

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

GARY DON BOYD GRAVES,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

Petition for Writ of Certiorari
to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

CHRISTOPHER A. CURTIS
Counsel of Record
FEDERAL PUBLIC DEFENDER'S OFFICE
NORTHERN DISTRICT OF TEXAS
819 TAYLOR STREET, ROOM 9A10
FORT WORTH, TEXAS 76102
(817) 978-2753

QUESTIONS PRESENTED

- I. Whether district courts can consider future earning capacity in determining whether a person is “non-indigent” for the purposes of assessing the \$5000 mandatory special assessment set forth in 18 U.S.C. § 3014(a)(3)?

PARTIES

Gary Don Boyd Graves is the petitioner; he was the defendant-appellant below. The United States of America is the respondent; it was the plaintiff-appellee below.

TABLE OF CONTENTS

Question Presented.....	ii
Parties.	iii
Table of Contents.	iv
Index to Appendices.	v
Table of Authorities.	vi
Opinions Below.	1
Jurisdictional Statement.....	1
Constitutional and Statutory Provisions Involved.	1
Statement of the Case.....	2
Reasons for Granting the Writ..	4
I. This Court should grant review to determine whether district courts can consider future earning capacity in determining whether a person is “non-indigent” for the purposes of assessing the \$5000 mandatory special assessment set forth in 18 U.S.C. § 3014(a)(3).	4
Conclusion..	8

INDEX TO APPENDICES

Appendix A Published Opinion of the Fifth Circuit affirming the sentence

Appendix B Judgment and Sentence of the United States District Court
for the Northern District of Texas

TABLE OF AUTHORITIES

	<u>Page No.</u>
FEDERAL CASES	
Duncan v. Walker, 533 U.S. 167 (2001)	5, 8
United States v. Altamirano, 11 F.3d 52 (5th Cir. 1993)	5
United States v. Fair, 979 F.2d 1037 (5th Cir. 1992)	7
United States v. Graves, 908 F.3d 137 (5th Cir. 2018)	1, 3, 4, 8
Unitd States v. Hodges, 110 F.3d 250 (5th Cir. 1997)	5, 7
United States v. Janatsch, 722 F. App'x 811 (?YEAR?)	5, 8
United States v. Kelley, 861 F.3d 790 (8th Cir. 2017)	4, 8
United States v. Strange, 692 F. App'x 346 (9th Cir. 2017).	5, 8
Williams v. Taylor, 529 U.S. 420 (2000)	5, 8

FEDERAL STATUTES

18 U.S.C. § 2252A	4
18 U.S.C. § 2252A(a)(5)(B), (b)(2)	2
18 U.S.C. § 3014	1, 4, 5
18 U.S.C. § 3014(a)(3)	4
28 U.S.C. § 1254(1)	1
28 U.S.C. § 2244(d)(2)	5

FEDERAL RULES

Sup. Ct. R. 13.1	1
----------------------------	---

PETITION FOR A WRIT OF CERTIORARI

Petitioner Gary Don Boyd Graves respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The published opinion of the United States Court of Appeals for the Fifth Circuit affirming the sentence can be found at *United States v. Graves*, 908 F.3d 137 (5th Cir. 2018), and is provided in the Appendix to the Petition. [Appx. A]. The district court entered its judgment on October 10, 2017, which judgment is attached as an Appendix. [Appx. B].

JURISDICTIONAL STATEMENT

The instant Petition is filed within 90 days of an opinion affirming the judgment, which was entered on November 8, 2018. *See* SUP. CT. R. 13.1. This Court's jurisdiction to grant *certiorari* is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, RULES, AND STATUTES INVOLVED

Title 18 U.S.C. § 3014 provides for the following special assessment:

§ 3014. Additional special assessment

(a) In general. – Beginning on the date of the enactment of the Justice for Victims of Trafficking Act of 2015 and ending on September 30, 2019, in addition to the assessment imposed under section 3013, the court shall assess an amount of \$5,000 on any non-indigent person or entity convicted of an offense under –

(3) chapter 110 (relating to sexual exploitation and other abuse of children);

STATEMENT OF THE CASE

The Appellant, Gary Don Boyd Graves (Graves) was indicted on June 14, 2017 for one count of possession of prepubescent child pornography, in violation of 18 U.S.C. §§ 2252A(a)(5)(B) and (b)(2). (RAO.10).¹ On June 16, 2017, the United States Magistrate Judge entered an order finding, “that the Defendant is financially unable to obtain counsel,” and appointing the Federal Public Defender. (ROA.18). Graves was released on conditions of pre-trial release on June 28, 2017. (ROA.50-56).

On August 3, 2017, Graves entered a guilty plea to the one-count Indictment, pursuant to a written plea agreement. (ROA.62-66;125). As a part of the plea agreement, Graves signed a written factual resume in which he stipulated to possessing a cellular phone that contained at least one image of prepubescent child pornography that was produced using materials that had been mailed, shipped and transported in interstate commerce. (ROA.59-61). As a part of the plea agreement, Mr. Graves waived his right to appeal with certain exceptions, including a sentence that exceeded the statutory maximum. (ROA.130). At the conclusion of the guilty plea hearing, Mr. Graves was released on his conditions of pretrial release. (ROA.114).

