

No. 20-5404

IN THE SUPREME COURT OF THE UNITED STATES

JERMAINE ISAAC ROSS, PETITIONER

v.

UNITED STATES OF AMERICA

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

MEMORANDUM FOR THE UNITED STATES

JEFFREY B. WALL
Acting Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

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Petitioner contends (Pet. 4, 18-20) that the Court's review is warranted to resolve a circuit conflict over whether a defendant who pleaded guilty to possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1), is automatically entitled to relief on plain-error review if he was not advised during his plea colloquy that one element of that offense is knowledge of his felon status. See Rehaif v. United States, 139 S. Ct. 2191 (2019). As explained in the government's petition for a writ of certiorari in United States v. Gary, No. 20-444 (filed Oct. 5, 2020), petitioner is correct that the circuits are divided on that recurring question and that it warrants the Court's review this Term.

The government's petition for a writ of certiorari in Gary, however, presents the best vehicle for plenary review of that question. The Fourth Circuit in Gary expressly held in a reasoned, precedential opinion that a district court's failure to advise a pleading defendant of Rehaif's knowledge element "is structural" error that entitles a defendant to relief because it automatically satisfies the third and fourth requirements of this Court's plain-error test. See United States v. Gary, 954 F.3d 194, 198, 202-208 (2020). Five judges of that court criticized that holding in a published opinion respecting the denial of rehearing en banc, describing it as "so incorrect" as to warrant this Court's "prompt[]" review. United States v. Gary, 963 F.3d 420, 420 (4th Cir. 2020) (Wilkinson, J., joined by Niemeyer, Agee, Quattlebaum, and Rushing, JJ., concurring in the denial of rehearing en banc).

By contrast, the court of appeals in this case resolved petitioner's forfeited challenge to his guilty plea in a brief unpublished opinion that predated -- and therefore did not engage with -- Gary or any of the other court of appeals decisions to address structural error in the wake of Rehaif. Pet. App. 3a-4a. Indeed, petitioner himself never argued in his court of appeals briefs that the claim of error he raised was "structural."

Accordingly, the petition for a writ of certiorari should be held pending the Court's consideration of the government's

petition in Gary, supra (No. 20-444), and then disposed of as appropriate.*

Respectfully submitted.

JEFFREY B. WALL
Acting Solicitor General

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* The government waives any further response to the petition for a writ of certiorari unless this Court requests otherwise.