

No. _____

In The
Supreme Court of the United States

SULIMAN MALIK EL-AMIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

- A. WHETHER THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT ERRED AS A MATTER OF LAW BY FAILING TO FIND THAT THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA IMPOSED AN UNREASONABLE SENTENCE THAT EXCEEDED AN IMPRISONMENT TERM SUFFICIENT BUT NOT GREATER THAN NECESSARY TO FULFILL THE SENTENCING PURPOSES OF 18 U.S.C. §3553(a).
- B. WHETHER THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT ERRED AS A MATTER OF LAW BY FAILING TO FIND THAT THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA IMPOSED AN UNREASONABLE SENTENCE IN LIGHT OF THE RECENT HOLDING IN *DEAN v. UNITED STATES*, 581 U.S. ____ (2017).

LIST OF PARTIES

SULIMAN MALIK EL-AMIN, *Petitioner*

UNITED STATES OF AMERICA, *Respondent*

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Suliman Malik El-Amin (hereinafter “Petitioner”) respectfully prays for a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the Fourth Circuit.

OPINION BELOW

The opinion of the Fourth Circuit is reported at *United States of America v. Suliman Malik El-Amin*, (4th Cir. 17-4127). Pursuant to Federal Rules of Appellate Procedure 32.1, the decision is unpublished.

JURISDICTION

The United States Court of Appeals for the Fourth Circuit decided this case on October 18, 2017. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1), and this Petition is timely filed within ninety days of the underlying Judgment of the Fourth Circuit pursuant to United States Supreme Court Rule 13(1) and 28 U.S.C. § 2101.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend VI

In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

Fed. R. Crim. Pro., R. 29(a)

After the government closes its evidence or after the close of all the evidence, the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction. The court may on its own consider whether the evidence is insufficient to sustain a conviction. If the court denies a motion for a judgment of acquittal at the close of the government's evidence, the defendant may offer evidence without having reserved the right to do so.

STATEMENT OF THE CASE

Petitioner Suliman Malik El-Amin (hereinafter referred to as “Petitioner”) was charged in a Bill of Information filed on September 6, 2016, with the following three counts:

- A. Count One 1: Did knowingly and intentionally possess with intent to distribute a controlled substance, that is, a mixture and substance containing a detectable amount of methamphetamine, a Schedule II controlled substance, in violation of Title 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C);
- B. Count 2: Did knowingly and unlawfully possess a firearm, that is, a Springfield Armory, Model XD, .45 caliber semiautomatic pistol, in and affecting commerce, in violation of Title 18 U.S.C. § 922(g)(1).

- C. Count 3: Did knowingly use or carry one or more firearms, and in furtherance of such drug trafficking crime as set forth in Count One in the Bill of Information, did possess one firearm, that is, a Springfield Armory, model XD, .45 caliber semiautomatic pistol, in violation of Title 18 U.S.C. § 924(c)(1)(A)(i).

Plea and Sentencing:

On September 13, 2016, Petitioner appeared before the Honorable David S. Cayer, Magistrate Judge, and pled guilty to Counts 1, 2 and 3 of the Bill of Information pursuant to a written Plea Agreement. On February 17, 2017, Petitioner was sentenced by the Honorable Robert J. Conrad, Jr. The Court found the correct offense level for the possession with intent to distribute methamphetamine and possession of a firearm by a convicted felon counts to be 19, a criminal history category III, with a resulting advisory range of 37 to 46 months for Counts 1 and 2, plus a 60 month consecutive mandatory minimum sentence for Count 3. However, the Government made a motion for downward departure pursuant to U.S.S.G. § 5K1.1 based on Petitioner's cooperation. The Government submitted that a reduction to total offense level 15 resulting in a guideline range of 24 to 30 months was appropriate based on his substantial assistance. Petitioner's counsel acknowledged that the Government had considered Petitioner's cooperation when recommending the downward departure, but argued that the reduction did not fully reflect his level of cooperation.

