

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2019

BRIAN ALAN MATALKA,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Petitioner, **BRIAN ALAN MATALKA**, pursuant to Rule 39 and 18 U.S.C. § 3006A(d) (6), asks leave to file the accompanying Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit without prepayment of costs and to proceed in forma pauperis. Petitioner was represented by counsel appointed under the Criminal Justice Act, 18 U.S.C. § 3006A (b) and (c), on appeal to the United States Court of Appeals for the Fifth Circuit.

Date:
March 16, 2020.

Respectfully submitted,
/s/Yolanda Jarmon
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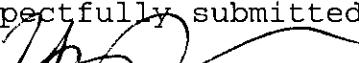
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QUESTIONS PRESENTED

I. On Appeal BRIAN MATALKA challenged the district court's imposition of a \$10,000 special assessment (\$5,000) per count pursuant to 18 U.S.C. § 3014(a)(3) base in part on a finding that he was non-indigent

The Fifth Circuit held that the district court did not plainly err in deeming him non-indigent based on his ability to pay after his release from prison.

In light of the foregoing, the question presented is as follows:

Did the Fifth Circuit's cursory review of the district court record reached the wrong conclusion that Matalka was not indigent under the standard proscribed by federal law in Puckett v. United States, 556 U.S. 129, 135, 129 S. Ct. 1423, 173 L. Ed. 2d 266 (2009) and United States v. Olano, 507 U.S. 725, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993)). Because the application of the plain standard of review is of exceptional importance to the administration of justice in federal criminal cases, this Court should grant certiorari in this case to decide this question and, and upon review, should reverse the judgment of the Fifth Circuit.

PARTIES TO THE PROCEEDINGS

All parties to the proceedings are named in the caption of the case before the Court.

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<p>This Court should grant certiorari because whether Brian Alan Matalka was indigent for purposes of 18 U.S.C. § 3014 involves a fact intensive inquiry and the Fifth Circuit cursory review of the district court record reached the wrong conclusion that Matalka was not indigent. Because the proper application of federal statutes and the plain error standard of review enunciated in <u>Puckett v. United States</u>, 556 U.S. 129, 135, 129 S. Ct. 1423, 173 L. Ed. 2d 266 (2009) and <u>United States v. Olano</u>, 507 U.S. 725, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993) are of exceptional importance to the administration of justice in federal criminal cases, this Court should grant certiorari in this case to decide this question and, and upon review, should reverse the judgment of the Fifth Circuit.</p>	
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PRAYER

The petitioner, **BRIAN ALAN MATALKA**, respectfully prays that a writ of certiorari be granted to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit issued on December 17, 2019.

OPINIONS BELOW

The original judgment United States v. BRIAN MATALKA, Cr. No. 4:16:CR:00035-001 (S.D. Tex. April 14, 2017) is attached as (Exhibit A). On December 17, 2019, the United States Court of Appeals for the Fifth Circuit entered its judgment and opinion affirming Matalka's convictions. United States v. Brian Alan Matalka, 288 Fed. Appx. 273, 2019, U.S. App. LEXIS 37553, 2019 WL 6883706 (5th Cir. 2019) (affirmed). (Exhibit B).

On appeal, Matalka challenged the district court's imposition of a \$10,000 special assessment (\$5,000 per count) pursuant to 18 U.S.C. § 3014(a)(3). Id. at 273.

The Fifth Circuit held that given the fact that Matalka's PSR states that he has a college degree and has been employed by earning \$44,000 per year at one point, the district court did not plainly err in deeming him non-indigent based upon his ability to pay after his release from prison. Id. at 274.

No petition for rehearing was filed.

JURISDICTION

On December 17, 2019, the United States Court of Appeals for the Fifth Circuit entered its judgment and opinion affirming the judgment of conviction and sentence in this case. This petition is filed within ninety days after entry of the judgment. See. Sup. Ct. R. 13.1 and 13.3. Jurisdiction of the Court is invoked under Section 1254(1), Title 28, United States Code.

FEDERAL STATUTES INVOLVED

18 U.S.C. § 3014:

(a) In General.—Beginning on the date of enactment of the Justice for Victims of Trafficking Act of 2015 and ending on September 30, 2021, 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—
(1) chapter 77 (relating to peonage, slavery, and trafficking in persons);
(2) chapter 109A (relating to sexual abuse);
(3) chapter 110 (relating to sexual exploitation and other abuse of children);
(4) chapter 117 (relating to transportation for illegal sexual activity and related crimes); or
(5) section 274 of the Immigration and Nationality Act (8 U.S.C. 1324) (relating to human smuggling), unless the person induced, assisted, abetted, or aided only an individual who at the time of such action was the alien's spouse, parent, son, or daughter (and no other individual) to enter the United States in violation of law.

STATEMENT OF THE CASE

A. Course of Proceedings And Facts

Brian Alan Matalka (Hereinafter "Matalka"), was charged in a

three count indictment in this case with crimes related to child pornography. (ROA.13-16). The government dismissed Count One of the indictment, distribution of child pornography, after Matalka entered pleas of guilty to Count Two and Three of the Indictment. (ROA.207, 221-222, 266). Count Two charged Matalka with receipt of child pornography in violation of 18 U.S.C 2252A §§ (a) (2) (B) and (a) (b) (1). (ROA.215-216). Count Three charged Matalka with possession of child pornography in violation of 18 U.S.C 2252A §§ (a) (b) (2) and (a), (5) (B). (ROA.216-217). The indictment included a notice of forfeiture as to several hard drives, CD/ROMS DVD pursuant to 18 U.S.C 2252A. (ROA.16). These were all items alleged to have been used in the commission of the crimes alleged. (ROA.223).

