

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

<b>United States of America,</b>	:	
<b>Plaintiff,</b>	:	
<b>vs.</b>	:	<b>Case No. 2:21-cr-175-001</b>
<b>Mark Alan Thomas,</b>	:	<b>Chief Judge Algenon L. Marbley</b>
<b>Defendant.</b>	:	

**SENTENCING MEMORANDUM**

***INTRODUCTION:***

Now comes the defendant, Mark Thomas, a 63-year-old man with a history of public service, no prior criminal history points, significant health problems and acceptance of responsibility for his actions, and respectfully requests a guideline sentence of 51 months incarceration.

***STANDARD OF REVIEW:***

When sentencing an offender in the post-*Booker* era, the District Court considers the applicable advisory sentencing guidelines range as well as the other factors listed in 18 U.S.C. §3553(a). The objective of this process is to reach a sentence that is sufficient, but not greater than necessary, to comply with the purposes of sentencing listed in §3553(a)(2). *United States v. Lee*, 974 F.3d 670, 676 (6th Cir. 2020).

The District Court begins by correctly calculating the applicable advisory guideline range. *Gall v. United States*, 552 U.S. 38, 52, (2007). After giving the parties an opportunity to argue and recommend an appropriate sentence, the district court must consider the

remaining §3553(a) factors to determine whether they support the recommended sentence. *Gall*, at 49. The court may not presume the guideline range is reasonable; rather, it must make a fact-based individualized assessment. *Id.* at 50; *Nelson v. United States*, 555 U.S. 350 (2009).

**STATUTORY CONSIDERATIONS:**

18 U.S.C. §3553(a) provides:

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;

**~HISTORY & CHARACTERISTICS~**

Mark Thomas was born in 1960 in Wheeling, West Virginia. He is the middle child of three siblings. (ECF 34, Pre-Sentence Investigation Report [PSIR]; PID #116, ¶¶ 56-57). He was raised in Bridgeport, Ohio until the age of eight, when the family relocated to St. Clairsville, Ohio. (*Id.* at ¶ 56). His father was an attorney and his mother was a homemaker. (*Id.*). His father was elected as a Belmont County Common Pleas Court Judge in the 1980's and remained on the bench until his death in 1989, due to lung cancer. (*Id.*). Mark did not report any troubles at home when he was young, such as domestic violence or substance abuse.

Mark graduated from a military high school. He then graduated from Kent State University with a bachelor's degree, and later attended and graduated from the Ohio Northern University College of Law in 1984. (*Id.* at ¶ 65). At some point in early or mid 2015, Mark's life started coming apart when he sustained his first suspension from the practice of law. (*Id.* at ¶ 66). Later, in 2016, his marriage ended. (*Id.* at ¶ 58). His work habits were phrenetic during this period, as his ex-wife reported that he worked "several

jobs” and worked “seven days a week” during their marriage. (Id. at ¶¶ 60). In addition to his law practice, he co-owned a restaurant in Wheeling, WV from 2005 to 2019; he was the St. Clairsville City Law Director from 1993 to 2001; he was a Belmont County Board of Commissioners member from 2001-2009 and again from 2013 to 2018; and, from January to August 2022, he was a St. Clairsville city councilman. (Id. at ¶¶ 70-72).

Mark has two adult children, one who currently works for a restaurant in Pittsburgh, Pennsylvania and a second who is a senior at a university in Cincinnati, Ohio. (Id. at ¶ 58). He was married to his children’s mother for 17 years, before they split up. (Id.). Mark has a very close relationship with his daughters and has always been a supportive and loving parent. (Id. at ¶¶ 58, 60).

Unfortunately, Mark has a number of serious health problems. One of his conditions was addressed years ago, through numerous surgeries, but still acts up and contributes to other health problems he has. Documentation of his medical problems will be presented to the Court for filing under seal. (Also see, Id. at ¶¶ 61-62).

Since the filing of the Final PSIR in November of 2022, Mark has recently provided the U.S. Probation Department with his financial statement, showing that he has a negative net worth and a neutral monthly income from his job as a title abstractor.

