15-1967

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

JANE DOE, 14 MC 1412,

Petitioner-Appellee,

—against—

UNITED STATES OF AMERICA,

Respondent-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF OF THE NEW YORK COUNCIL OF DEFENSE LAWYERS AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER-APPELLEE AND AFFIRMANCE

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STATEMENT OF INTEREST[1]

The New York Council of Defense Lawyers ("NYCDL") is a not-for-profit professional association of approximately 250 lawyers (including many former federal prosecutors) whose principal area of practice is the defense of criminal cases in New York federal courts. NYCDL's mission includes protecting the individual rights guaranteed by the Constitution, enhancing the quality of defense representation, and promoting the proper adminstration of criminal justice.

NYCDL offers the Court the perspective of experienced practitioners who regularly handle some of the most complex and significant cases in the federal courts. NYCDL has submitted *amicus* briefs in Second Circuit cases involving important criminal defense issues, including the right of the accused to the assistance of counsel, *see United States v. Stein*, 541 F.3d 130 (2d Cir. 2008), and the right of a criminal defendant, represented by counsel, to be heard on issues of juror conduct, *see United States v. Collins*, 665 F.3d 454 (2d Cir. 2012). NYCDL's *amicus* briefs have been cited by the Supreme Court in cases including *Kaley v. United States*, 134 S. Ct. 1090 (2014), *Rita v. United States*, 551 U.S. 338,

[1] Pursuant to 2d Cir. R. 29.1(b) and Fed. R. App. P. 29(c)(5), NYCDL and NACDL state that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and other than NYCDL and its members and NACDL and its members, no person contributed money that was intended to fund preparing or submitting this brief. Pursuant to Fed. R. App. P. 29(a), NYCDL and NACDL state that all parties have consented to the filing of this brief.

373 n.3 (2007) (Scalia, J., concurring), and *United States v. Booker*, 543 U.S. 220, 266 (2005), and by this Court in *United States v. Awadallah*, 436 F.3d 125, 135 & n.9 (2d Cir. 2006).

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of approximately 10,000 direct members in 28 countries, and 90 state, provincial and local affiliate organizations totaling approximately 40,000 attorneys. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL files numerous *amicus* briefs each year in the Supreme Court, the Second Circuit, and other courts, seeking to provide *amicus* assistance in cases that present issues of broad importance to criminal defendants, defense lawyers, and the criminal justice system as a whole.

SUMMARY OF ARGUMENT

Both parties agree that this Court should review the district court's order pursuant to the the well-established "abuse of discretion" standard, but the parties differ in their application of that standard. Doe's brief applies a deferential standard that is mindful of the district court's long experience with Doe and her

case. By contrast, the government's version of "abuse of discretion" review is searching and intrusive, comparing the specific facts of this case with those found in other cases; such an approach would require this Court to repeat what the district court already has done. *Compare* Govt's Brief, ECF No. 31, at 33-43, *with* Jane Doe Reply Brief, ECF No. 48, at 37-47.

We respectfully submit this *amicus curiae* brief to urge this Court to adopt the standard put forth by Doe. We believe this Court should review an order granting (or denying) expungment with great deference, recognizing that the district court is best situated to undertake the factual and context-specific determinations relevant to the issue.

In this case, the district court presided over Doe's trial, sentenced her, and oversaw her five years of supervised release. The district court had a unique opportunity to understand Doe's specific personal circumstances and was in a perfect position to consider and decide her expungement motion.

The abuse-of-discretion standard is a familiar one to appellate courts: it is applied when this Court reviews the reasonableness of a sentence, considers whether a supervised release condition is appropriate, or determines whether a revocation or early termination of supervised release is appropriate. Appellate courts apply this deferential standard in recognition that in circumstances such as this, the district court has distinctive insights that the appellate court may not have,

by virtue of the district court's proximity to the facts and the specific issues presented.

For the reasons discussed below, we urge this Court to review the district court's decision under an appropriately deferential abuse-of-discretion standard that shows due regard for the institutional competence of the district court to decide whether expungement is appropriate in a given case. Here, the application of such a standard should lead to affirmance.

THE DISTRICT COURT'S DECISION TO GRANT DOE'S MOTION FOR EXPUNGEMENT

Petitioner Jane Doe is a Haitian immigrant with limited financial resources, and the single mother of four children. She moved to expunge her health care fraud conviction thirteen years after the district court sentenced her to five years' probation, ten months of home detention, and restitution. Doe argued that her conviction had created an increasingly insurmountable barrier to obtaining employment. Although she wished to work, Doe went on and off welfare as she cycled through no less than five employers, repeatedly getting fired after those employers performed background checks and learned of her conviction. *Jane Doe v. United States*, 1:14-MC-1412 (JG), 2015 U.S. Dist. LEXIS 66672 (E.D.N.Y. May 21, 2015), at *6-11. Doe has no other criminal history, and she successfully completed the terms of her sentence. There is no question that she has served her

sentence and fulfilled all obligations imposed upon her by the criminal justice system.

