

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 17-CR-112-CVE
	)	
THOMAS MATHEWS,	)	
	)	
Defendant.	)	

DEFENDANT THOMAS MATHEWS' SENTENCING MEMORANDUM

In accordance with 18 U.S.C. § 3553(a) and LCrR 32.6, Defendant, Thomas Mathews, respectfully submits the following sentencing memorandum, and respectfully requests that the Court impose a sentence of one hundred twenty (120) months imprisonment, waive imposition of a fine, and find that he is indigent for purposes of 18 U.S.C. § 3014(a)—thus waiving that section's additional special monetary assessment.

I. WHO IS THOMAS MATHEWS?

Thomas Mathews is a married thirty-five (35) year old man who is the father of five children. Prior to the instant charges, Mr. Mathews had been a tribal leader in the Quapaw Tribe and has an extraordinary record of community service and helping others. His conduct that gave rise to this case has cost him his job, his assets, and his freedom. They will take him away from the remainder of his children's childhood and young adult lives, and will take financial support from them for the same period.

But that is not all there is to Thomas Mathews. He is respected and beloved by those who know him. Descriptions of him range from a “loving and deeply caring father” (Joseph Valandra letter)¹ to a man who is a community leader and servant. For instance, he is described as being an excellent father who cares for his numerous stepchildren in the same way that he does for his own children. (*See* Letter from Florence Mathews). This includes volunteering for school activities and classroom parties and eating lunch at the school. (*See* Letter from Vicki Lewis).

But his love and compassion go beyond his own family. He has led tornado-relief efforts, including physically “digging through rubble searching for survivors.” (Letter from Ronnie Harris). He has purchased and delivered groceries for families in need. (Letter from Claire Mathews). When community programs and scholarship programs have needed funding, Thomas has led the charge to make sure that the money was raised. This includes devoting significant time and effort to supporting a scholarship fund at Oklahoma State University in memory of his late brother. (*See* Letter from Kyle Don Kelley). He has helped random strangers find jobs. (*See* Letter from Barbara Kyser-Collins). When coaching youth baseball, he “made sure each kid on the team was treated as the MVP.” (Letter from Debbie Wray). In fact, one Christmas, Thomas learned a man he knew would be unable to purchase presents for his children. So Thomas bought the children presents himself. As the father put it: “[H]e showed up with so many presents for my children, more than I could have ever

¹ The cited letters and many more are being delivered to the Court in a bound volume through the U.S. Probation Officer assigned to this case.

provided for them. My children still say that was the best Christmas ever! For that, I can't thank Thomas enough." (Letter from Justin Bryant).

Thomas' actions have not only directly helped others, his character has created a model for others to follow. For instance, as a child, Thomas would bring extra money and snacks from home to provide to other children who were less privileged than him. (*See* Letter from Claire Mathews). Now as a father, his own children do the same. (*See id.*). Likewise, his loving family-first attitude has even caused others to model their own parenting styles after him. (*See* Letter from Justin Fears). His children's principal puts it most succinctly: "[Thomas] acted in a way that I wished more fathers would emulate." (Letter from Vicki Lewis).

Even incarceration has not been able to change Thomas' giving and caring attitude. For instance, upon meeting another inmate who makes art, Thomas contacted his parents to try to help the man market his artwork. (*See* Letter from Claire Mathews). When Thomas learned another inmate was encountering difficulties collecting payments he was owed, Thomas asked his family to help connect the man with people who could help him. (*See id.*).

In sum, those who know Thomas best consider him to be a community leader, loving father, and servant to those in need. As one long-time friend and colleague puts it: "[The] qualities that stand out most in my experience with Thomas are[] integrity, fairness[,] balance and his dedication to his family and our community." (Letter from Debbie Wray).