The Honorable Robert J. Conrad, Jr. granted the Government's motion for a downward departure. He also acknowledged the arguments for variance made by counsel with respect to the transformation she observed since Petitioner's arrest, his efforts at cooperation, the length of time of interviews and his strong family support.

The Honorable Robert J. Conrad, Jr. imposed a sentence of 24 months on each of Counts 1 and 2 to run concurrently, and a term of 60 months consecutive per § 924(c) on Count 3 for a total of 84 months, and a term of 3 years of supervised release.

The Judgment was signed by the Honorable Robert J. Conrad, Jr. on February 28, 2017, and the judgment was filed on February 28, 2017. Petitioner timely filed his Notice of Appeal to this Honorable Court on March 2, 2017.

On October 18, 2017, the United States Fourth Circuit Court of Appeals declined to address Petitioner's arguments and affirmed the Judgment of the District Court.

STATEMENT OF THE FACTS

Petitioner is named in a three-count Bill of Information filed on September 6, 2016, charging conspiracy to distribute and possess with intent to distribute methamphetamine in violation of 21 U.S.C. § 841, possess firearm by felon in and affecting commerce in violation of 18 U.S.C. § 922(g), and possess firearm in

furtherance of drug trafficking in violation of 18 U.S.C. § 924. Petitioner stipulated to a mixture and substance containing a detectable amount of methamphetamine that was known to or reasonably foreseeable by him was approximately 45.5 grams.

On December 14, 2015, Waxhaw Police Department was conducting a methamphetamine investigation of Petitioner. On that date, a confidential information (CI) purchased 3.22 grams of a mixture and substance containing a detectable amount of methamphetamine for \$150.00 at a CVS Pharmacy located on Providence Road South in Waxhaw, NC.

On December 16, 2015, a CI purchased 27.75 grams of a mixture and substance containing a detectable amount of methamphetamine from Petitioner for \$1,100.00 at a CVS Pharmacy located on Providence Road South in Waxhaw, NC. At that time, the Waxhaw Police Department, who had been conducting a methamphetamine investigation of Petitioner, sought assistance from the Bureau of Alcohol, Tobacco, Firearms and Explosives to continue the investigation.

On January 13, 2016, a CI arranged to purchase a quantity of methamphetamine from Petitioner. The CI and Petitioner met at a CVS in Waxhaw, NC. The CI gave Petitioner \$2,800.00 and Petitioner provided the CI with a substance later determined to be “flex” (fake drugs). After this meeting, the CI and Petitioner had several telephone discussions concerning the quality of the

drugs, and Petitioner agreed to bring him additional drugs to make up for the low quality drugs he had just sold him. On January 14, 2016, the CI met with Petitioner at the Bojangles restaurant on West Trade Street, Charlotte, NC to get more product from him. Petitioner arrived, exited his vehicle and got into the CI's vehicle. Petitioner gave the CI a bag of purported methamphetamine (a field test of this product provided a negative/inconclusive result). The CI then asked Petitioner if he could get him/her a "burner" (handgun). Petitioner then pulled a brown and black pistol from his armpit, showed it to the CI, and told the CI, "I keep me one. I keep me one." Surveillance officers observed Petitioner carrying a pistol and followed him out of the parking lot onto I-77 North. Charlotte-Mecklenburg Police initiated a traffic stop on Petitioner. A search of his vehicle ultimately revealed a Springfield Armory, Model XD-45 pistol loaded with twelve rounds of ammunition, and a bag of methamphetamine containing 14.53 grams. The firearm was stolen.

The Presentence Report states that the statutory range was a maximum of 20 years imprisonment for Count 1, a maximum of 10 years imprisonment for Count 2, and a minimum term of imprisonment of 5 years and a maximum term of life for Count 3 pursuant to 18 U.S.C. § 924(c). On motion of the Government, Petitioner received a downward departure for cooperation to Level 15, Category III on Counts 1 and 2 of the Information. The Honorable Robert J. Conrad, Jr. imposed a

sentence of 24 months on each of Counts 1 and 2 to run concurrently, and a term of 60 months consecutive per § 924(c) on Count 3 for a total of 84 months and a term of 3 years of supervised release.

