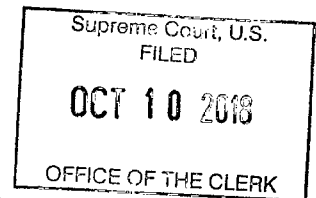


18-6590

No. \_\_\_\_\_

IN THE

SUPREME COURT OF THE UNITED STATES



SALAH MOHAMED — PETITIONER

(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

SALAH MOHAMED

(Your Name)

79212-083 R  
FCI-ASHLAND

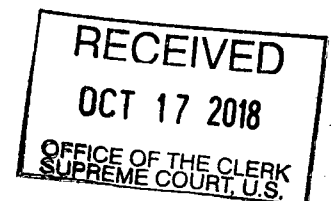
(Address)

POST OFFICE BOX 6001  
ASHLAND, KENTUCKY 41105-6001

(City, State, Zip Code)

NONE

(Phone Number)



## QUESTION(S) PRESENTED

(1)

Does a court abuse its discretion under the United States Sentencing Guidelines by sentencing a naturalized defendant more than three times above his recommended sentencing range for escape when the court considers the defendant's flight through Mexico and his attempt to reach Yemen (where he was born, and where his wife, children and family remain) an aggravating factor? And if not,

(2)

Is it ever an abuse of discretion to sentence a defendant at the statutory maximum sentence regardless of the properly calculated Sentencing Guidelines' advisory range?

## LIST OF PARTIES

~~[x]~~ All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

## TABLE OF CONTENTS

OPINIONS BELOW .....	1
JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED .....	3
STATEMENT OF THE CASE .....	4
REASONS FOR GRANTING THE WRIT .....	6
CONCLUSION.....	10

## INDEX TO APPENDICES

APPENDIX A	Judgment and Opinion, <u>United States v. Salah Mohamed</u> , No. 17-4742 (4th Cir. July 18, 2018)
APPENDIX B	Sentencing Transcript, <u>United States v. Salah Mohamed</u> , No. 2:17-CR-14 (WDVA Nov. 28, 2017)
APPENDIX C	
APPENDIX D	
APPENDIX E	
APPENDIX F	

## TABLE OF AUTHORITIES CITED

PAGE NUMBER

### CASES

<u>Community Care Foundation v. Thompson,</u> 412 F. Supp. 2d 18 (D.D.C. 2006) .....	6
<u>Gall v. United States,</u> 552 U.S. 38, 128 S. Ct. 2456, 168 L. Ed. 2d 203 (2007).....	6
<u>Kimbrough v. United States,</u> 552 U.S. 85, 128 S. Ct. 558, 169 L. Ed. 2d 481 (2007).....	6
<u>Peugh v. United States,</u> 569 U.S. 530, 133 S. Ct. 2072, 186 L. Ed. 2d 84 (2013).....	6
<u>Rita v. United States,</u> 551 U.S. 338, 127 S. Ct. 2456, 168 L. Ed. 2d 203 (2007).....	6
<u>United States v. Booker,</u> 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2007).....	6

### CONSTITUTION, STATUTES, GUIDELINES & REGULATIONS

United States Constitution Amendment V.....	9
18 U.S.C. § 3553(a).....	6
U.S.S.G. § 2Pl.1.....	9
U.S.S.G. § 5H1.10.....	9
Bureau of Prisons Program Statement 5100.08 (9/12/2006) "Inmate Security Designation and Custody Classification".....	7

### OTHER

<u>The Law Dictionary</u> (Anderson Publishing Co. 2002).....	6
---	---

IN THE  
SUPREME COURT OF THE UNITED STATES  
  
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

**OPINIONS BELOW**

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix   A   to the petition and is

☐ reported at \_\_\_\_\_; or,

☐ has been designated for publication but is not yet reported; or,

☒ is unpublished.

The opinion\*of the United States district court appears at Appendix   B   to the petition and is

☐ reported at \_\_\_\_\_; or,

☐ has been designated for publication but is not yet reported; or,

☒ is unpublished.

\*The transcript of the sentencing hearing is attached inasmuch as prisoners are not permitted to retain a copy of the Statement of

☐ For cases from **state courts**:     Reasons portion of their Judgment order.

The opinion of the highest state court to review the merits appears at Appendix \_\_\_\_\_ to the petition and is

☐ reported at \_\_\_\_\_; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

The opinion of the \_\_\_\_\_ court appears at Appendix \_\_\_\_\_ to the petition and is

☐ reported at \_\_\_\_\_; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

## JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was July 18, 2018.

☒ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No.   A  .

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from **state courts**:

The date on which the highest state court decided my case was \_\_\_\_\_.  
A copy of that decision appears at Appendix \_\_\_\_\_.

☐ A timely petition for rehearing was thereafter denied on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No.   A  .