Further, as is noted in the pre-sentence report and in the report of Dr. Curt Grundy,² at the time of this conduct, Mr. Mathews was taking a combination of prescription drugs that particularly affects one's cognitive abilities—hydrocodone and soma. Dr. Grundy's report notes a high probability that Mr. Mathews suffers from a substance use disorder arising from his perspective opioid use. This is not a defense to Mr. Mathews' conduct and should not be construed in any manner as limiting the detailed admissions of guilt that Mr. Mathews gave to the Court at the change-of-plea hearing. It is, however, a relevant fact in the Court's consideration of the context in which Mr. Mathews committed the charged crime.

Mr. Mathews made wrong choices when he began using the Whisper app to communicate with girls under the age of 18, and understands that he must be punished under the law for those choices. But here ten years is enough. Perhaps most importantly, it will allow Mr. Mathews to be housed at a facility where his family can more easily visit him and which is most appropriate for him.

II. THE § 3553(A) FACTORS AND WHY THEY SUPPORT THE SENTENCE THAT MR. MATHEWS SEEKS.

The Court must consider all of the factors set out in 18 U.S.C. § 3553(a) and “make an individualized assessment based on the facts presented.” *Gall v. United States*, 552 U.S. 38, 50 (2007); *see also United States v. Smart*, 518 F.3d 800, 805 n.4 (10th Cir. 2008) (“[D]istrict courts must be allowed to consider whether other § 3553(a) policies outweigh the Guidelines in a given case.” (citing *Kimbrough v. United States*, 552 U.S. 85, 91 (2007))). “[A] district court's job is not to impose a

² Which will be delivered to the Court along with the letters of support.

reasonable sentence. Rather, a district court's mandate is to impose a sentence sufficient, but not greater than necessary, to comply with the purposes of section 3553(a)(2)." *United States v. Conlan*, 500 F.3d 1167, 1169 (10th Cir. 2007) (emphasis added).

A. The Nature and Circumstances of the Offense and the History and Characteristics of Mr. Mathews.

As noted, Mr. Mathews has pleaded guilty to attempted enticement of a minor using the Whisper application. He accepts responsibility for his criminal conduct on the Whisper application.

Mr. Mathews acknowledges the seriousness of this offense. He recognizes respect for the law must be promoted and just punishment meted out by this Court. But his history and characteristics were placed on equal grounds in 18 U.S.C. § 3553(a)(1) by the U.S. Congress.

As noted above and in the letters which are being delivered to the Court, Mr. Mathews has an extraordinary history of community service and support. This substantial history is an appropriate consideration for the Court. *See United States v. Huber*, 462 F.3d 945, 952 (8th Cir. 2006) (affirming district court's grant of downward departure where defendant had loaned money to neighbors and fellow farmers in need, over a number of years, and this generosity had saved farms from foreclosure and helped finance the start-up and continuation of businesses in the local community); *United States v. Cooper*, 394 F.3d 172, 176 (3d Cir. 2005) (affirming district court's grant of downward departure where defendant did not simply donate money to charity but also organized and ran youth football team in depressed area,

mentored its members, and helped several members attend better high schools or go to college, which qualified as exceptional level of good works); *United States v. Bennett*, 9 F. Supp. 2d 513 (E.D.Pa. 1998) (where defendant's civic and charitable deeds were extraordinary, together with other grounds, departure from 232 to 92 months was warranted; defendant's substantial contributions in areas of substance abuse, children and youth, and juvenile justice were well documented and well recognized).

Further, Mr. Mathews is a first-time offender. This consideration lends itself toward a lesser sentence. *See, e.g., United States v. Paul*, 239 Fed. App'x 353 (9th Cir. 2007) (defendant's 16-month sentence, the top end of the guideline range for unlawful receipt of federal funding, was unreasonably high because defendant was a first-time offender and had displayed remorse); *United States v. Jewell*, 2009 WL 1010877 (E.D. Ark. April 15, 2009) (defendant sentenced to 30 months in prison for aiding and abetting tax evasion, because guideline range near the statutory maximum of 5 years was inappropriate for first time offender); *United States v. Cull*, 446 F. Supp. 2d 961 (E.D. Wis. 2006) (non-guideline sentence of 2 months in jail and 4 months home confinement, where advisory range was 10-14 months for marijuana offense by defendant who had never been confined, was sufficient to impress on him the seriousness of his crime and deter him from re-offending); *United States v. Qualls*, 373 F. Supp. 2d 873, 877 (E.D. Wis. 2005) (generally, a lesser prison term is sufficient to deter one who has not been subject to prior lengthy incarceration).