REASONS FOR GRANTING THE WRIT

I. THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT ERRED AS A MATTER OF LAW BY FAILING TO FIND THAT THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA IMPOSED AN UNREASONABLE SENTENCE THAT EXCEEDED AN IMPRISONMENT TERM SUFFICIENT BUT NOT GREATER THAN NECESSARY TO FULFILL THE SENTENCING PURPOSES OF 18 U.S.C. § 3553(a).

Standard of Review

The Fourth Circuit Court reviews a sentence for reasonableness, applying an abuse of discretion standard. (*Gall v. United States*, 552 U.S. 38, 51 (2007); (*United States v. Layton*, 564 F.3d 330, 335 (4th Cir. 2009). In so doing, the Court first examines the sentence for significant procedural error, including failing to calculate or improperly calculating) the advisory Sentencing Guidelines range, treating the Guidelines as mandatory, failing to consider the 18 U.S.C. § 3553(a) (2006) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence. (*Gall, supra*, 552 U.S. at 51). When considering the substantive reasonableness of the sentence, the Court must take into account the totality of the circumstances. (*United States v. Mendoza-Mendoza*, 597 F.3d 212, 216 (4th Cir. 2010).

The mandate of 18 U.S.C. § 3553(a) is for the court to impose a sentence “sufficient, but not greater than necessary” to comply with the statutory purposes of federal sentencing. In *United States v. Hunt*, 459 F.3d 1180, 1182 (11th Cir. 2006), the court summarized the factors that a sentencing court must 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 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 the sentencing range established...;
- (5) any pertinent [Sentencing Commission] policy statement...;
- (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.

The District Court, after granting the Government's downward departure motion pursuant to § 5K1.1, imposed a sentence of 24 months to run concurrent for Counts 1 and 2 and 60 months to run consecutive for Count 3. In entering this sentence, the Court recited the following:

"It takes into account the history and characteristics of the defendant, including the arguments for variance made by counsel with respect to the transformation she has observed since Mr. El-Amin's arrests, efforts at cooperation, the length of time of interviews, and the – in addition to strong family support, which is obvious to the Court here today, and represented, as well, in the letters of support, his employment skills and his own family responsibilities. All of those things were taken into account in considering the ultimate sentence, including considering whether to vary from the departure range. The Court chose not to vary any more than drop down to 24 months because of two things, one is the serious nature of the offense, the armed drug trafficking in Charlotte and elsewhere and, as well, and importantly, the criminal history that goes back to age 16 and involves assault, felony drug offenses, carrying concealed weapon, and an accessory after the fact second degree conviction-- accessory after the fact to second degree murder.

The Court notes that each –many of these convictions results in an arrest within a short period of time. The '02 uttering conviction on April 17th was followed by an April 27th arrest for possession of marijuana, that conviction in May of '02 was followed by a July '02 arrest for resisting. And it appears that the parole for the accessory conviction occurred in April of 2015, and the instant offense began in December of that same year.

And so it appears to the Court that there is a real need to protect the public with this sentence, and the ultimate sentence imposed attempts to do that as well as the other 3553(a) factors."

In the instant case, the Court of Appeals found in their Unpublished Opinion that Petitioner's sentence was both procedurally and substantively reasonable, finding that the Court properly calculated the applicable Sentencing Guideline range and appropriately explained the below guideline sentence in the context of relative § 3553(a) factors. Petitioner contends that the Court of Appeals erred in failing to find that Petitioner rebutted the presumption of reasonableness of his below guideline sentence. On the contrary, Petitioner contends that the evidence he presented at his sentencing justified a sentence below the 24 month sentences imposed by the Court for these predicate offense convictions.