***~NATURE AND CIRCUMSTANCES OF THE OFFENSE~***

In the course of acting as a fiduciary to the victim in this matter, Mark misappropriated a significant amount of money over the course of several years. (ECF 34, PSIR; PID # 106 & 107, ¶¶ 2 & 6). Mark had known the victim for many years and truly cared about her well-being. She had no children of her own. He made sure she was well cared for and never went without the treatment or comfort-care she needed. Because she

was well-off financially, and they were friends, Mark wrongly thought she would be “ok” with him borrowing some money from her. He intended to pay the money back, but quickly found himself in over his head. He was ashamed and lacked the courage to come forward and ask for help, before things spiraled further out of control. Mark has accepted responsibility for his actions and has made no excuses for his behavior. (Id. at ¶¶ 28 and 45).

**(2) the need for the sentence imposed**

**A. to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;**

The requested sentence of 51 months imprisonment is sufficient but not greater than necessary to accomplish the goals of 18 U.S.C. § 3553(a). Importantly, this was not a violent offense or one involving illegal narcotics. Mark is an intelligent man who has been running a title abstracting company to make ends meet. He is capable of earning a living and the sooner he is released from prison, the sooner he can make meaningful payments of restitution to the heirs of the victim. Mark did not live a life of luxury with the funds he misappropriated. He clearly mismanaged his own monies, providing an explanation, not an excuse, for behavior he regrets to his core. His crime was the result of a unique circumstance that will not repeat itself. He is deeply ashamed of himself and has learned the most painful of lessons. In trying to provide for his family, he destroyed that which he loved the most, and destroyed himself in the process.

**B. to afford adequate deterrence to criminal conduct;**

Mark’s life as an attorney and respectable member of his community is over. He is

now a convicted felon. In addition to the regret and sadness he feels for the surviving members of his victim's family, and knowing they will never forgive him, he will be paying for his misdeeds literally for the rest of his life, while being subject to this Court's jurisdiction for years to come. And, starting at the age of 63, with a number of serious health problems, Mark will be imprisoned for the first time in his life. These catastrophic consequences for his behavior pose an absolute deterrence to him committing any crimes in the future.

**C. to protect the public from further crimes of the defendant;**

Mark will never (and cannot) put himself in a position to be responsible for anyone else's money again. He lead a law-abiding life before this offense and will not re-offend. Mark has been essentially under supervision since the summer of 2019, when the FBI first spoke to him. He has not committed a criminal offense, nor been charged with any criminal offenses during the last three and one-half years, and has abided by the terms of his pre-trial release. Mark has demonstrated that he is not a threat to the public moving forward.

**D. to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;**

At 63 years of age, and having completed graduate school, Mark will not need further educational or vocational training. However, he may very well need specific treatment for his medical conditions, as will be addressed in a filing presented to the Court for filing under seal.

**(3) the kinds of sentences available;**

The Court is now permitted to consider arguments that the applicable guidelines fail to properly reflect §3553(a) considerations, reflect an unsound judgment, do not treat

defendant characteristics in the proper way, or that a different sentence is appropriate regardless. *Rita v. United States*, 551 U.S. 338, 351, 357 (2007). Judges “may vary [from Guidelines ranges] based solely on policy considerations, including disagreements with the Guidelines.” *Kimbrough v. United States*, 552 U.S. 85, 101 (2007) (internal quotation marks and citations omitted).

Here, counsel is requesting the Court sentence Mark at the lower end of the advisory guideline range, based upon a fact-based, individualized assessment of his circumstances.

**(4)** the kind of sentence and the sentencing range established for

**A.** the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

**(i)** issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

**(ii)** that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; \* \* \*

Again, the defense is requesting a sentence at the low end of the advisory guideline range for the reasons stated above and below.

**(5)** any pertinent policy statement

**A.** issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

**B.** that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(Please See Below: *Grounds for Departure and/or Variance*).

**(6)** the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct;

Sentencing Mark at the lower end the advisory guideline range, would not create an unwarranted sentencing disparity among first-time, nonviolent, non-drug offenders, whose offense was their first in an otherwise law-abiding life. This is especially the case where the rest of their adult life was spent raising a loving family and committing themselves to public service. Nor would such a sentence be disparate for similarly situated 63-year-old with serious health problems.

**(7)** the need to provide restitution to any victims of the offense.

Mark will be paying significant restitution to the heirs of the victim, likely for the rest of his life.

***OBJECTIONS TO PSIR:***

There are no objections to the calculation of the advisory guideline range in this case. However, counsel for the defense argues that based on the Final PSIR's calculation of Mark's net worth, which is hundreds of thousands of dollars in the red (ECF 34; PID # 118-119, ¶ 73), Mark is unable to pay a fine. It bears mentioning that undersigned counsel is appointed due to Mr. Thomas' indigency. And finally, with the submission of his financial statement to the Probation Department on April 6, 2023, it is clear that Mark has a negative net-worth and would not have an ability to pay a fine going forward, due to his indigency.

***GROUND FOR DEPARTURE AND/OR VARIANCE:***

Counsel for the defense is not requesting a departure or variance from the advisory guideline range. However, there are two grounds that support a sentence at the lowest end of that range. Again, as the guidelines are advisory, the Court is free to consider any factors it deems relevant in crafting a sentence that is sufficient but not greater than necessary to achieve the goals of 18 U.S.C. § 3553(a).

The **first ground** for a sentence at the low end of the advisory guideline range is found in Guideline **§ 5H1.1 – Age**. Mark is 63 years old. As the Court is aware, offenders at this age are extremely unlikely to re-offend, especially when they have no prior criminal history and their crime was nonviolent and non-drug related. Considered either individually or in combination with other offender characteristics, Mark's age and accompanying medical conditions distinguish him from typical cases covered by the guidelines and supports a sentence at the lowest end of the guideline range.

The **second ground** supporting a sentence at the low end of the advisory guideline range is found in **§ 5H1.4 – Physical Condition**. Mark has seriously medical conditions that will make incarceration even more challenging for a first-time prisoner who is two years away from Medicare eligibility. The details of his conditions are more fully addressed in an accompanying memorandum presented to the Court for filing under seal.

Based upon these two grounds, individually and in combination, a sentence of 51 months of incarceration is sufficient to meet the goals of the sentencing statute.

## CONCLUSION

Until the instant offense, Mark's life was one of public service to his community, and love and care for his family. Something went wrong with Mark, something beyond the simple explanation of "greed," as the Government contends. Mark did not take the monies to live an extravagant lifestyle. He was hurting financially and wrongly thought he could borrow money from an old friend. He never intended to hurt her and always intended to pay her back. He was vigilant in paying her bills, visited her on a regular basis at the nursing home, and made sure she was receiving the attention and quality healthcare she deserved.

Mark can only begin to pay meaningful restitution upon his release from prison. That being his number one priority for his victim's heirs, and in consideration of his age and serious medical conditions, undersigned counsel respectfully submits that the requested sentence of 51 months of imprisonment is sufficient but not greater than necessary to deliver justice in this case.<sup>1</sup>

Respectfully Submitted,

/s/ Andrew P. Avellano

ANDREW P. AVELLANO (0062907)

Counsel for Mark Alan Thomas

4200 Regent Street

Suite 200

Columbus, Ohio 43219

(614) 237-8050, phone

E-mail: andy@drewavo.com

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<sup>1</sup>Based upon the medical information presented to the Court for filing under seal, and the U.S. Probation Department's recommendation, counsel for Mr. Thomas respectfully requests that he be permitted to self-surrender to the BOP and that Mr. Thomas be recommended for placement in a BOP medical facility.

**CERTIFICATE OF SERVICE**

The under signed hereby certifies that a true and accurate copy of the foregoing was served upon all parties this 10<sup>th</sup> day of April 2023 via the Court's ECF system.

/s/ Andrew P. Avellano

ANDREW P. AVELLANO, Esq.

Counsel for Defendant

## General Information

<b>Case Name</b>	USA v. Thomas
<b>Court</b>	U.S. District Court for the Southern District of Ohio
<b>Date Filed</b>	Tue Sep 28 00:00:00 EDT 2021
<b>Judge(s)</b>	ALGENON L. MARBLEY
<b>Federal Nature of Suit</b>	Criminal
<b>Docket Number</b>	2:21-cr-00175
<b>Parties</b>	USA; Mark Alan Thomas