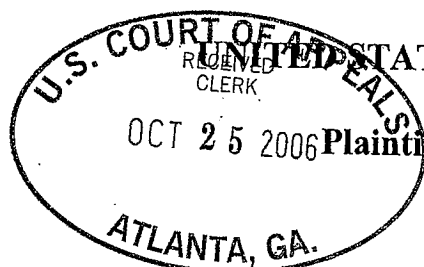


CASE NUMBER 06-12537-EE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT



UNITED STATES OF AMERICA,
Plaintiff-Appellant

v.

PATRICK LETT,

Defendant-Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA

AMICUS BRIEF OF
DOUGLAS A. BERMAN, WILLIAM B. SAXBE,
DESIGNATED PROFESSOR OF LAW,
MORITZ COLLEGE OF LAW AT THE OHIO STATE UNIVERSITY,
SUPPORTING PATRICK LETT, DEFENDANT-APPELLEE
AND THE AFFIRMANCE OF THE DISTRICT COURT'S
SENTENCING OF PATRICK LETT

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STATEMENT OF KEY FACTS

Patrick Lett, a Sergeant in the U.S. Army, is a 17-year military veteran who has served two tours of duty in Iraq. Following his second tour of duty, Lett initially chose to leave the military due to the stress and trauma of serving in combat, where he witnessed numerous close friends and fellow soldiers severely injured and killed.

Upon separating from the Army in 2003, Lett returned home to Alabama to stay with his parents and his two daughters, then aged 14 and 11. Shortly after returning home, Lett faced many personal difficulties, including the end of an engagement to his fiancé, his father's illness and death, and serious financial problems. As noted in his pre-sentence report, "after serving in Iraq, [Lett] was depressed and needed money" and "began drinking heavily." PSR at 14, 20.

Unable to find employment and with his savings running out, Lett was contacted by a cousin who agreed to pay for repairs to Lett's car if Lett would deliver packages for him. Desperate for resources, Lett helped his cousin deliver drugs in early 2004. Thereafter, once Lett realized that there was little opportunity for legitimate employment in his area, he decided to return to military service. By writing a letter to his congressman and by contacting an Army recruiter, Lett was able to reenlist in the Army in October 2004. The U.S. Army sent Lett to a duty

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) station in Ft. Polk, Louisiana.

)
)
) After another year of honorable service in the U.S. Army, Lett returned to
)
) Alabama in October 2005 upon being informed that his mother had been arrested.
)
) Upon his return, Lett was also arrested on drug charges; the cousin who had lured
)
) Lett into delivering drugs had given police names of numerous “accomplices” in
)
) an attempt to curry favor and secure lenient treatment. Though all charges were
)
) eventually dropped against his mother, Lett and fourteen co-defendants were
)
) charged in a multi-count indictment alleging various drug offenses.

)
) Lett quickly pleaded guilty to cocaine distribution charges in January 2006.
)
) In the factual resume submitted to the district court in support of his guilty plea,
)
) Lett admitted that between February 24, 2004, and April 1, 2004, he sold small
)
) quantities of crack cocaine to an undercover law enforcement officer. Lett and the
)
) United States agreed that he was responsible for a total of 60.42 grams of crack
)
) cocaine (just over two ounces).

)
) At sentencing, U.S. District Judge William H. Judge Steele heard evidence
)
) Lett’s very limited involvement in drug distribution and about his extraordinary
)
) military service and personal history. Three persons that served with Lett in the
)
) U.S. Army, Lett’s Commander and two Sergeants, testified as character witnesses.
)
) After hearing their testimony and Lett’s own expression of deep remorse, Judge
)
) Steele noted that he was facing “a very unusual set of circumstances” because

Lett's "contributions to the Army and to the military and, in turn, to this country have been substantial not only in terms of serving in time of war but serving in times of peace and serving, serving well." Doc. 419 at 19. Judge Steele indicated that Lett was "an extremely valuable asset to the United States Army, an outstanding NCO, a model soldier, a role model with excellent work ethic, a dynamic, innovative leader, a shining example for his peers and subordinates." Doc. 419 at 19-20.

Based on these and other findings, Judge Steele, mindful of the instructions in 18 U.S.C. § 3553(a) and the Supreme Court's ruling in *Booker*, concluded that a sentence below the calculated guideline range was appropriate. But, mistakenly thinking that a mandatory minimum sentencing term was applicable, Judge Steele initially believed that his "discretion [was] limited to the mandatory minimum in this case" and he imposed a sentence of 60 months in prison (the minimum penalty under 21 U.S.C. § 841(b)(1)(B)).

On April 17, 2006, Matthew Sinor, a law student who had served with Lett in the Army and was present at his sentencing, sent a letter by facsimile to Judge Steele's chambers and also to counsel for Lett and for the United States. Sinor inquired why Judge Steele could not have given a lower sentence given that Lett met the terms of the "safety valve" statute, 18 U.S.C. § 3553(f), which permits a judge to impose a sentence below any otherwise applicable statutory minimum.