In light of Petitioner's strong representation to the District Court of the many mitigating factors present for him, the Court of Appeals erred in failing to find that the sentence imposed by the District Court was greater than necessary to accomplish the purposes of sentencing.

II. WHETHER THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT ERRED AS A MATTER OF LAW BY FAILING TO FIND THAT THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA IMPOSED AN UNREASONABLE SENTENCE IN LIGHT OF THE RECENT HOLDING IN *DEAN v. UNITED STATES*, 581 U.S. ____ (2017).

Petitioner contends that based on the recent U.S. Supreme Court decision of *Dean v. United States*, 581 U.S. ____ (2017), he is entitled to be resentenced so

that the District Court can determine an appropriate sentence pursuant to 18 U.S.C. § 3553(a).

In *Dean*, the Supreme Court held that § 924(c) does not prevent a sentencing court from considering a mandatory/minimum sentence imposed under that provision when calculating an appropriate sentence for the predicate offense.

In the instant case, Petitioner faced sentences for his Counts 1 and 2 convictions for the predicate offenses and Count 3 for the § 924(c) conviction. Petitioner argued at sentencing that a 0 day sentence for the predicate offenses and a 60 month sentence for the § 924(c) conviction would satisfy the sentencing requirements of 18 U.S.C. § 3553(a) based on Petitioner's history and characteristics. Notwithstanding Petitioner's request for a 60 month active sentence for all of his convictions, the Court entered a sentence of 24 months on each of Counts 1 and 2 to run concurrent for the predicate convictions and 60 months consecutive for the § 924(c) conviction.

Subsequent to the entry of the Judgment, the United States Supreme Court entered its decision in *Dean v. United States*, 581 U.S.____ (2017). In *Dean*, Dean was convicted of 1 count of conspiracy to commit robbery, 2 counts of robbery and 1 count of possession of firearm by felon. He was also convicted of 2 counts of possessing and aiding and abetting the possession of a firearm in furtherance of a crime of violence in violation of 18 U.S.C. §§ 2 and 924(c).

(*Dean v. United States*, 581 U.S. ___, 2 (2017) At sentencing, Dean conceded that his predicate sentences carried a guideline sentencing range of 84 to 105 months. He argued that the Court should consider his lengthy mandatory/minimum sentence and impose only a 1 day sentence for the predicate offenses. The Court in that case agreed that a 30 year sentence plus 1 day was a more than sufficient sentence. However, the Court felt constrained by the language of § 924(c) to impose the 84 to 105 month predicate sentence to be followed by a consecutive 30 year sentence. The Supreme Court held that nothing in § 924(c) restricts the authority conferred on sentencing courts by § 3553(a) and the related provisions to consider a sentence imposed under § 924(c) when calculating a just sentence for the predicate count. (*Dean v. United States*, 581 U.S. ___, 6 (2017)

In the instant case, the Fourth Circuit concluded that *Dean* does not impact Petitioner's case as the District Court recognized its discretion to vary downward from Petitioner's Sentencing Guideline range pursuant to the § 3553(a) factors. *See Dean*, 137 S. Ct. at 1176-77. However, the Fourth Circuit failed to consider the effect *Dean* might have had on the District Court had counsel for Petitioner been able to articulate his request for relief in light of the new precedent.

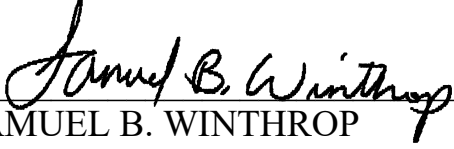
This Court has clearly held in *Griffith v. Kentucky*, 479 U.S. 314, 322 (1987), that new rules must be applied to “cases pending on direct review because failing to do so would violate basic norms of constitutional law adjudication.” See *Johnson v. Ponton*, 780 F.3d 219, 233 note 3 (4th Cir. 2014).

