreme Court demonstrates that [the defendant in this case] could have made a similar objection to the indictment's omission of a knowledge-of-status element, but failed to do so." *Ward*, 957 F.3d at 694-95. So, we cannot say that [Petitioner's] substantial rights were affected and thus, on plain-error review, his challenge to his indictment fails.

Pet. App. 9a.

The Sixth Circuit's decision to hold Petitioner's failure to object against him—twice—is even more surprising when viewed in light of the case law refusing to find counsel ineffective for failing to foresee a change in law.[4] In the end, the Sixth Circuit's rationales for rejecting

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[4] See *United States v. Fields*, 565 F.3d 290, 296 (5th Cir. 2009); See, e.g., *Lott v. Coyle*, 261 F.3d 594, 609 (6th Cir. 2001) (counsel not ineffective for not anticipating a change in the law, even though conflicting opinions already existed in the appellate court); *Green v. Johnson*, 116 F.3d 1115, 1125 (5th Cir. 1997) ("[T]here is no general duty on the part of defense counsel to anticipate changes in the law."); *Spaziano v. Singletary*, 36 F.3d 1028, 1039 (11th Cir. 1994); *Alcorn v. Smith*, 781 F.2d 58, 62 (6th Cir. 1986) ("[N]onegregious errors such as failure to perceive or anticipate a change in the law * * * generally cannot be considered ineffective assistance of counsel.").

Petitioner's arguments are inconsistent with this Court's precedent and hold Petitioner to a higher standard than is required by law. The Court should grant certiorari to accept jurisdiction over this important constitutional issue.

## II. The Court Should Grant Certiorari to Review to Sixth Circuit Panel's Majority Opinion, which Conflicts with the Court's Precedent by Finding that the Lack of Information Known to Police and Witnesses's Refusal to Answer Questions were Sufficient to Justify a Protective Sweep of a Residence well after the Arrest of the Target Outside the Home.

### A. A Protective Sweep of a Home is Permitted only when Articulable Facts would Lead a Reasonably Prudent Officer to Believe a Person Remains in the Home, Posing a Danger.

The task force officers arrested Petitioner's co-defendant, the target of their arrest warrant, outside the residence without incident. As a result, the applicability of the second type of allowable protective sweep described in *Maryland v. Buie*, 494 U.S. 325 (1990), was at issue. Under that theory, the officers were permitted to conduct a protective sweep only if able to articulate "facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene." *Id*. at 334-36.

### B. The Sixth Circuit Majority Found Reasonable, Articulable Suspicion out of Immaterial Facts and a Lack of Officer Knowledge.

The majority concluded that the government satisfied its burden of demonstrating that particularized facts created a reasonable suspicion that someone other than Petitioner, his co-defendant, and a third resident was inside the residence. It pointed to five factors in support. But each assertion is either factually wrong or conflicts with this Court's precedent.

First, the majority asserted that the police had reason to believe someone else was in the home because the co-defendant target "lived there and was wanted on gun and drug charges." Pet. App. 20a. The majority did not explain how the co-defendant's drug and gun charges create articulable facts to support a reasonable belief that another person was in the home. The arrest warrant may have increased the likelihood that guns or drugs would be found in the home. And, indeed, the officers' conduct in remaining at the home well after arresting their target showed that they were very interested in searching the home and therefore had motive to manufacture an excuse search the home for guns and drugs. But the *Buie* analysis is concerned with the presence of dangerous people, not evidence. See Pet. App. 49a (dissenting opinion). Because the majority wrongly relied on the fact that the co-defendant lived in the home and was wanted on gun and drug charges as a reason to believe a dangerous person remained in the home, the decision is in conflict with or runs afoul of *Buie*.

Second, the majority asserted that the police had reason to believe someone else was in the home because officers saw two rental cars outside, because drugs dealers often rent cars, and the presence of "more than one car" could be taken to mean multiple drug traffickers were in the home. Pet. App. 20a (citing *United States v. Stover*, 474 F.3d 904, 910-12 (6th Cir. 2007)). "But there was only one rental car outside the home when police searched it." Pet. App. 50a (dissenting opinion). "The police knew that; they pulled over the second car once it drove away." *Id*. Moreover, by the time the officers asked for consent, they had already arrested two people (Petitioner and his co-defendant) and identified two others. That was four people for just two cars, which does not suggest the presence of a fifth person. One of the persons was stopped while driving one of the rentals away from the home before the arrest. He was either a second drug

dealer out of the four, thereby eliminating the possibility that a second drug dealer was in the home, or he was non-drug dealer in a rental, tending to show there is no such direct line to be drawn from renting cars to being a drug dealer. Either way, no reasonable inference that another dangerous person was in the home could be drawn from the presence of a rental car after four people were identified as either outside the home or standing with the officers.