Matalka entered into a plea agreement with the government, pursuant to Federal Rule of Criminal Procedure 11(c) (1) (A) and 11 (c) (1) (B). Under the agreement, the government agreed to dismiss Count One of the indictment, distribution of child pornography in violation of 18 U.S.C 2252A §§ (a) (2) (B) and (a) (b) (1). Furthermore, the government agreed not to oppose a two level downward adjustment pursuant to U.S.S.G. § 3E1.1(a) for early acceptance of responsibility and, also, not to oppose an additional one level downward departure based on the timeliness of his guilty

plea if his offense level resulted in 16 or greater. The agreement was binding in the Southern District of Texas only. (ROA.201).

In return, Matalka agreed to waive his right to appeal the sentence imposed or the manner in which it was determined on any grounds set forth in 18 U.S.C. 3742. Additionally, Matalka waived his right to contest or "collaterally attack" his conviction or sentence pursuant to any post-conviction proceeding, including 28 U.S.C. § 2255, except for the right to a claim of ineffectiveness of counsel on direct appeal or under 28 U.S.C. 2255. (ROA.205-207).

According to the factual basis of the plea agreement, the government alleges that if the case had proceeded to trial, in order to prove its case for receipt and possession of child pornography, it would prove the following beyond a reasonable doubt:

On September 12, 2014, La Porte Police Department Detective David Huckabee, using a computer connected to the Internet and utilizing a law enforcement tool that allows single-source downloads from the Ares Peer-to Peer networks, conducted an investigation into the sharing of child pornography. David Huckabee identified a computer on the networks with the IP address of 99.107.252.41 as having files in its shared folder that were

suggestive of child pornography. (ROA.217-218). FBI Special Agent Brian Schultz, identified the computer with the IP address as one utilized from Matalka's apartment in Houston, Texas. (ROA.219).

Between September 12, 2014 and June 20, 2015 Detective Huckabee downloaded approximately a hundred video files from the shared folder that was associated with the afore-mentioned IP address. (ROA.218). Each of these video files were reviewed and met the federal definition of child pornography. One of these videos (kinderkutje)!!!new2006 !!! starting my two daughters 02 (Pthc) (2) was of two minor females, both of whom appeared to be under the age of 10, being anally and vaginally penetrated by the fingers of a presumed adult male. (ROA.218-219).

Another video titled !!!new!!2006-14 yo dutch girl, webcam (hussyfan pthc) very hot masturbate!!! depicts a female minor approximately 14 years old exposing her breasts and vaginally penetrating herself with foreign objects, as well as digitally simulating herself. (ROA.219). A third video entitled 23VGM2ABWYAE7DLX5VMC67QV55BV5.mpg, shows a minor female approximately six years old, being orally penetrated by a penis of an adult male (ROA.219).

On September 18, 2015 agents executed a federal search warrant at that location. (ROA.219). During the execution of the search

warrant, agents seized computers, multiple hard drives, and lose CD's ROMS, DVDs. The forensic examination of the 1 terabyte Hitachi Touro 5 external hard drive, a 160 gigabyte Western digital hard drive, a 120 gigabit Seagate Momentous hard drive, and seen CD ROM DVD revealed over 89 videos and 97 images videos of clearly young children engaged in explicit conduct as defined under federal law. (ROA.219) .

The images include children under the age of 12 and acts of violence, such as intercourse with adult males. (ROA.219-220) . Some of the images are known victims as identified through the National Center for Missing and Exploited Children. Through the investigation, it was learned that the defendant had been downloading and receiving child pornography from the Internet from on or about September 12, 2014, through on or about September 17th, 2015. (ROA.220) .

The investigation further revealed on September 18, 2015, Matalka was in possession of child pornography. Matalka used his hard drive and CDROMS and DVDs which were manufactured outside the State of Texas and China and Thailand, to receive and possess the child pornography which was on those devices; thereby effecting interstate and foreign commerce. Further, the child pornography that was received and possessed was transmitted via the Internet

which is a means and facility of interstate commerce. (ROA.220).

The Sentence

The 2016 edition of the Guidelines Manual was used in this case. (ROA.306). The PSI recommended a base offense level of 22 pursuant to U.S.S.G. § 2G2.2(a)(2) and 18 U.S.C. § 2252A(a) and (d). Additionally, the PSI assessed a two-level increase to the base offense level pursuant to U.S.S.G. § 2G2.2(a)(2) because the child pornography materials involved a prepubescent minor or a minor who had not attained the age of 12 years. An additional two-level increase was assessed pursuant U.S.S.G. § 2G2.2(b)(3)(f) because he is accused of knowingly engaging in distribution of child pornography. Another two-level increase was assessed pursuant U.S.S.G. § 2G2.2(b)(6) because the offense involved the use of a computer or interactive computer service for the possession, transmission, receipt or distribution of the material. (ROA.306).