As noted by Dr. Grundy's report, professional testing has confirmed that Mr. Mathews is "amenable to intervention," "did not indicate sexual interest in children

under the age of 14,” and that he was not a heightened risk for sexual recidivism. These characteristics of Mr. Mathews, which have been professionally confirmed, indicate that the sought sentence is appropriate.

Perhaps most importantly, if Mr. Mathews is sentenced to 120 months—or even 121 months (which is within the Guidelines range)—he would be eligible for housing in at least a low-security facility (and even a minimum-security facility if the Bureau of Prisons will waive the Personal Security Factor arising from the nature of the offense, which Mr. Mathews intends to seek). This will make it much easier for Mr. Mathews’ family—and his wife, parents, and children still support him and remain in regular contact with him—to visit him more easily and in better conditions. That will allow him to stay some part of the family, which in turn will allow him to better reintegrate into society once he is released.

B. Fulfillment of the Statutory Sentencing Purposes.

Mr. Mathews must, by statute, serve at least ten (10) years in prison. Congress set this sentencing floor, and it is respectfully submitted that such a lengthy sentence will reflect the seriousness of the offense, promote respect for the law and provide just punishment. It will also provide an adequate deterrent. This is especially so here given all that Mr. Mathews has lost and will lose, as well as the fact that he will be required to register as a sex offender for the balance of his life.

As for protecting the public, ten years is long enough inside a prison. Mr. Mathews will thereafter be on supervised release for at least five (5) years and perhaps much longer. Among the conditions to which he will be subject will all but certainly include stringent monitoring of his internet usage (if he can even use it at

all), which will more than adequately prevent the conduct at issue—all of which arose from an Internet application.

Dr. Grundy’s report notes that Mr. Mathews “is amenable to intervention and would benefit from placement in a structured sex offender treatment program.” The sought sentence will allow that to occur without being greater than necessary. Mr. Mathews can obtain the needed treatment within a ten-year period and a few additional months or years would not aid that process.

C. The Kinds of Sentences Available.

Here, the Court could impose a sentence of imprisonment not less than ten (10) years and up to life, and could impose supervised release for a period of five (5) years to life. A sentence substantially higher than ten (10) years is not warranted here. And as detailed herein, ten (10) years is the sentence that Mr. Mathews should receive. It is within one (1) month of the Guidelines range, which the Court must consider. Indeed, the Guidelines contemplate a sentence of almost exactly what Mr. Mathews seeks based upon the Sentencing Commission’s careful analysis of exactly the kind of conduct at issue for the type of offender at issue.

Congress has set important limitations on the Court’s sentencing discretion, in providing that probation is not available and that the Court must sentence Mr. Mathews to at least ten (10) years in prison. But the Court should not be harsher than Congress has outlined for Mr. Mathews, who has led an otherwise exemplary life.

D. The Guidelines.

While the Guidelines are but one factor, “[t]hey are entitled to thoughtful consideration.” *United States v. Pena-Macedo*, No. CR 07-1336 JB, 2008 WL 3992135, at *4 (D.N.M. Apr. 28, 2008); *Rita v. United States*, 551 U.S. 338, 349 (2007) (“The Guidelines as written reflect the fact that the Sentencing Commission examined tens of thousands of sentences and worked with the help of many others in the law enforcement community over a long period of time in an effort to fulfill [its] statutory mandate.”); *United States v. Cage*, 451 F.3d 585, 593 (10th Cir. 2006) (“the Guidelines are an expression of popular political will about sentencing that is entitled to due consideration . . . [and] represent at this point eighteen years' worth of careful consideration of the proper sentence for federal offenses.”). Mr. Mathews’ sought sentence is within one month of the Guidelines range. The Court can and should take that into account and impose either a 120 month sentence or a 121 month sentence which is consistent with the Guidelines.

