

No. 20-171

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**In the Supreme Court of the United States**

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ISAAC L. HOBBS, 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 SIXTH CIRCUIT*

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**MEMORANDUM FOR THE UNITED STATES**

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Petitioner contends (Pet. 3, 7-12) that the 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), establishes structural error by showing that 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. As petitioner acknowledges (Pet. 6), he did not argue in the court of appeals that the failure to advise him of *Rehaif*’s knowledge-of-status element was a “structural”

error, let alone argue (as his petition appears to assume) that structural errors necessarily affect one’s “substantial rights” for purposes of plain-error review. See Pet. at 15-16, *Gary*, *supra* (No. 20-444) (explaining that this Court has repeatedly reserved decision on whether “structural” errors automatically affect “substantial rights”). The court of appeals therefore had no occasion to address those questions or analyze precedents of this Court pertinent to resolving them. Moreover, because the court of appeals determined that petitioner failed to demonstrate an effect on his “substantial rights,” Fed. R. Crim. P. 52(b), it 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).

By contrast, the government’s petition for a writ of certiorari in *Gary* arises from a 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 other 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. Trujillo*, 960 F.3d 1196, 1205-1207 (10th Cir. 2020); *United States v. Lavalais*, 960 F.3d 180, 188 (5th Cir. 2020), petition for cert. pending, No. 20-5489 (filed Aug. 20, 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*

OCTOBER 2020

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