A four-level increase was assessed pursuant U.S.S.G. § 2G2.2(b)(4) because the offense involved material that portrayed sadistic or masochistic conduct and sexual abuse or exploitation of an infant or toddler. A five-level increase was assessed pursuant U.S.S.G. § 2G2.2(b)(7)(d) because the offense more than 600 images, specifically the equivalent of 6,772 images of child pornographic material. (ROA.306). Finally, Matalka received a three level

decrease in points pursuant to U.S.S.G. §§ 3E1.1(a) and (b) for acceptance of responsibility. (ROA.307). The Total Adjusted Offense Level resulted in 34. Matalka has no criminal history and therefore a Criminal History Category I was established. (ROA.307).

Due to the multiple counts of conviction, the grouping rules contained in U.S.S.G., Chapter Three, Part D, are applicable. Counts involving substantially the same harm shall be grouped together into a single group. Counts 2 and 3 are grouped pursuant to U.S.S.G. § 3D1.2(d), since the offense level is determined largely on the basis of an aggregate measure of harm, loss or substance or is ongoing or continuous in nature and the offense guideline is written to cover such behavior. (ROA.306).

Due to the operation of U.S.S.G. § 1B1.3, the counts result in identical offense levels; therefore, Count 2 was used to portray the guideline computations set forth below. With a Total Adjusted Offense Level at 34 and a Criminal History Category of I, the guideline range for imprisonment found in Zone D of the Sentencing Table, U.S.S.G. Chapter 5, Part A resulted in 151-188 months of imprisonment. (ROA.306, 312).

However, the statutory maximum of imprisonment for Count Two is not less than five years, but not more than 20 years imprisonment pursuant to 18 U.S.C. § 2252A(a)(b)(1). The statutory

maximum as to Count Three is ten years imprisonment pursuant to 18 U.S.C. § 2252A(a)(b)(2). (ROA.312).

As to both Counts Two and Three, the statutory supervised release range and the guidelines range is five years to life under 18 U.S.C. § 3583(k) and U.S.S.G. § 5D1.2(c)(2). (ROA.312). The statutory maximum fine for each count is \$250,000 for a total of \$500,000 pursuant to 18 U.S.C. § 3571. The guideline fine range was from \$17,500 to \$1175,000 pursuant to U.S.S.G. § 5E1.2(c)(3). (ROA.313).

Restitution was assessed at 32,500.00 due to the loss suffered by an unnamed victim in the "Vickie Series" and for 2,500 of the unnamed victims attorney's fees pursuant to 18 U.S.C. § 2259. (ROA.314). Pursuant to 18 U.S.C. § 3014, a \$5,000 special assessment was assessed as to both counts for a total of \$10,000. (ROA.313).

Matalka filed written objections to the PSR. Matalka objected to the two-level increase in points (the computer enhancement) applied pursuant U.S.S.G. § 2G2.2 (b)(6) arguing that it was double counting. (ROA.230, 653-655). The objection was denied. (ROA.230). Matalka objected to the two level increase in point for distribution of child pornography applied pursuant to U.S.S.G. § 2G2.2 (b)(3)(F). (ROA.230-236, 656-662). Matalka argued that he

did not possess the requisite *mens rea* of intent for U.S.S.G. § 2G2.2 (b) (3) (F) to apply. The objection was denied. (ROA.235-236). Matalka also objected to paragraph 8 of the PSR which states that he used the BitTorrent and Arrest Peer to Peer programs. Matalka argued that he used the Ares program which used the BitTorrent protocol. The objection was denied. (ROA.235-236).

Matalka objected to paragraphs 10 and 11 of the PSR which alleged that 200 files were downloaded. The objection was sustained in that the record reflects that 100 files were downloaded, however the objection was denied in that it did not change the guidelines range in this case. (ROA.236). Matalka objected to paragraph 20 of the PSR which stated that he recorded a 30-year old woman and an 18-year old. Matalka argued that no minor was ever recorded. (ROA.662). The objection was sustained, however this change had no impact on the guideline ranges. (ROA.236). Matalka objected to paragraph 57 of the PSR which states that new charges against him were filed since his arrest in the instant case. The objection was sustained as this information was proven to be inaccurate. (ROA.236-237,662). Objections were made as to certain facts related to Matalka mental and physical condition as outlined in paragraphs 64-68 of the PSR. (ROA.662-663). Although sustained, these objections had no impact on the

guidelines. (ROA.237). Defense counsel also objected to the 32,500 request for restitution for the victim as identified by the "Vickie Series." The district court also reduced the amount of restitution to the victim to 15,000 in total with only \$500 of that for attorney's fees. (ROA.259).

The district court adopted the revised PSI and the first and second addendums along with the clarifications and corrections outlined above. (ROA.120). Matalka received 108 months of imprisonment as to each count of conviction to run concurrently for a total of 108 months. Matalka received a with a term of 15 years supervised release as to each count of conviction for a total of 15 years. He was assessed a special assessment of \$10,200.00 and restitution in the amount of 15,000. (ROA.127). Now fine was imposed. (ROA.127).

Matalka then filed a notice of appeal on Notice of appeal was filed on April 25, 2017. (ROA.116).

BASIS OF FEDERAL JURISDICTION IN THE
UNITED STATES DISTRICT COURT

This case was brought as a federal criminal prosecution involving receipt of child pornography in violation of 18 U.S.C 2252A §§ (a) (2) (B) and (a) (b) (1) and possession of child pornography in violation of 18 U.S.C 2252A §§ (a) (b) (2) and (a), (5) (B). (ROA.215-217). The district court therefore had jurisdiction pursuant to 18 U.S.C. § 3231.

