

No. 20-5645

IN THE SUPREME COURT OF THE UNITED STATES

VIRGIL NICKENS, 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. 5-10) that the court of appeals erred in rejecting, based on an examination of the record as a whole, his claim that Rehaif v. United States, 139 S. Ct. 2191 (2019), entitled him to vacatur of his conviction under 18 U.S.C. 922(g)(1) and 924(a)(2) following trial and sentencing.¹ For the

¹ Other pending petitions for writs of certiorari raise similar questions. See Greer v. United States, No. 19-8709 (filed June 8, 2020); Reed v. United States, No. 19-8679 (filed June 8, 2020); Kachina v. United States, No. 20-5400 (filed June 11, 2020); Pugh v. United States, No. 20-5037 (filed July 15, 2020); Mack v. United States, No. 20-5407 (filed Aug. 14, 2020); Smith v. United States, No. 20-5558 (filed Aug. 24, 2020); Owens v. United States, No. 20-5646 (filed Sept. 4, 2020); Heard v. United States, No. 20-

reasons explained on pages 8 through 12 of the government's brief in response to the petition for a writ of certiorari in Greer v. United States, No. 19-8709 (Gov't Greer Br.), that contention lacks merit and does not warrant this Court's review at this time.² Although courts have not adopted identical approaches to reviewing plain error in the context of Rehaif claims following trials, no conflict currently exists on that question that requires this Court's immediate intervention.

As the government observed in Greer, see Gov't Greer Br. at 15-17, the Fourth Circuit's decision in United States v. Medley, 972 F.3d 399 (2020), appears to be at odds with the decision below on the substantive question of whether to recognize forfeited Rehaif errors even when the defendant's criminal record and period of incarceration demonstrate his awareness of his status as a convicted felon at the time he possessed the firearm. But it does not, at least explicitly, foreclose consideration of matters outside the trial record when addressing forfeited Rehaif claims under the plain-error standard. Id. at 417. Moreover, the Fourth Circuit recently granted the government's petition for rehearing en banc in Medley. See Order, Medley, supra (No. 18-4789) (Nov.

5742 (filed Sept. 8, 2020); Haynes v. United States, No. 20-5747 (filed Sept. 15, 2020); McGee v. United States, No. 20-5773 (filed Sept. 17, 2020); Burden v. United States, No. 20-5939 (filed Sept. 30, 2020); Scott v. United States, No. 20-5949 (filed Sept. 30, 2020).

² We have served petitioner with a copy of the government's brief in opposition in Greer.

12, 2020). Accordingly, Medley does not provide a basis for granting the petition for a writ of certiorari here.

The petition for a writ of certiorari should nevertheless be held pending the Court's consideration of the government's petition in United States v. Gary, No. 20-444 (filed Oct. 5, 2020). Gary presents the question whether a defendant who pleaded guilty after a plea colloquy during which he was not informed of the knowledge-of-status element discussed in Rehaif is automatically entitled to relief on plain-error review, without regard to whether the error affected the outcome of the proceedings. Although the guilty plea and trial contexts are not identical, resolution of the question presented in Gary could potentially affect the resolution of the petition here. The petition in this case should accordingly be held pending the Court's disposition in Gary and then disposed of as appropriate in light of Gary. See Gov't Greer Br. at 17-18.³

Respectfully submitted.

JEFFREY B. WALL
Acting Solicitor General

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³ The government waives any further response to the petition for a writ of certiorari unless this Court requests otherwise.