A pre-sentence report (PSR) was prepared by the probation office and the PSR reflected that, based on Graves’ financial affidavit, he had no substantial assets, and at the time before he was placed in custody, only had a positive cash flow of \$50.00. (ROA.151-152).

Graves filed objections to the PSR in which he objected to the imposition of a \$5000 special assessment on the grounds that he was indigent and relying on the plain language of the statute. (ROA.157). The probation officer filed an addendum to the PSR finding that Graves had \$700 a month income with \$245 left over from his monthly

¹ For the convenience of the Court and the parties, Petitioner has included citations to the page number of the record on appeal below.

cash flow. (ROA.161). Of course this was income earned by Graves prior to being incarcerated, while he was still on conditions of release. In arriving at this \$245 figure, the probation officer did not allow for any expense for rent.

At the sentencing hearing, Graves' attorney persisted in his argument that Graves was indigent. Aside from qualifying for court-appointed counsel, Graves' attorney pointed out that the most Graves has been able to earn is about \$1000 a month, which by any standard would be indigent. (ROA.118). The government merely argued that the defendant has future earning capacity because he was able-bodied. (ROA.118-120). The district court found Graves was not indigent based on his future earning capacity, overruled Graves' objection, and imposed the \$5000 assessment. (ROA.120).

On October 20, 2017, Graves was sentenced to 108 months imprisonment , a term of supervised release of 10 years, a \$100 mandatory special assessment, a \$5000 special assessment pursuant to 18 U.S.C. § 3014 and no fine or restitution. (ROA.83-86). Graves timely filed a notice of appeal on October 27, 2017. (ROA.87). Graves raised this issue regarding the \$5000 mandatory assessment for non-indigent individuals in his direct appeal. The Court of appeals affirmed the sentence in a published opinion. *See United States v. Graves*, 908 F.3d 137 (5th Cir. 2018), (Appendix A).

REASONS FOR GRANTING THE WRIT

I. **This Court should grant review to determine whether district courts can consider future earning capacity in determining whether a person is “non-indigent” for the purposes of assessing the \$5000 mandatory special assessment set forth in 18 U.S.C. § 3014(a)(3).**

Title 18 U.S.C. § 3014 provides for the following special assessment:

§ 3014. Additional special assessment

(a) In general. – Beginning on the date of the enactment of the Justice for Victims of Trafficking Act of 2015 and ending on September 30, 2019, in addition to the assessment imposed under section 3013, the court shall assess an amount of \$5,000 on any non-indigent person or entity convicted of an offense under –

(3) chapter 110 (relating to sexual exploitation and other abuse of children);

18 U.S.C. § 3014(a)(3).

The offense Graves was convicted of, 18 U.S.C. §2252A, is an offense under Chapter 110.

1) The statute does not allow for the district court to use future earning capacity or employability in determining indigence.

The statute does not define nor does it give direction as to how the district courts are to determine whether a defendant is non-indigent. At the time of appeal, the Fifth Circuit had not yet addressed this issue in a published opinion. On direct appeal, the Court of Appeals for the Fifth Circuit, in a published opinion, held that Section 3014, “allows district courts to consider a defendant’s future earning capacity when determining whether a defendant is indigent.” *United States v. Graves*, 908 F.3d at 138. In making that determination, this Court cited to *United States v. Kelley*, 861 F.3d 790, 801 (8th Cir. 2017) in which the Court of Appeals for the Eighth Circuit held, “we think that in the context of 3014 indigence determinations, an analysis of both a defendant’s current financial situation and his ability to pay in the future is appropriate in determining his ‘non-indigent’ status.” *Id.* at 801. The Court of Appeals also relied upon unpublished opinions out of the Tenth Circuit, *See United States v.*

Janatsch, 722 F. App'x 806,811 (10th Cir. 2018); and the Ninth Circuit, *See United States v. Strange*, 692 F. App'x 346, 349 (9th Cir. 2017).

The Appellant contends that to interpret the statute in such away that allows the Court to impose the \$5000 special assessment when the evidence shows he is presently indigent, but possibly could have future earnings or employability, renders the use of the word “non-indigent” in the statute meaningless. Truly almost any defendant would have some potential for future earnings. However, the statutory language specifically, and unambiguously prohibits imposition of the special assessment on any indigent person.

The Supreme Court is reluctant to interpret a statute in such a way as to render meaningless the particular words chosen by Congress. *See Duncan v. Walker*, 533 U.S. 167, 168 (2001) (A federal habeas petition is not an “application for State post-conviction or other collateral review” within the meaning of 28 U.S.C. 2244(d)(2). Otherwise the AEDPA’s use of the word “State” would be meaningless.) The Court begins with the language of the statute. *See id.* at 167, citing *Williams v. Taylor*, 529 U.S. 420, 431 (2000).