The 24 months on each of Counts 1 and 2 to run concurrent and the term of 60 months consecutive on Count 3 for a total of 84 months and a term of 3 years of supervised release imposed by the District Court and affirmed by the Fourth Circuit Court of Appeals should be reversed based on the holding in *Dean v. U.S.*. This case should be remanded to the District Court for re-sentencing.

CONCLUSION

For the foregoing reasons, Petitioner respectfully submits that the United States Supreme Court should grant the Petition For Writ of Certiorari.

RESPECTFULLY SUBMITTED,



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APPENDIX

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-4127

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

SULIMAN MALIK EL-AMIN,

Defendant - Appellant.

Appeal from the United States District Court for the Western District of North Carolina,
at Charlotte. Robert J. Conrad, Jr., District Judge. (3:16-cr-00222-RJC-DSC-1)

Submitted: September 28, 2017

Decided: October 18, 2017

Before GREGORY, Chief Judge, and SHEDD and DIAZ, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Samuel B. Winthrop, WINTHROP & WINTHROP, Statesville, North Carolina, for
Appellant. Amy Elizabeth Ray, Assistant United States Attorney, Asheville, North
Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

APPENDIX A

PER CURIAM:

Suliman Malik El-Amin pled guilty pursuant to a written plea agreement to possession of methamphetamine with intent to distribute in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(C) (2012), possession of a firearm by a felon in violation of 18 U.S.C. § 922(g)(1) (2012), and possession of a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1)(A)(i) (2012). The district court sentenced El-Amin to 84 months' imprisonment. On appeal, counsel has filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), stating that there are no meritorious grounds for appeal but questioning whether the district court imposed a substantively unreasonable sentence. Counsel also questions whether the court imposed an unreasonable sentence in light of the Supreme Court's recent decision in *Dean v. United States*, 137 S. Ct. 1170 (2017). El-Amin has filed a pro se supplemental brief arguing that he should be resentenced in light of *Dean*. We affirm.

This court reviews a defendant's sentence "under a deferential abuse-of-discretion standard." *Gall v. United States*, 552 U.S. 38, 41 (2007). Under this standard, a sentence is reviewed for both procedural and substantive reasonableness. *Id.* at 51. In determining procedural reasonableness, we consider whether the district court properly calculated the defendant's advisory Guidelines range, gave the parties an opportunity to argue for an appropriate sentence, considered the 18 U.S.C. § 3553(a) (2012) factors, and sufficiently explained the selected sentence. *Id.* at 49-51. If a sentence is free of "significant procedural error," we then review it for substantive reasonableness, "tak[ing] into account the totality of the circumstances." *Id.* at 51. "Any sentence that is within or

below a properly calculated Guidelines range is presumptively reasonable.” *United States v. Louthian*, 756 F.3d 295, 306 (4th Cir. 2014). “Such a presumption can only be rebutted by showing that the sentence is unreasonable when measured against the 18 U.S.C. § 3553(a) factors.” *Id.*

Upon review, we find that El-Amin’s sentence is both procedurally and substantively reasonable. The district court properly calculated the applicable Sentencing Guidelines range and appropriately explained the selected below-Guidelines sentence in the context of the relevant § 3553(a) factors. Further, the court offered ample reasons for rejecting counsel’s request for a downward variance. Accordingly, we find that El-Amin has failed to rebut the presumption of reasonableness accorded his below-Guidelines sentence. Finally, we conclude that *Dean* does not impact El-Amin’s case, as the district court recognized its discretion to vary downward from El-Amin’s Sentencing Guidelines range pursuant to the § 3553(a) factors. *See Dean*, 137 S. Ct. at 1176-77.

In accordance with *Anders*, we have reviewed the entire record in this case and have found no meritorious issues for review. We therefore affirm the district court’s judgment. This court requires that counsel inform El-Amin, in writing, of the right to petition the Supreme Court of the United States for further review. If El-Amin requests that a petition be filed, but counsel believes that such a petition would be frivolous, then counsel may move in this court for leave to withdraw from representation. Counsel’s motion must state that a copy thereof was served on El-Amin.

We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED