

NO. _____

OCTOBER TERM, 2017

IN THE SUPREME COURT OF THE UNITED STATES

JASON MARC JANATSCH, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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(a) The Question Presented for Review Expressed in the Terms and Circumstances of the Case.

The Eighth Amendment to the United States Constitution prohibits “excessive fines.” Consistent with this limitation, in 18 U.S.C. §3014(a) Congress imposed a \$5,000.00 special assessment on non-indigents only. The Tenth Circuit endorsed a “holistic” approach to the determination of indigency under §3014(a) that authorized consideration of a defendant’s future ability to pay. Further, the Tenth Circuit applied a Sentencing Guideline provision applicable to the imposition of fines to place the burden of proving indigence on the defendant.

Should this Court exercise its supervisory power to correct the Tenth Circuit’s sanctioning of an excessive financial penalty on indigents contrary to Congress’s specific directive?

(b) List of all Parties to the Proceeding

The caption of the case accurately reflects all parties to the proceeding before this Court.

(c) Table of Contents and Table of Authorities

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None.

- (d) Reference to the Official and Unofficial Reports of any Opinions

United States v. Janatsch, No. 16-6324, 2018 WL 566297
(10th Cir. filed Jan. 26, 2018).

- (e) Concise Statement of Grounds on which the Jurisdiction of
the Court is Invoked.

- (i) Date of judgment sought to be reviewed.

The Order and Judgment of which review is
sought was filed January 26, 2018.

- (ii) Date of any order respecting rehearing.

Rehearing was denied February 26, 2018;

- (iii) Cross Petition.

Not applicable;

- (iv) Statutory Provision Believed to Confer Jurisdiction.

Pursuant Title 28, United States Code, §1254(1), any party to a criminal case may seek review by petitioning for a writ of certiorari after rendition of judgment by a court of appeals.

- (v) The provisions of Supreme Court Rule 29.4(b) and (c) are inapposite in this case. The United States is a party to this action and service is being effected in accordance with Supreme Court Rule 29.4(a).

- (f) The Constitutional Provisions, Statutes and Rules which the Case Involves.

- (1) Constitutional Provisions:

United States Constitution, Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

- (2) Statutes Involved:

Title 18, United States Code, §3014(a)

(a) In General.- Beginning on the date of 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-

(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.

(3) Rules Involved:

United States Sentencing Guideline §5E1.2(a)

(a) The court shall impose a fine in all cases, except where the defendant establishes that he is unable to pay and is not likely to become able to pay any fine.

(g) Concise Statement of the Case.

Basis of Jurisdiction in Court of First Instance

This Petition seeks review of a judgment entered by a United States Court of Appeals. The jurisdiction of the district court below was based originally on an alleged violation of the laws of the United States. The United States District Court for the Western District of Oklahoma has original jurisdiction over offenses against the laws of the United States which occur in that district. Title 18, United States Code, Section 3231.

Facts Material to Consideration of Question Presented

On January 6, 2016, a three count Indictment was returned by a federal grand jury naming Jason Marc Janatsch as the only defendant. The indictment charged Mr. Janatsch produced, received, and possessed child pornography. Mr. Janatsch entered a plea of guilty to Count 1 of the Indictment alleging he used a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, a violation of 18 U.S.C. §2251(a).

The district court directed the preparation of a Presentence Report. The Presentence Report listed a \$5,000.00 special assessment pursuant to 18 U.S.C. §3014(a) among the sentencing options. Mr. Janatsch objected to the imposition of the \$5,000.00 special assessment. Mr. Janatsch argued the \$5,000.00 special assessment applied only to non-indigent persons. At the outset of the prosecution Mr.

Janatsch had been found indigent based on his financial condition. At the time of sentencing Mr. Janatsch did not have the ability to pay the assessment.

Mr. Janatsch is an indigent person who was, and continues to be, represented by court-appointed counsel. The determination of indigence has never been in dispute during the pendency of the district court or appellate proceedings. Moreover, Mr. Janatsch's financial condition at the time of sentencing corroborated the previous finding of indigence.

Mr. Janatsch described his financial circumstances during a presentence interview. He advised his only asset was a vehicle that was repossessed. His liabilities consisted of outstanding student loans and medical bills. A credit bureau inquiry by the United States Probation Office revealed \$39,824 in debt, \$16,468 of which was past due. These facts were not disputed. The government offered no evidence or argument on the issue of Mr. Janatsch's finances.

Mr. Janatsch was sentenced to the statutory maximum term of imprisonment of 360 months. In addition to the \$100.00 special assessment mandated by 18 U.S.C. §3013, Mr. Janatsch was ordered to pay the \$5,000.00 special assessment pursuant to 18 U.S.C. §3014. When imposing the \$5,000.00 special assessment, the district court stated:

I note in paragraph 132 [of the Presentence Report] the defendant objects to the \$5,000 assessment and I conclude from the presentence report –

I'm having a hard time concluding that the defendant is enough of a pauper, if you will, that I ought to not impose that assessment. And that's aside from the fact that he's going to have plenty of time to pay that off while incarcerated.