REASON FOR GRANTING THE WRIT

This Court should grant certiorari because whether Brian Alan Matalka was indigent for purposes of 18 U.S.C.3014 involves a fact intensive inquiry and the Fifth Circuit's cursory review of the district court record reached the wrong conclusion that Matalka was not indigent. Because the proper application of federal statutes and the plain error standard of review enunciated in Puckett v. United States, 556 U.S. 129, 135, 129 S. Ct. 1423, 173 L. Ed. 2d 266 (2009) and United States v. Olano, 507 U.S. 725, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993) are of exceptional importance to the administration of justice in federal criminal cases, this Court should grant certiorari in this case to decide this question and, and upon review, should reverse the judgment of the Fifth Circuit.

In the instant case, Matalka was ordered to pay a total special assessment of 10,200 immediately payable upon sentencing. Matalka was ordered to pay \$100.00 under U.S.C. 18 U.S.C. § 3013 as to each Count of Conviction, Counts Two and Three. He was also ordered to pay \$5,000.00 as to each Count of Conviction under U.S.C. 18 U.S.C. § 3014(a) (3). (ROA.127).

Section 3014(a) (3) of Title 18, provides for a \$5,000 special assessment as to each conviction in this case so long as the individual is "non-indigent." See also United States v. Dedual, No. 18-60216, 2019 U.S. App. LEXIS 3055, at *3-4 (5th Cir. Jan. 30, 2019). The inquiry regarding Matalka's ability to pay the special assessments imposed pursuant to 18 U.S.C. § 3014 is a fact-specific inquiry.

The Fifth Circuit had yet to articulate a test for determining whether a defendant is indigent for purposes of 18 U.S.C. § 3014. As such, the Fifth Circuit applied the standard that otherwise applied to fines assessed in criminal cases. Under that standard, "[t]he

defendant bears the burden of proving his inability to pay a fine, and may rely upon the [presentence report] to establish his inability to pay." United States v. Streaty, 735 F. App'x 140, 141 (5th Cir. 2018) (citing United States v. Magnuson, 307 F.3d 333, 335 (5th Cir. 2002)).

In this case the PSI contained a Section designated: "Financial: Condition: Ability to Pay." In that section, the PSI states that Matalka submitted a Personal Financial Statement, and denied ownership in a checking or savings account, real property, registered vehicles in his name or any other possessions of value, with the exception of approximately \$25 in his commissary account at the detention center. His only source of income was from his employment earnings. (ROA.311).

According to the PSI, Matalka reported that he had approximately \$30,000 in a retirement account, but had no access to the funds at the time. Matalka estimated that he had incurred \$17,200 in credit card debt and approximately \$25,000 in unpaid student loans. Matalka explained that his parents paid his legal fees, and in turn his parents were in possession of his 2008 Honda Civic with a clear title of approximately \$4,773. (ROA.311).

According to the PSI, based upon Matalka's credit report, he had two open credit accounts consisting of Wells Fargo Card Services, and Chase Bank with combined balances of totaling of \$17,829 (minimum payment of \$448 monthly). In addition, Matalka had seven education loans with combined balances totaling of \$24,933.

The report reflected no lien repossession, foreclosure, bankruptcy, or collection accounts. (ROA.311). An investigation into the potential assets owned by Matalka (using his name and Social Security Number) was conducted using Westlaw Asset Locator). No assets were found relative to Matalka. Further, the search revealed no bankruptcies, liens, judgments or UCC filings. (ROA. 312). Therefore, Matalka's debts totaled approximately \$ 84,962.00 dollars and the only asset he owned was the \$30,000 retirement that was not accessible to him at the time. (ROA.311).

At sentencing, the district court stated that it was adopting the presentence report and its addendum, except for clarifications and changes made on the record. (ROA.237). In doing so, the sentencing court adopted the PSI'S information regarding Matalka's financial worth. Here it is key to point out that the PSI made no recommendation as to Matalka's ability to pay. So when imposing the \$5,000 special assessments, the district court implicitly found that Matalka was non-indigent. See United States v. Rodriguez-Rodriguez, 388 F.3d 466, 468 n.8 (5th Cir. 2004); United States v. Streaty, 735 F. App'x 140, 141 (5th Cir. 2018).

In assessing the special assessments and the monetary penalties, the district court stated:

It is ordered that the defendant shall pay to the United States a special assessment of \$10,200. Court finds the defendant does not have the ability to pay a fine in addition to the assessment and the restitution sum to be awarded, and the Court will waive the fine in this case. (ROA.263).

It is further ordered that the defendant shall pay restitution in the amount of \$15,000 to the victim of the Vicky series of which no more than \$500 shall be allotted for attorney's fees for Vicky's attorney. Having assessed the defendant's ability to pay, payment of the total criminal monetary penalty shall be due as follows: (ROA.263-264)

The defendant shall make a lump sum payment of \$10,200 due immediately. The balance is due in payments of the greater of \$25 per quarter or 50 percent of any wages earned while in prison in accordance with the Bureau of Prisons Inmate Financial Responsibility Program. (ROA.264).