The district court was well-positioned to consider Doe's application. The court explained at the outset of its order that "[i]n addition to presiding over the trial in Doe's case and her subsequent sentencing, [the court] ha[s] reviewed every page of the extensive file that was created during her five years under probation supervision." *Id.* at *2. This included information about Doe's financial circumstances and employment history. This file was more than one thousand pages long. *Id*. at *6.

Based on this thorough review, the district court ruled that Doe's case presented "extraordinary circumstances" and justified expungement. In particular, the district court found that Doe needed to work to support her children, wanted to work, detested public assistance, and already faced a number of employment barriers due to her race and age. *Id*. at *4, 11, 20. The specific circumstances of her conviction, the court explained, were unrelated to her work as a home health aide and established that she only previously engaged in fraud out of desperation to make ends meet for her family. *Id*. at *25. Doe posed no risk of financial harm to others, and granting her motion for expungement would allow her to become a contributing member of society. *Id*. at *26. Based on these well-founded reasons, the district court granted Doe's motion on equitable grounds. *Id*. at *28.

ARGUMENT

I. APPELLATE COURTS HAVE APPLIED THE ABUSE-OF-DISCRETION STANDARD OF REVIEW WHEN REVIEWING SENTENCING AND POST-SENTENCING PROCEEDINGS.

This Court applies the abuse-of-discretion standard not only when it reviews an order granting or denying a motion for expungement, but also when it reviews the reasonableness of a sentence, the imposition of a condition of supervised release, and the revocation or early termination of supervised release. There is a good reason for the application of this standard in these related contexts: unlike the appellate courts, which can only base their decisions on a cold record, the district court is in a unique position to understand and evaluate the entirety of the defendant's background and the underlying proceedings. Owing to this recognition, appellate courts regularly show deference to the rulings of district court judges concerning post-conviction constraints and conditions, declining to reverse even decisions that the appellate court might not itself have reached. We briefly consider these analogous circumstances in order to see how the abuse-of-discretion standard is typically applied.

1. *Sentencing*. In *Gall v. United States*, 552 U.S. 38 (2007), the Supreme Court held that sentences are to be reviewed for abuse of discretion. The Court explained that under this standard, appellate courts must afford "due deference" to a district court's decision in this area.

Justice Stevens identified the "[p]ractical considerations" that supported this deferential standard:

> The sentencing judge is in a superior position to find facts and judge their import . . . sees and hears the evidence, makes credibility determinations, has full knowledge of the facts and gains insights not conveyed by the record. . . . The sentencing judge has access to, and greater familiarity with, the individual defendant before him than the . . . appeals court.

Gall, 552 U.S. at 51-52 (internal quotations and citations omitted). The Court further explained that district courts "have an institutional advantage over appellate courts in making these sorts of determinations," as they impose sentences much more frequently than appellate courts. *Id*. at 52 (citing *Koon v. United States*, 518 U.S. 81, 98 (1996)).

Given the institutional competence of the district court in this context, the Court explained that an appellate court must provide "requisite deference" to a district court's determination of sentence. *Id*. An appellate court should not reverse a district court's sentence simply because it may disagree with the court's conclusion. *Id*. at 59 ("[I]t is not for the Court of Appeals to decide *de novo* whether the justification for a variance is sufficient or the sentence reasonable.").

2. *Imposition of conditions of supervised release.* Everything that a district court has done leading up to the imposition of supervised release conditions gives it special insight into the proper selection of those conditions: an initial

assessment of pretrial release conditions, monitoring of compliance with those conditions throughout the pre-sentencing period, a guilty plea or trial in which the district court learns about the defendant's offense and personal characteristics, and the fact-intensive, individualized process of selecting a fair and reasonable sentence. For this reason, a highly deferential abuse-of-discretion standard is applied to the review of a district court's imposition of a condition of supervised release. *See, e.g., United States v. Chaklader*, 232 F.3d 343, 348 (2d Cir. 2000) (explaining that the district court has "wide discretion" to fashion conditions of supervised release under the abuse of discretion standard); *United States v. Ismail*, 219 F.3d 76, 78 (2d Cir. 2000) (describing this standard of review as "extremely deferential"); *accord United States v. Stults*, 575 F.3d 834, 850 (8th Cir. 2009) (same); *see also United States v. Watson*, 582 F.3d 974, 981 (9th Cir. 2009) ("In applying this standard of review, we give considerable deference to a district court's determination of the appropriate supervised release conditions, recognizing that a district court has at its disposal all of the evidence, its own impressions of a defendant, and wide latitude.") (quoting reference omitted). Appellate courts therefore avoid undertaking a merits-based examination of the district court's supervised release conditions. *See Chaklader*, 232 F.3d at 348 (concluding that the district court "was well within its wide discretion" to impose drug and alcohol