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 3553(a), Imposition of a Sentence:

(a) Factors to be considered in imposing a sentence. The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set fourth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider--

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed--

(A) to reflect the seriousness of the the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and sentencing range established for--

(A) the applicable category of the offense committed by the applicable category of defendant as set forth in the guidelines--

(i) issued by the Sentencing Commission pursuant to § 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress....

[ ]

(5) any pertinent policy statement--

(A) issued by the Sentencing Commission pursuant to § 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress....

[ ]

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.



## STATEMENT OF THE CASE

The Petitioner, Salah Mohamed ("Mr. Mohamed"), was serving a 246-month sentence related to convictions on three counts of drug and tobacco related offenses in the Eastern District of Virginia. Mr. Mohamed is a native of Yemen and a naturalized United States citizen.

While he was serving his sentence Mr. Mohamed met Kamal Qazah, a native of Jordan who is also a naturalized United States citizen, and the two became friends based on their shared culture and religious beliefs. In 2017 both of the men were serving their sentences at the minimum security prison camp adjacent to the United States Penitentiary-Lee County (Virginia) in the Western District of Virginia.

Their imprisonment in western Virginia presented greater hardships for both men than what is normally associated with prison life. They were constantly treated harshly by fellow inmates and staff, routinely referred to as terrorists, based on their appearance and religion, even though their prior offenses did not involve acts of terrorism. Both of them desired to return to their native homes to assist their families' with their daily survival. Mr. Mohamed's wife and children, as well as his father and siblings, were in Yemen and experiencing the devastating results of the civil war and famine the country is experiencing.

Mr. Mohamed and Mr. Qazah left the minimum security camp on May 3, 2017 by simply walking away in broad daylight. The camp does not have walls or a perimeter fence. No violence was used to effect their escape or subsequent flight. They were apprehended together 19 days later, without incident, in Mexico City. No additional crimes were committed by either of them during their escape, flight, or apprehension.

Criminal complaints were filed against both men on May 4, 2017 charging a violation of 18 U.S.C. § 751(a)(escape from federal prison). Both were subsequently indicted on July 24, 2017 by the grand jury in the Western District of Virginia for violations of 18 U.S.C. §§ 371(a) and 371.

Both men pled guilty, without plea agreements, on August 29, 2017, of the Presentence Investigation Reports determined the advisory guideline range for each defendant was 12 to 18 months, and both defendants agreed that the guideline calculation was correct.

At the sentencing Mr. Mohamed asked for a sentence within the guideline range; the government asked the district court to apply an upward variance to the sentence. The district court sentenced Mr. Mohamed (and Mr. Qazah) to the maximum sentence under the statute, 60 months, for reasons that the court stated during the sentencing. The full transcript of the sentencing is attached to this petition as Appendix B.

Mohamed filed a timely appeal of his sentence to the United States Court of Appeals for the Fourth Circuit. Case No. 17-4772. His sentence was affirmed on July 18, 2018. This petition follows the Court of Appeals' decision.

## REASONS FOR GRANTING THE PETITION

In United States v. Booker, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005), the Court replaced the de novo standard of review of sentences determined by applying the United States Sentencing Guidelines with an abuse of discretion standard that has been called the reasonableness standard. Rita v. United States, 551 U.S. 338, \_\_\_, 127 S. Ct. 2456, 168 L. Ed. 2d 203, 208 (2007). Under the post-Booker standard a sentence must be both procedurally and substantively reasonable. See Gall v. United States, 552 U.S. 38, 128 S. Ct. 586, 169 L. Ed. 2d 445 (2007); Kimbrough v. United States, 552 U.S. 85, 128 S. Ct. 558, 169 L. Ed. 2d 481 (2007).

Abuse of discretion includes decisions that are clearly unreasonable, arbitrary, or fanciful, based on erroneous conclusions of law or on clearly erroneous findings of fact, or where the record contains no evidence on which the decision could have been based. Under this standard, the Court will not substitute its judgment for the lower court's judgment. See generally, Community Care Foundation v. Thompson, 412 F. Supp. 2d 18 (DDC 2006); see also, The Law Dictionary (Anderson Publishing Co., 2002).

A principal purpose of the Sentencing Guidelines is to reduce sentencing disparities between similarly situated defendants. Peugh v. United States, 569 U.S. 530, \_\_\_, 133 S. Ct. 2072, 186 L. Ed. 2d 84, 94 (2013). After Booker the Sentencing Guidelines were no longer binding and sentencing courts must consider all of the factors set out in 18 U.S.C. § 3553(a) to guide their sentencing discretion. Ibid 186 L. Ed. 2d at 95. A major departure from the Sentencing Guidelines should be supported by a more significant justification than a minor one. Gall, 552 U.S. at 50.

