

22-5660

No. \_\_\_\_\_

ORIGINAL

Supreme Court, U.S.  
FILED

SEP 08 2022

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

Jon Anthony Terry — PETITIONER

(Your Name)

vs.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

U.S. Court of Appeals for the Fifth Circuit

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Jon Anthony Terry

(Your Name)

P.O. Box 24550

(Address)

Tucson AZ 85734-4550

(City, State, Zip Code)

N/A

(Phone Number)

QUESTION(S) PRESENTED

1. May a District Court, at sentencing, find a defendant "non-indigent" for the purposes of 18 USC 3014(a), based upon past income and a hypothetical "means" to pay the assessment at some time in the distant future?
2. May a District Court impose more than one \$5000 special assessment per defendant under 18 USC 3014(a) under a plain reading of the statutory language?

## LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

## RELATED CASES

Decision - Sentencing      U.S. District Court, Northern District of Texas  
No. 3:17-CR-647-1      September 11, 2019

Opinion - Direct Appeal      U.S. Court of Appeals for the Fifth Circuit  
No. 19-11039      May 10, 2022

Order - Panel rehearing      U.S. Court of Appeals for the Fifth Circuit  
No. 19-11039      June 13, 2022

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## TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
Blanton v. North Las Vegas 489 US 538, 109 S Ct 1289 (1989)	7
United States v. Barthman 983 F.3d 318 (8th Cir 2020)	6
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## STATUTES AND RULES

18 USC 3014

USSG 5E1.2(a)

## OTHER

IN THE  
SUPREME COURT OF THE UNITED STATES  
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

**OPINIONS BELOW**

For cases from federal courts:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

For cases from state courts:

The opinion of the highest state court to review the merits appears at Appendix \_\_\_\_\_ to the petition and is

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

The opinion of the \_\_\_\_\_ court appears at Appendix \_\_\_\_\_ to the petition and is

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

## JURISDICTION

[ ] For cases from federal courts:

The date on which the United States Court of Appeals decided my case was May 10, 2022.

[ ] No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: June 13, 2022, and a copy of the order denying rehearing appears at Appendix C.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from state courts:

The date on which the highest state court decided my case was \_\_\_\_\_. A copy of that decision appears at Appendix \_\_\_\_\_.

[ ] A timely petition for rehearing was thereafter denied on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Fifth Amendment. In relevant part:

"No person shall... be deprived of life, liberty, or property, without due process of law..."

18 USC 3014(e) in relevant part states that:

"In addition to the assessment imposed under section 3013, the court shall assess an amount of \$ 5000 on any non-indigent person or entity convicted of an offense..."

## STATEMENT OF THE CASE

Petitioner, Jon Anthony Terry, was arrested in this case on November 15, 2017 and has been in custody since that time. On September 11, 2019,

Petitioner was sentenced to the maximum 60 years pursuant to a plea agreement. This agreement included forfeiture and two special assessments.

Relevant to this petition, paragraph 6 of page 3 in the agreement improperly stated that a \$5000 special assessment under section 3014(a) was mandatory. Both the government and defense counsel insisted that this assessment was mandatory and not discretionary. Petitioner was not told and did not know that this assessment applied only to non-indigent defendants.

It must be noted that the sentencing transcript has no record of any indigency determination being made by the District Court Judge. While the PSR indicated a negative net worth and no income or employment in the 20 months since arrest, and the improper provision in the plea provided for one \$5000 assessment, the judge went on to impose two assessments (\$10,000).

For reasons unknown, and despite plain error, the Fifth Circuit Court of Appeals somehow concluded that the record indicated at sentencing that petitioner had a monthly income of \$2900 and \$3000 additional income from gaming. The Appeals court also failed to note petitioner's draconian 60 year sentence or the fact that if he survived prison, he would be nearly 90 years old upon release from prison with no marketable skills.

A motion for panel rehearing was also denied on June 13, 2022 and this petition timely followed.