Any balance remaining after release from imprisonment shall be paid in the greater of \$200 per month or 10 percent of the defendant's gross earnings, whichever is the greater, to commence 60 days after the date of release to a term of supervision. Payments to be made through the United States District Clerk, Southern District of Texas. (ROA.264).

In this case, the PSI made no affirmative recommendation regarding Matalka's ability to pay. At his sentencing hearing, Matalka made no challenge to the PSI asserting an inability to the assessment, nor did he present evidence in any way challenging the parameters of a fine. When the district court imposed sentence, Matalka raised no objection to the assessment imposed under 18 U.S.C. § 3014(a)(3). Thus, a review of this issue on direct appeal is for plain error. See United States v. Matovsky, 935 F.2d 719, 722 (5th Cir. 1991) (holding where the presentence report makes no recommendation concerning the fine, and the defendant neither presents evidence on nor objects to the amount of the fine assessed within the guideline range, the defendant may not raise new objections in the appeals court absent plain error).

In this case Matalka must demonstrate (1) an error occurred (2) that is "clear or obvious, rather than subject to reasonable dispute," and (3) that the error affects his substantial rights. Puckett v. United States, 556 U.S. 129, 135, 129 S. Ct. 1423, 173 L. Ed. 2d 266 (2009) (quoting United States v. Olano, 507 U.S. 725, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993)). If he does so, the Fifth Circuit has discretion to correct that error, and generally will do so only if it seriously affects the fairness, integrity, or public reputation of judicial proceedings. United States v. Mudekunye, 646 F.3d 281, 287 (5th Cir. 2011).

1. A clear and obvious error occurred.

In this case, the evidence shows that plain error occurred. First a clear and obvious error occurred because the district court erroneously applied 18 U.S.C. § 3014 where the evidence clearly demonstrates Matalka was indeed indigent. The PSR showed that Matalka had \$84,962.00 in debt. Matalka had a \$30,000 retirement fund, however there was no evidence that he could access the fund at the present time. The district court adopted the financial portion of the PSI, therefore the district court assessed that the \$30,000 was unavailable to Matalka at the time of sentencing. Nevertheless the district deemed Matalka non-indigent under the statute.

Here the Fifth Circuit's opinion was flawed because the district court's decision constituted "plain error." When comparing cases from other circuits where defendants were found non-indigent under this statute, it was because those defendants had assets.

For example, in United States v. Kelley, 861 F.3d 790, 802 (8th Cir. 2017), Kelley, the defendant was an Eagle Scout with a college degree. In another case, United States v. Lail, 736 F. App'x 381, 382 (4th Cir. 2018) (per curiam), the defendant was expected to have a total net worth of \$74, 500 after selling his residence. *Id.* at 382. And in United States v. Graves, 908 F.3d 137, 143 (5th Cir. 2018), the defendant possessed a GED, some college education, had a wide range of vocational skills, a long history of employment, and had previously earned \$40, 000 per year. See also United States v. Dedual, No. 18-60216, 2019 U.S. App. LEXIS 3055, at *4 (5th Cir. Jan. 30, 2019) (affirming the district court's finding of non-indigency where defendant's education and work history, which reflected, *inter alia*, that prior to his involvement in the instant offense, Defendant made over \$5,000 per month as a sales manager and was capable of obtaining and maintaining employment.)).

The instant case is distinguishable from those cited above where defendants were found non-indigent. Like the Defendant in Graves, Matalka holds a degree. Matalka a Bachelor of Science degree in Restaurant and Hotel management. However, Matalka's case is different from Graves because the PSI, which the district court adopted clearly states that Matalka will not be considered for rehire. (ROA.310). The PSR shows that from January 2009 to February 2016, prior to his incarceration in this case, Matalka worked as a Senior Administrative Sales Assistant with Hilton Hotel America-Houston. Hilton Hotel reported that Matalka earned \$20.89

an hour. Matalka reported that he earned \$44,000 annually. However, the PSR also indicated that he was not eligible for rehire by Hilton. (ROA.310-311).

Prior to working at Hilton, Matalka earned \$14.00 for six months in 2008 working as a restaurant supervisor at the Marriott. Matalka is indigent. The PSR also reported that Matalka has no specialized training or skills, and holds no professional licenses. (ROA.311).

Furthermore, after an investigation, no assets were found for Matalka. (ROA.312). In addition, Matalka is certain to have limited employment opportunities considering he is now required to register as a sex-offender. As a general rule the PSR is presumed reliable and may be adopted by the district without further inquiry if the defendant fails to demonstrate by competent rebuttal evidence that the information is "materially untrue, inaccurate or unreliable." But the financial section of the PSR shows that Matalka's debts are considerably higher than his assets and he will have few options for employment as a sex-offender. Based upon the foregoing financial evidence reported in the "adopted" PSR, the court clearly erred in finding Matalka non-indigent.

2. The error affected Matalka's substantial rights.

The next question for this Court to consider is whether the finding of non-indigency affected Matalka's substantial rights. See Puckett v. United States, 556 U.S. 129, 135, 129 S. Ct. 1423, 173 L. Ed. 2d 266 (2009) (quoting United States v. Olano, 507 U.S. 725, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993)). Ordinarily, an error affects

substantial rights only if it "' affected the outcome of the district court proceedings.' " United States v. Olano, 507 U.S. at 734. In the case at bar, the erroneously imposed \$5,000 special assessments affected Matalka's substantial rights. Had the court characterized Matalka as non-indigent under 18 U.S.C. § 3014, Matalka would not be burdened with the obligation to pay \$10,000 in special assessment fees in addition to the \$15,000 restitution to "Vickey", the victim in this case.

