

No. 20-6162

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IN THE SUPREME COURT OF THE UNITED STATES

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FRANK TRUJILLO, PETITIONER

v.

UNITED STATES OF AMERICA

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

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MEMORANDUM FOR THE UNITED STATES

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Petitioner contends (Pet. 5-8) 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 addresses all four prerequisites for plain-error relief in the context of 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 courts 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).

While no vehicle issues in this case would prevent the Court from addressing the application of plain-error review to Rehaif errors, two factors suggest that the government's petition in Gary remains the preferable vehicle for plenary review of that issue.

First, if the Court were to grant certiorari in this case, it would likely be necessary to reformulate the question presented. The question in the petition here asks "what standard of review applies" when a pleading defendant argues for the first time on appeal that his plea was not knowing and voluntary because he was not informed of all elements of an offense. See Pet. i. It does not focus on the more precise issue that has divided the courts of appeals, which concerns whether a defendant in that situation is automatically entitled to relief under the applicable plain-error standard. Second, the petition in this case was filed several weeks after the petition in Gary. Waiting to address the issue in this case could accordingly delay the Court's resolution of the issue, potentially until next Term, without any offsetting benefit.

Accordingly, rather than grant plenary review in this case, the Court should hold the petition for a writ of certiorari pending its 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

DECEMBER 2020

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