## REASONS FOR GRANTING PETITION

Both questions to this honorable court affect not only this petitioner, but many others similarly situated. These assessments can have crushing financial impacts on poor offenders that will often still be indigent, many well over 60 years old, with diminished or obsolete marketable skills. All based upon a flawed interpretation of the statute in question.

Congress did not define "non-indigent" as it appears in 18 USC 3014, nor did congress specify a process for making this determination although this court should direct the District courts to take care to insure that "non-indigent" is not an arbitrary or rate determination, but one that affords due process on a case by case basis.

In regards to the first question posed herein, this court should grant a writ of certiorari, not to specifically define the meaning of non-indigent, but the parameters on how District Courts should make these determinations in the context of section 3014.

For example, the Fifth Circuit has held that a District Court can consider both education and past employment as well as hypothetical future earnings potential if a defendant was "able-bodied" and has the theoretical "means", over if a defendant has 20 or more years. How far back and how far into the future should the courts be allowed to look? Indeed, such a broad consideration could result in all defendants being declared non-indigent. See, *United States v. Graves*, 908 F.3d 137 (5th Cir. 2018).

Take petitioner, for example. While he was college educated and had been employed until his arrest. By sentencing, he had not worked in nearly 2 years, had no assets, was in debt and was sentenced to 60 years.

Can the court really claim he is non-indigent?

The Eighth Circuit, however, has concluded a defendant in Petitioner's position would certainly not be found non-indigent. See United States v. Barthman, 983 F.3d 318 (8th Cir. 2020).

To further complicate matters, some courts have held that section 3014 carries a presumption of being non-indigent unless the defendant himself can prove indigency. This view appears to be based upon USSG 5E1.2(e) which does state as such. This idea is absurd as congress does not mention it nor does the plain text of section 3014 place such a burden on a defendant.

In fact, the Sixth Circuit has held that the court "must insure that the defendant is not indigent" even when the defendant does not challenge the 3014 assessment." United States v. Fowler, 956 F.3d 431, 438 (6th Cir. 2020).

Some courts have even gone so far as to declare that there is no requirement to determine indigency at all because the statute uses the phrase "shall assess" United States v. Wendecksega, 924 F.3d 858.

This honorable court should decide the limits on determining if a defendant is non-indigent under section 3014.

That the second question would be less controversial, however, there is a clear circuit split over whether the assessment under section 3014 is to be made per defendant (per offense) or per court.

The rulings of the Second and Third Circuits, in particular, are demonstrably at odds, although the Second Circuit's textual basis appears better grounded, stating "As a matter of grammar and common understanding 'an amount' on a person... convicted of an offense means the amount is

assessed one time" and elaborated on the textual differences between sections 3013 and 3014 to support its conclusions. United States v. Haverkamp, 958 F.3d 145 (2nd Cir 2020). Further, this court has often referred to "prosecution of an offense" to mean several counts or a "continuing offense." As such "an offense" is not limited to a single count of charged or prosecuted conduct. Blanton v. North Las Vegas, 489 U.S. 538 (1989)

Beyond the above, and looking to the congressional record itself, there is no evidence that congress intended multiple assessments per defendant. As such, there appears to be no support in the statutory text itself or in the plainly expressed view of congress that multiple punishments are permissible under the statute. We must always assume congress knows how to write statutes allowing for penalties, fines and assessments per count of conviction.

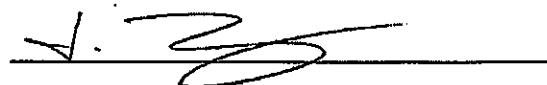
It did not do so here.

This honorable court should grant a writ of certiorari to resolve the circuit split, and construe the statutory language so that the District Courts have clarity and consistency, to uphold the fairness and integrity of the courts.

## **CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "J. Z.", is written over a horizontal line.

Date: September 8, 2022