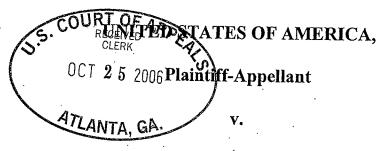
IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT



PATRICK LETT,

Defendant-Appellee

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

AMICUS BRIEF OF
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SUPPORTING PATRICK LETT, DEFENDANT-APPELLEE
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SENTENCING OF PATRICK LETT

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STATEMENT REGARDING AMICUS AND ORAL ARGUMENT

The Amicus is Douglas A. Berman, William B. Saxbe Designated Professor of Law, Moritz College of Law at The Ohio State University. Professor Berman supports Patrick Lett, Defendant-Appellee and the Affirmance of Mr. Lett's Sentence by the District Court. Professor Berman closely follows the development of state and federal sentencing law and has been especially concerned with the developments of sentencing jurisprudence in the federal courts throughout his academic career. In addition, Professor Berman became indirectly involved in this case through the work of one of his students, Matt Sinor.

The Amicus requests participation in oral argument and suggests that oral argument would aid the Court in resolving the Issues raised in this appeal.

The Amicus received consent for the filing of this brief from Kristen Gartman Rogers, counsel for the Defendant-Appellee, and Andrew Sigler, counsel for Plaintiff-Appellant, prior to filing.

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STATEMENT OF THE ISSUE

Should this Circuit declare Patrick Lett's sentence unreasonable?

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

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." 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

¹See, 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." 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."

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.

constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometime magnify, the crime and the punishment to ensue." Koon v. United States, 518 U.S. 81 (1996). The Koon Court was stressing the breadth of and need for district court departure authority even when the Guidelines were mandatory, and arguably Judge Steele's sentence in this case would have been justified before the Supreme Court in *United States v. Booker*, 543 U.S. 220 (2005), made the Guidelines "effectively advisory." See infra p. 14. But, especially in light of *Booker* and the provisions of 18 U.S.C. § 3553(a) that now govern federal sentencing, the soundness of Judge Steele's sentencing decision should be clear. As the Supreme Court counseled in Koon, Judge Steele carefully considered Patrick Lett as an individual and judged this case as a "unique study" in Lett's one "human failing" in an otherwise exemplary life. The government's arguments on appeal, distilled to their essence, are an effort to rebuke Judge Steele for viewing and judging Patrick Lett as a unique individual rather than as a number on a guideline matrix. Even before Booker, the government's basic approach to this case would be misguided; after Booker, it is arguably unconstitutional.

This Court has stressed that reasonableness review is deferential, and that it will not reverse a sentence unless left with "the definite and firm conviction that

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

judges to "impose a sentence sufficient, but not greater than necessary, to comply with the [traditional] purposes" of punishment and to consider "the nature and circumstances of the offense and the history and characteristics of the defendant." 18 U.S.C. § 3553(a). *Booker* further explains that the "numerous factors that guide sentencing" in § 3553(a) should "guide appellate courts . . . in determining whether a sentence is unreasonable." *Booker*, 543 U.S. at 261.

Before *Booker*, the federal sentencing system was "guideline-centric" — *i.e.*, guideline calculations and interpretation were the centerpiece of federal sentencing decision-making for both district and circuit judges. After *Booker*, the system no longer can be guideline-centric because (1) the pre-*Booker* guideline-centric sentencing system, according to the Supreme Court, violated defendants' Sixth Amendment rights, and because (2) the pre-*Booker* guideline-centric sentencing system, according to the U.S. Sentencing Commission and nearly all observers, failed to effectuate all the goals of § 3553(a). Given that the pre-*Booker* sentencing system was both constitutionally and statutorily suspect, courts must resist any post-*Booker* sentencing doctrines or rulings that may directly or indirectly recreate a guideline-centric federal sentencing system.

This Court recognized and further clarified these realities in *United States v.*Hunt, 459 F.3d 1180 (11th Cir. 2006). In Hunt, this Court stressed that neither the district court, nor this Court judging reasonableness, should defer excessively to

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

directives of 18 U.S.C. § 3553(a)(1) and (a)(6), compared Lett to the usual criminal defendant he sees and noted that Lett's case presented a "very unusual set of circumstances." Doc. 419 at 19. Judge Steele also expressly consider all the other factors set forth in 18 U.S.C. § 3553(a) by reviewing Lett's exemplary military service, by discussing the letters written to the court on Lett's behalf, and by comparing Lett's criminal conduct to the rest of his life. Doc. 419 at 19-20. When amending the sentence, Judge Steele made additional findings to support his sentencing decisions, noting (i) Lett's "limited role in the offense which, for his part, extended over a period of little more than a month," (ii) Lett's "voluntary withdrawal from that criminal enterprise followed by his re-enlistment in the U.S. Army where he remained on active duty until the time of his arrest on the present charges," (iii) Lett's "lack of criminal history," and (iv) Lett's "unblemished and significant 17 year career in the U.S. Army including two tours of duty in Iraq." Doc. 384 at 5.

The government on appeal places extraordinary emphasis on one § 3553(a) factor — the Guidelines — to support its argument that Lett's sentence is unreasonable. But, even if the Guidelines merited special attention in this case, Lett's sentence is arguably in line with the Guidelines "traditional" departure provisions and principles. The testimony of Lett's Commander and other non-commissioned officers at the sentencing hearing, the letters written to the court on

Lett's behalf, and his extraordinary and distinguished military service all dramatically document that Lett's offense was truly aberrational conduct occurring during a vulnerable period in his life. The aberrational nature of Lett's criminal behavior and his own voluntary termination of any criminal activity and return to military service — as well as his extraordinary military record and employment record (and related good works) and his compelling family circumstances — may, individually or in combination, support a "traditional" downward departure from the guidelines had the district court sought to impose a sentence within the traditional Guidelines paradigm. See U.S.S.G. § 5K2.0(c) (discussing situations in which a court "may depart from the applicable guideline range based on a combination of two or more offender characteristics or other circumstances"); see also United States v. Kim, 364 F.3d 1235, 1240 (11th Cir. 2002) (stressing that "district courts may occasionally depart on the basis of discouraged factors" and suggesting that, in extraordinary cases, a finding "sincere remorse and acceptance of responsibility" can support a traditional departure); United States v. Jones, 158 F.3d 492 (10th Cir. 1998) (approving downward departure, in part, for long-term work history); United States v. Big Crow, 898 F.2d 1326 (8th Cir. 1990) (affirming downward departure based upon excellent employment record).⁵

⁵ If concerned with Judge Steele's application of § 3553(a), this Court could and should affirm Lett's sentence based on traditional Guideline departure principles. *Cf. United States v.*

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.

CONCLUSION

For the aforementioned reasons, Lett's sentence should be affirmed.

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CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Fed. R. App. P. 32(a)(7)(B), that this brief contains fewer than 14,000 words.

J Brooke Savage

CERTIFICATE OF SERVICE

I hereby certify that on this day I have served the following by first class mail, postage prepaid:

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