treatment as part of supervised release even though evidence did not show defendant currently had substance abuse issues).

3. *Revocation proceedings.* The revocation of supervised release is another decision that requires the district court to weigh competing considerations: protection of the public, avoidance of recidivism, and the broader objectives of re-entry. The district court, which has been observing the defendant since the start, remains well-positioned to assess the best way to balance these objectives when deciding whether to revoke a term of supervised release and, if so, what punishment to impose as a result of the revocation. Here too, this Court has determined that a district court's revocation of supervised release is reviewed deferentially, for abuse of discretion. *See United States v. Wiltshire*, 772 F.3d 976, 979 (2d Cir. 2014). Other circuits have reached the same result. *See, e.g., United States v. Metzener*, 584 F.3d 928, 933 (10th Cir. 2009) ("A court abuses its discretion only when it makes a clear error of judgment, exceeds the bounds of permissible choice, or when its decision is arbitrary, capricious or whimsical, or results in a manifestly unreasonable judgment.") (quoting reference omitted); *United States v. Black Bear*, 542 F.3d 249, 252 (8th Cir. 2008); *see also United States v. Padgett*, 788 F.3d 370, 373 (4th Cir. 2015). Appellate courts have acknowledged that this deferential review prohibits them from meddling in the district court's decision; instead, "whether the district court's interpretation [that

revocation of supervised release] was reasonable is the sole question, even if we might interpret . . . differently." *Metzener*, 584 F.3d at 934; *see also id.* at 933 (citing *Gall* to add that the district court's interpretation of whether revocation was warranted "needs to be reasonable, but it does not need to be the only reasonable, or even the most reasonable, interpretation").

4. *Early termination of supervised release.* This Court and other appellate courts have likewise held that motions for early termination of supervised release are reviewed for abuse of discretion. *See United States v. Gammarano*, 321 F.3d 311, 314 (2d Cir. 2003) (reviewing denial of request for early termination for abuse of discretion); *see also United States v. Lowe*, 632 F.3d 996, 997 (7th Cir. 2011) (reviewing for abuse of discretion, which "occurs when the district court commits a serious error of judgment, such as the failure to consider an essential factor"). Similar to the Supreme Court's description of this standard in *Gall*, the D.C. Circuit has held that review for abuse of discretion does not permit the appellate court to substitute its judgment for that of the trial court. *See United States v. Mathis-Gardner*, 783 F.3d 1286, 1288 (D.C. Cir. 2015). While the appellate court should not function as a rubber stamp, neither can it "decide the issue by determining whether we would have reached the same conclusion." *Id.* In *Mathis-Gardner*, the appellate court found such an abuse of discretion, but only because the district court's reasoning was impossible to discern from the record.

Cf. Gammarano, 321 F.3d at 315 (holding that the district court must consider the statutory factors in exercising its discretion).

5. *Expungement orders*. As the parties both appear to agree, abuse of discretion is the proper standard of review here. This Court emphasized nearly 40 years ago that it deferentially reviews a district court's expungement ruling, a decision that "lies within the equitable discretion of the court[.]" *United States v. Schnitzer*, 567 F.2d 536, 539-40 (2d Cir. 1977) (explaining that "[a]ny particular request for expungement must be examined individually on its merits to determine the proper balancing of equities"). Since *Schnitzer*, other circuits have also reviewed expungement orders with great deference under an abuse of discretion standard. *See, e.g., Allen v. Webster*, 742 F.2d 153, 154-55 (4th Cir. 1984) (citing *Schnitzer's* characterization of expungement remedy to explain that an appellate court should review expungement rulings for abuse of discretion); *United States v. Int'l Harvester Co.*, 720 F.2d 418, 419 (5th Cir. 1983) ("We review decisions on requests to expunge by an abuse of discretion standard granting a range of latitude to the district court. That deference is warranted by its greater familiarity with the local scene and the actuality of local public events."). In practice, the *Schnitzer* court affirmed the district court's expungement decision, thus finding the district court had not abused its discretion, without engaging in a point-by-point examination of the record. *Schnitzer*, 567 F.2d at 540.

