

IN THE SUPREME COURT OF THE UNITED STATES

CLINTON DEVONE HICKS, PETITIONER

v.

UNITED STATES OF AMERICA

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

MEMORANDUM FOR THE UNITED STATES

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No. 20-5959

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MEMORANDUM FOR THE UNITED STATES

Petitioner contends (Pet. 5, 6-8) 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 government's petition for a writ of certiorari in Gary, however, is the best vehicle for this Court's review of the plain-error issue. The Fourth Circuit's decision in that case has a relatively extensive discussion of the application of the third and fourth prerequisites for plain-error relief to a defendant who pleaded guilty without being advised of Rehaif's knowledge-of-status requirement, and includes the views not only of the judges on the panel who concluded that plain-error relief was warranted but also of five judges who wrote to express their strong disagreement with that result following the government's petition for rehearing. See United States v. Gary, 954 F.3d 194, 198, 202-208 (2020); United States v. Gary, 963 F.3d 420, 420-424 (2020) (Wilkinson, J., joined by Niemeyer, Agee, Quattlebaum, and Rushing, JJ., concurring in the denial of rehearing en banc). Moreover, the government's petition for a writ of certiorari in Gary presents a single and specific question that focuses on the issue that has divided the court of appeals -- namely, whether a defendant who pleaded guilty to possessing a firearm as a felon without being advised that knowledge of his felon status is an element of that offense is automatically entitled to plain-error relief. See Pet. at I, Gary, supra (No. 20-444); see also id. at 21-22.

The court of appeals' decision here, in contrast, is comparatively brief, and does not reflect any dissenting views

apart from acknowledging the Fourth Circuit's decision in Gary. See Pet. App. D2-D4. Additionally, while no vehicle issues in this case would prevent the Court from addressing any or all of the prerequisites to plain-error relief, the petition also presents other questions on which the Court has recently and repeatedly denied certiorari and that do not warrant further review. See, e.g., Johnson v. United States, No. 19-7382 (June 22, 2020) (Question II); Alexander v. United States, 140 S. Ct. 2520 (2020) (No. 19-6906) (Questions III and IV); Herrera-Segovia v. United States, 140 S. Ct. 961 (2020) (No. 19-6094) (Question III).

Accordingly, rather than grant plenary review on the first question presented in the petition for a writ of certiorari, the Court should instead hold the petition pending consideration of the government's petition in Gary, supra (No. 20-444), and then dispose of it 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.