The parties and the district court all agreed that the Presentence Re-

port properly calculated Mr. Mohamed's recommended sentencing range as 12 to 18 months; however, the government asked the court to impose an upward departure or variance above the recommended sentencing range. The government gave four reasons for its request.

First, the government claimed that most defendants simply walk away from the camp (as Mr. Mohamed did) and are either apprehended nearby or maybe as far away as Washington, D.C. "where they have returned home to their families," and are arrested "within 24 to 48 to 72 hours after their escape." Appendix B (Sentencing Hearing Transcript) 7. The government does not claim or offer proof that the apprehensions were voluntary surrenders, or that these escapees had any intentions other than to permanently absent themselves from Bureau of Prisons custody. The government treats the escapees failure to effectively avoid apprehension for more than three days as a factor mitigating the escapees' offense behavior.

Second, the two traveled long distances and crossed an international border, and they would have traveled on to the Middle East through additional countries using forged passports if they had not been intercepted.

The government's third reason was the length of the original sentence. The government did not address the portion of the sentence that Mr. Mohamed had already served and did not comment on the Bureau of Prisons policy to limit assignment to minimum security camps to prisoners with less than ten years remaining on their sentence. See Bureau of Prisons Program Statement 5100.08 (9/12/2006) "Inmate Security Designation and Custody Classification."

The final reason presented was to deter others from succeeding in their escape by reaching a foreign country. The government presented the argument without presenting any evidence that Mr. Mohamed's travel through and to another country was for any purpose other than reaching his family and ignoring

the fact that traveling through Mexico had not prevented Mr. Mohamed's apprehension.

The district court sentenced Mr. Mohamed above the recommended guideline range and at the maximum sentence available under the statute.

The district court noted that Mr. Mohamed was serving a lengthy sentence and had a large amount of restitution. The court did not comment on the substantial portion of the sentence that had already been served or the amount of the joint and severable restitution that has been paid.

The district court also noted that Mr. Mohamed had been reapprehended in a relatively short time, but the court credited the reapprehension to the skill of the Marshals Service. There is nothing in the record indicating how the marshals located Mr. Mohamed, nor anything indicating that they used anything beyond routine measures to locate a fugitive. The court does not explain what distinguishes the instant case from the cases the government described when escapees were traveling to, or shortly after arriving, where they lived with their families. The only apparent distinction is that the others returned to homes and families within the United States whereas Mr. Mohamed, a native of Yemen, was traveling to his family's home and location outside of the United States.

The court also said it was increasing the sentence because Mr. Mohamed's purpose in heading to the Middle East was to hide in the chaos of the area. This directly contradicts other conclusions that the district court made during the sentencing. For example:

Let me say, I appreciate that they contend that they wanted to be with their families, particularly in a violence-torn and impoverished region of the world. But there are few inmates who do not have somewhat similar motivations if not that extreme.

Sentencing Transcript 14.

Essentially the district court says that escapees often escape to be with their families because they believe their families need them. That would seem to put Mr. Mohamed in the same category as those cases the government represented as typical. But then the court finds that Mr. Mohamed's sentence should be increased beyond the more typical sentence because his family's need is more extreme than the typical case. This seems to set the purpose of guideline sentencing on its head.

Mr. Mohamed, a native of Yemen who walked away from a minimum security camp, received a longer sentence than the Sentencing Guidelines would recommend if he had undertaken the aggravating conduct described in U.S.S.G. § 2Pl.1 (Escape). The reasons given for imposing the maximum sentence on Mr. Mohamed are completely unrelated to him walking away from the minimum security camp where he was serving his sentence. The increased sentence is the direct result of the distance between him and his wife and children, and the conditions his family faced in Yemen. The manner of Mr. Mohamed's escape are not unusual and certainly not extreme. Only his sentence is extreme.

The reasons implied to support the severity of Mr. Mohamed's sentence are that he was born in Yemen, that his family is trapped in the current chaos in Yemen and that the reason Mr. Mohamed left the camp was to help his family escape from the chaos in Yemen. Under the circumstances of the case, a sentence that is more than three times more than the recommended sentencing guideline is substantively unreasonable and an abuse of the sentencing court's discretion.

Mr. Mohamed's destination is related to his national origin, and any departure based on national origin is explicitly prohibited. U.S.S.G. § 5H1.10; see also U.S. Const. Amend. V (Due Process Clause). In this case there is an indicia that national origin was a consideration in sentencing

Mr. Mohamed to more than three times his Guideline recommended sentence, particularly in a case that does not involve any intentional or accidental injury or property damage, does not involve using or threatening violence, and in which Mr. Mohamed's absence from custody was less than three weeks. The only stated reasons for the increased sentence are directly related to the route Mr. Mohamed traveled to reach his family in Yemen and the final destination to reach his family.

This case should be remanded for resentencing.

### CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

*Salah Mohamed*

Date: October 9, 2018