3. The error affected the fairness, integrity or public reputation of the judicial proceedings in Matalka's case.

The court of appeals has the discretion to remedy the error-discretion if the error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.' " Puckett, 129 S.Ct. at 1429 (quoting Olano, 507 U.S. at 736, 113 S.Ct. 1770). According to the Fifth Circuit, it determines whether an alleged error is plain by reference to existing law at the time of appeal." United States v. Bishop, 603 F.3d 279, 281 (5th Cir. 2010).

In the sentencing context, the Fifth Circuit has held that an appellant can show an impact on substantial rights, and therefore a basis for reversal on plain error review, where the appellant can show a reasonable probability that, but for the district court's error, the appellant would have received a lower sentence. United States v. Garcia-Quintanilla, 574 F.3d 295, 303-04 (5th Cir.2009). As stated previously, had the district court correctly characterized Matalka as non-indigent under 18 U.S.C. § 3014, Matalka would not be

burdened with the obligation to pay \$10,000 in special assessment fees in addition to the \$15,000 restitution to "Vickey", the victim in this case. Therefore, clear error occurred and this court should vacate and remand Matalka's sentence

This Court should grant certiorari because whether Brian Alan Matalka was indigent for purposes of 18 U.S.C.3014 involves a fact intensive inquiry and the Fifth Circuit cursory review of the district court record reached the wrong conclusion that Matalka was not indigent. Because the proper application of federal statutes and the plain error standard of review enunciated in Puckett v. United States, 556 U.S. 129, 135, 129 S. Ct. 1423, 173 L. Ed. 2d 266 (2009) and United States v. Olano, 507 U.S. 725, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993)) are of exceptional importance to the administration of justice in federal criminal cases, this Court should grant certiorari in this case to decide this question and, and upon review, should reverse the judgment of the Fifth Circuit.

CONCLUSION

For the foregoing reasons, petitioner **BRIAN ALAN MATALKA** respectfully prays that this Court grant certiorari, to review the judgment of the Fifth Circuit in this case.

Date: March 16, 2020.

Respectfully submitted,

/s/Yolanda Jarmon
YOLANDA E. JARMON

Attorney of Record for Petitioner
2429 Bissonnet # E416
Houston, Texas 77005
Telephone: (713) 635-8338
Fax: (713) 635-8498

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2019

BRIAN ALAN MATALKA,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

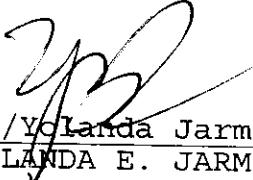
On Petition for Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit

CERTIFICATE OF SERVICE

YOLANDA E. JARMON, is not a member of the Bar of this Court but was appointed under the Criminal Justice Act 18 U.S.C. § 3006 A(b) and (c), on appeal to the United States Court of Appeals for the Fifth Circuit, certifies that, pursuant to Rule 29.5, **On March 16, 2020**, she served the preceding Petition for Writ of Certiorari and the accompanying Motion for Leave to Proceed in Forma Pauperis on counsel for the Respondent by enclosing a copy of these documents in an envelope, first-class postage prepaid, **Certified Mail No. 7019 1640 0000 6387 3784**, return receipt requested, and depositing the envelope in the United States Postal Service located at 3740 Greenbriar, Houston, TX 77098 and further certifies that all parties required to be served have been served and copies addressed to:

The Honorable Noel J. Francisco
Solicitor General of the United States

Room 5614, Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001



/s/Yolanda Jarmon
YOLANDA E. JARMON

APPENDIX

UNITED STATES DISTRICT COURT
Southern District of Texas
Holding Session in Houston

ENTERED

April 26, 2017

David J. Bradley, Clerk

UNITED STATES OF AMERICA
v.
BRIAN ALAN MATALKA

JUDGMENT IN A CRIMINAL CASE

CASE NUMBER: 4:16CR00035-001
USM NUMBER: 06351-479 See Additional Aliases

THE DEFENDANT:

Edward Michael Chernoff and Neal Andrew Davis
Defendant's Attorney

- pleaded guilty to count(s) 2 and 3 on July 1, 2016. ✓
- pleaded nolo contendere to count(s) _____ which was accepted by the court.
- was found guilty on count(s) _____ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. §§ 2252A(a)(2)(B) and 2252A(b)(1)	Receipt of child pornography	09/17/2015	2
18 U.S.C. §§ 2252A(a)(5)(B) and 2252A(b)(2)	Possession of child pornography	09/18/2015	3

 See Additional Counts of Conviction

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

 The defendant has been found not guilty on count(s) _____ Count(s) remaining is are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

April 14, 2017 ✓
Date of Imposition of Judgment

Signature of Judge

EWING WERLEIN, JR.
UNITED STATES DISTRICT JUDGE
Name and Title of JudgeApril 25, 2017
Date

SMY INGC

17-20300.110

Appendix A

DEFENDANT: BRIAN ALAN MATALKA
CASE NUMBER: 4:16CR00035-001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 108 months. ✓

This term consists of ONE HUNDRED EIGHT (108) MONTHS as to each of Counts 2 and 3, to run concurrently, for a total of ONE HUNDRED EIGHT (108) MONTHS.