.

That objection will be overruled. I think he'll -- he has the ability to pay it out over time.

The Tenth Circuit affirmed the imposition of the \$5,000.00 special assessment finding “Janatsch had not met his burden of proving indigency for purposes of the statute” and “nothing in the statute precludes an examination of future ability to pay as part of a holistic assessment of the indigency determination.” *Janatsch*, 2018 WL 566297, at *9. Mr. Janatsch’s petition for rehearing and en banc consideration was denied by the Tenth Circuit.

(h) Direct and Concise Arguments Amplifying the Reasons Relied on for the Allowance of the Writ.

Section 3014(a) of Title 18, United States Code, provides for a \$5,000.00 special assessment to be imposed for a limited period of time on non-indigent defendants convicted of certain offenses related to sexual exploitation and human trafficking. The special assessment is earmarked for the Domestic Trafficking Victims’ Fund to assist victims of sexual exploitation and abuse. 18 U.S.C. §3014(c). Congress did not prescribe a particular method of determining whether a defendant is “non-indigent.”

The district court did not explain why it concluded Mr. Janatsch was non-indigent in the face of undisputed evidence he had no assets, he had significant delinquent debt, and he had no prospects for income during the thirty years of confinement in federal prison. The record was completely devoid of evidence of his future prospects for employment as a registered sex offender.

Affirming the district court's conclusion Mr. Janatsch was not enough of a pauper to avoid liability for the assessment, the Tenth Circuit erroneously cited a sentencing guideline provision and case law governing the imposition of fines. According to the Tenth Circuit, these provisions authorized the district court to look to future ability to pay when making the indigence determination under §3014. In addition, the Tenth Circuit determined the burden of proving indigence for purposes of the \$5,000.00 special assessment was on the defendant.

Indigence determination

The only defendants subject to the \$5,000.00 assessment are “non-indigents.” Section 3014(a) is unambiguous. “The starting point in statutory interpretation is ‘the language [of the statute] itself.’” *Ardestani v. I.N.S.*, 502 U.S. 129 (1991), *quoting United States v. James*, 478 U.S. 597, 604 (1986). The use of the prefix “non” makes it clear the only individuals subject to the assessment are those *not indigent*.

At the time of sentencing Mr. Janatsch's financial condition reflected he had been unemployed for almost a year. He had no assets. His debt totaled \$39,824.00, \$16,468.00 of which was past due. The previous finding of indigence made in connection with Mr. Janatsch's request for court appointed counsel remained undisturbed. Importantly, the district court never found Mr. Janatsch was non-indigent. The district court found Mr. Janatsch was a "pauper," just "not enough of a pauper . . . to not impose that assessment."

Instead of deciding whether the district court erred by finding Mr. Janatsch was "non-indigent," the Tenth Circuit approved the district court's "holistic assessment of the indigency determination" to affirm the imposition of the assessment. Not only does the Tenth Circuit's "holistic" approach allow a district court to disregard a defendant's current indigence, it allows a district court to delve into the theoretical possibility the defendant will break the bonds of indigence while serving, as here, the next thirty years of his life in prison. The Tenth Circuit's "holistic" approach to indigency determination is well outside the scope of the plain language of §3014(a).

Moreover, the district court's determination Mr. Janatsch would have the ability to pay the assessment out over time was not based on a single fact in the record. Neither the Presentence Report nor the district court cited support for the conclusion Mr. Janatsch had the capability of earning money during his term of incarceration.

Even assuming he could be employed while confined, there was no evidence the wage for prisoners supported the determination the assessment could be paid over time.

The Tenth Circuit's resort to the sentencing guidelines as support for the "holistic" approach compounded the error. Congress gave no indication the determination of indigency for purposes of §3014(a) should be guided by either the statutory framework governing imposition of fines or the Sentencing Guidelines. Congress referenced statutes governing fines in §3014 for two specific purposes. First, in reference to the collection method for the assessment. 18 U.S.C. §3014(f). Second, in reference to the duration of the obligation with respect to collection efforts. 18 U.S.C. §3014(g). Congress' resort to the statutes governing fines for these specific purposes suggests that it did not intend for courts to incorporate the fine statutes for purposes of determining an individual's ability to pay the assessment.

Moreover, Congress placed §3014 in the General Provisions, Chapter 201, of Title 18 as opposed to Sentencing, Chapter 227, of Title 18, governing fines. Placing §3014(a) in Chapter 201, which also includes the Criminal Justice Act, 18 U.S.C. §3006A, suggests Congress meant the term indigent to be construed in the context of eligibility for court appointed counsel. "Other formal attributes of a legislative enactment, such as the manner of its codification or the enforcement procedures it

establishes, are probative of the legislature’s intent.” *Smith v. Doe*, 538 U.S. 84, 94 (2003).