E. The Need to Avoid Unwarranted Disparities in Sentencing.

Other defendants convicted of very similar conduct have received sentences of one hundred twenty (120) months. In one recent and local case, a defendant in the Eastern District who pleaded guilty to *two* 18 U.S.C. § 2422(b) violations, one of which involved a victim under 14 years of age, was sentenced to one hundred twenty (120) months in prison by the Honorable Ronald A. White. *See* Exhibit A. Of note, the U.S. Attorney—Mr. Kuester—stated that such a sentence was such that “[t]he defendant is being held accountable and the public is being protected” *Id.* He expressed no objection to such a sentence. Other similar results have obtained in other courts.

United States v. Howard, 766 F.3d 414, 418 (5th Cir. 2014) (“The district court found Howard guilty [after a trial] and sentenced him to 120–months imprisonment, the mandatory-minimum sentence.”); *United States v. Nestor*, 574 F.3d 159, 160 (3d Cir. 2009) (“The District Court denied Nestor's motion [again, after a trial] and sentenced him to 120 months for attempted enticement of a child and 46 months for possession of child pornography, with the terms to run concurrently.”); *United States v. Bohannon*, 476 F.3d 1246, 1247 (11th Cir. 2007) (“Thomas Edward Bohannon appeals his 120–month sentence for use of the internet to entice a minor into sexual activity, in violation of 18 U.S.C. § 2422(b) . . . which was below the 135–to–168–month advisory range he faced.”). All of these defendants in the Circuit cases went to trial, did not accept responsibility like Mr. Mathews, and most engaged in additional conduct that Mr. Mathews did not. It would be inconsistent with 18 U.S.C. § 3553(a)(6) to impose a greater sentence on Mr. Mathews than the above defendants—and Mr. Campbell in particular—received.

F. Restitution.

The PSR notes that no one has claimed restitution, and Mr. Mathews has no notice of—nor opportunity to be heard on—restitution. Therefore, it is not a factor in this case.

II. THE COURT SHOULD WAIVE IMPOSITION OF A FINE

The Sentencing Guidelines provide that the Court may decline to impose a fine “where the defendant establishes that he is unable to pay and is not likely to become able to pay any fine.” U.S.S.G. § 5E1.2(a). Under U.S.S.G. § 5E1.2(d), the Court, in determining the amount of a fine, if any, “shall consider,” among other factors, (1)

“any evidence presented as to the defendant’s ability to pay the fine (including the ability to pay over a period of time) in light of his earning capacity and financial resources;” (2) “the burden that the fine places on the defendant and his dependents relative to alternative punishments;” (3) “any restitution or reparation that the defendant has made or is obligated to make;” and (4) “any collateral consequences of conviction.”

Here, Mr. Mathews does not have the ability to pay a fine, as the PSR has noted. Mr. Mathews faces imprisonment for at least the next ten (10) years, and has little or no ability to access or earn funds with which he could pay any fine.

Under U.S.S.G. § 5E1.2(e):

If the defendant establishes that (1) he is not able and, even with the use of a reasonable installment schedule, is not likely to become able to pay all or part of the fine required by the preceding provisions, or (2) imposition of a fine would unduly burden the defendant’s dependents, the court may impose a lesser fine or waive the fine. In these circumstances, the court shall consider alternative sanctions in lieu of all or a portion of the fine, and must still impose a total combined sanction that is punitive.

Here, based upon the facts set forth herein and in the PSR, Mr. Mathews submits that he has established inability to pay a fine, even with a reasonable installment schedule. Mr. Mathews’ assets are in foreclosure or repossession; he owes substantial child support; and he will likely soon be filing for bankruptcy. There is nothing before the Court to suggest that Mr. Mathews is likely to become able to pay a Guidelines fine at any time in the foreseeable future, if ever.

As the Tenth Circuit Court of Appeals has found, “it is an incorrect application of the guidelines to impose a fine that a defendant has little chance of paying.” *United*

States v. Labat, 915 F.2d 603, 606 (10th Cir. 1990). Imprisonment, along with the collateral consequences of conviction, will impose an adequately punitive sentence in the circumstances presented.

III. THE COURT SHOULD DETERMINE THAT MR. MATHEW IS INDIGENT AND THUS DECLINE TO IMPOSE THE 18 U.S.C. § 3014 SPECIAL MONETARY ASSESSMENT.

18 U.S.C. § 3014 provides that the Court ““shall assess an amount of \$5,000 on any *non-indigent person* or entity convicted” of certain enumerated offenses, including the offense of conviction in this case. 18 U.S.C. § 3014 (emphasis added). Black’s Law Dictionary offers the following definition of indigent: “1. A poor person. 2. Someone who is found to be financially unable to pay filing fees and court costs and so is allowed to proceed *in forma pauperis*.” BLACK’S LAW DICTIONARY (10th ed. 2014).

“[T]he starting point for interpreting a statute is the language of the statute itself.” *Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). A court “must follow the plain and unambiguous meaning of the statutory language.” *Salinas v. United States*, 522 U.S. 52, 57 (1997) (citations and quotation marks omitted). Undefined terms are interpreted based upon their “ordinary and natural meaning . . . [and] the overall policies and objectives of the statute.” *United States v. Lowe*, 118 F.3d 399, 402 (5th Cir. 1997) (citations omitted).

The language of the United State Code Title 18 section 3014 states that the special assessment is to be imposed only on “non-indigent” persons. 18 U.S.C. § 3014(a) (“the court shall assess an amount of \$5,000 on any non-indigent person . . .”). In the criminal context, the term is most often associated with the Sixth Amendment right to counsel, where the ordinary and natural meaning of the term “indigent” is an

individual charged with committing a criminal offense who lacks an *immediate* ability to pay legal fees. *See generally Gideon v. Wainwright*, 372 U.S. 335, 340-344 (1963) (holding that a defendant who lacks an immediate ability to pay legal fees and expenses is indigent for Sixth Amendment purposes). Where Congress utilizes a term which has accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to such term in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. “In such case, absence of contrary direction may taken as satisfaction with widely accepted definitions, not as a departure from them.” *Morissette v. United States*, 342 U.S. 246, 263 (1952).

By the accepted definition of indigence, Mr. Mathews is indigent at the time of sentencing. His only bank account is substantially overdrawn. All of his real property and his vehicles are either in foreclosure or repossession, or are on the verge thereof. He owes significant debt—including child support—with no foreseeable ability to repay. Bankruptcy is likely imminent for he and his wife. If he appeared before this Court at an initial appearance today, he would certainly qualify for appointed counsel. He should therefore be determined to be indigent and thus beyond the scope of 18 U.S.C. § 3014(a)’s \$5,000 special monetary assessment.

WHEREFORE, Defendant, Thomas Mathews, respectfully requests that the Court impose a sentence of one hundred twenty (120) months imprisonment, waive imposition of a fine, and find that he is indigent for purposes of 18 U.S.C. § 3014(a)—and thus decline to impose that section’s additional special monetary assessment.

Respectfully submitted,

/s/ Ryan A. Ray

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CERTIFICATE OF SERVICE

I hereby certify that on May 23, 2018, a true and correct copy of the above and foregoing instrument was served via CM-ECF upon the following:

Jeffrey A. Gallant, Esq.
Shannon B. Cozzoni, Esq.

/s/ Ryan A. Ray

Ryan A. Ray