See Additional Imprisonment Terms

The court makes the following recommendations to the Bureau of Prisons:
The defendant participate in the Comprehensive Residential Drug Abuse Treatment Program during incarceration

The defendant participate in a sex offender treatment program during incarceration.

The defendant is remanded to the custody of the United States Marshal.

The defendant shall surrender to the United States Marshal for this district:

at a.m. p.m. on

as notified by the United States Marshal.

The defendant shall surrender for service of sentence at the insti-

The defendant shall surrender for service of sentence.

as notified by the United States Marshal.

as notified by the Probation or Pretrial Services Office

as notified by the Probation Officer shall be

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____ DEPUTY UNITED STATES MARSHAL

DEFENDANT: BRIAN ALAN MATALKA
CASE NUMBER: 4:16CR00035-001**SUPERVISED RELEASE**

Upon release from imprisonment you will be on supervised release for a term of: 15 years.
This term consists of FIFTEEN (15) YEARS as to each of Counts 2 and 3, to run concurrently, for a total of FIFTEEN (15) YEARS.

See Additional Supervised Release Terms.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
 - The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. (check if applicable)
4. You must cooperate in the collection of DNA as directed by the probation officer. (check if applicable)
5. You must comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. (check if applicable)
6. You must participate in an approved program for domestic violence. (check if applicable)

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

See Special Conditions of Supervision.

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation office, and you must report to the probation office as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment, you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

DEFENDANT: BRIAN ALAN MATALKA
CASE NUMBER: 4:16CR00035-001

SPECIAL CONDITIONS OF SUPERVISION

You must participate in an inpatient or outpatient substance-abuse treatment program and follow the rules and regulations of that program. The probation officer will supervise your participation in the program, including the provider, location, modality, duration, and intensity. You must pay the costs of the program, if financially able.

You must submit to substance-abuse testing to determine if you have used a prohibited substance, and you must pay the costs of the testing if financially able. You may not attempt to obstruct or tamper with the testing methods.

You must comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense.

You must participate in a sex offense-specific assessment. You must pay the costs of the program, if financially able.

You must participate in a sex offense-specific treatment program and follow the rules and regulations of that program. The probation officer will supervise your participation in the program and you must pay the costs of the program, if financially able.

You must submit to periodic polygraph testing at the discretion of the probation officer as a means to ensure that you are in compliance with the requirements of your supervision or treatment program. You must pay the costs of the program, if financially able.

You must not have direct contact with any child you know or reasonably should know to be under the age of 18, without the permission of the probation officer. If you do have any direct contact with any child you know or reasonably should know to be under the age of 18, without the permission of the probation officer, you must report this contact to the probation officer within 24 hours. Direct contact includes written communication, in-person communication, or physical contact. Direct contact does not include incidental contact during ordinary daily activities in public places.

You must not view or possess any "visual depiction" (as defined in 18 U.S.C. § 2256), including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of "sexually explicit conduct" (as defined in 18 U.S.C. § 2256).

You must not access the Internet except for reasons approved in advance by the probation officer.

You must allow the probation officer to install computer monitoring software on any computer (as defined in 18 U.S.C. § 1030(e)(1)) you use.

To ensure compliance with the computer monitoring condition, you must allow the probation officer to conduct initial and periodic unannounced searches of any computers (as defined in 18 U.S.C. § 1030(e)(1)) subject to computer monitoring. These searches shall be conducted for the purposes of determining whether the computer contains any prohibited data prior to installation of the monitoring software; to determine whether the monitoring software is functioning effectively after its installation; and to determine whether there have been attempts to circumvent the monitoring software after its installation. You must warn any other people who use these computers that the computers may be subject to searches pursuant to this condition.

You must not communicate, or otherwise interact, with the victims in this case, either directly or through someone else, without first obtaining the permission of the probation officer.

See Additional Special Conditions of Supervision

DEFENDANT: BRIAN ALAN MATALKA
CASE NUMBER: 4:16CR00035-001**CRIMINAL MONETARY PENALTIES**

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$10,200.00 ✓		\$15,000.00 ✓

A \$100 special assessment is ordered as to each of Counts 2 and 3, for a total of \$200.

An additional \$5,000 special assessment, pursuant to the Justice for Victims of Trafficking Act of 2015 at 18 U.S.C. § 3014, is ordered as to each of Counts 2 and 3, for a total of \$10,000.

A total restitution amount of \$15,000 is ordered, of which no more than \$500 is to be paid in attorney fees.

- See Additional Terms for Criminal Monetary Penalties
- The determination of restitution is deferred until _____. An Amended Judgment in a Criminal Case (AO 245C) will be entered after such determination.
- The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal payees must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss*</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
Victim of the Vicky Series		\$15,000.00 ✓	

- See Additional Restitution Payees
- TOTALS** \$0.00 \$15,000.00
- Restitution amount ordered pursuant to plea agreement \$ _____
- The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).
- The court determined that the defendant does not have the ability to pay interest and it is ordered that:
- the interest requirement is waived for the fine restitution.
- the interest requirement for the fine restitution is modified as follows:
- Based on the Government's motion, the Court finds that reasonable efforts to collect the special assessment are not likely to be effective. Therefore, the assessment is hereby remitted.