Third, the majority pointed to the fact that the person driving away from the home in a rental car refused to answer questions about who was at the house and whether there were guns in the house. Pet. App. 20a. As noted above, whether guns were in the house or not was a question about evidence, not people, and not relevant for whether the protective sweep was justified. This leaves the fact that a witness would not give information. "In essence, this amounts to a suggestion that police had specific and articulable facts because [this witness] did not give them any specific and articulable facts." Pet. App. 50a (dissenting opinion). In the words of the dissent, "This reasoning contradicts our repeated recognition that a lack of information does not create reasonable suspicion under *Buie*." *Id*.

Fourth, the majority pointed to testimony that the third resident (a 19-year-old) found in the home was nervous and evasive. Pet. App. 20a-21a. But the fact that a 19-year-old was nervous when facing a dozen police officers with guns drawn and when handcuffed says very little, if anything, about whether another person was in the home.

Finally, the majority pointed to the fact that an officer saw a black male look out an upstairs window. Pet. App. 4a, 20a. As the dissent notes, however, that was before three people, including two black males, exited the home. Pet. App. 51a (dissenting opinion). The majority noted that the officer "did not determine whether it was" one of the people that existed the home.

Pet. App. 4a. But not being able to determine the identity of a black male in a window is a lack of information, not an articulable fact. Cf. Pet. App. 20a (concluding that the officers' failure to positively identify the black male in the window as one of the black males that existed created reasonable suspicion). "That is especially true given the complete absence of other contextual facts suggesting that anyone remained in the home after those three had exited." Pet. App. 51a (dissenting opinion).

In conclusion, the officers in this case wanted to enter the home to search for evidence. The problem was that their target left the home voluntarily and was arrested outside the home. Rather than leave, the officers handcuffed a 19-year-old resident, entered the home, removed the handcuffs, and questioned her, including asking her to consent to a search. The officers stood around while she tried to decide what to do, including while she made a several-minute-long phone call to her mother. After that period of standing inside the home, no claim that the officers had were in danger was reasonable, and the Sixth Circuit's majority decision affirming the district court relied on unanswered questions rather than articulable facts. Petitioner submits that the Sixth Circuit decision finding grounds for the protective sweep based upon a lack of knowledge and witness silence conflicts with *Buie* or the constitutional principals behind *Buie*.

## CONCLUSION

Petitioner Maurice Stewart asks the Court to grant his petition for writ of certiorari for the compelling reasons noted above, including the circuit split that exists between the Third and Sixth Circuits. He asks the Court to grant his petition and grant full briefing in this important matter to address and resolve the circuit split as to whether plain error is shown and should be recognized and corrected when a defendant enters an *Old Chief* stipulation. In the alternative, he asks the Court to stay its ruling in this case until reaching its decision in *Greer v. United States*, No. 19-8709, cert. granted sub nom. *Greer v. United States*, 208 L. Ed. 2d 510, 2021 U.S. LEXIS 486 (mem.), (U.S., Jan. 8, 2021) (involving jury trial), and then, if appropriate, vacate the Sixth Circuit opinion below and remand for a reasoned opinion in light of this Court's decision in *Greer*. He also asks the Court to grant his petition on the grounds that the Sixth Circuit has ruled in a way that conflicts with the Court's decision in *Maryland v. Buie*, 494 U.S. 325, 110 S. Ct. 1093 (1990).

Respectfully submitted,

ROBINSON & BRANDT, P.S.C.

Dated: 21 July 2021

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## CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing petition for writ of certiorari on behalf of Petitioner Maurice Stewart, and the following appendix, were served by U.S. Priority Mail on the date I reported below upon the Solicitor General's Office, Room 5614, Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC 20530-0001; Assistant U.S. Attorneys James A. Ewing, 801 West Superior Avenue, Suite 400, Cleveland, OH 44113, and a PDF copy was emailed to Mr. Ewing at James.Ewing@usdoj.gov and to the Office of the Solicitor General at SupremeCtBriefs@USDOJ.gov.

Dated: 21 July 2021 by: /s/ Jeffrey M. Brandt
Jeffrey M. Brandt

# APPENDIX