Moreover, the Fifth, Eighth, Ninth and Tenth Circuits all seem to rely on case law that allows a district court consider future earning capacity when assessing a fine. The reason the courts should not look to case law concerning the imposition of fines as support of determining ability to pay for the imposition of this special assessment is precisely because “neither the Constitution nor any other federal law categorically prohibits the imposition of a fine where a defendant is found to be indigent.” *United States v. Hedges*, 110 F.3d 250, 252 (5th Cir. 1997); *citing United States v. Altamirano*, 11 F.3d 52, 54 (5th Cir. 1993). However, the statute in question in this case, 18 U.S.C. 3014, does, in fact, categorically prohibit the imposition of the \$5000 special assessment where the defendant is indigent. Accordingly, the district court should not

be allowed to base its finding of non-indigence on potential future earning capacity or speculative employability. That is exactly what the district court did in this case.

As the district court stated, “I find that the defendant is not indigent based upon his future earning capacity.” (ROA.120). The probation officer’s determination that the \$5000 special assessment should be imposed was based on the finding that the assessment “should be based on his future earning capacity.” (ROA152). Moreover, the district court found in its statement of reasons for the sentence that Graves did not have the ability to pay a fine. (ROA.173).

The problem with determining indigence in the above manner is that the statute in question specifically limits the imposition of the special assessment to non-indigents. At the time Graves’ sentence was imposed, he was indigent. For the probation officer and the district court to disregard his current indigent status on the basis that he was an able-bodied man who had the potential of attaining non-indigent status in the future is to render the plain and unambiguous language of the statute meaningless. The district court cannot use speculative, potential or possibilities of future earning capacity to disregard the defendant’s current, undisputed, status of an indigence.

2) The district court’s determination that Graves was not indigent was based solely on a speculative future earning capacity, not on his present status as indigent.

The United States Magistrate Judge entered an order finding, “that the Defendant is financially unable to obtain counsel,” and appointing the Federal Public Defender. (ROA.18). The district court found in its statement of reasons for the sentence that Graves did not have the ability to pay a fine. (ROA.173). The PSR found that Graves, while he was on conditions of pre-trial release, was only making approximately \$1000 per month, and only had about \$50 left a month after paying for rent and bills. (ROA.152). The PSR found that Graves had no substantial assets. (ROA.151). In a PSR Addendum, the probation officer found that Graves’ income, while

on pretrial release was only \$700 month. (ROA.162). Although the probation officer stated that Graves had \$245 available after paying bills, the probation officer did not include any expense for rent. (ROA.162). It stands to reason that Grave's earning capacity during his 108 term of imprisonment would be practically nothing at all. The probation officer's determination that the \$5000 special assessment should be imposed was based on the finding that the assessment "should be based on his future earning capacity."(ROA152).

The Federal Poverty Level, according to the United States Department of Health and Human Services is \$12,060 for individuals. <https://www.healthcare.gov/glossary/federal-poverty-level-FPL/>. That amount is well above Graves' earnings of \$700 per month (\$8400 per year) while he was on pretrial release. To find that Graves had \$700 income and had \$250 available after paying his bills is quite simply – implausible. All the evidence in the record established that Graves was indigent. The law is well-settled that Graves was entitled to rely on that evidence in support of a finding that he was indigent. *See United States v. Hodes*, 110 F.3d at 251; *citing United States v. Fair*, 979 F.2d 1037, 1041 (5th Cir. 1992).

What the record in this case reflects is that the probation officer's rationalization that the assessment should be imposed was that the determination "should be based on his future earning capacity," rather than a finding of indigence. (ROA152). The district court itself, made the finding of non-indigence based solely on future earning capacity: "I find that the defendant is not indigent based upon his future earning capacity." (ROA.120). The district court's finding that Graves was non-indigent violated the plain meaning of the statute.

The three Circuits that have addressed this issue have all relied strongly upon the idea that courts can look to future earning capacity to pay a criminal fine. *See United States v. Graves*, 908 F.3d at 141-142; *United States v. Kelley*, 861 F.3d at 801;

United States v. Janatsch, 722 F. App'x at 811; *United States v. Strange*, 692 F. App'x at 349. Using this method to determine whether the statute allows for the imposition of the \$5000 special assessment on non-indigent persons only, completely ignores the plain meaning of the statute. This Court should grant review to correct this error. *See Duncan v. Walker*, 533 U.S. at 168; and *Williams v. Taylor*, 529 U.S. at 431

CONCLUSION

FOR THESE REASONS, Petitioner asks that this Honorable Court grant a writ of *certiorari*.

Respectfully submitted this 6th day of February, 2019.

/s/Christopher A. Curtis
Christopher A. Curtis
Counsel of Record
FEDERAL PUBLIC DEFENDER'S OFFICE
NORTHERN DISTRICT OF TEXAS
819 TAYLOR STREET, ROOM 9A10
FORT WORTH, TEXAS 76102
(817) 978-2753