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: BRIAN ALAN MATALKA
CASE NUMBER: 4:16CR00035-001

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

- A Lump sum payment of \$10,200.00 due immediately, balance due
 not later than _____, or
 in accordance with C, D, E, or F below; or
- B Payment to begin immediately (may be combined with C, D, or F below); or
- C Payment in equal _____ installments of _____ over a period of _____, to commence _____ days after the date of this judgment; or
- D Payment in equal _____ installments of _____ over a period of _____, to commence _____ days after release from imprisonment to a term of supervision; or
- E Payment during the term of supervised release will commence within _____ days after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F Special instructions regarding the payment of criminal monetary penalties:

Payable to: Clerk, U.S. District Court, Attn: Finance, P.O. Box 61010, Houston, TX 77208

Balance due in payments of the greater of \$25 per quarter or 50% of any wages earned while in prison in accordance with the Bureau of Prisons' Inmate Financial Responsibility Program. Any balance remaining after release from imprisonment shall be paid in monthly installments of the greater of \$200 or 10% of gross income to commence 60 days after the release to a term of supervision.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Joint and Several

Case Number

Defendant and Co-Defendant Names
(including defendant number)Total AmountJoint and Several
AmountCorresponding Payee,
if appropriate

See Additional Defendants and Co-Defendants Held Joint and Several

The defendant shall pay the cost of prosecution.

The defendant shall pay the following court cost(s):

The defendant shall forfeit the defendant's interest in the following property to the United States:
As set forth in the order of forfeiture executed by this Court April 14, 2017.

See Additional Forfeited Property

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

United States v. Matalka

United States Court of Appeals for the Fifth Circuit
December 17, 2019, Filed
No. 17-20300 Summary Calendar

Reporter

788 Fed. Appx. 273 *; 2019 U.S. App. LEXIS 37553 **; 2019 WL 6883706

UNITED STATES OF AMERICA,
Plaintiff-Appellee v. BRIAN ALAN
MATALKA, Defendant-Appellant

Counsel: For UNITED STATES OF AMERICA, Plaintiff - Appellee: Anna Elizabeth Kalluri, Assistant U.S. Attorney, Carmen Castillo Mitchell, Assistant U.S. Attorney, U.S. Attorney's Office, Houston, TX.

Notice: PLEASE REFER TO *FEDERAL RULES OF APPELLATE PROCEDURE*
RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

For BRIAN ALAN MATALKA, Defendant - Appellant: Yolanda Evette Jarmon, Esq., Law Office of Yolanda Jarmon, Houston, TX.

Prior History: **[**1]** Appeals from the United States District Court for the Southern District of Texas. USDC No. 4:16-CR-35-1.

Judges: Before SMITH, DENNIS, and DUNCAN, Circuit Judges.

Opinion

[*273] PER CURIAM:^{*}

Brian Alan Matalka pleaded guilty to one count of receipt and one count of possession of child pornography. He

Core Terms

district court, non-indigent, release from prison, special assessment, motion to dismiss, ability to pay, indigent

^{*} Pursuant to **5TH CIR. R. 47.5**, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in **5TH CIR. R. 47.5.4**.

challenges the district court's imposition of a \$10,000 special assessment (\$5000 per count) pursuant to 18 U.S.C. § 3014(a)(3) based in part on a finding that he was not indigent. The Government has moved to dismiss the appeal, seeking to enforce the appeal waiver provision in Matalka's plea agreement. We need not decide whether Matalka's appeal waiver bars a § 3014(a)(3) challenge because the appeal is "easily resolved on the merits." See United States v. Graves, 908 F.3d 137, 140 (5th Cir. 2018), cert. denied, 139 S. Ct. 1360, 203 L. Ed. 2d 595 (2019) (citation omitted).

Matalka raises his non-indigency argument for the first time on appeal, so the district court's finding is reviewed only for plain error. See Puckett v. United States, 556 U.S. 129, 135, 129 S. Ct. 1423, 173 L. Ed. 2d 266 (2009). Section 3014(a)(3) mandates a \$5000-per-count special **[**2]** assessment against "any non-indigent person" convicted of certain child-exploitation crimes. Matalka has the burden of proving his indigence. See United States v. Streaty, 735 F. App'x 140, 141 (5th Cir. 2018) (citing United States v. Magnuson, 307 F.3d 333, 335 (5th Cir. 2002)).

When making a § 3014 indigence determination, the district court is to consider the defendant's current financial situation and his ability to pay in the future. Graves, 908 F.3d at 142. "[A] district court must **[*274]** impose the assessment unless it finds the

defendant could not pay it today—or at any point for the next twenty years." Id. at 141; see also 18 U.S.C. §§ 3014(g), 3613(b). That it may be difficult for a defendant to satisfy his financial obligations after his release from prison does not make him indigent. Graves, 908 F.3d at 143 & n.2. Here, Matalka's PSR states that he has a college degree and has been employed by Hilton and Marriott in various capacities, at one point earning \$44,000 per year. Given these facts, the district court did not plainly err in deeming him non-indigent based on his ability to pay after his release from prison. See Graves, 908 F.3d at 143.

Accordingly, the judgment is AFFIRMED, and the Government's motion to dismiss is DENIED.

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