Alerted to his error, Judge Steele amended the sentencing judgment by written order. Doc. 384. In a detailed opinion, Judge Steele explained his error concerning the application of a mandatory minimum term and announced that “Defendant Lett is entitled to be re-sentenced.” *Id.* at 5. Based on the evidence received at the prior sentencing hearing, Judge Steele concluded that Lett’s “limited role in the offense,” his “lack of criminal history” and his “unblemished and significant 17 year career in the U.S. Army including two tours of duty in Iraq” justified a sentence of imprisonment to time served and three years of supervised release. *Id.* at 5. Judge Steele, focusing on the sentencing mandates of the Sentencing Reform Act, concluded:

The Court finds that the sentence imposed addresses the seriousness of the offense, [the] sentencing objectives of punishment, deterrent, and incapacitation, and constitutes a reasonable sentence following consideration of the sentencing factors found in 18 U.S.C. 3553(a).

Id.

SUMMARY OF THE ARGUMENT

Patrick Lett's sentence is not unreasonable. The government bears the burden of proving that the sentence is unreasonable in light of the record and the factors set forth by Congress in 18 U.S.C. § 3553(a). *See United States v. Talley*, 431 F.3d 784, 788 (11th Cir. 2005). The government cannot meet this burden because the district court's findings and all of the factors in § 3553(a) support the sentence imposed by Judge Steele on Patrick Lett.

In seeking to show that Judge Steele's sentencing determination is unreasonable, the government does little more than stress the calculated Guideline range and other facets of the (now advisory) Guidelines. But, as this Court explained in *United States v. Hunt*, 459 F.3d 1180 (11th Cir. 2006), there are "many instances where the Guidelines range will not yield a reasonable sentence." *Id.* at 1184. Judge Steele recognized that Lett's case is one of the "many instances" in which the Guidelines do not fully capture the unique "nature and circumstances of the offense and the history and characteristics of the defendant." 18 U.S.C. § 3553(a). Judge Steele made extensive findings concerning Lett's extraordinary circumstances and military service, thoughtfully considered all the provisions of § 3553(a), weighed the factors appropriately, and imposed a reasonable sentence that was "sufficient, but not greater than necessary" to achieve the purposes of sentencing. *See* 18 U.S.C. § 3553(a).

ARGUMENT AND CITATIONS OF AUTHORITY

I. Patrick Lett's Sentence Is a Reasonable Sentence for a Non-Violent First Offense Committed by a Veteran with a Long and Distinguished Military Career and an Extraordinary Personal History.

U.S. Department of Justice officials have repeatedly stressed to Congress and the public that the toughest federal sentences are to be directed principally toward violent and repeat offenders.¹ Attorney General Alberto Gonzales during his confirmation hearings last year stressed that prison is best suited “for people who commit violent crimes and are career criminals.”² Gonzales also asserted that a focus on rehabilitation for “first-time, maybe sometimes second-time offenders ... is not only smart, ... it’s the right thing to do;” in his words, “it is part of a

¹*See, e.g.*, Testimony of Principal Deputy Attorney General William Mercer to Subcommittee on Crime, Terrorism, and Homeland Security of the Committee on the Judiciary, United States House of Representatives, at 14 (March 16, 2006) (explaining that tough federal sentences are properly not focused on “non-violent first-offenders”); Testimony of Assistant Attorney General Christopher Wray to Subcommittee on Crime, Terrorism, and Homeland Security of the Committee on the Judiciary, United States House of Representatives, at 8-9 (Feb. 10, 2005) (stressing that most federal prisoners “are in prison for violent crimes or had a prior criminal record before being incarcerated”); Letter to the Editor from Dan Bryant, Assistant Attorney General, WASH. POST, Dec. 24, 2005, at A25 (asserting that “[t]ough sentencing makes Americans safer by locking up repeat and violent offenders”).

²Transcript of the Senate Judiciary Committee’s hearings on the nomination of Alberto R. Gonzales to be attorney general, as transcribed by Federal News Service, *accessed at* <http://www.nytimes.com/2005/01/06/politics/06TEXT-GONZALES.html?ex=1108443600&en=015b93569fa7d7d0&ei=5070&pagewanted=print&position>.

compassionate society to give someone another chance.”³ Similarly, President George W. Bush in his 2004 State of the Union Address spoke passionately about the importance of showing compassion (and providing job training and placement services) to convicted offenders because “America is the land of second chance.”⁴

Judge Steele, in accord with these sentiments expressed by President Bush, Attorney General Gonzales, and Justice Department officials, obviously concluded that Patrick Lett deserved a second chance and that his non-violent first offense did not merit a long term of imprisonment. Given Lett’s 17 years of honorable service to this country, which has included two life-threatening tours of duty on the Iraqi battlefields, it is hard to imagine an American more deserving of a second chance. Judge Steele’s sentencing decision in this case was both well-reasoned and reasonable. The only arguably unreasonable aspects of this case are those of the government, which initially failed to correct Judge Steele’s mistaken belief about the applicability of a mandatory minimum sentencing term and now asserts that an extended term of incarceration is needed in this extraordinary case.

