

NO. 19-

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 2019

PHYTEAF PHEQUAN McCORMICK,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

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QUESTION PRESENTED

Whether the Fourth Circuit's judgment should be vacated and this case remanded for further review in light of this Court's recent opinion in *Rehaif v. United States*, ___ U.S. ___, 139 S. Ct. 2191, 204 L. Ed. 2d 594 (2019).

LIST OF PARTIES TO PROCEEDING BELOW

United States of America

Phyteaf Phequan McCormick

LIST OF PROCEEDINGS IN FEDERAL TRIAL AND APPELLATE COURTS

1. United States District Court for the Eastern District of North Carolina, No. 7:17-CR-120, *United States v. Phyteaf Phequan McCormick*. Criminal judgment entered June 6, 2018.

2. United States Court of Appeals for the Fourth Circuit, No. 18-4401, *United States v. Phyteaf Phequan McCormick*. Judgment affirming district court entered April 19, 2019.

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UNITED STATES OF AMERICA,
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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Fourth Circuit rendered in this case on April 19, 2019.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit affirming Petitioner's sentence is found at 765 Fed. Appx. 4 (4th Cir. 2019)(unpublished) and is attached at Pet. App. 1a. The judgment of the United States District Court for the Eastern District of North Carolina sentencing Petitioner to 90 months in prison is attached hereto as Pet. App. 3a.

JURISDICTIONAL GROUNDS

The opinion of the United States Court of Appeals for the Fourth Circuit affirming Petitioner's sentence issued on April 19, 2019. Pet. App. 1a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 922(g)(1) provides in pertinent part that:

It shall be unlawful for any person-

who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

...

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

STATEMENT OF THE CASE

According to the government, on January 19, 2017, a police officer in Lumberton, North Carolina, passed Petitioner and saw a child who was not in a seat. (J.A. 84). The officer stopped the car and asked the names of the four adults inside it. (J.A. 84). Petitioner the government said, gave the officer a false name. (J.A. 84). When he (the officer) realized this, he told Petitioner to get out of the car. (J.A. 84). Petitioner started struggling with the officer. (J.A. 84). During the altercation, Petitioner put a loaded handgun onto the hood of the car and told the other people with him to grab the weapon. (J.A. 84). No one did. (J.A. 84). Petitioner was arrested, and in the process he told the police that he had no previous convictions and that he had worn the gun on the outside of his pants. (J.A. 85). When they subsequently searched the car, the officers found a second handgun where Eric Evans, another passenger in the car, had been sitting, and they recovered ammunition and a cleaning kit from a purse belonging to the driver, Kadeshya McMillian. (J.A. 85).

* * *

The government said that on May 1, 2017, Petitioner, armed with a gun and aided by Trey Council, assaulted a man inside a convenience store. (J.A. 85). They pushed him down, took his car keys, ripped a necklace off of his neck, and stole an iPhone and a handgun from him. (J.A. 85). Petitioner and Council then drove the man's car around the block. (J.A. 85). They returned it, but there were shots fired at the car as they were leaving. (J.A. 85).

* * *

On May 16, 2017, Lumberton police were watching a suspected drug house when they saw Petitioner get into the back seat of an SUV. (J.A. 85). Michael Brown drove the vehicle, Trey Council sat in the front passenger seat, and Joshua Jones sat in the rear of the SUV with Petitioner. (J.A. 85). A child in a car seat also rode in the back. (J.A. 31, 85). Police followed the SUV for as long as it took Brown to break a traffic law, but a chase began when they tried to stop him. (J.A. 85). During the chase, someone threw a handgun out of the SUV's front window. (J.A. 85). Eventually, Brown crashed. (J.A. 31, 85).

After the accident, while Petitioner, Jones, and Council were being taken to jail, Petitioner allegedly told Jones to claim possession of the guns; instead, Jones denied it. (J.A. 85). The n later, at the police station, one of the jailers heard a loud noise when Petitioner walked over to a trash can and coughed. (J.A. 85). When he looked into the trash, the jailer found a loaded ammunition clip. (J.A. 32, 85).

In a taped telephone conversation from jail, Petitioner, told Brown to give the gun Kadeshya McMillian. (J.A. 85). Brown said that before police searched the SUV, he ran from the crash scene with Petitioner's firearm. (J.A. 85). Petitioner told Brown to give the gun

to Ms. McMillian. (J.A. 85).

* * *

A federal grand jury subsequently indicted Petitioner for violating 18 U.S.C. § 922(g)(1). (J.A. 9). Count one charged him with possessing a firearm on January 19, 2017, and count two alleged he had ammunition on May 16, 2017. (J.A. 9). The indictment read, in relevant part, as follows:

COUNT TWO

On or about May 16, 2017; in the Eastern District of North Carolina, the defendant, PHYTEAF PHEQUAN MCCORMICK, having been previously convicted of a crime punishable by imprisonment for a term exceeding one (1) year, did knowingly possess, in and affecting commerce, ammunition, in violation of Title 18, United States Code, Sections 922(g) (1) and 924.

(J.A. 9).

Pursuant to an agreement with the government that preserved his right to appeal from an upward departure or variance, Petitioner pled guilty to the ammunition count in United States District Court. (J.A. 31, 64, 74 ¶2.c). In relevant part, the plea agreement read as follows:

3. The Defendant understands, agrees, and admits:

a. That as to each Count of the Indictment to which the Defendant is pleading guilty, the charge, code section, elements, and applicable penalties are as follows:

Count Two

(1) Felon In Possession of Ammunition

(2) Code sections violated: 18 U.S.C. §§ 922(g) and 2

(3) Elements: On or about April 11, 2016, in the Eastern District of

North Carolina, the Defendant,

First: knowingly possessed *ammunition*;¹

Second: after having been convicted of a crime punishable by a term of imprisonment exceeding one year; and

Third: the possession of the *ammunition* was in or affecting commerce.

(J.A. 76).

At the plea hearing, the district court, in accepting Petitioner's guilty plea, asked Petitioner the following question:

THE COURT: Now, Mr. McCormick, did you, as the Government has alleged in Count Two, on or about May 16, 2017 in the Eastern District of North Carolina, having been previously convicted of a crime punishable by imprisonment for a term exceeding one year, knowingly possess in and affecting commerce ammunition in violation of 18 U.S. Code, Section 922(g)(1) and 924? Did you do all that?

(J.A. 31).

Petitioner replied, "Yes, sir." (J.A. 31).

The Court then called upon the government to provide a factual basis to support Petitioner's guilty plea. (J.A. 31). In relevant, the government said the following:

[Government Counsel] . . . In Robeson County on May 16, 2017 the police attempted to stop a vehicle in which the defendant was a passenger. The vehicle fled police and then crashed and all occupants were ultimately arrested.

¹The plea agreement originally said "a firearm." (J.A. 76). The words "a firearm" are crossed out, and the word "ammunition" is hand written above them. The change bears the initials of the Assistant United States Attorney and Petitioner's attorney. The word "ammunition" is also substituted for "a firearm" in the description of the third element. (J.A. 76).

Back at the station the defendant asked to go to the bathroom. He was told he would have to wait. The defendant began coughing, walked over to a trash can and dropped a heavy object that made a loud clunking noise when it hit the bottom of the trash can. An officer immediately went to the trash can and recovered a magazine loaded with 9mm ammunition. An ATF nexus examiner examined the 9mm ammunition recovered from the trash can and determined that it was manufactured outside North Carolina and, therefore, traveled in and affecting interstate commerce.

Prior to this incident, the defendant was convicted of an offense punishable by more than one year in prison.

(J.A. 31-32).

The district court accepted the plea and adjudged Petitioner guilty of violating 18 U.S.C. § 922(g). (J.A. 33). On June 6, 2018, the district court sentenced Petitioner to imprisonment for a term of 90 months, the sentence representing an upward variance of nearly three years above the top of Petitioner's guideline sentencing range. (J.A. 41, 58, 98, 100).

Petitioner appealed to the United States Court of Appeals for the Fourth Circuit. (J.A. 72). In that forum, Petitioner argued his sentence was unreasonable because the district court had based the variance on factors already accounted for in the guideline calculation. In an opinion issued on April 19, 2019, the Fourth Circuit affirmed Petitioner's sentence

On June 21, 2019, this Court decided *Rehaif v. United States*, ___ U.S. ___, 139 S. Ct. 2191, 204 L. Ed. 2d 594 (2019).

**MANNER IN WHICH THE FEDERAL QUESTION
WAS RAISED AND DECIDED BELOW**

Petitioner did not raise this question in the district court nor in the court of appeals. *Rehaif* explains that “in prosecutions under § 922(g) and 18 U.S. C. § 924(a)(2), the Government must prove that a defendant knows of his status as a person barred from possessing a firearm.”

204 L. Ed. 2d at 605. This Court has confirmed that a plea is constitutionally invalid and a defendant has not intelligently entered a guilty plea if “neither he, nor his counsel, nor the court correctly understood the essential elements of the crime, as those elements were interpreted by this Supreme Court after entry of the plea.” *Bousley v. United States*, 523 U.S. 614, 618-619 (1998). In such a case, the appellate court may review for plain error when the defendant failed to challenge the adequacy of his guilty plea in the district court.

REASON FOR GRANTING THE WRIT

BY AFFIRMING PETITIONER’S SENTENCE, THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The United States charged Petitioner with violating 18 U.S.C. § 922(g), being a felon in possession of a ammunition. That statute says that

It shall be unlawful for any person—

who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

...

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. §922(g)(1).

At the time of Petitioner’s guilty plea, sentencing, and appeal to the Fourth Circuit, the controlling law held that the United States did not need to prove that Petitioner knew he “been

convicted in any court of, a crime punishable by imprisonment for a term exceeding one year" in order to convict him of being a felon in possession of a firearm. That controlling law was wrong, as this Court held on June 21st of this year. *See Rehaif v. United States*, ___ U.S. ___, 139 S. Ct. 2191, 204 L. Ed. 2d 594 (2019). Petitioner thus asks this Court to vacate the Fourth Circuit opinion and remand this case to allow the parties to address in the Fourth Circuit whether the plea agreement in this case was unknowing and unintelligent in light of *Rehaif*.

The proper course here is to allow the Fourth Circuit the opportunity for this review and to allow the parties to make whatever arguments are appropriate in that court in light of *Rehaif*. *See Rehaif*, 204 L. Ed. 2d at 605 (reversing the judgment of the Court of Appeals and remanding the case for further proceedings); *Id.* at 620 (Alito, J., dissenting) ("Those for whom direct review has not ended will likely be entitled to a new trial").

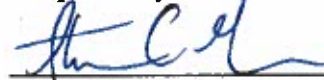
Petitioner respectfully asks that the writ issue.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fourth Circuit.

This the 18th day of July, 2019.

Respectfully submitted,



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