II. THIS COURT SHOULD APPLY THE ABUSE OF DISCRETION STANDARD HERE WITH APPROPRIATE DEFERENCE.

Just like in the contexts discussed above, the district court was in the best position to determine whether expungement of Doe's conviction was appropriate. The district court presided over Doe's trial, sentencing, and supervised release. When Doe filed her motion for expungement, the district court evaluated her individual circumstances, drawing on its unique perspective as to whether those circumstances merited expungement. The district court recognized that expungement is a form of relief that is infrequently granted, but determined that it was appropriate here given the particulars of Doe's case.

Like a sentencing determination, this was an individualized decision about a particular human being that requires deference on appeal. *See Gall,* 552 U.S. at 52 ("It has been uniform and 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, sometimes magnify, the crime and the punishment to ensue.") (quoting *Koon*, 518 U.S. at 113). When a court decides an expungement motion after an intensive individualized inquiry like that undertaken by the district court here, this Court should review that decision deferentially, regardless of the outcome. To do otherwise—as the government would have it—would require the Court to do precisely what the Supreme Court in *Gall* rejected as a false application of the

abuse-of-discretion standard. *Id*. at 56 ("Although the Court of Appeals correctly stated that the appropriate standard of review was abuse of discretion, it engaged in an analysis that more closely resembled *de novo* review of the facts presented[.]").[2]

The government argued below that the facts were "not sufficiently extreme" to support expungement. It largely repeats the same argument on appeal. This Court may or may not be inclined to agree with the district court's conclusion, but the nature of an abuse-of-discretion standard demands that it is not sufficient for this Court to conclude that it would have decided the matter differently had it heard the case in the district court. On the contrary, the abuse-of-discretion standard alone—even without regard to the underlying merits—counsels for affirmance here. As discussed above and more fully in Doe's brief on appeal, the district court did not grant this motion lightly, based on caprice or whim. The district court's 16-page memorandum and order goes into great detail regarding the rationale for the court's decision. That order reflects the great care taken by the

[2] We note that the standard urged in this brief is not one that is tilted in favor of either the government or the defense as a general matter. In our experience, far more motions to expunge are denied than are granted, and this standard will thus serve to insulate from reversal some denials of expungement motions that arguably might have been granted if the record were reviewed *de novo*. *See, e.g.,* motions denied in *Stephenson v. United States*, No. 10-MC-712 (RJD), 2015 U.S. Dist. LEXIS 137740 (E.D.N.Y. Oct. 8, 2015); *United States v. Gomelskaya*, Nos. 10-CR-460, 14-MC-1170 (SJ), 2015 U.S. Dist. LEXIS 109653 (E.D.N.Y. Aug. 19, 2015); *United States v. Schonsky*, No. 05-CR-332 (JG), 2015 U.S. Dist. LEXIS 66656 (E.D.N.Y. May 21, 2015). But the standard is nonetheless the correct one here because, as explained, it shows appropriate deference to the district court's superior understanding of the facts and circumstances of a given case.

district court to assess the relevant facts and to consider those facts in the broader social context. The district court proceeded with the understanding that expungement should be granted only in "extreme circumstances," and that it required a balancing of the relevant interests. *Jane Doe*, 2015 U.S. Dist. LEXIS 66672, at *16. Based on this careful analysis, the district court concluded that "there is something random and senseless about the suggestion that Doe's ancient and minor offense should disqualify her from work as a home health aide." *Id*. at *26.

Thus, even if this Court concludes that it would have denied Doe's motion, it should not disturb the district court's decision unless, after applying appropriate deference to the district court's decision, it finds that the district court abused its authority to expunge Doe's record. We respectfully submit that no such abuse of power occurred here, and that this Court should therefore affirm.

CONCLUSION

For the reasons stated above, the decision of the district court should be affirmed.

Dated: December 23, 2015
New York, New York

Respectfully submitted,

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/s/ Harry Sandick

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CERTIFICATE OF COMPLIANCE

I, Harry Sandick, hereby certify that:

1. I am a member of the bar of this court;
2. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), as modified for amici by Fed. R. App. P. 29(d), because this brief contains 3333 words, excluding the parts of this brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii);
3. The brief complies with the typeface limitation of Fed. R. App. P. 32(a)(5) and the style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word for Windows in 14-point Times New Roman font.

Dated: December 23, 2015
New York, New York

/s/ Harry Sandick
Harry Sandick