

No. 20-7282

IN THE SUPREME COURT OF THE UNITED STATES

EARL MALLOY, PETITIONER

v.

UNITED STATES OF AMERICA

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

MEMORANDUM FOR THE UNITED STATES

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

IN THE SUPREME COURT OF THE UNITED STATES

No. 20-7282

EARL MALLOY, PETITIONER

v.

UNITED STATES OF AMERICA

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

MEMORANDUM FOR THE UNITED STATES

Petitioner contends (Pet. 5-7) that his conviction following a guilty plea for possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1), should be vacated on collateral review under 28 U.S.C. 2255 because knowledge of his felon status was not understood to be an element of his offense during the proceedings in the district court. See Rehaif v. United States, 139 S. Ct. 2191 (2019). The district court denied relief, explaining that petitioner had procedurally defaulted his Rehaif-based claim by failing to raise it on direct review and that he could not demonstrate the “actual[] prejudice[]” required to excuse that default. D. Ct. Doc. 29, at 4-6 (Apr. 30, 2020). The district

court also declined to issue a certificate of appealability (COA), id. at 6-7, as did the court of appeals, Pet. App. 1a. Petitioner contends (Pet. 5-7) that the lower courts erred in denying him a COA, and he has applied for a COA from this Court, Application No. 20A140 (filed Feb. 17, 2021).

On January 8, 2021, this Court granted the petition for a writ of certiorari in United States v. Gary, No. 20-444 (argued Apr. 20, 2021), to consider whether a defendant who raises a Rehaif-based challenge to a guilty plea for the first time on direct appeal is automatically entitled to plain-error relief. Unlike Gary, this case arises on collateral review, and it therefore raises distinct legal questions. Nonetheless, this Court's decision in Gary might conceivably affect the resolution of petitioner's claims and the propriety of issuing a COA in this case. Because the decision in Gary could affect the proper disposition of the petition for a writ of certiorari (No. 20-7282) and petitioner's application for a COA in this Court (No. 20A140), both the petition and the application for a COA should be held pending the decision in Gary, and then disposed of as appropriate in light of that decision.*

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

Respectfully submitted.

ELIZABETH B. PRELOGAR
Acting Solicitor General

APRIL 2021