A decade ago, the Supreme Court stressed that “[i]t has been uniform and

³*Id.*

⁴Transcript of 2004 State of the Union Address by President George W. Bush (Jan. 20, 2004), available at <http://www.whitehouse.gov/news/releases/2004/01/20040120-7.html>.

the district court committed a clear error of judgment in weighing the § 3553(a) factors.” *United States v. Williams*, 456 F.3d 1353, (11th Cir. 2006); *see also Talley*, 431 F.3d at 788 (“When we review a sentence for reasonableness, we do not, as the district court did, determine the exact sentence to be imposed. Our review is not *de novo*. A district court may impose a sentence that is either more severe or lenient than the sentence we would have imposed.”). Based on the unique and extraordinary factual record in this case, there is no basis for concluding that Judge Steele committed a “clear error in judgment” when deciding upon Lett’s sentence. To the contrary, Judge Steele’s sentence for Patrick Lett reflects wise discretionary judgment exercised by a thoughtful and conscientious district judge. Indeed, on this factual record, a declaration that Lett’s sentence is unreasonable would send a chilling message that, even after *Booker*, a federal district court’s impartial and reasoned sentencing judgment takes a back seat to the partisan sentencing arguments of federal prosecutors.

II. All the Factors Congress Set Forth in § 3553(a) Support Judge Steele’s Sentence.

The *Booker* remedial opinion explains that, with the Guidelines now “effectively advisory,” federal judges are required “to take account of the Guidelines together with other sentencing goals” set forth in 18 U.S.C. § 3553(a). *Booker*, 543 U.S. at 259. The central directive of § 3553(a) commands federal

the Guidelines because what constitutes “a reasonable sentence necessarily must be a case-by-case determination.” *Id.* at 1184. The sentencing instructions in § 3553(a) provide no textual basis for elevating the Guidelines well above all other relevant sentencing considerations; as *Hunt* explains, district and circuit courts must now orient their sentencing work around the text and principles set forth by Congress in § 3553(a) and by the Supreme Court in *Booker*.

In his sentencing decision in this unique case with its extraordinary facts, Judge Steele properly focused on all the provisions of § 3553(a) and properly resisted the government’s claims that the calculated Guidelines range fulfilled all the applicable purposes set forth in the Sentencing Reform Act. Judging Patrick Lett as an individual, Judge Steele provided a thoughtful and reasoned explanation based in the provisions of § 3553(a) for the sentence he selected. Indeed, given Lett’s extraordinary “history and characteristics” and the “nature and circumstances” of the offense (into which Lett was lured at a time of extreme vulnerability and from which he extricate himself before he knew any investigation had begun), this is a case in which perhaps only a non-guideline sentence would have been reasonable in light of the commands of § 3553(a). *Cf. Hunt*, 459 F.3d at 1184 (explaining that there are “many instances where the Guidelines range will not yield a reasonable sentence.”)

Significantly, Judge Steele at the initial sentencing, in accord with the

Critically, this Court need not figure out whether a traditional Guideline departure would have been appropriate on these facts: after *Booker*, courts must consider the Guidelines along with all the other § 3553(a) factors and decide, on a case-by-case basis, how much weight to give the Guidelines and to the other § 3553(a) factors in the course of imposing a sentence “sufficient, but not greater than necessary” to achieve the purposes of sentencing. *See Hunt*, 459 F.3d at 1184. By not giving excessive weight to the Guidelines — especially in this unique case with its extraordinary facts — Judge Steele properly followed all the provisions of § 3553(a) and all the instructions of this Court after *Booker*. The court used the Guidelines range as a starting point and then determined that other § 3553(a) factors, including the exceptional facets of Lett’s history and characteristics and the circumstances of the offense, called for a sentence below the Guidelines. In light of all the provisions of § 3553(a), Judge Steele’s sentencing decision was not unreasonable.

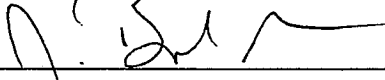
Simmons, 368 F.3d 1335, 1342-1343 (11th Cir. 2004) (affirming a sentencing 100 months above the applicable range based on a ground other than those set forth by the district court). At the very least, if this Court does not affirm Lett’s sentence, it must provide for a that would allow Lett to develop traditional Guideline departures arguments below.

CERTIFICATE OF SERVICE

I hereby certify that on this day I have served the following by first class
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