Shifting the burden of proof

This Court held “[w]hen we are determining the burden of proof under a statutory cause of action, the touchstone of our inquiry is, of course, the statute.” *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 56 (2005). Section §3014 is silent on who bears the burden of proving indigence. If the statute is silent the Court should resort “to the ordinary default rule that plaintiffs bear the risk of failing to prove their claims.” *Id.*, citing McCormick §337, at 412 (“The burdens of pleading and proof with regard to most facts have been and should be assigned to the plaintiff who generally seeks to change the present state of affairs and who therefore naturally should be expected to bear the risk of failure of proof or persuasion”); C. Mueller & L. Kirkpatrick, *Evidence* § 3.1, p. 104 (3d ed. 2003) (“Perhaps the broadest and most accepted idea is that the person who seeks court action should justify the request, which means that the plaintiffs bear the burdens on the elements in their claims”). See also *Hawkins v. Schwan’s Home Service, Inc.*, 778 F.3d 877, 885-887 (10th Cir. 2015) (citing *Weast* and discussing generally burden of persuasion and burden of proof in Americans with Disabilities Act suit).

The Tenth Circuit's resort to the law governing imposition of fines and sentencing guidelines provisions governing fines led to the erroneous conclusion Mr. Janatsch bore the burden of proving indigence. As it concerns fines, Congress did not impose a burden on the defendant of proving inability to pay a fine. Instead, Congress provided the courts explicit guidance on factors to consider in whether to impose a fine. Factors such as the amount of the fine, the time within which to pay the fine, and the method of payment of the fine are included in the Congressional directive. *See* 18 U.S.C. §3572(a).

With respect to the Sentencing Guidelines, §5E1.2, USSG, advises a court shall impose a fine “except where the defendant establishes that he is unable to pay and is not likely to become able to pay any fine.” A fine is not the equivalent of a special assessment under the sentencing guidelines. The sentencing guidelines have a separate provision dealing with special assessments. *See* USSG §5E1.3. The United States Sentencing Commission has not amended the special assessment provision to include reference to the special assessments enacted in §3014. There is no indication the Sentencing Commission endorses reference to USSG §5E1.2 with respect to who bears the burden of proof of indigent status pursuant to §3014(a).

The propriety of the Sentencing Commission imposing the burden on the defendant to show his inability to pay a fine is not an issue before this Court in this

case. It is sufficient to note Congress has provided no similar directive with respect to imposition of the assessment under §3014(a), other than the unequivocal condition the assessment should only be ordered for “non-indigents.”

The Tenth Circuit’s decision erroneously shifted the burden of proving non-indigence to Mr. Janatsch without statutory authority. The Eighth Circuit’s decision in *United States v. Kelley*, 861 F.3d 790 (8th Cir. 2017), cited by the Tenth Circuit as supporting authority, is flawed by the same legal analysis and is factually distinguishable. In *Kelley*, it appears the district court’s decision to impose the \$5,000.00 special assessment was affected significantly by the defendant’s lack of credibility concerning the profit made from the sale of his residence. *Kelley*, 861 F.3d at 802. Thus, it was quite possible the defendant was in fact non-indigent at the time of sentencing as required by the statute. In this case, there is no ambiguity as to Mr. Janatsch’s status as an indigent.

The monetary burden was enacted by Congress in §3014(a) as a special penalty for defendants who commit sexual offenses involving minors. Its purpose is to recognize the severity of these offenses and to exact an explicit sanction linked directly to the offense. Congress did not intend to inflict this burden on defendants who are unable to pay because they are poor. Mr. Janatsch was too poor to be fined as part of the punishment for his crime, but, without any evidence indicating he will

be able to pay, was subjected to the special assessment. This was an abuse of the statute by the district court. The Tenth Circuit's misapplication of the law crafting an "holistic" approach to this concrete issue exacerbates the error. The result was an excessive financial penalty that violates the Eighth Amendment.

(i) Appendix.

- (i) Opinion delivered upon the rendering of judgment by the court where decision is sought to be reviewed:

United States v. Janatsch, No. 16-6324, 2018 WL 566297 (10th Cir. filed Jan. 26, 2018).

- (ii) Any other opinions rendered in the case necessary to ascertain the grounds of judgment:

None;

- (iii) Any order on rehearing:

Rehearing was denied February 26, 2018.

- (iv) Judgment sought to be reviewed entered on date other than opinion referenced in (i):

None;

- (v) Material required by Rule 14.1(f) or 14.1(g)(i):

None;

- (vi) Other appended materials:

None.

CONCLUSION

For the foregoing reasons, Mr. Jason Marc Janatsch respectfully requests a Writ of Certiorari issue to review the Order and Judgment filed January 26, 2018, of the United States Court of Appeals for the Tenth Circuit in Case Number 16-6324.

Respectfully submitted,

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