No. 20-5955

IN THE SUPREME COURT OF THE UNITED STATES

CHARLES LYNCH PETTIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH 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. 4-6, 13) that this 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 petition for a writ of certiorari here, however, is not a suitable vehicle for resolving the circuit conflict. The court of appeals' brief, unpublished opinion here did not expressly address whether the failure to advise a pleading defendant of Rehaif's knowledge requirement is a structural error that entitles a defendant to relief without a showing that the error affected the outcome. Instead, applying circuit precedent, the court of appeals determined that petitioner in this case was not "entitled to plain-error relief under Rehaif, because, at a minimum, he has not shown any error affected his substantial rights." Pet. App. A2. Moreover, having determined that petitioner was not entitled to relief because he failed to establish an effect on his "substantial rights," Fed. R. Crim. P. 52(b), the court of appeals did not reach or resolve the separate plain-error requirement -- which this Court has found dispositive in two previous cases involving claims of structural error -- that the error have seriously affected the fairness, integrity, or public reputation of judicial proceedings, see United States v. Cotton, 535 U.S. 625, 633-634 (2002); Johnson v. United States, 520 U.S. 461, 470 (1997).

In contrast, the government's petition for a writ of certiorari in Gary arises from a published court of appeals decision expressly holding 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. United States v. Gary, 954 F.3d 194, 198, 202-208 (4th Cir. 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). And three courts of appeals have acknowledged but rejected the Fourth Circuit's approach in precedential opinions, including in opinions that similarly address both the third and the fourth requirements of the plain-error test. See Pet. at 21-22, Gary, supra (No. 20-444); United States v. Lavalais, 960 F.3d 180, 188 (5th Cir. 2020), petition for cert. pending, No. 20-5489 (filed Aug. 20, 2020); United States v. Trujillo, 960 F.3d 1196, 1205-1207 (10th Cir. 2020), petition for cert. pending, No. 20-6162 (filed Oct. 23, 2020). Granting review in Gary would put squarely before the Court a decision that addresses both plain-error requirements about which the circuits are divided. Granting review in this case would not.

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

NOVEMBER 2020

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